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INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES ICSID Case No. ARB(AF)/20/78

MEMORIAL FOR RESPONDENT

Vemma Holding Inc.

(Claimant)

v.

The Federal Republic of Mekar

(Respondent)

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TABLE OF ABBREVIATIONS

ARRAKIS	Arrakis-Mekar Bilateral Investment Treaty
BIT	Bilateral Investment Treaty
CBFI	Consort of Bonooru Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	Comprehensive Economic Partnership and Trade Agreement
CRPU	Committee on Reform of Public Utilities
Facts	Statement of Uncontested Facts
ICSID	ICSID Convention, Regulations and Rules
ICSID AF	ICSID Additional Additional Facilities Rules
ILC (1)	ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001.
ILC (2)	ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001.
LPM	Labourers' Party of Mekar
Mekar	The Federal Republic of Mekar
N.A.	Notice of Arbitration
PO3	Procedural Order No. 3
PO4	Procedural Order No. 4
R.N.A.	Response on Notice of Arbitration
Vemma	Vemma Holdings Inc.

TABLE OF AUTHORITIES

AICPA	American Institute of Certified Public Accountants, Statement on Standards for Valuation Services No. 1, Appendix B, International Glossary of Business Valuation Terms. (American Institute of Certified Public Accountants, Inc., New York, 2007)
Alvarez	Jose Enrique Alvarez, '*The Present – Investment Arbitration as a Governance Tool for Economic International Relations? Is the International Investment Regime a Form of Global Governance?*', in Albert Jan van den Berg (ed), Arbitration: The Next Fifty Years, ICCA Congress Series, Volume 16 (© Kluwer Law International; Kluwer Law International 2012).
Bekkum	Jaron van Bekkum. *"Golden shares: a new approach"* (European Company Law 7, n 1, 2010).
Blake	Conway Blake, *"Harassment in FET"* (Jusmundi, June 18 2021), available at <https://jusmundi.com/en/document/wiki/en-harassment-in-fet >
Born	Gary B. Born. Chapter 18: *Investor-State and State-to-State Arbitration',* in Gary B. Born, *International Arbitration: Law and Practice,* 2nd edition, 2004, pp. 417 - 449
Born, Forrest	Gary B. Born; Stephanie Forrest, *"Amicus Curiae Participation in Investment Arbitration"*. (ICSID Review - Foreign Investment Law Journal, 2019)
Broches	Aaron Broches. *"The Convention on the Settlement of Investment Disputes between States and Nationals of Other States"* (135, Hague Rec. d Course 331, at 354-5, 1972)
Cazurra, Inkpen, Musacchio, Ramaswamy	Alvaro Cuervo-Cazurra, Andrew Inkpen, Aldo Musacchio & Kannan Ramaswamy, Governments as owners: *"State-owned multinational companies"* (Journal of International Business Studies, United States of America, 2014).
Cohen	Steve Cohen. *"A Strategic Framework for Devolving Responsibility and Functions from Government to the Private Sector"* (Public Administration Review, United States of America, 2001).
Cubbin, Leech	John Cubbin and Dennis Leech: *"The Effect of Shareholding Dispersion on the Degree of Control in British Companies: Theory and Measurement"* (The Economic Journal, Great Britain, 1983).
Ding, Zhang, Zhang	Yuan Ding, Hua Zhang and Junxi Zhang, *"Private vs State Ownership and Earnings Management: evidence from Chinese listed companies"* (Corporate Governance: An International Review, United Kingdom, 2007).
Fisher, Romaine	Fisher F., Romaine R., *"Janis Joplin's Yearbook and the Theory of Damages"*, (Greenwood Publishing Group, Inc., United States, 1990).

Korzun	Vera Korzun, *"The Right to Regulate in Investor- State Arbitration: Slicing and Dicing Regulatory Carve-Outs"*, (SJD Dissertations, 2016) available at <https://ir.lawnet.fordham.edu/sjd/8>
Lienert	Ian Lienert. *"Where Does the Public Sector End and the Private Sector Begin?"*, (IMF Working Paper, 2009).
NAFTA	NAFTA Statement of the Free Trade Commission, supra note 3.
Özgür	Özgür, Erman, *"Due Process in the Fair and Equitable Treatment Standard"* (Jusmundi, September 3rd 2021) available at <https://jusmundi.com/en/document/wiki/en-due-process-in-fet?su=%2Fen%2Fsearch%3Fquery%3Ddue%2520process%26page%3D1%26lang%3Den&form[search_phrase][0]=due&form[search_phrase][1]=process&form[search_phrase][2]=Due&word[0]=due&word[1]=process&word[2]=Due>
Pietrowski	Pietrowski, R., *"Evidence in International Arbitration, Arbitration International"*, (Volume 22, Issue 3, 1 September 2006, Pages 373–410)
Schliemann	Schliemann, Christian *"Requirements for Amicus Curiae Participation in International Investment Arbitration - The Law and Practice of International Courts and Tribunals 12 (2013) 365–390"* (Brill, January 2013) available at https://brill.com/view/journals/lape/12/3/article-p365_4.xml.
Schreuer	SCHREUER, Christoph. *"Fair and equitable treatment"*. In: DOLZER, Rudolf. "*Principles of International Investment Law."* (Oxford: Oxford University Press, 2008. p. 125-135.)
Senn, Hewett, Fine	Mara Senn; Dawn Yamane Hewett; Stephanie I. Fine. Chapter 18: *"Damages in International Arbitration: Understanding the Theories and Methods of Damages Valuation and Compensation"* (United States, 2008)
UNCTAD	UNCTAD Series on Issues in International Investment Agreements II, Most-Favoured-Nation Treatment.
UNCITRAL (1)	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
UNCITRAL (2)	UNCITRAL Working Group II, supra note 5, Article 5 (2)

TABLE OF CASES

Abengoa	*Abengoa S.A. y COFIDES S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award (Spanish) (2013).
ADM	*ADM v. Mexico*, Award, ICSID Case No. ARB (AF)/04/5 (November 21, 2007)
AES	*AES v Hungary (II)*, Award, ICSID No. ARB/07/22 (September 23, 2010)
AGIP	*AGIP S.p.A. v. People's Republic of the Congo*, ICSID Case No. ARB/77/1 (November 30, 1979)
Aguas Suez (1)	*Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, Award, ICSID Case No. ARB/03/19 (July 3, 2018)
Aguas Suez (2)	*Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, Order in Response to a Petition for Participation as Amicus Curiae, ICSID Case No. ARB/03/19 (May 19, 2005)
Al-Bahloul	*Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. 064/2008, Final Award (2008).
Apotex Holdings (1)	*Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1 Procedural Order n. 4 (March 4, 2013)
Apotex Holdings (2)	*Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1 Procedural Order n. 5 (March 4, 2013)
Arif	*Arif v. Moldova*, Award, ICSID Case No. (April 8, 2013)
Bear Creek	*Bear Creek Mining v. Peru*, Award, ICSID Case No. (November 30, 2017)
Bernhard	*Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2 (June 26, 2012)
BG	*BG Group Plc v. The Republic of Argentina*, Ad hoc Arbitration, Final Award (2007).
Bridgestone	*Bridgestone v. Panama*, Award, ICSID Case No. ARG/16/34 (August 14, 2020)
Burlington	*Burlington v. Ecuador*, ICSID, Decision on Reconsideration and Award (February 14, 2017)

Charanne	*Charanne and Construction Investments v Spain*, SCC, Final Award, (January 21, 2016)
CME (1)	*CME v. Czech Republic*. Ad hoc Arbitration, Final Award, (March 14, 2003)
CME (2)	Separate Opinion on the Issues at the Quantum Phases of CME v. Czech Republic by Ian Brownlie, C.B.E., Q.C (March 14, 2003)
CMS	*CMS Gas Transmission Company v. The Argentine Republic*, Award, ICSID Case No. ARB/01/8, (May 12, 2005)
Crystallex	*Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (2016).
Duke Energy	*Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19 (August 18, 2008).
Eco Oro Minerals Corp.	*Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41 Procedural Order n.6
EDF	*EDF v Romania*, Award, ICSID Case No. ARB/05/13 (October 8, 2009)
EDF and others	*EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23 (June 11, 2021).
El Paso	*El Paso v Argentina*, Award, ICSID Case No. ARB/03/15, Award (October 31, 2011).
Electrabel	*Electrabel v Hungary*, ICSID, Decision on Jurisdiction, Applicable Law and Liability (November 30, 2012)
Fraport	*Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II)*, ICSID Case No. ARB/11/12 (December 10, 2014)
Gavazzi	*Gavazzi v. Romania*, ICSID, Award (Excerpts), (April 18, 2017)
Gemplus	*Gemplus, S.A., SLP, S.A., and Gemplus Industrial S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 (June 16, 2010)
Generali	*Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (2009)
Grace	*Grace and others / Oro Negro v. Mexico*, Award, ICSID Case No.UNCT/18/4 (June 19, 2018)

H&H	*H&H v. Egypt*, Award, ICSID Case No. ARB/09/15 (May 6, 2014)
Karkey Karadeniz	*Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1 (August 22, 2017)
Kim and others	*Kim and others v. Uzbekistan*, Award, ICSID Case No. ARB/13/6 (March 8, 2017)
Lauder	*Ronald S. Lauder v. The Czech Republic*, Final Award, UNCITRAL (September 3, 2001).
LG&E	*LG&E Energy Corp. LG&E Capital Corp.. LG&E International INC. v. Argentina Republic*, ICSID Case No ARB/02/1, Decision on Liability, (October 3, 2006).
Liman Caspian	*Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (2010).
Marion Unglaube	Marion Unglaube v. Costa Rica, Award, ICSID Case No. ARB/08/1 (May 16, 2012)
Mera Investment	*Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction (November 8, 2017)
Micula	*Ioan Micula, Viorel Micula and others v. Romania* (I), Award, ICSID Case No. ARB/05/20 (May 19, 2020)
Mobil Exploration	*Mobil Exploration v Argentina*, Award, Decision on Jurisdiction and Liability ICSID Case No. ARB/04/16 (April 13, 2013)
MTD	*MTD Equity and MTD Chile v. Republic of Chile*, ICSID Decision on Annulment Case No. ARB/01/7 (March 21, 2007)
Occidental	*Occidental v. Ecuador (II)*, Award, ICSID Case No. ARB/06/11 (October 5, 2012)
Parkerings	*Parkerings v Lithuania*, Award, ICSID Case No. ARB/05/8 (September 11, 2007)
Perenco	*Perenco v. Ecuador*, Award, ICSID Case No. ARB/08/6 (September 27, 2019)
Plama	*Plama v. Bulgaria*, Award, ICSID Case No. ARB/03/24 (February 8, 2005)
PNG	*PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33 (May 5, 2018)

Reinhard Unglaube	*Reinhard Hans Unglaube v. Republic of Costa Rica*, Award, ICSID Case No. ARB/09/20 (May 16, 2012).
RFP	*Resolute Forest Products Inc. v. Canada,* PCA Case No. 2016-13 (December 30, 2015)
RosInvest	*RosInvest v. Russia*, Final Award, SCC Case No. 079/2005 (September 12, 2010)
RREEF	*RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. 079/2005, Decision on Responsibility and on the Principles of Quantum (November 30, 2018).
Saluka	*Saluka Investments B.V. v. The Czech Republic*, Partial Award, UNCITRAL, (March 17, 2006).
Sanum Investments	*Sanum Investments v. Lao People's Democratic Republic (I)*, PCA Case No. 2013-13, Award on Jurisdiction, (December 13, 2013)
South American Silver	*South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia*, PCA Case No. 2013-15 Award (November 22, 2018)
Stadtwerke Munchen and others	*Stadtwerke Munchen and others v Spain*, Award ICSID Case No. ARB/15/1 (December 02, 2019)
Stati	*Stati v. Kazakhstan*, Award, SCC Case No. 116/2010 (December 19, 2013)
STEAG	*STEAG GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Decisión Sobre Jurisdicción, Responsabilidad E Instrucciones Sobre Cuantificación De Daños (September 8, 2020)
Tza Yap Shum	*Tza Yap Shum v. Republic of Peru*, Award, ICSID Case No. ARB/07/6 (July 7, 2011)
Unión Fenosa Gas	Unión Fenosa Gas v. Egypt, ICSID Case No. ARB/14/4, Dissenting Opinion of Arbitrator Mark Clodfelter (2018)
UPS	United Parcel Service of America Inc. v. Government of Canada, ICSID Case No. UNCT/02/1 (April 19, 2000)
White Industries	White Industries v. India, Ad hoc Arbitration, Final Award, (November 30, 2011)

STATEMENT OF FACTS

Parties to the Dispute

1. Vemma Holdings Inc. (hereinafter referred to as **"Vemma"** or "**company**"), the Claimant in this arbitration, is an airline holding company incorporated in the Commonwealth of Bonooru (hereinafter referred to as **"Bonooru"**) that has the Government of Bonooru retaining the majority of shareholding. The company operates in the national and international market, concentrating its operations between Bonooru and the Federal Republic of Mekar (hereinafter referred to as "**Mekar**").

2. Mekar, the Respondent, is one of the 11 independent nations of the Aslanian region. After its independence, the country faced high regulatory intervention, late economic reforms and an extended period of political instability, however, today Mekar has a solid and established economy.

3. In April 2014, Mekar and Bonooru signed the Comprehensive Economic Partnership and Trade Agreement (hereinafter referred to as "**CEPTA**"). The agreement entered into force on October 15th, 2014 and replaced the previous BIT from 1994, which was terminated on the same date.

Financial crisis and selling of Caeli shares

4. Mekar's civil aviation industry was composed by Aer Caeli and Caeli Airways, both state-owned enterprises. The economic crisis of 2008 affected the aviation industry, which caused the future launch of the process of sale and privatization of Caeli Airways in September 2010.

5. In November 2010, Vemma presented its purchase intention for Caeli Airways.

Vemma acquires Caeli

6. Regardless of the opinion of the Chairperson of Mekar's Committee on Reform of Public Utilities (hereinafter referred to as "**CRPU**" or "**The Committee**"), who was

a strong opponent of Vemma investments in Mekar, Vemma's proposal was found to be the most financially attractive business model for Caeli.

7. On March 5th, 2011, the Claimant's acquisition of an 85% stake in Caeli and the participation of the airline in the Moon Alliance were approved by the Competition Commission of Mekar (hereinafter referred to as "**CCM**").

Management of Vemma over Caeli

8. Vemma's management of Caeli was marked by changes and questionable decisions, what the Mekari government called an "extravagant approach". However, despite the concern shown by the Respondent, Vemma remained optimistic about the region's aviation industry and pursued its expansion.

The CCM's Investigations

9. In 2016, the CCM started its First Investigation on Caeli Airways arguing that the airline had adopted predatory pricing strategies and preferential secondary slot trading. Caeli's market share was taken into consideration in conjunction with its Moon Alliance partner Royal Narnia to start the investigation, which ultimately resulted in a penalty of MON 150 million.

10. A Second Investigation was also initiated in December 2016 by the complaint of small regional airlines. The CCM again imposed fines when this investigation ended in the amount of MON 200 million.

The Claimant announces its intention to sell Caeli

11. Caelis's market share dropped below 40% as its operations on most routes were generating deep losses. Therefore, in November 2019, the representatives of Vemma announced their intention to sell their stake in Caeli.

12. Mekar made a purchase offer, in which it intended to retake shareholding control of Caeli Airways. On October 8th 2020, Vemma sold its stakes to Mekar Air services

for USD 400 million.

Vemma launched a claim

13. The Claimant filed a claim alleging that Mekar had violated Chapter 9 of the CEPTA by treating Vemma in an unfair and inequitable manner. Notwithstanding, it will be further demonstrated that this Tribunal lacks jurisdiction to solve the present dispute, as Vemma is a State-owned Company and that Mekar has not breached any of the CEPTA's provisions.

PRELIMINARY ISSUES

I. The Tribunal has no jurisdiction over the present dispute as it constitutes a State-to-State arbitration

14. Vemma has submitted its claim for arbitration pursuant to Article 9.16 of the CEPTA and Article 2 of the International Centre for the Settlement of Investment Disputes Additional Facilities.[1] However, it is the Respondent's contention that the present arbitration shall not be settled in the International Center for Settlement of Investment Disputes as this is a State-to-State arbitration. Such findings can rely either on the analyses of the organizational structure of the company or on the application of the Broches Test.

15. Therefore, Vemma is a State-owned and controlled company due to its organizational structure **(A)**; the Broches Test also establishes that Vemma is a State-owned company **(B)** and Bonooru uses Vemma as a facade to bring claims under the ICSID Additional Facility Rules and the ICSID Convention **(C)**.

A. Vemma is a State-owned and controlled company due to its organizational structure

16. Although Vemma is considered to be a mixed-capital company, it is strongly influenced and financed by Bonooru. This can be demonstrated by the multiple benefits that the company received from the government, such as the financial benefits offered under the Horizon 2020 scheme[2], and the fact that Vemma had the remaining of its debts paid off by the PJSC Bonoorian People's Bank, a nationalized bank in Bonooru in which the government holds a 58.96% stake[3]. These situations make the connection between the Commonwealth of Bonooru and Vemma evident.

[1] N.A: L 25.
[2] Facts: L 1079.
[3] Facts: L 1024.

17. A State-owned company is not necessarily characterized by being a company in which the State exercises ownership, but one in which the State exercises effective control over it, regardless of the number of shares.[4] Although, Vemma's organizational structure consists of two distinct periods, the first when Boonoru had the minority of the shares and the second when it acquired the majority of the shares,[5] the company control had always remained with the Bonoori government.

18. In this specific panorama, it is emphasized that the effective control of a company is not proportional to the number of common shares, but rather to the golden shares,[6] which are based on having veto power and controlling the company's biggest decisions and future acquisitions,[7] and Bonooru has always had golden share control of the company.[8] Thus, it stands that Bonooru's strategy was consolidated in the purchase of Caeli through Vemma, as at this point, it matters little, as seen in the facts, whether the common shares belonged to other investors.

19. The purchase of Caeli Airways itself is dubious in terms of revenue and profit, since Caeli was in a serious economic situation and Mekar no longer had the capacity to expand in the aviation market. It can be concluded that Vemma's operating methodology was more likely guided by its function as a vehicle of the State to exercise its foreign policy and diplomacy goals alongside conventional social and financial objectives,[9] as it was registered that the routes between Mekar and Bonooru were not profitable for Caeli, benefiting Bonooru more than Vemma or Caeli.[10]

20. The corporate relationship between Vemma and Bonooru has persisted since the creation of the company, especially when considering that the company was

[4] Bekkum, p. 10 - 16.
[5] Facts: L 1410.
[6] Cazurra, Inkpen, Musacchio, Ramaswamy, p. 923.
[7] Cazurra, Inkpen, Musacchio, Ramaswamy, p. 10.
[8] Facts: L 1542 – 1549.
[9] Cazurra, Inkpen, Musacchio, Ramaswamy, p. 5.
[10] Annex VII: 1866.

supposed to carry the duties of its predecessor, the State-owned BA Holding, becoming the operator of the Royal Narnian, the flag carrier of Bonooru.[11]

21. The governmental character of Vemma becomes evident by Bonooru's Prime Minister's statement in the period of privatization of Bonooru Air. He stated that the government intended on maintaining a significant interest in Bonooru Air, as well as that Bonooru Air's successor, Vemma, would be directed to ensure that it operates the most remote islands, regardless of profitability.[12]

22. Furthermore, the Constitutional Court of Bonooru, in the matter of the privatization of Bonooru Air, stated that the subsidies granted by the government, as well as Bonooru's continued participation through Vemma assured that Bonooru would be able to ensure the utilization of the Royal Narnian for the public benefit.[13]

23. Correspondingly, Ms Sabrina Blue's declaration in a press conference on May 31st, 2016, confirms the arguments stated above, as she asserted that Vemma contributed to the enhancement of Bonooru's tourism infrastructure, enhancing the mobility rights of the Bonoori population within the Greater Narnian region, specifically pointing out that Vemma had certainly lived up to the standards set by its predecessor in Bonooru.[14]

24. Additionally, when serving as an expert in a similar case, in which the Broches Test was applied, Professor Rudolf Dolzer asserted that an ICSID Tribunal should decline jurisdiction in case it finds that two parties assimilated with a State are before it seeking to resolve a dispute.[15]

25. Therefore, by analyzing Vemma's organizational structure, it becomes clear that Bonooru had control of the company, demonstrating that Vemma is a State-owned company.

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[11] Facts: L 929.
[12] Facts: L 922.
[13] Annex III: L 1493.
[14] PO4: L 3294.
[15] *PNG* ¶ 79.

1. Article 25 of the ICSID Convention does not enable State-owned companies to bring claims under the Convention

26. The Claimant might try to persuade this Tribunal bringing a wrongful analogy of the article 25 of the ICSID Convention regarding the time of the purchase of the shares, claiming that the company could not be considered State-owned as, at the time of the request for arbitration, on November 17th, 2020, the Bonoori government owned solely 33% of the shares of the company, increasing its interest by 55% only four months after that.

27. Article 25 of the ICSID Convention, applied according the ICSID Additional Facilities Rules,[16] states that the jurisdiction of the Center extends to any legal dispute arising directly out of an investment between a Contracting State and a national of another Contracting State, who has or had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit the dispute to arbitration, as well as on the date on which the request was registered.[17]

28. However, the situation of article 25 does not translate to the present case, neither does the analogy, as the percentage owned by the government is not the issue, rather the government as beneficiary, as a State-owned company, is not necessarily characterized by the amount of shares owned by the State, but by the effective exercise of control from the government.

29. Therefore, the present dispute cannot be resolved by this Tribunal as the real party of the arbitration is the Government of Bonooru in an attempt to hide its participation in the dispute and should be resolved by a tribunal competent to settle disputes between States.

[16] ICSID AF, Article 4 (2).
[17] ICSID, Article 25 (2) (b).

B. The Broches Test also establishes that Vemma is a State-owned company

30. The application of the Broches Test complements the analysis of the public character of the company and fortifies the arguments previously provided, remaining unquestionable that Vemma is a State-owned enterprise.

31. Aaron Broches created the Broches Test as a way to determine whether a company should be allowed to bring claims under the ICSID Convention. According to the test, a company should not be excluded from claims against States under the ICSID Convention, as long as it does not act as an agent for the government or discharges an essentially governmental function.[18] These exceptions do not translate to our case as Vemma acted as an agent for the government of Bonooru **(1)** and Vemma discharged governmental functions in favor of Bonooru **(2).**

1. Vemma acted as an agent for the government of Bonooru

32. It is clear that Vemma did not act as an investor in this case, acting as an agent for the government of Bonooru. The relationship between Boonoru and Vemma has always been significant and has always gone far beyond a mere shareholding, the percentage of which has increased over the years. In this way, Bonooru has become one of Vemma's most significant investment partners, helping to finance new acquisitions and contribute to the fulfillment of State duties.[19]

33. When it comes to companies that have a sovereign State shareholder, there is a fine line between the power exercised by the State over that company and the use of that company for the purposes of State strategy.[20] In the first case, the State might be merely exercising its rights as a shareholder, but in the second the company performs functions as an agent. Bonooru crossed the line of being a mere shareholder, as it used Vemma to promote its interests through a seemingly private company.

[18] Broches.
[19] Annex IV: L 1519.
[20] Cubbin, Leech, p. 354.

34. The real interests of a rich and powerful State as Bonooru are not necessarily pursued by the State itself, as private companies, but with State capital, play a fundamental role in achieving the interests of these States.[21]

35. It is undeniable that Vemma acquired this equity interest in order to benefit Boonoru's interests. The purchase of a significant part of Caeli Airline Services through Vemma Holdings was with the clear objective of expanding Bonooru's influence internationally and to conquer Mekar's aviation market harming its economic and infrastructural system, by several anti-competitive actions taken by Caeli, such as abuse of dominant position, predatory pricing and unfair subsidization.[22] As it is clarified by Ms. Misty Kasumi's statement, Caeli was flying routes that were not profitable and that seemed to benefit Bonooru more than Vemma or Caeli.[23]

36. In a similar case, when stating that the Tribunal should not accept the claimants submission due to it being an agent for its government, Dolzer asserted that the predominant conceptual characteristics of the Claimant pointed in the direction of a public, and not a private company, placing outside of the circle of entities covered by the ICSID Convention.[24]

2. Vemma discharged governmental functions in favor of Bonooru.

37. Furthermore, pursuant to the Broches Test, it is clear that Vemma also discharged governmental functions in favor of Bonooru, acting as a mechanism for the government to act in the aviation market and provide air transport according to legal demands.

38. Although the traditional conceptualization of governmental function is based on the provision of medical, educational, social protection and environmental protection

[21] Ding, Zhang, Zhang, p. 235.
[22] Facts: L 241.
[23] Annex VII: L 1866 - L 1870.
[24] *PNG* ¶82.

services,[25] the expansion of State action is enormous in many countries with the objective to gain influence in strategic sectors, both nationally and internationally.[26]

39. In this way, non-traditional sectors, such as the air, maritime, infrastructure and, important for the present case, the commercial air transport, receive large financial investments and fit the modern standards of governmental function. The governmental aspect of air transportation is even more evident in the present case, as the Constitution of Bonooru assigns special importance to the mobility rights of its population, due to the country's geography.[27]

40. The provision of transport is such a necessary measure in Bonooru, that the Constitutional Court of Bonooru has found that Article 70 of the Constitution bestows positive obligations upon the State to assist and ensure provision of *essential transportation* to the population living in remote areas, as its major public facilities, such as healthcare and educational institutions, are concentrated in the country's major islands.[28]

41. The involvement of Vemma on Bonooru's air transportation is shown once again by Bonooru's Prime Minister's statement that Vemma would be directed to ensure that it operates routes to the most remote islands, regardless of profitability,[29] with the objective to serve Article 70 of the constitution, and by the decision of the Constitutional Court of Bonooru that Bonooru's continued participation through Vemma assured that Bonooru would be able to ensure the utilization of the Royal Narnian for the public benefit.[30]

42. Therefore, it is clear that Vemma was utilized by the government of Bonooru as a way to provide air transportation, a governmental function in face of the geography of the region and necessary´, according to Article 70 of the Constitution, which

[25] Lienert, p. 4.
[26] Cohen, p. 433.
[27] Facts: L 895 – 899.
[28] Facts: L 896.
[29] Facts: L 922.
[30] Annex III: L 1495.

placed on the government the obligation to assist and ensure provision of essential transportation.

C. Bonooru uses Vemma as a facade to bring claims under the ICSID Additional Facility Rules and the ICSID Convention

43. The purpose of the ICSID is to settle disputes between a State and a national of another contracting State[31] and the consent to take such disputes to arbitration before the Center arises from treaties between the States, that normally stipulate that the private investor has to be protected from the governmental power that a State holds, as its investment is dependent on the legislation and control of the contracting State and can face particular risks from host government interference.[32] To that end, it is the Respondent's intention to prove clear that the intention of the government of Bonooru is to take advantage of the treatment and protection directed to investors, hiding itself behind Vemma, while the real party to the dispute should be Bonooru.

44. It is clear that Boonoru had obscure interests in Vemma's acquisition of Caeli, since the country was known for using private companies to expand its influence in other nations, demonstrated by the clear evidence of anti-competitive behavior by Caeli, such as abuse of dominant position, predatory pricing and unfair subsidization.[33]

45. The evident influence of Bonooru over private companies is demonstrated by the known fact that Bonoori companies tend to not be fully independent from the government[34] and especially by the Aviation Analytics report from June 7th, 2019, that attested that Vemma had assurances that the government of Bonooru would certainly step in if anything bad were to happen to the company, as it was the country's national carrier.[35]

46. Therefore, the promotion of Bonooru's interests through Vemma is an affront to the people of Mekar, as the country hides itself behind a supposedly private company

[31] ICSID, Article 25.
[32] Born, p. 1.
[33] N.A: L 241.
[34] Annex VII: L 1860.
[35] Annex IX: L 1948.

with the goal to reap the benefits of a Investor-to-State arbitration, instead of a State-to-State arbitration.

II. The Tribunal shall reject the *Amicus Curiae*'s submission of The Consortium of Bonoori Foreing Investors.

47. The Tribunal has power, pursuant to Article 43 of the ICSID Additional Facilities Rules,[36] Article 9.19 of the CEPTA[37] and Articles 4 and 5 of UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration,[38] to either accept or deny the amicus curiae briefs submitted.

48. Thus, following the requirements prescribed in the aforementioned legislation and relevant case law, the Respondent asks the Tribunal not to accept the participation of The Consortium of Bonoori Foreing Investors (hereinafter referred to as "**The Consortium**" or "**CBFI**") since CBFI will not assist the Tribunal as it does not bring a new perspective to the dispute **(A)**, CBFI does not have a significant interest in the dispute **(B)**, CBFI does not address matters within the scope of the dispute **(C)** and CBFI is not independent from Vemma **(D)**.

A. CBFI will not assist the Tribunal, once it does not bring a new perspective to the dispute

49. According to art. 41 (3) of ICSID Additional Facilities Rules, a non-disputing party would assist the court by bringing a new perspective, insight to the case, different from that of the disputing parties.[39]

50. The applicant for amicus curiae must demonstrate to the Tribunal that their allegations will be useful in the process,[40] bringing a new factual or legal

[36] ICSID AF.
[37] CEPTA, Article 9.19.
[38] UNCITRAL (1), Articles 4 and 5.
[39] ICSID AF, Article 41 (3).
[40] Born, Forrest, p. 9.

perspective.[41] Nevertheless, it is to be considered that the due process rights and good order of the proceedings must be preserved and the amicus must remain a friend of the court and not a friend of the Party.[42]

51. In the present case, The Consortium does not bring a new perspective to the dispute, in fact, CBFI brings 38 times the same perspective of the Claimant. The facts brought by The Consortium are the reality of its members and their general interest in the proceedings. In addition, the laws pointed out by The Consortium are the same as those pointed out by the Parties.

52. The CBFI submission does not bring any new perspective to assist the Tribunal. All facts brought by it have already been mentioned by the Parties, such as the acquisition process of Caeli, the context regarding the business climate of Bonooru, facts about the aviation industry in Bonooru, as well as the whole impact in Greater Narnia.[43]

B. CBFI does not have a significant interest

53. In order to be granted an amicus curiae status in an investment arbitration, a non-disputing party must fulfill some essential requirements, such as demonstrating that it has an significant interest in the dispute. This interest cannot be general, but personal and specific, demonstrating how the decision would impact directly or indirectly the rights and principles that this non-disputing party represents and defends.[44]

54. In its application, the CBFI failed to demonstrate its significant interest in a precise way, not fulfilling the requirement of article 41 (3) (c) of the ICSID Additional Facility Rules. Rather, CBFI only demonstrated a generic and vague interest.

55. CBFI limits itself stating that, as a representative of Bonoori nationals that invest in the Greater Narnian Region, its focus is to foster a "strong, competitive economic

[41] *Micula* ¶ 259.
[42] *Micula* ¶ 332.
[43] CBFI submission: L 505.
[44] *Apotex Holdings (2)* ¶ 32.

environment that facilitates growth and development of Bonooru as well as the Greater Narnian Region", and that Bonoori businesses have interest in the decision that shall be rendered in this present dispute, regarding "the interpretation of investor-State dispute settlement provisions of current and future investment agreements in Mekar".[45]

56. Although CBFI might have expressed that it has interest in the outcome of this dispute, CBFI has not clearly explained in which way the decision would directly or indirectly impact Bonoori businesses. Therefore, it is not possible to conceive that the requirement of demonstrating significant interest was fulfilled by the Consortium.[46]

Public Interest

57. CBFI and the Claimant may allege that the Consortium has public interest over the present dispute, and such public interest would be within the criterion of significant interest. However, public interest and significant interest are different requirements that must not be analyzed in the same matter.

58. As addressed before, significant interest is met by a non-disputing party when it demonstrates that its own interest would be affected by the outcome of the dispute. On the other hand, public interest is configured when the outcome of the dispute has a high possibility of "affecting individuals or entities beyond the Disputing Parties".[47]

59. CBFI also did not demonstrate public interest in the dispute. The Consortium based the requirement for its entry in the dispute on the fact that it represents a group of investors that has investments and operations in Mekar. However, what is being discussed in the present arbitration are the measures taken by Mekar that may have impacted the Claimant, not the Mekari legislation *per se* that might impact other investors. In fact, the Claimant is alleging that it must be awarded damages and if

[45] CBFI submission: L 505.
[46] *Apotex Holdings* (2) ¶ 33.
[47] *Apotex Holdings* (2) ¶ 35, 36.

the Tribunal comes to a finding in which the Claimant is owed, that arbitral decision does not significantly affect the performance of other investors.[48]

60. Therefore, CBFI's justification for joining to defend a public interest should not be accepted, as it is not clear which interest the Consortium seeks to defend.

61. Nevertheless, it is imperative to point out that public interest is absent in the legal provision, given that the ICSID rules only mention significant interest, which, as already stated, is different from public interest. Thus, the non-disputing party cannot use a distinguished requirement than the one present in the pertinent rules.

62. Notwithstanding the reasoning above displayed, if this Tribunal decides on the existence of a significant or public interest defended by the CBFI, the Consortium participation in the dispute must still be denied, as even when there is public interest in the dispute, whenever the applicant's real intention is to favor one of the parties, the submission shall not be accepted.[49]

63. Since Claimant is a Bonoori business investor and, as expressed by the Consortium itself, its intention is solely to defend the interest of Bonoori business seeking for a favorable outcome for the Claimant, CBFI may bring unnecessary or even untruthful facts, not assisting the Tribunal, unduly burdening Respondent and disrupting the present dispute. Therefore, CBFI shall not be accepted as Amicus Curiae.

C. CBFI does not address matters within the scope of the dispute

64. Relevance to the matters presented in the dispute is a fundamental requirement to allow a non-disputing party to be part in the proceedings.[50] The CBFI submitted its brief to be allowed as amicus curiae stating that it is concerned with doing business in the Greater Narnia Region as The Consortium acts as a protector of investors

[48] CBFI submission: L 505.
[49] *Aguas Suez* (2), ¶ 31.
[50] Born and Forrest, p. 10.

originating in Bonooru and it cannot allow any State in the region to act in ways that prejudice the companies which it is protecting.[51]

65. The arguments brought by the petitioner should be related to substantive legal issues that will be discussed and decided in the arbitration,[52] which is a strict and uncountable requirement. Moreover, the petitioner must clearly demonstrate the issues of fact and law that are being brought. [53]

66. However, The Consortium does not propose to submit observations on legal or factual issues relating to the core of the dispute, which is the Claimant's claim for compensation due to alleged breaches of the CEPTA by Mekar. Instead, CBFI limits itself to quoting the applicable legislation in a general way. At no point in its petition The Consortium states which issues it deems allowable for the dispute. The party just cites Bonooru's regulatory framework[54] and argues that the case will create precedents for investments of the same type in the future.

67. Therefore, the Respondent submits that the Tribunal should reject the CBFI's submission to be amicus curiae as The Consortium did not address any legal or factual matters in the proceeding.

D. CBFI is not independent from Vemma.

68. Another important criterion to be considered by the Tribunal to analyze the petitions of amicus curiae is the independence of the petitioners from the disputing parties. Even though that is not a formal and explicit requirement and it requires interpretation of the Tribunal, it is important to differentiate and note whether there is a controlling relationship or determining influence of one of the disputing parties over the amicus' petitioner,[55] as the amicus curiae should act as a friend of the court and not a friend of the parties.

[51] CBFI submission: L 525 – 535.
[52] Schliemann, p. 371.
[53] *Grace; Eco Oro Minerals Corp.; RFP; Apotex Holdings (1); Apotex Holdings (2); Bernhard; UPS.*
[54] CBFI submission: L 540.
[55] Schliemann, p. 378.

69. The CBFI is a non-profit organization and has not received any financial support to submit the application to be amicus curiae, however, there is clear interdependence between the petitioner and the disputing party, once to be part of the membership, each member is required to pay a monthly fee. The Consortium is an association created to defend and protect all investors who are part of it, in light of this, the Tribunal shall verify the influence that Vemma has over CBFI.

70. In addition, CBFI represents over thirty companies that have been doing or have done business with Mekar. Some of these companies already have claims against the Respondent. Furthermore, the connection between the petitioner and Lapras Legal Capital, which is helping Vemma on creating strategies along the proceeding against Mekar[56], undermines their independence. That is, regardless of whether the petitioner is in fact independent or not, these circumstances give the impression that it is not independent.

71. It is also recommended that the amicus curiae application shall disclose the identity of the petitioner, its interest in the dispute, its membership and legal status, if it has any affiliation, direct or indirect, with any disputing party, communicate any government, person or organization that has provided any financial or other assistance in preparing the submission and the nature of the assistance.[57]

72. The CBFI provided general informations by not explaining the nature and the limits of the assistance of Lapras Legal Capital with Vemma's claim, not describing details the membership of Vemma in the association and, finally, not elucidating the affiliation of CBFI with Vemma and also with the Government of Bonooru in a transparent manner. These are critical issues to determine the independence of the petitioner.

[56] CBFI submission: L 520.
[57] UNCITRAL (2), ¶ 35; NAFTA ¶ 2 (c)–(e).

73. Therefore, if there is any doubt about the petitioner's independence, which cannot be verified or the non-disputing party refuses to answer, the Tribunal should deny the access in proceeding, denying also the status of amicus curiae to the applicant.[58]

74. Thus, once the independence of CBFI could not be verified and considering that the applicant did not disclose the association itself and the membership of the investors, as well as that there is a lack of certainty about whether it has any kind of submission from Vemma, the Tribunal should deny the status of amicus curiae to The Consortium.

III. The Tribunal shall admit the petition of The Committee on Reform of Public Utilities to be granted as *Amicus Curiae*

75. On the contrary of the CBFI petition, the submission of The Committee on Reform of Public Utilities (hereinafter referred to as "**CRPU**") shall be accepted and the status of amicus curiae shall be granted. As it will be demonstrated, CRPU does comply with the requirements of Article 41 (3) of ICSID Additional Facilities Rules[59], Article 9.19 of CEPTA[60] and Articles 4 and 5 of UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration[61]. As CRPU will assist the Tribunal by bringing a new perspective **(A)**; CRPU addresses matters in the scope of the dispute **(B)** CRPU demonstrates a significant interest in the dispute **(C);** and CRPU is independent from the Parties **(D)**.

A. CRPU will assist the Tribunal by bringing a new perspective

76. The Committee brings a new perspective and a special knowledge about the facts that are discussed in the proceeding since CRPU not only participated in the process of acquisition of stakes in Caeli by Vemma,[62] but also acted as an inspector during the process.

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[58] *Bernhard* ¶ 56 .
[59] ICSID AF, Article 41.
[60] CEPTA, Article 9.19.
[61] UNCITRAL (1) Articles 4 - 5.
[62] CRPU Submission: L 620.

77. To assist the Tribunal, CRPU will contribute with technical acquaintance and a particular view about the management of Vemma over Caeli.

B. CRPU addresses matters in the scope of the dispute

78. The Committee addresses matters in the scope of the dispute. The Committee alleges that the privatization process of Caeli was tainted with corruption and that it might impact the legality of the acquisition, which is crucial to determine this Tribunal competence.[63]

79. Therefore, hence the jurisdiction of the present Tribunal is being discussed, the Committee's submission shall be accepted.

C. CRPU demonstrates a significant interest in the dispute

80. The Committee has significant and public interest in the result of this dispute. CRPU is an association of Mekari civil society and aims to protect business in the country by regulating and identifying any evidence of corruption or prohibited practices that could prejudice national and international investors and that could prejudice Mekar.

D. CRPU is independent from the Parties

81. In the role of independence, although CRPU is an association of Mekari Society, as established in the petitioner writing, The Committee is not submissive of the Mekar. It did not receive any financial support to participate in this arbitration and it does not answer to the Government of Mekar, but to the society and the public interest involved in the proceedings.

82. Therefore, as CRPU has fulfilled all the formal and informal requirements, pursuant to the applicable legislation over this arbitration and case law, The Respondent asks the tribunal to accept the submission of CRPU to participate in the dispute as amicus curiae.

[63] CRPU Submission: L 651.

ARGUMENTS ON MERITS

IV. The Respondent has not breached its obligations under the CEPTA

83. The Claimant broadly alleged that a series of actions taken by the Respondent resulted in a breach of its obligations under the CEPTA. In an attempt to fit it into the principle of fair and equitable treatment, the Claimant first argued that Mekar had breached not an specific article, but the whole Chapter 9 of the Treaty. It was only on Procedural Order No.1 that the Claimant decided to limit its claims under Article 9.9.[64]

84. In a desperate attempt to blame the State for its own mistakes towards the investment, the Claimant failed to point out with precision where the breaches of the treaty had occurred.

85. It is noted that recently many arbitrations alleging a breach of FET have been brought to tribunals, becoming a popular litigation strategy due to its open-ended nature.[65] Unfortunately, this broad interpretation of the standard also brings a lack of predictability and can cause the Host State to lose its regulatory powers as any measure that brings a potential negative effect on the investor's investment could amount to a breach of the FET standard.[66]

86. In the present case, the Respondent's situation plays a significant role in its decisions. Coming from an independence process in 1994, the country had already faced regulatory and economic issues following population growth and economic crises.[67] The conditions of the Host State had been said to play an important part in the analysis of whether the FET standard has been breached[68] and must be taken into consideration by this Tribunal when analyzing Claimant's contentions.

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[64] PO1: L 413 - 414.
[65] UNCTAD, p. 10.
[66] *Ibidem.*
[67] Facts: L 945-950.
[68] UNCTAD p.11.

87. In light of the above, it will be demonstrated that Mekar treated the Claimant's investment in a fair and equitable manner since the Respondent acted within its right to regulate and in accordance with Article 9.8 of the CEPTA **(A)**; the Respondent did not breach the Claimant's legitimate expectations **(B)**; the Respondent's conduct was not arbitrary or discriminatory **(C)**; the Respondent accorded due process to the Claimant **(D)**; the Respondent's measures do not amount to a denial of justice **(E)**; and there was no abusive treatment from the Respondent **(F)**.

A. The Respondent acted within its right to regulate and in accordance with Article 9.8 of the CEPTA

88. State's right to regulate comes from the principle of self-determination and attendant rights of a State to determine its own legal and economic order.[69] It is the prerogative of the State, as a sovereign entity, to be able to exercise its sovereign powers in issuing regulatory measures for the benefit of the public welfare, even if it affects private property.[70]

89. Sovereignty has its limitations, a State is not shielded from its responsibility and the standard of protection contained in BITs.[71] However, despite having these limitations recognized, one must not take into consideration only the State's rights and obligations towards the investor but also towards its own people. A State must not fail to protect its own population in order to guarantee the investor's rights.

90. The CEPTA recognizes in its Article 9.8 that the Parties in their own territories have the right to regulate in order to achieve legitimate public policy objectives.[72] In that sense, the Respondent merely implemented a proper application of its domestic laws to promote economic freedom and enhance consumer welfare as the Claimant's anti-competitive behavior could put other airlines operating in the country at risk.

[69] Alvarez ¶146-147.
[70] *BG* ¶268.
[71] *Crystallex* ¶584.
[72] CEPTA: L 2724-2732.

91. Furthermore, the CEPTA states in its preamble the promotion of new opportunities for workers and businesses as well as the benefit of consumers.[73] Tribunals have found that the preamble of treaties must be considered to determine the BIT's object and the scope of the protected investment.[74] Caeli's behavior towards the other airlines went against these principles as the other companies could shut down their activities in Mekar, leaving Mekari citizens unemployed, harming other businesses connected to them and creating a monopoly in the sector.

92. The Claimant argues that their investment was damaged, culminating in the sale of Caeli Airlines, due to Mekars' actions towards it. However, the Respondent was merely exercising its sovereignty and regulatory powers for the purpose of maintaining order in the country. Even though the Company was of great importance to Mekar's aviation industry, its administration behavior was detrimental to the other airlines and the Respondent could not simply wait for its entire aviation industry to go to ruin for the sake of one investor.

93. Therefore, the Respondent submits that it acted within its right to regulate, pursuant to Article 9.8 of the CEPTA.

B. The Respondent did not breach the Claimant's legitimate expectations

94. For a legitimate expectation to be created, a specific representation must have been made by a Party to an investor to induce a covered investment.[75] General statements in treaties or legislation, which can evolve because of their nature of general regulations, are not considered to be specific representations.[76] Such vague and general representations are not capable of giving rise to reasonable legitimate expectations, which are amenable to protection under the FET standard.[77] Thus, unless specific representations are made to the investor, it cannot rely on the Treaty

[73] CEPTA: L 2484-2506.
[74] *Mera Investment* ¶121.
[75] CEPTA: L 2747-2750.
[76] *El Paso* ¶ 375.
[77] *White Industries* ¶10.3.17.

to protect it from any changes in the State's legal and economic framework as such expectation would neither be legitimate nor reasonable.[78]

95. Moreover, it is well-established that the Host State can maintain a reasonable degree of regulatory flexibility as a response to changing circumstances in the public interest.[79] A standard of behavior that would foresee the State's legislation not being changed is not realistic, nor is it the Treaty's purpose that the State will guarantee that the economic and legal conditions will remain unaltered over time.[80]

96. Furthermore, the subjective expectation that an investor had at the time that it made the investment is not enough.[81] Thus, the assessment of whether an expectation is legitimate must be objective.[82] Such assessment must take into account all circumstances, including the *political*, *socioeconomic*, *cultural* and *historical conditions* prevailing in the Host State.[83] Also, it is important to note that *due diligence* must have been exercised to entitle an investor to protection of its legitimate expectations.[84]

97. In the present case, the Respondent has always made it clear that although the State is open to foreign investments, this would not give the investors the right to interfere with internal affairs, especially during an economic crisis. The CEPTA concluded between Mekar and Bonooru in 2014 provides for this right.[85]

98. The scope of treatment granted by the agreement cannot be exclusively determined by the foreign investor's considerations and desires. The Claimant's expectations should be based on reason and *in light of the circumstances*.[86] The Claimant contends that the Respondent breached its legitimate expectations when the newly elected government made changes in Mekar's policies. However, as the Claimant

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[78] *EDF* ¶217.
[79] *Electrabel* ¶ 7.77; *Parkerings* ¶332; *AES* ¶9.3.29; *Stadtwerke Munchen and others* ¶264.
[80] *El Paso* ¶350; *Mobil Exploratio*n ¶928.
[81] *Charanne* ¶495.
[82] *RREEF* ¶261.
[83] *Duke Energy* ¶340; *South American Silver* ¶648.
[84] *South American Silver* ¶ 648; *Charanne* ¶ 505.
[85] R.N.A: L 215-217; Korzun, p. 379.
[86] *Saluka* ¶ 304; *South American Silver* ¶ 648.

was well aware, Mekar is an independent country and has the right to have elections and to change its political point of view.[87] These political changes never violated the full-protection and security clause of the CEPTA.

99. Further, the Claimant should have expected that the State's political framework would change as Mekar is a developing country.[88] In order to try and recover from a devastating crisis, the Respondent had to make changes and adapt to the circumstances. If the Respondent did not respond rapidly, not only would the economic sector suffer but also the entire population. In this struggling context, the people of Mekar aligned with the propositions of the LPM campaign during and after the elections. Thus, the Claimant could have foreseen these changes and planned its investment accordingly. The Claimant had access to information and should have noticed that a popular party had a very specific point of view regarding the privatization program.

100. The Claimant should have paid attention to what was happening in its surroundings.[89] If the Claimant had been diligent, it could have noticed the scale of the economic crisis and would have been able to plan its investment.

101. Furthermore, the Respondent, in an attempt to regain trust in its currency, passed a decree in 2018 requiring all companies operating in Mekar to offer goods and services denominated exclusively in MON.[90] This measure changed the previously established permission that allowed airfares to be denominated in US Dollars. In October 2017, the Mekari authorities had permitted companies to denominate its airfares in US Dollars[91] as a way of helping companies facing financial issues during the State's economic crisis. However, the State's spiraling crisis continued, which ultimately led to the election of the LPM, a party that had gained the people's trust.[92]

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[87] *South American Silver* ¶ 649.
[88] Facts: L 942 - 950.
[89] *South American Silver* ¶ 648.
[90] Facts: L 1208 - 1210.
[91] Facts: L 1197 - 1199.
[92] Facts: L 1200.

102. By the end of 2017, the party enacted a series of measures trying to stabilize the State's situation and re-nationalize multiple enterprises.[93] This led to the voluntary exit of many foreign investors. Since the Claimant was a part of the Mekari economy and was supposedly being diligent, it should be presumed that the Claimant was fully aware of these regulatory changes as well as informed about the exit of other foreign investors.

103. Therefore, on January 30th, 2018, when the government passed the decree that obliged companies to offer goods and services denominated in MON, there was no violation of the Claimant's legitimate expectations. In light of the circumstances, the Claimant should have foreseen the possibility of regulatory changes and further, the Claimant was not given any specific assurance that the permission granted in 2017 would be long-standing, especially after the elections.

104. Moreover, the Claimant was not forced to sell its shares in Caeli to the Respondent. The Claimant chose to sell its shares out of free will. The Claimant was never forced to make the sale. Although the enforced award prohibited the Claimant from selling its shares to the Hawthorne Group LLP, it did not compel the Claimant to sell them to Mekar. The Claimant simply had to present a different offer from another party to the Respondent, according to the Shareholder's agreement.

105. Thus, the Claimant's expectations were not breached by the enforcement of this award nor were they violated by the subsequent sale of its shares to the Respondent.

106. Therefore, the Respondent did not breach the Claimant's legitimate expectations as no specific assurances were given to the Claimant nor commitment to maintain stability of the legal framework in the CEPTA in the form of a stabilization clause.

C. The Respondent's conduct was not arbitrary or discriminatory

107. To classify the Host State's actions as arbitrary, it must be proven that those actions were unjustified, founded on prejudice or preference instead of reason or

[93] Facts: L 1206.

fact.[94] The Respondent submits that it has acted with reason, coherence and as expected during the economic crisis.

108. Regarding the claim that the Respondent's actions were discriminatory, it is clear that these allegations are baseless since the State's conduct does not fit the criteria of discriminatory treatment. A measure is considered discriminatory if (i) there is an intentional treatment (ii) in favor of a national (iii) against a foreign investor and (iv) that is not taken under similar circumstances against another national.[95] Thus, to determine if the Host State's conduct was discriminatory, the Claimant must prove that there was an intent to differentiate its company from others in similar circumstances.[96]

The Respondent's actions were not arbitrary.

109. Before the Claimant's investment in Caeli was admitted, the Claimant was notified that any anti-competitive behavior would be subject to the review of the CCM.

110. The rapid expansion of Caeli Airways naturally drew the attention of the CCM and Caeli's competitors. The two investigations conducted by the CCM into Caeli Airways, and consequent fines imposed, were merely proper applications of the domestic laws of Mekar, which were in force when the Claimant made its investment.[97]

111. Furthermore, the Claimant states that although the CCM's investigations were illegal, the imposed-airfare caps were not.[98] This clearly exemplifies the Claimant's incoherent claims. The Claimant argues that the measures taken during the investigation were well-justified and within reason, but the procedure that led to the application of the airfare caps was not. The Claimant is not being logical by

[94] *LG&E* ¶ 157.
[95] *LG&E* ¶ 146.
[96] *Lauder* ¶ 221; *Occidental* ¶ 168; *CMS* ¶ 291.
[97] R.N.A: L 231 - 237.
[98] N.A: L 79 - 80.

questioning an entire investigation, stating that it was initiated arbitrarily yet recognizing that the interim measures implemented were reasonable.

112. The Claimant enjoyed a 54% market share in Mekar, when combining the market share of Caeli and Royal Narnian. The Claimant was a major shareholder in Caeli and was the owner of Royal Narnian.[99] The First Investigation was opened because the Claimant met the circumstances established under the Monopoly and Restrictive Trade Practice Act, Chapter III, 2.[100] Further, the CCM has the discretion to initiate an investigation of a company even if the company has a lower market share. This occurs when the company might be threatening its competitors and indulging in anti-competitive behavior. Thus, even if the CCM could only consider Caeli's market share, which was 43%, the Commission would still be able to open the investigation.

113. Therefore, it was a legal procedure, initiated with good reason, as the Commission had the right to initiate investigations when needed[101] and as the Claimant's competitors brought complaints to the CCM about Caeli's predatory behavior,[102] as of the second investigation, corroborating the initiative of the CCM.

The Respondent's actions were not discriminatory.

114. Moreover, the Respondent did not discriminate against the Claimant when denying it to receive the subsidies granted by Executive Order 9-2018. The Claimant was already receiving financial aid from Bonooru.[103] Furthermore, the Claimant was profoundly associated with Bonooru's government. Other companies had already suffered from Caeli's anti-competitive behavior, and thus needed financial support.[104]

[99] Facts: L 932.
[100] Annex V: L 1598.
[101] Annex V: L 1596.
[102] Facts: L 1170 - 1177; PO3: L 3175 - 3177.
[103] Facts: L 1076 - 1079.
[104] Annex VIII: L 1902 - 1903; PO4: L 3299 - 3301.

115. The Respondent tried to boost its struggling economy by granting subsidies to companies that would eventually help the State and its citizens recover from the crisis.[105] Further, the Claimant's company was known for not planning its investment too far ahead, so it was not the best company on which to rely during an economic crisis.[106] If the Respondent were to provide further financial support to Caeli, it could have drowned in debt.

116. The State has a specific budget and cannot afford to make radical changes in it just because an investor is not pleased. The Claimant was not differentiated from the other investors because of its foreign nationality. When deciding which companies would receive the subsidies, there were certain factors to be considered such as the company's value and if the loan would be secure.[107] In 2018, when Executive Order 9-2018 was enacted, Caeli still enjoyed a market share that exceeded 40%,[108] which meant that even during the economic crisis, the Claimant was able to maintain its position. Thus, it was not necessary to grant the Claimant the subsidies, considering that there were other companies affected by the crisis that had a lower market share.

117. Therefore, the Respondent granted subsidies to companies in greater need than Caeli and decided which airlines would receive the subsidies based on reason and facts. There was an appropriate correlation between the State's objective to save its economy and the measure adopted to achieve it.[109]

118. In light of the above, the Respondent's conduct was neither arbitrary nor discriminatory as the Claimant wrongly suggests. Thus, the Respondent submits that it has not violated its obligations under the CEPTA.

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[105] Facts: L 1251 - 1253.
[106] R.N.A: L 225 - 227.
[107] Annex VIII: L 1907, 1922 - 1925.
[108] Facts: L 1336.
[109] *AES*, ¶10.3.7 - 10.3.9.

D. The Respondent accorded due process to the Claimant

119. Due process is a legal principle that, under international law, embodies the minimal standards in the administrations of justice.[110] The obligation of due process consists of notifying an investor of hearings and not deciding about a claim in his absence or in gross violation of procedural rules, not maliciously misapplying substantive laws, not using powers for improper purposes, not acting intentionally against the investor to harm its investment and not exercising unreasonable pressure on an investor to reach certain goals.[111]

120. In addition, the CEPTA provides for breaches of transparency in judicial or administrative proceedings as grounds for violating due process.[112] A lack of honesty and transparency by the State in these processes has already been found to infringe the minimum standard of treatment of fair and equitable treatment.[113]

121. The decisions made by the Respondent's courts, whether about the airfare caps or the enforcement of the award made by Mr. Rett Eichel Cavanaugh, were notified to the Claimant and also followed Mekari law. In its decision, Justice VanDuzer justified the denial to remove the airfare caps on the CCM's reasonable conclusions and on the possibility of the aftermath recovery due to the Company's large market share.[114]

122. The Superior Court of Mekar dismissal of Vemma's appeal was reasoned in accordance with Article V(1)(e) of the New York Convention and Section 36(2) of the Law No. 9.307/1998, pointing out that the recognition of an award may, and not must, be denied if it was annulled in the country where it was issued.[115] The use of discretion by the court was allowed and in the absence of the veracity of the corruption evidence of the award, the Supreme Court made its decision to dismiss

[110] Özgür (accessed at 26/08/2021).
[111] *Al-Bahloul* ¶221.
[112] CEPTA: L 2738-2742.
[113] *Waste Management* ¶98.
[114] Facts: L 1323-1329.
[115] Annex XV: ¶10.

the appeal.[116] The court merely acted within its powers without having any intention to harm the Claimant's investments. One must observe that it is one thing for a decision not to be justified and another for a justification not to please the Claimant's opinion.

123. In the CCM's First Investigation on Caeli, Mekari laws were not maliciously misapplied. Caeli's market share was considered in conjunction with Royal Narnian. Further, there was a provision in the Monopoly and Restrictive Trade Practice Act, as amended in 2009, allowing the use of discretion by the Commission in industries where special attention is needed and the corporation owns a market share lower than 50%.[117]

124. A lack of transparency is found when a State makes it hard for an investor to operate its investment or understand what is required by the government in order for its investment to succeed.[118] There has to be clear rules and established practices or procedures provided by the Host State in order to ensure transparency.[119] Mekar's government decree nullifying its previous exception granted for airline companies to continue its operations in US dollars and requiring all companies to offer goods and services exclusively in MON[120] was objective and clearly established the guidelines to be followed. This decision was not made in order to harm the Claimant's investment. It was necessary to create credibility in the local currency.[121]

125. In light of the above, the Respondent submits that it accorded due process at all times. Therefore, a breach of the obligation under Article 9.9 does not exist under the claim of a breach of due process.

[116] Annex XV: ¶18.
[117] Annex V: L 1598-1603.
[118] *Micula* ¶469.
[119] *Metalclad* ¶88.
[120] Facts: L 1208 - 1210.
[121] Facts: L 1188 - 1190.

E. The Respondent's measures do not amount to a denial of justice

126. A high threshold is required for a denial of justice to exist as the State's courts must have refused to entertain a suit, subject it to undue delay or administer justice in a seriously inadequate way.[122] There must be clear evidence of an outrageous failure of the judicial system[123] or of failure to provide a minimally adequate justice system.[124] Mekari courts did not act in such a way towards the Claimant.

127. The Claimant alleges that it has been denied justice due to the unreasoned and significantly delayed decisions given by Mekar's courts.[125] However, the Claimant brought this question without bringing any proof of the alleged outrageous denial of justice that it has suffered, merely stating that its urgent matters were not given the proper dose of special attention.

128. During the period of 1980 to 2015, Mekar faced an intense population growth alongside its independence process[126], which has mainly impacted its judicial system. It has not been able to expand at the proper rate and consequently has not been able to keep up with the growing number of demands.[127] In 2015, it took an average of 22 months for a case to be decided, taking approximately 27 months for a final decision when it came to commercial matters.[128]

129. The Claimant's claim concerning the airfare caps had a hearing scheduled within 13 months, even with a high volume of cases stemming from the economic crisis, which was overloading Mekar's judicial system.[129] Failure to obtain a fast trial is not grounds for raising denial of justice as for justice to be provided within a reasonable delay depends on the circumstances and the context of each case.[130] The

[122] *Azinian* ¶ 102, 103.
[123] *Phillip Morris* ¶ 500.
[124] *Agility* ¶ 216.
[125] N.A.: L 100 - 103.
[126] Facts: L 945 - 949.
[127] Facts: L 949 - 950.
[128] Facts: L 950 - 953.
[129] Facts: L 1233 - 1235.
[130] *Generali* ¶163.

Claimant's matter was reviewed, and even took a faster-than-average amount of time and given a proper decision, therefore, no denial of justice can be alleged.

130. Tribunals have stated that for a Respondent to be liable for denial of justice, the Claimant must prove that the court system fundamentally failed, mainly in procedural errors amounting to a lack of due process.[131] The Claimant has no proof of such failure of the Respondent's court system since at all times the courts worked towards resolving the issues.

131. Therefore, the Respondent submits that its measures do not amount to a denial of justice.

F. There was no abusive treatment from the Respondent

132. The Respondent did not harass or act in any way that could be regarded as abusive towards the Claimant.

133. To establish that an investor has been subjected to abusive treatment, the investor has the burden of proving theclaim.[132] An investor will need cogent evidence in order to establish serious misconduct by a Host State, such as *intimidation* or *harassment*.[133] However, the Claimant lacks such evidence as it makes a mere reference to an alleged abusive treatment.

134. The Respondent granted the Claimant full-protection and security. The State's actions were in agreement with its regulatory framework and were reasonable, especially considering the difficulties Mekar was facing.

135. Thus, the Respondent submits that there was no abusive treatment in the present case.

[131] *Liman Caspian* ¶279.
[132] *Reinhard Unglaube*, ¶ 36.
[133] Blake, ¶¶ 9, 10, 11.

V. Alternatively, the Claimant is not entitled to compensation

136. The Respondent has not violated the CEPTA and no compensation is owed to the Claimant. In the remote event that this Tribunal finds that the CEPTA has been breached, the Respondent submits that monetary damages may only be awarded at a "market value", according to Article 9.21 of the CEPTA **(A)**; the States' agreement to compensation at a "market value" in the CEPTA is not a violation of the Most-Favored-Nation Treatment clause **(B)**; the Respondent has already purchased the investment at a "market value" **(C)**; alternatively, compensation has to be reduced due to the Claimant's contributory fault and the ongoing economic crisis in Mekar **(D)**; and the principal sum may only accrue simple interest from the date of the award at a risk-free rate **(E)**.

A. Monetary damages may only be awarded at a "market value", according to Article 9.21 of the CEPTA

137. The CEPTA clearly establishes in Article 9.21 that the tribunal may award monetary damages at a "market value".[134] The Signing Parties peremptorily determined that only cases of expropriation entitle a claimant to compensation at the "fair market value".[135]

138. Treaties concordantly define how compensation must be paid. Some provide for just compensation, representing the genuine or "fair market value", while others provide for prompt, adequate and effective compensation amounting to the "market value" of the investment.[136] It is a choice made by the States when agreeing on a treaty, which should be respected when a tribunal makes a final award. In the CEPTA, it is evident that the States were well-aware of the different alternatives for compensation and manifestly opted to establish that compensation would be awarded according to the "market value", except in expropriation cases. Furthermore, the Claimant's requested compensation has been calculated according

[134] CEPTA: L 3018 - 3024.
[135] CEPTA: L 3018 - 3021.
[136] *CME* (1) ¶ 497.

to its investment's peak valuation of USD 1.1 Billion.[137] It is highly unlikely that a breach of Article 9.9 of the CEPTA has occurred at the exact time that the investment reached its highest value.

139. Thus, as there is no expropriation claim in the present case, the Respondent submits that monetary damages may only be awarded at a "market value" by this Tribunal, pursuant to Article 9.21 of the CEPTA.

B. The States' agreement to compensation at a "market value" in the CEPTA is not a violation of the Most-Favored-Nation Treatment clause

140. The CEPTA defines the particular types of treatment that are protected under the Most-Favored-Nation (hereinafter referred to as "**MFN**") Treatment provision. When there is controversy, it is the tribunal's responsibility to analyze the language of the provision and interpret the intention of the parties.[138] Notwithstanding, the Signing Parties left no doubt regarding the scope of the MFN provision in the CEPTA. It does not include substantive obligations in other treaties as they do not in themselves constitute "treatment", thereby not giving rise to a violation of the MFN provision.[139]

141. Section "E" of the CEPTA addresses the settlement of disputes. With regard to a tribunal rendering a final award, the tribunal may award monetary damages at a "market value", with the exception of claims related to expropriation.[140] Dispute settlement provisions in whole or in part set forth in other treaties are not incorporated through the MFN clause, unless there is no doubt of the parties' intention to incorporate them,[141] which is not the present case. It cannot be presumed that the States have negotiated these provisions to be enlarged by incorporating other provisions from other treaties negotiated in entirely different contexts.[142]

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[137] PO4: L 3280 - 3281.
[138] *Tza Yap Shum* ¶ 196.
[139] Facts: L 2717 - 2720.
[140] Facts: L 3016 - 3021.
[141] *Plama* ¶ 223; *H&H* ¶ 358; *Sanum Investments* ¶ 358.
[142] *Plama* ¶ 207.

Providing compensation equivalent to the "fair market value" is a substantive obligation in the Arrakis-Mekar BIT,[143] which cannot be incorporated in the CEPTA. It is not a subject matter encompassed by the MFN clause as substantive protections do not in themselves constitute "treatment".[144]

142. In addition, while the "fair market value" represents a broad measure of an investment's intrinsic worth, expressed by the price at which it would be sold from a hypothetical willing and able seller to a hypothetical willing and able buyer, when neither is under compulsion and both have reasonable knowledge,[145] the "market value" represents what the investment is truly worth at the whims of market forces. It is what the market will pay for the asset.[146] In this sense, the fact that States choose one measure over another in a bilateral investment treaty does not in any way mean that investors of a certain State have been treated less favorably. It is not possible to apply an objective test to verify what is more favorable as these are different measures, resulting in different values, one not necessarily being lower than the other for the investor. As such, different treatment does not necessarily mean that such treatment has been less favorable.[147] The express choice of a compensation measure becomes nugatory should the MFN clause be applied this way.[148] The MFN clause in the Treaty cannot be relied upon to change an award compensation measure to which the States clearly and explicitly agreed. It would create an unattractive hypothesis for the tribunal, involving a strange view of the intention of the States.[149]

143. Therefore, the Respondent submits that there is no violation of the MFN clause in the present case as the "fair market value" measure cannot be incorporated from

[143] Arrakis: L 3089 - 3094.
[144] Facts: L 2717 - 2720.
[145] AICPA, p. 44.
[146] Senn, Hewett, Fine, p. 4.
[147] UNCTAD, p. 29.
[148] *CME* (2) ¶ 11.
[149] Ibid., ¶ 11.

another treaty and the choice of the "market value" measure does not imply that the investor has been treated less favorably.

C. The Respondent has already purchased the investment at a "market value"

144. The Claimant was unable to find another buyer for its shares in Caeli Airways between February and September 2020, selling its stake in the airline at the "market value" of USD 400 million on October 08th, 2020.[150]

145. The Hawthorne Group LLP proposal price cannot be determined to be the "market value" of the investment as the price was artificially inflated and not an arm's length commercial price.[151] The Sinnoh Chamber of Commerce's Arbitration Institute declared that the offer could not be considered as one received from a "*bona fide* third party" due to the existing affiliation of the Hawthorne Group LLP with Vemma through the Moon Alliance.[152]

146. The Supreme Arbitrazh Court of Sinnograd set aside the aforementioned award, however, neither did the Court find itself in a position to conclusively rule whether corruption in fact had taken place,[153] nor was it within its mandate to establish whether the arbitrator had committed an act of corruption.[154] Between 2010 and 2020, the World Justice Project's Rule of Law Index consistently ranked Sinnoh among the top-10 countries with respect to administration of civil and criminal justice, emphasizing that courts are virtually free of corruption.[155] The award was set aside based on circumstantial evidence of corruption,[156] which Mekar Airservices failed to discharge,[157] but the Respondent had the option to enforce it, pursuant to Article V(1)(e) of the New York Convention and Section 36(2) of the Commercial Arbitration Law (Law No. 9.307/1998).[158] As a matter of fact, the

[150] Facts: L 1390 - 1392.
[151] Facts: L 1345 - 1346.
[152] Facts: L 1358 - 1361.
[153] Annex XIII: L 2185 - 2186.
[154] Annex XIII: L 2192 - 2194.
[155] PO4: L 3306 - 3310.
[156] Annex XIII: L 2203 - 2204.
[157] Annex XIII: L 2208 - 2209.
[158] Annex XV: L 2346 - 2348.

award was set aside based on a report prepared by the Center for Integrity in Legal Services (CILS), an organization that is funded by foreign donations to interfere in Mekar's domestic affairs, and it is against Mekar's public policy to give credence to reports from such an organization.[159] Its bank accounts have been frozen until investigations into suspicious foreign funding and illicit activities under Mekari Law are complete.[160] A high standard of proof is required for cases involving allegations of corruption.[161] There must be clear and convincing evidence or reasonable certainty.[162] An award should only be set aside if it violates the most basic notions of morality and justice and it takes a very strong case for such a conclusion to be reached.[163] In the present case, there were no sufficiently serious, specific and consistent *indicia* of corruption,[164] only circumstantial evidence and hearsay.

147. Therefore, as the Claimant failed to find other arm's length offers, the Respondent contends that no further payment is owed to the Claimant as its stake in Caeli Airways has been purchased at the "market value" of USD 400 million.

D. Alternatively, compensation has to be reduced due to the Claimant's contributory fault and the ongoing economic crisis in Mekar

148. Even in the event that this Tribunal finds that the Respondent owes compensation, the Claimant's conduct is required to be taken into consideration to determine the due reparation.

149. The contributory fault is a general principle of international law wherein any compensation is to be reduced by the contribution to the injury by willful or negligent action or omission of the entity in relation to whom reparation is sought.[165] In investment cases, damages have been reduced due to the investor's role in the

[159] Annex XIV: L 2286 - 2289.
[160] Annex XIV: L 2287-2289.
[161] Pietrowski, pp. 379-380; *Karkey Karadeniz* ¶ 492.
[162] *Kim and others* ¶ 614; *Fraport* ¶ 479; *H&H* ¶ 390.
[163] Annex XIV: L 2258 - 2260.
[164] Annex XIV: L 2291 - 2292.
[165] ILC (1), Article 39.

event that led to a loss. Such reductions have occurred with a reference to the ILC Draft Articles,[166] but the contributory fault is so widely accepted that it has also been recognized without the need of such reference.[167] This is consonant with the principle that an injury entitles full reparation, but nothing more.[168]

150. Vemma's proposal for Caeli Airways did not account for the serious volatility of fuel prices and competition.[169] Also, Mekar Airservices advised against making risky decisions, given the known volatility of demand in the region.[170] Instead, the Claimant opted to attempt to increase the Airline's market share.[171] Representatives of Mekar Airservices also cautioned that such aggressive expansion should be controlled due to exorbitant costs to maintain the fleet during seasons of low demand and to hedge the liability of additional financing.[172]

151. It was public and notorious that the Claimant was making risky decisions. While Mekar Airservices focused on improving financial health, Vemma preferred fleet expansion and slashed airfares.[173] *Phenac Business Today* published a podcast suggesting that Caeli Airways should cut back its operation.[174] According to *Aviation Analytics*, the rapid expansion of Caeli Airways was ill-advised and if it had focused on its debts, the drastic situation in which it ended up would not have occurred.[175] Additionally, Fitch Ratings assigned a 'BB' Long-Term Issuer Default Rating to Vemma due to risky investments, external risks exposure and looming liquidity crunch.[176] It was also cited that an internal review of Vemma's airline

[166] *Stati* ¶1331; *Gemplus* ¶ 11.12; *Burlington* ¶ 572; *Gavazzi* ¶ 270; *Perenco* ¶ 359.
[167] *RosInvest* ¶¶ 634, 635, 668; *AGIP* ¶ 99.
[168] ILC (2), p. 110.
[169] Facts: L 1036 - 1037.
[170] Facts: L 1095 - 1098.
[171] Facts: L 1098 - 1099.
[172] Facts: L 1108 - 1110.
[173] Facts: L 1136 - 1138.
[174] Facts: L 1124 - 1126.
[175] Annex IX: L 1956 - 1059.
[176] PO4: L 3283 - 3285.

businesses was crucial.[177] The company was under pressure to sell its airline operations in Mekar to shore up liquidity.[178]

152. The Claimant was also aware of the legal framework in Mekar, including the possibility of the CCM launching investigations. Likewise, the Claimant was aware of the volatility of the MON exchange rate and the economic situation of the country. Any company should incorporate the probability and severity of such risks, as well as any other risk verified in its due diligence process, to its business model to make its decisions.

153. Therefore, not only did the Claimant contribute to the result, but also the contribution was significant and material, entitling this Tribunal to widen its discretionary powers in the determination of the amount of reparation to be awarded. Such discretionary power has been acknowledged by other tribunals.[179] Moreover, there is a clear causal link between the fault and the suffered harm, as required by some tribunals to reduce the international responsibility of a State.[180] Had Vemma taken a more cautious approach in its business model, the events that led to the loss in the investment would not have occurred. Generally, a host State's breach of a treaty is regulatory in character, whereas an investor's conduct reflects a failure to safeguard its own interests instead of any breach of duty owed to the Host State.[181] As such, it is usual for the loss to be shared equally between the Claimant and the Respondent.[182] Therefore, the compensation must reflect a fair and reasonable apportionment of responsibility between the Claimant and the Respondent due to the material and significant contribution of the Claimant.

154. Furthermore, the Claimant had the actual duty to mitigate its losses[183] from the moment the circumstances were known.[184] The Claimant had plentiful opportunities

[177] PO4: L 3285 - 3286.
[178] PO4: L 3288 - 3290.
[179] *STEAG* ¶ 794; *Occidental* ¶ 670; *MTD* ¶ 101.
[180] *Bear Creek* ¶ 410; *Abengoa* ¶ 670; *Unión Fenosa Gas* ¶ 18.
[181] *MTD* ¶ 101.
[182] Ibid., ¶ 101.
[183] *Bridgestone* ¶ 565.
[184] *CME* (1) ¶ 303.

to take less aggressive approaches to reduce its obligations that would have allowed it to navigate the economic crisis without such risk exposure. Nevertheless, it only sought to increase its profitability and now attempts to receive compensation for incurred losses, which were bound to happen, from a State already in a dire economic situation. The requested amount of USD 700 million in compensation would undermine the general welfare of the Mekari population as it represents twice the consolidated annual public spending of Mekar.[185] A 2019 IMF report predicted negative growth in four consecutive quarters, an 8 per cent GDP fall, a 2,600 per cent average inflation in 2020, as well as a potential third debt default.[186]

155. In light of the above, the Respondent submits that any awarded compensation has to be reduced by the Claimant's contributory fault and the ongoing economic crisis in Mekar.

E. The principal sum may only accrue simple interest from the date of the award at a risk-free rate

156. The CEPTA only contemplates the inclusion of interest in an award in case of restitution of property.[187] The awarding of interest is not automatic and depends on the circumstances of each case, particularly on whether it is necessary to ensure full reparation.[188]

157. Should this Tribunal find that interest must be awarded, it should only be applied from the date of the award as damages are only due at this date in the present case. When there is not a single date that a breach occurred, rather the breach was a result of a combination of factors over a period of time, the obligation to pay interest only arises from the date of the award.[189] Additionally, simple interest is more appropriate than compound interest in such cases.[190] The calculation of

[185] Facts: L 3164 - 3165.
[186] PO3: L 3161 - 3163.
[187] Facts: L 3020 - 3024.
[188] ILC (2), p. 108.
[189] *Arif* ¶ 618.
[190] *Arif* , ¶ 619; *ADM* ¶ 298.

compensation itself fully compensates the Claimant for the suffered damage and simple interest compensates for the loss of the use of the principal sum of the award.[191] Furthermore, the Claimant is only entitled to interest to compensate it for the time of value of money, not for risks that it does not bear.[192] A risk-free rate, such as the USD LIBOR, is the appropriate benchmark for interest as it represents a reasonable expectation of return.[193]

158. Therefore, the Respondent submits that, in case this Tribunal awards interest, the principal sum may only accrue simple interest from the date of the award and at a risk-free rate.

[191] CME (1) ¶ 641.
[192] Fisher, Romaine, p. 146.
[193] *EDF and others* ¶ 1325; *Marion Unglaube* ¶ 324.

PRAYER FOR RELIEF

159. For the foregoing reasons, the Respondent respectfully requests this Tribunal to render an award as follows:

1. To declare that it does not have jurisdiction over the present dispute due to the Claimant's status as a State-owned enterprise;

2. To accept The Committee of Reform on Public Utilities submission to be Amicus Curiae;

3. To reject The Consortium of Bonoori Foreign Investors submission to be Amicus Curiae;

4. To hold that the Claimant's claims are not admissible;

5. To declare that the Respondent has not violated Article 9.9 of the CEPTA;

6. In case the Tribunal finds that Respondent has violated Article 9.9, then it should conclude that the Respondent has already purchased the Claimant's investment at "market value" and award the Claimant no compensation; alternatively, the Tribunal should reduce any compensation awarded considering the Claimant's contributory fault and the ongoing economic crisis in Mekar;

7. In case the Tribunal awards interest, then it should conclude that the principal sum should only accrue simple interest from the date of the award and at a risk-free rate;

8. To order the Claimant to bear all the costs of this arbitration.

Respectfully submitted on September 23, 2021

by

TEAM NGOMA G

On behalf of the Federal Republic of Mekar.