**TEAM 1629 PIRZADA G**

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 9 OF THE BONOORU - MEKAR COMPREHENSIVE ECONOMIC PARTNERSHIP AND TRADE AGREEMENT AND THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES ("ICSID") ARBITRATION (ADDITIONAL FACILITY) RULES

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**VEMMA HOLDINGS INC.**
**(CLAIMANT)**

***v.***

**THE FEDERAL REPUBLIC OF MEKAR**
**(RESPONDENT)**

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ICSID CASE

No. ARB(AF)/20/78

# MEMORIAL FOR RESPONDENT

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| **Abed** | Abed El Jaouni and Imperial Holding SAL v. Lebanese Republic, ICSID Case No. ARB/15/3, Award, January 14, 2021. |
| **ADC** | ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16, Award, October 2, 2006. |
| **Agility** | Agility Public Warehousing Company K.S.C. v. Republic of Iraq, ICSID Case No. ARB/17/7, Final Award, February 22, 2021. |
| **Aguas del Tunari** | Aguas del Tunari S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, October 12, 2005. |
| **Aguas Santa Fe** | Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, March 17, 2006. |
| **American Airlines** | United States of America v AMR Corporation, American Airlines, AMR Eagle Holding Corporation, U.S. District Court for the District of Kansas - 140 F. Supp. 2d 1141, April 27, 2001. |
| **Ampal-American** | Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Jurisdiction, February 1, 2016. |
| **Apotex** | Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1, August 25, 2014. |

| | |
|---|---|
| **Ascom Group** | Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan (I), SCC Case No. 116/2010, Judgment of the Court of Appeal of England and Wales [2018] EWCA 1896, August 10, 2018. |
| **Austrian Airlines** | Austrian Airlines v. The Slovak Republic, UNCITRAL, October 9, 2009. |
| **Awdi** | Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania, ICSID Case No. ARB/10/13, Award, March 2, 2015. |
| **Azinian** | Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States, ICSID Case No. ARB (AF)/97/2, Award, November 1, 1999. |
| **Azurix** | Azurix Corp. v. The Argentine Republic (I), ICSID Case No. ARB/01/12, Award, July 14, 2006. |
| **Bear Creek** | Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, November 30, 2017. |
| **Biwater** | Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, July 24, 2008. |
| **Blanco** | Jorge Luis Blanco, Joshua Dean Nelson and Tele Fácil México, S.A. de C.V. v. United Mexican States, ICSID Case No. UNCT/17/1, Final Award, June 5, 2020. |
| **Bosnian Genocide case** | Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, ¶43. |

| | |
|---|---|
| **BUCG** | Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction, May 31, 2017. |
| **Burlington Resources** | Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, February 7, 2017. |
| **Cairn Energy** | Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India, PCA Case No. 2016-07, Final Award, December 21, 2020. |
| **Chevron** | Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I), PCA Case No. 34877, Award, August 31, 2011. |
| **Chorzów** | Factory at Chorzów, Merits, Judgement, 1928, P.C.I.J., Series A, No. 17. |
| **Chromalloy Aeroservices** | Chromalloy Aeroservices v. Arab Republic of Egypt, U.S. District Court, District of Columbia, Case No. 94-2339, July 31, 1996. |
| **CME** | CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Final Award, March 14, 2003. |
| **Corporación Mexicana** | Corporación Mexicana de Matenimiento Integral, S De RL De CV v Pemex-Exploración y Producción, United States Court of Appeals, Second Circuit, Case No. 13-4022, August 2, 2016. |
| **CSOB** | Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, May 24, 1999. |

| | |
|---|---|
| **De Sanchez** | De Sanchez v. Banco Central de Nicaragua and Others, United States District Court, E. D. Louisiana, 515 F. Supp. 900 (E.D. La. 1981), April 20, 1981. |
| **Dix** | Dix case, American – Venezuelan Commission, Opinion, 1905. |
| **Duke Energy** | Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, August 18, 2008. |
| **EBO** | EBO Invest AS, Rox Holding AS and Staur Eiendom AS v. Republic of Latvia, ICSID Case No. ARB/16/38, Award, February 28, 2020. |
| **Eco Oro** | Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41, (Decision on Non-Disputing Parties' Application), February 18, 2019. |
| **EDF** | EDF Limited v. Republic of Romania, ICSID Case No. ARB/05/13, Award, October 8, 2009. |
| **El Paso** | El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Award, October 31, 2011. |
| **Electrabel** | Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, November 25, 2015. |
| **Eli Lilly** | Eli Lilly and Company v. Canada, ICSID Case No. UNCT/14/2, Procedural Order 4, February 23, 2016. |

| | |
|---|---|
| **ELSI** | Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), Judgment, I.C.J. Reports 1989, ¶15. |
| **Enron** | Enron Nigeria Power Holding Ltd v. Lagos State Government, Federal Republic of Nigeria, Power Holding Company of Nigeria, ICC Case No. 14417/EBS/VRO/AGF, Decision of the US Court of Appeals for the District of Columbia Circuit, December 27, 2016 |
| **Enron Creditors** | Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, May 22, 2007. |
| **Eritrea-Ethiopia** | Eritrea-Ethiopia Claims Commission, PCA Case No. 2001-02, Final Award - Eritrea's Damages Claims, August 17, 2009. |
| **Fabiani** | Antoine Fabiani (France v. Venezuela), French-Venezuelan Commission, Award, 1905. |
| **Fraport** | Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II), ICSID Case No. ARB/11/12, Award, December 10, 2014. |
| **Fynerdale** | Fynerdale Holdings BV v. The Czech Republic, PCA Case No. 2018-18, Award, April 29, 2021. |
| **Gabriel Resources** | Gabriel Resources v. Romania, ICSID Case No. ARB/15/31, Procedural Order 19, December 7, 2018. |
| **Glamis Gold** | Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Award, June 8, 2009. |

| | |
|---|---|
| **Glencore** | Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6, Award, August 27, 2019. |
| **Hamester** | Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, June 18, 2010. |
| **Hebei Import** | Hebei Import & Export Corporation v. Polytek Engineering Company Limited, Court of Final Appeal Hong Kong, Case No. FACV 10/1998, February 9, 1999. |
| **Himpurna** | Himpurna California Energy Ltd. v PT. (Persero) Perusahaan Listruik Negara, Ad Hoc Arbitration , Award, May 4, 1999. |
| **Inceysa** | Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award, August 2, 2006. |
| **Indian Metals** | Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia, PCA Case No. 2015-40, Final Award, March 29, 2019. |
| **Infinito Gold** | Infinito Gold Ltd. v. Costa Rica, ICSID Case No. ARB/14/5, Procedural Order 2, June 1, 2016. |
| **Infinito Gold v. Costa Rica** | Infinito Gold Ltd. v. Republic of Costa Rica, ICSID Case No. ARB/14/5, Decision on Jurisdiction, December 4, 2017. |
| **Jan de Nul** | Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, November 6, 2008. |

| | |
|---|---|
| **Karaha** | Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara and P.T. PLN, Court of Queen's Bench of Alberta Canada, Case No. 0203 03768, October 24, 2007. |
| **Krederi** | Krederi Ltd. v. Ukraine, ICSID Case No. ARB/14/17, Award, July 2, 2018. |
| **Legality of the Use of Force** | Legality of the Use of Force (Serbia and Montenegro v Belgium), Preliminary Objections, I.C.J. Reports 2004, ¶279. |
| **Lemire** | Joseph Charles Lemire v. Ukraine (II), ICSID Case No. ARB/06/18, Award, March 28, 2011. |
| **LIAMCO** | Libyan American Oil Company v. The Government of the Libyan Arab Republic, Ad hoc Arbitration, Award, April 12, 1977. |
| **Limited** | South American Silver Limited (Bermuda) v. The Plurinational State of Bolivia, PCA Case No. 2013-15, Award, November 22, 2018. |
| **Littop** | Littop Enterprises Limited, Bridgemont Ventures Limited and Bordo Management Limited v. Ukraine, SCC Case No. V 2015/092, Final Award, February 4, 2021. |
| **Maffezini** | Emilio Agustin Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on the Tribunal's Objections to Jurisdiction, January 25, 2000. |
| **Mamidoil** | Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award, March 30, 2015. |

| | |
|---|---|
| **Metal-Tech** | Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, October 4, 2013. |
| **Methanex** | Methanex Corporation v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as '*amici* curiae', UNCITRAL Award, January 15, 2001. |
| **Minnotte and Lewis** | David Minnotte and Robert Lewis v. Republic of Poland, ICSID Case No. ARB(AF)/10/1, Award, May 16, 2014. |
| **MNSS** | MNSS B.V. and Recupero Credito Acciaio N.V v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award, May 4, 2016. |
| **MTD** | MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile, ICSID Case No. ARB/01/7, Award, May 25, 2004. |
| **Nicaragua** | Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, ¶14. |
| **Occidental** | Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, October 5, 2012. |
| **Pac Rim** | Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Award, October 14, 2016. |
| **Parkerings** | Parkerings – Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, September 11, 2007. |

| | |
|---|---|
| **Perenco** | Perenco Ecuador Limited v. Republic of Ecuador, ICSID Case No. ARB/08/6, Award, September 27, 2019. |
| **Petroleum** | Frontier Petroleum Services Ltd. v. The Czech Republic, PCA Case No. 2008-09, Final Award, November 12, 2010. |
| **Phoenix Action** | Phoenix Action Ltd v. Czech Republic, ICSID Case No. ARB/06/5, Award, April 15, 2009. |
| **Piero Foresti** | Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01, August 4, 2010. |
| **Plama** | Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award, August 27, 2008. |
| **Rumeli** | Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, July 29, 2008. |
| **S.D. Myers** | S.D. Myers, Inc. v. Government of Canada, Ad hoc Arbitration, Partial Award (Merits), November 13, 2000. |
| **SAUR** | SAUR International v. Argentine Republic, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, June 6, 2012. |
| **Siag** | Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt, ICSID Case No. ARB/05/15, Dissenting Opinion of Professor Francisco Orrego Vicuña (Award), June 1, 2009. |

| | |
|---|---|
| **Spyridon Roussalis** | Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, December 7, 2011. |
| **Suez** | Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, March 17, 2006. |
| **Tadić** | Prosecutor v. Duško Tadić, IT-94-1-A, July 15, 1999. |
| **Tatneft** | OAO "Tatneft" v. Ukraine, PCA Case No. 2008-8CPA, Jugement de le Cour d'Appel de Paris, November 29, 2016. |
| **TECO** | TECO Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23, Award (Resubmission Proceeding), May 13, 2020. |
| **Tehran** | Foremost Tehran, Inc., Foremost Shir, Inc. and others v. The Government of the Islamic Republic of Iran, The Ministry of Economic Affairs and Finance and others, IUSCT Case Nos. 37 and 231, Award, April 11, 1986. |
| **Telenor** | Telenor Mobile Communications A.S. and The Republic of Hungary, ICSID Case No. ARB/04/15, Award, September 13, 2006. |
| **Territorial Dispute** | Territorial Dispute (Libya v Chad), Judgement, I.C.J. Report 1994, ¶6. |
| **Tethyan** | Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1, Award, July 12, 2019. |

| | |
|---|---|
| **Thunderbird** | International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Arbitral Award, January 26, 2006. |
| **Toto** | Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Award, June 7, 2012. |
| **Toto v. Lebanon** | Toto Costruzioni Generali S.p.A. v. Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, September 11, 2009. |
| **Tulip Real Estate** | Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Separate Opinion of Michael Evan Jaffe on the Question of Attribution Under Art 8, ILC Articles (Award), March 10, 2014. |
| **UPS** | United States Parcel Service of America v. Canada, Decision of Tribunal on Petitions for Intervention and Participation as Amici Curiae, October 17, 2007. |
| **Urbaser** | Urbaser SA & Anor v. Argentine, ICSID Case No. ARB/07/26, Award, December 8, 2016. |
| **Vivendi** | Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus curiae, May 19, 2005. |
| **von Pezold** | Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, July 28, 2015. |
| **White Industries** | White Industries Australia Limited v. The Republic of India, Ad Hoc Arbitration, Final Award, November 30, 2011. |

| | |
|---|---|
| **World Duty Free** | World Duty Free Company v. Republic of Kenya, ICSID Case No. ARB/00/7, October 4, 2006. |
| **Yukos** | Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No. 2005-04/AA227, Final Award, July 18, 2014. |

## CONVENTIONS

| | |
|---|---|
| **NYC** | The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, p. 3., 10 June 1958, U. N. T. S., vol. 330. |
| **VCLT** | Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331. |

## MISCELLANEOUS

| **Cited as** | **Full citation** |
|---|---|
| **Airline Competition** | Directorate for Financial and Enterprise Affairs Competition Committee, Airline Competition, June 12, 2014. |
| **Airport Spot Guideliness** | ACI, IATA, WWACG, Worldwide Airport Slot Guidelines, June 1, 2020. |
| **ARSIWA** | Responsibility of States for Internationally Wrongful Acts 2001. |
| **Bartholomeusz** | Bartholomeusz, L. The amicus curiae before international courts and tribunals, Non-State Actors and International Law, ¶¶209-286, 2005. |

| | |
|---|---|
| **Blyschak** | Blyschak, P. State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protection, Journal of International Law and International Relations, 6(2). |
| **Evans** | Evans, K., Barriers to Entry in the Airline Industry, 2017, URL: https://bizfluent.com/list-7576197-barriers-entry-airline-industry.html (20. 8. 2021). |
| **Fach Gomez** | Fach Gomez, K. Rethinking the Role of *Amicus Curiae* in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest, Fordham International Law Journal Volume 35, Issue 2, Article 3, 2012. |
| **General Comment ICCPR** | Human Rights Committee, General Comment 27, CCPR/C/GC/27, 2 November 1999. |
| **History of ICSID Convention** | Documents concerning the Origin and the Formulation of the Convention, Volume II, Part 1, 1968. |
| **ILC Commentary** | Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001. |
| **Indonesia's Law on Aviation** | The Republic of Indonesia's Law Number 1 Year 2009 on Aviation. |
| **Maddocks** | Maddocks, J. Outsourcing of Governmental Functions in Contemporary Conflict: Rethinking the Issue of Attribution, ECIL Working Paper 2018/4 (forthcoming in Virginia Journal of International Law), 2018. |
| **Miller** | Miller, B., Liu, J., Wright, R., Yoo, J. Guide for Potential *Amici* in International Investment Arbitration, University of Toronto, 2014. |

**Newcombe** Newcombe A, Lemaire A. Should *Amici Curiae* Participate in Investment Treaty Arbitrations. Vindobona Journal of International Commercial Law & Arbitration 22: 24, 2001.

**Nielsen** Nielsen, R. P., Competitive Advantages of State Owned and Controlled Businesses, Management International Review, Vol. 21, No. 3, 1981.

**Nugraha** Nugraha, R. A. Harmonization of the Aviation Sector within President Jokowi's Maritime Policy: a way to promote pioneer flights, Jurnal Hukum & Pembangunan 46 No. 4, 2016.

**OECD Predatory Pricing** Organisation for Economic Co-Operation and Development, Predatory Pricing, 1989.

**Pellegrini** Pellegrini, Castelli, Pesenti, Secondary trading of airport slots as a combinatorial exchange, Transportation Research Part E: Logistics and Transportation Review, Volume 48, Issue 5, September 2012.

**Pheasant** Pheasant, G. Slot trading in the EU, Global Competition Review, November 7, 2007.

**Ruiz** Arangio-Ruiz, Second Report on State Responsibility, UN Doc A/CN.4/425, 1989.

**Schliemann** Requirements for *Amicus* Curiae Participation in International Investment Arbitration, A Deconstruction of the Procedural Wall Erected in Joint ICSID Cases ARB/10/25 and ARB/10/15," Law and Practice of International Courts and Tribunals 12, 2013.

**Schreuer et al.** Schreuer, C. H. Malintoppi, L. et al., The ICSID Convention: A Commentary, Cambridge University Press, 2009.

**Sornarajah** Sornarajah, M. The International Law on Foreign Investment, Third Edition, Cambridge University Press, New York, 2010.

**Transatlantic Airline Alliances** The European Commission and the United States Department of Transportation, Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches, a report, November 16, 2010.

**Triantafilou** Triantafilou, E. Is a Connection to the Public Interest a Meaningful Prerequisite of Third-Party Participation in Investment Arbitration, 5 Publicist 38, 2010.

**UN Guide** UNCITRAL Secretariat, Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, United Nations, New York, 2016.

**UNCITRAL Rules** UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, United Nations Commission on International Trade Law [UNCITRAL], General Assembly resolution 68/109, New York, 2014.

**UNCITRAL, Report of Working Group II** UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-seventh session, UN Doc. A/CN.9/760, 2012.

**Uniting Aviation** Uniting Aviation, Aviation Benefits: contributing to global economic prosperity, 2018, URL: https://unitingaviation.com/news/economic-development/aviation-benefits-for-a-better-future/ (1. 9. 2021).

**Vaara** Vaara, E., Kleymann, B., & Seristo, H., Strategies as Discursive Constructions: The Case of Airline Alliances. Journal of Management Studies, 41(1), December 22, 2003.

**Wit** Wit, J. de, Burghouwt, G., Slot allocation and use at hub airports, perspectives for secondary trading, European Journal of Transport and Infrastructure Research, 8(2), April 1, 2008.

**Wöss** Wöss, H. and San Román A., Full Compensation, Full Reparation, and the But-For Premise, in Wöss H. et al., The Guide to Damages in International Arbitration, Global Arbitration Review, 2021. URL: https://globalarbitrationreview.com/guide/the-guide-damages-in-international-arbitration/4th-edition/article/full-compensation-full-reparation-and-the-premise (15. 9. 2021).

## LIST OF ABBREVATIONS

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| § | Paragraph |
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| **AFR** | ICSID Additional Facility Rules |
| **ARSIWA** | Articles of Responsibility of States for Internationally Wrongful Acts |
| **BIT** | Bilateral Investment Treaty |
| **CBFI** | Consortium of Boonori Foreign Investors |
| **CCM** | Competition Commission of Mekar |
| **CEPTA** | Bonooru - Mekar Comprehensive Economic Partnership and Trade Agreement |
| **CILS** | Centre for Integrity in Legal Service |
| **CRPU** | External Advisors to the Committee on Reform of Public Utilities |
| **FET** | Fair and equitable treatment |
| **Facts** | Statement of Uncontested Facts |
| **FMV** | Fair market value |
| **ICJ** | International Court of Justice |
| **ICTY** | The International Criminal Tribunal for the former Yugoslavia |
| **ICSID** | International Centre for Settlement of Investment Disputes |
| **MFN** | Most favoured nation |
| **MRTP** | Monopoly and Restrictive Trade Practice Act (as Amended in 2009) |
| **NAFTA** | North American Free Trade Agreement |
| **NYC** | The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards |
| **PCIJ** | Permanent Court of International Justice |
| **SOE** | State-owned enterprise |
| **UNCITRAL Rules** | UNCITRAL Arbitration Rules (as revised in 2010) |
| **PO** | Procedural Order |

# STATEMENT OF FACTS

## PARTIES TO THE DISPUTE

1. Vemma Holdings Inc. is Claimant, an airline holding company incorporated pursuant to the laws of the Commonwealth of Bonooru.
2. Respondent is the Federal Republic of Mekar, shareowner of the State-owned Caeli Airways Joint-Stock Company.

## HISTORICAL BACKGROUND

3. Federal Republic of Mekar is a developing state in the Greater Narnian region.
4. Vemma's shareholders are private and institutional shareholders, whose individual stakes do not exceed 7%. Bonooru preserved shareholding, ranging between 31% and 38% until March 2021, when it acquired a 55% stake in Vemma.
5. Vemma's main asset is airline Royal Narnian, which founded the Moon Alliance together with five other major airlines in 2011.
6. On 5 January 2011, Vemma acquired an 85% majority share in Caeli, previously a SOE. Mekar retained a 15% stake.
7. Vemma received subsidies under the Horizon Scheme 2020 by the Ministry of Transport and Tourism from October 2011 until June 2016.

## PROCEDURAL QUESTIONS

8. The disputing parties and Caeli concluded a Shareholders' Agreement relating to Caeli in March 2011.
9. Respondent and Bonooru signed CEPTA in April 2014, which entered into force in October 2014. The pre-existing BIT was terminated.
10. Respondent is not a party to the ICSID Convention, while Bonooru is. Both are parties to the Vienna Convention on the Law of Treaties and the New York Convention.
11. Claimant submitted the dispute to arbitration pursuant provisions of ICSID Additional Facility Rules and CEPTA Chapter 9.
12. Prior to the submission, Vemma unsuccessfully attempted to reach a mutually agreeable resolution with Mekar.
13. Mekar was notified of the dispute on 15 November 2020.

14. In 2021 CBFI and CRPU filed a leave to grant *amici* submissions, and both replied to the leaves. On 28 June 2021, Tribunal and the disputing parties held a procedural conference to discuss the further procedure related to the *amicus* submissions.

**EXPANSION OF CAELI AIRWAYS**

15. From August 2011 to December 2013, Caeli earned a considerable profit, which was followed by rapid expansion.
16. The expansion led to a *suo moto* investigation from the CCM, during which the interim price caps were instated. In December 2016 a second investigation was initiated due to a complaint from minor direct competitors.
17. On 30 January 2018 Mekar's government passed a decree requiring all goods and services in the country denominated in MON. Caeli consequently requested CCM to remove the interim airfare caps, which was denied on 15 June 2019.
18. In August 2018, the CCM concluded its first investigation while airline caps were kept in place pending the second investigation.
19. On 25 September 2018 subsidies were granted to airlines in accordance with Executive Order 9-2018. Caeli Airways was rejected.
20. On 1 January 2019, CCM completed its second investigation into Caeli. Airfare caps were kept until Caeli's market share in conjunction with Royal Narnian dropped below 40%.

**SALE OF VEMMA'S SHARE**

21. In November 2019, representatives of Vemma announced their decision to sell their stake in Caeli.
22. Vemma received an offer from Hawthorne Group. In December 2019, Vemma informed the representatives of Mekar Airservices of the terms of the offer.
23. On 11 February 2020, Mekar Airservices filed a request for arbitration with the SCC Arbitration Institute to find that Vemma had failed to obtain a *bone fide* third-party offer. On 9 May 2020, the sole arbitrator Mr Cavanaugh declared an award in favour of Mekar Airservices.
24. In June 2020, Vemma successfully filed a request to Sinnoh court to set aside the award. On 23 August 2020 Mekar's courts nevertheless enforced the award, resulting in an appeal by Vemma to the Superior Court, which was dismissed in September 2020.
25. On 8 October 2020 Vemma sold its stake in Caeli to Mekar Airservices for USD 400 million.

## SUMMARY OF PLEADINGS

**Jurisdiction**. Respondent submits Tribunal does not have jurisdiction in the present dispute. Firstly, Vemma is a SOE nonetheless Bonooru's minority stake. Secondly, Vemma has been acting as an agent of Bonooru's government, in addition to exercising governmental authority, empowered by Bonooru. Ultimately, Respondent raises an illegality plea and subsequently submits Tribunal should either exercise its ex officio powers pursuant AFR or alternatively stay the proceedings.

**The *amicus* submission by CBFI**. Respondent submits Tribunal should reject the submission made by CBFI. Firstly, CBFI cannot assist with a different point of view and shows no significant interest in the dispute. Secondly, CBFI lacks independence and has not filed its request in pursuit of public interest. Conversely, Tribunal should allow the CRPU submission since the requirements are met.

**Breach of Article 9.9 CEPTA.** Tribunal shall find that Respondent did not breach Article 9.9 CEPTA. First, the CCM's *suo moto* investigation was initiated lawfully on the grounds established in Chapter III of the Monopoly and Restrictive Trade Practice Act. Second, imposed measures were necessary, proportionate and reasonable. Third, Vemma was denied subsidies in a non-discriminatory manner. Fourth, Respondent accorded the due process obligation and provided Claimant justice in courts.

**The compensation claim.** Respondent is not responsible for Claimant's loss, as it is the consequence of risky economic decisions by Claimant. Alternatively, should Tribunal establish causation, market value standard should be applied. Tribunal should find that Respondent owes no compensation based on the market value standard as it has already been paid. In any event, if Tribunal finds that compensation is still owed, it should reduce it due to Claimant's own contribution to the loss and Mekar's currency crisis.

# PLEADINGS

1. The Federal Republic of Mekar, Respondent in the present dispute brings this submission before Tribunal and will establish that Tribunal lacks jurisdiction over the dispute under Chapter 9 CEPTA **[I.]** and that Tribunal should allow the *amicus* submission by CRPU and bar the submission by CBFI **[II.].** Furthermore, if Tribunal accepts its jurisdiction, Respondent did not breach Article 9.9 CEPTA **[III.].** and should therefore not be obliged to provide compensation to Claimant **[IV.].**

# I. TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE PRESENT DISPUTE

2. Claimant submitted the dispute to arbitration under Chapter 9 CEPTA and ICSID AFR, due to an arbitration clause in Article 9.17 CEPTA.

3. However, Claimant constitutes a SOE, which is acting as an agent for Bonooru and is exercising governmental functions [A.], therefore, CEPTA and AFR do not apply since Respondent consented to investor-State disputes only. Furthermore, provided Tribunal dismisses Respondent's first objection, Respondent will demonstrate that the lack of Tribunal's jurisdiction is based on the illegality of the investment itself [B].

## A. Tribunal lacks jurisdiction under Chapter 9 CEPTA and ICSID AFR

4. According to Article 9.16 CEPTA, a claim may be submitted to arbitration under the provisions of CEPTA by an investor. Under CEPTA an investor is a natural person or an enterprise with the nationality of a contracting party.[1] The requirement of nationality is also prescribed by Article 25 ICSID Convention and Article 2 AFR.

5. SOEs can invest in third States and become foreign investors,[2] as well as qualify as a '*national of another contracting state*' within the meaning of Article 25 ICSID Convention.[3] However, by granting SOEs' access to ICSID arbitration, the drafters of the Convention limited such circumstances[4] to enterprises which assimilate themselves to a private enterprise rather than a government agency.[5] In favour of this, Aron Broches put

[1] Article 9.1, §6 CEPTA.
[2] Tatneft, §22.
[3] CSOB, §16.
[4] Blyschak, ¶¶26-27.
[5] History of ICSID Convention, ¶11, §30.

forward an argument, under which SOEs cannot qualify as a national of a contracting State, if they are acting as an agent for the government or are discharging an essentially governmental function,[6] *i.e.* the Broches test.[7]

6. Respondent will demonstrate Vemma's status of a SOE and concurrently corroborate that Vemma has been operating under the instructions and the control of its government [1.] and that it has been exercising governmental authority [2.]. In doing so Respondent will rely on Articles 5 and 8 ARSIWA,[8] since it has been established the Broches test mirrors these attribution rules.[9]

### 1. Vemma is acting as an agent for Bonooru's government

7. The '*agent of the government'* part of the Brooches test correlates with Article 8 ARSIWA, which stipulates an entity's conduct to be attributable to the State, provided the entity is acting under either instructions of the State or under directions or control of the State while carrying out such conduct. It is important to note that the '*instructions'* and '*control or direction*' are to be assessed disjunctively, meaning they do not represent a cumulative requirement, but rather if either is satisfied, the basis for the attribution is present.[10]

8. Respondent therefore submits that Claimant has been acting as an agent for Bonooru's government, due to the control Bonooru has maintained over it, in addition to the fact, it has been performing its functions under their instructions.

9. Respondent therefore submits that Claimant has been acting as an agent for Bonooru's government, due to the control Bonooru has maintained over it, in addition to the fact, it has been performing its functions under their instructions.

[6] Schreuer, *et al.*, ¶161, §271.3
[7] CSOB, §17; BUCG v. Yemen, §§31, 35-36; Maffezini, §§79-80.
[8] Responsibility of States for Internationally Wrongful Acts 2001.
[9] BUCG, §34. Tatneft, §13 and Toto v. Lebanon, §44.
[10] Tulip Real Estate, §1.

### a. Bonooru's Ministry of Transport and Tourism had control over Vemma's actions

10. According to the ILC Commentary to Article 8 ARSIWA, conduct is attributable to a State, if the State controlled the specific operation and the conduct in question was an integral part of the operation,[11] constituting the effective control test.[12] The ICJ explained that the general control by the State with a high degree of dependency on it, cannot without additional evidence result in the attribution.[13]

11. However, the applicability of the effective control test does not appertain to situations, where an organised and hierarchically structured group is acting on behalf of the State but is rather applicable when an individual is doing so.[14] In this regard, to attribute acts to a State, it must be proved that the State finances or helps an entity with the general planning of the activities.[15] Claimant's actions however fulfil the standards of both presented tests.

12. The first indicator of Bonooru's control is the financing of Vemma's operations via the Horizon 2020 Scheme.[16] A key part of this Scheme was granting recurring subsidies to companies investing in tourism-related infrastructure in Bonooru, including Vemma, which received its first subsidy seven months after the investment was approved.[17] The Ministry of Transport and Tourism recorded such payments until June 2016.[18]

13. Furthermore, Bonooru has maintained its control via shareholding. In claiming so, Respondent is not referring to the current 55% stake as it is aware, that the relevant applicable criterion for determining Tribunal's jurisdiction is the time of institution of the proceedings,[19] but on the fact that minority shareholding can provide control. The legal capacity of a minority shareholder to control an entity can exist by reason of the percentage of shares held and legal rights conveyed in agreements.[20] Additionally, two

[11] ILC Commentary, ¶47, §3.
[12] Nicaragua, §115.
[13] Bosnian Genocide case, §§400, 401.
[14] Tadić, §137.
[15] *Ibidem*, §131.
[16] Facts, §28.
[17] *Ibidem.*
[18] PO4, §6.
[19] CSOB, §31.
[20] Aguas del Tunari, §264.

major indicators of governmental control of an entity are the identity of its shareholders and the composition and behaviour of its board of directors.[21] Similarly, tribunal in Thunderbird found sufficient evidence of control despite the share of ownership amounting to less than 50%.[22]

14. Until the point of restructuring, Bonooru maintained a 31-38% stake in Vemma[23] Respondent submits that Claimant was operating under Bonooru's control since no other shareholder held a stake exceeding 7% in Vemma.[24] As control can also be achieved through dominating the company's decision-making structure,[25] and Vemma's Articles of incorporation require 50% of voting shares for a quorum, Bonooru's representatives frequently formed a majority of members present and voting when not all shareholders attended.[26] Hence, Bonooru certainly can be considered as a controlling shareowner. After all, as a former employee within Bonooru's Ministry of Tourism stated, Bonooru's corporations tend to not be fully independent or are sometimes entirely dependent on the government.[27]

15. Ultimately, airlines such as JetGreen and Star Wings, owned by holding groups from Arrakis, have received subsidies from their home States and Mekar under the Executive Order 9-2018 and have thus not been treated as a SOE.[28] Therefore, Claimant's possible allegation that subsidies cannot be considered as factors contributing to Vemma's SOE status should be dismissed, as subsidies must be considered in conjunction with shareholding and shareholders' impact on the decision-making process.

16. Thus, Respondent submits that Vemma fulfils the standards of both control tests, since it is evident that Bonooru has controlled it through its share ownership and had the impact on its decision-making process, in addition to financing its operations. Since Respondent provided evidence, which testify to a high degree dependency of Vemma on Bonooru, rather than a general dependence, effective control is apparent.

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[21] Tehran, §47.
[22] Thunderbird, §107.
[23] Facts, §10.
[24] PO4, §2.
[25] Awdi, §194.
[26] PO3, §3.
[27] Phenac Business Today Podcast Transcript, 17 November 20.
[28] Facts, §46.

### b. Vemma has been acting under instructions of Bonooru

17. Applying the tests presented above to the 'instructions' part of the argument, testifies to Vemma performing under Bonooru's instructions.

18. Through the Memorandum, Bonooru has explicitly instructed Vemma to assist Bonooru in enabling the mobility rights of Bonooru's citizens,[29] meaning the instructions were given regarding a specific operation. However, instructions concerning making the investment itself were not given explicitly regarding Caeli. Hence, by posing the objection under paragraph 3(l) to purchase, take or accept shares in any company, whose objectives are comparable to Vemma's, Bonooru overall instructed Vemma to invest in airline companies.

19. Respondent therefore submits that Bonooru authorised the overall actions of making investments in airline companies and has additionally explicitly instructed to assist Bonooru in enabling mobility rights of its citizens.

## 2. Vemma has been performing governmental functions

20. In addition to Vemma acting as an agent for Bonooru's government, Vemma has been performing governmental functions.

21. The exercising of governmental functions part of the Broches test corresponds with Article 5 ARSIWA, which prescribes the attribution of conduct of entities exercising elements of governmental authority under three conditions. Firstly, the entity must be empowered by the national law of its home State to exercise such authority. Secondly, the entities' conduct must amount to an exercise of governmental authority, and ultimately, that the entity indeed exercises such governmental authority.[30]

22. Respondent will establish that Claimant has been empowered by Bonooru to exercise governmental functions, as it has been performing acts traditionally reserved for Bonooru's state organs.

[29] Memorandum of Association of Vemma Holdings Inc., §3(h).
[30] Maddocks, ¶9.

### a. Claimant has been empowered by Bonooru to perform governmental functions

23. The first requirement for the attribution of an entity's conduct to a State is the empowerment to perform governmental functions by the entity's home State. ARSIWA does not specify the form in which such authorisation must be made, however by explicitly stating: '*may be contracted to*…', ILC Commentary clarifies the authorisation is subject to a wide variety of legal acts and regulations.[31]

24. Respondent submits Claimant has been empowered by the Memorandum and by the Constitution Act of Bonooru. Article 70(1) of the Constitution provides the right of Bonooru's inhabitants to enter, remain in and leave its territory. The second paragraph obliges Bonooru to guarantee this right. Moreover, Vemma's role in ensuring the constitutional right and the government's duty in guaranteeing it, is recognized in the *Kyoshi v. Bonooru* case. Herein the Court expressed its satisfaction that the State has empowered Vemma through the Memorandum to ensure the enforcement of Article 70.[32]

25. Hence, the Memorandum explicitly imposes an obligation upon Vemma to ensure the free movement of Bonooru's inhabitants, in addition to making the investment itself. [33]

### b. Claimant is exercising governmental authority

26. Respondent will demonstrate that Claimant has been performing governmental functions based on two facts. Firstly, Claimant has been performing functions normally exercised by a State organ, and secondly, while assessing the nature of Claimant's actions, the purpose of such actions should be taken into consideration.

#### i. Vemma is exercising functions, normally performed by Bonooru

27. Although the concept of governmental authority has not been identified by ARSIWA, the ILC Commentary has expressed that it is dependent upon a particular society, its

[31] ILC Commentary, p. 43, §2.
[32] Constitutional Court of Bonooru on Privatisation of BA Holdings, The People's Council of the Island of Kyoshi v. Bonooru, CCB Case No. 1981-17, §56.
[33] Memorandum of Association of Vemma Holdings Inc, §3(l).

history, and traditions.[34] However, such conduct encompasses functions of a public character, normally performed by State organs. [35]

28. Respondent asserts that Claimant has been exercising governmental functions, since it performed actions historically reserved for Bonooru, an archipelagic State.

29. Since the main public facilities are situated on 4 out of 109 islands,[36] the necessity for the subject matter of Article 70 of Bonooru's Constitution and the need for regulation of the free movement of people on the governmental level are evident. Historically, the State has been a constant guarantee of this right, as prescribed by Article 70(2). Initially, the right was ensured through water transport, however with increased viability of commercial aviation, Bonooru developed a network of domestic airways.[37]

30. After all, State regulation of public transport is common in archipelagic States. For example, Indonesia recognized the importance of air transportation in 1945 and has therefore initially established two airline companies as their flag carriers[38] and later a separate airline for traveling to most remote islands.[39]

31. It is therefore evident that the air transport from and to Bonooru and within its islands provided by Vemma, has historically been performed by Bonooru, since it involves operations to ensure a fundamental right of its inhabitants.

### ii. The purpose of Claimant's functions should be taken into consideration

32. Respondent proposes that Tribunal upholds the position by the U.S. Court of Appeals in *De Sanchez* case, where the court clarified that the determination of the nature of acts is impossible without inquiring into their purpose.[40] A governmental nexus can be indicated, if the functions were exercised in public interest.[41]

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[34] ILC Commentary, ¶43, §6.
[35] Maddocks, ¶10.
[36] Facts, §5.
[37] *Ibidem*, §6.
[38] Nugraha, ¶522.
[39] Indonesia's Law on Aviation, Articles 2 (m) and 3.
[40] De Sanchez.
[41] Maddocks, ¶11.

33. Clear indication of public interest primarily derives from the statement the Prime Minister of Bonooru made prior to the privatisation of BA Holdings. He clarified that the successor will be directed to ensure certain flights regardless of profitability, to become more efficient and offer better services to the citizens.[42] However, the reason Vemma was able to achieve this goal lies in the Horizon 2020 Scheme under which it received recurring subsidies.[43] Moreover, the Scheme was also the reason the investment was beneficial for Bonooru and not Vemma or Caeli.[44]

34. The importance of the Scheme regarding Caeli's operations derives from the circumstances, in which it was unveiled. Firstly, it was uncovered by the Secretary of Transportation and Tourism Ms. Sabrina Blue in 2011.[45] Most importantly, she was appointed to this position the same day Vemma submitted its bid for the purchase of Caeli, on 23 November 2010.[46] This fact alone is a major indicator of not only Bonooru's careful investment planning but also Vemma's purpose to utilize the investment in Caeli for Bonooru's public interest, since Ms. Blue's previous position was the head of Vemma's board of directors.[47]

35. The purpose of Vemma's investment being in public interest, is also visible through the subsidies, as Bonooru's court stated that the subsidies received, were for flights offered on routes of significance to mobility of disparate communities.[48] Ultimately, the reason for Caeli's profitability are the subsidies received from Bonooru.[49]

36. Hence, Tribunal should consider the purpose of Vemma's actions, which was to assist its government in ensuring the mobility rights under Article 70 of the Constitution, catering to the interest of the public.

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[42] Facts, §8.
[43] *Ibidem.*
[44] Phenac Business Today Podcast Transcript, 17 November 2014.
[45] Facts, §28.
[46] *Ibidem*, §22.
[47] *Ibidem.*
[48] Kyoshi v. Bonooru, §59.
[49] Phenac Business Today Podcast Transcript, 17 November 2014.

## B. Tribunal lacks jurisdiction since the investment is illegal

37. In the event Tribunal dismisses Respondent's submission regarding Vemma's status as a SOE, Respondent submits Tribunal lacks jurisdiction as the investment itself was procured by means of corruption and is consequently illegal, although the legality requirement is not specifically stated in CEPTA [1.]. Alternatively, the lack of jurisdiction is based on the fact the investment constitutes a *mala fides* investment [2.].

38. Respondent is aware the Constitutional Court of Bonooru has taken *suo moto* cognizance of allegations against Mr. Umbridge[50] regarding the corrupt procurement of the investment in Caeli. Consequently, it respectfully asks Tribunal to either act pursuant Article 41(2) AFR or implement a stay of the proceedings until the Court issues a decision [3] or alternatively consider the illegality during the merits phase [4.].

### 1. Vemma's investment in Caeli Airways is illegal

39. For an alleged misconduct to disrupt tribunal's jurisdiction, it must have occurred at the stage of the entry of the investment.[51] Since Vemma bribed Mr. Umbridge to secure the investment, Respondent submits Vemma's bribes constitute an illegal investment, which stands as ground to deny the jurisdiction nonetheless the legality requirement is not explicitly present in CEPTA.

#### a. Although CEPTA does not explicitly require an investment compliant with Mekar's domestic law, illegality plea is admissible

40. Although the majority of tribunals have declined their jurisdiction based on a provision in a BIT, stating the investment must comply with the host State's laws,[52] numerous tribunals have upheld that the establishment of the investment and its conformity with the national laws is implicit even when not expressly required by the relevant BIT.[53]

41. Although CEPTA does not contain a legality requirement, Tribunal should consider the possibility of the investment procured illegally.

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[50] PO3, §13.
[51] Sornarajah, ¶318.
[52] Fynerdale, §§553-555; Infinito Gold, §137; SAUR, §§307-310.
[53] Ampal-American, §301; Fraport, §332; Yukos, §1349; Hamester, §125; Plama, §138; Minnotte Lewis, §131.

### b. Tribunal lacks jurisdiction pursuant the clean hands doctrine

42. Provided the illegality is attested, Tribunal should reject to hear Claimant's case under the clean hands doctrine. The subject-matter scope of illegality above all covers acts for securing the investment, meaning corruption and fraud.[54] Corruption opposes the clean hands doctrine,[55] which prohibits arbitral tribunals from hearing a claim tainted by corruption.[56]

43. Respondent submits that Tribunal does not have jurisdiction since the investment was procured by means of corruption, which the clean hands doctrine prohibits.

## 2. Tribunal does not have jurisdiction as Vemma's bribes to Mr. Umbridge constitute a mala fides investment

44. In any case, Tribunal lacks jurisdiction as the investment contradicts the *bona fides* principle, which governs legal relations, in the contractual field, meaning the absence of deceit.[57] Therefore, investments must not be established through corruption to benefit from ICSID dispute settlement mechanisms.[58]

45. Moreover, due to the investor's fraudulent behaviour during the bidding process in the *Inceysa* case, tribunal found the investment violated the principle of good faith and the *Nemo auditur propriam turpitudinem allegans* principle, precluding an entity to benefit from its own wrongdoing.[59] Hence, tribunal found itself incompetent to hear the dispute.[60] The lack of jurisdiction on the basis of *mala fides* investment has been recognized by tribunals in *Phoenix Action*,[61] *Fraport*,[62] and *Hamester*[63] cases.

46. Therefore, Respondent submits the lack of jurisdiction can be derived from the principle of good faith, since the investment was not compliant with such principle.

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[54] Metal-Tech., §165; Mamidoil, §378; Krederi, §386.
[55] Littop, §485.
[56] Siag, §17.
[57] Inceysa, §231.
[58] Phoenix Action, §100; Hamester, §123; SAUR, §308.
[59] Inceysa, §240.
[60] *Ibidem*, §257.
[61] Phoenix Action, §106.
[62] Fraport, §344.
[63] Hamester, §123.

### 3. Tribunal should exercise its ex officio powers under ICSID AFR or alternatively stay the proceedings

47. Acknowledging the aforementioned, Respondent primarily requests Tribunal to exercise its *ex officio* powers pursuant Article 41 AFR or alternatively stay the proceedings.

48. According to Article 41(2) AFR, tribunals have the power to call upon the parties to produce documents, witnesses, and experts, if they deem it a necessity and at any time of the proceedings. The ICSID tribunal has already implied that Article 41(2) imposes an obligation upon tribunals to assess allegations of corruption *ex officio*, since corruption represents a matter of international public policy. [64]

49. Therefore, Respondent asks of Tribunal to summon Claimant and Mr. Umbridge to submit all relevant and necessary documents and other evidence, testifying to or against such accusation, and to question the parties involved.

50. Alternatively, provided Tribunal does not consider it a necessity under the previous paragraph, Respondent submits it should implement a stay of the proceedings until the Constitutional Court of Bonooru issues a decision.

### 4. Provided Tribunal accepts its jurisdiction, the illegality of the investment shall affect the merits of the case

51. Provided Tribunal declines the illegality plea for jurisdictional purposes, Respondent proposes the illegality affects the merits of the case. The fact that the investment is in violation of the host State laws can appear when dealing with the merits, either if it was unknown prior to that stage or if tribunal considered it best to be analysed at that point.[65]

[64] Infinito Gold, §137.
[65] Phoenix Action, §102.

## II. WHILE THE LEAVE SOUGHT TO FILE THE *AMICUS* SUBMISSION BY CBFI SHOULD NOT BE GRANTED, TRIBUNAL SHOULD ALLOW THE LEAVE SOUGHT BY CRPU

52. Claimant and Respondent have agreed that *amici* submissions in the present proceedings can be filed only if specific requirements under Article 9.19 CEPTA and Article 41(3) AFR are met.[66] The *amici* submissions in the present proceeding are constrained by three explicit substantive requirements (hereinafter explicit requirements), which must be met cumulatively. Firstly, the submissions must regard a matter of fact or law within the scope of the dispute, secondly, *amici* can assist Tribunal when evaluating submissions by the Parties and thirdly, show significant interest in the proceeding. However, Tribunal can consider other requirements, *e.g.* independence and public interest (hereinafter other requirements) in accordance with the established practice of tribunals.[67]

53. Respondent will establish that CBFI lacks abovementioned requirements and should be denied the grant [A.], while CRPU fulfils them and should be accepted by Tribunal [B.].

### A. The CBFI's submission fails to meet the requirements for *amicus* submission under Article 9.19 CEPTA, 41(3) AFR and Article 4 UNCITRAL Rules

#### 1. The explicit requirements under Article 9.19 CEPTA and 41(3) AFR are not met

##### a. CBFI cannot assist with a different point of view

54. The perspective of CBFI, namely that its standing in the procedure is intrinsically tied to Claimant's commercial activities and that it safeguards the compliance with international norms, facilitating participation of State-linked enterprises in commercial activities,[68] can show that CBFI could not present a different point of view to Tribunal than that of the Parties, but would rather be a repetition of the claims.

55. Tribunals have warned that the leave sought to file *amicus* submissions can be denied when opposing arguments could be adequately discussed by the disputing parties.[69] This

[66] PO1, §21, sub§(g).
[67] Biwater, §§51-53, Schliemann, ¶378.
[68] *Amicus* submission by Consortium of Bonoori Foreign Investors, §10.
[69] Eco Oro, §31-33, Infinito Gold, PO2 §34, Bear Creek, PO6, §38, Gabriel Resources, §63.

is the case with the present request to file a submission. The CBFI intends to make submission in regard to the standing of SOEs and the test to be applied, which looks at the nature and not the purpose of Claimant's activities.[70] Due to the nature of the question, the Parties are at the position to provide information and since the Parties have already argued on these two points, Respondent submits that Tribunal should find that CBFI cannot offer a different perspective and thus fails to fulfil this requirement.

#### b. CBFI shows no significant interest in the present dispute

56. CBFI claims that it has significant interest in the decision in this case, since the results in the present dispute would influence frequent investors in the country, which have made sizable contributions of capital in Mekar.[71]

57. However, this alone does not suffice in order to fulfil the requirement of significant interest. The frequency of investments and the impact of Tribunal's decision on investors in Mekar solely does not imply significant interest.[72] Furthermore, Claimant cannot rely on the fact that air travel and trade form an essential interest in the framework of human rights,[73] since there were no travel and trade restrictions imposed. Hence, Respondent submits that the actions and claims of Claimant do not in any way show that it has interest in protecting stable regulatory regime for investments or human rights, let alone significant.

### 2. The *amicus* submission by the CBFI does not fulfil other requirements at the discretion of Tribunal under UNCITRAL Rules

58. Claimant and Respondent are bound by the provisions of Chapter 9 CEPTA, including Article 9.20(6) CEPTA, under which the UNCITRAL Rules should be applied. If Tribunal finds that only Article 9.19 CEPTA is applicable in order to rule on the *amicus* submission, Respondent submits that in addition to the three substantive requirements, explicitly provided in Article 9.19 CEPTA, ICSID and UNCITRAL Rules, tribunals also frequently interpret that the aforementioned rules require conditions of independence and public interest.[74] Accordingly, Respondent respectfully invites Tribunal to consider

[70] Methanax, §48.
[71] *Amicus* submission by Consortium of Bonoori Foreign Investors, §9.
[72] Apotex, §28.
[73] General Comment ICCPR, §8.
[74] Biwater, §51-53; Schliemann, ¶¶374-378.

other requirements and decide that even if the *amicus* submission by CBFI would fulfil the three explicit requirements, it fails to fulfil the other requirements, namely independence (a) and public interest (b).

### a. CBFI lacks independence

59. Non-disputing parties that wish to file a submission must fulfil the requirement of independence, which a tribunal considers together with explicitly provided requirements. Independence requires expertise, experience, and independence in the narrower sense.[75]

60. Although CBFI might prove experience and expertise, it lacks independence *stricto sensu*, since it is closely aligned to Claimant.[76] First of all, Claimant is a member of the CBFI in good standing and is thus represented by them as a Bonoori investor, investing in the Greater Narnian Region.[77] Moreover, Lapras Legal Capital, also a member of the CBFI, is currently advising Claimant regarding the funding strategies in the present dispute.[78] Ultimately, thirty-eight members of the CBFI hold investment rights in Mekar and two are pursuing claims against Mekar.[79] For these reasons, the submission by the CBFI should not be accepted.

### b. CBFI has not filed its request in pursuit of public interest

61. Virtually every international investment dispute, which involves state interests, concerns matters of a more public nature than traditional commercial arbitration.[80] However, tribunals have identified more precise criteria for determining public interest in a concrete procedure.[81] A matter is deemed to be of public interest when the final decision in an investment dispute has the potential to affect, directly or indirectly, persons beyond those immediately involved as parties in the case.[82]

62. However, in the present case the outcome of the dispute will not impact the public's access to air travel, since firstly, Vemma has already sold its share in Caeli to Mekar in

[75] Vivendi, §56; Eli Lilly, §E.
[76] Von Pezold, §49.
[77] *Amicus* submission by Consortium of Bonoori Foreign Investors, §7.
[78] *Ibidem*, §7.
[79] *Ibidem*, §6.
[80] Apotex, §29.
[81] Aguas Santa Fe, §18.
[82] *Ibidem.* Vivendi, §19.

October 2020,[83] and most importantly, several of Caeli's routes were shut down beginning in 2019,[84] indicating Vemma has not been operating in Mekar for over a year and has thus not been providing transport services as a governmental authority. Provided Tribunal considers Vemma's inactiveness in Mekar not determinative, Respondent submits the proceeding does not have the potential to impact wider interest,[85] but rather CBFI's own personal interests, which does not suffice. Moreover, the ICSID tribunal has previously found that the subsequent privatization of the airport deemed any public interest argument untenable.[86] Similarly, CBFI applied the argument of international and domestic law on investment in the privatisation regarding airplane travel, which must be denied in this case as well.

## B. CRPU's submission meets the requirements for *amicus* submission under Article 9.19 CEPTA, 41(3) AFR and Article 4 UNCITRAL Rules

### 1. The explicit requirements under Article 9.19 CEPTA and 41(3) AFR are met

63. Respondent submits that the *amicus* submission by CRPU fulfils the three explicit requirements (a-c) under Article 9.19 CEPTA in accordance with the interpretation of tribunals, referring to Article 41(3) AFR.

#### a. The *amicus* submission by CRPU addresses a matter within the scope of this dispute *(ratione legis)*

64. The first explicit substantive requirement that an *amicus* submission must fulfil is that the submission addresses a matter within the scope of the dispute, namely that the submission must be relevant to the issues being arbitrated.[87]

65. Interpreted according to its literal meaning, the arguments by the petitioner should be related to the substantive legal questions to be resolved in the arbitration, meaning that procedural questions are unsuitable for the *amici* submissions.[88] However, some tribunals have expressly considered arguments on jurisdiction or simply accepted them on the

[83] Facts, §63.
[84] Facts, §53.
[85] Biwater, §53.
[86] ADC, §304.
[87] Methanex, PO4, §36, Infinito Gold, PO2, §§18, 31.
[88] UPS, §71.

basis of a non-literal approach,[89] under which issues of jurisdiction might raise matters of public interest.[90]

66. According to both approaches CRPU's submission fulfils the first explicit requirement. Firstly, the application for leave by CRPU expresses its intentions to cover legal questions and principles of investment rights in Mekar under Chapter 9 CEPTA, respect national laws on privatisation,[91] uphold and promote fair business practices in Mekar,[92] and to determine Tribunal's competence-competence,[93] fulfilling the literal approach. Ultimately, the non-literal approach is also fulfilled since the CRPU submission addresses the matter within the jurisdictional agreement between the Parties and concerns issues of investor-State dispute settlement regimes.[94]

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**b. CRPU is able to assist Tribunal by offering a different point of view from that of the disputing parties**

67. The *amicus* submission must assist tribunal by offering a different point of view than that of the Parties. This requirement presupposes that the perspective is different from, rather than a repetition of, what the parties have argued.[95]

68. Organizations which due to their membership or grass roots activity, can provide salient data about the actual public impact of company activities or regulatory state action that is hard to obtain otherwise are the most appropriate to participate.[96] Moreover, engagement in privatisation proceedings as external advisors can provide novel arguments and professional contribution to the proceeding.[97]

69. In this regard, Respondent submits that CRPU could advance novel arguments due to firstly, its involvement in the entirety of the privatisation process and secondly, its professional focus in investment banking. Accordingly, CRPU has the capacity to

[89] Pac Rim, §(II); Electrabel, §5.32; Eco Oro, PO6, §27.
[90] Apotex, §33.
[91] *Amicus* submission by External Advisors to the Committee on Reform of Public Utilities, §620.
[92] *Ibidem,* §645.
[93] *Ibidem,* §650.
[94] *Ibidem.*, §615.
[95] Philip Morris, §26, Newcombe, ¶¶16-18.
[96] Aguas de Santa Fe, §13, UPS, §62, Vivendi, §20, Triantafilou, 2010, ¶44.
[97] This requirement mirrors, in part, the 'suitability' factor in Suez. Reffering to *Suez:* Triantafilou, 2008, ¶858.

provide data about the public impact of company activity[98] and assist Tribunal by providing a different point of view.

### c. CRPU shows significant interest in the proceeding

70. Pursuant to the last substantive requirement, an *amicus* submission must show significant interest in the proceeding.[99] To prove whether an *amicus* submission shows significant interest, low standard is required.[100] A personal stake in the proceedings is not an argument for refusing the a petition, but, on the contrary, is an argument in favour of CRPU participation.[101] Those who are directly or indirectly affected by a decision of an arbitral tribunal are deemed to have significant personal interest.[102]

71. Respondent submits that CRPU submission fulfils the last explicit requirement due to firstly its involvement as interveners before federal courts in Mekar in relation to judicial proceedings concerning approval for privatisation projects,[103] and secondly because of the fact that stagnation in anti-corruption efforts in Mekar also impacts the financial operations of the CRPU.[104]

72. Since the explicit requirements pursuant to Article 9.19 CEPTA and Article 41(3) AFR are fulfilled by CRPU, Respondent respectfully asks Tribunal to accept the leave sought by CRPU.

## 2. The *amicus* submission by CRPU fulfils other requirements at the discretion of Tribunal under UNCITRAL Rules

73. In addition to the three substantive requirements, explicitly provided in Article 9.19 CEPTA, ICSID and UNCITRAL Rules, Respondent submits that the CRPU submission fulfils requirements of public interest (a) and independence (b).

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[98] *Amicus* submission by External Advisors to the Committee on Reform of Public Utilities, §635.
[99] Some tribunals refer to this as a suitability requirement, e.g. Suez, §§12, 16.
[100] Suez, PO1, §§12, 16.
[101] Schliemann, ¶372.
[102] Glamis Gold, §286.; Schliemann, ¶372.
[103] *Amicus* submission by External Advisors to the Committee on Reform of Public Utilities, §645.
[104] *Ibidem.*

### a. Public interest justifies granting of the leave by CRPU

74. *Amici* submissions aim to protect important public interests such as anticorruption.[105] Anti-corruption norms thus present an international public order,[106]and claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by tribunal.[107]

75. Accordingly, Respondent submits that public interest justifies granting the leave sought by CRPU due to evidence of corruption, which presents public interest, namely the rights received by Vemma Holdings, procured by means of bribes paid to Mr. Umbridge[108] and additionally the fact that stagnation in anti-corruption efforts in Mekar also impacts the financial operations of the CRPU, members of Mekari civil society, thus representing the public.[109] In this respect, the submission by CRPU fulfils this requirement.

### b. CRPU is an independent third party

76. The principal function of *amici* is to support their members,[110] but they must show that there exists no close relationship between them and the Parties.[111] However, not every kind of minor financial or factual relationship is considered to be detrimental to independence.[112] For example, under the UNCITRAL draft, 20% annual revenue is given as an indicative threshold that should not be exceeded in order to be considered independent.[113] The strict threshold was, however, not included in the official text, in order to leave room for reasonable discretion by tribunal,[114] which Tribunal is invited to consider in the present dispute as well.

77. Similarly, collaboration with one of the parties on a non-material level, in this case privatisation process, is also not grounds for rejecting an *amicus curiae*, as illustrated in the

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[105] Infinito Gold, PO2, §33; Fach Gomez, ¶544.
[106] Miller, ¶20.
[107] World Duty Free, §157.
[108] *Amicus* submission by External Advisors to the Committee on Reform of Public Utilities, §635.
[109] *Ibidem.*
[110] UPS, §50.
[111] Methanex, §38.
[112] UNCITRAL, Report of Working Group II, §49.
[113] UPS, §9.
[114] Schliemann, ¶379.

*Biwater* case, although the petitioners explicitly stated that they seek to work with governmental agencies in the area of their expertise.[115]

78. In this respect, the fact that CRPU actively participated in the process of privatisation of Caeli and during the deliberations leading up to Vemma's acquisition of its stake in Caeli,[116] consequently receiving remuneration,[117] does not suffice for this submission to be denied based on the lack of independence.

79. To conclude, Respondent respectfully asks Tribunal to deny the leave sought by CBFI and allow the leave sought by CRPU. If allowed, CBFI would present its submission without pursuing public interest, and with not being able to offer an independent and different point of view from that of the Parties.

[115] *Ibidem*.
[116] *Amicus* Submission by External Advisors to the Committee on Reform of Public Utilities, §2.
[117] *Ibidem,* §3.

# III. RESPONDENT DID NOT BREACH THE FAIR AND EQUITABLE TREATMENT STANDARD FROM ARTICLE 9.9 CEPTA

80. Article 9.9 CEPTA provides that the host State shall provide the investors from another Contracting State FET. Contrary to Claimant's allegations, Respondent will establish it did not violate the FET standard. First, the investigation by the CCM and the imposed airfare caps were lawful, as Vemma abused its dominant position in the air traffic market [1.]. Second, Vemma was justifiably denied subsidies and was not subjected to discrimination [2.]. Third, Respondent acted in accordance with the due process obligation and provided Claimant justice in courts [3.].

## A. Vemma abused its dominant position in the air traffic market

81. Respondent did not breach Article 9.9 CEPTA since the CCM lawfully initiated the investigation against Caeli Airways [1], and the imposed measures were reasonable and proportionate [2].

### 1. The CCM lawfully initiated the investigation against Caeli Airways

82. Prior to Claimant making the investment in Caeli, it was sufficiently notified that any anti-competitive behaviour would be subject to the review of the CCM.[118] Additionally, when the CCM approved Vemma's acquisition of Caeli, the CCM required an undertaking from Caeli, that it would not engage in high-level cooperation on competition parameters with Moon Alliance members, which was duly submitted.[119]

83. Respondent will demonstrate that Caeli's market share was above 50% and lawfully accounted in conjunction with Royal Narnian [a], and subsequently, that even without Royal Narnian factored the CCM had legal basis for investigation, as aviation industry demands special attention [b].

[118] Response to the Notice of Arbitration, §12.
[119] Facts, §25.

### a. Caeli's market share is above 50% when taken in conjunction with its Moon Alliance partner, Royal Narnian

84. Caeli is a part of Moon Alliance together with other airlines, of which Royal Narnian is particularly noteworthy, given the evidence of preferential secondary slot-trading between the Royal Narnian and Caeli[120] and cooperation in respect of lounge access, terminals, IT platforms check-in operations and code-sharing.[121] Additionally, Vemma is 100% owner of Royal Narnian.[122]

#### i. Claimant engaged in high-level cooperation

85. Slots are rights that allow airlines to take off, land or use other infrastructure at an airport.[123] Secondary slot-trading is trading of these slots between airlines after initial allocation by an airport.[124] Given that the number of slots at an airport is limited,[125] preferential secondary slot-trading can present serious advantage in gaining market share and can allow prevention of entry to competitors, thus it raises concerns of its impact on competition.[126]

86. Moreover, any kind of horizontal cooperation between airlines may produce anti-competitive effects, especially high-level cooperation, which includes coordination on competition parameters, such as schedules, capacity, facilities and acquiring an interest in allied airlines.[127] Cooperation at this level is deemed more likely to achieve merger-like synergies and is hence more likely to raise competition concerns.[128]

87. Therefore, when considering the level of cooperation between Caeli and Royal Narnian and their potentially anti-competitive behaviour, the CCM rightfully accounted their market share in conjunction.

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[120] Facts, §27.
[121] *Ibidem.*
[122] Facts, §10.
[123] Pheasant, p.30.
[124] Pellegrini, p.1009-1022.
[125] Airport Slot Guidelines, ¶8.
[126] Wit, ¶¶155-156
[127] Airline Competition, p.11.
[128] *Ibidem.*

### ii. Claimant adopted predatory pricing strategies

88. Claimant consistently maintained lower fares and even when competitors suffered losses, it did not try to keep competition fair by adjusting them, but rather wanted to capture greater market share.[129] The MRTP Act provides a definition of an anticompetitive act. Caeli's behaviour has been subordinated to selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.[130] Low airfares and loyalty programmes raised concerns of breach of Mekar's antitrust legislation in the form of predatory pricing. These concerns were further amplified by subsidies received by Vemma under the Horizon 2020 scheme.[131]

89. Competition authorities across the world have as well initiated investigations based on predatory strategies, similar to present case. In France, the Competition Commission investigated whether the activities of Pont-à-Mousson S.A. abused its dominant position by introducing a superior line of products and lowering its prices below cost, although cost was not defined.[132] Moreover, the U.S. Government investigated American Airlines which were maintaining a dominant position at an airport and started lowering prices when new competitors entered the routes on which it operated.[133] Therefore, the CCM's *suo moto* investigation over the fear of predatory pricing was in line with established practices, given the presented concerns.

### iii. CCM's investigation was not arbitrary, nor did it frustrate Claimant's legitimate expectations

90. Claimant might argue that the *suo moto* investigation was an act of arbitrariness and that it frustrated Claimant's legitimate expectations. Arbitrary measure is a measure that inflicts damages on the investor without any apparent legitimate purpose and is based on discretion, prejudice, or personal preference.[134] Mere illegality or inconsistency cannot establish a breach of the FET.[135] Additionally, legitimate expectations rely on State's conduct that creates reasonable and justifiable expectations on the part of an investor.[136] Since the amended MRTP Act from 2009 was in force when Claimant made the

[129] Facts, §35.
[130] Monopoly and Restrictive Trade Practice Chapter IV, paragraph 1(i).
[131] Facts, §45.
[132] OECD Predatory Pricing, ¶51.
[133] American Airlines, ¶1.
[134] EDF, §303.
[135] Indian Metals, §228; ELSI §128.
[136] Thunderbird, §147.

investment,[137] and as undertaking was demanded that it would not engage in high-level cooperation, Claimant cannot argue that it did not expect that the CCM would initiate investigation and that the investigation was arbitrary.

91. The CCM properly used Article 2 MRTP Act, which gives the CCM legal basis to initiate a *suo moto* investigation if a corporation obtains a market share greater than 50% and there is concern of anti-competitive behaviour. Royal Narnian and Caeli are both owned by Vemma, and their high level of cooperation cannot be denied. Further, with low fares and financial help in form of subsidies from Horizon 2020 scheme raised concerns of predatory pricing. Therefore, the CCM initiated the *suo moto* investigation lawfully.

**b. The CCM may exercise discretion in industries that require special attention to open an investigation where a corporation owns a lower market share**

92. If Tribunal concludes that Caeli's market share should not be considered in conjunction with Royal Narnian, Tribunal should find that the CCM still had the right to exercise discretion in industries that require special attention to open an investigation where a corporation owns a lower market share in accordance with Chapter III Article 2(a) MRTP Act.

93. Airline industry is a fast-developing industry.[138] It is very competitive and has high barriers of entry for new airlines[139] affecting competition. This is especially the case in the presence of alliances, as they are complex and dynamic networks, whose members must constantly negotiate between autonomy and cooperation.[140] As already established, alliances differ in level of cooperation between members, which may present danger to competition as they can act like *de facto* mergers, therefore aviation industry demands special attention.

[137] Facts, §26.
[138] Uniting Aviation.
[139] Evans.
[140] Vaara, ¶¶7–8.

94. Even when accounting solely Caeli's market share of 43%[141], the CCM still had the right to initiate an investigation, as aviation is one of the industries requiring special attention, especially in the presence of alliances.

### 2. The imposed measures were reasonable and necessary

95. The CCM has the power to impose proportionate interim and final remedies, only to the extent necessary to bring the infringement to an end.[142] The CCM imposed airfare caps on Caeli to prevent it from earning supra-competitive profits in the future.[143]

96. Proportionality is an element of the FET standard,[144] which is fulfilled when there is a reasonable relationship between the public purpose, supported by regulation, and the restrictions imposed on the foreign investor.[145] Additionally, a measure is arbitrary if it wilfully disregards a due process or shocks a sense of judicial propriety.[146] All measures which are arbitrary are also unreasonable [147]

97. Claimant argues that airfare caps, after the currency crisis hit, were unnecessary and unreasonable.[148] However this is inaccurate, as the existence of the interim measures was solely conditioned by the behaviour of Caeli, since their rationale is to bring a corporation in line with the MRTP Act.[149] The CCM did approve Caeli's membership in Moon Alliance, but it did not allow abuse of dominance and predatory pricing. As soon as Caeli did not pose a threat to competition, that is when its market share in conjunction with Royal Narnian fell below 40%, the airfare caps were lifted.[150]

98. As it was found by the CCM in the first and second investigations, Claimant breached Mekar's antitrust legislation with low airfares and loyalty programmes, resulting in predatory pricing,[151] and squeezing out concession from Phenac International Airport by

[141] Facts, §36
[142] MRTP Act, Article 4(d).
[143] Facts, §37.
[144] MTD, §109, Occidental, §404.
[145] EDF, §293.
[146] ELSI, §128.
[147] Glencore, ¶1446.
[148] Notice of Arbitration, §16.
[149] Article 4 of the MRTP Act.
[150] Facts, §55.
[151] Facts, §45.

threatening to move its traffic from Phenac to other airports.[152] As these breaches presented serious threat to competition on Phenac Airport, the decision to keep the caps until Caeli's market share, with Royal Narnian included, fell below 40%[153] was proportionate, reasonable and necessary.

99. Thus, it can be deduced that the introduced interim measures were reasonable and proportionate. The placed airfare caps were also the least restrictive, as they allowed the airline to operate normally, while at the same time preventing Caeli Airways from negatively impacting competition.

## B. Vemma was justifiably denied subsidies

100. Respondent recognizes non-discrimination as a key element of FET standard. Measures affecting an investor are discriminatory, if they are clearly less favourable than those accorded to other comparators, if they intend to harm the foreign investor or are not justified by sufficient reasons.[154]

101. Claimant alleges that by denying subsidies, Respondent breached Article 9.9 CEPTA as it acted in a discriminatory manner. Respondent will establish that it treated Claimant according to the FET standard as it treated subjects in similar situations equally [1.]. Alternatively, if Tribunal finds that there was differential treatment, Respondent will establish it was justified [2.].

### 1. Respondent treated investors in like circumstances in equal way

102. For a conduct to be discriminatory it must be established that Respondent treated companies in like circumstances differently.[155] Thus, Tribunal needs to identify the subjects in similar circumstances.

103. When looking for comparators, Tribunal should take into consideration enterprises in the same sector and with similar structural ownership. Respondent has

[152] Facts, §49.
[153] *Ibidem.*
[154] Urbaser, §1088.
[155] Limited, §710.

already established that Claimant is a SOE. To this end, Respondent submits that Larry Air should be established as a comparator. Larry air is an airline, wholly owned by a foreign government[156] and was denied subsidies.[157]

104. Respondent refused to grant subsidies to airlines partially owned by foreign governments for their distinct advantages that allow them to out-compete privately owned firms.[158] Furthermore, since SOEs have financial advantages when dealing with crises, Mekar decided to grant subsidies only to non-state entities.

105. Hence, if Larry Air is established as a comparator, it can be concluded that Respondent treated subjects in like situations equally. Since there was no differential treatment of subjects in like circumstance, the conditions for discrimination were also not met.

### 2. Alternatively, Respondent's differential treatment was justified

106. Should Tribunal determine that Larry Air is not a suitable comparator, but StarWings and JetGreen are, it is invited to find that the different treatment towards Claimant was reasonably justified as it was based on objective reasons under the Executive Order 9-2018.

107. One of the criteria for establishing discrimination is that there was no reasonable justification for the differential treatment. However, when there is an objective justification, differentiated treatment of similar cases may be justified.[159]

108. Executive Order 9-2018 vests discretion to grant the subsidies to the Secretary.[160] When exercising its discretion, the Secretary must consider factors provided in Section 3101 Article (c)(A-D) of Executive Order 9-2018. In case of Caeli, it is particularly important to consider Article (c)(B), under which a granted subsidy should not distort market conditions in favour of one or more enterprises.[161] Caeli was already showing

[156] Facts, §47.
[157] *Ibidem.*
[158] Facts, §46.
[159] Parkerings, §368.
[160] Executive Order 9-2018, Sec. 3101, Article (c)(1).
[161] Executive Order 9-2018, Sec. 3101 Article (c)(B).

anti-competitive behaviour[162] and the granting of subsidies would further contribute to their distortion of competition. Claimant also had a large governmental ownership, which gives it a competitive advantage.[163]

109. JetGreen and StarWings both received subsidies, despite getting funds from their home States, however they were not engaging in anticompetitive behaviour. Furthermore, they are private-owned companies, unlike Claimant.[164] Thus, when considering Claimant's anticompetitive behaviour and the discretion vested in the Secretary it can be concluded that the refusal of subsidies was justified.

## C. Respondent acted in accordance with the due process obligation and provided Claimant justice in courts

*110.* The test for establishing a denial of justice sets a high threshold.[165] In the commonly cited decision in *ELSI* case, the denial of justice was defined as a '*wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*'.[166]

*111.* Respondent will demonstrate that it acted accordingly with the due process obligation as the Secretary of Civil Aviation acted transparently [1.], Mekar's courts did not subject Claimant's case to undue delay [2.] and courts did not misapply international law as they enjoy a discretion when enforcing awards [3.].

### 1. Secretary of Civil Aviation acted in a transparent way when denying subsidies

112. Respondent submits that it has acted in a transparent manner when denying subsidies to Claimant. To establish absence of transparency in administrative proceedings, a complete lack must be shown.[167] However, Claimant failed to show that such a high level of violation.

113. The transparency requirement has been interpreted to require that the legal basis for the investor's operations is apparent and that any decisions of the host State affecting

[162] Facts, §28.
[163] Nielsen, ¶¶56-66.
[164] Facts, §46.
[165] Agility, §210, EBO, §472, Krederi, §447.
[166] ELSI, §128.
[167] Blanco, §359.

the investor can be traced back to that legal framework.[168] Therefore, Respondent submits that the applicable legal framework for granting subsidies is publicly accessible and that all decisions affecting the Claimant can be traced back to it. Executive Order 9-2018 authorises the Secretary for reviewing and deciding on applications for subsidies within its discretion and provides the conditions, which must be considered when making such decisions.

114. In view of the above, Respondent submits that Claimant failed to prove that the administrative process was completely non-transparent. For this reason, Respondent asks Tribunal to establish that the Secretary of Aviation acted transparently in awarding subsidies and thus acted in accordance with due process obligation.

### 2. Mekar's courts did not subject Claimant's case to undue delay

115. Claimant alleges that Mekar's courts handled their claim about airfare caps in an inordinately slow manner. Respondent, on the other hand, submits that there was no undue delay. Alternatively, even if there was a delay, it does not constitute a denial of justice.

116. It is generally acknowledged that denial of justice includes wrongful delays.[169] However, international law has no precise standards to access whether court delays are a denial of justice.[170] Furthermore, there is also no determined time frame in which a proceeding must be resolved.[171]

117. In the *Chevron* case it was decided that a delay of 14 years does not reach a denial of justice[172] and in *Jan de Nul* case a delay of ten years was not seen as a denial of justice.[173] Further in the case of *White Industries* tribunal supported its decision with the host States status as a developing country, establishing that that the status of a host State can be an appropriate reason for a delay.[174] Thus, a developing country must be held to different standards compared to developed countries such as Switzerland, or the United

[168] Petroleum, §285.
[169] Krederi, §455, Azinian, §102, Spyridon Roussalis, §602, Fabiani, ¶117.
[170] Toto, §155.
[171] Azinian, §§102-103.
[172] Chevron, §250.
[173] Jan de Nul , §204.
[174] White Industries ,§10.4.18.

States. The duration of proceedings can in those cases be rather unsatisfactory in terms of efficient administration of justice[175], but it does not necessarily constitute a denial of justice. That can only be demonstrated if there is a particularly serious shortcoming and appalling conduct that shocks, or at least surprises, the sense of judicial propriety.[176]

118. Mekar is a developing country whose population quickly grew from 6 million to 10.8 million.[177] One of the consequences of this rapid growth is an extension of the time needed for courts to resolve cases. Even though Mekar's courts usually need approximately 27 months to resolve commercial cases, Tribunal should note that the court released its decision in only 16 months since the claim was made.[178] Alternatively, if Tribunal finds that there was a delay, Respondent submits it does not yet meet the high threshold required to reach denial of justice, as it does not surprise or shock the sense of judicial propriety.

### 3. Courts enjoy discretion to recognize and enforce arbitral awards that are set aside

119. Respondent submits that courts enjoy discretion to recognize and enforce arbitral awards that are set aside. Mekar's courts appropriately exercised this discretion, considering the evidence and the public policy of Mekar.

120. Section 36 of the Commercial Arbitration Act enacts conditions for enforcement of foreign awards. The content of this Section is the same as of Article V NYC to which Mekar is a Contracting State. The aim of those provisions is to simplify the recognition and enforcement of arbitral awards and to provide a high level of control to Contracting States.[179] In accordance with this objective, the NYC grants courts the discretion, based on the word 'may', to refuse to recognize and enforce an award on the grounds listed in article V, without obligating them to do so.[180] This is analogous to the Commercial Arbitration Act.

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[175] *Ibidem.*, §10.4.22.
[176] Chevron, §244.
[177] Facts, §§945-950.
[178] Caeli's claim against the CCM was registered on 27 March 2018 and the decision was issued on 15 June 2019 as evident from Facts §44 and 54.
[179] UN Guide, ¶125.
[180] *Ibidem.*

121. Based on the discretionary language of NYC and Commercial Arbitration Act Respondent will establish that tribunals enjoy discretion when enforcing awards [a.] and that the enforced award was not contrary to Mekar's public policy [b.].

### a. Courts enjoy discretion when enforcing awards

122. Section 36(1)(e) provides that a court may at the request of the party against whom it is invoked refuse to enforce a set aside award.

123. Based on the discretionary language of Article V NYC several courts have accepted to enforce awards set aside at the seat of the arbitration on the basis of the use of the term 'may'.[181] Furthermore in the *Chromalloy Aeroservices* case, the court reasoned that recognizing the annulment of the Egyptian court would violate United States public policy in favour of final and binding arbitration of commercial disputes.[182]

124. In view of the discretion granted by Section 36 of Commercial Arbitration Act, the courts can recognize a decision even if it has been set aside. Therefore, Respondent did not misapply international law by enforcing a set aside award.

### b. The award did not contradict Mekar's public policy

125. Section 36(2)(b) of Commercial Arbitration Act establishes an exception that an arbitral award may be refused on the grounds of public policy. However, the meaning of public policy is not specified in the Commercial Arbitration Act nor in the NYC. Consequently, States have the autonomy to independently define public policy and must use it with 'extreme caution'.[183] This exception should thus be implemented only in cases when an arbitration ruling threatens the public interest, public faith in the administration of justice, or individual rights to personal liberty or private property.[184] To apply this exception, a high standard of proof must be met, thus the party opposing enforcement must present compelling evidence,[185] especially in cases of corruption.[186]

[181] Chromalloy Aeroservices, Corporación Mexicana.
[182] Chromalloy Aeroservices, §(III)(C)(2).
[183] Ascom Group, §§37-38.
[184] Enron, §23.
[185] Karaha.
[186] EDF, §221.

126. Claimant based its allegation solely on the report by Centre for Integrity in Legal Services (hereinafter CILS), who is recognized by the Mekari Minister of Internal Affairs as a body funded by foreign donations to intervene in Mekar's domestic affairs by foreign companies.[187] Therefore, as they are not independent, their report cannot be credible.

127. Since Claimant had no additional evidence to substantiate the bribery, the Supreme Court rightly enforced the award, as Claimant failed to prove with convincing evidence that corruption had indeed taken place. Alternatively, if Tribunal finds that Respondent did misapply international law, Respondent submits that mere misapplication is not enough to constitute a denial of justice, as the misapplication was not irrational or abusive.[188]

[187] High Commercial Court of Mekar ruling, 23 August, 2020, §13.
[188] Krederi, §449, Rumeli, §652, Azinian, §102.

# IV. RESPONDENT OWES NO COMPENSATION TO CLAIMANT

128. Respondent submits that its actions did not violate Article 9.9 CEPTA and calls on tribunal to establish the same and find that Respondent owes no compensation. Alternatively, if Tribunal finds a violation, Respondent will establish that Claimant has failed to establish that the suffered damages are the consequence of Respondent's actions [A.]. In any event, if Tribunal finds that there is a causal link, it should apply the market value and find that Respondent owes no compensation [B.]. Alternatively, if compensation is still owed it should be reduced due to Claimant's conduct and economic situation of Mekar [C.].

## A. Claimant has failed to show that the suffered damages are a result of Respondent's actions

129. Claimant may only claim compensation if it can demonstrate with a 'sufficient degree of certainty' that the harm 'would in fact have been averted' if Respondent had complied with its obligations.[189]

130. Respondent submits that Claimant failed prove that the injury asserted by the Claimant is the consequence of wrongful conduct by Respondent, as the injury is too remote [1.], and at the same time the consequence of Claimant's own actions [2.].

### 1. The loss claimed by Claimant is too remote

131. Respondent submits that causation is a key element of the investors' claim for compensation**.** Under CIL, Claimant is the one who bears the burden of proving the violation and a causal link between such violation and claimed damages.[190]

132. Compensation can only be claimed for direct harm and if the normal and natural course of events would indicate that the injury is a logical outcome.[191] Thus, the existence of loss does not immediately entitle an investor to seek compensation. Sometimes the injury may be too remote.[192]

[189] Bosnian Genocide case, §462.
[190] Lemire, §155.
[191] Ruiz, ¶37.
[192] MNSS, §356.

133. The economic damage Claimant suffered was substantially aggravated and altered by the economic crisis in Mekar, which started in late 2016, when MON began to deteriorate.[193] In the *Dix* case, where there was a state of war, tribunal explained that the interruption of the normal course of business is something completely inevitable in such circumstances.[194] Therefore, it decided that incidental losses incurred by individuals because of such interruption are too remote for compensation.[195] Same can be concluded for the present dispute, as it is impossible to avoid economic damage in times of an economic crisis. As such Respondent's breach is not the real cause of the economic harm Claimant suffered.

134. Consequently, Claimant's loss cannot be attributed to Respondent's conduct, as Claimant failed to prove a direct link between the infringement and the damage.

### 2. The damage caused is not the result of violations but the actions of Claimant

135. Respondent will establish that the loss suffered by Claimant is not the consequence of the breach. If Tribunal finds a breach of CEPTA, it should address causation. Only if there is a sufficient causal link between the infringement of the BIT and the Claimants' losses will compensation be granted.[196]

136. Tribunals frequently use the 'but-for' premise to determine whether the breach caused the loss.[197] The premise compares the hypothetical situation without the breach and the actual situation with the breach to prove causality and loss. If Claimant would be in the same economic situation in the absence of breach, there would be no causation.[198]

137. Claimant is responsible for the losses it has brought upon itself as it made bold business decision. Admittedly, they initially resulted in success and rapid growth of Caeli Airways, however, such rapid expansion was ill-advised.[199] This was also confirmed by Ms. Misty Kasumi, Professor of Economics, who stated that Claimant's business model

[193] Facts, §39.
[194] Dix, ¶121.
[195] *Ibidem.*
[196] Duke Energy §468.
[197] Abed, §61, Cairn Energy, §1862, Tethyan, §286, TECO, §93.
[198] Wöss.
[199] Aviation Analytics June 7, 2019, §4.

was not good for long term operation and using situational low fuel prices presented a risk for further growth.[200] Furthermore, board representatives from Mekar Airservices have clearly expressed their opinion that the profits generated should be used to cover debts and improve financial health, but Vemma's representatives preferred fleet growth.[201] The consequence of such decisions were most evident, when the economic crisis started and the fuel prices rose, as Caeli Airways was unable to secure a steady stream of revenue.[202]

138. Consequently, even if there was no breach, Claimant would have suffered a loss due to its decisions regarding the use of profits and the onset of the economic crisis. As Claimant failed to show causation, Respondent asks Tribunal to find that losses do not give rise to liability on the part of Mekar.

### B. Tribunal should apply the market value standard and find that Respondent owes no compensation

139. If Tribunal finds that Respondent's breach is the cause for Claimant's loss it is bound to respect Article 9.21 CEPTA and apply the market value for determining compensation [1.]. Moreover, even ignoring the fact that CEPTA determines which standard is to be used, market value is the most appropriate standard for granting compensation in this case [2.]. Respondent also submits that Claimant cannot invoke the most favoured nation clause to claim the fair market value. [3].

#### 1. Tribunal is bound to respect Article 9.21 CEPTA

140. The market value is the standard to which both parties agreed in Article 9.21 CEPTA. Hence Respondent submits that Tribunal should apply market value standard contained in the aforementioned Article.

141. Tribunal is obligated by the CEPTA to base the compensation on the market value standard and thus it cannot, in good faith, request to use a different standard. Claimant also agreed to limit its claim to Article 9.9 of the CEPTA[203], hence excluding

[200] Phenac Business Today Podcast Transcript, 17 November 2014.
[201] Facts, §§31 and 35.
[202] Facts, §40.
[203] PO1, §17.

claims based on Article 9.12, the only Article in CEPTA allowing use of the FMV standard.

142. In the absence of a special provision, it is left for tribunals to determine a measure of compensation appropriate to the specific circumstances of the case.[204] *A contrario*, it can be concluded, that when there is a special provision determining which standard to use for compensation, use of different standard cannot be requested, and Tribunal is bound to use standard determined in the provision.

143. Respondent asks Tribunal to find that the market value has already been paid for Claimant's investment by purchasing its shares of Caeli Airways for USD 400 million, after Claimant's unsuccessful attempt to find buyers. Therefore, Claimant is owed no compensation.

### 2. Even ignoring the fact that CEPTA determines which standard to use, Market value is the most appropriate standard for granting compensation in this case

144. The full compensation principle aims to give the injured party the necessary amount of money to put it in the same position as it would have been if the contract would not have been breached.[205] That can be achieved with the FMV standard or with the market value standard.

145. The concept of FMV is commonly understood as the price at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller. Further, there should be no compulsion to buy or sell, and the parties should have reasonable knowledge of the facts, all of it in an open and unrestricted market.[206] The problem is, however, that it completely ignores duress or threat or specific economic circumstances, like economic crisis, as its rationale is to avoid opportunistic behaviour of states.[207] On the other hand, the market value standard takes

[204] S.D. Myers, §§303-319.
[205] Chorzów, ¶47.
[206] El Paso, §702, Enron Creditors, §361, Azurix, §424.
[207] Wöss.

into account economic situations that affect businesses, and in such cases may be considered fair and adequate compensation.[208]

146. Therefore, in this case use of the market value standard is more appropriate, as it takes into account the currency crisis in Mekar[209] and previously established Claimant's business model and decisions.

### 3. The most favoured nation clause cannot be invoked

147. MFN treatment ensures that a host State provides to the foreign investor and its investments, treatment that is no less favourable than that which it accords to foreign investors of any third country. However, in order to determine the effect of the MFN clause, it is preferable to look at a specific clause, its wording and placement, than to rely on general concepts.

148. In certain cases the MFN clause may also be used to determine compensation. For example, in *CME* case tribunal used the clause in question to interpret the phrase 'just compensation' in the expropriation clause in the Czech Republic-Netherlands BIT to represent the same as the FMV standard used in the Czech Republic-United States BIT.[210] However, it is necessary to distinguish between interpretation and complete replacement of provisions. The task of a tribunal is to interpret a BIT, not to replace the dispute resolution mechanism specifically negotiated by the parties, when the parties have not showed an intention to do this.[211] Moreover, replacing the agreed provisions with the help of the wide interpretation of the MFN clause would also result in instability and uncertainty of States.[212]

149. Article 9.21 CEPTA sets for that the agreed standard for compensation is the market value standard, an exception is provided only for cases of expropriation. The Article therefore does not provide for any exception that would allow a party to circumvent that provision through the MFN clause contained in Article 9.7 CEPTA.

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[208] *Ibidem.*
[209] Facts, §39
[210] CME, §500.
[211] Telenor, §92.
[212] *Ibidem.* §94.

150. Based on all the above, Respondent submits that Tribunal should use the market value standard to determine compensation. Accordingly, it should be noted that the market value is USD 400 million, which the Respondent had already paid when it bought Claimant's share.[213] Therefore, Respondent no longer owes compensation.

### C. If Tribunal finds that Respondent owes compensation, it must be reduced due to the Claimant's conduct and economic situation of Mekar

151. Should Tribunal find that Respondent owes compensation to Claimant, it should find that Claimant bears responsibility for its losses as Respondent was against Claimant's business decisions [1.]. Additionally, compensation awarded must take into account currency crisis happening in Mekar [2.].

#### 1. Compensation should be reduced due to Claimant's risky business decisions

152. It is recognised in international law that the injured party's conduct should be considered when determining compensation and may justify an exclusion or reduction of compensation.[214] The conduct must be wilful and negligent,[215] and have caused a material and significant[216] contribution to its own loss.

153. In *MTD* case tribunal held that Chile would not be liable for bad business decisions of MTD and concluded that MTD should bear 50% of damages.[217] Similarly, Mekar Airservices was against Claimant's business model of hasty expansion and not spending profits for its debt reduction.[218] Additionally, Respondent had warned Claimant of possible consequences of Claimant's business decisions, therefore, Respondent cannot be liable for all damages incurred by Claimant. Compensation should thus be reduced due to Claimant's own contribution to the loss.

[213] Facts, §63.
[214] Burlington Resources, §572, Perenco, §359, Yukos, §1633.
[215] Article 39 ARSIWA.
[216] Occidental, §670.
[217] MTD, §243.
[218] Facts, §31 and 35.

### 2. The economic crisis in Mekar should be considered when determining compensation

154. Awards of immense magnitudes can impose crippling burdens upon the State's economy and population.[219] Huge compensation awards require large divisions of resources from the paying countries and affect its population.[220] Consequently, a compensation must be assessed considering the actual economic circumstances of the State.[221] In *Himpurna* case tribunal limited damages to less than 10% of the sum requested, stating that enabling damages to be calculated to impoverish the State would constitute abuse of rights. [222]

155. The 2019 IMF report predicted negative growth for Mekar in addition to fall of the GDP and a colossal inflation rate.[223] Consequently paying USD 700 million demanded by Claimant would impose an unreasonable burden on Mekar, as it would have to transfer approximately twice the amount of its consolidated public spending.[224] This would negatively impact on Mekar's already weakening economy and its population. Therefore, Respondent invites Tribunal to reduce compensation due to the economic crisis in Mekar.

156. Therefore, Respondent asks Tribunal to recognise that Claimant's losses are not the consequence of Respondent's breach. In any event, if Tribunal rules that Respondent is responsible for Claimant's losses, it should apply the market value standard for determining compensation and find that it was already paid. Alternatively, if Tribunal decides that Respondent still owes compensation, it should be reduced.

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[219] Eritrea-Ethiopia, §22.
[220] *Ibidem.*
[221] *Ibidem.*
[222] Himpurna, §383.
[223] PO3, §4.
[224] *Ibidem.*

## PRAYER FOR RELIEF

In light of all submissions, Claimant respectfully requests Tribunal to find that:

1. Tribunal lacks jurisdiction over the present claims under Article 9 CEPTA and ICSID Additional Facility Rules,
2. While the leave sought for filing the *amicus* submission by CBFI should not be granted, tribunal should allow the leave sought by CRPU,
3. To find that Respondent did not breach Article 9.9 CEPTA and accorded FET to Claimant,
4. If Tribunal declares that Respondent breached Article 9.9 CEPTA, it should find that Respondent owes no compensation as it purchased Claimant's investment at market value. Alternatively, Tribunal should reduce the compensation due to Claimant's contribution to the loss and the economic crisis in Mekar.

Respectfully,

Respondent