TEAM: RAU

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

UNDER THE ICSID ADDITIONAL FACILITY RULES, 2006

MEMORANDUM FOR RESPONDENT

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

On Behalf of:	Against:
The Federal Republic of Mekar	**Vemma Holdings Inc.**
Mekari Ministry of Justice	4, Navalny Drive, 0934
1 Parliamentary BLVD, Phenac, Mekar	Szeto, Bonooru
RESPONDENT	**CLAIMANT**

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LEGAL INSTRUMENTS

ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, Vol. II 3 (2001).
Australia-Chile FTA	Australia-Chile Free Trade Agreement (2009).
CAFTA-DR	Dominican Republic-Central America Free Trade Agreement (2004).
France – Venezuela BIT	Agreement between the Government of the French Republic and the Government of the Bolivarian Republic of Venezuela on the reciprocal encouragement and protection of investments (2001).
ICJ	Statute of the International Court of Justice (1946).
ICSID AF Rules	Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (Additional Facility rules) (2006).
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States (1966).
NAFTA FTC statement	Statement of the Free Trade Commission on Non-Disputing Party participation (2003).
UNCITRAL transparency rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, A/68/462 (2014).
VCLT	Vienna Convention of on the Law of Treaties 23/05/1969, Vol. 1155 No. 18232 UNTS (1980).

ARBITRAL DECISIONS

AES	*AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22 (23/09/2010).
Agility	*Agility Public Warehousing Company K.S.C. v. Republic of Iraq*, ICSID Case No. ARB/17/7, Final Award, (22/02/2021).

Al-Bahloul	*Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. 064/2008, Partial Award on Jurisdiction and Liability, (2/09/2009).
AMTO	*Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award (26/03/2008).
Antaris	*Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award (2/05/2018).
Apotex	*Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, (25/08/2014).
Apotex(PO)	*Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of Applicant Mr Barry Appleton as a Non- Disputing Party (04/03/2013).
Archer Daniels	*Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/04/5, Award, (21/11/2007).
Arif	*Mr. Franck Charles Arif v. Republic of Moldova,* ICSID Case No. ARB/11/23, Award, (8/04/2013).
Austrian Airlines	*Austrian Airlines v. The Slovak Republic*, UNCITRAL, Final Award, (9/10/2009).
Autopista	*Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, (27/09/2001).
Azinian	*Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, (1/11/1999).
Azurix	*Azurix Corp. v. The Argentine Republic,* ICSID Case No. ARB/01/12, Award, (14/07/2006).
Bayindir	*Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, (27/08/2009).
Beijing Shougang	*Beijing Shougang mining investment company ltd., China Heilongjiang International economic & technical cooperative corp., and Qinhuangdaoshi Qinlong international industrial co. ltd. v. Mongolia*, PCA Case No. 2010-20, Award (30/06/2017).

Belenergia	*Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award (28/08/2019).
Biwater	*Biwater Gauff (Tanzania) Ltd v. Tanzania*, ICSID Case No. ARB/05/22, Award (24/07/2008).
Bogdanov	*Bogdanov v. Moldova*, SCC, Arbitral Award, (22/09/2005).
Border Timbers	*Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Procedural Order No. 2.
BUCG	*Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on jurisdiction (31/05/2007).
Cengiz	*Cengiz İnşaat Sanayi ve Ticaret A.S v. Libya,* ICC Case No. 21537/ZF/AYZ, Award, (7/11/2018).
Champion	*Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Award, (27/10/2006).
Chevron	*Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* (II), PCA Case No. 2009-23, Second Partial Award on Track II, (30/08/2018).
Chevron Bangladesh	*Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v. People's Republic of Bangladesh*, ICSID Case No. ARB/06/10, Award (17/05/2010).
CME-Brownlie	*CME Czech Republic B.V. v. The Czech Republic*, Separate Opinion on the Issues at the Quantum Phases of CME v. Czech Republic by Ian Brownlie, C.B.E., Q.C., (14/03/2003).
CMS	*CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, (12/05/2005).
Crystallex	*Crystallex International Corporation v Venezuela*, ICSID Case No.ARB(AF)/11/2, Award (4/4/2016).
CSOB	*Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the tribunal on objections to Jurisdiction (24/05/1999).

Desert Line	*Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, (6/02/2008).
EDF	*EDF (Services) Limited v. Republic of Romania*, ICSID Case No. ARB/05/13, Award, (8/10/2009).
El Paso	*El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, (31/10/2011).
Enron	*Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, (22/05/2007).
Gami	*Gami Investments Inc. v. Mexico*, UNCITRAL, Award, (15/11/2004).
Genin	*Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25/06/2001).
Glamis Gold	*Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award (9/06/2009).
Kappes	*Daniel W. Kappes and Kappes, Cassidy & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Claimants' counter-memorial on preliminary objections.
Krederi	*Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, (2/07/2018).
Lauder	*Lauder v. Czech Republic*, Award, ICSID Reports Vol. 9 (03/09/2001).
Levy de Levi	*Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, (26/02/2014).
LG&E	*LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (03/10/2006).
Maffezini	*Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of Tribunal on Objections to Jurisdiction (25/02/2000).
Mamidoil	*Mamidoil Jetoil Greek Petroleum Products Soc SA v Albania*, ICSID Case No ARB/11/24, Award (30/03/2015).
Masdar Solar	*Masdar Solar & Wind Cooperation U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, (16.05.2018).

Methanex	*Methanex Corporation v. United States of America*, Decision of the tribunal on petitions from third persons to intervene as "amici curiae" (15/01/2001).
Micula	*Ioan Micula, Viorel Micula & others v. Romania*, ICSID Case No. ARB/05/20, Award (11/12/2013).
MTD	*MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, (25/05/2004).
National Grid	*National Grid PLC v. The Argentine Republic*, Award, (3/11/2008).
NextEra	*NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain,* ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Principles of Quantum.
Occidental	*Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, (5/10/2012).
Oostergetel	*Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Final Award (23/04/2012).
Orascom	*Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award (31/05/2017).
Philip Morris	*Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, (8/07/2016).
Pope	*Pope&Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award, (26/06/2000).
Prosecutor-Tadic	*Prosecutor v. Duško Tadi´c, International Tribunal for the Former Yugoslavia*, Case IT-94-1-A (1999).
Rusoro	*Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, (22/08/2016).
Saluka	*Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (17/03/2006).
Sempra	*Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (28/09/2007).

Suez	*Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae (19/05/2005).
Suez-Liability	*Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability (30/07/2010).
SunReserve	*Sun Reserve Luxco Holdings SRL v. Italy*, SCC Case No. 132/2016, Award (25/03/2020).
Tecmed	*Tecnicas Medioambientales Tecmed S.A. v. the United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (29/05/2003).
Thunderbird	*International Thunderbird Gaming Corp v Mexico*, UNCITRAL, Award (26/01/2006).
Tokios	*Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, (26/07/2007).
Total	*Total S.A. v Argentina*, Decisions on Liability, ICSID Case No.ARB/04/01, (27.12.2010).
Total-Liability	*Total S.A. v Argentina*, ICSID Case No.ARB/04/01, Decisions on Liability (27.12.2010).
Unión Fenosa Gas	*Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Dissenting Opinion of Arbitrator Mark Clodfelter (31/08/2018).
UPS	*United Parcel Service of America, Inc. (UPS) v. Government of Canada*, Award on the Merits, (24/05/2007).
UPS(Amicus)	*United Parcel Service of America, Inc. (UPS) v. Government of Canada*, Amicus Submissions of the US Chamber of Commerce (2005).
Vento	*Vento Motorcycles, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/17/3, Award, (6/07/2020).
Waste Management	*Waste Management, Inc. v Mexico ("Number 2")*, ICSID Case No.ARB(AF)/00/3, Award (30/4/2004).
WDF	*World Duty Free Company v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award (04/10/2006).

White Industries	*White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award (30/11/2011).
Wirtgen	*Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen v Czech Republic*, PCA Case No.2014- 03, Final Award (11.10.2017).
Yukos	*Yukos Universal Ltd v. Russian Federation*, PCA Case No. AA227, Final Award (18/07/2014).
Yukos-Juris	*Yukos Capital SARL v. The Russian Federation*, PCA Case No. 2013-31, Interim Award on Jurisdiction.

ACADEMIC LITERATURE

Born	Gary Born, *'Bribery and an Arbitrator's Task'*, Kluwer Arbitration Blog (11/09/2011).
Broches (1966)	Aron Broches, *The convention on the Settlement of Investment Disputes: Some observations on Jurisdiction*, Columbia Journal of Transnational Law (1966).
Broches (1995)	Aron Broches, *Selected essays: World Bank, ICSID, and other subjects of public and Private International Law*, Dordrecht: Martinus Nijhoff (1995).
Buffard/Zemanek	Isabelle Buffard & Karl Zemanek, *The "Object and Purpose" of a Treaty: An Enigma?,* Austrian Review of International & European Law (1998).
Cosar	Cosar, U., *Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences and Sanctions*, in Van den Berg, A.J. (ed.), *Legitimacy: Myths, Realities, Challenges*, Vol. 18 ICCA Congress Series, ICCA & Kluwer Law International (2015).
Delaney/Magraw	Joachim Delaney, Daniel Barstow Magraw, *Procedural Transparency* in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds.), The Oxford Handbook of International Investment Law, Oxford University Press (2008).
Dimsey	Mariel Dimsey, *Article 4. Submission by a third person,* Transparency in international investment arbitration (Cambridge University Press 2015).

Dolzer/Schreuer	Dolzer R, Schreuer C, Principles of International Investment Law. OUP, Oxford, 2012.
Finch	George A. Finch, *The sources of modern international law*, Washington: Carnegie endowment for international peace (1937).
Fitzmaurice	Sir Gerald Fitzmaurice, *formerly the Chief Legal Adviser in the British Foreign Office in his Hague academy lectures*, Vol. 92 Hague Academy (1957).
Gomez	Katia Fich Gomez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, Fordham International Law Journal Vol. 35 (2012).
ICSID Commentary	Christoph H. Schreuer, et al. *The ICSID Convention: A Commentary* 2nd Ed., Cambridge University Press (2009).
Jacob/Schill	Jacob M J, Schill S, *Fair and Equitable Treatment: Content, Practice, Method. In: Bungenberg M et al. (eds.) International Investment Law. Nomos/Hart, Baden-Baden*, pp. 700-763, 2015.
Kinnear	Meg Kinnear, '*Transparency and Third Party Participation in Investor-State Dispute Settlement' Presentation, in 'Making the Most of International Investment Agreements*' Symposium co-organised by ICSID, the OECD and UNCTAD (12/12/2005).
Klager	Klager R, *Fair and Equitable Treatment in International Investment Law*, Cambridge University Press, Cambridge, 2011.
Koskenniemi	Martti Koskenniemi, *Report of the Study Group of the International Law Commission to the general assembly*, A/CN.4/L.682 (2006).
Kovács	Csaba Kovács, *Chapter 5: The Attribution of Internationally Wrongful Conduct*, Attribution in International Investment Law (2018).
Lauterpacht	Lauterpacht, Sir Hersch, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration*, London: Longmans, Green and Co. Ltd (1927).
Levine	Eugenia Levine, '*Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, Berkeley Journal of International Law (2011).

Linderfalk	Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law As Expressed In The 1969 Vienna Convention On The Law Of Treaties*, Springer (2007).
Marboe	Irmgard Marboe, *International Standards, Bases of Value, and Valuation Approaches', in Irmgard Marboe, Calculation of Compensation and Damages in International Investment Law (Second Edition)*, Oxford International Arbitration Series, OUP, 2017.
McLachlan	Campbell McLachlan, Laurence Shore, Matthew Weiniger, *International Investment Arbitration, Substantive Principles*, OUP, Oxford, 2017.
McLaughlin	Mark McLaughlin, *Defining a State-Owned Enterprise in International Investment Agreements*, ICSID Review - Foreign Investment Law Journal (2019).
McNair	Lord McNair, *The law of treaties*, Oxford University Press (1961).
Miles	Cameron A Miles, *Corruption, Jurisdiction and Admissibility in International Investment Claims*, Journal of International Dispute Settlement, Oxford University Press (2012).
Mohtashami/ Hosseny	Reza Mohtashami; Farouk El-Hosseny, *State-Owned Enterprises as Claimants before ICSID: Is the Broches Test on the Ebb?*, BCDR International Arbitration Review (2016).
Olleson	Simon Olleson, *Attribution in Investment treaty arbitration*, ICSID Review - Foreign Investment Law Journal (2016).
Oppenheim	Robert Jennings, Arthur Watts, *Oppenheim's International Law*, 9th edition Oxford University Press (1992).
Paulsson	Jan Paulsson, *Denial of Justice in International Law*, Cambridge Unversity Press, 2005.
Peczenik	Alexander Peczenik, *Juridikens metodproblem*, Stockholm: Gebers, (1980).
Petrochilos	Georgios Petrochilos, *Attribution*, in Katia Yannaca-Small ed., *Arbitration under International Investment Agreements*, A Guide to the Key Issues, Oxford University Press (2009).
Schliemann	Christian 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, The Law and Practice of International Courts and Tribunals (2013).
Sinclair	Sinclair, *The Vienna Convention on the Law of Treaties*, 1984.
Sorensen	Max Sørensen, Copenhagen, Einar Munksgaard, *Les Sources Du Droit International*, International affairs (1949).
Stern	Brigitte Stern, *Civil Society's Voice in the Settlement of International Economic Disputes*, ICSID Review – Foreign Investment Law Journal (2007).
Sutherland	P F Sutherland, *The World Bank Convention on the Settlement of Investment Disputes*, (1979) 28 ICLQ 367.
Talus	Talus K, *Revocation and Cancellation of Concessions, Operating Licences, and Other Beneficial Administrative Acts. In: Scill S (ed)* International Investment Law and Comparative Public Law. OUP, Oxford, 2010.
Verdross	Verdross Alfred, *Principles Giniraux Du Droit Dans La Jurisprudence Internationale*, Collected Courses of the Hague Academy of International Law (1935).
Zhang	Anran Zhang, *The Standing of Chinese State-Owned Enterprises in Investor-State Arbitration: The First Two Cases*, Vol. 17 Chinese Journal of International Law (2018).

INTERNATIONAL AND DOMESTIC DECISIONS

Chromalloy	*Chromalloy Aeroservices Inc. v. The Arab Republic of Egypt* (District Court of Columbia 1996), in Yearbook Commercial Arbitration XXII (1997) (United States no. 230), at 1001-1012.
Elettronica	*Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgment, (20/07/1989).
Fisheries	*United Kingdom v. Norway*, ICJ reports of Judgements, Advisory opinions and orders (18/12/1951).
Gabčíkovo–Nagymaros	*Case Concerning Gabčíkovo–Nagymaros Project, ICJ, Judgment*, (25/9/1997).

Hilmarton	*Hilmarton v. Omnium de Traitement et de Valorisation* (OTV) (Supreme Court 1994), in Yearbook Commercial Arbitration XX (1995) (France no. 23), at 663-665.
Nicaragua	*Case Concerning the Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v. The United States of America),* International Court of Justice, Judgement, (27/07/1986).

OTHER SOURCES

ARSIWA-Commentary	*Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, Yearbook of the International Law Commission, Vol. II 3 (2001).
MFN Commentary	ILC Draft Articles on Most Favoured Nation (1978).
OECD	*G20/OECD Principles of Corporate Governance*, OECD Publishing, Paris (2015).
OECD/Airlines	OECD, *Background Paper*, Airline Competition (12 June 2014).
OECD COFOG	OECD Classification of the Functions of Government (2011).
OECD Working Papers No.6	Christiansen, H. (2013), "Balancing Commercial and NonCommercial Priorities of State-Owned Enterprises", OECD Corporate Governance Working Papers, No. 6, OECD Publishing.
UNCTAD	United Nations Conference on Trade and Development, Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, UNCTAD/DIAE/IA/2011/5, 2012.
US/Tehran	United States Diplomatic and Consular Staff in Tehran.

LIST OF ABBREVIATIONS

¶/¶¶	Paragraph(s)
&	And
1994 BIT	Bonooru-Mekar Bilateral Investment Treaty
AOA	Articles of Association
Art(s)	Articles
CEPTA	Comprehensive Economic Partnership and Trade Agreement
CIL	Customary International Law
Facts	Statement of Uncontested Facts
FET	Fair and Equitable Treatment
FMV	Fair Market Value
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
MOA	Memorandum of Association
MST	Minimum Standard of Treatment
MV	Market Value
p.	page
PO	Procedural Order
Record	2021 FDI International Arbitration Moot case
Response	Response to Notice
SCC	Stockholm Chamber of Commerce
v.	Versus

STATEMENT OF FACTS

1. The Parties in this arbitration are Vemma Holdings Incorporated ("**Claimant**") and the Federal Republic of Mekar ("**Respondent**").

2. **Claimant** is an airline holding company incorporated in the Commonwealth of Bonooru ("Bonooru").

3. **Respondent** is the host state to Claimant.

Pre-Investment

19 December 1984	Claimant began to own and operate the Royal Narnian (the flag-carrier of Bonooru). It is the privatised successor of the state-owned BA Holdings.
24 August 1994	Mekar and Bonooru signed the Treaty for the Promotion and Protection of Investments ("**1994 BIT**").
5 March 2011	The Competition Commission of Mekar ("**CCM**") approved Claimant's acquisition of Caeli Airways, and accepted an undertaking that it will not engage in anti-competitive behaviour.
29 March 2011	Claimant entered into a Share Purchase Agreement to purchase 85% stake in the company.

Post-Investment

28 October 2011	Claimant started receiving subsidies from Bonooru under the Horizon 2020 scheme.
2011 - 2013	Claimant adopted a policy of market expansion.
15 October 2014	Comprehensive Economic Partnership and Trade Agreement ("**CEPTA**") signed by Mekar and Bonooru in April 2014, came into force replacing the 1994 BIT.

2014	Caeli Airways released data stating that low pricing did not allow it to earn large profits.
End of 2015	Caeli placed heavy orders to upscale its operations against the advice of Mekar Airservices Ltd. (a State-Owned Holding Company having 15% share of Caeli Airways).
9 September 2016	CCM launched a *suo moto* investigation into Caeli Airways ("**First Investigation**") to investigate whether Caeli had adopted predatory pricing strategies. In order to prevent harm to competitors, it also placed a cap on Caeli's airfare as an interim measure.
Late 2016	Mekar's currency, the 'MON', began to nosedive. This became a full-fledged economic crisis by 2017.
December 2016	Upon receiving a complaint from its competitors, the CCM launched another investigation into Caeli Airways ("**Second Investigation**") focusing specifically on alleged price undercutting on certain routes to and from the Phenac International Airport.
30 January 2018	To stabilize its currency, Mekar's government passed a decree requiring all companies in the country to operate exclusively in MON.
August 2018	CCM concluded the First Investigation and issued a voluminous report into Caeli's activities, finding Caeli guilty of predatory pricing. A fine of MON 150 million was imposed and the airfare caps were kept in place impending the Second Investigation.
25 September 2018	Mekar's President passed Executive Order 9-2018, granting subsidies to airlines. Caeli Airways' application for subsidies under this Order was rejected as it was a State-owned company and enjoyed added protections.
1 January 2019	CCM concluded its Second Investigation and found that Caeli had indulged in price undercutting to run competitors out of the market.

	It imposed a fine of MON 200 million and decided to continue the airfare caps till Caeli's market share fell below 40%.
15 July 2019	After hearing on the imposition of airfare caps in the High Court of Mekar, Justice VanDuzer released an interim decision declining to remove them. Seeing no possibility of arriving at a different decision, he also dismissed the Caeli's merits on appeal.
17 December 2019	Mekar Airservices rejected Claimant's buyback offer after it received an artificially inflated offer from Hawthorne Group LLP to buy its stake in Caeli. Hawthorne was tied to Claimant through the Moon Alliance and thus, did not present an arms-length offer.
9 May 2020	After failed negotiations, Mekar Airservices had filed a request for arbitration with the Sinnoh Chamber of Commerce. The award was rendered in favour of Mekar Airservices.
1 August 2020	Supreme Arbitrazh Court of Sinnograd set aside the award pursuant to Claimant's application on grounds of corruption.
23 August 2020	The High Commercial Court of Mekar issued a ruling enforcing the award in Mekar on the application of Mekar Airservices, recognising that the award cannot be set aside in the absence of sufficiently serious, specific and consistent indicia of corruption.
25 September 2020	The Supreme Court of Mekar dismissed Claimant's appeal of the aforementioned order.
8 October 2020	After failing to yield another buyer, the Claimant sold its stake in Caeli to Mekar Airservices for 400 million USD.
15 November 2020	Claimant filed the Notice of Arbitration. Subsequently, Respondent submitted its Response to the Notice of Arbitration.

2 March 2021	Through the Airways Infrastructure Rescue Act, Bonooru acquired a majority stake in Vemma and it underwent a large-scale restructuring.
19 April 2021	The Consortium of Bonoori Foreign Investors filed their amicus submission.
28 May 2021	The External Advisors to the Committee on Reform of Public Utilities filed their amicus submission.

EXECUTIVE SUMMARY

4. **JURISDICTION:** The respondent requests the tribunal to reject jurisdiction over the claimant's claims as the claimant, in reality, is a State entity under International Law. However, investment arbitration, specifically under ICSID and CEPTA, does not allow state parties to bring claims before tribunals. In the alternate, if the tribunal finds that SOEs can bring claims under CEPTA, then the respondent shall demonstrate that the claimant fails to satisfy the requirements of CEPTA. Although, these arguments are sufficient, however, in the unlikely event, if the tribunal applies the ICSID convention's Aron Broches test, then also the claimant fails to satisfy the necessary requirements.

5. **AMICI SUBMISSIONS:** CBFI submissions fail to meet such threshold of public or specific interest. Further, CBFI doesn't bring any perspective which would assist the tribunal in any manner and threaten the transparency of the proceedings as they are associated with the claimant. Therefore, CBFI' submissions must be rejected. This tribunal should only allow the CRPU as amicus curiae as the tribunal has ex officio obligation to consider perspectives that the disputing parties could not bring and can do so on its own motion. Further, the submissions meet the threshold of 'public and specific interest'.

6. **MERITS:** The Respondent has not breached its obligation to provide FET to the Claimant under Article 9.9 of CEPTA. None of the actions pursued by the Respondent frustrated the Claimant's legitimate expectations, denied justice, constituted any arbitrary or discriminatory behaviour or subjected the Claimant to any abusive treatment. All the actions pursued by Mekar were well founded on legal grounds, and reasonable in the light of the prevailing circumstances. Since, all the measures undertaken by Mekar were legitimate, these measures, whether considered individually or cumulatively do not constitute a breach of Article 9.9 of CEPTA.

7. **DAMAGES:** In the unlikely event that the tribunal finds a violation of Article 9.9, then the tribunal should conclude that under the Market Value standard, which is the adequate standard of compensation in the instant case, Mekar owes no compensation to the Claimant since it has already purchased the Claimant's investment at Market Value. In the alternative, any amount of compensation should be reduced considering the Claimant's contributory fault and the ongoing economic crisis in Mekar.

ARGUMENTS

PART I: PROCEDURAL ISSUES

JURISDICTION

I. THE TRIBUNAL LACKS JURISDICTION OVER THE CLAIMS OF VEMMA HOLDINGS INC.

8. The Federal Republic of Mekar ('respondent' or 'Mekar') objects to the jurisdiction of this tribunal on three grounds.

i. The claimant is a State-Owned Enterprise ('SOE') of Bonooru and SOEs fall outside the definition under CEPTA.
ii. *Alternatively*, claimant does not fulfil the requirements of an investor under Article 9.1 of CEPTA.
iii. Additionally, the claimant does not fulfil the nationality requirement under the *Aron Broches test.*

9. In all three grounds, the respondent shall demonstrate that this tribunal lacks jurisdiction *ratione personae.* In the first objection, the respondent will demonstrate how the claimant, being an SOE is not protected as an investor under CEPTA because the drafters of CEPTA intended to preclude SOEs from bringing claims before tribunals constituted under CEPTA. In the alternate, the respondent shall demonstrate that the claimant fails to fulfil the requirement of an enterprise under Article 9.1 of CEPTA.

10. These grounds are sufficient to establish that the tribunal lacks jurisdiction over the claimant's claims as there is no additional requirement of nationality under the ICSID AF Rules. Nevertheless, if the tribunal applies the nationality requirement of ICSID Convention in this dispute, then the respondent lastly submits that the claimant fails to satisfy the requirements of *Aron Broches test* as it was performing governmental functions during the course of its investment in Mekar.

11. Hence, this is neither an investor-state dispute to which Mekar has consented to under CEPTA and nor is this a dispute between Mekar and a national of Bonooru under ICSID AF Rules. In reality, this is a State v. State dispute between Bonooru and Mekar. Bonooru is just using Vemma as an imposter to gain access to this arbitral proceeding as an 'investor'.

A. VEMMA IS A STATE-OWNED ENTERPRISE OF BONOORU.

12. The claimant might submit that Bonooru's minority shareholding in Vemma means that Vemma is not an SOE. However, this is not a correct standard to distinguish between private and government enterprises.[1]

13. The OECD defines SOEs as enterprises "in which the state exercises ownership" and that "are under the control of the state, either by the state being the ultimate beneficiary owner of the majority of voting shares or otherwise exercising an equivalent degree of control".[2]

14. Commentators and tribunals have observed that mere participation in shareholding is not necessarily a reliable indicator of control.[3] Different voting rights attached to different types of shares, decision-making procedures, and the exercise of management, all contribute to a complex picture of control.[4] Even minority shareholding might amount to control through a capacity to block major changes or otherwise.[5]

15. Therefore, the correct standard to determine the nature of an enterprise is to see the degree of control the state has in an enterprise. Although the word 'control' has not been defined

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[1] *Nicaragua*¶397; *BUCG*¶38; *Maffezini*¶*76.*

[2] OECD Corporate Governance p.14.

[3] ICSID Commentary p.323¶850; *Autopista*¶*119.*

[4] ICSID Commentary p.247¶573.

[5] *Id.* p.324; McLaughlin p.603-604; Sutherland p.385.

precisely, tribunals look into multiple factors to evaluate control. These standards of assessment have been framed in the context of Articles 5 and 8 of ILC Draft articles.[6]

16. Vemma satisfies all the above requirements of a State-Owned Enterprise as:

i. Vemma is authorized to perform Bonooru's obligations under its domestic law which satisfies Article 5 of ARSIWA; and
ii. Bonooru exercises pervasive control over Vemma which satisfies Article 8 of ARSIWA.

i. Vemma is an SOE under Article 5 of ARSIWA.

17. Vemma fulfils the definitional requirements of Article 5 of ILC Draft as this article is intended to take account of situations where former State corporations have been privatized but retain certain public or regulatory functions.[7] This intention squarely covers Vemma under Article 5 as it was formerly a state corporate that retained certain public functions after the privatization of the corporation.[8]

18. Vemma was obligated[9] to assist the population under Article 70 of Bonooru's Constitution.[10] Clause 2 of Article 70 states: *"**(2)** Bonooru shall ensure that every citizen is guaranteed travel to and from its many islands"* The word used in the clause 2 is 'shall' which means that the obligations under Article 70 of Bonooru's Constitution Act were strictly obligations of the state. Put simply, it was only Bonooru's obligation under its domestic law.

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[6] *Chevron Bangladesh¶171.*

[7] ARSIWA Commentary p.42.

[8] *Id.*

[9] MOA¶3(h).

[10] *Id.*

19. Since Vemma was obligated to undertake 'Bonooru's' obligations, Vemma's acts should be considered as acts of Bonooru, and for this reason, Vemma should be treated as a State-Owned Enterprise of Bonooru.

ii. Vemma is an SOE under Article 8 of ARSIWA.

20. Vemma also fulfils the definitional requirements of Article 8 of ILC Draft Articles as this article does not require a high threshold in each and every circumstance.[11] It is sufficient to consider the act of an entity as an act of the state under this Article if that entity is working on either the 'directions' or 'instructions' of the state.[12]

21. Bonooru has always retained shareholding in Vemma.[13] However, this fact alone is not the answer to the issue. Apart from retaining shares, Vemma was directly working on the directions and instructions of Bonooru for two reasons:

22. *Firstly,* the statement of the Prime Minister of Bonooru (on 10 November 1980) makes it clear that Vemma was functioning on Bonooru's "directions".[14] *Secondly,* Bonooru's Constitutional Court has also observed that Bonooru is ensuring the utilization of Vemma for public benefit.[15]

23. These facts are sufficient to establish that Vemma was operating in Bonooru on the directions of the Bonoori government.[16] As a consequence, the actions of Vemma shall be considered as the acts of Bonooru.

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[11] ARSIWA Commentary p.48; *Prosecutor-Tadi´c¶117.*

[12] ARSIWA Commentary p.47; *Nicaragua¶109&115.*

[13] Facts¶10.

[14] Facts¶8.

[15] Record p.43.

[16] ARSIWA Commentary.

24. Therefore, Vemma is a state-owned enterprise of Bonooru without any doubt.

B. STATE-OWNED ENTERPRISES DO NOT QUALIFY AS LEGITIMATE INVESTORS IN THESE ARBITRAL PROCEEDINGS.

i. The definition of enterprise should be imported from CEPTA.

25. The respondent believes that the claimant will make submissions that the definition of "enterprise" should be imported from the 1994 Bonooru-Mekar BIT as it is still operative. However, this is a wrong assertion as:

26. The ICSID AF Rules and CEPTA allow claims arising out of private investments between an investor and state only.[17] The 1994 BIT, however, includes investments[18] and disputes[19] between two states.

27. This is because under the 1994 BIT, the arbitration clause contains state to state arbitration mechanism as well, and it is for this reason the definition of enterprise under 1994 BIT includes 'government owned enterprises'[20] which is absent in CEPTA.[21]

28. If this tribunal chooses to import the definition of enterprise from the 1994 BIT, it will ultimately be allowing a claim under it as the BIT definition of investor, under no circumstance, will fit in the arbitration clause of CEPTA which only includes the possibility of investor-state arbitration.[22]

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[17] ICSID AF Rules, Art. 2; CEPTA, Art. 9.16¶2.

[18] 1994 BIT, Art. I.

[19] *Id.*, Art. IX.

[20] *Id.*, Art. I.

[21] CEPTA, Art. 9.1.

[22] CEPTA, Art. 9.16.

29. This tribunal, however, must not do so as both the parties have agreed not to submit claims under the 1994 BIT.[23] Therefore, the definition of enterprise under Article 9.1 of CEPTA shall act as *lex specialis.*[24]

30. *Alternatively,* in the unlikely event if this tribunal finds the definition of "enterprises" under 1994 BIT as operative, then also it should not apply it as the parties have redefined the same term 'enterprise' in CEPTA.[25] It is a settled principle under *lex posterior* that when two similar laws are operative, the most recent one shall be adopted.[26] Hence, the definition under CEPTA, being the recent one, should be applied instead of the definition under the 1994 BIT.

ii. The protection of CEPTA does not extend to state-owned enterprises.

31. The claimant might argue that CEPTA uses broad terms, and it does not exclude SOEs from the definition of investors. However, this is not a correct argument. Every provision of a treaty must be read in accordance with its object and purpose,[27] and must be reconciled with the intention of the drafters.[28] This is a standard form of interpretation adopted by arbitral tribunals,[29] as it reconciles with Article 31 of VCLT.

32. CEPTA was created for the sole reason to include investment protection.[30] Under the chapter of investment protection, the definition of an enterprise is mentioned.[31] Although,

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[23] CEPTA Art. 1.6¶2.

[24] Koskenniemi¶57; Alexander Peczenik p.106; For example: France-Venezuela BIT.

[25] CEPTA Art. 9.1; Finch; Sorensen.

[26] Finch.

[27] Linderfalk.

[28] Buffard/Zemanek.

[29] *Lauder¶292; MTD¶113.*

[30] CEPTA, Sec. D.

[31] CEPTA, Art. 9.1.

the definition of enterprise, in itself, does not exclude SOEs from its protection. However, the intentional omission of Government-owned companies from the definition is sufficient to show that the drafters of CEPTA did not intend to include SOEs within the meaning of investor.[32]

33. Under the 1994 BIT, even government owned enterprises qualified as legitimate investors. However, under CEPTA, government owned enterprises have been omitted.[33] This is sufficient to establish that the drafters of CEPTA intentionally omitted SOEs from Article 9.1.[34] Hence, considering SOEs as legitimate investors under CEPTA will not only defeat the purpose of CEPTA but also contravene the general rule of interpretation under Article 31 of VCLT.

C. ALTERNATIVELY, VEMMA IS NOT AN INVESTOR UNDER ARTICLE 9.1 OF CEPTA.

34. Without prejudice to the foregoing submission that CEPTA does not protect SOEs as legitimate investor, in the unlikely event that the tribunal finds that Article 9.1 includes SOEs, then also Vemma is not a genuine "enterprise" under Article 9.1 as it fails to match the definitional threshold of a "legitimate enterprise".

35. CEPTA defines an enterprise as:

> *"enterprise of a Party is: (a) an enterprise that is constituted or organised under the laws of that Party* ***and has substantial business activities in the territory of that Party****;* ***or*** *(b) an enterprise that is constituted or organised under the laws of that Party and is* ***directly or indirectly owned or controlled by a natural person of that Party*** *or by an enterprise mentioned under paragraph (a)"*[35]

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[32] *Kappes*¶*35*; McNair p.400-401.

[33] CEPTA, Art. 9.1.

[34] *Austrian Airlines*¶*115.*

[35] CEPTA, Art. 9.1.

36. Vemma fails to satisfy the definitional threshold(s) of a genuine enterprise under both the clauses of CEPTA as:

i. Vemma did not have any substantial business activities in Bonooru; and
ii. Vemma was not being controlled by 'nationals' of Bonooru.

i. Vemma did not have substantial business activities in Bonooru.

37. Although the respondent acknowledges that Vemma was organized under Bonoori laws, however, the business activities of Vemma in Bonooru were not *substantial business activities.*

38. The jurisprudence on substantial business activities is not widely developed.[36] However, tribunals have a consensus that *substantial* means *significant.*[37] Therefore, the magnitude of business is not the criterion but the quintessential requirement is: that the activities must be of substance.[38] Thus, this tribunal must only look into Vemma's activities in Bonooru and not the size of its business in the state.[39]

39. The claimant may submit that it had an office in Szeto, Bonooru, and was undertaking business activities such as licensing, taxation, etc. However, these activities are merely formal requirements which a corporation has to fulfill in order to remain a corporation.[40] These activities are insignificant and do not amount to substantial business activities.

40. The respondent in the subsequent section will show that the claimant was being controlled by Bonooru which was its actual decision-making body. Thus, the business activities, which the claimant claim to be substantial, are not even its own. In reality, claimant is

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[36] *NextEra¶260.*

[37] *AMTO¶69.*

[38] *Id.*

[39] *Id.*

[40] *Yukos-Juris¶534.*

merely a state-owned vehicle which was being used to conduct the business of Bonooru and the actual party which has business in Bonooru is the state itself.

ii. Vemma was not being controlled by 'natural persons' of Bonooru.

41. Vemma fails to satisfy the threshold requirement of 'control' under clause (b) as it is being controlled by Bonooru[41] and not by its nationals. However, under any circumstance Bonooru can never qualify as a 'national' in investor-state disputes.[42]

42. The claimant may assert that it had a board of directors which takes decision regarding the functioning of the company. However, the claimant is hiding the reality here. Vemma Holdings Inc., as the name suggests, is a shareholding company. Vemma's involvement in the company is only limited to the ownership of shares. However, the claimant in the present case was not having any control over its shares.

43. Since the actual controlling party of the business activities is Bonooru, Vemma's role in the company is limited to just a majority shareholder without any legal capacity to control its activities.[43] The claimant's presence in Vemma through its shareholding cannot be considered as activities under its control.

44. Thus, Vemma Holdings Inc. was merely a "special purpose vehicle" of Bonooru which was created to continue the public functions of the state.[44] Consequentially, the claimant neither had substantial business activities nor was it controlled by natural persons of Bonooru. In reality, the claimant was controlled by the state, i.e., Bonooru.

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[41] Facts¶8.

[42] *Maffezini¶74.*

[43] *Id.*

[44] MOA¶3(h).

45. Therefore, Vemma fails to fulfill the requirements of an enterprise under Article 9.1 of CEPTA.

46. Thus, regardless of the fact whether the CEPTA protects SOEs or not, the protection of CEPTA will not extend to the claimant's investment since it fails to match the threshold of legitimate enterprise under Article 9.1 of CEPTA.

D. THE *ARON BROCHES* TEST IS NOT A CORRECT TEST UNDER THE ICSID AF RULES.

47. International law is solely based on consent which is derived from the treaty between two parties.[45] In the present instance, the respondent submits that the threshold to see whether the claimant is a legitimate investor, or not, should be drawn only from the CEPTA.[46]

48. The nationality requirement under the *Aron Broches* test[47] is irrelevant in the present arbitral proceedings as it is a requirement under the ICSID Convention, and any provision or application of ICSID Convention should not extend to the ICSID AF Rules.[48]

49. Thus, this tribunal should refrain from adopting the ICSID Convention's nationality requirement under the so-called *Aron Broches test,*[49] and should strictly confine itself to the definition of investor under CEPTA.[50] The following are the reasons to back this assertion:

50. Mr. Broches, one of the principal drafters of the ICSID Convention, devised a test which is popularly known as the Aron Broches test. The statement of Mr. Broches is:

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[45] Dolzer/Schreuer.

[46] *Id.*

[47] ICSID Commentary; Broches(1966).

[48] ICSID AF Rules, Art. 3.

[49] Broches (1995).

[50] CEPTA, Art. 9.1.

> *"The broad purpose of the* ***Convention*** *is the promotion of private foreign investment and the first preambular clause of the Convention uses the term private international investment……. that* ***for purposes of the Convention*** *a mixed economy company or government-owned corporation should not be disqualified as a "national of another Contracting State" unless it is acting as an agent for the government or is discharging an essentially governmental function."*[51]

51. Special attention should be given to the highlighted words which are "for purposes of the [ICSID] Convention." This means that Mr. Broches himself intended to make the exception which should be applicable only to the ICSID Convention.[52] The same standard cannot be applied in the ICSID AF Rules for three reasons:

52. *Firstly,* none of the provisions of the ICSID Convention, including recommendation under it is applicable to the ICSID AF Rules.[53]

53. *Secondly,* adopting a similar standard of nationality which was specifically tailored for the ICSID Convention will defeat the object and purpose of the ICSID AF Rules which was made for the sole reason to not apply similar standards as that of the Convention.[54]

54. *Lastly,* the claimant might argue that the *Aron Broches* test is an accepted test which has been recognised by different tribunals[55] so it can be at best applied as a customary law by the tribunal. However, CIL cannot be applied in instances where a state has persistently objected to any international custom.[56] In the present instance as well, Mekar has always objected to the ICSID Convention's rules with scepticism.[57] Therefore, the nationality

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[51] ICSID Commentary p.161; Broches(1995) p.202.

[52] *Id.*

[53] ICSID AF Rules, Art 3.

[54] ICSID AF Rules, Introduction.

[55] *CSOB¶20; BUCG¶39-41*; Zhang p.1147-1152¶2.

[56] Oppenheim p.29; *Fisheries*; Fitzmaurice p.99-100.

[57] Facts¶20.

requirement under the ICSID Convention or the *Aron Broches test* cannot be applied in these arbitral proceedings.

E. ALTERNATIVELY, VEMMA DOES NOT MEET THE NATIONALITY REQUIREMENT UNDER THE *ARON BROCHES* TEST.

i. Vemma was 'structurally' an organ of Bonooru.

55. The respondent reiterates that the *Aron Broches test* is a wrong test under the ICSID AF Rules. However, in the event that the tribunal applies the test in these arbitral proceedings then also Vemma fails to fulfil the nationality test under the Aron Broches' exception as it was performing governmental functions throughout the course of their investment in Mekar.

56. The Aron Broches test is a mirror image of attribution test under Articles 5 and 8 of ARSIWA.[58] The attribution test is generally seen through the lens of structural and functional tests.[59] Structurally, the respondent has already submitted that the claimant was a state organ of Bonooru as Bonooru had pervasive control over Vemma's management.[60]

57. Further, the *Beijing Shougang* tribunal observed that if a state has direct control over the employment of an enterprise, then this factor is a direct indicator that the enterprise is a state entity.[61] In this case as well, Bonooru always had an appointee on the board of directors.[62] What substantiates the respondent's assertion more is the fact that Bonooru

[58] *BUCG¶34.*

[59] *Maffezini¶77-79*; Olleson p.467-468.

[60] Memorial, Sec. I.A.; Facts¶8; Record p.43.

[61] *Beijing Shougang¶164.*

[62] AOA¶152.2.

replaced the board of directors of Vemma with its government's functionaries on March 2, 2021.[63] These factors alone are sufficient to show that the claimant is a state entity.[64]

58. It is without doubt that the claimant was owned and controlled by Bonooru.[65] Such degree of ownership should be seen as a presumption that the claimant is a state entity,[66] and consequentially this is an arbitration between two states, which falls outside the jurisdiction of this tribunal.[67]

59. At this point, the claimant might argue that the *Aron Broches test* is a functional test rather than a structural test. However, this is again a wrong assertion because attribution is not a checklist of tests but rather a cumulative examination of various factors.[68] On the notion of attribution test, the *Maffezini tribunal stated* that: "When all or most of the tests result in a finding of State action, the result, while still merely a presumption, **comes closer to being conclusive.**"[69]

60. In the event that the tribunal only applies the functional test, then also, the claimant should be considered as a state organ as the claimant enterprise was performing essentially governmental functions.

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[63] Facts¶65.

[64] *Beijing Shougang.*

[65] Facts¶8; Record p.43.

[66] *Orascom¶554-556.*

[67] ICSID AF Rules, Art. 2; CEPTA, Art. 9.16¶2.

[68] *Maffezini¶75.*

[69] *Id.*¶81.

ii. Vemma was performing essentially governmental functions.

61. The first consideration point that this tribunal should look into is the object and purpose of Vemma, and the reason for their creation.[70] In the present case, Vemma was created after the privatization of Bonooru's state owned airline, BA Holdings.[71] The key objectives of Vemma were to perform the governmental objectives such as mobility, development of infrastructure, etc.[72] These functions are specifically reserved for states.[73] Hence, Vemma was merely functioning as 'state owned vehicle' to carry out governmental functions of Bonooru.

62. Further, the participation of Bonooru[74] in the creation of Vemma is also a very important factor to suggest that the claimant was created to carry out governmental functions of the state.[75] Indeed, in this case as well, Vemma was performing all such governmental functions throughout the course of their investment in Mekar for the following reasons:

63. *Firstly,* the Caspian project was launched in 2010,[76] the objective of the project was to ensure movement between Bonooru and its neighbors.[77] Just after 1 year of Caspian Project,[78] Vemma invested in Mekar's Caeli Airways. This is a strong indicator of the real intention and the actual purpose of the investment as[79] this is a strong factor which strongly

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[70] *Id.*¶27.

[71] Facts¶9.

[72] MOA¶3(h).

[73] OECD COFOG.

[74] Facts¶10.

[75] *Maffezini¶85.*

[76] Facts¶4.

[77] *Id.*

[78] Facts¶26.

[79] *Maffezini¶70.*

points out that the major objective of the claimant enterprise was to ensure the fulfilment of Caspian project. This can further be substantiated by the fact that "one of the pillars" of Vemma's activities in Mekar was to cater to customers travelling from Mekar to Bonooru.[80]

64. *Secondly*, every commercial activity is driven by profit motive,[81] as opposed to state activity which is driven by public benefit motive.[82] However, the routes between Bonooru and Mekar were continued even after Vemma was not yielding any profit from it,[83] and despite constant warnings from Mekari officials.[84] The continuation of these routes makes it conspicuous that the claimant was not driven by any profit motive, which a private corporation would be.[85] Rather, the only motive of the claimant was public welfare of Bonoori citizens. Hence, the activities of Vemma lose their commercial character, and are consequentially, governmental activities.

65. *Thirdly*, a direct or indirect affiliation with the government is a strong indicator of governmental activities.[86] Vemma agreed to refinance Caeli's debts from a Bonoori owned bank,[87] which again is an important factor to suggest that it was using the governmental authority to carry out its activities in Mekar.[88]

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[80] Facts¶28.

[81] OECD Working Papers No.6.

[82] Kovács.

[83] Facts¶30.

[84] *Id.*¶31.

[85] OECD Working Papers No.6.

[86] ARSIWA Commentary p.47.

[87] Facts¶23.

[88] ARSIWA Commentary p.43.

66. *Lastly,* in Vemma's MOA, one of the key objectives was the development of the airline industry,[89] which is a government function.[90] The tribunal should see that the claimant was given subsidies by Bonooru to carry out these governmental activities under the Horizon 2020 scheme.[91] However, subsidies under Horizon 2020 could only be given to those companies that were "investing in the tourism related infrastructure of Bonooru".[92]

67. These subsidies under Horizon 2020 transpire the entire reality of the claimant. The claimant, through its investment in Mekar, was investing in tourism of Bonooru by running routes between Bonooru and Mekar, despite running losses only to promote Caspian project and the state's function of infrastructure development. Therefore, the claimant was not performing commercial functions but purely governmental functions throughout the course of its investment in Mekar.

F. THE RESTRUCTURING OF CLAIMANT WAS DONE IN BAD FAITH.

68. On 2 March 2021, the claimant enterprise underwent large scale restructuring after which Bonooru acquired majority shareholding in the claimant enterprise and their board of directors was replaced with government functionaries, and their functions were increased to include paramilitary activities.[93] The respondent acknowledges that the relevant time for jurisdiction is the date of institution of proceedings, which in the present case is 15 November 2020.[94]

69. However, this change in the investment of the claimant enterprise poses severe threat to investment law jurisprudence. The principle of good faith has to be kept even after the

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[89] MOA¶3(h).

[90] ARSIWA Commentary, p.43; Petrochilos.

[91] Facts¶28.

[92] *Id.*

[93] *Id.*

[94] Facts¶63.

institution of proceedings.[95] The present restructuring of the claimant enterprise, however, was done in bad faith as one of the key objectives of the restructuring was to assist the claimant in this arbitration against the respondent.[96] It is for this reason that lawyers from Bonooru's justice department were employed specifically to assist the claimant in this arbitration.[97] Hence, the present restructuring of the claimant enterprise was done by Bonooru solely to use the claimant as an imposter to get access to this tribunal.[98]

70. The tribunal should take cognizance of this fact and, simultaneously, reject jurisdiction to set a strong precedent to protect the investment law jurisprudence. If this tribunal accepts jurisdiction, then this case will be used as a precedent to open doors for states to get access to ICSID tribunals which would defeat the object and purpose of investment arbitration under ICSID.[99]

AMICI SUBMISSIONS

II. THE TRIBUNAL SHOULD ALLOW THE AMICUS CURIAE PARTICIPATION OF THE EXTERNAL ADVISORS TO THE COMMITTEE ON REFORM OF PUBLIC UTILITIES AND DENY THE AMICUS CURIAE PARTICIPATION OF THE CONSORTIUM OF BONOORI FOREIGN INVESTORS.

71. This tribunal has two leave applications before it to file amicus briefs. The first leave application has been filed by the Consortium of Bonoori Foreign Investors ('CBFI') and the second leave application has been filed by the External Advisors to the Committee on Reform of Public Utilities ('CRPU').

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[95] Dolzer/Schreuer.

[96] Facts¶63.

[97] *Id.*

[98] Facts¶63.

[99] Mohtashami/Hosseny.

72. The tribunal should only accept CRPU's submissions and reject CBFI's submissions.

A. THE TRIBUNAL SHOULD APPLY UNCITRAL TRANSPARENCY RULES IN THESE ARBITRAL PROCEEDINGS.

73. Under Article 9.20(6) of UNCITRAL, the parties have agreed to apply the standards of UNCITRAL transparency rules.[100] Under the UNCITRAL transparency rules, the tribunal while exercising any discretion shall take into account: public interest involved,[101] and the assistance the amicus submission would give to the tribunal in reaching to a correct decision.[102] This tribunal shall also apply a similar threshold in these arbitral proceedings.

B. THE TRIBUNAL SHOULD DENY CBFI'S AMICUS SUBMISSIONS.

74. The tribunal should deny CBFI's amicus participation for <u>three</u> reasons:

i. CBFI does not meet either the 'public interest' or the 'significant interest' threshold.
ii. CBFI is not independent from the claimant.
iii. CBFI doesn't bring any different perspective which would assist the tribunal.

i. <u>CBFI does not meet either the 'public interest' or the 'significant interest' threshold</u>.

75. The respondent submits that the appropriate threshold is the public interest. However, even if the significant interest threshold is applied, then also CBFI fails to meet both thresholds to qualify as a genuine amicus curiae as:

76. In their Amicus submission, CBFI has specified its interest by stating:

[100] CEPTA, Art. 9.19¶7.

[101] UNCITRAL transparency rules, Art. 1¶4(a).

[102] *Suez¶24; Biwater¶61-65.*

> *"The impact of the decision in this case on the* ***interpretation*** *of investor-State dispute settlement provisions of current and future investment agreements in Mekar holds significant interest."*[103]

77. This makes it clear that CBFI has interest only in the interpretation of the tribunal which would benefit their members.[104] This means that CBFI only has "professional interest" in the subject matter of this arbitral proceedings as 38 of its members have claims pending against Mekar.[105] However, professional interest is not a threshold to participate in arbitration as amicus curiae.

78. In *Apotex,* the tribunal denied an amicus curiae submission for a similar reason.[106] In that case also, the factual matrix is similar to the present case. The amicus curiae, who was a lawyer of different clients who had pending cases under NAFTA, filed the application to participate as amicus curiae.[107] Similar to this case, the amicus had interest in the interpretation of NAFTA by the tribunal.[108] The tribunal, not only rejected the leave application, but also criticised the amicus curiae by stating:

> *"It seems that the Applicant's* ***'significant interest'*** *in this arbitration lies only in having this Tribunal adopt legal* ***interpretations of NAFTA*** *that he* ***favours*** *that could be advantageous to his clients in his pending and possible future NAFTA cases. Although it may be an interest,* ***the Tribunal concludes that it is not a significant interest under Section B(6)(c) NAFTA FTC Statement. The contrary interpretation would lead to absurd results; and that cannot possibly be what was intended with the admission of amicus curiae briefs in NAFTA arbitrations****."*

79. Finally, the tribunal found that Mr Appleton's amicus application was driven by a particular professional interest, rather than a public interest affecting him as a member of the

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[103] CBFI submission¶9.

[104] *Id.*

[105] *Id.¶6.*

[106] *Apotex(PO)¶43.*

[107] *Id.¶5.*

[108] *Id¶14.*

community.[109] This observation by the *Apotex* is very important in the present case as well. This tribunal should note that the formal requirements under NAFTA FTC statement and CEPTA[110] are exactly similar.[111]

80. Therefore, relying on the observation of *Apotex* tribunal, the respondent requests this tribunal to reject CBFI's submissions as they fail to meet either the 'public interest' or the 'significant interest' threshold.[112]

ii. CBFI threatens the transparency of the proceedings as it is not independent from the claimant.

81. An amicus is a 'friend of court' and not a 'friend of party'.[113] CBFI's member Lapras Legal's association with the claimant threatens the transparency of these arbitral proceedings. Hence, the submissions should not be accepted. Previously also, tribunals have rejected amicus briefs for having any association with the disputing parties.[114] Similarly, in this case Lapras Legal is financially advising the claimant with respect to *this arbitration.*[115] Thus, as far as the present arbitration is concerned, the claimant is a client to Lapras legal, and more importantly Lapras legal is assisting the claimant in this dispute.

82. Therefore, the tribunal should reject CBFI's participation as amicus curiae to protect the transparency of the present arbitral proceedings.

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[109] *Apotex(PO)¶43.*

[110] CEPTA, Art. 9.19¶3.

[111] *Id.;* NAFTA FTC statement, Sec. B.

[112] *Apotex(PO)¶40,43*.

[113] Kinnear.

[114] *UPS(Amicus)*¶9; *Border Timbers*¶*49;* Schliemann.

[115] CBFI Submission¶7.

iii. CBFI doesn't bring any different perspective which would assist the tribunal.

83. The most important objective of amicus curiae participation is that the amicus brief must assist the tribunal by bringing different perspective than the disputing parties,[116] and must have expertise to make such submission.[117] CBFI fails to satisfy the objective as:

84. *Firstly,* CBFI has just given arguments for claimants,[118] rather than disclosing any fact which would assist the tribunal. So, CBFI's submissions should only be treated as an exhibit to the claimant's arguments rather than an amicus brief.

85. *Secondly,* CBFI is an industry association, rather than a legal association.[119] So, in no possible scenario their expertise would assist the tribunal in the interpretation or application of CEPTA.

86. Therefore, CBFI's amicus submissions should not be accepted by this tribunal.

C. THE TRIBUNAL SHOULD ACCEPT CRPU'S AMICI SUBMISSIONS.

87. The tribunal should accept CRPU's amici submissions for two reasons:

i. CRPU satisfies both "public interest" and "significant interest" thresholds.
ii. CRPU brings different perspective than the disputing parties and raises issues within the scope of the dispute, and does not unduly burden the arbitral proceedings.

[116] *Biwater¶61-65.*

[117] *Suez¶24; Biwater¶355,359,392.*

[118] CBFI Submission.

[119] CBFI Submission¶2.

i. CRPU satisfies the threshold of both 'public interest' and 'significant interest' threshold.

88. Under the UNCITRAL transparency rules, the appropriate standard is the 'public interest' threshold.[120] The public interest threshold means that the subject matter must involve an element of public interest, and not that the amicus briefs must be in furtherance of public interest.[121] CRPU satisfies this threshold as:

89. *Firstly,* CRPU has raised an issue regarding corruption.[122] Corruption, in itself, is a topic which lies in public fora.[123] Therefore, it is clear that the present dispute involves a subject matter which involves the element of public interest.

90. *Secondly,* the more important factor here is that if the claimant has made investment by the means of corruption, then the investment will become illegitimate.[124] Illegitimacy is the most important reason for which amicus curiae participation becomes quintessential.[125] Prof. Stern has highlighted the need to allow *amicus submissions* which will assist the tribunal in answering complex questions of public policy by stating:

> *"the participation of the* ***amici curiae in investor-State arbitration is ... consistent with the changing nature of investor-State arbitrations and the complex issues of public policies that tribunals are increasingly being called upon to address*** *... [T]his system, which was traditionally based on private legitimacy arising from the consent of the parties, seems to now be in search of public legitimacy, which it is thought can be obtained from a certain degree of openness to civil society."*[126]

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[120] UNCITRAL transparency rules, Art. 1¶4(a); *Methanex¶49.*

[121] Dimsey; NAFTA FTC statement.

[122] CRPU Submission p.19.

[123] Cosar p.548; *Union Fenosa Gas¶3.*

[124] CEPTA preamble; Miles p.330.

[125] Levine; Born.

[126] Stern; Delaney/Magraw; Gomez.

91. This tribunal should also apply the same threshold and accept CRPU submissions which match the threshold of public interest. However, if the tribunal chooses to apply the 'significant interest' threshold, then also CRPU matches the threshold as:

92. *Firstly,* CRPU is a third person which is concerned with the promotion of fair business in Mekar.[127] *Secondly,* CRPU has always shown significant interest before Mekari Courts as well by participating as intervening parties in judicial proceedings related to privatisation.[128] *Lastly,* stagnation in anti-corruption efforts in Mekar will directly impact the financial operations of CRPU as they regularly advise potential investors about prospecting opportunities in Mekar.[129]

93. Therefore, these factors highlight the significant interest of CRPU in these proceedings.

ii. CRPU brings different perspective than the disputing parties and raises issues within the scope of the dispute, and does not disrupt the proceedings.

94. The purpose of allowing third persons to participate in arbitral proceedings is that the tribunal and the parties should benefit from the special knowledge of the third person and its perspective on the issues.[130] CRPU's submission has highlighted that the claimant's investment was made through corruption which is clearly a new perspective which will greatly assist the tribunal determining jurisdiction over the claimant's claims. CRPU's submission should be accepted as:

95. *Firstly,* if the experience of the amicus will provide assistance to the tribunal, then the tribunal should accept the *amicus curiae* submissions.[131] In this case also, CRPU has vast

[127] CRPU Submission p.19.

[128] *Id.*

[129] *Id.*

[130] *Suez*¶*24*; Dimsey p.33.

[131] *Suez*¶24; *Apotex(PO)*¶*23*; For Example: Australia–Chile FTA.

experience in privatisation in Mekar.[132] Therefore, CRPU's experience is an important element which would be of great assistance to the tribunal.

96. *Secondly,* owing to the underlying public interest involved in the present arbitration, and the fact that the parties themselves have not agreed to the jurisdiction of the tribunal.[133] CRPU's submissions should be seen as submissions within the scope of the dispute.[134] In the alternate, if the tribunal finds CRPU submissions to be outside the scope of the dispute then also, it should be accepted as:

97. When an amicus makes a submission that is outside the scope of the dispute that may not have been raised by the parties, but are of an important nature then it is an "*ex officio* obligation on the tribunal to consider them."[135] CRPU was involved in the entirety of the privatisation process during claimant's investment.[136] Therefore, CRPU is in the position to give unbiased facts at the time of privatisation which might not be raised by the disputing parties.[137] In practise also, tribunals have allowed amicus submissions even if such submissions were not within the scope of the dispute.[138]

98. *Thirdly,* this tribunal is the judge of its own competence. Thus, any submission which might assist in determining jurisdiction shall be considered. Corruption, surely, is one such issue in which the tribunal can accept amicus submissions *suo moto.*[139] In *WDF* also, the tribunal made a similar observation that it is a strongly held view within the arbitration community that an arbitral tribunal has the power and jurisdiction to consider issues of illegality and

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[132] CRPU Submission p.19.

[133] Response¶2-6.

[134] *Apotex(PO).*

[135] Dimsey.

[136] CRPU Submission p.19.

[137] Dimsey p.187; Levine; Born.

[138] *Id*.

[139] *Id*.

can do so on its own motion, even if the issue has not been put before it by the parties.[140] Relying on this observation, this tribunal should also accept CRPU's submissions.

99. *Lastly,* CRPU is independent of the disputing parties as they are members of civil society who have no role to play in the present arbitration.[141] Further, CRPU's members were remunerated at a fix fee and success fee as a percentage of sale price.[142] Therefore, CRPU's submission should be accepted as it would greatly assist the tribunal without disrupting the proceedings.

PART II: MERITS AND DAMAGES

MERITS

III. THE RESPONDENT HAS NOT VIOLATED ARTICLE 9.9 OF CEPTA.

100. Without prejudice to the respondent's position that the tribunal does not have jurisdiction over the present dispute, Mekar has not violated its obligation to provide Fair and Equitable treatment to Vemma under Article 9.9 of CEPTA.

101. In order to assess the breach of any of the elements under Article 9.9 in this case, the tribunal should apply the standard of CIL. This is because the title of Article 9.9 is 'Minimum Standard of Treatment' which in itself is CIL. Further, under Article 1.3(2) every provision of CEPTA must be interpreted in accordance with the applicable rules of international law. Under the MST in CIL, the threshold to constitute a breach of FET is very high.

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[140] *WDF¶129.*

[141] CRPU Submission p.19.

[142] *Id.*

102. In the words of the Glamis Tribunal, it is "a floor, an absolute bottom below which the conduct is not accepted by the international community."[143] Only a manifest or grossly unfair treatment[144] that shocks judicial propriety[145] would constitute a breach of FET under the MST.

103. In that light, the respondent has not breached the threshold to provide FET under MST to the claimants and has not violated Article 9.9 of CEPTA. None of the actions pursued by the respondent has:

i. frustrated the claimant's legitimate expectations.
ii. denied justice to the claimant,
iii. discriminated against the claimant, or
iv. subjected the claimant to any abusive treatment.

104. These acts, whether considered individually or cumulatively, do not constitute a violation of Article 9.9 of CEPTA.

A. THE RESPONDENT DID NOT FRUSTRATE THE CLAIMANT'S LEGITIMATE EXPECTATIONS.

i. Frustration of legitimate expectations is not a standalone violation of Article 9.9.

105. The claimant will try to convince the tribunal that frustration of legitimate expectation under CEPTA is a standalone breach of Article 9.9. However, this assertion is incorrect. This is because Article 9.9(3) states:

> *"When applying the above fair and equitable treatment obligation, a Tribunal may* ***consider*** *whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor*

[143] *Glamis Gold¶615.*

[144] *Waste Management¶98; Tecmed¶154; Antaris¶360; Saluka¶309; Sempra¶318; Micula¶522; Genin¶367.*

[145] *AES¶9.3.4; SunReserve¶688.*

relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated."

106. The highlighted word simply states that the tribunal 'may' only consider the claimant's legitimate expectation. This implies that legitimate expectations under CEPTA only serve as a contributing factor to determine a breach of FET and do not, in themselves, constitute a breach of Article 9.9. Therefore, a frustration of claimant's legitimate expectations alone cannot amount to a breach of Article 9.9 of CEPTA.

107. In any event, the respondent has not frustrated the legitimate expectations of the claimant in the instant case.

ii. The expectations of the claimant were not legitimate.

108. The investor's expectations are protected only when they are legitimate in the light of the prevailing circumstances.[146] The legitimacy of the expectations of the investor, however, should be assessed objectively without regard to the subjective hopes of the investor.[147] For the purpose of Article 9.9 of CEPTA, in order to assess the legitimacy of the Claimant's expectations, this tribunal should see whether Mekar made any specific representation in order to induce the investment. In doing so, the tribunal should examine the form, content and intent of the representation.[148] In the present case, the respondent has not violated any legitimate expectation of the claimant as:

109. *Firstly,* the claimant might argue that the approval of its business plan resulted in specific assurance. While CCM had approved the business plan of the claimant, it had, however, not given a license to the claimant to engage in anti-competitive or illegal measures. In

[146] Suez¶228; McLachlan p.316; Dolzer/Schreuer p.148.

[147] Jacob/Schill p.725; *Saluka¶304; Belenergia¶583; SunReserve¶710.*

[148] *Total¶121; Crystallex¶547; Wirtgen¶409.*

present instance, the CCM had limited its assurance only to low or mid-level co-operation, low pricing and certain benefits at the Phenac International Airport.[149]

110. However, the claimant used these assurances to predatorily price its services at the cost of other competitor's interest, engaged in preferential slot trading which is a high-level co-operation as it is a far-reaching agreement,[150] and abused its dominance at Phenac International Airport to eliminate competitors off the market.[151] While these activities fall outside the specific assurances, the claimant had specifically undertaken to not indulge in such activities.[152] At this point, the claimant cannot say that they reasonably expected that the respondent will not take measures against their anti-competitive and illegal activities.

111. *Secondly*, any authorization of business plan may be withdrawn if the investor fails to comply with the laws of the Host State.[153] Further, subjective expectations of the claimant cannot supersede the objectives of CEPTA.[154] Under MRTPA, predatory pricing and disruptive market arrangements are offences. Moreover, one of the key objectives of CEPTA is to promote fair-competition.[155] Thus, the claimant's anti-competitive measures cannot be protected as legitimate expectations.

iii. <u>In any event, the respondent had the right to regulate</u>.

112. Even if legitimate expectations exist, this does not bar states from exercising their inherent right to regulate in order to address changing economic and social needs.[156] Article 9.8 of

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[149] Facts¶25.

[150] OECD/Airlines¶32.

[151] Facts¶49.

[152] Facts¶25.

[153] Talus p.453-473.

[154] CEPTA, Art. 1.3(1)(b).

[155] MRTPA, Chap IV.

[156] *SunReserve¶702-703; Gami¶94.*

CEPTA explicitly provides that Mekar can exercise its right to regulate for legitimate policy objectives like social and consumer protection. In doing so, if Mekar negatively affects the investor's legitimate expectation, then the same would not amount to a breach of FET under Article 9.9.

113. In the instant case, the investigations were conducted for the legitimate policy objective to protect the interests of the consumers and the competitors from the anti-competitive measures adopted by Vemma. Further, the investigations were conducted in line with the Mekar's competition law. Since, the respondent's conduct did not exceed its regulatory authority, there was no frustration of Vemma's legitimate expectation.

B. MEKAR'S JUDICIARY DID NOT DENY JUSTICE TO THE CLAIMANT.

114. Under Article 9.9(2)(a), and the CIL, the test for establishing a denial of justice is very high. According to the Harvard Draft Articles, denial of justice exists only when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice or a manifestly unjust judgment.[157] A mere disagreement or error in law or procedure does not amount to a denial of justice.[158]

115. The high threshold for denial of justice can only be breached when there is an outrageous failure of the national legal system as a whole.[159] Put simply, in order to constitute a denial of justice, Vemma should show that Mekar failed to provide a 'minimally' adequate justice system to the claimant.[160] In this case, the claimant has failed to do so.

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[157] Klager p.215.

[158] *Agility¶212.*

[159] *Philip Morris¶500; Chevron¶8.36; Oostergetel¶273.*

[160] *Agility¶216.*

116. The Mekari Courts did not deny justice in any of the three events alleged by the claimant, be it,

i. The delay in the interim hearings;
ii. The interim decision of Justice VanDuzer; and
iii. The enforcement of the award set aside at the seat of arbitration.

i. The delay in the interim hearings did not deny justice to the claimant.

117. Under international law, only a delay which is 'undue' or 'unwarranted' amounts to a denial of justice.[161] The assessment of this delay, however, is highly fact specific.[162] Various tribunals have previously observed that in order to ascertain whether a delay constitutes a denial of justice, it should consider the various factors that contributed to the delay,[163] and the behavior of the Courts.[164]

118. In the present case, the 13-month delay in the interim hearings was solely because of Mekar's overburdened judiciary.[165] At the time when the claimant registered their claim, there was a high volume of cases stemming from the economic crisis.[166] Several parties had approached the Courts seeking immediate redressal.[167] Owing to the lack of resources of

[161] Paulsson p.177.

[162] *White Industries¶10.4.10*.

[163] *Krederi¶457*.

[164] *Oostergetel¶290*.

[165] Facts¶¶13,44.

[166] Facts¶44.

[167] *Id*.

the Mekari Courts, it was impossible to schedule an interim hearing at an earlier date.[168] More importantly, the claimant was cognizant of this delay.[169]

119. In *White Industries v India*, the delay in enforcement of the award took more than 9 years before the Indian judiciary, yet the tribunal did not find a denial of justice. In that case, the tribunal acknowledged that India was *a developing country* with *a seriously overstretched judiciary*.[170] In such instances, the delay should only be seen as an inevitable consequence of overburdened judiciary and not as an intentional delay effectuated in bad faith.[171]

120. Similarly, in this case as well, while the respondent regrets the 13-month delay but it was caused solely because of the overburdened judiciary and was not a willful delay to harm the claimant's interest. Since this delay was not effectuated in bad faith, the same cannot be considered undue, and hence cannot amount to a denial of justice.

ii. The interim decision of Justice VanDuzer was not a fundamental breach of due process.

121. In order to constitute a denial of justice, there must be a willful disregard of due process.[172] This occurs when there is a refusal to hear claims or justice is delivered in a seriously inadequate way.[173] In the instant case, there has been no breach of the claimant's due process rights since their claims on the airfare caps were adequately heard.

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[168] *Id.*

[169] Facts¶13.

[170] *White Industries¶10.4.18.*

[171] *Id.*

[172] *Elettronica Sicula¶128; Agility¶209.*

[173] *Azinian¶¶102-03.*

122. During the interim hearings, Mekar's High Court sufficiently heard the claimant's submission from 25 April 2019 to 27 April 2019 concerning a stay on the airfare caps.[174] In the summary judgment of Justice VanDuzer, the caps were not removed only because of the previous conduct of the claimant in adopting anti-competitive measures,[175] and the financial capabilities of the claimant.[176]

123. Further, when the claims regarding the airfare caps were heard, at that time, Justice VanDuzer also considered the claimant's *prima facie* case on merits, and dismissed the merits of Vemma's appeal in accordance with the normal practice in Mekari Courts.[177]

124. The claimant at this point would try to convince this tribunal that the decision of Justice VanDuzer is a breach of their due process rights since their claims on merits were dismissed prematurely on a prima facie consideration. However, this assertion is baseless. In this light, the observation of the tribunal in *Philip Morris v Uruguay* is significant. In that case, the tribunal observed that the obligation of the Courts is only to hear the substance of the claim and not each and every argument to reach a conclusion.[178] In doing so, this tribunal should consider whether *in substance* the Mekari Court *failed to decide the material aspects* of the claimant's claim such that *they can be said not to have decided the claim at all."*[179]

125. In this case, only after a *prima facie* consideration of Vemma's claims on merits, and the lack of possibility of arriving at a different final decision, Justice VanDuzer dismissed the merits of Vemma's appeal. Since, Justice VanDuzer had adequately heard the substance of Vemma's claims, and only then dismissed their appeal, the summary judgment does not

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[174] Facts¶52.

[175] Facts¶54.

[176] *Id.*

[177] Facts¶54.

[178] *Philip Morris¶557.*

[179] *Id*¶557.

amount to a willful disregard of due process, let alone a fundamental breach of due process. Hence, it is not a denial of justice.

iii. The enforcement of the award set aside at the seat of arbitration was not a denial of justice.

126. A denial of justice occurs only when the Court gives a malicious[180] or outrageously wrong final and binding decisions so as to shock the sense of judicial propriety.[181] In the instant case, the enforcement of the award set aside at the seat of arbitration does not amount to a denial of justice.

127. Before showing that the enforcement of the set-aside award does not constitute a denial of justice, it is the respondent's position that the Claimant here is only trying to appeal against the judgement Mekari Courts before this tribunal. However, this tribunal should not function as a super-appellate court.[182] The scope of review of the acts of a domestic judicial body before the Tribunal is very limited and it should not be treated as a court of appeal.[183]

128. However, in the event that this tribunal chooses to review the enforcement decision of the Mekari Court in the instant case, then, the enforcement of the award set aside at the seat of arbitration does not amount to a denial of justice.

129. In the present case, the award issued by Mr. Rett Cavanaugh ('award') under the Shareholders' Agreement between Vemma and Mekar Airservices Ltd was set aside by the Supreme Arbitrazh Court of Sinnograd ('annulment decision') at the seat of arbitration. Even when the award was set aside, their enforcement cannot be considered as a denial of justice because the Mekari Courts have the discretion to enforce this award.

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[180] *Al-Bahloul¶237.*

[181] *Arif¶445.*

[182] *Mamidoil¶¶764-770.*

[183] *Azinian¶99.*

130. This is because Article V(1)(e) of the New York Convention and Section 36(2) of the Mekar's Commercial Arbitration Act provides that an award set aside at the seat of arbitration "may" not be enforced. The use of the term "may" grants the Mekari Courts the discretion to enforce an award even if it has been set aside.[184]

131. Mekar has persistently objected to a limited review power of the domestic courts.[185] Hence, the NY convention cannot be interpreted in a manner which would limit Mekari courts' review powers and previously also, Mekar has rightfully exercised this discretion to enforce an award even when the same has been set-aside.[186]

132. However, if this tribunal were to narrowly interpret the discretion granted under the New York Convention as one that can only be exercised in exceptional circumstances, then also, the enforcement of this award does not constitute a denial of justice since it was not done in bad faith.

133. The award was set aside on the grounds of bribery. The annulment decision set the award aside despite an absence of conclusive proof that the award was induced with bribery. The annulment decision stated "despite the weight of evidence submitted by the Claimant, including 14 June 2020 CILS Report and the report of the independent experts appended to it, the Court does not find itself in a position to conclusively rule on whether the act of bribery had in fact taken place."[187]

134. Since the award was set aside on grounds of bribery and the annulment decision itself could not rule on the existence of bribery in the first place, the enforcement of this award does not rise to the threshold of being a malicious or outrageously wrong final decision. Thus, the enforcement does not amount to a denial of justice.

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[184] *Hilmarton*¶¶*663-665; Chromalloy*¶¶*1001-1012.*

[185] Facts¶20.

[186] Record p.65¶8.

[187] *Id.*¶10.

C. THE CLAIMANT WAS NOT SUBJECTED TO ANY ARBITRARY OR DISCRIMINATORY CONDUCT.

i. The two investigations by the CCM were not arbitrary.

135. Any measure of the state can be termed arbitrary only if the same is not based on any legal standard but on discretion, prejudice or personal preference.[188] In the present instance, both the investigations of CCM were provided under MRTPA.

136. In the *first* investigation, CCM considered the composite market shares of Caeli and Royal Narnian because of a market disruptive arrangement between them.[189] This investigation was not arbitrary as CCM can take *suo moto* actions against such anti-competitive measures.[190] Further, CCM had already notified its no-tolerance approach towards any market disruptive arrangement in its white paper issued in July, 2016.[191] Solely aside the fact that the present consideration of composite market share was not arbitrary, in any event, MRTPA provides that CCM can investigate corporations even with a low market share if they pose a threat to the competition.[192] Thus, the first investigation by CCM, on its own motion, was not arbitrary. Furthermore, on a later stage, the concerns of CCM were proven to be genuine as the investigation transpired the illegal activities of the claimant.[193]

137. In the *second* investigation, CCM conducted the investigation after receiving complaints from the claimant's competitors over the claimant's abuse of dominance at Phenac International Airport.[194] Under MRTPA, CCM can conduct such investigations after

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[188] *EDF*¶303.

[189] Facts¶36.

[190] MRTPA, Chap III.

[191] Facts¶36.

[192] MRTPA, Chap III.

[193] Facts¶45.

[194] Facts¶38.

complaints.[195] This investigation, again, transpired claimant's illegal activity.[196] Thus, both the investigations were reasonable in the light of claimant's consistent illegal activities.

ii. Claimant was not discriminated.

138. Discrimination occurs when the investors in like circumstances are treated differently without justification.[197] Hence, a finding on discrimination depends on; *first*, the parties must exist in like circumstance; *second*, there is a differential treatment; and *third*, the differentiation is done without any reasonable justification.[198]

139. In the instant case, the subsidies granted to airline industry by virtue of the Executive Order 9-2018 is not discriminatory since it did not arbitrarily deny the claimant of such reliefs. To prove this, the Respondent would show:

a. The claimant and the other foreign airlines were not in like circumstances; and in the alternative,
b. Any differential treatment between them was justified.

a. The claimant and other foreign airlines were not in like circumstances.

140. The determination of whether investors are in like circumstances is a fact and context-sensitive inquiry.[199] Even when the investors operate in the same business sector, tribunals have previously looked into multiple factors like the framework,[200] respective activities,[201]

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[195] MRTPA, Chap III.

[196] Facts¶49.

[197] Saluka¶313; Dolzer/Schreuer p.196.

[198] *Pope¶38.*

[199] *Levy de Levi¶396; Apotex¶8.15; Bayindir¶389.*

[200] *Vento¶241,249.*

[201] *Cengiz¶529-540.*

scope of operations,[202] factual circumstances of the investor,[203] or public interest to determine likeness.[204]

141. In the instant case, Vemma and the other foreign airlines are not in like circumstances. This is because Vemma is a state-owned enterprise and the other foreign airlines like StarWings and JetGreen who were granted the subsidies are non-state-owned airlines.[205] Under the Executive Order 9-2018 only non-state-owned airlines were granted the subsidies.

142. Vemma was in like circumstances only with other 'State-owned' airlines. And, in the instant case, along with Vemma, Larry Air, another state-owned airline operating in Mekar was also not provided subsidy under this Executive Order 9-2018.[206]

b. Alternatively, any differential treatment between them was justified.

143. A differential treatment is unjustified only when it is capricious, irrational or absurd.[207] However, when the differentiation is done in pursuit of a legitimate aim, then that differentiation is justified.[208]

144. In the instant case, Vemma was denied the subsidies under the Executive Order 9-2018 because it had several unique advantages over other non-state-owned airlines.[209] Vemma constantly received funds from Bonooru under the Horizon 2020 scheme. Also, since it was state-owned, Bonooru was under an obligation to bail in Vemma in the event of any crisis.

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[202] *UPS¶173-176; Champion¶154.*

[203] *Apotex¶¶8.42-8.54.*

[204] *Rusoro¶563.*

[205] Facts¶46.

[206] Facts¶47.

[207] *El Paso¶¶309-315*.

[208] *Enron¶282*; Kläger p.196-197.

[209] Facts¶46.

This is further evidenced by Bonooru's own restructuring of Vemma on 2 March 2021 when it bailed in the claimant of its losses by a large-scale restructuring.[210] This advantage was not afforded to the non-state-owned airlines. Hence, the subsidies were granted only to non-state-owned airlines who were devoid of such added advantages.

145. Further, based on a similar reasoning, Larry Air, another state-owned airline was also not granted subsidies under this Order.[211] Since, the differentiation was made in pursuit of a legitimate aim, this differentiation is justified, and does not amount to a discriminatory conduct.

D. THE CLAIMANT WAS NOT COERCED TO SELL ITS INVESTMENT OWING TO THE CUMULATIVE ACTIONS OF MEKAR.

146. For any measure of the state to breach Article 9.9(2)(d) of CEPTA, and constitute an abusive treatment there has to be an 'unreasonable' interference in the management of the investment.[212] These include 'unwarranted' and 'improper' pressure, 'threats' of criminal proceedings, 'unfounded' fines, and deliberate obstruction in the daily business operations.[213] Put simply, not any measure of the state but only those which are initiated deliberately to frustrate the claimant's investment would constitute an abusive conduct.[214]

147. In this case, the claimant has suffered losses due to its whimsical business strategies, and not by the respondent's actions. Finally, when the claimant had no option but to sell its shares, the respondent, emphatically, purchased the shares. Shockingly, the claimant has argued that the respondent had abusively coerced the claimant to sell its shares at a fire sale

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[210] Facts¶65.

[211] Facts¶47.

[212] *Tokios¶111.*

[213] UNCTAD p.82.

[214] *Waste Management¶138.*

price.[215] However, this argument is incorrect. Any measure undertaken by Mekar would be coercive only if there were manifestly no lawful grounds for the relevant actions, and the actions undertaken were solely to inflict harm on the investor.[216] In the instant case, all the actions of the State were well founded on legal grounds as:

148. *Firstly,* the CCM's investigations, and the subsequent imposition of fines were reasonable because Vemma chose to employ anti-competitive business strategies[217] despite having prior knowledge of Mekar's competition law[218], and the fact that any anti-competitive behavior would be subject to the review of CCM.[219] The interim airfare caps were placed to prevent the claimant from earning supra-competitive profits.[220]

149. *Secondly,* the mandatory use of MON (Mekar's national currency) instead of USD was done in the wake of a severe currency crisis. As per the IMF guidelines,[221] and with a view to stabilize MON, this measure was undertaken "to establish credibility in the local currency to avoid a debilitating economic situation."[222] Further, this measure required not just the claimant's company but all the companies operating in Mekar to offer services in MON.[223]

150. *Lastly,* the Respondent did not coerce Vemma into selling its shares to Mekar. It was Vemma's own inability to find a suitable purchaser for its shares that it decided to sell its

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[215] Notice¶24.

[216] UNCTAD p.83.

[217] Facts¶¶36,38,45,49.

[218] Facts¶19; Response¶12.

[219] Response¶12.

[220] Facts¶¶37,43,45,49.

[221] Facts¶39.

[222] Facts¶¶39,42.

[223] *Facts¶42; Total-Liability¶197.*

shares to Mekar.[224] Mekar had the right to reject the offer from Hawthorne LLP because it was not an arms-length offer, which is a necessary requirement under Article 39(1)(a) of the Shareholders Agreement between Vemma and Mekar Airservices Ltd.[225]

151. As emphasized in *Desert Line v Yemen*, only when a state exercises undue pressure in coercing the claimant to enter into an agreement, it would constitute an abusive treatment.[226] Vemma's own voluntary decision to sell its shares to Mekar cannot be deemed coercive.

152. Since all the actions of the Respondent were reasonable and based on lawful grounds, there was no cumulative effect which coerced Vemma to sell its shares, and subsequently there was no breach of Article 9.9(2)(d) of CEPTA.

DAMAGES

IV. THE APPROPRIATE STANDARD OF COMPENSATION IS THE MARKET VALUE OF THE INVESTMENT.

153. The Respondent maintains that it has not violated Article 9.9 of CEPTA, therefore, it owes no compensation to the claimant. However, in the event that the tribunal finds a breach of Article 9.9, then the respondent makes following submissions:

i. The tribunal should apply the Market Value ('MV') standard expressly provided in Article 9.21 of CEPTA. Under the MV standard, the tribunal should find that Mekar has already purchased the Claimant's investment at USD 400 million and by doing so, Mekar owes no further compensation to Vemma.

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[224] Facts¶63.

[225] Facts¶57; Record p.52,Section 39(1)(a).

[226] *Desert Line¶¶186-187.*

ii. Also, in the instant case, neither the MFN clause in CEPTA nor the principles of international law can be invoked to derogate from the standard expressly provided in the treaty.
iii. Alternatively, any amount of compensation awarded should be reduced on account of Vemma's contributory fault, and the ongoing economic crisis in Mekar.

A. THE ADEQUATE COMPENSATION STANDARD IS THE MV AND THE SAME HAS BEEN PAID TO THE CLAIMANT.

154. If the tribunal concludes that the respondent has violated the CEPTA, then, the tribunal should apply the MV standard to determine compensation, as agreed by both Bonooru and Mekar under Article 9.21 of CEPTA. In the present case the MV is the appropriate standard of compensation. The reason for this is two-fold.

i. The MFN clause cannot be triggered in the present dispute.
ii. The principles of international law cannot be invoked to derogate from an explicit treaty provision.

155. After establishing these two points, the respondent will show that under the MV standard, which is the appropriate standard to determine compensation in the instant case, Mekar has already paid the MV of Vemma's investment. Therefore, Mekar owes no further compensation to Vemma.

i. MFN clause cannot be triggered in the present dispute.

156. The MFN clause under Article 9.7 of CEPTA cannot be triggered to compensate Vemma in Fair Market Value ('FMV') in which the investors of Arrakis are being compensated.[227] The respondent recognizes that the purpose of an MFN clause in a treaty is to ensure that the relevant parties 'treat' each other as favorably as they treat third parties.[228] However, in

[227] PO3¶15.

[228] Dolzer/Schreuer.

determining what constitutes "treatment" for the purpose of invoking an MFN clause, special attention should be paid to the wording of the MFN clause in the treaty.[229] In the present case, the MFN clause cannot be triggered for three reasons.

157. *Firstly,* unless expressly stated, 'treatment' under MFN cannot be made applicable to compensation.[230] Under CEPTA, compensation is not a ground to trigger the MFN clause. Under Article 31 of VCLT, a subsidiary source of interpretation is allowed only in the cases where the ordinary meaning gives rise to ambiguity.[231] However, in this case the ordinary meaning of MV is clear and precise.

158. Article 9.21(1)(a) of CEPTA, and the Mekar's Model BIT allows any award on compensation only in MV.[232] More importantly, under CEPTA compensation in FMV can only be given in the cases of direct expropriation.[233] Since, CEPTA itself employs two different standards of compensation (MV and FMV), the intention of the drafters of CEPTA is clear to limit compensation only to MV in cases of breaches of FET. Therefore, the claimant cannot employ any subsidiary source of interpretation for a favorable outcome as the ordinary meaning of MV does not give rise to any absurdity, and is clear and precise.

159. *Secondly,* it is clear from CEPTA, that the 'treatment' for the purpose of Article 9.7(2) excludes the process of dispute settlement in other international investment treaties. This tribunal should note that compensation is a process of dispute resolution and the same was observed in a separate opinion by Sir Ian Brownlie in CME v Czech:

> *"The application of the most-favored nation clause (see Article 3(5) of the Dutch Treaty) to the compensation provisions of the Dutch Treaty in order to incorporate the substantially different formulation in the U.S. Treaty is an unattractive hypothesis. In the first place, it involves a strange view of the intention of the parties. The express*

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[229] Krederi¶289.

[230] MFN Commentary, Art. 11.

[231] Sinclair p.120.

[232] CEPTA, Art. 9.21(1)(a); Arrakis-Mekar BIT, Art. 13.

[233] CEPTA, Art. 9.12(2).

> *choice of a compensation clause becomes nugatory if the MFN clause applies in this form. The presumption must be that the clause promises* ***MFN treatment only in matters of treatment of an investment, and not to the process of dispute settlement****.''*[234]

160. Therefore, in this case, MFN cannot be triggered to give compensation in FMV.

161. *Lastly*, even if compensation is considered to be a substantive obligation, then also MFN cannot be triggered as under CEPTA, substantive obligation cannot be a ground to trigger MFN.[235] Therefore, the MFN cannot be triggered to compensate the claimant in FMV under any circumstance.

ii. CIL cannot be invoked to derogate from the specific provision of CEPTA.

162. In the present case, Article 9.21(1)(a) of the CEPTA explicitly states that any monetary damage that would be awarded should be in the MV standard. The presence of a specific provision on compensation renders any principle of international law non applicable.

163. CIL cannot be invoked to derogate from specific treaty provisions under CEPTA.[236] The purpose of any principle of international law is only to fill the gaps in the absence of any specific provision in the treaty.[237] The principles of international law, however, cannot be invoked to derogate from an explicit treaty provision.[238]

164. The existence of a specific treaty provision acts as *lex specialis* to establish the metric of compensation.[239] The tribunal in *ADM v Mexico* observed that "*The customary*

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[234] *CME-Brownlie¶11*.

[235] CEPTA, Art. 9.7(2).

[236] Dolzer/Schreuer.

[237] *Masdar Solar¶548*.

[238] *Archer Daniels.*

[239] *Id.¶116.*

international law that the ILC Articles codify do not apply to matters which are specifically governed by lex specialis."[240]

165. Under Article 9.21(1)(a) of CEPTA, any monetary damage should be in the MV standard. The presence of a specific provision on the standard of compensation acts as *lex specialis,* thereby, rendering any principle of international law non applicable in the present case. In the instant case, since Article 9.21(1)(a) provides for compensation in MV, any principle of international law cannot be used to derogate from this explicit treaty provision.

iii. Mekar has already purchased the claimant's shares in MV.

166. Since the adequate compensation standard is the MV standard, the price of the asset under this standard is determined by the amount a willing buyer is willing to pay for an asset on a particular valuation date.[241]

167. In the instant case, the MV of Vemma's investment as on 8 October 2020 is USD 400 million.[242] Due to Vemma's inability to attract a suitable buyer for its shares,[243] and the currency crisis in Mekar,[244] the respondent purchased Vemma's stake in Caeli Airways for USD 400 million.[245] In doing so, Mekar already paid off the MV of Vemma's investment.

168. Since Mekar has paid the MV of Vemma's investment, which is USD 400 million, as on 8 October 2020, this tribunal should find that Mekar owes no compensation to Vemma.

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[240] *Id.*¶118.

[241] Marboe, p.176.

[242] Facts¶63.

[243] Facts¶63.

[244] Facts¶39.

[245] Facts¶63.

B. ALTERNATIVELY, MITIGATING FACTORS SHOULD BE CONSIDERED TO REDUCE COMPENSATION.

169. In the event that the tribunal finds that Mekar owes compensation to Vemma, then, any amount of compensation so awarded should be reduced, for both,

i. Vemma's contributory fault, and
ii. Ongoing economic crisis in Mekar.

i. Vemma materially contributed to the loss it had to suffer.

170. The tribunal should reduce compensation on account of Vemma's contributory fault since Vemma undertook measures that *willfully* and *materially* contributed to the damage it had to suffer.

171. According to Article 39 of the ARSIWA, "in determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission" of the entity seeking compensation. This implies that even in situations where the damage has been caused by the wrongful act of the state, the conduct of the injured party is equally relevant, insofar as that party has materially contributed to the damage by some willful or negligent act or omission.[246]

172. In the instant case, Vemma materially contributed to the losses it suffered by acting willfully and negligently. This is because at the time Vemma made the investment in Mekar, it also inherited the debt liabilities associated with the airlines.[247] As experienced

[246] ARSIWA Commentary, p.110.

[247] Facts¶23.

businesspersons in their home state and globally,[248] Vemma was not unaware of the volatility of the market[249] or the uncertainty in oil prices.[250]

173. Despite this, rather than focusing on the long-term financial health of the airline, the claimant took an extravagant business approach by funneling funds towards rapid expansion.[251] The claimants pursued their ill-strategized business plan despite the constant and clear warnings of the Respondent.[252] As a result of these willful and negligent actions, in the wake of the economic crisis[253] and the rise in the oil prices,[254] the claimants had to suffer huge losses.

174. Moreover, the airfare caps and the subsequent fines imposed on the claimant's business was the result of the claimant's anti-competitive business strategies.[255] Hence, the depreciation in the value of the claimant's investment or any subsequent loss it had to suffer was solely because of the actions of the claimant.

175. Investment tribunals have substantially reduced the amount of compensation when the harm suffered was caused in part by the investor's own negligent business decisions[256] or

[248] Response¶11.

[249] Facts¶29.

[250] Facts¶24.

[251] Response¶11.

[252] Facts¶29.

[253] Facts¶44.

[254] Facts¶48.

[255] Facts¶45.

[256] *MTD¶¶178,242-43; Azurix¶¶414,425-26,429 Bogdanov¶5.2.*

unlawful acts.[257] The tribunal in *MTD v Chile*, while reducing the compensation by 50%, explained that "BITs are not insurance against business risk."[258]

176. Thus, in this case too, the claimants *should bear the consequences of their own actions as experienced businesspersons* including any unwise and illegal business decisions they made and the risks they undertook[259] irrespective of Mekar's actions.

177. Therefore, this tribunal should reduce any compensation owed to the claimant because of their contributory fault.

ii. The ongoing economic crisis should be considered.

178. The tribunal should reduce any amount of compensation that may be awarded to Vemma because of the dire and serious economic crisis in Mekar.

179. Even when the breach of an FET is acknowledged, various tribunals have previously observed the need to reduce the amount of compensation considering the dire economic crisis in the host state.[260] Any compensation awarded should *reflect the reality of crisis* as compared to a *normal business scenario*.[261] Consequently, while determining compensation amidst a serious economic crisis in Argentina, the tribunal in *Enron v Argentina* remarked:

[257] *Occidental¶¶679,680,687; Yukos¶¶1611,1615,1637.*

[258] *MTD¶178.*

[259] *Id.*

[260] *Sempra¶397; CMS¶244; LG&E¶139; National Grid¶179-180.*

[261] *Enron¶407.*

> "*just as it is not reasonable for the licensees to bear the entire burden of such changed reality neither would it be reasonable for them to believe that nothing happened in Argentina since the License was approved.*"[262]

180. Similarly, in the instant case, the tribunal should consider the economic crisis prevailing in Mekar. As per the 2019 report, the IMF has predicted four consecutive quarters of negative growth for Mekar, an 8% fall in GDP, and a 2600% average inflation rate in 2020.[263] Further, not only did the bank loan defaults in Mekar increase by 23% but it also received a "CCC" credit rating from Fitch.[264] Mekar is facing a potential third debt default in as many decades.[265]

181. Put simply, in order to pay the USD 700 million that Vemma demands, Mekar would have to transfer twice its consolidated annual public spending to Vemma.[266] This would have a crippling effect on the Respondent.

182. Therefore, even if a breach of FET is found, this tribunal should reduce the amount of compensation considering the grave economic crisis ongoing in Mekar.

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[262] *Id.*¶*232.*

[263] PO3¶4.

[264] *Id*.

[265] *Id.*

[266] *Id*.

PRAYER FOR RELIEF

183. Respondent respectfully requests the tribunal to:

i. Find that the tribunal lacks jurisdiction over the present dispute.
ii. Deny the amicus curiae participation of the Consortium of Bonoori Foreign Investors.
iii. Allow the amicus curiae participation of the External Advisors to the Committee on Reform of Public Utilities.

184. In the event that the tribunal accepts jurisdiction, the respondent respectfully requests the tribunal to issue an award declaring that:

i. The respondent has not violated Article 9.9 of CEPTA; **or**
ii. The respondent has already paid the compensation by purchasing the claimant's shares at Market Value; **or**
iii. Reduce any compensation because of the contributory fault of the claimant and the ongoing economic crisis in Mekar.

RESPECTFULLY SUBMITTED ON 23 SEPTEMBER 2021 BY,

RAU

ON BEHALF OF THE RESPONDENT

THE FEDERAL REPUBLIC OF MEKAR