INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Vemma Holdings Inc.

(Claimant)

v

The Federal Republic of Mekar

(Respondent)

MEMORIAL FOR RESPONDENT

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TABLE OF ABBREVIATIONS

Abbreviation	Citation
§(§)	Section(s)
¶(¶)	Paragraph(s)
Arrakis-Mekar BIT	Treaty Between The Federal Republic of Mekar and the Kingdom Of Arrakis for the Promotion and Protection of Investments
Association Articles	Articles of Association of Vemma Holdings Inc.
Association Memorandum	Memorandum of Association of Vemma Holdings Inc.
Aviation Analytics	Aviation Analytics June 7, 2019
BIT	Bilateral Investment Treaty
Bonooru	The Commonwealth of Bonooru
Bonooru-Mekar BIT	Treaty Between the Federal Republic of Mekar and the Commonwealth of Bonooru for the Promotion and Protection of Investments
CBFI	The Consortium of Bonoori Foreign Investors
CBFI Submission	*Amicus* Submission by the Consortium of Bonoori Foreign Investors
CEPTA	Comprehensive Economic Partnership and Trade Agreement Between the Commonwealth of Bonooru and the Federal Republic of Mekar
CILS Report	14 June 2020 Centre for Integrity in Legal Services Report
Claimant Comments	Claimant's Comments on Applications for Leave to File *Amicus* Submissions
Constitution	Constitution Act of Bonooru
CRPU	Mekar's Committee on Reform of Public Utilities
ed.	Edition
Executive Order 2018	Executive Order 9-2018
External Advisor Submission	*Amicus* Submission by External Advisors to the Committee on Reform of Public Utilities
Facts	Statement of Uncontested Facts

FET	Fair and Equitable Treatment
FMV	Fair Market Value
GDP	Gross Domestic Product
High Court Ruling	High Commercial Court of Mekar Ruling
ICJ	International Court of Justice
ICSID	The International Center for Settlement of Investment Disputes
ILC	International Law Commission
ISDS	Investor-State Dispute Settlement
Judgment on Mobility Rights	Constitutional Court of Bonooru on Mobility Rights (excerpts)
Judgment on Privatisation	Constitutional Court of Bonooru on Privatisation of BA Holdings (excerpts)
Lapras	Lapras Legal Capital
Mekar/Respondent	the Federal Republic of Mekar
MON	Mekari Mon
MRTP Act	Monopoly and Restrictive Trade Practice Act
NDP	Non-disputing Party
NGO	Non-government Organization
No.	Number(s)
NoA	Notice of Arbitration
NULC	Nyahode Union Learning Centre
OECD	The Organization for Economic Co-operation and Development
p(p).	Page(s)
Phenac Airport	Phenac International Airport
PO 1/2/3/4	Procedural Order NO.1/Procedural Order NO.2/Procedural Order NO.3/Procedural Order NO.4
Podcast Transcript	Phenac Business Today Podcast Transcript
Respondent Comments	Respondent's Comments on Applications for Leave to File *Amicus* Submissions
Response to NoA	Response to the Notice of Arbitration

RSFO Notice	Right of First Refusal Offer Notice
Sinnoh Court Ruling	Supreme Arbitrazh Court of Sinnogard Ruling
Superior Court Ruling	Superior Court of Mekar Ruling - 25 September 2020
UNCITRAL	United Nations Commission on International Trade Law
USD	United States Dollar
VCLT	Vienna Convention on the Law of Treaties
Vemma/Claimant	Vemma Holdings Inc.
WTO	World Trade Organization

TABLE OF AUTHORITIES

Arbitral Awards

Abbreviation	Citation
9REN	*9REN Holding S.a.r.l v Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, 31 May 2019
AES	*AES Summit Generation Ltd. and AES-TiszaErömü Kft. v The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010
Aguas	*Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v The Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for as *Amicus Curiae*, 17 March 2006
AIG	*American International Group, Inc. and American Life Insurance Company v The Islamic Republic of Iran and Central Insurance of Iran (Bimeh Markazi Iran)*, IUSCT Case No. 2, Award (Award No. 93-2-3), 19 December 1983
Alex Genin	*Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001
Almas	*Mr. Kristian Almås and Mr. Geir Almås v The Republic of Poland*, PCA Case No 2015-13, Award, 27 June 2016
Amco	*Amco Asia Corporation et al v Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983
Amoco	*Amoco International S.A. v Isiamic Republic of Iran*,

	IUSCT Case No. 56, Partial Award (Award No. 310-56-3), 14 July 1987
Ampal	*Ampal-American Israel Corporation and others v Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Head of Loss, 21 February 2017
Apotex (PO 2)	*Apotex Holding Inc. and Apotex Inc. v The United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order No. 2, 11 October 2011
Apotex (PO on NDP)	*Apotex Holding Inc. and Apotex Inc. v The United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, Mr. Barry Appleton, as a Non-Disputing party, 4 March 2013
Arif	*Mr. Franck Charles Arif v Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013
Azurix	*Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006
Bayindir	*Bayindir Inssat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005
Berschader	*Vladimir Berschader and Moïse Berschader v The Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006
Binder	*Binder v The Czech Republic,* UNCITRAL, Final Award, 15 July 2011
Biwater (Award)	*Biwater Gauff (Tanzania) Ltd. v Tanzania*, ICSID Case No. ARB/05/22,

	Award, 24 July 2008
Bosnian Genocide	*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, (Judgment) [2007], ICJ Rep 43
Bridgestone	*Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v Republic of Panama*, ICSID Case No. ARB/16/34, Award, 14 August 2020
BUCG	*Beijing Urban Construction Group Co. Ltd. v Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017
Continental	*Continental Casualty Company v The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008
Chorzów Factory	*Case Concerning the Factory at Chorzów (Germany v Poland)*, PCIJ Rep Series A No 17 Merits, 26 July 1927
CME (Final Award)	*CME Czech Republic B.V. (The Netherlands) v The Czech Republic*, UNCITRAL, Final Award, 14 March 2003
CME (Separate Opinion)	*CME Czech Republic B.V. (The Netherlands) v The Czech Republic,* UNCITRAL, Separate Opinion on the Issues at the Quantum Phases of CME v Czech Republic by Ian Brownlie, C.B.E, Q.C., 14 March 2003
CMS	*CMS Gas Transmissions Company v The Republic of Argentine*, ICSID Case No. ARB/01/8, Award, 12 May 2005
Crystallex	*Crystallex International Corporation v Venezuela,*

	ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016
CSOB	*Ceskoslovenska Obchodni Banka, A.S. v The Slovakia Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999
Deutsche Bank	*Deutsche Bank AG v Democratic Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012
EDF	*EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009
El Paso	*El Paso Energy International Company v The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011
Electrabel (Liability)	*Electrabel S.A. v Republic of Hungary,* ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012
Electrabel (Award)	*Electrabel S.A. v Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015
Eli Lilly	*Eli Lilly And Company v Government of Canada*, UNCITRAL Case No. UNCT/14/2, Procedural Order No. 4, 23 February 2016
ELSI	*Elettronica Sicula SpA (ELSI) (United States v Italy)*, (Judgment) [1989], ICJ Rep 15
Enron	*Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007
EOM	*Eco Oro Minerals Corp. v Republic of Colombia,* ICSID Case No. ARB/16/41,

	Procedural Order No. 6 Decision on Non-Disputing Parties' Application, 18 February 2019
F-W Oil	*F-W Oil Interests, Inc. v The Republic of Trinidad and Tobago*, ICSID Case No. ARB/01/14, Award, 3 March 2006
Feldman	*Marvin Feldman v Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002
Flemingo	*Flemingo DutyFree Shop Private Limited v the Republic of Poland*, UNCITRAL, Award, 12 August 2016
Hamester	*Gustav F.W. Hamester GmbH & Co. K.G. v Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010
Gas Natural	*Gas Natural SDG S.A. v The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005
Inceysa	*Inceysa Vallisoletana, S.L. v Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006
Jan de Nul	*Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008
Liman	*Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010
Loewen (Award)	*The Loewen Group, Inc. and Raymond L. Loewen v United States of America*,

	ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003
LG&E (Liability)	*LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006
LG&E (Award)	*LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007
Maffezini	*Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 12 November 2000
Metaltech	*Metal-Tech Ltd. v Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013
Methanex	*Methanex Corporation v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "*amici curiae*", 15 January 2001
Micula	*Ioan Micula et al. v Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013
Mondev	*Mondev International Ltd. v United States of America,* ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002
MTD	*MTD Equity Sdn. Bhd. & MTD Chile S.A. v Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004
Noble	*Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005

Nykomb	*Nykomb Synergetics Technology Holding AB v The Republic of Latvia*, SCC, Arbitral Award, 16 December 2003
Occidental	*Occidental Petroleum Corporation and Occidental Exploration and production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012
Oscar Chinn	*Oscar Chinn (United Kingdom v Belgium)*, 1934 PCIJ Rep Serie A/B No 63, Judgement, 12 December 1934
Paushok	*Sergei Paushok Cjsc Golden East Company Cjsc Vostokneftegaz Company v The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011
Plama	*Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Certificate, August 27, 2008
Phillips Petroleum	*Phillips Petroleum Company Iran v The Islamic Republic of Iran, The National Iranian Oil Company*, IUSCT Case No. 39, Award (Award No. 425-39-2), 29 June 1989
Phoenix	*Phoenix Action, Ltd. v The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009
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, Procedural Order No. 4, 24 March 2015
PNB Bank	*AS PNB Banka, Grigory Guselnikov et al. v Republic of Latvia*, ICSID Case No. ARB/17/47,

	Procedural Order No. 3 Decision on the European Commission's Application pursuant to Rule 37(2), 30 October 2018
Pope & Talbot	*Pope & Talbot Inc. v The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001
PRC	*Pacific Rim Cayman LLC v The Republic of El Salvador*, ICSID Case No. ARB/09/12, Procedural Order No. 8, 23 March 2011
Resolute	*Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Procedural Order No. 6 On the Participation of Prof. Robert and Mr. Barry Application as *Amici Curiae*, 29 June 2017
Salini	*Salini Construttori S.P.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001
Santa Elena	*Compañía del Desarrollo de Santa Elena S.A. v Republic of Costa Rica*, ICSID Case No ARB/96/1, Award, 17th February 2000
SAUR	*SAUR International S.A. v Republic of Argentina*, ICSID Case No. ARB/04/4, Award on Jurisdiction and Liability, 6 June 2012
SD Myers	*S.D. Myers, Inc. v Government of Canada*, UNCITRAL, Partial Award, 13 November 2000
Sempra	*Sempra Energy International v The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007
Shufeldt	*Shufeldt Claim (United States v Guatemala)* (1930) 2 UNRIAA 1079
Siemens	*Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007

Suez	*Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v The Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, 12 February 2007
Tecmed	*Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003
Telenor	*Telenor Mobile Communications A.S. v The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006
Thunderbird (Award)	*International Thunderbird Gaming Corporation v The United Mexican States*, UNCITRAL, Award, 26 January 2006
Thunderbird (Separate Opinion)	*International Thunderbird Gaming Corporation v The United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde, 1 December 2005
Toto	*Toto Construactioni Generali S.P.A. v The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 7 June 2012
Tulip	*Tulip Real Estate Investment and Development Netherlands B.V. v Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014
UAB	*UAB E Energija (Lithuania) v Republic of Latvia*, ICSID Case No. ARB/12/23, Award, 22 December 2017
UPS	*United Parcel Service of America Inc v Canada*, ICSID Case No. UNCT/02/1,

	Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001
Vivendi II	*Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007
Von Pezold	*Bernhard Von Pezold et al. v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No.2, 26 June 2012
Waste Management II	*Waste Management, Inc. v Mexico ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004
White Industries	*White Industries Australia Limited v The Republic of India* ICSID Case No. ARB/03/24, Final Award, 30 November 2011
Wintershall	*Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008
Yukos	*Yukos Universal Limited (Isle of Man) v Russia,* PCA Case No.2005-04/AA227, Interim Award on Jurisdiction and Admissibility, 30 November 2009

Treaties/Conventions

Abbreviation	Citation
Argentine-France BIT	*Agreement between the Republic of France and Argentina on the Promotion and Reciprocal Protection of Investments* (adopted 03 July November 1991, entered into force 03 March 1993)
Argentine-US BIT	*Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment* (adopted 14 November 1991, entered into force 20 October 1994)

ICSID Convention	*Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159
NAFTA	*North America Free Trade Agreement* (adopted 12 August 1992, entered into force 1 January 1994)
Netherlands-Czech & Slovak	*Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic*, (signed 29 April 1991, entered into force 1 October 1992)
New York Convention	*Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (adopted 16 June 1958, entered into force 7 June 1959) 330 UNTS 3
US-Trinidad & Tobago	*Treaty Between the Government of the United States of America and the Government of the Republic of Trinidad and Tobago Concerning the Encouragement and Reciprocal Protection of Investments* (adopted 26 September 1994, entered into force 26 December 1996)
VCLT	*Vienna Convention on the Law of Treaties* (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

Rules

Abbreviation	Citation
ICSID AF Rules	*ICSID Additional Facility Rules*, 2006

Articles

Abbreviation	Citation
Broches	Aron Broches, "The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction" (1966) 5 Columbia J. Transnatl. Law 263
Feldman SOE	Mark Feldman,

	"State-Owned Enterprises as Claimants in International Investment Arbitration" (2016) 31 ICSID Rev/FILJ 24
Gourgourinis	Anastasios Gourgourinis, "Fair and Equitable Treatment in International Investment Law: The Art of Watching out for Both the Elephants and the Fleas in the (Normative) Room of Investment Protection" (2015) 16 J World Investment & Trade 335
Mertenskötter & Stewart	Paul Mertenskotter and Richard B. Stewart, "Remote Control: Treaty Requirements for Regulatory Procedures" (2019) 104 Cornell L. Rev. 165
Nganjoh-Hodu & Ajibo	Ngangjoh-Hodu Y. & Ajibo Collins, "Legitimate Expectation in Investor-State Arbitration: Re-contextualising a Controversial Concept from a Developing Country Perspective" (2018) 15 Manch J. Int. Econ. Law 45
Patrick	Dumberry, Patrick, "The Prohibition against Arbitrary Conduct and the Fair and Equitable Treatment Standard under NAFTA Article 1105" (2014) 15 J. World Invest. Trade117
Schliemann	Christian Schliemann, "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" (2013) 12 Law & Prac Int'l Cts & Tribunals 365
Tschanz & Vinuales	P. Y. Tschanz & J. E. Vinuales, "Compensation for Non-expropriatory Breaches of International Investment Law" (2009) 26(5) J. Int. Arbitr. 729
Scott Vesel	Scott Vesel, "A Creeping Violation of the Fair and Equitable Treatment Standard?" (2014) 30 Arbitr. Int. 553

Books

Abbreviation	Citation
Baumgartner	Jorun Baumgartner,

	Treaty Shopping in International Investment Law (OUP 2016)
Beharry	Christina L. Beharry(ed.), *Contemporary and Emerging Issues an the Law of Damages and Valuation in International Investment Arbitration* (Brill | Nijhoff 2018)
Crawford	James Crawford, *State Responsibility: The General Part* (CUP 2013)
Crawford et al.	James Crawford et al., *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2015)
Dolzer & Schreuer (1st edn)	Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (1st edn, OUP 2008)
Dolzer & Schreuer (2nd edn)	R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012)
Kingsbury & Schill	Benedict Kingsbury & Stephan W. Schill(ed), *Public Law Concepts to Balance Investors' Rights with State Actions* (OUP 2010)
Kovács	Csaba Kovács, *Attribution in International Investment Law* (Kluwer International Law 2018)
Laryea	Emmanuel T. Laryea, "*Legitimate Expectations in Investment Treaty Law: Concept and Scope of Application*" in Chaisse J., Choukroune L., Jusoh S. (eds), *Handbook of International Investment Law and Policy* (Springer 2020)
Longman	*The Longman dictionary of law* (8th edn, 2011)
Newcombe & Paradell	Andrew Newcombe, Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, (Kluwer Law International 2009)
Oxford	*The Oxford English Dictionary* (2nd edn, 1989)
Petrochilos	Georgios Petrochilos et al., Katia Yannaca-Small(ed), *Arbitration under International Investment Agreements, A Guide to the Key Issues*

	(OUP 2009)
Schicho	Luca Schicho, *State entities in international investment law* (Nonos Publishers 2012)
Stefano	Carlo de Stefano, *Attribution in International law and Arbitration* (OUP 2020)
Van den Berg	Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law and Taxation Publishers 1981)

Documents

Abbreviation	Citation
EC FDI Proposal	European Commission, "Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Screening of Foreign Direct Investments into the European Union" COM (2017) 487
FTC Statement	North American Free Trade Agreement Commission, "Statement of the NAFTA Free Trade Commission on Non-disputing Party Participation" (2003)
IHRP & CIEL Guide	International Human Rights Program (IHRP) at the University of Toronto, Faculty of Law and the Center for International Environmental Law, "Guide for Potential *Amici* in International Investment Arbitration" (2014)
IISD Toolkit	International Institute for Sustainable Development, "A Sustainable Toolkit for Trade Negotiators" (2016)
ILC Articles	International Law Commission, "Articles on the Responsibility of States for Internationally Wrongful Acts" A/CN.4/SER.A/2001/Add.1(Part 2), 2001
ILC Commentary	International Law Commission, "ILC Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries" (2001)
IVSC IVS	International Valuation Concepts and Principles, "Introduction to International Valuation Standards"

	(8th edn, 2007)
NAVCA IGBVT	North American Veterinary College Administrators, "International Glossary of Business Valuation Terms" (2017)
UNCITRAL Guide	United Nations Commission on International Trade Law, "UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (2016)

Miscellaneous

Abbreviation	Citation
Ciurtin	Horia Ciurtin, "The Compensation Standard for FET Breaches: The Far Limits of Legal Analogy" (Kluwer Arbitration Blog, 30 January 2015) <http://arbitrationblog.kluwerarbitration.com/2015/01/30/the-compensation-standard-for-fet-breaches-the-far-limits-of-legal-analogy> accessed 20 September 2021
Airlines & Monopoly	Open Markets, "Airlines & Monopoly" <https://www.openmarketsinstitute.org/learn/airlines-monopoly> accessed 20 September 2021
Hanna	Hanna Wilhelmer, "The 'Right To Regulate' in CETA's Investment Chapter - Fair and Equitable Treatment, Expropriation and Interpretative Powers" (Seminar in International Law & European Law: Investment Law, Vienna, 2014)
US Model BIT	"Treaty Between the Government of the United States of America And the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment" <https://ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf > accessed 21 September 2021

STATEMENT OF FACTS

Pre-Investment

[1] ***1984***: Owning to Bonooru's privatization scheme, Bonooru Air was split into three airlines, among which Royal Narnia was chosen as its flag carrier. Vemma Holdings Inc. had full ownership and operation of Royal Narnia. Bonooru retained 31~38% of Vemma's shares, from its incorporation until March 2020.

[2] ***1991***: Together with five major airlines, the Royal Narnian created the Moon Alliance.

[3] ***2010***: Bonooru's government launched the Caspian Project, an initiative to facilitate movement and communication amongst its neighbors.

The Initiation of the Investment

[4] ***2011***: Vemma acquired 85% share of Caeli authorized by the CCM through the highest bid. The remaining 15% shares were owned by the Mekar through Mekar Airservices Ltd.

Post-Investment

[5] ***2011***: Bonooru's Secretary of Transportation and Tourism unveiled the "Horizon 2020" Scheme as part of the Caspian Project. Vemma received the first subsidy from Bonoori government under this Scheme on 28 October 2011.

[6] ***2012***: Vemma expanded its fleet and offered low-fare, long-distance flights into Mekar to capitalize the tourism interest brought by the Eldin volcanic eruption and inexpensive MON. Against the advice from Mekar Airservices, Vemma insisted in its expansionary strategies.

[7] ***2014***: Vemma decided Caeli to provide more international routes to cover the fall-winter decline. In June, Caeli turned a net profit over the whole year with the five-year lowest oil prices and its fall-winter losses were far less than before.

Due to the low pricing strategies, it received a much higher footfall and it captured more market share in Mekar.

[8] ***2015***: While representatives from Mekar Airservices emphasized on financial health, Vemma's representatives made Caeli inject profit to orders for 45 Boeing 737 Max and two programs to consolidate its consumer base.

Challenged Measures

[9] ***2016***: In September, CCM initiated the First Investigation against Caeli in compliance with Mekari law and CEPTA. As an interim measure, CCM placed caps on Caeli's airfare to prevent it from earning supra-competitive profits. In December, requested by Caeli's competitors, CCM launched the Second Investigation into Caeli's business activities.

[10] ***2017***: In March, a currency crisis ensued in Mekar. In October, Mekar approved the denomination of airfare in USD for all airlines operating in its territory.

[11] ***2018***: In August, CCM concluded the First Investigation. For Caeli's violation of antitrust legislation, it imposed a fine and maintained the airline caps in place pending the Second Investigation. In September, Mekari President passed Executive Order 9-2018 which granted subsidies for airlines operating in Mekar but denied subsidies to Caeli because of its State-owned nature. Meanwhile the highest oil prices since 2013, Caeli was left in deeper financial distress.

[12] ***In January 2019***, CCM completed its Second Investigation, asserting the Caeli's engagement in anti-competitive behaviour in Phenac Airport and imposing a fine of MON 200 million. Simultaneously, Caeli appealed against CCM in the Mekari court. The Mekari court separately arranged two hearings.

[13] ***In June 2019***, the Justice VanDuzer released his interim decision on the airfare caps, dismissing Caeli's claim to remove the caps.

[14] ***In October 2019***, CCM lifted the applicable airfare caps, as soon as Caeli's market share (when considered in conjunction with the market share of its Moon Alliance partner, Royal Narnian) fell below 40%.

[15] ***In November 2019***, faced with the burgeoning liabilities of the enterprise and failure to gain a loan in Mekar, Vemma decided to sell its stake.

[16] ***2020***: In February, Mekar Airservices filed a request for arbitration over the validity of the offer from Hawthorne Group LLP with the Sinnoh Chamber of Commerce. In October, Mekar Airservices purchased Vemma's stake in Caeli for 400 million USD. Afterwards, Caeli received state aids in consideration of public interest. In November, Vemma filed a notice of arbitration against Mekar.

[17] ***2021:*** In March, Bonooru increased its shareholding in Vemma to 55% and restructured Vemma in large scale.

SUMMARY OF ARGUMENTS

Jurisdiction:

[1] The Tribunal does not have jurisdiction under Chapter 9 of the CEPTA because the present dispute constitutes State-to-State arbitration. The Claimant's conduct should be attributed to State, since Vemma was performing the governmental function and was under entrustment or direction of State.

***Amicus* submission:**

[2] The Tribunal should reject the leave to CBFI for filing *amici* submission because they were not qualified. Contrarily, the Tribunal should accept the submission from external advisors to CRPU because it has fulfilled all the requirements of *amicus curiae* submission.

Fair and equitable treatment:

[3] The Respondent did not violate the obligations under Article 9.9 of CEPTA, because firstly, CCM's measures were not arbitrary; secondly, Secretary of Civil Aviation's refusal of granting subsidies was non-discriminatory; thirdly, Mekari courts' conduct did not lead to denial of justice; and fourthly, the Respondent's composite conduct did not violate FET clause cumulatively.

Compensation:

[4] Even if the Respondent violated Article 9.9 of CEPTA, the appropriate compensation was 400 million USD under market value standard in line with the stipulation of CEPTA and customary international law. Besides, despite the fair market value standard is applied, the amount of compensation alleged by the Claimant shall be mitigated.

PLEADINGS

I. THE TRIBUNAL DOES NOT HAVE THE JURISDICTION UNDER CHAPTER 9 OF CEPTA.

[1] To prevent the proceedings from becoming State-to-State arbitration,[1] the Respondent objected the jurisdiction *ratione personae* on that Vemma is not the real party to the dispute.

[2] The State's participation in the investment may give rise to the doubt to the tribunal's jurisdiction *ratione personae*, when its involvement reveals the strong connection between the home State and the investor.[2]

[3] To some extent, the investor's conduct pertaining to the investment can be attributed to the state,[3] which would disqualify the investor as the Claimant because the home State is the real party to the investor-State arbitration proceedings.[4]

[4] In this regard, the tribunals in investment arbitration have developed the approach to apply the attribution rules, with the purpose to find the real party to the proceedings in the context of the State-owned enterprise.[5]

[5] Since neither CEPTA nor ICISID provides the applicable attribution rules,[6] the Respondent invites the Tribunal to apply the functional test and control test, which the jurisprudence has used to examine the attribution SOE's conduct pertaining to the investment.[7]

[6] Multiple tribunals and scholars consider both tests in line with ILC Articles which have been recognized to reflect the pre-existing customary international

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[1] Response to NoA, ¶¶2-6.
[2] Kovács, p.267; *Jan de Nul*, ¶157; *Noble*, ¶82; *Hamester*, ¶172.
[3] Kovács, p.288; *Hamester*, ¶181; *Toto*, ¶43.
[4] *CSOB*, ¶¶10,15,28-32; *Maffezini*, ¶¶74-75.
[5] *Hamester*, ¶¶171-180; *Jan de Nul*, ¶¶155-157.
[6] *Maffezini*, ¶76; Stefano, p.101.
[7] *EDF*, ¶¶187,189,190,198; *Almas*, ¶99; *Flemingo*, ¶391; *Hamester*, ¶¶202-203; *Tulip*, ¶¶292-302; *Jan de Nul*, ¶¶163-173; Stefano, pp.119-123.

law,[8] as well as to mirror the Broches test adopted by the relevant jurisprudence related to SOE standing.[9]

[7] In this regard, the Respondent concerns that the arbitration may proceed between the States,[10] since Vemma's conduct pertaining to the investment was attributable to Bonooru based on the functional test under *ILC* Article 5 **[A.]** and control test under *ILC* Article 8 **[B.]**.

A. Vemma performed the governmental function under ILC Article 5.

[8] The functional test has two cumulative requirements that *an entity* shall be empowered with governmental authority and *an act* shall be performed through the exercise of governmental function.[11] In this respect, Vemma was empowered by Bonoori governmental authority ***[i.]*** and the investment was in exercise of the governmental authority ***[ii.]***.

i. Vemma was empowered by governmental authority.

[9] The form of empowerment in international law is flexible, the *F-W Oil* tribunal held that "*the element that would go in its definition in particular case would be a mixture of act, law and practice*".[12]

[10] For instance, the *Hamester* tribunal found that Ghanian law granted its SOE, namely Cocobod with the mission to encourage the development of the cocoa industry and regulate the market,[13] which the tribunal considered specific elements of "*puissance publique*".[14]

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[8] Hobér, pp.548-549; Feldman SOE, pp.25-26; *EDF*, ¶¶191-193,199-201; Stefano, pp.105-106.
[9] Dolzer & Schreuer, p.200; *BUCG*, ¶34; *CSOB*, ¶17; Broches Jurisdiction, p.263.
[10] Response to NoA, ¶¶2-6.
[11] *Hamester*, ¶176; *Jan de Nul,* ¶163; *EDF*, ¶191.
[12] *F-W Oil*, ¶203; NAFTA, Article 1502(3)(a); 2012 US Model BIT, Article 2(2)(a); Hobér, pp.550,556,560.
[13] *Hamester*, ¶189.
[14] *Hamester*, ¶¶190-193.

[11] Notably, such delegation is no need for an express statutory delegation as long as it can be inferred from internal law,[15] in which instance "*the toleration or even encouragement of the exercise of elements of governmental authority*" can be found as empowerment.[16]

[12] In this regard, the Respondent submits that Vemma has been authorized as the national carrier and discharged with the governmental function to guarantee Bonoori citizen's mobility rights and to carry out Bonooru's regional policy.

a. To guarantee mobility right.

[13] Bonooru is an ***archipelagic*** State composed by 109 islands surrounded by the Eastern Ocean.[17] Without the airlines and ferry, Bonoori citizens would have no access to travel to other places within the territory or outside the territory.[18] Therefore, such rights are of great public interest in Bonooru and there were multiple civil movements towards the restructure of its national carriers.[19]

[14] Thus, Bonoori constitutional law has ruled that the government has ***the positive obligation*** in ensuring the transportation services available.[20] Correspondingly, the Bonoori government is obliged to ensure Vemma to provide the low-fare air services to guarantee such access under the ***state funding***.[21]

[15] In execution of the duties "*in accordance with Article 70 of the Constitution Act*", Vemma's Association Article stipulates its objectives as to assist "*in developing the aviation industry as well as the civil aviation infrastructure*".[22]

[16] Therefore, Vemma was discharged with the governmental function to guarantee the civil mobility rights.

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15 ILC Commentary, Article 5, ¶7; Crawford, p.131.
16 Hobér, p.140; Schicho, p.127.
17 Facts, ¶5.
18 Facts, ¶5; Judgment on Mobility Rights, ¶25.
19 Facts, ¶¶7-8,65; Judgment on Mobility Rights, ¶23.
20 Constitution, Article 70(1); Facts, ¶5; Podcast Transcript, p.55.
21 Judgment on Mobility Rights, ¶25.
22 Association Memorandum, Article 3(h).

b. To carry out Bonooru's regional policy.

[17] Vemma has become an important anchor for Bonooru's regional strategy, especially by virtue of Caeli, its investment in Mekar. After Bonooru turned into the dominant capital exporter with the greatest GDP in the region, it initiated the Caspian Project for the further economic and diplomatic leverage.[23]

[18] In the tourism and transportation section, Bonooru launched Horizon Scheme as a constituent part of the project, which provides significant subsidies to Vemma in respect of Caeli.[24] As Ms. Sabrina stated before the House of the Commonwealth, Vemma's investment "*will boost the tourism infrastructure at our disposal*", namely, to include the overseas infrastructure into the disposal of Bonooru.[25]

[19] Therefore, Vemma as the successor of Bonoori national carrier, undertook the role as the tunnel for the capital exportation and the control of Mekari aviation infrastructure.[26]

[20] In sum, Vemma was discharging the governmental function to guarantee the civil mobility rights and carry out Bonooru's regional policy in transportation sector.

ii. The acts of Vemma were performed by such exercise of governmental authority.

[21] To ascertain the governmental function discharged in the investment, the tribunal needs to find that whether specific acts at stake are essentially commercial rather than governmental ***in nature***.[27]

[22] To elaborate the exercise of the governmental function, the *Jan de Nu* tribunal noted that the ***use of prerogatives de puissance publique*** is essential in the

[23] Facts, ¶3.
[24] Facts, ¶¶28,36,45; Podcast Transcript, p.55; PO 4, ¶6.
[25] Facts, ¶28; PO 4, ¶6.
[26] Facts, ¶¶9-10; Podcast Transcript, p.54; PO 4, ¶6.
[27] *Hamester*, ¶¶193-196; *Maffezini*, ¶¶52,57.

delineation of public conduct and private sphere.[28] The *Biwater* tribunal further illustrated such *puissance publique* as the State's public prerogatives or imperium to be found in the impugned actions.[29]

[23] For instance, the exercise of the public prerogatives or imperium can take the form as the state intervention beyond the commercial practice in *Maffezini*;[30] or as the mandate or regulations issued by the enterprise at stake in *Hamester*,[31] *etc*.

[24] *In casu*, with the projects to facilitate the Bonoori capital, Bonoori citizens would have growing demand for business travel in Greater Narnian.[32] In this regard, Vemma catered to their mobility rights via providing services for the frequent travelers, which enabled them to travel between Bonooru and the region in excessively low prices.[33]

[25] Such services offered by Caeli involved significant public prerogatives, namely, the significant state fundings and the strong State intervention in the investment for the realization of the growing mobility rights, the assistance and the diplomatic leverage.[34]

c. The State fundings.

[26] There are abundant evidences revealing that Bonooru has provided Vemma with ample subsidies to construct infrastructure for the citizen's mobility rights.[35] Despite the subsidies under the constitutional law, Vemma also enjoyed the subsidies from Horizon Scheme.[36]

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[28] *Jan de Nul*, ¶170.
[29] *Biwater (Award)*, ¶458.
[30] *Maffezini*, ¶53.
[31] *Maffezini*, ¶78.
[32] Facts, ¶¶4,28,30,34.
[33] Facts, ¶35.
[34] Podcast Transcript, p.55; Facts, ¶¶4-5; Judgment on Privatisation, ¶59; PO 4, ¶6.
[35] Podcast Transcript, p.55; Facts, ¶¶4-5,8; Constitution, Article 70; Judgment on Privatisation, ¶59; PO 4, ¶6.
[36] Judgment on Privatisation, ¶59; Facts, ¶28.

[27] Such massive fundings enabled Vemma to offer the services in the prices far lower than the market average and even give the discount by the programmes for the frequent flyers and corporations.[37] Besides, Vemma was able to develop airlines between Bonooru and Mekar, also Mekar to the surrounding airports to utilize the Phenac Airport with advantageous location.[38]

d. The strong State intervention.

[28] For Vemma's investment, Bonooru intervened and threatened Mekar with the diplomatic and economic leverage multiple times.[39] Correspondingly, after Mekar sanctioned Caeli for its illegal conduct, Bonooru withdrew all the fundings and left the projects incomplete.[40]

[29] With ill-advised strategies and distorted financial structure, Caeli was still able to refinance its significant inherited debts with the most favorable rate, in Bonoorian People's Bank, the national bank of Bonooru.[41] Besides, the public has recognized that Bonooru government would step in the investment when in a bad situation.[42]

[30] With these prerogatives, Vemma was providing cheap air services and catering to travelers from Bonooru to the Greater Narnian by virtue of the Mekari aviation infrastructures. Thus, the mobility rights of the Bonoori citizens could be well realized and the infrastructures could be well included into Bonooru's disposal as confirmed by Ms. Sabrina.[43]

[31] Therefore, Vemma was discharging the governmental function in its investment and its conduct shall be attributed to Bonooru according to the functional test.

B. Vemma was under control of State under ILC Article 8.

[37] Podcast Transcript, p.55; Facts, ¶¶28,35.
[38] Facts, ¶¶27-28; Podcast Transcript, p.55; PO 4, ¶1.
[39] Response to NoA, ¶18; PO 3, ¶7.
[40] PO 4, ¶1.
[41] Facts, ¶¶23,29-31,35; Aviation Analytics, p.57.
[42] Aviation Analytics, p.57; Podcast transcript, p.55.
[43] Facts, ¶28; PO 4, ¶6.

[32] The *EDF* tribunal noted that the control test in the meaning of ILC Article 8 is "*exceptional*" and in relation to a State Enterprise, it has ruled two elements: the State's control over the enterprise and the particular result to pursue.[44]

[33] In this regard, the Respondent submits that the control test has been fulfilled because Bonooru controlled Vemma through the internal control and external instructions **[*i.*]** to achieve the particular result **[*ii.*]**.

i. Bonooru's control over Vemma

[34] To measure the specific control, the *Deutsche Bank* tribunal considered two aspects to evidence the State control of CPC, internally, "*the State ownership, the Government control over CPC's personnel, finances and decision-making*" and externally, "*the conducting Sri Lanka's oil policy in the national interest*."[45]

[35] Therefore, the Respondent submits that Bonooru has controlled Vemma in its investment in two lines, namely, the internal control through the corporation structure **[a.]** and external control through projects and instructions **[b.]**.

a. Internal control through the corporation.

i) The debt trap.

[36] The *Jan de Nul* tribunal noted that *the perceived best commercial interest* can imply whether the State uses its ownership to control over the enterprise.[46] In *Deutsche Bank*, the tribunal also found the company was required to follow the written directions regardless of whether it was in the ***best interest***, thus established the control.[47]

[37] *In casu*, the Respondent submits that the Bonoori government set up a debt trap for Caeli in order to carry out its control, disregarding the enterprise's best interest.

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[44] *EDF*, ¶200.
[45] *Deutsche Bank*, ¶405.
[46] *Jan de Nul*, ¶169.
[47] *Deutsche Bank*, ¶405.

[38] It was twice that the Mekari representatives cautioned the Vemma to pay attention to the debt risk.[48] However, regardless of profitability and financial health,[49] Vemma insisted on its ***radical expandatory strategies*** and refused to liquidate the inherited debt but kept to refinance them in Bonoorian People's Bank, enabling the significant cash flow of Caeli.[50]

[39] When Vemma operated attractive slots at airports in Greater Narnia, it should had benefited from those advantages. However, Vemma's debt structure made it suffered from financial inflexibility and insufficient funds for overall sustainable growth, against its best interest.[51]

[40] Due to such refinancing, the consistent debt had thus turned Bonooru's nationalized bank a significant creditor. It enabled the Bonoori government to have more control to influence the corporation decision. This reflects the strong connection between Vemma and other state entities of Bonooru.[52]

ii) Vemma's management and shareholdings.

[41] For the cooperation structure, the *EDF* tribunal emphasized that the board should decide *in full autonomy in the company's interest*.[53] The control established because the directions were given by the mandates to the members of the board of directors,[54] which indicated the compelling nature of the Ministry's mandate system.[55]

[42] Besides, the *Salini* tribunal relied on the fact that the State's majority stake translated into a *de facto* control of the Board the majority of the Board of Directors of ADM was made up of representatives of the Moroccan State.[56] The *Ampal* tribunal also confirmed the control due to the decisions of enterprise

[48] Facts, ¶29.
[49] Facts, ¶35.
[50] Facts, ¶¶23,30.
[51] PO 4, ¶5.
[52] Facts, ¶35.
[53] *EDF*, ¶205.
[54] *EDF*, ¶205.
[55] *EDF*, ¶205.
[56] *Salini*, ¶32.

"*were all taken with the blessing of the highest levels of the Egyptian Government*".[57]

[43] In present case, the State positively exercised its voting rights from ownership in the regular meeting and its representatives presented every meeting.[58] Since no other shareholder held more than a 7% stake, its relative significant influence enabled the State to form a majority to dominate the meeting decision.[59]

[44] Besides, the *non-executive director* of the board from the ministry could be a vehicle to deliver the specific instructions and directions from State in respect of the policy making and planning of the enterprise.[60] This largely promoted the viability of its control.

[45] Further, in light of the significant subsidies between 2011 and 2016,[61] Bonooru can exploit the significant debt liability and the relative advantageous shares to control the enterprise by virtue of the financial influence.

b. The external control through projects and instructions.

[46] The *UAB* tribunal inferred from circumstantial evidence to establish the control of State, including an intention on the Municipality's part to use the enterprise as an instrument.[62] Notably, the tribunal relied on an *interview of the Mayor* alluding to the termination of the relationship with party, shortly after the party applied to freeze the assets of enterprise.

[47] Herein, with the control inside the corporation, the Caspian Project and Horizon 2020 also helped the government to deliver specific instruction and set targets for Vemma.

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[57] *Ampal*, ¶146.
[58] PO 3, ¶3.
[59] PO 4, ¶2.
[60] Association Memorandum, Article 152.4.
[61] PO 4, ¶6.
[62] *UAB*, ¶¶828-829.

[48] As a mixed-market State, Bonooru used to govern and regulate the State enterprise by virtue of plans and targets,[63] indicating that the government can implement the policy to control Vemma. Besides, the Constitutional Court has ruled that the Bonooru government is able to ensure the operation through the ***minority*** participation.[64]

[49] Besides, Ms. Sabrina, the erstwhile head of the Vemma Board performed as an active advocate for the interest of Vemma before the legislative organ of Bonooru to cooperate with such project plans.[65]

[50] Significantly, Ms. Sabrina's statement clearly expressed Bonooru's intention of utilizing Vemma to facilitate the infrastructure and guarantee the Bonoorian mobility rights, as Vemma "*lived up to the standards set up by its predecessor*" BA Holdings.[66]

[51] Evidence also showed that Bonoori officials were stressing pressure to Mekar during the Caeli's expansion and Caeli threatened the Phenac Airport for more benefits with airline resources.[67]

[52] Therefore, Bonooru actively participated in this investment via the external intervention. Cumulatively the Bonoori government was able to control and direct Vemma both internally and externally.

ii. Vemma acted disproportionately to achieve the particular result.

[53] Notably, such result is not necessarily governmental. The tribunals acknowledged that ILC Article 8 can encompass both *acts de jure gestionis* and

[63] Facts, ¶3.
[64] Judgment on Privatisation, ¶59.
[65] Facts, ¶28.
[66] Facts, ¶3; PO 4, ¶6.
[67] PO 3, ¶7.

acts de jure imperii.[68] The PPL in *Flemingo* is an example that such close control extended also over the commercial operations at Chopin airport.[69]

[54] The *Tulip* tribunal considered that whether the particular result contained the elements of a particular State purpose in public policy and to the extent the enterprise exercised to achieve.[70]

[55] To distinguish such State purpose, the *Maffezini* tribunal compared conduct of the enterprise SODIGA with other commercial companies, finding that the conduct charging with the implementation of governmental policies relating to industrial promotion was "*not normally open to ordinary commercial companies*".[71]

[56] Vemma's investment served as the tunnel for Bonooru to promote its Caspian Project to facilitate the Bonoori capital and to include the oversea infrastructure into its scope.[72]

[57] For instance, Bonooru offered fundings to rebuild the Mekari airports and Vemma based its business of international airlines on Phenac Airport in the same line.[73] After Vemma's efforts impeded, Bonooru quickly withdrew its fundings from the relevant project, revealing their close link.[74]

[58] Notably, given Caeli's dominate position in Mekari market, its competitors also evidenced that Caeli involved in various antitrust and anti-competitive conduct such as predatory pricing and capitalizing its privileges in airports.[75]

[59] As Caeli's strategies to deal with the debt mentioned above, it is well recognized that Vemma adopted an ill-advised operating strategy.[76] Vemma did not intend

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[68] *Hamester*, ¶180; *Bayindir*, ¶129.
[69] *Flemingo*, ¶428.
[70] *Tulip*, ¶305.
[71] *Maffezini*, ¶78.
[72] PO 4, ¶¶1,6.
[73] Facts, ¶¶4,28; Podcast transcript, p.55.
[74] Facts, ¶65.
[75] Facts, ¶¶36,38.
[76] Facts, ¶¶29,35; Aviation Analytics, p.57.

to liquidate its significant debt but insisted in its high-risk strategies to dispose the aviation resources and takeover the market shares.[77]

[60] Therefore, Vemma was controlled to take advantageous aviation resources into Bonooru's disposal and form the monopoly to serve the Caspian Project.[78]

[61] In conclusion, both tests have simultaneously been satisfied in the present case, and such investment can certainly be attributed to the State.

[62] As the ICSID AF Rules only contemplate proceedings between a State and a national of another State,[79] meanwhile both Parties have not consented to State-to-State arbitration with Bonooru under Chapter 9 of CEPTA either, the Tribunal does not have jurisdiction in present case.[80]

II. THE TRIBUNAL SHOULD REJECT THE LEAVE TO CBFI AND GRANT THE LEAVE TO EXTERNAL ADVISORS TO CRPU FOR FILING *AMICI* SUBMISSION.

[63] Implicating public interest, the ISDS mechanism might impact stakeholders beyond the two disputing parties.[81] In order to ensure that "*all angles on, and all interests in, a given dispute are properly canvassed*", there is a critical space to be filled by NDP.[82]

[64] In this sense, different instruments and rules empower the tribunals to permit suitable NDP to participate in the arbitral process as *amici*.[83] *In casu,* Article 41 of the ICSID AF Rules authorizes the tribunal to permit a "*person or entity that is not a party to the dispute*" to file an *amicus* submission.[84]

[65] In exercising this power, the applicable rules require the submission to "***assist the tribunal***", "*address a matter* ***within the scope of the dispute***", and express

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[77] Facts, ¶¶31,35.
[78] Facts, ¶¶28,36.
[79] ICSID AF Rules, Article 2.
[80] CEPTA, Article 9.1.
[81] IHRP & CIEL Guide, p.12.
[82] *Apotex (PO 2)*, ¶22.
[83] ICSID Convention, Article 37(2); ICSID AF Rules, Article 41(2); FTC Statement; other tribunals' practice, including WTO panels and the Iran-U.S. Claims Tribunal and other treaties and rules.
[84] PO 1, ¶19; ICSID AF Rules, Article 41.

the "***significant interest***" of the applicant. Additionally, the Tribunal shall ensure the ***efficiency*** of the proceedings involved with *amici*.[85]

[66] Besides, the provisions are non-exhaustive and the Tribunal is free to address "*other things*".[86] The Respondent therefore invites the Tribunal to consider "***public interest***" and "***independence***" as two requirements, to avoid the intervention from NDP who represents the same interest or position as the Parties. [87]

[67] In *Suez*, the tribunal divided the conditions for the admission of *amicus curiae* briefs into three dimensions.[88] Under these dimensions, the *Suez* tribunal considered all the requirements mentioned above.

<table>
<tr><th><u>Dimensions</u></th><th><u>Requirements</u></th><th><u>Objects</u></th></tr>
<tr><td>the appropriateness of the subject matter of the case</td><td>public interest</td><td>arbitration</td></tr>
<tr><td rowspan="4">the suitability of a given non-disputing party to act as amicus curiae in that case</td><td>significant interest</td><td rowspan="2">applicant</td></tr>
<tr><td>independence</td></tr>
<tr><td>assist the Tribunal</td><td rowspan="2">submission</td></tr>
<tr><td>address a matter within the scope</td></tr>
<tr><td>the procedure by which the amicus submission is made and considered</td><td>efficiency</td><td>procedure</td></tr>
</table>

(emphasis added)

[68] *In casu,* CBFI and external advisors to CRPU submitted their applications for leave to file a NDP submission and the written submissions of an *amicus curiae* brief.[89] In this regard, the Respondent invites the Tribunal to reject the leave to

[85] ICSID AF Rules, Article 41; CEPTA, Article 9.19.3.
[86] ICSID AF Rules, Article 41.
[87] *Eli Lilly*, ¶H; *Apotex*, ¶22; *Methanex*, ¶49; *Suez*, ¶¶13,16; *Von Pezold*, ¶¶49-56.
[88] *Suez*, ¶17.
[89] PO 1, ¶21.

CBFI **[A.]** and grant the leave to external advisors to CRPU for filing *amici* submission **[B.]**.

A. The Tribunal should reject the leave to CBFI for filing *amicus* submission.

[69] Pursuant to ICSID AF Rules and CEPTA, the Respondent submits that: CBFI's submission was not in pursuit of any "*public interest*" of the arbitration **[*i.*]**, CBFI did not have "*a significant interest in the proceeding*" **[*ii.*]**, CBFI was not "*independent from the disputing parties*" **[*iii.*]**, therefore CBFI's submission failed to "*assist the tribunal*" by providing different perspectives, knowledge and insight **[*iv.*]**.

i. CBFI did not pursue any public interest.

[70] The tribunals involve *amicus* participation to guarantee that all angles of public interest are represented in the proceedings.[90] Therefore, the tribunals shall determine whether the burdens of *amicus* can be justified by assessing whether there is "*a* ***public interest*** *in the subject-matter of the arbitration*" which needs to be enshrined into the *amicus* submission.[91]

[71] The jurisprudence specified the requirement of public interest into twofold notion: *firstly*, the general public interest arising from the international law and State, presented in all cases of investment arbitration under ICSID; *secondly*, the particular public interest concerning basic public service and law questions arising from ***subject-matter*** of the proceedings.[92]

[72] In this regard, the tribunals ruled that only the particular public interest shall be provided by the *amicus* to assist the tribunal.[93] However, CBFI failed to do so in its application.

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[90] *Apotex (PO on NDP)*, ¶22.
[91] *Eli Lilly*, ¶H; *Apotex (PO on NDP)*, ¶22; *Methanex*, ¶49.
[92] *Suez*, ¶19; *Methanex*, ¶49.
[93] *Suez*, ¶¶18-20; *Methanex*, ¶49.

[73] CBFI based the public interest on "*the rights of foreign investors against arbitrary acts of another sovereign*" and alleged that if this right is not guaranteed, it will hurt the expectation of investors and the economic vitality of the region.[94]

[74] Such allegations relate to the general protection of the investors and their correspondent legitimate expectation that have been stipulated in almost all the BITs.[95] They are way too general to be considered as a particular feature for the Tribunal to accept CBFI's *amicus* submission and to bear the perceived burden of *amicus* participation.

ii. CBFI failed to demonstrate significant interest.

[75] CBFI failed to demonstrate its significant interest in its application for two grounds:

a. The absence of particular interest.

[76] The *Apotex* tribunal and other tribunals held that the significant interest must be "*more than a **general** interest*", demonstrating how "*the rights or principles the applicant represents and defends*" would be affected by the decisions of the tribunal.[96]

[77] Herein, interests in CBFI submission are too abstract and unsubstantial. CBFI did not refer to the impact of any specific issue but only the general allegations that would appear in every ICSID arbitration, such as the interpretation of the ISDS provisions and the access to the impartial judicial system.[97]

b. The absence of its proper interests.

[78] The interests shall be virtually possessed by ***the applicant itself***. For example, the *Apotex* tribunal declined the submission from a professional lawyer because

[94] CBFI Submission, ¶8.
[95] Emmanuel, §§1-2.
[96] *Apotex (PO on NDP)*, ¶38; *EOM*, ¶34; *PNB Bank*, ¶28; *Morris,* ¶10.
[97] CBFI Submission, ¶¶8-9.

the interests he asserted were those of his clients.[98] Since the applicant was addressing the same issues in other ***on-going arbitration***, his "significant interest" lay only in having *Apotex* tribunal adopt his favored legal interpretations.[99]

[79] Similarly, among CBFI's members, the Claimant and two other companies are ***pursuing claims*** against Mekar under Chapter 9 of CEPTA.[100] The vague words of CBFI cannot eliminate its suspicion to influence this Tribunal for advantageous legal interpretations to its members in the present and future proceedings.[101]

[80] According to the same reason as the *Apotex* tribunal, although it may be an interest, it is not a significant interest. Otherwise, it would "*lead to absurd results*".

[81] Further, even if CBFI could well argue that the outcome of this arbitration will have an impact on the rights it represents and defends but not the favored interpretation, it is not the rights of CBFI but the rights of its members or more universal foreign investors.[102]

[82] CBFI referred to the judicial system, the marketplace and economic growth, but only demonstrated the general effects of the irrelevant investors rather than the virtual activities it is conducting or the principles it is developing.[103]

iii. CBFI lacks independence from the Disputing Parties.

[83] The jurisprudence deemed the apparent lack of independence to be a sufficient ground to deny the application,[104] to ensure that the positions of the applicant

[98] *Apotex (PO on NDP)*, ¶¶39-40.
[99] *Apotex (PO on NDP)*, ¶16.
[100] CBFI Submission, ¶6.
[101] CBFI Submission, ¶10.
[102] CBFI Submission, ¶¶8-9,11; PO 3, ¶11.
[103] CBFI Submission, ¶¶8-10.
[104] *Von Pezold*, ¶56.

and the disputing parties are inconsistent thereby avoiding unfairly prejudice against either party.[105]

[84] Along with *Von Pezold* and *Aguas*,[106] Schliemann concluded that the decisive factor of the independence is whether the disputing party can influence the *amicus* submission determinatively.[107]

[85] For instance of such influence, in *Von Pezold*, the applicants requested the leave to participate as joint *amici* through an NGO, namely NULC, which was monitored by Mr. Sacco.[108] However, the tribunal found that Me. Sacco was strongly allied with the respondent's land policies and NULC was engaged with the claimant in another on-going judicial proceedings and thus declined its application[109]

[86] Similarly, CBFI's interests and claims were remarkably in line with the Claimant. The evidences are as follows:

a. Lapras' participation.

[87] Firstly, Lapras has participated in Vemma's preparation against Mekar by virtue of legal funding advisement, in which Lapras provided potential litigation funding and funders. [110] The failure in the proceedings would affect Lapras' further transactions with its clients in legal fundings and thus diminish its credit, raising potential conflict of interest.

[88] However, CBFI's members unanimously approved that the CFO of Lapras could vote for the *amicus* submission in ignorance of the direct transaction with Vemma and its significant underlying interest in the outcome of the arbitration.[111]

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[105] *Suez*, ¶¶13,16; *Von Pezold*, ¶¶49-56; Schliemann, pp.374,379.
[106] *Von Pezold*, ¶¶54-55; *Aguas*, ¶¶23,29,32.
[107] *Eli Lilly*, ¶E; Schliemann, p.380.
[108] *Von Pezold*, ¶¶19,55.
[109] *Von Pezold*, ¶¶7,54-56.
[110] CBFI Submission, ¶7; PO 3, ¶12.
[111] Respondent Comments, ¶3(2); PO 3, ¶12; CBFI Submission, ¶7.

b. The members' ongoing claims against Mekar.

[89] As the aforementioned *Von Pezold*, the ongoing dispute that has relations with the applicants, thought ***indirect***, can still raise the doubt to the independence as long as such relations can have the applicants to take the disputing parties' position.[112]

[90] *In casu*, two members of CBFI are contemporarily pursuing claims against Mekar under Chapter 9 of CEPTA.[113] Compared to *Von Pezold*, where the applicants only communicated with an organization that has a dispute with the claimant, CBFI has its two members directly participated in the arbitrations with the disputing party.

[91] The thirty-eight members that have significant investment in Mekar would definitely expect the proceedings to favor the investor party.[114] Therefore, as an advocacy for the members, CBFI has the unique duty to represent their requests for a more favorable outcome in these proceedings against Mekar.[115]

[92] To sum, CBFI has significant conflict of interest that would lead to the prejudice towards the Respondent and ***the consistent perspectives*** with the Claimant.

iv. CBFI provides no novel facts or arguments.

[93] The *Apotex* tribunal ruled that the *amicus* shall provide "*a **different** perspective and a particular insight*" from the disputing parties.[116] Besides, the *Methanex* tribunal held that the tribunal must assume that the disputing parties will provide "***all** the necessary assistance and materials required by the [t]ribunal to decide their dispute*".[117]

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[112] *Van Pezold*, ¶¶7,55-56; see [76]-[82] of Memorial.
[113] CBFI Submission, ¶6.
[114] CBFI Submission, ¶6.
[115] CBFI Submission, ¶6; Claimant Comments, ¶2; PO 3, ¶11.
[116] *Apotex (PO on NDP)*, ¶31.
[117] *Methanex*, ¶48.

[94] As the foregoing, CBFI and the Claimant are especially likely to have the consistent perspective due to their mutual significant interests.[118] Besides, CBFI presumably has no expertise or experience other than Vemma, inasmuch as they are both Bonoori individuals operating in the international investment.[119]

[95] Additionally, CBFI's submission does not contain anything particular other than broad facts and legal arguments which are correspondingly opposed to the Respondent's, which cannot be assumed that the Claimant would not respond in the same line.[120]

[96] Therefore, CBFI could not be assumed to offer different assistance from the Claimant, to "*facilitate the Tribunal's process of inquiry into, understanding of, and resolving the dispute*".[121] There is no need for the Tribunal to bear the superfluous costs and time to accept a same claim as that of the Disputing Party.

B. The Tribunal should grant the leave to external advisors to CRPU for filing *amici* submission.

[97] The Claimant held that the matter addressed by external advisors to CRPU was a new jurisdictional question, and thus fell outside the scope. However, the Respondent submitted that the submission fell "*within the scope of the dispute*" **[*i.*]** and fulfilled other statutory requirements **[*ii.*]**.

i. The submission of external advisors to CRPU fell within the scope.

[98] The determinative issues before the Tribunal are whether the scope of the dispute excluding the question of jurisdiction *ratione legis* **[a.]** and additionally, whether it is appropriate for the *amicus* to bring a new jurisdictional question **[b.]**.

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[118] See [76]-[82] of Memorial.
[119] CBFI Submission, ¶¶2,7-10; Facts, ¶¶9,24-26.
[120] *Methanex*, ¶48; CBFI Submission, ¶10.
[121] *UPS*, ¶60.

a. Whether the scope of the dispute excluding the question of jurisdiction *ratione legis*.

[99] To clarify the relation to the proceedings, the *Resolute* tribunal interpreted "*the scope of the dispute*" as "*the issues contested by the Disputing Parties*".[122]

[100] Herein, the Tribunal determined to address "*whether the tribunal has jurisdiction over the present claims*" under applicable law, which has been consented by both Parties according to the PO 1.[123] The Tribunal has not limited the dispute to jurisdiction *ratione personae*.

[101] Albeit the Disputing Parties did not raise such question, the Respondent did challenge the jurisdiction of the Tribunal in Response to the Notice of Arbitration.[124]

[102] The jurisdiction *ratione legis* clearly falls within such broad scope.

b. Whether it is appropriate for the *amicus* to comment on jurisdiction question.

[103] Although jurisdictional matters require special attention, it is deemed appropriate to accept *amicus* assistance by several tribunals.[125]

[104] Specifically, the *Apotex* tribunal also held that if the jurisdictional question concerns an important ***public interest***, it can be included into the scope of the dispute, because "*non-disputing parties might be well-placed to provide assistance and perspective or insights beyond those of the disputing parties*".[126]

[105] The submission was about the corruption in the investment.[127] To consider the legality of the investment can guarantee arbitration to deter the prevailing

[122] *Resolute*, ¶¶4.3-4.8.
[123] PO 1, ¶28.
[124] Response to NoA, ¶¶2-6.
[125] *PRC*, ¶(ii); *Electrabel (Liability)*, ¶5.32; *Apotex (PO 2)*, ¶¶32-33.
[126] *Apotex (PO 2)*, ¶¶32-33.
[127] External Advisor Submission, ¶¶4-6.

corruption situation in Mekar and facilitate the development of the transparent trade between Mekar and Bonooru.[128]

[106] Therefore, the Respondent invites the Tribunal to accept the arguments and evidence from external advisors to CRPU on jurisdiction *ratione legis* question for the important public character.

ii. Other statutory requirements have also been fulfilled by the submission of external advisors to CRPU.

[107] Significant interest. External advisors to CRPU regularly advise potential investors prospecting opportunities in Mekar, its business would be impacted due to the Mekari corruption custom if the Tribunal decide to protect such a tainted investment.[129]

[108] Assistance to the tribunal. The submission disclosed unbiased facts and arguments regarding the bribes paid to the Chairperson of the CRPU, which cannot be easily obtained by Disputing Parties.[130] Therefore, the Tribunal may reach a correct decision on jurisdiction *ratione legis*.

[109] Public interests. External advisors to CRPU provided the public interests that the Tribunal's decision on jurisdiction *ratione legis* will have an impact on the regional economy and social atmosphere, especially the subject-matter of anti-corruption efforts in Mekar.[131]

[110] To draw a conclusion, external advisors to CRPU are qualified *amici* to the proceedings.

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[128] External Advisor Submission, ¶6; Facts, ¶¶12,15,60; PO 3, ¶13.
[129] External Advisor Submission, ¶¶4-6.
[130] External Advisor Submission, ¶4.
[131] External Advisor Submission, ¶¶4-6; PO 3, ¶13.

III. THE RESPONDENT DID NOT VIOLATE ITS OBLIGATIONS UNDER ARTICLE 9.9 OF CEPTA.

[111] FET is playing a central role in protecting investors rights,[132] which is generally regarded as an ***autonomous*** treaty standard and interpreted by each tribunal.[133] As the other end of the balance, State's ***inherent*** right of regulate is previously restricted by the excessive attention of FET but re-emphasized with the development of arbitral practice.[134]

[112] However, the Respondent has treated the Claimant fairly and equitably under CEPTA, including the conduct of CCM **[A.]**, the granting of subsidies **[B.]**; the proceedings in Mekari courts **[C.]**; Besides, Mekar's actions cannot composite a cumulative violation **[D.]**.

A. CCM did not treat the Claimant with arbitrariness.

[113] The arbitrariness is enumerated in CEPTA as a violation of FET. The Claimant has claimed that CCM arbitrarily initiated the *suo moto* investigation **[*i.*]** and refused to remove the caps **[*ii.*]**.[135]

i. The initiation of investigation did not constitute arbitrariness.

[114] Arbitrariness is generally accepted as "***a willful disregard of due process of law***",[136] with a high threshold of liability.[137] In *EDF*, the tribunal concluded that arbitrariness would be found if a measure is not based on legal standards but on excess discretion and prejudice.[138]

[115] *In casu*, CCM initiated the First Investigation based on the discretion granted in MRTP Act, in compliance with the due process of law. As stipulated, in

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[132] Hanna, p.3.
[133] *Lemire*, ¶284; *National Grid*, ¶¶170-172; *Saluka*, ¶294.
[134] Hanna, Chapter IV, p.40; CEPTA, Article 9.8.
[135] NoA, ¶¶14-17.
[136] *ELSI*, ¶128; *Alex Genin*, ¶371; *Mondev*, ¶127; *Pope & Talbot*, ¶63; *Loewen (Award)*, ¶131; *Azurix*, ¶¶391-392.
[137] Patrick, p.145; *Mondev*, ¶127; *Pope & Talbot*, ¶63; *Alex Genin*, ¶371; *Azurix*, ¶¶391-392; *ELSI*, ¶128.
[138] *EDF*, ¶303; *Crystallex*, ¶578.

industries that "***required special attention***" **[a.]**, the discretion can be exercised on an anti-competitive corporation even if its market value is below 50% **[b.]**.[139]

a. Civil aviation industry requires special attention.

[116] As an industry which is characterized as natural monopoly, civil aviation industry tolerates agglomeration to some extent.[140] Corporation can easily break through due boundaries and form monopoly position, which doesn't even need to have a market share over 50%.

[117] Besides, as competitors withdraw and competitive pressure decreases, there leaves room for a monopolistic corporation to raise airfares and lower its services to gain more profits.[141] With fewer options for aviation services in the market, the corporation can easily turn monopolistic under the coverage of aviation alliance and largely damage the customer's interests.

[118] Based on the nature of civil aviation industry and the severe consequences of monopoly in this industry, it requires the special attention.

b. Caeli's suspicious conducts posed a threat to other competitors.

[119] Firstly, with the Bonooru's subsidies,[142] Caeli continuously implemented predatory strategies to get more footfall and even reduced its price below the avoidable costs, which may expel other competitors.[143]

[120] Secondly, Caeli's high-level cooperation such as preferential secondary slot-trading with its Moon Alliance partner, Royal Narnian, allows them to benefit from each other, while other competitors have no such benefits.[144] Meanwhile,

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[139] MRTP Act, Chapter III, (2)(a).
[140] Is the Airline Industry an Oligopoly? <https://www.investopedia.com/ask/answers/011215/airline-industry-oligopoly-state.asp> (assessed at 22 September 2021).
[141] Airlines & Monopoly.
[142] Facts, ¶¶28,36,45.
[143] Facts, ¶¶34,45; Podcast Transcript, p.55.
[144] Facts, ¶¶21,27,36; PO 4, ¶5.

they occupied more than half of the market share, thereby possibly forming a monopoly position that was disadvantageous to other competitors.[145]

[121] Under such concern, CCM undoubtedly needs to pay special attention in civil aviation industry and reasonably investigate Caeli's suspicious behaviors.

ii. Refusal of removing caps was not arbitrary.

[122] In *AES*, the tribunal determines that the respondent providing a fixed price for each generator was not arbitrary in view of two factors, the existence of rational policy **[a.]** and reasonable correlation between the act and policy **[b.]**.[146]

a. The challenged measure served for rational policy.

[123] The *AES* tribunal regarded addressing the state aid concerns as a rational policy because it was taken by a State following a logical explanation and with ***the aim of addressing a public interest matter***.[147]

[124] Specifically in *AES*, the reinforcement of the administrative prices, the respondent's conduct impugned therein, was found not for the intention of affecting claimant's contractual rights but against the excessive profits of the generators that was burdening the consumers.[148]

[125] *In casu*, for sustaining market competition and protecting the consumer interests,[149] CCM was conducting the investigation against Caeli's anti-competitive behaviors.[150] The interim measures were essential to prevent it from suddenly increasing the airfare to obtain *supra* competitive profits.[151]

[145] Facts, ¶¶36,49,55.
[146] *AES*, ¶¶10.3.7-10.3.9; *Micula*, ¶525; *Electrabel (Award)*, ¶179; *Saluka*, ¶307.
[147] *AES*, ¶10.3.8.
[148] *AES*, ¶¶10.3.29-10.3.32.
[149] MRTP Act, Preamble.
[150] Facts, ¶¶36,38.
[151] Response to NoA, ¶13; Facts, ¶37.

[126] During the currency crisis, the potential risk of earning such profits was even more distinctive in case that the inflation of MON would disguise its unreasonable pricing without the restriction of caps. [152]

[127] Therefore, the caps were to prevent its potential abuse of monopoly statute that would largely damage its competitors and the customers rather than directed against Caeli's legal operations.

b. The challenged measure was reasonably related to the policy.

[128] The *Electrabel* tribunal determined the "*reasonable correlation*" between act and policy through the ***proportional test***,[153] which required to examine the necessity of the act to achieve the policy **(i.)** and the balance between the intended effects and affected interests **(ii.)**.[154]

i) Imposing caps was necessary for the policy.

[129] The necessity of measures indicates that there is no less restrictive measure that is equally effective.[155] And it was also recognized by the *AES* tribunal to deny the arbitrariness of the State's act because of the lack of other options to achieve certain policy.[156]

[130] *In casu*, after the Second Investigation, CCM were ready to remove the caps aimed at regulating the monopoly and anti-competitive measures as long as Caeli's market share dropped below 40%.[157]

[131] However, in nearly three years with the impugned caps, Caeli had maintained its large market share above 40%, indicating its reluctance to comply with

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[152] Facts, ¶39; PO 3, ¶4.
[153] *Feldman*, ¶122; *Azurix*, ¶¶311-312; *LG&E (Liability)*, ¶195; *EDF*, ¶293; *Continental*, ¶232; *MTD*, ¶109.
[154] *Electrabel (Award)*, ¶¶179-180; *AES*, ¶10.3.9.
[155] Kingsbury & Schill, p.87.
[156] *AES*, ¶10.3.35.
[157] Facts, ¶¶49,55.

Mekari law and abandon its monopoly status.[158] There was no reason to believe that it would obey the law and the instruction with a less restrictive measure.

[132] Therefore, maintaining caps was necessary for the rational policy.

ii) The intended effect and the affected interests were of balance.

[133] In *Electrabel*, the tribunal also considered such balance through the analysis of the balancing between ***the intended effects*** of the measure and ***the affected interests*** after the measure met the test articulated above.[159]

[134] *In casu*, as the Claimant alleged, the affected interest, *i.e.* the inability to profit, was beyond the intended effects of imposing caps and denotation on MON, which could not substantiate.[160]

[135] Mekar's mandate denotation could not significantly influence Caeli's operations in business because except this, Mekar did not restrict the currency transfer.[161] By transferring MON to foreign currency of stable value, Caeli could alleviate its concern on losses caused by currency devaluation. Such regulation clearly fell within the Respondent's right under CEPTA with such minor inconvenience.[162]

[136] CCM is an autonomous body independent from other administrative organs.[163] Without the power to request the Central Bank for a more expeditious calculation of inflation rate, it performed due diligence in renewing the caps with its available knowledge.[164]

[137] Albeit the caps were challenged, the Claimant did not reduce its market shares three years after its complaints in Mekari court, which was the actual effect

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158 Facts, ¶¶36,49,55.
159 *Electrabel (Award)*, ¶180.
160 Facts, ¶¶40-43; NoA, ¶17; Response to the NoA, ¶13; Facts, ¶37.
161 Facts, ¶42; CEPTA, Article 9.10.
162 CEPTA, Article 9.8.
163 Facts, ¶19; MRTP Act, Preamble.
164 Facts, ¶43.

intended by CCM.[165] After such effects, the caps were lifted in time, without further detriment beyond the intention.[166]

[138] Therefore, the caps were to facilitate Caeli to reduce its market shares including potential damage into the intended effects, and after its realization, it caused no further affected interests in ***balance*** with such intention.

[139] Thus, considering the caps' necessity and proportionality for the policy of protecting competition in the market and consumers, the challenged measure was not arbitrary.

B. The refusal of granting Caeli subsidies was non-discriminatory.

[140] The *Saluka* tribunal held that discrimination occurs when the host state treats an investor and its investment less favorably than other investors ***in like circumstance*** without justification.[167] Such definition was also agreed by the tribunal in *Thunderbird*, *SD Myers* and *Feldman*.[168]

[141] *In casu*, the conclusion that refusal of granting Caeli subsidies was not discriminatory because Caeli was not in like circumstance in first place due to its significant state aid **[a.]** and the different air services from other recipients **[b.]**.

a. Bonooru significantly aided Caeli.

[142] The *Saluka* tribunal determined that the four banks were in like circumstance because they all could not survive on them own without the subsidies from the State.[169]

[143] Firstly, different from the *Saluka*, Vemma and Caeli as the promoter of Bonooru's regional policy had ***continuingly*** received significant state fundings

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[165] Facts, ¶¶43,55.
[166] Facts, ¶55.
[167] *Saluka*, ¶313.
[168] *Thunderbird (Award)*, ¶176; *SD Myers*, ¶¶252-254; *Feldman*, ¶184; *CMS*, ¶290; *Pope & Talbot*, ¶¶30-38.
[169] *Saluka*, ¶¶314-323.

from the Horizon 2020 and Bonoorian People's Bank due to the debt restructure.[170] Besides, Bonooru retained its intervention in this investment as aforementioned.[171]

[144] However, without such strong State intervention in the enterprise, the privately-owned airlines would hardly survive the crisis if given no emergency subsidies from the states.[172]

[145] Therefore, Vemma and Caeli assumingly had more capacity to handle the situation than the major recipients.

b. Caeli provided different air services.

[146] The jurisprudence also identified the competitive relationship as the basis for the "*like circumstance*", which means that the compared investors shall provide competitive and substitutable products and services.[173]

[147] However, Executive Order 2018 intended to grant the subsidies to those airlines provided necessary and essential services.[174] Therefore, the predominant recipients were airlines operating important domestic routes in minor market shares.[175] Thus, the decline of these airlines would significantly influence the important demand of citizens.

[148] Contrarily, Caeli's main business model referred to the multiple international long-haul airlines which were expensive and unnecessarily for Mekari government to maintain in such dire situation.[176]

[149] Therefore, Caeli was not in like circumstance as other airlines because it was running different air services which were not in the scope of the subsidies.

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[170] Response to NoA, ¶15; NoA, ¶¶7,18; Response to the NoA, ¶¶3-4; Facts, ¶¶9-10,23-26,28,65.
[171] See [28]-[31] of Memorial.
[172] Facts, ¶¶46-47; PO 4, ¶7.
[173] *SD Myers*, ¶¶250-251; *Pope &Talbot*, ¶63; *Paushok*, ¶315.
[174] Executive Order 2018, §3102.
[175] PO 4, ¶7.
[176] Executive Order 2018, §3102.

C. Mekari court did not deny justice.

[150] Denial of justice is described as a "*manifest injustice leading to an outcome which shocks a sense of judicial propriety*".[177] However, it was usually not certified by the tribunals in the former cases due to the very high threshold.[178]

[151] The Claimant has alleged that Mekari court denied the justice for three acts: firstly, its delay in judicial proceeding **[*i.*]**, secondly, premature judgment **[*ii.*]** and thirdly, execution of the award which was set aside **[*iii.*]**.

i. The delay of the proceedings could not be regarded as denial of justice.

[152] The jurisprudence recognizes that undue delay can give rise to denial of justice.[179] In *White Industries*, the tribunal denied the 9-year delay to be a denial of justice in examination of several "*fact-sensitive*" factors, including "*the need for swiftness*", "*the significance of the interest at stake*" and "*the behavior of the courts themselves*" etc.[180]

[153] Under such criteria, the reasonable delay in addressing Caeli's appeal of removing caps did not amount to denial of justice mainly due to three aspects.

[154] ***Firstly***, the *White Industries* tribunal recognized the purely commercial matter was less compelling compared with the criminal proceedings, thus the criterion of the need for swiftness can be determined by the particular need for the urgent resolution.[181]

[155] As mentioned above, since the caps did not destroy Caeli's profitability, Caeli was still able to maintain its normal operation in that time.[182] Thus the

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[177] *Mondev*, ¶127; *Loewen (Award)*, ¶132; *Azurix*, ¶370; *Waste Management II*, ¶¶97-98.
[178] *Mondev*, ¶¶133,152; *Alex Genin*, ¶¶357,371-373; *Waste Management II*, ¶¶128-130.
[179] *Mondev*, ¶126; *Toto*, ¶156; *Binder,* ¶448.
[180] *White Industries*, ¶10.4.10; *Toto*, ¶¶163-165; *Oostergetel*, ¶290.
[181] *White Industries*, ¶10.4.14.
[182] NoA, ¶17; Response to the NoA, ¶13; Facts, ¶37.

commercial case did not amount to "*[particular] need for the urgent resolution*" compared with criminal proceedings unresolved in Mekari court.[183]

[156] ***Secondly***, the appeal was only relevant to Caeli's own commercial interests, which was far less important than the general set-aside application from the commercial arbitration perspective in *White Industries*.[184] Thus, it could not tell "***the significance of the interest at stake***" to advance its appeal without reasons.

[157] ***Thirdly***, considering ***the behavior of court itself***, the delay did not amount to denial of justice. Under the tight judicial resources,[185] Mekari court still arranged the hearing and held it as scheduled.[186] Compared not only with the domestic average time,[187] but also with the judicial delay time in *White Industries*,[188] the 13-month waiting period is within a reasonable range.

The time in Caeli's appeal	**The average time in Mekar**	**The time in *White Industries***
13 months	27 months	9 years (108 months)

ii. The summary judgement did not amount to denial of justice.

[158] The Claimant has contended that the judgement of refusing to remove caps ignored the existing evidences, which denied Caeli justice.

[159] ***Firstly***, the *Liman* tribunal recognized that the court had ***discretion*** to evaluate evidences and the claimant failed to fulfill its burden of proof.[189] Thus the

[183] Facts, ¶¶13,44.
[184] *White Industries*, ¶10.4.13.
[185] Facts, ¶¶13,44,45.
[186] Facts, ¶¶44,52.
[187] Facts, ¶13.
[188] *White Industries*, ¶10.4.21.
[189] *Liman*, ¶377.

procedural irregularity, *i.e. neglect of a piece of evidence without giving reasons*, could not constitute denial of justice.[190]

[160] Herein, during the three-day hearing, Caeli was able to present its submission before the court,[191] and thus the court satisfied itself that the existing evidences before CCM were enough to impose the caps and such measures were in balance with its intended effects.[192]

[161] ***Secondly,*** the *Arif* tribunal confirmed the difference of the legal tradition in the decision reasoning which can be less formalistic or more teleological, unless such reasoning appeared so egregiously wrong that no competent and honest court would use them.[193]

[162] When addressing the case, the court made the verdict through "summary judgement" under the permission of Executive Order 5-2014.[194] Such swift judgement did not *per se* mean the ignorance of facts and evidences and would impede the justice of the merits, which shall be considered as Mekari legal tradition with overburdening judicial system.[195]

[163] Even if there existed some imperfections on the proceeding, they were far from the level of causing results which "*shock or surprise a sense of judicial propriety*" in the sense of international law.[196]

iii. The execution of the annulled award did not lead to denial of justice.

[164] The Claimant contended that execution of the award tainted by corruption was contrary to Mekari domestic law and the international convention.[197] However,

[190] *Liman*, ¶377.
[191] Facts, ¶52.
[192] Facts, ¶54.
[193] *Arif*, ¶453.
[194] PO 3, ¶8.
[195] Facts, ¶¶13,44.
[196] *Mondev*, ¶127; *Loewen (Award)*, ¶132; *Azurix*, ¶370; *Waste Management II*, ¶¶97-98.
[197] NoA, ¶¶26-27.

the claim would fail because such corruption was not found in the evidence **[a.]** and Mekar has such discretion to enforce the award **[b.]**.

a. The corruption was unfounded.

[165] To assess the evidence for proving corruption, the tribunal in *Bridgestone* dismissed the claimant's circumstantial evidences because they did not meet the "*clear and convincing standard*" to prove the existence of corruption in judicial proceeding.[198]

[166] *In casu*, firstly, CILS failed to demonstrate the source of the ***sole*** evidence and provided nothing beyond the record.[199] Thus, there is a high possibility that this audio was fabricated given the unidentified Mekari representative and the great vacancy behind it.

[167] Secondly, CILS is an entity funded by foreign donations accused to interfere in Mekar's domestic affairs.[200] Besides, Mekar was also investigating into its suspicious foreign funding and has frozen its bank accounts, for which CILS might have a grudge.[201]

[168] Thirdly, the evidence was the ***sole*** and ***circumstantial*** evidence,[202] which means that except this, there was no witness or record to support the same allegation.

[169] However, the Sinnoh Court also "*does not find itself in a position to conclusively rule on whether the act of bribery had in fact taken place*,"[203] but set aside the award predominantly due to domestic policy combatting corruption.[204] Notably,

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198 *Bridgestone*, ¶407.
199 Facts, ¶60; CILS Report, ¶¶1-4; Sinnoh Court Ruling, ¶5; High Court Ruling, ¶¶10-13.
200 NoA, ¶¶24,26; Facts, ¶60.
201 High Court Ruling, ¶¶10,13.
202 CILS Report, ¶3; Facts, ¶60.
203 Sinnoh Court Ruling, ¶10.
204 Sinnoh Court Ruling, ¶¶12-14.

Sinnoh court as one of the most transparent judicial system in the world, has taken such issue in the sense of policy rather than the findings of law.[205]

[170] Therefore, without such strict domestic policy, Mekari court did not find the corruption to take place under its standard for circumstantial evidence.[206]

b. The Respondent has the discretion to enforce an arbitral award.

[171] *In casu*, New York Convention granted the States with broad margin in the determination for arbitral awards execution, under Article V(1) of New York Convention.[207] This provision is recognized to facilitate the states in such issue rather than oblige them to do so.[208]

[172] Therefore, Mekari court has the discretion to enforce the award which was set aside in a third country, considering the difference of the evidence rules.[209] Therefore, although the judgement was annulled in Sinnoh, the court appropriately exercised this discretion and enforced the award without violation of the public policy in Mekar.

D. Mekar's actions cannot cumulatively violate Article 9.9 of CEPTA.

[173] Originated from the creeping expropriation, the concept of creeping violations relies on ***the cumulative effect*** of the State's actions which will completely alter the overall framework and thus frustrate the investors' ***legitimate expectations***.[210]

[174] In this regard, the Claimant alleged that Mekar's actions taken together breached the fair and equitable treatment in CEPTA,[211] which cannot substantiate

[205] PO 4, ¶8.
[206] High Court Ruling, ¶¶9-10,12; Superior Court Ruling, ¶18.
[207] UNCITRAL Guide, pp.125-126.
[208] Van den Berg, "Enforcement of the Arbitral Award", p.265.
[209] New York Convention, Article V.
[210] *El Paso*, ¶¶515-519; *Siemens*, ¶¶263-265; Scott Vesel, pp.559-563.
[211] NoA, ¶¶21,29; Response to NoA, ¶17.

because a creeping violation of FET cannot be established under CEPTA **[*i.*]**, and even if it could, such violation cannot be found in the present case **[*ii.*]**.

i. CEPTA does not provide a creeping violation.

[175] "*The creeping violation*" of FET standard cannot be established under CEPTA because firstly, CEPTA defines the FET standard by providing the specific situations of violation **[a.]** and secondly, the breach of legitimate expectation cannot *ipso facto* lead to the breach of FET **[b.]**.

a. The definition of the FET violation.

[176] Other than stipulating the general clause like the BIT in *El Paso* or *Vivendi II*,[212] CEPTA defines fair and equitable treatment via enumerating the specific situations of violation that can result from the "***a measure or measures***" of the Parties.[213]

[177] Firstly, such enumeration relates the infringeable measures to the specific situations such as *denial of justice* or *abusive treatment* but provides no margin for a general violation of FET treatment.[214] Notably, Article 9.9(2) restricted the discretion for other elements to the Parties' consensus rather than the Tribunal.[215] Such stipulation has been recognized to limit the scope of FET protection and avoid expansive interpretation in relation to FET.[216]

[178] Secondly, this provision identified that the "*measures*" taken by the Parties to give rise to such breach but not the cumulative effects of multiple actions.[217] The effects of the state conduct remotely relate to the measures and it would constitute an unfair expansion of the FET standard in line with the context.[218]

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[212] Argentine-US BIT, Article II(2)(a); Argentine-France BIT, Article 3.
[213] CEPTA, Article 9.9(2).
[214] *El Paso*, ¶¶515,519; *Waste Management II*, ¶17; Scott Vesel, pp.554-555.
[215] CEPTA, Article 9.9(2)(e), Article 9.22.
[216] IISD Toolkit, "5.4.5 Fair and Equitable Treatment (FET) or Minimum Standard of Treatment (MST)".
[217] CEPTA, Article 9.9(2).
[218] VCLT, Article 31.

[179] Thus, the allegation of the breach to general obligation cannot substantiate under CEPTA.

b. The legitimate expectation.

[180] CEPTA provides ***the legitimate expectation*** as a factor to be considered "*when applying the above fair and equitable treatment obligation*" *i.e.* the specific situations in Article 9.9(2),[219] indicating that it is a stand-alone doctrine independent from the obligation.[220]

[181] This stipulation signifies that a breach of legitimate expectation does not ***ipso facto*** amount to a breach of FET obligation.[221]

[182] However, "*the creeping violation*" ***solely*** regards the frustration of the legitimate expectation as a breach of general FET standard without providing further specific forms.[222] As the breach of legitimate expectation cannot substantiate a violation alone, the creeping violation cannot be imported to CEPTA.[223]

[183] To sum, given that the general effect of State conduct is not specified as FET obligation and the legitimate expectation is solely a separate factor, the creeping violation has found no basis in CEPTA.

ii. Alternatively, Mekar did not violate the FET obligation cumulatively.

[184] Even if the Tribunal deems that the creeping violation can be introduced to the FET standard in CEPTA, the Respondent's actions are in compliance with the fair and equitable treatment as a whole.

[185] The tribunal in *El Paso* found such creeping violation by two steps: it firstly examined the overall role of the State measures in the alleged damage of the investors and secondly found the cumulative effects of such measures frustrated

[219] CEPTA, Article 9.9(2), Article 9.9(3).
[220] Laryea, §3.2; Nganjoh-Hodu & Ajibo, p.48.
[221] *Arif*, ¶¶535-536; *Thunderbird (Separate Opinion)*, ¶37.
[222] *El Paso*, ¶518; Gourgourinis, pp.349-352.
[223] Nganjoh-Hodu & Ajibo, p.51.

FET standard.[224] Correspondingly, the Respondent will contend in the same line.

a. The overall role of the Respondent's measures in Vemma's loss.

[186] The *El Paso* tribunal deemed it necessary to assess the causes of the investor's loss, therein, the sale by the investor, namely El Paso, of its interest in the Argentinian companies, to find whether the State conduct related to the investor's loss.[225]

[187] Argentina contended that the sales were due to El Paso's liquidity problems and downgrading credit in the economic crises.[226] However, the tribunal found the contrary that the sale of Argentinian assets in the modest price was beyond its solution of its own problems and had little relation with its own decisions.[227]

[188] Further, the tribunal held that the State measures asserted great pressure over El Paso and were the ***prevailing reasons*** for the investor's sales.[228]

[189] In the same approach, the facts in the present case lead to the different destinations from *El Paso*. The Respondent contends that Vemma's dire situation and sale were due to its own ***operating strategies*** and ***economic crisis*** but not the Respondent's measures.

[190] Firstly, despite Mekari representatives repeating cautions in financial health, Vemma insisted on its radical strategies and invested all its profits into excessive expansion.[229] Caeli thus stayed in a risky financial structure with outstanding debt,[230] in the situation that its parent company, Vemma was strongly suffering from its global financial predicament.[231]

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[224] *El Paso*, ¶¶460-519.
[225] *El Paso*, ¶¶459,460.
[226] *El Paso*, ¶¶488-503.
[227] *El Paso*, ¶¶460-509.
[228] *El Paso*, ¶¶501-509.
[229] Facts, ¶¶27,29,31,33-35; Podcast Transcript, p.54; Aviation Analytics, ¶4.
[230] Facts, ¶¶30,35,51; Aviation Analytics, ¶4; Podcast Transcript, pp.54-55.
[231] PO 4, ¶5.

[191] Secondly, its expansion significantly increased its operating costs due to the enlarged airline services and exacerbated by its low-pricing strategies.[232] However, with the rising oil prices and the deteriorating economic situation, it was unable to guarantee the profitability with such overwhelming operating costs.[233]

[192] Thirdly, in case of economic crisis to relieve the catastrophic damage, the Respondent started its renationalization and many foreign investors pulled out of Mekar's market.[234] Besides, Mekar even offered the subsidies to help some airlines to overcome the economic downturn as discussed before.[235]

[193] Therefore, without the Respondent's sanction on its illegal conduct, Vemma would still encounter with the great loss combined with its failure in operation. The Respondent's actions were not the prevailing reason for Vemma's loss.

b. The cumulative effect of the Respondent's measures against FET.

[194] The *El Paso* tribunal found the respondent's measures cumulatively led to the complete alteration of the legal and market framework constructed to attract investors.[236] Therein, El Paso relied its investment on the measures protecting the foreign investors from a devaluation of the dollars and had the correspondent legitimate expectation to such policy.[237]

[195] However, Argentina initiated the pesification and destroyed the link between capacity payments and computation in dollars via a series of conduct handling the economic crisis, which cumulatively altered the framework and frustrated the investor's legitimate expectation.[238]

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[232] Facts, ¶¶27,29,31,33-35,45; Podcast Transcript, p.55; Aviation Analytics, ¶4.
[233] Facts, ¶¶44,48; Podcast Transcript, p.54.
[234] Facts, ¶41.
[235] Facts, ¶¶46-47; PO 4, ¶7; Executive Order 9-2018; see [147] of Memorial.
[236] *El Paso*, ¶517; *LG&E*, ¶139; Scott Vesel, p.536.
[237] *El Paso*, ¶¶510-513.
[238] *El Paso*, ¶¶510-515.

[196] *In casu*, the Respondent did not frustrate Vemma's legitimate expectation. Vemma's loss resulted from its own failure in handling the crisis, which could not be included as legitimate expectation.[239]

[197] Further, the Respondent did provide a stable framework for Vemma to operate its business. CCM did not sanction Vemma until the investigations were concluded;[240] Mekari court has provided Vemma with every opportunity to assert its rights and managed to dispense justice speedily much less than the average time.[241]

[198] Besides, Mekar did not issue any policy or regulation that might change the framework for the investment and Vemma's legitimate expectation shall be based on the pre-existing MRTP Act and market forum.[242] It should have been fully aware of the consequence of its antitrust and anti-competitive behaviors before it took the steps.

[199] Therefore, the Respondent did not frustrate any legitimate expectation and the cumulative effect did not violate the FET standard.

IV. THE RESPONDENT SHOULD COMPENSATE BASED ON MARKET VALUE IF THERE DOES EXIST A VIOLATION OF FET.

[200] Even if the Tribunal found that the Respondent has breached its obligations under CEPTA, the compensation standard shall be awarded at *market value standard* ("MV standard") rather than the *fair market value standard* ("FMV standard") **[A.]**. Alternatively, even if the FMV standard is applied, the compensation shall be mitigated considering the Claimant's contributory fault and Mekar's dire economic situation **[B.]**.

A. The Tribunal shall award at market value.

[239] *El Paso*, ¶¶360,366; *Oscar Chinn*, p.88.
[240] Facts, ¶¶36,38,45,49.
[241] Facts, ¶¶13,44,50.
[242] *Feldman*, ¶154; MRTP Act; Facts, ¶¶12-21.

[201] The Respondent submits that firstly, CEPTA has provided clear guidance for compensation at market value **[*i.*]** and secondly, MV standard is in lieu with the principle of *full reparation* **[*ii.*]**.

i. Article 9.21 has provided MV standard for non-expropriatory actions.

[202] Article 9.21 of CEPTA stipulates that the Tribunal may award the compensation at a ***market value***, except as otherwise provided for in Article 9.12 concerning the expropriation.[243] Except that, there is no specific provision pertaining to the compensation standard for FET breaches.

[203] Further, the sole exception of Article 9.21 to apply FMV standard is exclusively for the expropriation compensation, since it requires that such compensation refers to the direct expropriation in legal procedures.[244]

[204] Therefore, CEPTA has provided clearly that the non-expropriatiory actions including the breaches of FET standard, shall be compensated at market value.

[205] Even if the Tribunal intended to apply FMV standard, the impugned actions cannot qualify because firstly, FMV standard cannot be introduced through *Most Favoured Nation Treatment* clause ("MFN clause) **[a.]** and secondly, FMV standard is not ***tantamount*** to the expropriation for the fair market value **[b.]**.

a. FMV standard cannot be invoked through MFN clause.

[206] The Parties have consented to exclude the resolution of investment disputes from the treatment that can be imported from other treaties and requires the importation limited to ***the substantive obligations*** for great certainty.[245]

[207] In this regard, the compensation standard does not qualify as the treatment under MFN. The Parties' consensus towards the compensation standard can be investigated via the arrangement of the treaties in a stringent sense.[246]

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[243] CEPTA, Article 9.12, Article 9.21.
[244] CEPTA, Article 9.
[245] CEPTA, Article 9.7(2).
[246] *Plama*, ¶223; *Telenor*, ¶¶91,95; *Berschader*, ¶175,206; *Gas Natural*, ¶49.

[208] Firstly, CEPTA stipulates general standard for compensation in the Section E – Settlement of Disputes after the Section D regulating the substantive rights on the investment protection.[247] Specifically in Article 9.20, provision on the procedural issue concerning the award, the compensation standard is provided as the Tribunal's discretion but not a substantive obligation for the Parties.[248]

[209] Secondly, the FMV standard in Arrakis-Mekar BIT is located in the final part of the treaty after the provisions of the dispute settlement and is provided as the discretion in the situation where "*the Tribunal makes a Final Award*".[249] It shall be regarded as a procedural issue rather than substantive one for the investment protection.

[210] Therefore, the compensation standard is separated from the protection that the Parties accord to the investors and investment and cannot be considered as a substantive obligation for the parties to be imported in the present case.

b. <u>The FMV standard cannot be invoked through analogy to expropriation.</u>

[211] Several precedents ruled that the damage caused by the breaches of FET clause can be compensated at *fair market value* when it is tantamount to the expropriation.[250]

[212] For instance, the *CMS* tribunal considered FMV standard an appropriate option to compensate the cumulative infringement causing long-term losses to the investors while such standard figures prominently in respect of expropriation.[251]

[213] The *CMS* tribunal found such breach as the respondent fundamentally altered the framework of tariff and currency policy that the investment relied on and

[247] CEPTA, §§C-E.
[248] CEPTA, Article 9.21.
[249] Arrakis-Mekar BIT, Article 13.
[250] Argentina-US BIT, Article 4.1; *LG&E (Award)*, ¶39; *Sempra*, ¶403; *CMS*, ¶410; Tschanz & Vinuales, p.735.
[251] *CMS*, ¶¶409-410.

mandated CMS to transfer its shares by a series of governmental decisions, causing expropriatory effects to the investor.[252]

[214] However, there are two grounds that such approach cannot be applied herein:

[215] Firstly, different from the treaties without the compensation standard for non-expropriatory actions, CEPTA specifies the compensation at market value in general and restricts the discretion to introduce another standard.[253]

[216] Secondly, the final loss of Vemma's investment was made in commercial contract at arm's length. It is Vemma's desperate to shore up liquidity that prompted its to conclude the purchase with Mekar after 3 years of struggling without finding another willful buyer, which was not compelled by the governmental decree or mandate.[254]

[217] Therefore, the present case did not exist the ***expropriatory effects*** that might lead to the application of FMV standard.

ii. MV is more in line with the compensation principle of full reparation.

[218] The "***full reparation***" principle for wrongful acts was derived from *Chorzów Factory*, which requires the State to endeavor to ***wipe out*** all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[255]

[219] Such principle has been endorsed by the ILC Articles and accepted by multiple tribunals. [256] And herein, MV standard fulfilled the requirements of *full reparation*.

[220] By words of the *Amoco* tribunal:

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[252] *CMS*, ¶¶274-281,299-301; *Azurix*, ¶¶295,313.
[253] Argentina-US BIT, Article 4.1; CEPTA, Article 9.12; Beharry, pp.112-140.
[254] PO 4, ¶7; Facts, ¶21.
[255] *Chorzów Factor*y, p.47.
[256] ILC Articles, Article 31; *Amoco*, ¶191; *Vivendi*, ¶¶8.2.4-8.2.5; *MTD*, ¶238; *9REN*, ¶376; *Tecmed*, ¶188; *CME (Final Award)*, ¶618.

> "*[o]ne of the best settled rules of the law of international responsibility of states is that no reparation for* ***speculative or uncertain damages can be awarded***."[257]

[221] Besides, high probability of wrong calculation can easily lead to unjust enrichment on the side of the Claimant.[258]

[222] Followed by the *Shufeldt*, "*the lucrum cessans must be the direct fruit of the contract and not too remote or speculative*"[259] as well as shall be proved reasonable anticipated by clear and convincing evidence of ongoing and expected profitability.[260]

[223] In this regard, the MV standard refers to the valuation based on the eligible transaction with parties of due prudence and diligence in the market rather the FMV standard focused on the hypothesis regardless of the market situation.[261]

[224] Under the circumstances where the foreign investors were pulling out of Mekari market for the deteriorating crisis,[262] Mekar made the purchase and helped Vemma to cut off the overwhelming losses.[263] Such price of ***market value*** should be considered as the most direct reparation for Vemma's impaired investment which had largely lost its profitability and burned with significant liability.[264]

[225] Conversely, the evaluation of FMV standard based on a ideal market was a largely deviated from the actuality, exceeding the accessible value that it could

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[257] *Amoco*, ¶238.
[258] *Amoco*, ¶231.
[259] *Shufeldt*, p.1099.
[260] Whiteman, p.1837.
[261] *CMS*, ¶402; *Azurix*, ¶424; NAVCA IGBVT; IVSC IVS, ¶¶1.3.1-1.3.2. ~~Starrett housing corp v. Iran (Final Award), Award No.314-24-1(1987), reprinted in 16 Iran U.S. Cl. Trib. Rep. 112, 201; NAVCA IGBVT, p.4; CMS, ¶402, describing the ASA definition as "internationally recognized"). See also *Azurix*, ¶424; The definition employed by the CMS and Azurix panelsisfound at NAVCA IGBVT; IVSC GAVP, ¶5.2; IVSC IVS, Market Value Basis of Valuation, ¶3.1; The operative phrases within this definition are considered in IVSC IVS, at ¶3.2.~~
[262] Facts, ¶¶41,56.
[263] Facts, ¶¶53,56,63.
[264] Facts, ¶¶51,56; Response to the NoA, ¶21.

realize, in the emergent situation where Vemma was in desperate need for a willing buyer to shore up its liquidity and handle the outstanding debt.[265]

[226] The positive speculation of Vemma and Caeli's recovery after the crisis was unsubstantial under the principle of full reparation,[266] since its failure of investment was also largely due to its ill-advised strategies and the uncoverable costs caused by awakening oil prices and diminishing demand.[267]

[227] Besides, the Claimant provides no convincing evidence of its capacity to recover or maintain its former high-profitability. In this regard, the recovery to its peak value was too remote to be considered when Vemma was struggling to survive from its global malfunction and had no prospective strategies to reconstruct its business.[268]

[228] Thus, the MV standard shall be applied herein.

B. Even if the FMV standard is applied, the amount of compensation shall be reduced.

[229] The Respondent submits that the amount of compensation shall be reduced as the Claimant made material contribution to the damage caused **[*i.*]**, and the dire economic situation in Mekar should be considered **[*ii.*]**.

i. The Claimant materially contributed to the loss as its business strategies were unreasonable.

[230] According to *ILC Articles 31&39*, if the consequences alleged by the Claimant were reached mainly due to its contributory fault, then the final compensation amount should be reduced accordingly.[269] In sought for such reduction, the contributory negligence must be material and significant.[270]

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[265] Facts, ¶¶51,53,56; Response to the NoA, ¶¶20-21.
[266] Facts, ¶¶51,53,56,64-65.
[267] Response to the NoA, ¶¶11,22; Facts, ¶¶30-31,33,35,48,51,53; Aviation Analytics, p.57; Podcast Transcript, pp.54-55.
[268] PO 4, ¶5; Facts, ¶¶53,65.
[269] ILC Articles, Article 39.
[270] *Occidental*, ¶670; *Yukos*, ¶¶1599-1600.

[231] *In casu*, it is Vemma's negligence to the inherited debt, liquidity crunch and awakening oil prices that led it to the dire situation.[271] Insisted in its ill-advised strategies after 2016, Caeli maintained numerous unprofitable long-haul airlines that consumed a lot of oil.[272] Therefore, the currency crisis and the arising oil prices exacerbated the uncoverable costs and put Caeli into the edge of insolvency.[273]

[232] While Vemma was struggling in the insufficient liquidity, Caeli turned into an unfavorable enterprise with outstanding inherited debt.[274] Therefore, Vemma was desperate to get rid of Caeli but could not yield another buyer.[275] For the public interest in the airlines Caeli was running, Mekar purchased the investment.[276]

[233] Therefore, Vemma did not perform in due diligence and had substantial negligence towards the situation, for which the compensation shall be reduced.

i. The dire economic situation in Mekar should be considered.

[234] When deciding the compensation, the tribunal must take into account all relevant circumstances in the case.[277] In *Enron*, the tribunal held that the valuation of damages must reflect the reality of the crisis and the specific influence it has in connection with valuation and compensation.[278] Arb. Brownlie has recognized that the respondent as a sovereign State that has its income from the well-being of the population, the requested overwhelming compensation would go against the Parties' intention for the investment treaty.[279]

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[271] Facts, ¶¶35,42,48,51; Aviation Analytics, p.57.
[272] Facts, ¶¶29,38,42,48; Aviation Analytics, p.57.
[273] Facts, ¶¶39,42,48.
[274] PO 4, ¶5.
[275] Facts, ¶63.
[276] Facts, ¶64; PO 3, ¶9.
[277] *Santa Elena*, ¶91; *AIG*, ¶109; *Phillips Petroleum*, ¶¶122-123.
[278] *Enron*, ¶¶405-407.
[279] *CME (Separate Opinion)*, ¶¶75-79.

[235] *In casu*, the state finance is a mitigating factor of compensation. Mekar has been suffering from severe economic crisis since 2016 and was facing a potential third debt default in as many decades.[280]

[236] The USD 700 million that Vemma demands was twice Mekar's consolidated annual public spending which is an unbearable burden for Mekar in the crisis, and would entail miserable repercussions for the livelihood and economic well-being of the population.[281]

[237] In sum, the compensation amount should be reduced due to Vemma's contributory actions to the loss and the economic crisis of Mekar.

[280] Facts, ¶¶39,41; PO 3, ¶4.
[281] PO 3, ¶4.

PRAYER FOR RELIEF

[238] In light of the above, the Respondent respectfully requests the Tribunal to:

(i) Decline to exercise jurisdiction over the present case;

(ii) Find that the tribunal should reject the submission of CBFI;

(iii) Grant the leave to external advisors for filing *amici* submission;

(iv) Find that the Respondent did not violated Article 9.9 of the CEPTA;

(v) In case the Tribunal finds Mekar did not violate Article 9.9, then the Tribunal should conclude Mekar has already purchased the Claimant's investment at market value and award the Claimant no compensation; alternatively, the Tribunal should reduce any compensation awarded considering the Claimant's contributory fault and the ongoing economic crisis in Mekar.

Submitted on 23 September 2021 by TEAM Rivero G

On behalf of Respondent

The Federal Republic of Mekar