TEAM Pinto G

INTERNATIONAL CENTRE ON THE SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB(AF)/20/78

Vemma Holdings Inc.

(CLAIMANT)

v.

The Federal Republic of Mekar

(RESPONDENT)

MEMORIAL FOR THE RESPONDENT

TABLE OF CONTENTS

Index of Abbreviations

¶(¶)	Paragraph ()
Art./ Arts.	Article / Articles
BIT	Treaty Between the Federal Republic of Mekar and The Kingdom of Arrakis for the Promotion and Protection of Investments.
CEPTA	Bonooru - Mekar Comprehensive Economic Partnership and Trade Agreement
Claimant	Vemma Holdings Inc.
e.g.	Exempli Gratia (For example)
ICSID	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States [1965] 575 UNTS 159
ICSID AF Rules	ICSID Additional Facility Rules (2006)
No.	Number
p./pp.	page/pages
Parties	Claimant and Respondent
Respondent	The Federal Republic of Mekar
v.	versus
VCLT	Vienna Convention on the Law of Treaties [1980] 1155 UNTS 331

INDEX OF AUTHORITIES

TREATIES, CONVENTIONS AND RULES

Cited as	Reference
Amendment 1	ICSID Secretariat, Proposals for Amendment of the ICSID Rules---Working Paper (Volume 3), 2018.
Amendment 5	ICSID Secretariat, Proposals for Amendment of the ICSID Rules---Working Paper 5 (Volume 1), 2021.
ARSIWA	ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, A/CN.4/SER.A/2001/Add.1(Part 2), 2001.
The World Bank Guidelines	World Bank Guidelines on the Treatment of Foreign Direct Investment, reprinted in Shihata, Legal Treatment of Foreign Investment: "The World Bank Guidelines", Dordrecht, Boston, London 1993
Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, United Nations, New York, 2014

COMMENTARIES AND ART.S

Cited as	**Reference**
Audit	Bernard Audit, Transnational Arbitration and State Contracts: Findings and Perspectives, 1988
Broches	Aron Broches, "The Convention on the Settlement of Investment Disputes Between States and Nationals of other States", 136 R.C.A.D.I. (1972)
Caron	D.D. Caron, and E. Shirlow, Most-Favored-Nation Treatment: Substantive Protection (KIL 2015)
DAMFNC Commentaries	ILC, Draft Articles on Most-Favoured-Nation Clauses, with Commentaries, A/CN.4/SER.A/1978/Add.1 (Part 2), 1978.
Gary Born & Stephanie Forrest	Gary Born & Stephanie Forrest, 'Amicus Curiae Participation in Investment Arbitration' [2019] 34 ICSID Review 626
Marboe	I. Marboe, Calculation of compensation and damages in international investment law (2nd edn, OUP 2017)
McLachlan	C. McLachlan, L. Shore, and Weiniger, International Investment Arbitration: Substantive Principles (2nd edn, OUP 2017)

OECD	OECD (2004), ‘"Indirect Expropriation" and the "Right to Regulate" in International Investment Law”, OECD Working Papers on International Investment, 2004/04, OECD
Sabahi	B. Sabahi, Compensation and restitution in investor-state arbitration: Principles and practice (OUP 2011)
Schwebel	Schwebel, Stephen M. “The Influence of Bilateral Investment Treaties on Customary International Law.” Proceedings of the Annual Meeting (American Society of International Law) 98 (2004)
Schill	S. W. Schill, ‘Multilateralizing Investment Treaties through Most-Favored-Nation Clauses’ [2009] 27 Berkeley Journal of International Law 496.
Wiik	Astrid Wiik, “Amicus Curiae before International Courts and Tribunals” [2018], Nomos Verlagsgesellschaft

Index of Court Decisions

Permanent Court of International Justice

European Court of Human Rights

INDEX OF ARBITRAL AWARDS

International Centre for Settlement of Investment Disputes

ADC	ADC Affiliate and ADC & ADMC Management Ltd v. Republic of Hungary, Award, ICSID Case No. ARB/03/16 (2.10.2006)
Apotex Appleton	Apotex v America, Procedural Order on The Participation of the Applicant, Mr Barry Appleton, as a Non-Disputing Party, ICSID Case No. ARB(AF)/12/1 (4.3.2013)
Bayindir	Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan, Award, ICSID Case No. ARB/03/29 (27.8.2009)
Bear Creek Mining	Bear Creek Mining v Peru, Procedural Order No. 5, ICSID Case No. ARB/14/21 (21.7.2016)
Biwater	Biwater v Tanzania, Procedural Order No. 5, ICSID Case No. ARB/OS/22 (2.2.2007)
BUCG	Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, Decision on Jurisdiction , ICSID Case No. ARB/14/30 (31.5.2017)
CMS	CMS Gas Transmission Company v. Republic of Argentina, Award, ICSID Case No. ARB/01/8 (12.5.2005)
Continental Casualty	Continental Casualty Company v Argentina, Award, ICSID Case No. ARB/03/9 (5.9.2008)

CSOB	Ceskoslovenska Obchodni Banka, A.S. (CSOB) v. The Slovak Republic, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/97/4 (24.5.1999)
Eli Lily	Eli Lily v Canada, Procedural Order No. 4, ICSID CASE NO. UNCT/14/2 (23.2.2016)
Flughafen	Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/19 (8.29.2012)
Lemire	Joseph Charles Lemire v. Ukraine, Award, ICSID Case No. ARB/06/18 (28.3.2011)
LG&E	LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentina, Decision on Liability, ICSID Case No. ARB/02/1 (3.10.2006)
Maffezini	Maffezini v. The Kingdom of Spain, Decision on Jurisdiction, ICSID case No. ARB/97/7 (25.1.2000)
Metalclad Corp	Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1 (30.8.2000)
MTD	MTD Equity Sdn Bhd and MTD Chile S.A. v Chile, Award, ICSID Case No. ARB/01/7 (25.5.2007)
Parkerings	Parkerings–Compagniet AS v Lithuania, Award, ICSID Case No.ARB/05/8 (11.9.2007)

Philip Morris (No. 3)	Philip Morris v Uruguary, Procedural Order No. 3, ICSID Case No. ARB/10/7 (17.2.2015)
Philip Morris (No. 4)	Philip Morris v Uruguary, Procedural Order No. 4, ICSID Case No. ARB/10/7 (24.3.2015)
Ponderosa	Enron Corporation Ponderosa v Argentina, Award, ICSID Case No.ARB/01/3 (22.5.2007)
PSEG Global	PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, Award, ICSID Case No. ARB/02/5 (19,1,2007)
RREEF Infrastructure	RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain, Award, ICSID Case No. ARB/13/30 (11,12 2019)
Siag and Vecchi	Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, Award, ICSID Case No. ARB/05/15 (11.5.2009)
Siemens AG	Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8 (6.2.2007)
SolEs Badajoz GmbH	SolEs Badajoz GmbH v. Kingdom of Spain, Award, ICSID Case No. ARB/15/38 (31,7, 2019)
Tecmed	Tecnicas Medioambientales Tecmed S.A. v Mexico, Award, ICSID Case No. ARB(AF)/00/2 (29.5.2003)

United Parcel Service	United Parcel Service of America Inc. v. Government of Canada, Jurisdiction, ICSID Case No. UNCT/02/1 (22.11.2002)
UPS	UPS v Canada, Chamber of Commerce of the United States Application for Amicus Status and Amicus Submission , ICSID Case No UNCT/02/1 (20.10.2005)
Venezuela Holdings	Mobil Corporation, Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27 (9.10.2014)
Vivendi	Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19 (19.5.2005)
Waste Management	Waste Management v Mexico, Award, ICSID Case No. ARB(AF)/00/3 (30.4.2004)

United Nations Commission on International Trade Law

CME	Czech Republic B.V. v. The Czech Republic, Final Award, UNCITRAL (14.3.2003)
Myers	S.D. Myers, Inc. v. Government of Canada, Partial Award, UNCITRAL (13.11.2000)

Permanent Court of Arbitration

Chevron	Chevron v Ecuador, Procedural Order No. 8, PCA Case No. 2009-23 (18.4.2011)
Jurgen Wirtgen et al.	Jurgen Wirtgen et al. v. Czech Republic, Final Award, PCA Case No. 2014-03 (11,11 2017)

Saluka	Saluka Investments BV (The Netherlands) v Czech Republic, Partial Award, PCA Case No.2001-04 (17.3.2006)

Iran-United States Claims Tribunal

Sola Tiles	Sola Tiles, Inc. v. Government of Islamic Republic of Iran, Award No. 298-317-1, 14 IRAN-U.S. C.T.R. 223 (22.4.1987)

STATEMENT OF FACT

Time	Facts
1964	The Constitutional Court of Bonooru found that Article 70 bestows positive obligations upon the State to assist and ensure provision of essential transportation to the population living in remote areas.
1979	Following losses from the 1973 and 1979 oil shocks, the CAA restructured the state-owned BA Holdings, Bonooru Air's parent company, into an arms-length enterprise in an effort to enhance its profitability.
December 1984	The process of privatization was completed.
2003	The erstwhile Managing Director of Caeli Airways ("Caeli"), Mr. Yangchen Su, presided over a merger of Caeli Airways with Aer Caeli. Caeli Airways was making an operating profit but net loss at the time, whereas Aer Caeli was making a smaller profit having cut down its airfare to compete with more expensive alternatives.
2009	Additionally, to inspire investor confidence, the new legislature revised Mekar's Monopoly and Restrictive Trade Practice Act in 2009 (Annex V). This amendment envisaged the creation of a Competition Commission of Mekar ("CCM"), armed with an independent enforcement directorate. Ms. Moira Rose was appointed as the President of this agency. On the day of her appointment, her office released a press statement detailing her vision "to see the CCM function as an autonomous body independent of government influence".
September 2010	Mekar Airservices Ltd., a state-owned and controlled transition vehicle to which Caeli Airways' assets and part of its debt liability were transferred. Under his leadership, Mekar Airservices Ltd. marketed Caeli Airways' core assets to potential bidders – its brand and logo, valuable slots at two highly congested international airports, its profitable ground handling company CA Handling, and well-equipped technical base at Phenac, Mekar's capital. While bidders could purchase Caeli's aircraft and equipment as well as take on existing employees, there was no obligation upon them to do so.
23 November 2010	Four companies, including Vemma, participated in the tendering process. On 23 November 2010, the same day as Vemma submitted its bid for the purchase of Caeli, the Szeto Times reported that Ms Sabrina Blue, erstwhile head of Vemma's

board of directors, had been appointed as the Secretary of Transport and Tourism in a cabinet reshuffle in Bonooru.

5 January 2011 22.The Group's tender valued at 800 million USD was accepted on 5 January 2011. However, select members of Mekar's Committee on Reform of Public Utilities noted that Vemma's proposal relied on an overly optimistic forecast which did not account for serious volatility of fuel prices and potential take-over of the long-distance routes by competitors. The Chairperson of the committee was a strong proponent of selecting Vemma throughout the bidding process. He stressed that Vemma's ties to Bonooru were an asset. He also noted in his concluding remarks that he hoped Vemma's imminent success would encourage more investors from Bonooru to consider Mekar as an investment destination.

January 2011 25. The CCM approved Vemma's acquisition of an 85% stake in Caeli Airways and the airline's participation in the Moon Alliance on 5 March 2011. In respect of the alliance, the CCM noted that Caeli's partnership with Moon Alliance members would enable the airlines to offer new and improved services, as well as low-cost services due to economies of traffic density, boosting consumer welfare. However, the CCM sought an undertaking from Caeli that it would not engage in high-level co-operation on competition parameters such as prices, schedules, capacity, facilities, and other sensitive information with Moon Alliance members, which was duly submitted.

March 2011 On 29 March 2011, Vemma Holdings entered into a Share Purchase Agreement with Mekar Airservices Ltd. to purchase an 85% stake in the company. The remaining 15% shares were beneficially owned by the Mekari State through Mekar Airservices Ltd. Simultaneously, Vemma and Mekar Airservices Ltd. entered into a Shareholders' Agreement (Annex VI).

2011-2013 On the other hand, the eight purchased and fifteen leased Boeing 737 aircraft that Caeli added to its fleet in June 2011, through contracts with a fellow Moon Alliance Member, were optimal for this mid-haul journey. The consequent equipment and fuel efficiency allowed it to avoid the deep losses faced by its competitors. Caeli also benefited from its cooperation with other Moon Alliance members, especially the Royal Narnian, in respect of lounge access, terminals, IT platforms, check-in operations and code- sharing.

2011

28. One of the pillars of Caeli Airways' business model during this period was catering to customers travelling from Mekar to Bonooru. Traditionally, Bonooru attracted business travellers from Mekar and other neighbouring countries, routes that Caeli Airways had flown frequently under State ownership. In 2011, Bonooru's Minister of Transportation and Tourism unveiled the "Horizon 2020" Scheme as part of the Caspian Project to "optimally tap the potential of Bonooru's emerald beaches, its fascinating national parks, and its human, cultural and historical treasures". A key part of this Scheme was to offer recurring subsidies to companies investing in tourism-related infrastructure in Bonooru. Vemma received the first subsidy under this Scheme on 28 October 2011. Ms. Sabrina Blue, when pressed on the rationale behind these subsidies by opposition party members, stated in June 2011 before the House of Commons that: "In its application, Vemma has credibly outlined how its investment in Caeli Airways would draw more travellers from Mekar and the Greater Narnian Region to Bonooru's emerging tourism markets. Vemma's expansion into Mekar will offer substantial benefits not only to Vemma but to all of Bonooru by enhancing the aviation network available to prospective tourists. This will boost the tourism infrastructure at our disposal."

2012

29. Over the course of 2012, natural formations from the Eldin volcanic eruption piqued tourist interest in Mekar, which was further buoyed by the inexpensive MON. To capitalise on this growing interest, Vemma Holdings decided to offer low-fare, long-distance flights into Mekar. Against the advice of Mekar Airservices, who preferred network development focused on frequency of domestic flights in the initial years following privatisation, Vemma concentrated efforts on expanding routes for cross-continental travel to Mekar using its A340 fleet, adding 20 new destinations in 2012. At the first annual shareholders' meetings, representatives of Mekar Airservices cautioned the new Vemma-appointed management against taking an "extravagant approach", given the volatility of demand in the region, and especially in Mekar, during fall and winter months. However, representatives of Vemma argued that to limit expansion would mean forfeiting unclaimed market share.

August 2011 to December 2013

30. In this period, it was also able to refinance its inherited debt liability from BPB at more favourable rates than available on the market.

31. Citing these losses, representatives of Mekar Airservices cautioned that Caeli's expansion should be controlled to avoid exorbitant costs associated with maintaining its fleet during seasons of low demand and hedge the liability of additional financing. Conversely, Vemma's representatives on Caeli's board continued to project optimism based on the airline's 2013 earnings. In the first quarter of 2014, the board decided to increase the number of Caeli's international routes to offset the losses incurred regionally during the fall-winter season.

June 2014

33. Oil prices around the globe crashed to a five-year low due to steadily rising supply from non-CEPO countries. (According to the CEPO Secretary-General, these prices "have already hit bottom. We do not see the possibility of further decline and are even preparing for a strong uptick in prices in the near future".) A podcast published by Phenac Business Today (Annex VII) suggested that Caeli Airways should cut back its operation on these routes.

Caeli Airways turned a net profit over the whole year for the first time since its acquisition. Its fall-winter losses, while far lesser than those incurred in 2013, were particularly concentrated in the high-traffic routes between Bonooru and Mekar, where regional competitors offering low-fare flights emerged quickly. A podcast published by Phenac Business Today (Annex VII) suggested that Caeli Airways should cut back its operation on these routes.

2015

35. While board representatives from Mekar Airservices preferred injecting these profits into outstanding debt and improving financial health, Vemma's representatives preferred fleet expansion and slashed airfares.

June 2016

35. The first was a frequent-flyer programme, which allowed flyers to exchange accumulated points for free or enhanced services, and even benefits at supermarkets and gas stations. The second was a corporate-discount scheme offered to small and mid-sized enterprises. By June 2016, Caeli became the only

consistently profitable carrier on over half the routes to and from its base airport, Phenac International.

2015, July 201635. Foot note 3 Until 2015, the CCM maintained that "[w]here foreign subsidies take the form of financial flows facilitating acquisitions of Mekari companies or where they directly support the operation of a company in the Mekari, or facilitate bidding in a public procurement procedure, there appears to be a regulatory gap." In July 2016, CCM released a White Paper wherein it noted that "the disciplines of the amended MRTP Act concerning 'Agreements or Arrangements that Prevent or Lessen Competition Substantially' are wide enough to envisage market-disruptive agreements between two enterprises operating in Mekar, one of whom is a state-owned enterprise providing financial contribution to the other".

9 September 2016 36. Caeli's rapid expansion drew the attention of the CCM, which launched a suo moto investigation into its activities ('the First Investigation'). In its press release dated 9 September 2016, the CCM indicated its intention to investigate whether Caeli had adopted predatory pricing strategies with the aim of hindering competition on the domestic market. At the time of the investigation, Caeli enjoyed a 43% market share in Mekar.

We believe it is appropriate to consider this composite market share given the evidence of preferential

secondary slot-trading between the Royal Narnian and Caeli. We are also concerned that foreign subsidies received by Vemma under the Horizon 2020 program enabled Caeli's predatory pricing strategies. In this light, proactive action is necessary: we cannot wait for Caeli to drive out smaller competitors to take corrective steps."3 To date, the CCM has not investigated any other airlines alliance members active in Mekar, alone or in combination.

2016 37. As an interim measure, the CCM placed caps on Caeli Airways' airfare to prevent it from earning supra-competitive profits in the future. These airline caps were set reasonably above the rates Caeli Airways charged on set routes.

While it also objected to the CCM's investigation into subsidies received under the Horizon 2020 Scheme, Caeli cooperated with the CCM at every step. It did not protest the airfare caps, and there is no evidence the caps hurt its profitability in 2016.

December 2016 38. In December 2016, a consortium of small regional airlines in Greater Narnia, led by one of their Mekari members, brought another complaint before the CCM, alleging that Caeli "launched flights on specific regional routes with the sole purpose of pushing its competitors off these routes, capitalising on its undercutting policies and the privileges it enjoyed at Phenac International Airport".

late 2016 - March 2017 39.starting in late 2016, the Mon began to nosedive. While economists disputed the predominant cause of the Mon's fall, most often cited reasons included shaky investor sentiment, State interference with the central bank, and tariff threats from trading partners. High foreign-currency debt also resulted in Mekar running deficits in both its fiscal and current accounts. By March 2017, a currency crisis ensued in Mekar. Simultaneously, increasing inflation led to a surge in costs of everyday items and reduced consumer spending power. The IMF emphasised "the need to establish credibility in the [local] currency to avoid a debilitating economic situation".

July 2017 40. Caeli was unable to secure a steady stream of revenue. It requested meetings with Mekar's Secretary of Civil Aviation to seek permission to denominate its airfare in US dollars instead of the Mon till the crisis abated.

October 2017 40. Having received several similar requests, Mekari authorities approved the denomination of airfare in US dollars for all airlines operating in its territory in October 2017.

30 January 2018 41.with a view to stabilise its currency, Mekar's government passed a decree requiring all companies operating in the country to offer goods and services denominated exclusively in Mon

Between Feb and March 2018

43. Caeli also requested the CCM to remove the interim airfare caps imposed on it. Moreover, the airfare caps set by CCM were pegged to Mekar's official inflation rate calculated by the Central Bank, released each year in December.

Caeli representatives felt this was insufficient as inflation had been increasing exponentially over the previous months and by the end of 2018 could be much higher than anticipated by the December 2017 statistic.

CCM denied Caeli's request, reasoning that the interim measures could not be removed until its investigations were complete, and that interference with inflation rates was beyond its competence.

8 March 2018

On 8 March 2018, Caeli's board voted to seek judicial review of the CCM's airfare caps. They sent multiple letters to the Central Bank to revise the inflation rates, to which it received responses directing it to the Central's bank long-standing policies of not responding to individual corporate requests.

27 March 2018

44. Caeli's claim against the CCM was registered

a hearing on interim measures was scheduled only in April 2019 due to a high volume of cases stemming from the economic crisis.

"Several parties have appeared before this Court seeking immediate redressal. However, the Court does not have the resources to make this possible. Moreover, we continue to prioritise criminal matters due to their far-reaching consequences."

the end of August 2018

45. the CCM concluded its First Investigation into the commercial activities of Caeli Airways and issued a voluminous report on the results of the investigation.

found a breach of Mekar's antitrust legislation in the form of predatory pricing resulting from low airfares and loyalty programmes.

subsidies received by Vemma under the Horizon 2020 scheme helped Caeli drastically reduce its airfare below its average avoidable costs

Accordingly, the CCM imposed a total penalty of MON 150 Million on Caeli. The CCM also decided to keep the airline caps in place pending the Second Investigation.

Representatives of Caeli unsuccessfully tried to secure meetings with the CCM enforcement directorate to delay the imposition of the fines.

25 September 2018

46. Over the course of the next few months, Mekar attempted to alleviate some of the airline industry's concerns. On 25 September 2018, the President passed Executive Order 9-2018 (Annex VIII)

The Order vested discretion with respect to grant of subsidies to the Secretary of Civil Aviation. Caeli Airways' application for subsidies under this Order was rejected by the Secretary, who did not indicate the reasons for the dismissal. Foreign airlines such as Star Wings and JetGreen, both owned by holding groups from Arrakis, received subsidies under this program despite having received subsidies from their home States greater than Vemma received under the Horizon 2020 programme.

"Whether our government gives taxpayers money to one company or another is strictly up to our Congress. In any case, authorities worldwide have recognized that State-owned companies have unique advantages over other companies that enable them to outcompete privately-owned firms. It would be unfair to grant certain State-owned companies even more of an advantage in our airline market to the detriment of our people."

Caeli Airways was one of the only two airlines owned in any significant part by a foreign government operating in Mekar at the time, the other being the wholly government-owned Larry Air. Neither received subsidies under Executive Order 9-2018.

End of 2018

Meanwhile, oil prices in 2018 rose to the highest since 2013 as a result of global sanctions on two major oil-producing nations. This left Caeli Airways in a state of deeper financial distress, especially due to its continued operation of old aircraft until this time.

Its regional operations also suffered when Mekar decided to ground all Boeing 737 MAX aircraft in its airspace. This decision was taken following an accident on 29 October 2018 when a 737 MAX crashed after take-off from Jakarta, killing all 189 on-board. No other country grounded Boeing 737 MAX aircraft until March 2019, following a second crash which was confirmed to be based on the same technical failure as the first crash.

January 2019 49.the CCM completed its Second Investigation into Caeli. Caeli had engaged in anti-competitive behaviour in conducting its business activities in Phenac International Airport. Specifically, it was found to have abused its dominant position to extract significant additional privileges in terms of airport service fees from Phenac International Airport, which allowed it to undercut ticket fares and eventually push other competitors off the market consisting of routes to and from Phenac International.

Moreover, Caeli's exclusionary strategy was inferred from the fact it had introduced excessively low prices only on routes to and from Phenac International and that its strategy could only run competitors out of the market, without helping Caeli gain new customers or increase revenues. Consequently, a fine in the amount of MON 200 million was imposed on Caeli Airways. The CCM also decided to continue to impose airfare caps until Caeli Airways' market share, with its fellow Moon Alliance member factored in, were to fall below 40%. While this market share stood at 42% at the time, Caeli continued to incur significant losses on the routes it operated.

January 2019 50.Caeli countered that the privileges cited by the CCM in its report were part of the original privatisation package, which the CCM had approved in March 2011. On 20 January 2019, representatives of Caeli appealed both orders of the CCM in the Mekari courts. Caeli asked that this appeal be joined with the April 2019 hearing on the airfare caps. The registrar denied this request on 26 January 2019, reasoning that "the April 2019 hearing shall remain solely concerned with the airfare caps. The CCM has requested time to respond to Caeli's notice, which must be afforded to protect its due process rights. As is required under Mekari law, any fines cannot be enforced pending Court review. Therefore, this is hardly an immediate concern." The registrar subsequently scheduled an initial hearing on the Competition Authority's fines for May 2020.

8 February 2019 Facing the risk of insolvency, Caeli Airways applied for a 200 million USD loan to the State-controlled bank of Mekar, First National Phenac, in order to be able to service its other debts. On 8 February 2019, the bank offered a credit line at an inflated interest rate. In a letter addressed to Caeli, the Chairman explained that this

decision was premised on the CCC+ rating assigned to Caeli by the Investment Information and Credit Rating Agency ("IICRA") earlier that month.

IICRA is a governmental credit rating agency tasked with assessing creditworthiness of State-owned or State-related enterprises in Mekar.

51 In turn, the IICRA memorandum explaining its rating decision noted that it had taken into consideration "risky investment choices by Caeli, long-standing debts that Caeli has failed to service since its privatisation, and large fines payable to the CCM". Caeli refused this loan.

25 April 2019 Mekar's High Court heard submissions from Caeli Airways and the CCM concerning a stay on the imposition of airfare caps. Justice VanDuzer reserved his judgment for a written decision to be delivered on a subsequent date.

June 2019 Aviation Analytics, a leading international quarterly, pinned Caeli's fate on enthusiastic overexpansion and the unforeseen financial situation in Mekar (Annex IX).

15 June 2019 Justice VanDuzer "While this Court may not agree with the Competition Commission's rationale, the Court finds that the decision reached by the Commission was within a range of potentially reasonable conclusions given the facts before it. The Court also takes note of the previous conduct of the party seeking the temporary injunction. It is mindful of the large market share that the Applicant enjoys in Mekar, which would allow it to recover quickly in the aftermath of the economic crisis. Hence, on a balance of convenience, the Court declines to grant an interim removal of the airfare caps applicable to the Applicant.

Further, the Court has considered the Applicant's prima facie case on the merits in its examination of this request for temporary injunction. It does not foresee the possibility of arriving at a different final decision. Therefore, to save the precious resources of our courts, and to avoid the parties waiting in anticipation, the Court also dismisses the merits of the Applicant's appeal at this point."

October 2019 By the third quarter of 2019, Caeli's market share in Mekar dropped below 40%, with its operations on most routes generating deep losses. The CCM lifted the applicable airfare caps in October 2019.

November 2019 — November 2019 meeting of Caeli Airways' board, representatives of Vemma announced their intention to sell their stake in Caeli Airways, given the burgeoning liabilities of the enterprise. Vemma secured an offer from Hawthorne Group LLP, a Sinnoh-based private equity firm with stakes in numerous low-cost airlines, for Vemma's entire stake in Caeli Airways. In a notice dated 9 December 2019 (Annex X), Vemma communicated the terms of this offer to representatives of Mekar Airservices.

17 December 2019 — Mekar Airservices rejected the offer, deeming the price offered to be artificially inflated and not an arm's length commercial price. It noted that "the right to offer the shares at 'the price proposed by a bona fide third-party purchaser' does not extend to offering them at a price proposed by the Hawthorne Group or its affiliates, which are associated to Vemma Holdings through the Moon Alliance." After failed negotiations between the two parties, Mekar Airservices filed a request for arbitration on 11 February 2020 with the Sinnoh Chamber of Commerce's ("SCC") Arbitration Institute under the SCC Arbitration Rules (Annex XI) and Article 48 of the Shareholders' Agreement. It requested the tribunal to find that Vemma had failed to secure a bona fide third party offer under Article 39 of the Shareholders' Agreement.

Upon the parties' failure to agree upon a sole arbitrator, the SCC Secretariat appointed 78-year- old Mr Rett Eichel Cavanaugh to adjudicate the dispute. Mr Cavanaugh, a Gopongan national, is a renowned scholar in the arbitration sphere. Following a fast-track arbitration procedure, the sole arbitrator rendered an award in favour of Mekar Airservices on 9 May 2020. The award declared that the Hawthorne Group's offer in respect of Vemma's shares in Caeli could not be considered as one received from a "bona fide third party" due to its "affiliation" with Vemma via the Moon Alliance.

9 May 2020. — the sole arbitrator rendered an award in favour of Mekar Airservices on

14 June 2020 — Centre for Integrity in Legal Services ("CILS") (Annex XII), a non-profit organisation in Mekar, alleged that Mr. Cavannaugh had received bribes from representatives of Mekar Airservices to render a favourable decision

9 May 2020 — Vemma filed for the set aside the award of 9 May 2020 at the court in Sinnoh.

1 August 2020 the Supreme Arbitrazh Court of Sinnograd set aside the award (Annex XIII) pursuant to Vemma's application. The judge found that "failure to set aside the award would contravene the objective of combating bribery" and, therefore, would be contrary to the public policy of Sinnoh. The Supreme Arbitrazh Court is the first and only instance in relation to the set aside proceedings.

ISSUE I: The Arbitral Tribunal does not have jurisdiction over the present claim

1 Both Bonooru and Mekar are Member States of the VCLT, whose article 26 obliges States to be bound by and perform treaties they have signed in good faith. Therefore, CEPTA, which was entered by the two countries in 2014 is applicable. Article 9.17 of CEPTA provides that Each Party consents to submitting a claim to arbitration in which the ICSID Convention or the Additional Facility Rules (AF Rules) would apply. Given that Claimant is a national of Bonooru, and the Respondent is not a party to the ICSID Convention, the ICSID AF Rules should apply, and the Tribunal does not have jurisdiction over the case.

2 Article 5 and 8 of ILC Responsibility of States for Internationally Wrongful Acts provides that a person or entity's conducts should be attributed to the State if those conducts are exercising elements of governmental authority or directed or controlled by the government. Adopting similar standards, BUCG applied the Broches Test to determine when companies' conducts should be attributed to States.[1]

3 Pursuant to article 2 of the ICSID Additional Facility Rules, tribunal may only exercise jurisdiction over disputes between a state and a national of another state. Claimant is not qualified as a national, because first it is controlled by Bonoori government, and second, it discharged an essentially government function, which is shown both in its purpose of creation and in the nature of its conducts.

I. Vemma was controlled by Bonoori government.

4 Bonoori government has historically maintained a sizable stake in Vemma and the stake increased to 55% later[2]. The head of Vemma's board of director is a government official[3], and the non-executive director was occupied by Bonooru's Ministry of Transport and Tourism. And, if I may direct your attention to page 86 of the record, paragraph 3, it reads Bonooru's representatives on Vemma 's board are present for every meeting. Consequently, for some meetings, Bonooru's representatives form a majority of members present and voting when not all other shareholders attend.

5 All these facts together indicated Bonoori government's active participation in Vemma's decision making process and its ability to make major decisions. Thus, it can be concluded that Vemma was controlled by Bonoori government.[4]

[1] *BUCG*, ¶34; *CSOB*, ¶17.

[2] Record, P29, ¶10.

[3] Record, P31, ¶22.

[4] *EDF v. Romania*

II. Vemma performed government functions.

6 This is shown both in its purpose of creation, and the nature of its investment towards Caeli Airline. The purpose of an entity's creation constitutes the determining factor in assessing whether an entity performs government functions.[5] Here, Vemma was directed by the government to protect citizen's mobility rights regardless of profitability. Bonooru Air's intended successor, which is Vemma, will be directed to ensure that it operates routes to our most remote islands, regardless of profitability.[6] Further, Article 3(h) of the Company memorandum also stated that one of the objectives of the Company is to assist in developing the aviation industry and ensure Bonooru citizen's constitutional rights to travel[7]. Since it is Bonooru governments that is under positive obligation to protect citizen's mobility rights, as provided by Constitutional Court of Bonooru, the purpose of Vemma's creation was indeed to perform government function.

7 As for the nature of its conduct, during its investment towards Caeli Airway, Vemma devotes significant efforts into routes between Mekar and Bonooru, regardless of the loss, the commercial risks, and objections of Caeli's other shareholders.[8] It also received subsidy from Bonoori government for its investment decisions. These indicates that Vemma's investment performed the function of protecting the constitutional rights of Bonoori citizens and develop its aviation and tourism industry.

ISSUE II: The Tribunal shall bar amicus submission by The Consortium of Bonoori Foreign Investors ("CBFI"), and grant leave to the amicus submission by Mekar's Committee on Public Utilities Reform ("CPUR")

8 Pursuant to article 41 of the AF Rules, in regard of a written submission filed by a non-disputing party, including amicus submission, the tribunal has discretion to decide whether leave shall be granted to it or not.[9] Only when all the criteria are met can the leave be granted to the submissions by tribunal.[10]

9 Here, the Tribunal shall bar the amicus submission by CBFI (**I**), since it is not in pursuit of public interest (**A**), does not provide effective assistance to the Tribunal (**B**), and shall be rejected for lack of independence (**C**). On the contrary, the submission by CPUR shall be barred (**II**), for it is within the scope of dispute.

[5] *Maffezini v. Spain.*

[6] Record, P29, ¶8.

[7] Record, P44, ¶1520.

[8] Record, P22, ¶22.

[9] AF Rules, art.41(3).

[10] Ibid.

I. The Tribunal shall bar the amicus submission by CBFI

A. Submission by CBFI is not in pursuit of public interest

10 As provided in Article 9.20.6 of the CEPTA, the UNCITRAL rules on transparency in Treaty-based investor-State arbitration ("Transparency Rules") is applicable in the present case.[11] Article 1.4(a) of the Transparency Rules stated that where it provides for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account the public interest in transparency and in the particular arbitral proceedings.[12]

11 This requires the amicus submission to not only concern, but more importantly, advance public interest.[13] For instance, in the case Resolute Forest, the tribunal agreed that the interpretation of NAFTA's jurisdictional provisions might impact persons other than the disputing parties, but in the end concluded that the applicant had not demonstrated that its submissions were "in the furtherance of the public interest".[14] Similarly, in the case Apotex, the applicant's failure to identify the public interest that its submissions would advance was sufficient to reject the application.[15]

12 In the case at hand, CBFI's submission merely addressed the existing business climate of Bonooru. It failed to identify in its submission any kind of public interest that may be promoted.[16] In specific, CBFI's submission only concerns the impact and nature of business activites in Bonooru on capital flows from the perspective of a free market environment, which does not consider the impact caused by Vemma's investment in Mekar in the post economic crisis context.[17] Public interest is not in any way be advanced. Therefore, the Tribunal should bar CBFI's submission.

B. Submission by CBFI can not provide effective assistance to the Tribunal

13 Art 41(3)(a) of ICSID Additional Facility Rules regulates that in determining whether to allow a filing of a non-disputing party or not, the tribunal shall consider the extent to which its submission "would assist the tribunal in determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing Parties."[18] Similar provision could also be found in Art 4.3.(b) of the UNCITRAL rules on Transparency[19]. In our present case, however, CBFI fails this requirement.

[11] CEPTA, art.9.20.6

[12] Transparency Rules, art.1.4(a).

[13] Gary Born, p.651.

[14] *Resolute Forest*, ¶4.7.

[15] Apotex, ¶34.

[16] Record, p.16, ¶¶8-9.

[17] Record, p.17

[18] AF Rules, art. 41.(3).(a).

[19] UNCITRAL Rules, art. 4.3.(b).

1. The submissions of CBFI are not sufficiently different in content and perspective from those of the parties.

14 In interpreting and applying this provision, many tribunals have put stress on the requirement of "different", which means the submission of the non-disputing party should not be a duplicative of that of the Parties.[20] In this respect, CBFI's submission fails this requirement. Except for those out of scope, all its submissions have already been elaborated by the Parties. For example, its core submission concerning Bonooru's business landscape is irrelevant in this case. However, if this is meant to emphasize that Vemma is not state-owned, then this submission is in essence identical to that of the Respondent's. This finding could apply to all of its submissions, which means that CBFI cannot provide assistance to the tribunal since it cannot put out different facts or opinions.

2. CBFI does not possess any special expertise or perspective to make contributions to the tribunal.

15 Some of the prior tribunals based their decisions on the applicant's potential contribution of particular knowledge or expertise and likely utility to the tribunal. This standard is usually adopted when the case involves some issues that are highly related to some certain fields, *i.e.* medical, environment, etc. For example, in *Philips Morris*, the tribunal accepted the submissions of WHO and PATO, both of which have particular knowledge and expertise regarding the matter in dispute, mainly about tobacco control globally and the regulatory environment in which the Claimant operates.[21] However, CBFI does not possess this advantage since it has no special expertise in any specific field. It could only focus on the matters of investment itself, which have already been fully briefed by the Parties.

16 Except for its lack of special expertise, CBFI also fails to provide a new perspective to the tribunal since it did not directly participate in the investment activity and possesses no direct relationship to the investment, which means that concerning the factual issues in dispute, CBFI can provide no assistance to the Tribunal at all. As for the determination of legal issues, CBFI fails to prove it has any different perspective, either. What's more, the legal issues have already been fully developed by the Parties, leaving little room for CBFI to contribute any further information.

3. The parties have fully briefed their submissions, which indicates that the participation of *Amicus Curiae* cannot further assist the Tribunal.

17 Many tribunals have ruled that when the Parties have already presented detailed submissions concerning the issues in dispute, the applicant will not be able to provide a different perspective.

[20] *Apotex Appleton,* ¶33, *Chevron,* ¶19.
[21] *Philip Morris (No. 3),* ¶28, *Philip Morris (No. 4),* ¶30.

For example, the tribunal of *Bear Creek Mining* ruled that "both Parties are represented by distinguished international law firms with extensive experience in international investment arbitration… it has not sufficiently been shown that CCSI would be able to contribute any further information or arguments."[22] In the present case, the Parties have already elaborated their submissions, be it about the nature of Vemma or the interpretation of the investment treaty, therefore leaving no room for *amicus curiae* to make further proposals. As indicated by the decision of *Methanex*, "the Tribunal must assume that the Disputing Parties will provide all the necessary assistance and materials required by the Tribunal to decide their dispute."[23].

C. CBFI is not independent

18 Some investment tribunals have held that the requirement of independence is implicit in non-disputing party participation rules, whereas some other tribunals deducing the same requirement from transparency rules. However, given the disclosure information, CBFI obviously fails this test

1. The requirement for an *Amicus Curiae* to be independent is implicit in the existing rules.

19 The current rules for participation of non-disputing party do not explicitly mention the independence of the *amicus curiae*. However, this understanding is implicit in the existing rules.

20 As established by prior decisions of tribunals, the requirement of independence is necessary in consideration of whether the submission of an *amicus curiae* should be accepted. For example, in *InterAguas,* the tribunal concludes that "The Tribunal will therefore only accept *amicus* submissions from persons who establish to the Tribunal's satisfaction that they have the expertise, experience, and **independence** to be of assistance in this case."[24] In *Von Pezold*, the tribunal aligned with this view, holding that "[Amicus Curiae] should also be **independent** of the Parties. This is implicit in Rule 37(2)(a), other ICSID tribunals have also considered."[25] These tribunals deduced the requirement for independence from the requirement concerning the *amicus curiae*'s capability to provide assistance to the tribunal. It is thereby concluded that if the *amicus curiae* obviously lacks independence, then it could hardly put out anything different from those already submitted by the Parties, since the topics it proposes to address have already been addressed with the same perspective by the related party.

21 There are some other tribunals deriving the requirement of independence from disclosure rules. For example, the tribunal in *Eli Lily* concludes that it could be deduced from the requirement "to disclose whether or not the applicant has any direct or indirect affiliation with any disputing party,

[22] *Bear Creek Mining*, ¶37.
[23] *Methanex,* ¶48.
[24] *InterAguas*, ¶23.
[25] *Von Pezold*, ¶49.

that an amicus needs to be independent from the disputing parties."[26] The proposed amendments to the ICSID Rules also introduce two new criteria for amicus participation relating to the independence of the applicant: (i) identification of the applicant's activities and any affiliation with a disputing party; and (ii) disclosure whether the applicant has received assistance with its filings.[27] The commentary to the proposal states that these two new criteria will "allow the Tribunal to better assess the perspective and expertise of the proposed [applicant] and whether there are any relationships between the [applicant] and any party", as well as "whether it is receiving financial or other assistance in filing the submission"[28], which could in turn be helpful to judge the independence of the petitioner.

22 In conclusion, given all the decisions of prior tribunals, we could find that the requirement for an *amicus curiae* to be independent is inherent in the existing rules. Then the next question arises: what does independence require? Under what circumstance will a petitioner be considered to lose its neutrality?

23 This could be concluded from the content of disclosure requirements and the decisions of prior tribunals. Namely, the first consideration is about the amicus's relationship with any party. For example, in *Von Pezold* and *InterAguas*, both tribunals concluded that the applicant, a non-governmental organization, was not independent because, among other things, its founder was engaged in an on-going dispute with the claimant. In the Tribunal's words, 'the apparent lack of independent or neutrality' of the applicants was sufficient ground to deny the application.[29] Likewise, financial assistance or assistance in other form could constitute a denial of acceptance. These are explicitly reinforced by the decision of *InterAguas*, which states that "additional information on its membership. professional and financial relationships"[30] would be required to evaluate a non-disputing party's independence.

2. CBFI fails the test

24 Back to the present case, as disclosed by CBFI's submission, two of its members, SRB Infrastructure and Wiig Wealth Management Group, are currently pursuing claims against Mekar under Chapter 9 of CEPTA.[31] What's more, another of its member, Lapras Legal Capital, is advising the claimant with respect to its claim.[32] This special relationship obviously constitutes a lack of independence, hence, CBFI fails this requirement.

[26] *Eli Lily*, ¶D.
[27] Amendment 5, pp.64-65, rule 67.
[28] Amendment 1, p.216, ¶¶464-465.
[29] *InterAguas*, ¶56.
[30] *InterAguas*, ¶32.
[31] Record, p.17, ¶6.
[32] Record, p.17, ¶7.

II. The Tribunal shall grant leave to amicus submission by CPUR

25 According to Article 41 of the AF Rules, the matter addressed in the amicus submission shall be within the scope of the dispute.[33] This requirement limits the information contained in a submission which the tribunal may consider. For instance, in the case UPS v. Canada, the tribunal found that it was inappropriate for amici curiae to make submissions on jurisdiction, because the parties were "fully able to present the competing contentions, and had already done so", because it was "for the respondent to take jurisdictional points".[34]

26 However, contrary to Claimant's allegation, in the present case, CPUR's submission is within the scope of dispute. CPUR's submission raised a jurisdictional issue by questioning the legality of the particular investment, which was based on the alleged corruption during the privatization process, which was not known by the Respondent previously.[35] Respondent here is not provided with sufficient opportunities to fully present its case on this particular jurisdiction issue for lack of information. As a result, it is appropriate for CPUR to raise it in the middle of the dispute, for it raises a new argument that is within the scope of dispute.

ISSUE III THE RESPONDENTS DID NOT VIOLATE THE FAIR AND EQUITABLE TREATMENT STANDARD ("FET") AS SET OUT IN ARTICLE 9.9 OF THE CEPTA.

I. The respondent's acts breached the obligation of fair and equitable treatment by denial of justice in proceedings No denial of justice conduct is committed by the Respondent

27 Denial of Justice sets a high threshold, sometimes labelled as "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety".[36] This high threshold is recognized in various authorities such as the tribunal in Loewen v. U.S.A.[37] The tribunal emphasizes that to constitute denial of justice, there must be "manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety."[38]

28 In this case, as for the Mekar's recognition and enforcement of the Sinnoh's arbitration, considering the sole disputed evidence issued by a historically biased organization. the enforcement of Mekar's

[33] AF Rules, art.41.

[34] UPS, ¶71.

[35] Record, p.24.

[36] Agility v. Iraq, para. 210.

[37] Loewen v. U.S.A, para. 198.

[38] Id.

court is in compliance with Mekar's national law and international public policies. The conduct of Mekar's court is in compliance with art 5 of the NY Convention since it is not mandatory. Moreover, on no ground should Mekar set aside an award based on the public policy of another country. The claimant failed to prove the manifest injustice. Moreover, the legal test for denial of justice requires the claimant to prove objectively that the impugned judgment was "clearly improper and discreditable", with the failure by the "national system as a whole to satisfy minimum standards".[39] The criteria relating to the evidence is not clear. As a result, there's no denial of justice in this case.

II. No arbitrary or discriminatory conduct is committed by the Respondent

29 Discrimination is understood as differential treatment of an investor or investment that is not rationally justified.[40] To determine if a measure is discriminatory, arbitral tribunals have relied upon whether there had been any 'capricious, irrational or absurd differentiation' in the treatment of different entities in 'like circumstances. [41] As the tribunal in Lemire v. Ukraine observed: "To amount to discrimination, a case must be treated differently from similar cases without justification; a measure must be 'discriminatory and expose the claimant to sectional or racial prejudice".[42]

30 First, regarding the rejection of the subsidy, the claimant, as a state-owned enterprise, is not in like circumstances with other airline companies in economic sector. Other than pure commercial activities, the claimant also perform Bonooru's governmental function as regulated in art 70 of its constitution law. Therefore, Mekar shall not treat governmental function and commercial operation in the same way.

31 Even though the like circumstances did exist, there is justification behind Mekar's subsidy policy. SOEs receive abundant help from the government, which will make it easier for them to gain a competitive advantage over private enterprise. This advantage does not only contain funding, but also information. Based on information, SOEs may conduct event-driven investment strategy, finding new business opportunities and enjoying policy bonus. Given Mekar's limited capacity during the financial crisis, it is proportionate to prioritize fundings for private enterprises.

32 Second, during the second investigation, Mekar did not treat Vemma arbitrarily either. The fine and punishment during the second investigation is solely based on Vemma's anti-competitive behavior, that is, undercut ticket fares and eventually push other competitors off the market.[43] The

[39] Chevron and TexPet v. Ecuador (II), para. 8.40.

[40] Waste Management Inc v Mexico, para. 98.

[41] Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic.

[42] ICSID, Decision on Jurisdiction and Liability, 14 January 2010, para.262

[43] para 49.

legal basis of the CCM is that the claimant is selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor. [44]

33 The respondent clearly applies a universal standard without any distinction as to any particular entity or person. Any anti-competitive behavior would be subject to the review of the CCM was sufficiently notified before Claimant's investment admission.

34 The decision to conduct investigation, place caps and consequent measures were made in accordance with domestic anti-competitive regulations and based on a fair case-bycase. About the subsidy provided by Executive Order 9-2018, it is a rational differentiation. The Respondent believes that Vemma, as State-owned companies, have unique advantages. Foreign subsidies received under the Horizon 2020 programme enabling Caeli's predatory pricing strategies is a solid example. Thus, to prevent further threat of predatory pricing, Mekar decided not giving subsidy to Vemma, which could not constitute arbitrary conduct.

III. The claimant is not frustrated by failing to protect its legal expectation.

35 "Legitimate expectations" shall be evaluated on three dimensions: specific representations; reasonable reliance; and frustration. In this case, the treatment to Vemma given by the respondent is not surprising. It is Vemma's failing to fulfill its due diligence obligation and building the whole expectations on the basis of ignorance (the ignorance of internal unhealthy financial structure, external worsening economic environment, the risk of its monopoly conducts and the the developing status of the host state that caused the unpleasant outcome.

A. No specific representation is given to the CLAIMANT.

36 No explicit or implicit assurance was provided by the respondents. Mekar's Committee on Reform of Public Utilities delivered clear worries regarding the overly optimistic forecast of Vemma's proposal, and specifically mentioned the risk of serious volatility of fuel prices. The term "imminent success" in Chairperson's concluding remark shows no specific representations or commitments to Vemma, therefore cannot serve as a proper basis for legitimate expectation. Moreover, Mekar had warned Vemma about the unhealth financial structure of Caeli numerous times.

B. The claimant's reliance is not reasonable.

37 Reliance is what investor relied on such reasonable expectations when deciding to invest in the host state. The expectations should be legitimate, reasonable or fair and not based on investor's subjective considerations, with the conduct of due diligence, and the consideration of the developing status of the state as well as the political and socioeconomic context.

[44] art(i) of the chapter 4 of the Monopoly act, page 48, line 1649.

38 About the cap put on Caeli during the financial crisis, it is also reasonable and fair. Contrary to claimant's proposal, Respondent claims that the price of the cap during the economic crisis is legitimate, reasonable, and fair, Because the cap has already taken the financial crisis into consideration. The evidence is illustrated by that in January 2018, Caeli argued that the official inflation rate was insufficient since inflation has been increasing exponentially. However, we propose that the inflation rate is sufficient enough since it has just been recalculated by the Central Bank in December 2017, just one month before Caeli's request. Further, the MON has been nosedived for a year. Therefore, it's plausible that when calculating inflation rate, the Central Bank has already taken the serious financial crisis into consideration. It would be surprising if the central bank of Caeli recalculated the inflation rate just after 1 month, considering no further proof in this case could prove the change of inflation rate. Claimant's request is only relied on its subjective considerations.[45]

39 Claimant's expectations were not reasonable here. All conducts of the CCM, the Mekar Bank and the Mekari courts comply with the established national law of Maker. Their conduct can be easily speculated upon the statutes. CLAIMANT shall not expect any special treatment or privilege from Mekar. Vemma shall also not use the initial original privatization package as an excuse of conducting anti-competitive behavior since the Monopoly Act had come into effect prior to its acquisition of Caeli Airways. Vemma failed to conduct appropriate due diligence and thus may not assume compliance of its anti-competitive conduct. Moreover, investing in a developing country, CLAIMANT shall be aware of the upcoming frustration and delay as a result of bureaucratic incompetence and recalcitrance, as well as the unstable currency due to the swap. market.[46] Therefore, CLAIMANT shall take Mekar's slow judicial process and MON volatility into consideration in advance of its investment.

C. High risks should be taken into consideration when investing in developing country.

40 Investing in a developing country, Vemma should understand that if it couldn't tackle its unhealthy financial structure, it could face high risk and would be incapable of resolving any accidents, such as financial risks. It is set out in El Paso case that when investing in developing countries, both higher risk and greater chances should take into consideration.

41 After benefiting from the volatility of MON exchange rates in 2012, Vemma should consider the risk of getting harmed by it. After 6 times of reminders from Mekar and third parties from 2011 to 2015 about financial risk, currency risk and the oil prices, Vemma could only blame itself for

[45] *Generation Ukraine, Inc v Ukraine,* Award of 16 September 2003.

[46] *Crystallex v. Bolivarian Republic of Venezuela,* Award of 4 April 2016.

the loss during the financial crisis. After the cap issued in 2016 and nose dive of MON in the same year, Vemma could only blame itself for late responses of seeking judicial remedy in 2018. The chance of survival is not taken by anyone, but deliberately given up by Vemma itself.

42 Furthermore, secondary slot trading is widely considered as having the risk of anti-competitive. The market share calculation is not superising as well, if Vemma has ever noticed the Monopoly Act and numerous notice and warnings from the CCM. In the first investigation, the claimant receives no specific representations from Mekar. The CCM has never declared or implied the relationship between the MOON ALLIANCE and the method of determining market share. The CCM clearly states the aim of allowing Caeli to join the Moon Alliance is to offer new and improved services, with explicit prohibition of high-level cooperation on capacities. However, instead of the new and improved services, Vemma choose to conduct inside trade with its 100% owned subsidy, Royal Narnian, on anti-competitive secondary slot trading . It would be surprising if CCM did not count one of Vemma's subsidies into the other's market share.

43 Even if we take a step back, that Royal Narnian shall not be calculated into Caeli's market share, the first investigation may still be justified by art 2(a) of Chapter 3 of the Monopoly Act. Caeli should notice the discretion right of CCM. Moreover, the airline services industry is the top 3 industries in Mekar, which is vital to Mekar's economy. Caeli owns a large market share. CCM enjoys a relatively independent status from the government and there's blank legislation or case law in airline industry monopoly. A combination of these factors may invoke the exceptionally rare circumstances. As a result, the first investigation by CCM is lawful and plausible, and definitely not surprising.

ISSUE IV: THE COMPENSATION REQUESTED BY THE CLAIMANTS IS SPECULATIVE.

44 Respondent submits that the appropriate compensation standard should be "no compensation", since **(I)** the Tribunal are not obliged to act in conformity with the fair market value standard, and **(II)** the fair market value standard for compensation in 2006 Arrakis-Mekar BIT shall not be applied by MFN clause in Article 9.7 of CEPTA.

I. The Tribunal are not obliged to act in conformity with the fair market value standard.

45 Various authorities provide their definition of the term "Fair Market Value".[47] A commonly used definition of the fair market value is provided in the *International Glossary of Business Valuation Terms* and is used by arbitral tribunals[48]: "the price, expressed in terms of cash equivalents, at which

[47] IVS 104 Bases of Value, ¶ 30.1.

[48] *Mobil Exploration v. Argentina*, p. 123; *El Paso v. Argentina*, p. 702; *Enron v. Argentina*, p. 361; *Azurix v. Argentina (I)*, p. 424; *CMS v.*

property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts."[49] Given this explanation, other tribunals have adopted similar definitions.[50]

46 Therefore, key elements of the fair market value standard of an asset, among others, are that:

i. the parties involved "do not have a particular or special relationship" (i.e. are acting at arm's length); [51]

ii. the price paid reflects a hypothetical transaction, in which parties are well informed and not under any compulsion to buy or sell;[52] and

iii. the property is sold in an "open and unrestricted market" where participants are acting freely and competitively, and where there are no restrictions on the sale of the property.[53] In such a market, the fair market value of the property "*will reflect its highest and best use", be that for the "continuation of an asset's existing use or for some alternative use*."[54]

47 Consequently, it can be easily concluded that settled in the International Glossary of Business Valuation terms, a vital element of the fair market value is that the buyer and seller should act at arm's length, that means, independent.

48 However, in the present case, in this transaction amount to 1.1 billion MON[55], the parties involved have a particular or special relationship, which is connected by the Moon Alliance. There is unarguable fact that the Respondent, the Claimant and the third party - Hawthorne Group all possessed the Moon Alliance memberships. In Moon Alliance, members highly cooperate on lounge access, terminals, IT platforms, check-in operations and code-sharing[56], building competition parameters for each other and making themselves as an interest group.

49 Therefore, the offer to buy the majority stake of the Claimant in Mekari airline Caeli Airways JSC made by the third-party buyer, Hawthorne Group LLP, does not constitute a "bona fide written offer for a Third-Party arms-length Transaction" pursuant to Article 39(1)(a) of the Shareholders' Agreement relating to Joint-Stock Company Caeli Airways signed between the Claimant, the

Argentina, p. 402.

[49] International Glossary of Business terms, p. 44.

[50] *Vivendi v. Argentina (II)*, p. 88; *Tecmed v. Mexico*, p. 191; *Starrett Housing Corporation v. Iran*, p. 277.

[51] *Tenaris and Talta v. Venezuela (I)*, p. 557; IVS 104 *Bases of Value*, ¶ 30.2.(f).

[52] *Ibid*; International Glossary of Business terms, p. 44.

[53] *Ibid*; IVS 104 *Bases of Value*, ¶ 30.3.

[54] IVS 104 *Bases of Value*, ¶ 30.3-30.4.

[55] Record, p. 57, ¶ 1945.

[56] Record, p. 32, ¶ 1070.

Defendant and Caeli Airways[57] JSC on March 29, 2011.

50 Mekar legitimately exercise its rights to exclude the Hawthorne Group, since the Hawthorne Group's offer in respect of Vemma's shares in Caeli could not be considered as one received from a "bona fide third party" due to its "affiliation" with Vemma via the Moon Alliance. The Respondent is reasonably skeptical of whether the Hawthorne Group's offer was made in good faith and legitimately exercise our rights.

51 Further, the claimant fails to prove the number and scope of the damages, or the causation between the damage and Mekar's violation of 9.9 of CEPTA. As can be seen in STEAG vs Spain and other case law, the burden of proof is directly on the injured party.[58]

II. The fair market value standard for compensation in 2006 Arrakis-Mekar BIT shall not be applied by MFN clause in Article 9.7 of CEPTA.

52 Since the fair market value standard is only effective and more favourable in terms of substantive matters, Mekar has no obligation for compensation by a fair market standard since 9.21 of the CEPTA has already specified it as a procedural matter. **(A).** Moreover, due to the Claimant's contributory fault, it had no claim for cumulative damages. **(B).**

A. Mekar has no obligation for compensation by a fair market standard since 9.21 of the CEPTA has already specified it as a procedural matter.

53 MFN clauses are designed to provide a level playing field between foreign investors from different countries.[59] And MFN clauses may act as a potential potent ratchet for substantive protection.[60] Although the capacity for investors to use MFN clauses in this manner is generally accepted by commentators and tribunals, more recent cases have indicated potential limitations on the use of MFN clauses in this way.[61]

54 As a consequence, the scope of the more favorable treatment that may be invoked may in any case be further limited by the terms of the base treaty. The wording of MFN clauses and the *ejusdem generis* principle, in particular, have been used to preclude investors from invoking MFN clauses to benefit from substantive protections that are not already contained in the base treaty.[62] Hence, the express exceptions may impact such uses of MFN provisions.[63]

55 Especially, the arbitration clause or the dispute settlement clause in the base treaty might further

[57] Record, p. 52, ¶ 1755.

[58] *STEAG vs Spain*, p. 208, ¶ 749.

[59] *Bayindir*, ¶387.

[60] McLachlan, p.254.

[61] *Muhammet*, ¶90; *İçkale*, ¶328; Batifort, p.873.

[62] *Teinver*, ¶884; *Impregilo*, ¶184.

[63] *Mesa Power*, ¶401.

limit the use that may be made of comparator treaties through the MFN clause.[64] As a result, although MFN clauses may act significantly for substantive protection, their operation in practice has been narrower than generally assumed to be the case.[65]

56 In the present case, the MFN clause contained in art 9.7 of CEPTA should not apply, since it only regulated the substantive obligations.[66] Article 9.7 of CEPTA requested that "Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favorable than the treatment it accords in like situations, to investors of a third country and to their investments".[67] Subsequently, Article 9.12 of CEPTA establishes the fair market value for compensation in situations of direct expropriation while Article 9.21 provides the opportunity for the tribunal to award monetary damages at market value if a tribunal makes a final award against a Respondent.[68]But since Procedural Order 3 has ruled that the discussion on expropriation was not to be brought up in this proceeding.[69] The only provision that concerns with evaluation method rests on Article 9.21 of CEPTA.

57 However, the compensation rules which was in the core issue in this dispute, 9.21 of the CEPTA, fell under section E, Settlement of Disputes, making it a procedural issue.[70] This different arrangement between Bonuroo and Mekar proved that both states had specific intention to limit the MFN treatment mentioned in Article 9.7 of CEPTA, which was consistent with the numerous and evolving state practice in area of the international investment law. As a consequence, the tribunal should respect this exceptional plan in the base treaty and focus solely on the market value standard for compensation rather than the fair value standard. Since judicial procedures is a sovereignty issue, it therefore should comply to Mekar's domestic law, not a comparator treaty with another third country.

58 As a conclusion, substantive rights in Article 13 of the 2006 Arrakis-Mekar BIT shall not be applied, neither is the fair market value since the compensation standard contained in CEPTA belongs to matters of procedures. since the compensation standard contained in CEPTA belongs to matters of procedures.

B. Due to the Claimant's contributory fault, the tribunal should not render cumulative damages other than the market value compensation.

[64] *Accession Mezzanine*, ¶73.

[65] Caron, p.399.

[66] Record, p.76, ¶2715.

[67] Record, p.76, ¶2710.

[68] Record, pp.77,82, ¶¶2800, 3020.

[69] Record, p.87, ¶3230.

[70] Record, p.82, ¶3020.

59 Article 39 of ARSIWA provides that, "[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought."[71] Arbitral tribunals have interpreted Article 39 of ARSIWA in the sense of requiring that the claimants' conduct be taken into account in determining compensation.[72] The same principle has also been recognized without a reference to the ARSIWA. [73]

60 Though Article 39 of ARSIWA embodies a restrictive notion of contributory fault,[74] as long as the contribution is material and significant, it surpasses the triggering threshold.[75] As a consequence to such contributory fault, the amount of damages awarded to investors shall be reduced by a percentage in order to reflect investors' role in the events leading to a loss.[76] If the Claimants should bear part of the damages suffered, the discretionary power of the Tribunal to awarded compensation is at least to decrease 50% of the damages as suffered or claimed.[77]

61 Moreover, an investor's failure to mitigate losses is another factor that can be taken into account when determining damages.[78] This is because such obligation of mitigation of damages is "a further element affecting the scope of reparation" and that "a failure to mitigate by the injured party may preclude recovery to that extent".[79] The principle that claimants must take reasonable steps to mitigate their losses is not only a well-established principle in investment arbitration, but also can be considered to be part of the general principles of law which, in turn, are part of the rules of international law.[80] It is worthwhile to note that such duty to mitigate arises from the moment that the investor was aware of the circumstances giving rise to the breach.[81]

62 In the present case, Vemma had the contributory fault to its own damages. In the course of the management, Vemma was negligent in the volatility of demand in the region and insisted in going further fleet expansion and slashed airfares, even in the case of the fall-winter decline beyond Vemma had expected.[82] Different to Mekar Air services' opinion that Caeli should consider its outstanding debt and financial health, Caeli' radical managerial strategies continued conducting in

[71] ARSIWA, art.39.

[72] *Perenco*, ¶359; *Marco Gavazzi*, ¶270.

[73] *RosInvest*, ¶364.

[74] DAMFNC Commentaries, art.39, cmt.1 and 2.

[75] *Stans Energy*, ¶832.

[76] *UAB*, ¶1144.

[77] *MTD*, ¶242.

[78] *Bridgestone*, ¶565.

[79] DAMFNC Commentaries, art.31, cmt.11.

[80] *Middle East Cement*, ¶10.6.4

[81] *CME*, ¶303.

[82] Record, p.31, ¶1025.

the influence of Vemma's representatives when downhill.[83] Moreover, as proven above, the claimant fails to prove the causal link between the reasonable inflation rate and its loss due to the inflation. In conclusion, Vemma, due to its fault of exorbitant expansion, should be responsible for Caeli's crisis as well as its own damages on its stake transfer.

63 In the light above, the Respondent is not obliged for any accumulative damages since the Claimant has lost its claim in international law due to its own contributory fault in reckless expansion of Vemma.

[83] Record, p.31, ¶1010.

PRAYER FOR RELIEF

In light of the above, Respondent respectfully requests the Tribunal to find that:

a. The Tribunal does not has jurisdiction over the present case.

b. The tribunal shall grant the leave to the amicus submission by Mekar's committee on public utilities reform ("CPUR"), and bar amicus submission by the consortium of Bonoori foreign investors ("CBFI").

c. The respondents does not violate the fair and equitable treatment standard ("FET").

d. Mekar's compensation shall not be equivalent to the fair market value of the investment.

Respondent reserves the right to amend its prayer for relief as may be required.