TEAM POCAR

INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

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

Vemma Holdings, Inc.

(Claimant)

v.

The Federal Republic of Mekar

(Respondent)

Memorial for the Respondent

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IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration, 2010
ILC Articles	ILC, Articles on Responsibility of States for Internationally Wrongful Acts
ILC Commentary	ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (November 2001) UN Doc. Supp. No. 10 (A/56/10).
ICCPR	International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976)
ICSID AF Rules	International Centre for the Settlement of Investment Disputes Additional Facility Rules
Kuwait-Portugal BIT	Kuwait-Portugal Bilateral Investment Treaty (signed 23 July 2007, entered into force 28 May 2011)
New York Convention	1958 New York Convention on the Recognition and Enforcement of

	Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959)
Treaty of the Charaguamas	The Revised Treaty of Charaguamas, 2001 CARICOM Secretariat
United States-Argentina BIT	United States-Argentina BIT (signed 14 November 1991, entered into force 20 October 1994)
VCLT	Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980

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FTC Statement — The North America Free Trade Agreement ("NAFTA") Free Trade Commission's Statement on non-disputing party participation of 2003

List of Abbreviations

Art.	Articles
BAK	Bonooru's national currency, Bakugo
BIT	Bilateral Investment Treaty
Bonooru	The Commonwealth of Bonooru
Caeli	Caeli Airways
CBFI	The Consortium of Bonoori Foreign Investors
CRPU	The Committee on Reform of Public Utilities
CCM	Competition Commission of Mekar
CEPTA	Comprehensive Economic Partnership and Trade Agreement
FET	Fair and equitable treatment
FMV	Fair Market Value
Hawthorne	Hawthorne Group
Lapras	Lapras Legal Capital
ICSID	International Centre for the Settlement of Investment Disputes
ICSID (AF) Rules	International Centre for the Settlement of Investment Disputes

	Additional Facility Rules
Mekar	The Federal Republic of Mekar
Memorandum	Vemma's Memorandum of Association
MFN	Most-Favoured-Nation Clause
MON	Mekar's national currency, Mon
p.	Page
SCC	Sinnoh Chamber of Commerce
SOE	State-Owned Enterprise
SRB	SRB Infrastructure
Vemma	Vemma Holdings Inc.
Wiig	Wiig Wealth Management Group
¶/¶¶	Paragraph(s)

STATEMENT OF FACTS

Parties to the Dispute

1. The Claimant is Vemma Holdings Inc. (Vemma) is an airline holding company incorporated in Bonooru, with 100% ownership in Royal Narnian. In 1991, together with five major airlines from Europe, Asia, Latin America, and North America, the Royal Narnian created the Moon Alliance.

2. The Respondent is the Federal Republic of Mekar, which sits approximately 1,600 km to Bonooru's south. High regulatory intervention and late economic reforms started in 1994 affected Mekar's post-independence growth. Until 2003, Mekar's civil aviation industry consisted of Air Caeli and Caeli Airways before these two were merger into Caeli Airways in the same year. Mekar's currency is the Mekari MON.

Investment

3. Due to the part of privatization program by Republic of Mekar, the Claimant entered into a Share Purchase Agreement with Mekar Airservices Ltd. to purchase an 85% stake in the company. The remaining 15% shares were beneficially owned by the Mekari State through Mekar Airservices Ltd. Simultaneously, Vemma and Mekar Airservices Ltd. entered into a Shareholders' Agreement. As part of its purchase, Vemma inherited existing discounts on airport services and landing and navigation fees enjoyed by Caeli Airways at Phenac International Airport, in Phenac, Mekar, along with twelve relatively young A340 aircrafts.

Origins of the Dispute

4. Due to uncertain financial condition of Caeli Airways, Mekar started a privatisation program and sold a controlling stake in Caeli Airways. Claimant acquired an 85% stake in Caeli Airways and Mekar maintained 15% ownership through Mekar Airservices Ltd.

5. In April 2014, Mekar and Bonooru signed the Comprehensive Economic Partnership and Trade Agreement (CEPTA). The agreement entered into force on 15 October 2014. Mekar and Bonooru agreed to terminate the pre-existing BIT on 15 October 2014.

6. When the Claimant acquired an 85% stake in Caeli Airways, Claimant understand about Caeli Airways's debt, but the Claimant took an extravagant approach to its investment activities, funnelling funds towards rapid expansion and ill-strategized business plans instead of tending to long-term financial health. The Claimant ignored some warnings from the representatives of Mekar present on Caeli Airways' board. It is this risky strategy that precipitated into a precarious financial situation for the Claimant when the economic downturn hits Respondent.

7. Due to their step to using such a risky strategy by ignoring representatives of Mekar present on Caeli and doesn't take into considering uncertain economic conditions, Caeli Airways successfully being a venture generating net profit by offered prices below Caeli's competitors.

8. The significant development that occurs in Caeli Airways naturally drew the attention of the Competition Commission of Mekar ("CCM") and Caeli's competitors. It is important to understand that Claimant's jurisdiction is prohibiting any anti-competitive behaviour. The two investigations conducted by the CCM into Caeli Airways, and consequent fines imposed, were merely proper application of the domestic laws of Mekar, which were in force when the Claimant made its investment.

9. The CCM determined to placed caps on Caeli Airways' airfare to prevent it from earning supra-competitive profits. Caeli never protested the airfare caps, and there is no evidence the caps hurt its profitability in 2016. The airfare was only kept in place until 2019 due to clear evidence of anti-competitive behaviour by Caeli. As indicated, Mekar lifted the airfare caps as soon as Caeli's market share fell below 40%.

10. Mekari currency (MON) rapidly declined and Claimant noted that Caeli Airways unprofitable caused by unstable MON condition. Mekar's President passed Executive Order 9-2018 which granted subsidies for airlines operating in Mekar. Caeli Airways' application for subsidies under this Order was rejected by the Secretary, who did not

indicate the reasons for the dismissal. Foreign airlines such as Star Wings and JetGreen. both owned by holding groups from Arrakis, received subsidies under this program despite having received subsidies from their home States greater than Vemma received under the Horizon 2020 programme.

11. The Claimant fought Respondent in Mekari courts and Respondent won. Despite Mekar's victory, Claimant does not accept the award and was against the conduct of Mekar's judiciary. Claimant claims that they were denied justice, but actually Mekari courts gave the Claimant every opportunity to voice its grievances before the appropriate judicial authority.

12. The courts even managed to dispense justice speedily, as compared to the time it usually takes Mekari courts to render decisions in commercial matters. Importantly, the courts enjoy the discretion to recognize and enforce an arbitral award that is set aside in the country, or under the law of which the award was made. They appropriately exercised this discretion, considering the evidence on record and the public policy of Mekar.

13. The dispute regarding the Hawthorne offer was submitted to arbitration under the rules of the Sinnoh Chamber of Commerce. Mr. Rett Eichel Cavannaugh was selected as a sole arbitrator and on May 9th 2020 the award was released and based on the award, Respindent won the arbitration. Despite any issues during the arbitration, it was a legally legitimate award. Mekar's courts enforced the award on 23 August 2020.

Legal Efforts

14. Respondent has shown good faith by pursuing legal efforts through the Mekari courts and Sinnoh Chamber of Commerce and the awards were favorable to the Respondent. The dispute should have been regarded as resolved after the award is legally valid. Thus, the Claimant sent a notice of arbitration on November 15th 2020 and the arbitration proceeding pursuant to Article 9.16 of the Bonooru-Mekar CEPTA and Article 2 of the ICSID Additional Facility Rules to settle the dispute.

SUMMARY OF ARGUMENTS

15. **Jurisdiction *ratione personae*:** The Respondent argues that Vemma classifies as a SOE due to Bonooru's share in the company and Bonooru's (dominant) role in the enterprise. Due to the fact that Vemma classifies as an SOE, therefore Bonooru is liable of Vemma's actions, and that Bonooru shall be the party raising the issue to the Tribunal, not Vemma.

16. **Jurisdiction *ratione voluntatis*:** Due to the aforementioned argument that Vemma is an SOE, and shall be represented by Bonooru instead of Vemma, which makes the present dispute a State-to-State arbitration in which Mekar has not consented to. Moreover State-to-State arbitration is not included under ICSID. Therefore, the Respondent argues that the Tribunal does not have jurisdiction in the present dispute.

17. ***Amicus curiae* submissions:** The Tribunal shall grant leave sought for Mekar's CRPU's *amicus* submission and bar CBFI's *amicus* submission. Mekar's CRPU neither unduly burdens or would unfairly prejudice any parties due to its rather neutral stance, and that it has significant public interest in the arbitration proceeding. On the other hand, CBFI would unduly burden and unfairly prejudice the parties involved due to the membership of Lapras, which aids Vemma in the present dispute; and SRB and Wiig that are also pursuing similar arbitral proceeding against Mekar.

18. **Arbitrary measures:** There has been no arbitrary measures taken by the Respondent. investigation and airfare caps placed on Caeli were lawful to avoid anti-competitive behavior, and that a State has the right to regulate its market. Next, the usage of MON during a financial crisis was a measure to strengthen MON in the global currency market. A State is allowed to take measures to avoid further crisis. Lastly, Caeli is not entitled to any subsidy by taxpayers, nor that it is in like-situation with the other airlines receiving subsidies from Mekar.

19. **Denial of justice:** To be classified as a denial of justice, several thresholds must be met. The fact is that the Respondent has catered to Claimant's need through Mekari courts, despite the high case load. The delay was not unwarranted; it has been made

clear from the beginning that any case going through the Mekari courts would take a while to be catered to, due to the underfunding and the high case load relating to the financial crisis. The Claimant was unable to accept the Award decided in favor of Mekar. After the court proceeding, during the purchase plan by Hawthorne, Mekar was even willing to go through an arbitral proceeding through the SCC. Mekar is currently enforcing the award due to the fact that it is accommodated by the CEPTA. Again, the Claimant was unable to accept the Award decided in favor of Mekar and accused the sole arbitrator of corruption, with no regards of presumption of innocent and the arbitrator's privacy by bringing up an illegally obtained evidence.

20. **Creeping violations:** Claimant submits that there has been creeping violation that accumulated from the actions taken by Mekar. Respondent disagrees due to the fact that there is no such thing as creeping violations, as it was a term used by a Tribunal to make a synonymous analogy with creeping expropriation. There has been no expropriation claim raised by the Claimant, therefore this analogy cannot, and shall not be used against the Respondent.

21. **Compensation:** Mekar has paid $400,000,000 to Vemma which is the market value of Caeli. Market value is used instead of FMV due to CEPTA's provision on monetary damages. Art. 9.21 of the CEPTA clearly stated that the monetary damages should be at market value, unless specified on Art. 9.12, which regulates expropriation, in which in case of expropriation, the investor is to be remunerated at a FMV. There has been no expropriation issue raised by the Claimant, therefore it is not entitled to a compensation on FMV. Moreover, if the Tribunal wishes to award more monetary damages on behalf of the Claimant, the Tribunal shall take Mekar's dire financial situation into account, as it would disrupt Mekar's public funding funded by taxpayers' money to fund public services.

22. **Arbitration costs**: Respondent argues that the Claimant is to be responsible with all the costs of this arbitration. If the Tribunal decides that the Respondent is also to bear the costs of this arbitration, the Tribunal shall at least split the costs between both parties.

ARGUMENTS ON PROCEDURAL MATTERS

I. JURISDICTIONAL ISSUE

23. The Tribunal lacks jurisdiction under Chapter 9 of the CEPTA and under Article 25 of the ICSID Convention due to the fact that The Respondent stands by the opinion that Vemma is a state-owned enterprise (SOE), and thus, judging from its functionaries and its characteristics, Vemma shall be considered as a state entity under international law.

A. THIS TRIBUNAL LACKS JURISDICTION *RATIONE PERSONAE*

i. Despite privatization, Vemma remained under Bonooru's Control; therefore Vemma is acting under the direction of a State

24. After the privatization of BA Holdings, Vemma Holdings, Inc. (the Claimant) was founded to replace its predecessor. Despite its 'privatization', Claimant still carried its predecessor's main function; to serve Bonooru citizens' mobility rights under Article 70 of the Bonoori Constitution.[1] The Constitutional Court of Bonooru also made an emphasize that the founding document of Vemma, the Memorandum, will ensure that Royal Narnian will continue operating through routes to Bonooru's remote communities.[2]

25. Since the founding of Vemma, Bonooru has retained a minority, but influential stake at between 31% to 38%[3]–more than one fourth of its shareholding. Adding on top of that, no other shareholder holds more than a 7% stake in Vemma.[4] As the Bonooru's representatives on Vemma's board are present for every meeting, and consequently, the representatives form a majority of members present and voting when not all other shareholders attend, shows that Bonooru has control of the company. The sufficient vote proves control of the company, and the controller (Bonooru) can have a decisive influence on any decisions or resolution.[5]

[1] Annex I
[2] Annex III, ¶56
[3] Statement of Uncontested Facts, ¶10
[4] Procedural Order No. 4, ¶2
[5] *Caratube*, ¶253

26. It has been made clear by Bonooru's highest court, that the State shareholding in Vemma was preserved at all times for it to continue to perform governmental functions of BA Holdings, its predecessor[6], as stated by the Constitutional Court of Bonooru, on the case of the Privatization of BA Holdings. This is might be the case that the majority of the controlling shareholder do not have power of all the controlling shares.[7]

27. State-owned enterprise is owned by government agencies who exercise the ownership rights[8]. The Bonooru government could be seen exercising its ownership rights through the conditions seen on Vemma's Memorandum, the government of Bonooru remains a highly influential party in the operation of the company, and is catering to the Article 70 of the Constitution of Bonooru.[9] Therefore we see Vemma as a State entity, or at least an extension of a State entity, due to the fact that Bonooru is the only governmental shareholder in Vemma.[10]

28. Whether or not an SOE is acting as an agent for the government or discharging an essentially governmental function, a test was developed by Aron Broches[11] based on the Art. 5 and 8 of the ILC Articles. The test could be applicable to the present dispute as the Tribunal would have to determine if Vemma is acting on behalf of Bonooru by carrying out governmental function. The fact laid out on Vemma's Memorandum speaks for itself; that Vemma is acting on behalf of Bonooru by Carrying out governmental function. This was also supported by the Constitutional Court of Bonooru, which admitted that Bonooru will still retain its control within the company, in this case to carry out its previous functions when Vemma was still an SOE, carrying conducts on behalf of the Bonoori government.[12]

29. Previous tribunal awards have established that an investor with less than 50% share ownership can control a company.[13] Therefore we think that despite only retaining less than 50% shares in Vemma post-privatization, Bonooru was still able to control the

[6] Response on the Notice of Arbitration, ¶3
[7] *Kappes*, ¶147
[8] OECD (2018), Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices, p. 9
[9] Annex IV
[10] Procedural Order No. 4, ¶2
[11] The Broches Test was developed by Aron Broches to determine if an SOE is carrying out governmental functions.
[12] Annex III, ¶43
[13] *Aguas del Tunari*, ¶39

company, especially due to the fact that no other entities own more than 7% of the shares in Vemma.[14]

30. Vemma has also enhanced Bonooru's tourism infrastructure which has in turn, enhanced the mobility rights of Bonoori Population within the Greater Narnian Region and has been deemed as living up to the standards set by its predecessor.[15]

31. Even if the Tribunal does not consider Claimant as an SOE at the beginning of the investment, Bonooru made an acquisition of 55% stake in the company on 2 March 2021, which makes them qualify as an SOE[16] through the Airways Infrastructure Rescue Act.

32. After the takeover, its board of directors was replaced with government functionaries and its legal team was equipped with lawyers from Bonooru's justice department[17] in which could qualify as acting under the instructions of, or under the direction or control of the State in carrying out the conduct.

i. Vemma's acts shall be attributed to Bonooru

33. We argue that Bonooru shall take liability of Vemma's actions, making this a State-to-State arbitration, rather than an investor-State one.

34. In *Blount Brothers*, an issue was presented in which the Tribunal was determining whether Iran Housing Company falls within the definition of "Iran" as a State as any agency, instrumentality, or entity controlled under the Government of Iran. It was then concluded that any claims against the Iran Housing Company is a claim against Iran. This could be the case for Vemma too.[18]

35. In *Maffezini,* it has been said that SODIGA operates under the control of the State and operated as an arm of the State for the purposes of the economic development of the region of Galicia. Accordingly, as a State entity, its wrongful acts or omission may be

[14] Procedural Order No. 4 ¶2
[15] Ibid, ¶6
[16] Response to the Notice of Arbitration, ¶4
[17] Statement of Uncontested Facts, ¶65
[18] *Blount Brothers*, ¶20

attributed to the State.[19] The Respondent shares the same argument with the Claimant in *Maffezini*, in which any acts may be attributed to the state, therefore Bonooru shall step forward to represent itself in this dispute instead of Vemma. In *EBO Invest*, the Tribunal came to the conclusion that the SJSC airport shall be considered and treated as an organ of a State.[20] They referenced *Maffezini* on their Award.

36. In *Noble Ventures*, the Tribunal agreed with the Claimant's stance, in which they argued that the companies acted as if they were entities entitled by Romania, therefore they should be considered as an act of a State.[21] In this case, Vemma acted as the agent to carry out Art. 70 of the Constitution of Bonooru, therefore the State shall be held responsible for the present dispute, not Vemma.

37. The Tribunal in *BUCG* stated that it is a common ground that Article 25(1) of the ICSID Convention is not open to State-owned companies as claimants when acting as agents of the State.[22] Reciting our aforementioned argument, Vemma as Claimant, should've been considered as a State and therefore, ICSID doesn't have any jurisdiction regarding State-to-State dispute resolution.

38. The conduct of a person or group of persons shall be considered an act of a State under international law if they act on the instructions, or under the direction or control of that State in carrying out the conduct.[23]

39. A State can be responsible for a non-State entity that has been delegated a governmental authority[24] under the articles of 4, 5, 8 or 11 of the ILC Articles.[25] Under the same Articles, when the operation of an SOE is at the core of an international dispute, it is possible that the enterprise's conduct may engage the responsibility of the home State, either as an organ of the state, or as a body exercising elements of its governmental authority of the State.[26]

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[19] *Maffezini*, ¶72
[20] *EBO Invest*, ¶334
[21] *Noble Ventures*, ¶81
[22] *BUCG*, ¶31
[23] *Electrabel*, ¶7.63
[24] *InterTrade*, ¶203
[25] ILC Articles, Articles 4, 5, 8, 11
[26] *F-W*, ¶203

40. The Tribunal on *M.C.I.* finds that INECEL, should be considered, in accordance with international law, as an organ of the Ecuadorian State.[27] This is due to the fact that the INECEL was considered by the Claimant to be directed and controlled by Ecuador through its government officials. The Claimants maintain that the object and functions of INECEL include those reserved generally to State regulatory bodies.[28]

41. Actions of SOEs may be attributed to the State if the actions are made in the exercise of governmental authority.[29] This is similar to Vemma, which used to be controlled by the government, and after privatization still exercised functions that are usually reserved to governmental functions to serve its people.

42. Therefore, according to the aforementioned arguments that had been laid out, Vemma shall not be considered as a private entity. Vemma is an SOE acting as an agent of a State and therefore has to be considered as a State in the eye of this proceeding.

B. THIS TRIBUNAL LACKS JURISDICTION *RATIONAE VOLUNTATIS*

43. This Tribunal does not have jurisdiction *ratione voluntatis* as it has not consented to the State-to-State arbitration procedure under Chapter 9 (Article 9.16 and 9.17) of the CEPTA.[30] Besides, Art. 25 of the ICSID Convention speaks about the various elements of jurisdiction, including consent.

44. Claimant's activities reflect governmental functions instead of a commercial/for-profit function. As mentioned in the previous argument, Vemma fulfills that of an SOE, and therefore its actions are attributable to Bonooru. A consent by Vemma does not create rights and obligations under the ICSID Convention[31]. Under CEPTA, Mekar's consent is limited to disputes arising between a State and 'national of another state'.

[27] *M.C.I*, ¶225
[28] Ibid, ¶219
[29] *Al-Bahloul*, ¶170
[30] CEPTA, Art. 9.16, 9.17
[31] ICSID Convention, Art. 25

45. In order for the Centre to have jurisdiction over a dispute is to fulfill the jurisdiction *ratione voluntatis*, which requires consent from both parties.[32] We submit that the Tribunal upheld Respondent's concerns over jurisdiction *ratione voluntatis*.[33]

46. The Respondent argues that this dispute is indeed a State-to-State arbitration and therefore the Tribunal lacks jurisdiction *ratione voluntatis.*

II. AMICUS CURIAE

47. The term *amicus curiae* is taken from Latin, meaning "friends of the court". It is used to refer to a third party not involved in the dispute invited to speak to the court regarding a matter of law.

48. In this dispute, two Non-Disputing Parties have sought to be grant leave.[3435] The two parties are The External Advisors to the Committee of Public Reform Utilities (CRPU)[36] and the Consortium of Bonoori Foreign Investors.[37]

49. The presence of non-disputing party can be useful; it can provide new information and perspective on the case. It may affect the outcome of the dispute and lead to a fairer decision in the long run. As we may know, this plays an important role in investment disputes when important public interest issues are often at stake.[38]

50. We believe that there is a clear case of public interest in this arbitration procedure, therefore we believe that the Tribunal shall grant leave sought for the *amicus* submission submitted by Mekar's External Advisors to the CRPU and bar the submission submitted by CBFI, due to the fact that they lack public interest in participating in the present arbitration and that they could unfairly prejudice the Respondent.

[32] *Phoenix*, ¶54
[33] *Itisaluna*, ¶225
[34] Amicus Submission by The External Advisors to the Committee of Public Reform Utilities
[35] Amicus Submission by The Consortium of Bonoori Foreign Investors
[36] Amicus Submission by The External Advisors to the Committee of Public Reform Utilities
[37] Amicus Submission by The Consortium of Bonoori Foreign Investors
[38] Nicolette Butler, Non-Disputing Party Participation in ICSID Disputes: Faux Amici?, p. 148

A. THE TRIBUNAL SHALL GRANT LEAVE SOUGHT BY EXTERNAL ADVISORS TO THE COMMITTEE ON REFORM OF PUBLIC UTILITIES (CRPU)

51. Amici are members of Mekari civil society whose professional focus is investment banking.[39] They possess a general interest in promoting fair business practices in Mekar.

i. The Participation by Mekar's External Advisors to the CRPU does not unduly burden the parties

52. It is the Tribunal's task to ensure that the participation of non-disputing party does not disrupt the proceedings or unduly burden or unfairly prejudice any parties involved in the proceedings.[40]

53. The Tribunal in *Bear Creek* granted the leave sought for the non-disputing party in its proceeding.[41] The reason for the Tribunal to grant the leave sought was due to the fact that the non-disputing party would not unduly burden nor unfairly prejudice either one of the parties.

54. The Claimant may argue that the participation of CRPU might add a new jurisdictional question,[42] but the fact is that there has been tribunals that accepted new issues to be raised during the proceeding.[43]

ii. The Participation by the Mekar's External Advisors to the CRPU would provide an insight based on public interest

55. One of the criterias of why a party shall be admitted as a non-disputing party in an arbitral proceeding is that there is a clear concern on public interest raised by the petitioner.[44]

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[39] Amicus Submission by External Advisors to the Committee on Reform of Public Utilities, ¶2
[40] *Tallinn*, ¶14
[41] *Bear Creek*, ¶58
[42] Vemma's Application to Bar the Amicus Submission by Mekar's External Advisor to The Committee on Reform of Public Utilities, p. 22
[43] *Merrill*, ¶8
[44] FTC Statement, Free Trade Commission: Statement of the Free Trade Commission on non-disputing party participation, B.6

56. The Respondent supports openness and transparency in arbitration proceedings under Chapter 9 of the CEPTA, including through the appropriate participation of *amici*.[45] Therefore, we think that it is important to acknowledge that there has been corruption following Vemma's investment in Mekar. Since the application for *amicus* submission became public, the Constitutional Court of Bonooru has taken *suo moto* cognizance of the allegations against Mr. Dorian Umbridge.[46] This is important to find out whether the investment done by Vemma was within the legal framework.

57. It is important for the participation of non-disputing parties to have the desirable consequence of increasing transparency of investor-state arbitration.[47] We thereby agree that granting the leave sought for the CRPU would be helpful in increasing the transparency of the present arbitration proceeding, especially when the merits of the dispute concerns denial of justice and alleged corruption pinned by Claimant onto the Respondent.

58. The purpose of having *amicus* in an arbitration procedure is to equip the Tribunal with arguments, expertise, and perspectives that the parties may not have provided.[48]

59. The Respondent sees a public interest brought by CRPU into the present dispute. The Tribunal's willingness to receive the submission might support the process in general and this arbitration in particular; whereas a refusal could do harm.[4950] The Respondent does agree with the Tribunal in *Methanex* as the acceptance of CRPU as a Non-Disputing Party would help the process of the present dispute through the arbitration process.

60. A different expertise, experience or perspective from that of the Disputing Parties would give the Tribunal access to the widest possible range of views. By ensuring all that, the arbitral process shall be strengthened.[51]

[45] Mekar's Application to Bar the Amicus Submission by the Consortium of Bonoori Foreign Investors, p. 24
[46] Procedural Order No. 3, ¶13
[47] *Aguas Provinciales,* ¶21
[48] Ibid, ¶23
[49] *Biwater*, ¶51
[50] *Methanex*, ¶49
[51] *Apotex*, ¶22

61. When a non-disputing party has been proven to have significant interest in an arbitral proceeding, then the Tribunal shall grant leave to them.[52] A significant interest is enough ground for a Tribunal to grant leave sought by the non-disputing party.[53]

62. *Amicus* briefs that have gone through a proper screening process will contribute to the better quality of an investment arbitration award, by providing a broader perspective to the Tribunal, and also offering comprehensive factual and legal arguments.[54] We think that if the Tribunal grants leave to CRPU, the Tribunal would have a broad perspective and it would help the arbitration proceeding.

63. Therefore, we are asking the Tribunal to make a decision on granting leave sought for *amicus* filed by CRPU.

B. THE TRIBUNAL SHALL BAR THE AMICUS SUBMISSION BY THE CONSORTIUM OF BONOORI FOREIGN INVESTORS

64. The Consortium of Bonoori Foreign Investors (CBFI) is a is a non-profit industry association that represents Bonoori investors investing in the Greater Narnian region and internationally.[55]

i. There is lack of public interest in CBFI's participation in the proceeding

65. We have read and examined the *amicus* submission submitted by CBFI and the Respondent hereby thinks that the Tribunal shall bar the *amicus* submission by CBFI as CBFI lacks the motivation based off of public interest in this arbitration procedure.[56] This definitely defies the benefit of allowing a non-disputing party into the arbitration proceeding; as the benefits are as following; i.e. greater transparency, enhanced legitimacy, and public interest in cases.[57]

[52] *Lone Pine*, ¶8
[53] *Vattenfall*, ¶22-23
[54] Tomoko Ishikawa, Third Party Participation in Investment Treaty Arbitration, p. 3
[55] Amicus Submission by the Consortium of Bonoori Foreign Investors, ¶2
[56] Mekar's Application to Bar the Amicus Submission by the Consortium of Bonoori Foreign Investors
[57] Eugenia Levine, Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third Party Participation, p. 200–224

66. The Tribunal in *RFP* cited Section 6(B) of the FTC Statement, in which they determine whether there is a public interest in the subject-matter of the arbitration, and that the non-disputing party submitting submissions to participate in the arbitration proceeding has to have significant interest matching with the matter of public interest in the arbitration.[58]

67. When a non disputing party fails to meet the thresholds of public interest, they get rejected[59] and even if the Tribunal only doubt that there is no relevant interest, they get rejected by the Tribunal.[60]

68. Therefore, we think that the Tribunal shall bar the *amicus* submission filed by CBFI due to lack of public interest.

ii. CBFI might unfairly prejudice and unduly burden the Respondent

69. Problem arises when a party whose independence and motive are questionable. The fact that CBFI has ties to Lapras Legal Capital, which CBFI admitted through their *amicus* submission. Lapras Legal Capital's relationship with Vemma is based off Lapras' role in advising Vemma for its arbitration procedure against Mekar.[61]

70. Another problem with the participation of CBFI is that two other members of the consortium, Wiig and SRB are also currently pursuing claims against Mekar under the same Chapter, Chapter 9 of the CEPTA. In what way, would the participation of CBFI would give a fair insight for the Tribunal? The Respondent hereby thinks that this is a serious matter of unfair prejudice and would unduly burden the Respondent.

71. A Tribunal shall ensure neither disputing party is unduly burdened or unfairly prejudiced by such submissions.[62] The Respondent argues that the presence of Lapras Legal Capital as one of the members of CBFI would cause unfair prejudice against Mekar as Lapras Legal Capital is actively advising Vemma for the present procedure against Mekar. The Tribunal in *Micula* admitted the *amicus* submission but only as

[58] *RFP*, ¶2.6
[59] *Apotex*, ¶¶22-23
[60] *Lone Pine*, ¶6
[61] Amicus Submission by the Consortium of Bonoori Foreign Investors
[62] *Eli Lilly*, ¶J

amicus curiae and not *amicus actoris vel rei*—the *amicus* stall stay as a friends of the court and not friends of either Party.[63]

72. The presence of a third party, should not risk the disruption of the arbitration proceedings, or burden or unfairly prejudice any Party or Non-Disputing Party.[64] The fact that Lapras has ties to CBFI, and at the same time to Vemma, and that two other members of the consortium are going through similar arbitration proceeding towards Mekar, would defy this standard of not giving unfair prejudice towards the party.

73. The concern here is that they could have obtained information from parties and it is clear that the presence of *amicus* is to provide a new insight, not to obtain evidence nor information from the participating parties.[65]

74. The Tribunal in *Border Timbers* denied the application of a non-disputing party due to the fact that the Tribunal found that the circumstances surrounding these Petitioners are such that the Claimants may be unfairly prejudiced by their participation and the Application must therefore be denied.[66]

75. The circumstances of the application of the non-disputing party has given rise to legitimate doubts as to the independence or neutrality of the applicants. The lack of independence and neutrality of non-disputing party is a sufficient ground to deny their application.[67] The Tribunal shall test the lack of independence and neutrality of CBFI.

76. The Tribunal shall not permit anything that is unduly burdensome towards the parties involved in the arbitral proceeding. This is to ensure that no disputing party is negatively affected by the presence of the non-disputing party.[68]

77. The Respondent requests the Tribunal to bar the *amicus* submission submitted by the CBFI to avoid unfair prejudice and unduly burden towards the Respondent, due to the

[63] *Micula*, ¶27
[64] *Pac Rim,* p. 9
[65] *Foresti*, p. 1
[66] *Border Timbers,* ¶62
[67] *von Pezold*, ¶56
[68] *UPS*, ¶¶69-71

involvement of Lapras in the present dispute, and that several members of the consortium are also going through similar arbitral proceedings against Mekar.

ARGUMENTS ON SUBSTANTIVE MATTERS AND COMPENSATION

I. FAIR AND EQUITABLE TREATMENT

78. Despite Claimant's claims on FET breach and denial of justice pinned onto the Respondent, we do believe that Claimant has taken the wrong approach to understand the issue as a whole. The Respondent rejects the accusation of the FET breach and believes that the Respondent has treated the Claimant fairly and equitably in accordance to the Article 9.9 of the CEPTA. The Tribunal in *Mondev* stated that a judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.[69]

A. THERE HAS NOT BEEN ANY ARBITRARY MEASURES NOR ACTIONS COMMITTED BY THE RESPONDENT

79. In *ELSI* the term "arbitrary" was defined as willful disregard of due process, an act that shocks or surprises a sense of judicial propriety.[70] There has no breach on any clause nor provisions under Chapter 9 of the CEPTA. If anything, the actions taken by Mekar as a host State to the investment was done solely as an act of good faith in the present investment.

i. The investigations conducted by the CCM are lawful

80. Caeli's rapid expansion in Mekar drew the attention of the CCM, which launched a *suo moto* investigation into its activities.[71] The investigation was launched in order to investigate whether or not Caeli had conducted predatory pricing strategies. At the date of the investigation, (there had been a press release dating 9 September 2018) Caeli enjoyed 43% market share in Mekar.

81. Claimant claimed that the investigation was illegal under the *Monopoly and Restrictive Trade Practice Act, As Amended in 2009*[72], but Respondent disagrees. Under the Act,

[69] *Mondev*, ¶118
[70] *ELSI*, ¶128
[71] Statement of Uncontested Facts, ¶36
[72] Notice of Arbitration, ¶14

the The CCM may open an investigation into behaviour it deems anti-competitive, *suo moto* if it meets certain circumstances.

82. While Claimant argues that Caeli did not exceed the 50% threshold as mentioned in the act, together with its Moon Alliance g, the market share did exceed 50%, which is 54%. The Act also constituted that the CCM may open an investigation if the corporation poses a unique thread, and/or have or are likely [in the near future], push competitors out of the market.

83. Not only that it may open an investigation if the aforementioned situation happened, it shall also open an investigation into potentially anti-competitive behavior, if the corporation has at least 10% of market share (Chapter III, Section 3(a)) and there has been a complaint (Section 3(b)).[73]

84. The European Court of Justice in the *Hoffman-La Roche* case stated that the dominant position of an entity relates to a position of economic strength enjoyed by the relevant entity, which enables it to prevent effective competition being maintained on the market by affording it to behave to an appreciable extent independently of its competitors, and ultimately of the customers.[74]

85. The Revised Treaty of Charaguamas states:

> An enterprise holds a dominant position in a market if by itself or together with an interconnected enterprise, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors.[75]

86. Based on Art. 178(a) of the aforementioned Treaty, an enterprise like Vemma would be considered as an enterprise with dominant position due to its market share. On Art. 178(b), it is stated that if there was two enterprises, they should be treated as interconnected if they were a subsidiary of the other or subsidiaries of the same parent enterprise. The fact that Royal Narnian is an airline operating under Vemma fits the requirement of 'interconnected enterprise' mentioned in the model BIT.

[73] Monopoly and Restrictive Trade Practice Act, as Amended in 2009
[74] *Hoffmann La Roche*, ¶38
[75] Revised Treaty of Charaguamas, Art. 178(a); Determination of Dominant Market Position

87. In Chapter III, Section 3(a) it has been said that there may be an investigation when there has been a complaint filed by (a) direct competitor(s).[76] We could see that there has been a report made by competitors of Caeli in the Greater Narnia Region.[77] As stated by the Act, the investigation launched was lawful and protected by Mekar's laws.

88. Not only it is protected by law, it is also protected by the CEPTA in Art. 9.8 regarding the right of a State to regulate, which reads that the Parties of an investment recognize their right to regulate in their territories in order to achieve consumer protection[78]. In order to protect the market and the consumers, it is important for Mekar to start an investigation, as there has been an allegation on predatory pricing and a report filed by the competitors in the market.

89. In the next paragraph, it is stated that for greater certainty, when a Party regulates including through modification to its laws, even if it interferes with an investor's expectations or negatively affects an investment, does not count as a breach of an international obligation under the said Section.[79] Therefore, Vemma cannot accuse Mekar of acting arbitrarily towards Caeli, as Mekar's actions are protected under this paragraph of Art. 9.8.

90. As claimed by Vemma, Claimant argued in its Notice of Arbitration that the investigation by CCM was 'unfair and arbitrary'[80]. Respondent would argue that the actions taken by Mekar is not arbitrary and is rather fair. 'Arbitrary' is defined as 'depending on the will alone', 'without cause based upon the law'.[8182]

ii. The airfare caps placed on Caeli and the fine was imposed was to prevent anti-competitive behavior

91. The CCM placed caps on Caeli's airfare to prevent it from earning supra-competitive profits in the future. The caps were set reasonably above the rates Caeli charged on set

[76] Monopoly and Restrictive Trade Practice Act, as Amended in 2009
[77] Statement of Uncontested Facts, ¶38
[78] CEPTA, Art. 9.8.1
[79] Ibid, Art. 9.8.2
[80] Notice of Arbitration, ¶15
[81] Black's Law Dictionary, 'Arbitrary'
[82] *Siemens*, ¶318

routes.[83] There were no proof that these airfare caps hurt Caeli's profitability in 2016, and Caeli did not protest against the placement of the caps.[84]

92. In *AES,* the Respondent (Hungary) had placed price caps towards the Claimant and that the Respondent claimed that the Claimant did not show that it was an issue for them.[85] The Tribunal ruled in favor of the State as they claimed that there are two elements that required to be analyzed to determine whether an act of a State was unreasonable; which was the existence of a rational policy and the reasonableness of the act of the state in relation to the policy.[86]

93. The fines imposed on Caeli[87] were to regulate Mekar's domestic competition. Besides, after the First Investigation, the CCM report found a breach of Mekar's antitrust law by Caeli, and after the Second Investigation, the report found that Caeli has abused its dominant position to extract additional provileges in airport service fees from Phenac International Airport, and eventually push other competitors off the market.[88]

94. In *Global Telecom*, it was said by the the Respondent (Canada) that it would like to exercise its sovereignty by carrying out the lawful regulation of domestic commerce and competition[89]; it was then decided by the Tribunal that Canada hadn't broken any clauses in the BIT as Canada was only carrying out its task in regulating domestic competition.[90]

95. Another example could be seen in which the Tribunals saw that the Respondent's actions in which was seen by the Claimant as arbitrary, was just merely a policy to halt anti-competitive behavior and to adapt to modern market conditions.[91]

[83] Statement of Uncontested Facts, ¶37
[84] Loc. cit
[85] *AES*, ¶9.2.11
[86] Ibid, ¶10.3.7
[87] Statement of Uncontested Facts, ¶45, 49
[88] Loc. cit.
[89] *Global Telecom,* ¶698
[90] Ibid, ¶708
[91] *Mamidoll,* ¶¶247-248, 795

iii. Mekar's decision to enforce the usage of MON for all transaction within the State is lawful

96. The Claimant has accused Mekar on purposefully discriminating Caeli through its policy on the usage of MON for all transactions within Mekar. This is not the case. IMF had stated that Mekar needs to establish credibility in the [local] currency to avoid a debilitating economic situation[92]; and the path that Mekar chose in this situation was to require *all* companies to operate using the Mekari MON instead of foreign currencies.[93] The policy enforced by Mekar is not only reserved to Caeli. It was enforced towards all companies operating in Mekar.

97. In *Morris,* it has been said that it is common ground in the decisions of more recent investment tribunals that the requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances.[94][95]

98. In *Daimler*, the Respondent (Argentina) had a full-fledged currency crisis ensued, provoking political, social, and economic consequences so devastating that the Government of Argentina has termed them a "collapse of the state." The Government of Argentina then applied a few measures to halt the State from collapsing. Argentina applied that all transactions and debt must be paid using Argentine Pesos.[96] The Tribunal the ruled in favor of State, due to the fact that the Tribunal acknowledges Argentina's right to regulate its economy both in times of economic crisis and otherwise.[97]

99. In a crisis situation government authorities may use a broad range of powers without incurring in or affecting international responsibility"[98][99] which regards to a nation's sovereignty in deciding the actions to be taken during a crisis. Hence why Mekar's

[92] Statement of Uncontested Facts, ¶39
[93] Ibid, ¶42
[94] *Morris*, ¶422
[95] Also citing *Impregilo*, ¶¶290-291; *El Paso (II)*, ¶183
[96] *Daimler*, ¶¶40-41
[97] Ibid, ¶100
[98] *Metalpar*, ¶136
[99] *Sea-Land*, ¶48

actions to combat the currency crisis, which is making is obligatory for all transactions to use MON, shall not be considered affecting its international responsibilities.

100. Hence, we submit that Mekar's decision to implement the rule that all businesses operating in Mekar shall use MON is lawful, reasonable, and was implemented in regards of the currency crisis.

iv. The subsidy does not break Most-Favored-Nation clause

101. Most-favored-nation (MFN) clause in an investment agreement obliges a host country to treat a foreign investor at least as favourably as investors from any third country.[100] In this case, Vemma has claimed that a subsidy has broken the MFN clause.

102. Under the Executive Order 9-2018, Caeli Airways and Larry Air are not eligible for subsidy.[101] This is not without reason; Larry Air is an SOE as it is a completely government-owned[102], and Mekar sees Caeli, which is owned by Vemma, considered by Respondent as an SOE.

103. On Art. 9.7 the CEPTA, most-favoured-nation clause is said to be treatment no less favourable than the treatment it accords in like situations.[103] We could see that in this situation, Larry Air and Caeli are in the same situation, which both are government-owned and operates under the directions of a government.

104. The two airlines in like situations, Larry Air and Caeli, are government-owned and neither received subsidy, while the other airlines receiving subsidies are privately-owned, therefore there is no likeness between them. For a measure to be discriminatory, two objective similar situations must be treated differently,[104][105][106] and that for a situation to be considered breaching MFN clause, two different investors must be in

[100] *Ronald Kläger,* 'Fair and Equitable Treatment' in International Investment Law
[101] Ibid, ¶47
[102] Loc. cit
[103] CEPTA, Art. 9.7.1
[104] *Ulysseas*, ¶293
[105] *Goetz,* ¶121
[106] *Cavalum,* ¶416

like-situations and are treated differently.[107] The standard of "non discrimination" requires a rational justification of any differential treatment of a foreign investor.[108]

105. Two separate investors were similarly situated and that the two investors were treated differently.[109] When it was found that the situation of the two investors are different[110], it explained the reason of the different treatment between the two. Discriminatory treatment are only applicable towards two investors in like situation receiving two different treatments.[111]

106. The threshold of MFN clause is that it should be applied only to those investors or investments that are 'in like circumstances' or 'in similar situations' to investors or investments with which a comparison is being made[112], which is not the case with the present dispute. Again, Larry Air and Caeli are in a similar situation, in which are government-owned (SOEs) and neither received subsidy under the Executive Order.

107. In order to determine whether a treatment is discriminatory, it is necessary to compare the treatment challenged in the dispute with the treatment of persons or things that are in a comparable situation.[113][114]

108. In *Vento*, the Tribunal concluded that the difference was in the type of investment, therefore there is no like-situation or similar circumstances, and the Tribunal rejected the claim.[115] In here we could see the difference in the airlines that received subsidy with Larry Air and Caeli, as the foreign investor or the investment must be in like circumstances to an investor or investment of the Respondent State.[116] There is in no way that Claimant is in like circumstances with the airlines receiving subsidy, as Claimant is considered by Mekar as an SOE.

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[107] *Berschader*, ¶20
[108] *Saluka*, ¶460
[109] *Parkerings*, ¶225
[110] Ibid, ¶365
[111] *Ameritrade*, ¶128
[112] *Çap*, ¶785
[113] *Olin*, ¶202
[114] *Total*, ¶210
[115] *Vento*, ¶¶241, 249
[116] *Corn Products*, ¶¶116-117

109. Besides, the Draft Pan-African Investment Code states that the national treatment clause does not apply to subsidies or grants provided to a government or a State enterprise, including government-supported loans, guarantees, and insurance. In this dispute, the clause does not apply because Mekar has the right to choose which investor would receive subsidies, as it is provided by Mekar.[117]

110. If the Tribunal wishes to address this further, we shall keep in mind that the Claimant bears the burden of proof of what is and what is not considered "in like situations".[118][119]

111. Therefore, we submit that the Respondent's decision to not grant subsidy to Larry Air and Caeli is not an arbitrary decision and does not break the MFN clause.

v. Mekar's decision to halt Hawthorne's purchase is protected under the Shareholders' Agreement

112. Under the Shareholders' Agreement, Mekar has the right of first refusal.[120] Upon receiving *bona fide* offer from a third party, Vemma would require to offer Mekar Airservices Ltd. the right to purchase the shares at the price offered.[121]

113. In *Phoenix*, the Tribunal adopted the principle of *bona fide* or good faith, which refrain any legal entities to take unfair advantages relating motives and purposes of their legal actions.[122] Meanwhile In *Hamertes*, the Tribunal stated that an investment would not be protected if it violates the host State's domestic law.[123] Unfortunately, Vemma secured an offer from Hawthorne, which associated to Vemma through the Moon Alliance, along with Royal Narnian.[124]

114. Respondent believes that, if Hawthorne enjoyed Vemma's share in Caeli, once again, there will be an anti-competitive behaviour conducted by Caeli, together with Royal

[117] Draft Pan-African Investment Code, Art. 10
[118] *Cengiz*, ¶526
[119] *Thunderbird*, ¶¶175-176
[120] Shareholders' Agreement, Art. 39.1
[121] Ibid, Section 1(a)
[122] *Phoenix*, ¶107
[123] *Hamertes*, ¶123
[124] Statement of Uncontested Facts, ¶56

Narnian, which violates *Monopoly and Restrictive Trade Practice Act, As Amended in 2009* and the model BIT, *Revised Treaty of the Charaguamas.*

B. THERE HAS NOT BEEN A DENIAL OF JUSTICE

115. The accusation pinned on Respondent regarding "denial of justice" is a premature accusation and does not mirror a thorough examination of the whole situation during the legal proceeding in Mekar and in the arbitration proceeding taking place in Sinnoh Chamber of Commerce. The Respondent believes that there has not been a denial of justice, in contrast to Claimant's claims.

i. Mekari Courts have catered to Claimant

116. On the 27th of March, 2018, Caeli registered its claims against CCM for a judicial review on the airfare caps placed.[125] The hearing was scheduled to take place in April 2019 due to a huge influx of cases due to the economic crisis in Mekar. Despite the huge influx of cases, the court still catered to and heard Caeli's suit, despite the rejection of the merging of the airfare caps hearing and the hearing for appeal against the MON 2,000,000 fine by the CCM.

117. There is denial of justice if there has been denial in access to courts.[126] A denial of justice could be pleaded if the relevant courts refuse to entertain a suit.[127] In this case, Respondent has never denied Claimant's rights to go through the legal proceeding in Mekar, and there has even been an award that ruled on behalf of Mekar. The Claimant cannot deny the fact that their request have been heard before the Mekari Courts in 20 January 2019[128], even if it was denied a few days later on 26 January 2019, and that there had been a hearing taking place on 25 to 27 April 2019.[129]

118. An opinion from Scholar Christopher Greenwood on the denial of justice under international law, there is denial of justice in international law only if there is clear

[125] Ibid, ¶44
[126] *Krederi*, ¶451
[127] *Azinian*, ¶102
[128] Statement of Uncontested Facts, ¶50
[129] Ibid, ¶52

evidence of discrimination against a foreign litigant.[130] There has been no discrimination issue regarding the legal proceeding raised by the Claimant in this dispute.

119. In *Metalclad*, the Tribunal decided that there had been denial of justice, but that was decided on the basis of the denying of meeting with the Municipal Town Council, in which Metalclad received no invitation to.[131] In *AMTO*, it was also the case; they cited denying access to courts[132] as a form of denial of justice. This is not the case in the present dispute, as Mekari courts have tried its best to hear the plea from Vemma's side of the dispute. Mekari courts have not denied anything that could classify as denial of justice as seen in *Metalclad* and *AMTO.*

120. We think that the Claimant's reason as in why Claimant is filing for denial of justice is due to the fact that Claimant is unable to accept their loss at Mekari courts. Even if Respondent misapplied Mekar's domestic law during the proceeding, Respondent still does not meet the threshold of denial of justice. The Tribunal in *Agility* found that denial of justice claim is not to made out merely because the court misapplied the domestic law.[133]

121. The Tribunal in *Infinito* stated the there is denial of justice when there is a denial, unwarranted delay or obstruction of access to courts.[134] Yes, there was delay, but it was not unwarranted. The fact that Mekari courts were overflowing with cases due to the financial crisis[135] is enough to give a reason for the delay in the court proceeding. But there has not been any denial or obstruction of access for the Claimant when it filed for its claims through Mekari courts.

122. The Respondent can only be held liable for denial of justice, [136][137] if the Claimant could prove that the Mekari court system fundamentally failed to serve Claimant.

[130] *Loewen*, ¶14
[131] *Metalclad*, ¶54
[132] *AMTO*, ¶75
[133] *Agility*, ¶212
[134] *Infinito*, ¶438
[135] Statement of Uncontested Facts, ¶44
[136] *Liman*, ¶279
[137] *Lindercón*, ¶228

Claimant's inability to accept the ruling against them does not classify as denial of justice.[138]

123. Mekari courts have accepted the complaints and catered to the Claimant. Even when state officials are acting in good faith towards investors, there will sometimes be controversial judgements, mistakes in following procedures, et cetera. State authorities are faced with demands on their administrative resources and there might be delays or limited time. These imprudent exercise of discretion or even outright mistakes do not lead to a breach of the international minimum standard[139] on denial of justice.

124. A Tribunal's role is not to correct procedural or substantive errors that might have been committed[140] by the courts in Mekar. The evidentiary threshold to establish a claim on denial of justice is also very high.[141] Hence, Respondent still stands with is original argument in which Respondent does not think that Mekari courts have done anything to be classified as denial of justice in the eye of international law.

125. If anything, Mekari courts have helped the Claimant settle its dispute, and Claimant's claims are solely based on Claimant's incapability to accept the Judgement released by Mekari courts.

ii. There has been a premature accusation regarding the alleged bribery of Mr. Cavannaugh

126. On 14 June 2020, a report was released by the Centre of Integrity in Legal Services (CILS)[142]. It said that Mr. Cavannaugh had received bribes from representatives of Mekar Airservices in order to rule a decision in favor of Mekar.

127. Not only that a report was released, CILS also released an audio recording allegedly capturing a conversation between Mr. Cavannaugh, the sole arbitrator chosen to run the arbitration proceeding between Vemma and Mekar regarding the offer from Hawthorne Group.[143]

[138] *Alghanim*, ¶¶476-479
[139] *Clayton*, ¶437
[140] *H&H*, ¶400
[141] Loc. cit
[142] Annex XII
[143] Statement of Uncontested Facts, ¶60

128. Respondent believes that there has been a premature accusation regarding the alleged bribery. Respondent does not think that Claimant could pin an allegation as serious as bribery based off of a report in which the authenticity shall be questioned.

a. The evidence was taken without the consent of Mr. Cavannaugh

129. IBA Rules stated that The Arbitral Tribunal may, at the request of a Party or on its own motion, exclude evidence obtained illegally.[144]

130. The Tribunal on *EDF* rejected Claimant's request for an evidence, which was an audio recording on its Procedural Order No. 3.[145] The Tribunal rejected the Claimant's request due to the fact that the audio was acquired through illegal means (without the party's consent), under Romanian Law, the Claimant stood no chance in bringing an audio evidence into the arbitration proceeding due to the fact that it was obtained illegally.

131. Moreover, if in any events the recording was indeed the original, unfabricated recording of Mr. Cavannaugh, the audio evidence was still obtained without the consent of everyone involved.

132. The Claimant also has shown that it does not regard the privacy of Mr. Cavannaugh, and it breaches Article 17 of the ICCPR:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

It is clear that there has not been any regards for respect for Mr. Cavannaugh's privacy.

133. It is important that arbitral tribunal respects the privacy of everyone involved, be it directly, or indirectly, in an arbitral proceeding.

[144] IBA Rules, Art. 9.3
[145] *EDF*, ¶49

b. The evidence taken could have been fabricated, or might not even belong to Mr. Cavannaugh

134. The Tribunal on *Libananco* stated that they would only accept the audio recording if the if the Tribunal is satisfied that they were accurate transcriptions of actual telephone recordings.[146] They found that the exhibit could be manipulated without any detection through third parties.

135. The Respondent argues that the recording could have been manipulated, as nowadays there are third parties that are able to manipulate certain digital datas, such as videos, audio recordings, and documents. There is no guarantee that the audio brought in by CILS and by Claimant as a base to pin corruption and bribery onto Mr. Cavannaugh is real.

136. The Respondent shall not be burdened with proving if the recordings are indeed the recordings of Mr. Cavannaugh's voice.

137. The Tribunal in *EDF* stated that the burden of proof lies on the Claimant, as the Claimant was the one to pin the allegations on Mr. Weil, EDF's the Chairman and Chief Executive Officer. They then stood on Respondent's side, arguing that the Claimant has not given a legible evidence that the bribery did take place.[147]

138. Based on the Tribunal at *EDF*, we therefore request that the Claimant be responsible for the burden of proof it shall bear after pinning allegations on Mr. Cavannaugh.

c. Under the notion of presumption of innocence, Mr. Cavannaugh shall not be declared corrupt until there has been a lawful judgement

139. Bribery is a criminal offence,[148] in which the offeror and the recipient could be criminally charged. Therefore, the notion of presumption of innocence shall apply to this case.

[146] *Libananco*, ¶376
[147] *EDF*, ¶232
[148] Black's Law Dictionary

140. In *Fraport,* it is stated that the notion of presumption to innocence exists to convey the idea that nobody shall be held responsible for any misconduct without first being heard.[149] The allegation of corruption has not been first clarified through a lawful legal proceeding to prove whether or not Mr. Cavannaugh did indeed accept a bribe, instead, the Claimant went to the court in Sinnoh to set aside the Award.[150]

141. Various international human rights bodies consider a violation occurs whenever public authorities make public statements which prejudge the outcome of particular criminal proceedings.[151] In this case, Sinnoh court made an annulment even before Mr. Cavannaugh was declared guilty by a court.

142. In *Awdi,* the Tribunal cited Art. 6.2 of the Human Rights Convention, stating that:

> […] everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.[152][153]

Presumption of innocence has also been a customary rule in international law, in which the Claimant shall also abide by in respect of the allegation against Mr. Cavannaugh.

143. In conclusion, the recording collected shall be declared illegally obtained without the consent of the person(s) involved, is prone to fabrication through a third party application, and that Mr. Cavannaugh shall have the benefit of the doubt and deserves to go through a lawful investigation to prove his alleged corrupt arbitration process. The fact that the Respondent is very concerned about the presumption of innocence towards Mr. Cavannaugh shows Mekar's commitment to integrity and due process of law, as one of the main standards for FET.[154]

iii. The enforcement of the SCC Arbitration Award is lawful and is protected under CEPTA

144. The Respondent submits that the enforcement of the Award is lawful as it is protected under CEPTA under Art. 9.21 of the CEPTA. It is stated that a disputing party may not seek enforcement of a final award until a court has dismissed or allowed an application

[149] *Fraport,* ¶123
[150] Statement of Uncontested Facts, ¶60
[151] *Al-Waraq,* ¶574
[152] Human Rights Convention, Art. 6.2
[153] *Awdi,* ¶80
[154] *Rumeli,* ¶33

to set aside or annul the award.[155] Therefore we argue that Mekar can seek enforcement of the award as the Sinnoh court has ordered to set aside the award.

145. Moreover, in Art. V(1) New York Convention, the word used was "may"—when applied, it implies that there is no obligation for the parties to completely reject the enforcement of the said Award that has been set aside.

146. The discussions regarding this has happened before, and the application has been done before, in which a court set aside the award and it was enforced later, for example the *Hilmarton* case in which the Award was set aside but yet still enforced.[156] In the *Chromalloy* case, the Award was set aside in Egypt yet was still recognized in the United State.[157]

147. Therefore, we submit that the Tribunal shall deem that the enforcement of the SCC Award does not constitute denial of justice and that it is also protected under CEPTA.

C. CREEPING VIOLATIONS

148. Claimant brought the claim that there has been creeping violations committed by the Respondent.[158] The Claimant has cited the Tribunal in *El Paso* that uses an synonymous analogy, using "creeping expropriation" as its example.[159]

149. When examined, the analogy of a "creeping (FET) violation" to a "creeping expropriation" is more problematic than it might appear.[160] This is due to the fact that not all FET violations are synonymous of expropriation. Using creeping expropriation as a base for an analogy is a flawed analogy.

150. The Respondent argues that there has been no FET breach, let alone a "creeping" FET breach that accumulates from harmless actions that might lead to an FET breach—referring to the aforementioned arguments in the previous submissions, the Respondent has shown regards to transparency, good faith, and due process of law.

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[155] CEPTA, Art. 9.21.5(b)(i)
[156] *Hilmarton*
[157] *Chromalloy*
[158] Claimant Memorial
[159] *El Paso*, ¶¶515, 519
[160] Scott Vesel, A 'Creeping' Violation of the Fair and Equitable Treatment Standard?

151. We therefore submit that there has been no accumulation of faults that could lead to creeping violations. The Respondent still stands by the argument that it did not breach Art. 9.9 of the CEPTA.

II. COMPENSATION

152. The obligation of a State to provide full reparations cannot arise by itself after the discovery of a violation of international law. However, there is a need for causality that refers to the problem of proving a causal relationship between the state's actions and investor's losses.[161]

153. Therefore Respondent argues that Mekar is not obliged to pay any more compensation towards the investor due to the following reasons:

A. CLAIMANT IS NOT ENTITLED TO COMPENSATION

154. The Respondent argues that the Respondent is not entitled to pay any compensation towards the Claimant.

i. Mekar has paid the compensation on 'market value'

155. On 8 October 2020, Mekar bought Vemma's shares in Caeli Airways for the total amount of USD 400,000,000 despite Mekar's dire financial situation. Mekar bought Caeli's assets due to Vemma's incapability to find a suitable buyer for its shares in Caeli. [162]

156. The only argument provided for this claim is that Vemma's investment is valued at 1,100,000,000 USD, and Mekar has paid 400,000,000 USDfor the assets, therefore Vemma is claiming the remaining 700,000,000 USD.[163] This cannot be right, as 1,100,000,000 USD was the the peak valuation of Vemma's investment in Mekar.[164]

[161] ILC Commentary, Art. 31(9)
[162] Response to Notice of Arbitration, ¶21
[163] Procedural Order No. 3, ¶16
[164] Procedural Order No. 4, ¶4

157. The claim in which Claimant deserves compensation at a market value comes from the peak valuation. Sure, the maximum market valuation at its peak is objective, but the fact that it is short-lived is one of its shortcomings.[165] The adjusted investment valuation would be the most suitable as if would take the amount of it's worth at the date of the buyback.[166]

158. Therefore we submit that the Respondent has paid the compensation to Vemma on market value and that the Claimant shall not demand any more than the already paid compensation,

ii. The term 'fair market value' is reserved for expropriation and has to be based off of mutual consent of both parties

159. The Claimant, on its Notice of Arbitration, pursued for a compensation from Respondent at USD 700,000,000, claiming that it is the appropriate compensation at "fair market value".[167]

160. FMV is defined as the price at which a hypothetical sale transaction between willing and well-informed parties acting at arm's length in an open and unrestricted market would occur. FMV is defined as the price of an asset in a hypothetical market, which in the case of an income-producing asset or "going concern" is also the measure of future prospects.[168]

161. In the United States, FMV is defined as the price at which the property would change hands between a willing buyer and a willing seller, who are neither under any compulsion to buy and sell the property.[169]

162. The usage of the term 'fair market value' in the CEPTA is reserved when there is expropriation. This is supported through Article 9.12 of the CEPTA[170] which mentioned expropriation that shall be remunerated using the 'fair market value'.[171]

[165] *Rusoro*, ¶789
[166] Loc. cit
[167] Notice of Arbitration ¶30
[168] *CMS*, ¶396
[169] *United States*, ¶ 12,926
[170] CEPTA, Art. 9.12.1
[171] *Ibid*, Art. 9.12(2)

163. In United States-Argentina BIT, the FMV standard is also reserved for expropriation[172]. In Kuwait-Portugal BIT, the FMV standard is also reserved for expropriation; the compensation shall be determined and shall be computed in accordance with internationally recognized principles of valuation on the basis of FMV of the expropriated investment.[173]

164. The Claimant did not raise any issue of expropriation in this matter and only raised the issue of FET breach in the context of the Most-Favoured-Nation clause breach and denial of justice. There has not been any claims regarding expropriation, yet the Claimant requests for the compensation to be paid using the parameters used for expropriation.

165. The Tribunal in *SD Myers* when analysing the analogous situation under NAFTA, stated that the treaty does not state that it applies to all breaches of its provisions but "expressly attached it to expropriations".[174] This could be applied to the provisions stated on the article 9.12 of the CEPTA as stated above.

166. The Tribunal di *LG&E*, when faced with the fact that Claimant has demanded compensation to be paid through the standards of FMV, they stated that FMV is referred to in Article IV of the Treaty as the measure of compensation in cases of expropriation.[175] This is a similar situation as FMV is referred to Article 9.12 (2) of the CEPTA as a compensation for expropriation done by an expropriating party.

167. In *Santa Elena* the Claimant indicated in its Request that a dispute had arisen in relation to the expropriation by Respondent and there was compensation owed to Claimant by Respondent as a result of said expropriation*[176]*, the Tribunal agrees that the Respondent shall pay compensation based on fair market value due to its expropriation.[177] The case is an example of how fair market value is a standard reserved for expropriation.

[172] See United States-Argentina BIT, Art. 3(1)
[173] Kuwait-Portugal BIT, Art. 5.1(b)
[174] *SD Myers*, ¶307
[175] *LG&E*, ¶12
[176] *Santa Elena*, ¶3
[177] Ibid, ¶70

168. Moreover, in the CEPTA itself, Art. 9.12 reserved the fair market value for expropriation[178]—Art. 9.21 specified that a final award may award a Claimant with monetary damages at a market value, unless otherwise provided in 9.12 (expropriation).[179] Therefore the CEPTA itself acknowledges that the fair market value is reserved for expropriation, otherwise, the monetary damages are to be set at a market value.

169. FMV transaction shall be based off of consent and neither has to act under compulsion.[180] Claimant cannot pressure Mekar into paying the compensation in fair market value.

170. In conclusion, Claimant is not entitled to compensation due to the fact that it has received USD 400,000,000 from Claimant, which was the market value of Claimant's investment. Claimant is also not entitled to compensation on FMV due to the fact that according to most Tribunals, FMV is reserved to expropriation, which has not been raised as an issue by Claimant; moreover, according to Article 9.21 of the CEPTA, the Claimant is owed monetary damages at a market value.[181]

B. IN CASE THAT THE CLAIMANT IS ENTITLED TO COMPENSATION

171. If the Tribunal thinks that the Claimant is still owed compensation by the Respondent, we would request that the Tribunal decide that the amount to be paid by the Respondent to Claimant by considering two of the following arguments: (i) that Claimant is responsible for the damages occurred, and (ii) taking Mekar's dire financial condition into account.

i. Claimant is responsible for the damages occurred

172. When Claimant made its investment in Mekar in 2011, it also inherited debt liabilities associated with Caeli. Claimant has experience in handling the airline industry in its home State and also globally—therefore, Claimant could not have been blind to the volatility of an investment in the aviation industry.

[178] CEPTA, Art. 9.12.1
[179] CEPTA, Art. 9.21.1.a
[180] *Tenaris*, ¶557
[181] CEPTA, loc. cit

173. Claimant took approaches that had been warned as risky for the sake of rapid expansion. Caeli's board has warned the Claimant for this risky business strategy.[182] This strategy then became the one that pushed Caeli to a seriously concerning financial situation when Mekar was hit with the economic crisis.

174. While Claimant did bring Caeli to its peak (although short-lived), Caeli's board has continuously warned Claimant for its risky business model.[183] According to Ms. Misty Kasumi, there is risk on Claimant's business model, and she called the business model "not good for long-term period".[184]

175. Some arbitral Tribunals have accounted that an investor's failure to mitigate the damages occurred shall be taken into account while determining damages. In *Occidental*, the Tribunal held that an award of damages may be reduced if the claiming party also committed a fault which contributed to the prejudice it suffered. [185] In *Yukos*, the Tribunal relied on the doctrine of contributory fault in which could add up to the injury suffered by the investor.[186]

176. The Tribunal in *Gavazzi* cited the Tribunal on *CME*; which concluded that international practices do not support the reduction of reparations unless there are cases of contributory fault by the investor in action.[187] We think that there has been a contributory fault, in this case, an ill-advised business model that was proven to be short-lived.

177. The dissenting opinion from Mark Crodfelter in *Unión* stated that the Respondent has tried to warn the investor of the risks through its experts therefore Claimant shall bear part of the damages occurred.[188] The Tribunal in *Bridgestone* stated in its award that if

[182] Response to the Notice of Arbitration, ¶11
[183] Ibid, ¶*22*
[184] Annex VII
[185] *Occidental*, ¶¶678&697
[186] *Yukos*, ¶¶1594-1630
[187] *Gavazzi*, ¶271
[188] *Union*, ¶56

the Claimant would have exercised their right for mitigation in their loss, the Tribunal would have given them the full compensation that they demanded.[189]

178. When a Tribunal considered that the Claimants are involved in their dispute and contributed to their losses. As a result, the Claimants should bear part of the damages suffered by them.[190] The Tribunal finally awarded only 50% of the damages suffered by the Claimants.

179. Art. 39 of the ILC Articles relates to the awarding of the compensation and when it contributes to an injury, the compensation shall be cut.[191][192]

180. The Tribunal in *Bogdanov* did not find that the Respondent is liable for payment of damages corresponding to the entire loss.[193] The Tribunal in the present dispute shall also not find that the Respondent is liable for payment of damages corresponding to the entire loss suffered by the Claimant.

181. We demand the Tribunal, if possible, apply the same measures to Claimant as we have warned Claimant for its risky business model that could collapse anytime the financial situation becomes unstable. This is also in relation to our next argument:

ii. The Tribunal shall take Mekar's dire financial situation into account

182. Starting in 2016, the Mekari MON began to nosedive, and by March 2017, a currency crisis emerged in Mekar.[194] As of July 2017, Caeli was unable to keep the steady stream of revenue due to the crisis occurring in Mekar.[195]

183. An IMF report in 2019 predicted four consecutive quarters of negative growth in Mekar, 8% fall in GDP, and 2600% average inflation rate in 2020. In order to pay the compensation demanded by Vemma, Mekar would have to transfer its public spending

[189] *Bridgestone*, ¶565
[190] *MTD*, ¶¶242-243
[191] *Copper Mesa*, ¶¶6.101-6.102
[192] *Stati*, ¶1331
[193] *Bogdanov*, ¶91
[194] Statement of Uncontested Facts, ¶39
[195] Ibid, ¶40

to Vemma[196] which would jeopardize the Mekari people. The people would not have what they need for the sake of paying reparations to the Claimant.

184. There is always an economic risk when it comes to investment. The risk results from unexpected changes in the economic contest of an investment project.[197][198] The risks include inflation and financial crisis that could not be foreseen when the investment was made.[199]

185. It is not always possible to anticipate the consequences of turbulence in the financial markets or the financial system, or to avoid them.[200] An investor cannot legitimately expect that the regulatory framework will not change when any prudent investor could've anticipated the change before making the investment.[201]

186. The Tribunal shall run an an assessment on the investor's legitimate expectations, and shall consider the economic and socio-political circumstances that might affect and/or interfered with the expectations of the investor. An example would be of special economic and socio-political circumstances include an economic and/or financial crisis in the host State.[202] An investor cannot expect that the host State will act as it would have done in normal situations. Besides, this issue counts as *force majeure*, due to the fact that it is an unforeseen event.[203]

187. The aim of compensation on damages is to give compensation to Claimant for the loss it has suffered at the hand of the Respondent.[204] But the loss occurred was due to Claimant's risky business strategy as aforementioned above, and also due to the unpredictable economic situation in Mekar, therefore the Respondent requests the

[196] Procedural Order No. 3, ¶4
[197] Marcos D. García Domínguez, Calculating Damages in Investment Arbitration: Should Tribunal Take Country Risk into Account?, p. 100
[198] Colin White and Miao Fan, Risk and Foreign Direct Investment
[199] Ibid
[200] *Argentina – Financial Services*, ¶7.783
[201] *Belenergia*, ¶584
[202] Yulia Levashova, Fair and Equitable Treatment and Investor's Due Diligence Under International Investment Law, p. 237
[203] *Niko*, ¶200
[204] Michael Pryles, Lost Profit and Capital Investment, p. 1

Tribunal to take Mekar's financial condition into account to not sacrifice the public interest of the Mekari people.

C. ARBITRATION COSTS

188. As Claimant is the party raising the issue to the Centre, Claimant is supposed to bear all costs related to of this arbitration. This is because Mekar rejects all of Claimant's allegations regarding the arbitrary measures, denial of justice, and other damages Claimant argued to have been invoked by Mekar.

189. Claimant has to bear all costs as it has caused its own injury; it would not have to start an arbitration proceeding if it weren't for it's own contributory fault. It is possible for Tribunals to award that the Claimant is responsible for all the costs of arbitration proceeding.[205]

190. Therefore, we submit that the Claimant is to bear all costs related to this arbitration.

[205] *Detroit*, ¶¶59, 60

PRAYERS FOR RELIEF

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

1. Declare that the Tribunal lacks jurisdiction *ratione personae* and *ratione voluntatis*;
2. grant leave sought for the *amicus* submission filed by External Advisor of Mekar's CRPU and to bar the *amicus* submission filed by CBFI;
3. declare that there has been no FET and MFN clause breach;
4. declare that there has been no denial of justice; and
5. declare that Vemma is not entitled to any compensation; or that in any case Vemma is entitled to compensation, the Tribunal shall take Mekar's financial condition into account.
6. declare that Vemma is responsible for all the costs regarding the present arbitration procedure.

TEAM POCAR

on behalf of the Respondent

The Federal Republic of Mekar