TEAM ALIAS: RUDA

FOREIGN DIRECT INVESTMENT INTERNATIONAL ARBITRATION MOOT, 2021

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

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

VEMMA HOLDINGS INC.	**V**	**THE FEDERAL REPUBLIC OF MEKAR**
(CLAIMANT)		(RESPONDENT)

MEMORIAL *for* RESPONDENT

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UNCTAD - FET	*United Nations Conference on Trade and Development. Investor-State Dispute Settlement: UNCATD Series on Issues in International Investment Agreements II. (New York and Geneva: United Nations, 2014).*

LIST OF ABBREVIATIONS

Annex I	Constitution Act of Bonooru, 1947
Annex III	Constitutional Court of Bonooru on Privatisation of BA Holdings (excerpts)
Annex V	Monopoly and Restrictive Trade Practice Act, as Amended in 2009
Annex VIII	Executive Order 9-2018
BIT	Bilateral Investment Treaty
Bonooru	Commonwealth Of Bonooru
CBFI Submission	Amicus Submission by the Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
FMV	Fair Market Value
LPM	Labourer's Party of Mekar
Notice	Notice of Arbitration
CRPU Submission	Amicus Submission by External Advisors to the Committee on Reform of Public Utilities
Mekar	Federal Republic Of Mekar
Order	Executive Order 9-2018
PO3	Procedural Order No 3
PO4	Procedural Order No 4
Response	Response to the Notice of Arbitration
Rules on Transparency	UNCITRAL Rules on Transparency In Treaty-Based Investor-State Arbitration

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STATEMENT OF FACTS

1. The Claimant, **Vemma Holdings Inc.**, is an airline holding company incorporated under the laws of Bonooru. From its date of incorporation until March 2020, Bonooru owns between 31% to 38% minority stake in Vemma, and other private and institutional shareholders from Bonooru and Goponga own not more than a 7% stake.

2. The Respondent is the **Federal Republic of Mekar**. In April 2014, Bonooru concluded the Comprehensive Economic Partnership and Trade Agreement with Bonooru.

3. In **2010**, Mekar enacted a decree to privatize Caeli Airways. On **March 29, 2011**, Vemma Holdings entered into a Share Purchase Agreement with Mekar Airservices Ltd. to purchase an 85% stake in Caeli Airways. Simultaneously, Vemma and Mekar Airservices Ltd. entered into a Shareholders' Agreement, which granted Mekar Airservices Ltd. the *right of first refusal* relating to Joint-Stock Company Caeli Airways.

4. During **August 2011 - December 2013,** Caeli Airways was able to capitalise on a much larger demand - both domestically, with an average increase by 21% from 2010 to 2013, and internationally, with an average increase by 17% from 2010 to 2013 - than it had expected and generate significant cash-flow.

5. On **September 2016**, CCM launched a *suo moto* investigation into Caeli's activities, and explained the decision in a circular, stating: Caeli's market share exceeds 54% in conjunction with its Moon Alliance partner, Royal Narnian, and also concerned that subsidies received by Vemma under the Horizon 2020 programme enabled Caeli's predatory pricing strategies. As an interim measure, the CCM placed caps on Caeli Airways' airfare, set reasonably above the rates Caeli Airways charged on set routes to prevent it from earning supra-competitive profits in the future.

6. On **December 2016**, CCM launched a second investigation after a consortium of small regional airlines in Greater Narnia, alleged that Caeli "launched flights on specific regional routes with the sole purpose of pushing its competitors off these routes, capitalising on its undercutting policies and the privileges it enjoyed at Phenac International Airport".

7. By **March 2017**, a currency crisis ensued in Mekar, increasing inflation led to a surge in costs of everyday items and reduced consumer spending power. Caeli and other airlines were adversely affected, failing to maintain sustainable revenues. On receiving several requests from the airlines, Mekari authorities approved the denomination of airfare in US dollars for all airlines operating in its territory.

8. In **November 2017**, the LPM was elected back with the party securing an overwhelming parliamentary majority. The LPM blamed the "crisis of catastrophic proportions" on the privatisation program and vowed to return the country to the Mekari people. This displaced the Mekar's Common Man's Party ["CMP"] which had been ruling for the past 9 years.

9. On **January 30, 2018**, Mekar's new government passed a decree requiring all companies operating in the country to offer goods and services denominated exclusively in MON; nullifying the short-lived exemption granted to airlines by CMP.

10. In **August 2018**, CCM concluded its First Investigation into the commercial activities of Caeli Airways. The report found a breach of Mekar's antitrust legislation in the form of predatory pricing. As a result, the CCM imposed a total penalty of MON 150 Million on Caeli and also decided to keep the airline caps in place pending the Second Investigation.

11. On **September 25, 2018**, the President passed Executive Order 9-2018, granting subsidies. Caeli Airways' application for subsidies was rejected without indicating the reasons for the dismissal.

12. On **January 1, 2019**, the CCM completed its Second Investigation into Caeli. Similar to the former investigation, the report concluded that Caeli had engaged in anti-competitive behaviour. Later, representatives of Caeli appealed both orders of the CCM in the Mekari courts, requesting to join this appeal with the April 2019 hearing. However, the registrar denied the request.

13. In **April 2019**, Caeli's lawyers urged for an immediate hearing on interim measure to secure a stay on airfare caps. As previously, the Court Registrar rejected the request for a separate hearing on interim measures. Later, Mekar's High Court heard submissions from Caeli Airways and the CCM concerning a stay on the imposition of airfare caps and ruled in favour of CCM.

14. In **June 2019**, Caeli Airways was forced to shut down several loss-making routes, return aircraft to their lessors following the breakdown of sale and leaseback deals, lay off 30% of its staff, cancel existing purchase orders, and ground large parts of its fleet.

15. On **December 9, 2019**, Vemma secured an offer from Hawthorne Group LLP, a Sinnoh-based private equity firm, for buying Vemma's entire stake in Caeli Airways. In a notice, Vemma communicated the terms of this offer to representatives of Mekar Airservices. However, Mekar Airservices rejected the offer under its Right to first refusal, deeming the price offered to be artificially inflated and not an arm's length commercial price.

16. On **February 11, 2020**, Mekar Airservices filed a request for arbitration with the Sinnoh Chamber of Commerce's Arbitration Institute under the SCC Arbitration Rules (Annex XI) and Article 48 of the Shareholders' Agreement to find that Vemma had failed to secure a bona fide third party offer under Article 39 of the Shareholders' Agreement.

17. On **May 9, 2020**, following a fast-track arbitration procedure, the sole arbitrator rendered an award in favour of Mekar Airservices. Soon after the award, Centre for Integrity in Legal Services ("CILS"), a non-profit organisation in Mekar, released a report alleging that Mr. Cavannaugh, the sole arbitrator, had received bribes from representatives of Mekar Airservices to render a favourable decision.

18. In **August, 2020**, the Supreme Arbitrazh Court of Sinnograd set aside the award pursuant to Vemma's application and in consonance with the public policy of Sinnoh. Nevertheless, Mekar Airservices sought to enforce the award before the High Commercial Court of Mekar. The Court issued a ruling recognizing and enforcing the award in Mekar.

19. On **September 25, 2020**, the Superior Court dismissed Vemma's appeal forcing Vemma to sell its stake in Caeli to Mekar Airservices for 400 million USD.

20. In **November 2020**, Vemma filed its request for arbitration before the ICSID Tribunal in accordance with Article 9.16 of the Bonooru - Mekar Comprehensive Economic Partnership and Trade Agreement (the "CEPTA") and Article 2 of the International Centre for the Settlement of Investment Disputes Additional Facility Rules.

PHASE I

[1] The Tribunal does not have jurisdiction *ratione personae* as the Claimant fails to fulfil the objective criteria under Article 2 "ICSID Additional Facility Rule" **["AF Rules"]**. Pursuant to Article 32 VCLT, based on the preparatory work of the ICSID Convention, Claimant is not a genuine investor based on the *Broches Test* and subsequently under Articles on Responsibility of States for Internationally Wrongful Acts **["ILC Articles"]**. Moreover, the critical dates are irrelevant, given Bonooru's existing ties with Vemma since inception.

[2] The Tribunal may grant leave for amici submissions subject to the requirements under AF Rules and Comprehensive Economic Partnership and Trade Agreement **["CEPTA"]**. Supporting the same, the Tribunal shall apply UNCITRAL rules on transparency in treaty-based investor-State arbitration. Moreover, the Tribunal shall deny the amicus submission by the Consortium of Bonoori Foreign Investors **["CBFI"]**, as it fails to meet the requirements, *viz.* CBFI's submission does not serve a public purpose, whereas it shall grant leave to the amicus submission by the external advisors to the Committee on Reform of Public Utilities **["CRPU"]**, as it does.

PHASE II

[3] Respondent did not breach FET standard because first, it has at all times accorded fair and equitable treatment to the Claimant. Second, Claimant could not have relied on an expectation that Respondent would not change the law as CEPTA grants regulatory rights to act in legitimate public policy interest. Moreover, Claimant cannot adopt a creeping FET violation theory as it has no basis under CEPTA or customary international law and hence, there is no discrete violation to confer breach of FET.

[4] Finally, the Tribunal shall apply the "market value" standard provided under Art. 9.21 of CEPTA and also in light of the fact that CEPTA does not allow importation of compensation standards under MFN Clause. Hence, Claimant is not entitled to any further compensation since Mekar has already paid the market value, 400 million USD. In any event, if Tribunal applied FMV, the compensation should be reduced against Claimant's failure to mitigate losses and the prevailing economic crisis in Mekar.

1. THE TRIBUNAL DOES NOT HAVE JURISDICTION UNDER COMPREHENSIVE ECONOMIC PARTNERSHIP AND TRADE AGREEMENT ["CEPTA"] and ICSID ADDITIONAL FACILITY RULES ["AF RULES"].

[1] In a desperate attempt to maintain its impunity, Claimant filed proceedings against Mekar expecting to be granted a remedy. However, such a remedy, though groundless, cannot even be considered by the Tribunal. As a matter of fact, Vemma is a State-owned enterprise with Bonooru maintaining a sizable stake in the company, since its inception.[1]

[2] Claimant's bad faith did not stand still: having submitted its claims before the Tribunal, it deceptively pretended to be a protected investor under the CEPTA and AF Rules.[2] However, Vemma's existing ties with the Government of Bonooru requires the Tribunal to assess if the Claimant satisfies the objective requirements set forth in Article 2 of the AF Rules.[3]

[3] Based on Article 2 AF Rules and the CEPTA, this Tribunal lacks jurisdiction *ratione personae* over the present dispute since Claimant is not a genuine investors,[4] under *Broches Test*.[5] **[1.1]** Moreover, the critical dates are irrelevant, given Bonooru's existing ties with Vemma since inception. **[1.2]**

1.1. THE TRIBUNAL LACKS *RATIONE PERSONAE* JURISDICTION OVER THE PRESENT CLAIMS.

[4] Claimant suggests that "investor of a Contracting Party" in Article 2 AF Rules only implies being incorporated in one of the Contracting Parties to the treaty. However, that would not be a proper interpretation of this Article in light of the broader purpose of AF Rules and of the present circumstances.

[5] While assessing whether an enterprise belongs to a contracting party to a CEPTA, arbitral tribunals usually resort to specific nationality tests.[6] As it can be seen, however, Article 2 AF

[1] Statement of Uncontested Facts ["Facts"], § 935.
[2] Maffezini § 89; Tokio Tokeles § 43.
[3] Article 2, AF Rules.
[4] Prosper Weil, Tokio Tokeles, § 23.
[5] CSOB, § 17.
[6] Amerasinghe/(2009), p. 254 Tokio Tokeles, § 43.

Rules does not include any test or standard for the determination of an enterprise's nationality or origin.

[6] Nevertheless, the AF Rules could never be intended to protect a State-owned enterprise.[7] A contrary interpretation would disregard Article 32 of the VCLT when it permits supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning.[8]

[7] Hence, the Claimant does not qualify as an investor under Article 2 AF Rules, because the Broches test is relevant based on the preparatory tools of treaty interpretation **[1.1.1]**, and that Claimant is not a genuine investor pursuant to the applicable test. **[1.1.2]**

1.1.1. The Broches Test is more appropriate in light of the object and purpose of AF Rules.

[8] If the ordinary meaning of terms fails to give a clear meaning then the treaty needs to be interpreted in light of its object and purpose.[9] In order to perform such a task, arbitral tribunals have resorted to preambles and objectives of the treaty.[10] Particularly, the ICSID Convention and ICSID AF Rules mirror the objectives.[11]

[9] Furthermore, AF Rules is an extended branch of ICSID Convention, opening access to the Centre in a number of additional cases.[12] In particular, Art. 2 AF Rules mimics Article 25 ICSID Convention in a manner extending the ICSID Convention's rather limited subject-matter jurisdiction over "investment disputes".[13] Consequently, the intention of the drafters remain the same, *to facilitate arbitration between investors and States*,[14] *prima facie* the preparatory work of the treaty and the circumstances of its conclusion are coinciding.

[7] Article 2, AF Rules.
[8] Article 32, VCLT.
[9] Article 31, VCLT.
[10] Weeramantry, § 70-71; Aguas del Tunari, § 241; Prosper Weil, Tokio Tokeles, § 19.
[11] Art.25, ICSID Convention; Art. 2, AF Rules.
[12] UNCTAD-Dispute Settlement, p.19.
[13] Ibid.
[14] ICSID-History (1), p. 274–275; Broches/(1972), p. 353.

[10] In absence of the requirements under Article 2 AF Rules, the provision can be determined reading along the object and purpose of the Convention[15], as well as analysing elements such as the title of the treaty, its preamble and the preparatory works[16], apart from studying the treaty as a whole.[17]

[11] The issue of whether State-owned Enterprises have a standing in Investor-State disputes, was addressed within the drafting history of the Convention, by Aron Broches. Mr. Broches concluded:

> *"*a mixed economy company or government-owned corporation should not be disqualified as a national of another Contracting State unless it is acting as an agent for the government or is discharging an essentially governmental function*".*[18]

[12] The notion has been formulated as "*Broches Test*" to objectively assess the nationality of SOEs and has been relied on by a number of Tribunals. Scholars[19] and arbitrators have also recognised the application of *Broches Test* in order to distinguish between government-owned companies, which may legitimately qualify as nationals of another contracting State, from those whose links with the State are so tight that they cannot be considered as distinct entities.

1.1.2. Broches Test replicates the rules of attribution under ILC Articles.

[13] The "*Broches Test*" mirrors the image of the attribution rules in Articles 5 and 8 of the ILC Articles on State Responsibility. The test lays down markers for the non-attribution of State status.[20]

[14] Reputed scholars have also observed that the *Broches Test* has significant analogies with the rules on attribution codified in the ILC Articles.[21] Subsequently, the commentaries to the ILC Articles make it clear that for a State to be held responsible, the SOE must either be acting in a governmental capacity or the State must have 'effective control' over the actions considered to be internationally wrongful.

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[15] Article 31, VCLT.
[16] Article 32, VCLT.
[17] Fitzmaurice/Merkouris, p. 155; Sinclair, p. 130-131.
[18] Aaron Broches.
[19] CSOB, § 17.
[20] BUCG, § 34.
[21] Paul Blyschak, § 35.

[15] As premise, in the *Maffezini* case, the Tribunal elaborated a two-pronged tests based on the ILC Articles: first, devoted to ascertaining the existence of an agency relationship, and second, aimed at verifying whether the function carried out by the entity might be deemed "public in nature", stressing, however, that it was not applying the rules on attribution.[22] Conversely, the *BUCG* Tribunal noted the disjunctive "or" in the concluding sentence requiring the Tribunal to find either of the two parts of the *Broches test*.[23]

[16] Based on the same, the Respondent submits that this Tribunal lacks jurisdiction because Vemma is an SOE that has acted as an agent of Bonooru since its inception **[A]**; and has performed essentially governmental functions throughout the life of the investment. **[B]**

A. Vemma acted as an agent of Bonooru under the scope of Article 8 ILC Articles.

[17] Article 8 of ILC provides:

> "The conduct of a person or group of persons shall be considered an act of a State […] is in fact acting on the instructions of, or under the direction and control of that State in carrying out the conduct."[24]

[18] The Respondent submits that since Vemma's inception, Bonooru has been a significant shareholder[25] and subsequently, its majority shareholder[26], such that the subsequent reorganization has not changed its status of an agent of the State.

[19] Furthermore, Article 8 ILC Articles considers actions enacted in guidance or control, as an act of the State.[27] Although the evidentiary record discloses that Vemma participated in the bid as general bidder and acquired the investment, Bonooru's use of its ownership interest extinguished the commercial rationale of the alleged investment.[28]

[22] Maffezini, § 84; Consorzio, § 19(i).
[23] BUCG, § 33.
[24] Schering, § 361; Otis, § 283; Eastman, § 153; Starrett, § 143.
[25] Facts, § 935.
[26] Facts, § 1410.
[27] ILC ARTICLES commentary.
[28] Facts, § 190.

[20] In this respect, the *Maffezini* Tribunal held that:

> "The test that has been developed [to establish whether a particular entity in a state body] looks at various factors, such as ownership, control, the nature, purposes and objectives of the entity whose actions are under scrutiny, and to the character of the actions taken."[29]

[21] These corporate controls and mechanisms are not surprising in the context of State-owned corporations. However, as noted above, the issue is not the corporate framework of the State-owned enterprise, but whether it functions as an agent of the State in the fact specific context.[30] The evidence in this case establishes that, Vemma circumvented from its commercial objectives, *prima facie* Vemma was acting as an agent of the Bonooru in any relevant sense of the word "agent."[31]

[22] In particular, since privatization, the government and judiciary have explicitly referred to Vemma as a vehicle to fulfil public benefits and have ensured its monopoly over the enterprise despite minority shareholding.[32] Although, Claimant argues Vemma as private enterprise, however, the evidentiary record, as stated by the Court of Bonooru suggests otherwise:

> "The Court is satisfied that the government has ensured that there are protections for our citizens' access to mobility. The provisional Memorandum of Association of Vemma Holdings [...] ensures that Royal Narnian will continue to operate routes to remote communities [...] we are sufficiently convinced that Bonooru will be able to ensure the utilisation of the Royal Narnian for public benefit."[33]

[23] Likewise, when a State uses its ownership interest in control of a corporation specifically in order to achieve a particular result, the conduct in question is attributed to the State.[34] In regard to these facts, Respondent contends that Bonooru has an effective and overall control on Vemma and that it has acted as an agent of Bonooru. [35]

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[29] Maffezini, § 76.
[30] ILC Articles commentary, p. 64.
[31] Annex III, § 1495.
[32] Facts, §§ 920, 925.
[33] Ibid.
[34] ILC Articles commentary, p. 48.
[35] Maffezini, § 30.

B. Vemma performed governmental functions under the scope of Article 5 ILC Articles.

[24] It is common ground that Article 25(1) of the ICSID Convention is not a State-to-State dispute resolution mechanism and is not open to State-owned companies as claimants when acting as agents of the State. In this respect, the Respondent submits that the test to determine the scope of governmental functions performed by an entity is under the rules of Article 5, ILC Articles.

[25] Article 5, ILC Articles stipulates:

> "The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the government authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."[36]

[26] Article 5 specifically intends to take account of situations where former State corporations have been privatized but retain certain public or regulatory functions.[37] "*Entity*" reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority and include semi-public entities, public agencies of various kinds and even, private companies, provided that the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs.

[27] For the purposes of article 5, an entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the State. The fact that an entity is empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority is decisive to classify it as an agent of the State.

[28] A similar test was adopted and applied in *CSOB* as follows:

> "In determining whether CSOB, in discharging these functions, exercised governmental functions, the focus must be on the nature of these activities and not their purpose."[38]

[36] ILC Articles commentary, p. 64.
[37] Ibid.
[38] CSOB, § 20; Maffezini, § 80; Rumeli, § 212.

[29] On account of the same, the nature of the entity in the present case is that of a *Parastatal Entity*, exercising elements of governmental authority in situations where former State corporations have been privatized but retain certain public or regulatory functions.[39]

[30] In particular, despite the fall-winter decline, Vemma continued its services accustomed to constant demand from business travellers in Bonooru. The evidentiary facts that the Court of Mekar has recognised "air travel as a unique purpose in Bonooru"[40] as well as in light of Bonooru's obligation under Article 70(2) of Constitution Act of Bonooru, 1947, to ensure that every citizen is guaranteed travel to and from its many islands, such an action indicates Vemma's lack of commercial rationale and a delegated governmental function.[41]

1.2. THE CRITICAL DATES ARE IRRELEVANT AS CLAIMANT WAS A STATE-OWNED ENTERPRISE THROUGHOUT THE LIFE OF THE INVESTMENT.

[31] Claimant, alternatively, has relied on the relevant date to determine the investor's nationality. However, the Respondent refutes Claimant's contention because the objective test is an ongoing requirement throughout the life of the investment. Claimant, since its inception, has been a State-owned enterprise[42], acting as an agent of the State[43] and carrying out essentially governmental functions.[44]

[32] The determination of a change in the investor's nationality based on the criteria of relevant dates is fact specific. The Tribunals in *Venoklim, Blue Bank* and *Rusoro Mining* have relied on the determination of the nationality of investors based on the relevant dates because the investor had a substantial change of nationality either after the date of investment made; the date of the alleged breach or the date of notice of arbitration. However, in the present case the question is whether the investor was a State-owned enterprise acting under the control of Bonooru on these critical dates respectively.

[39] PO4, § 3295.
[40] Annex III, § 1485.
[41] Maffezini, § 77.
[42] Annex IV, § 1550.
[43] Arguments, § 17-23.
[44] Ibid, § 24-30.

[33] Control is typically established either by outright ownership of the enterprise, ownership of a majority of the shares, or by a specified minimum minority ownership, if the government is the largest shareholder.[45] The power to infer majority of the board decisions similarly confers governmental control.[46]

[34] In the present case, no other investor, apart from Bonooru, within Vemma Holdings Inc. held shares more than 7%[47] whereas Bonooru has always maintained a sizable stake between 31-38% within Vemma.[48] Such an implication confirms the control of Vemma by Bonooru in its formal structure as well.

[35] Additionally, Bonooru's representatives on Vemma's board are present for every meeting and for some meetings, they form a majority as present and voting when not all other shareholders attend",[49] indicating the active participation by the State.

[36] In conclusion, the Tribunal lacks jurisdiction as the Claimant fails to fulfil the Broches Test and the burden of proof rests on the Claimant to prove that they neither acted as an agent nor carried out any governmental functions for Bonooru.

[45] Corporate Governance, p. 249.
[46] Ibid, p. 94.
[47] PO4, § 3270.
[48] Facts, § 930.
[49] PO3, § 3155.

2. THE TRIBUNAL MAY GRANT LEAVE FOR AMICI SUBMISSIONS SUBJECT TO THE REQUIREMENTS UNDER AF RULES AND CEPTA.

[37] Procedurally, even though the CEPTA or AF Rules do not expressly provide for the power of tribunals in admitting amicus curiae, Article 35 AF Rules authorises procedural flexibility.[50] It states:

> "*if any question of procedure arises which is not covered by these Rules or any rules agreed by the parties, the Tribunal shall decide the question*."

[38] To support such a contention, ICSID Tribunals have decided in several cases that it has the jurisdiction to admit the application for an amicus curiae submission.[51] Hence, the Tribunal has wide discretion in granting leave to amicus submission under Article 35 AF Rules, subject to the fulfilment of the requirements provided under article 9.19 of CEPTA and Art. 41(3) of AF Rules.[52]

[39] In addition, Articles 9.19 CEPTA can be further supported with Article 5 UNCITRAL Rules. Both provisions provide for a set of requirements in examining or considering the amicus submissions.

[40] Respondent submits that the Tribunal should apply Rules on Transparency **[2.1]** and deny CBFI's submission since it fails to serve a public purpose **[2.2]** whereas grant leave to CRPU's submission as it fulfills all the requirements. **[2.3]**

2.1. The TRIBUNAL SHOULD APPLY RULES ON TRANSPARENCY TO THE PRESENT PROCEEDING.

[41] An agreement has been reached between the Parties concerning the standard of rules applicable to the present proceeding in accordance with Article 9.20(6) CEPTA. The provision states:

> "[...] The Federal Republic of Mekar shall duly consider the application of the UNCITRAL Rules... to any international arbitration proceedings initiated against the Federal Republic of Mekar pursuant to this Agreement."[53]

[50] Apotex, § 21.
[51] UPS; Methanex, § 7.
[52] Piero Foresti, § 1.
[53] CEPTA, § 3010.

[42] Hence, Respondent had rightfully reserved its rights, allowing the Tribunal to apply the Rules on Transparency to the present proceedings.[54]

2.2. THE AMICUS SUBMISSION BY THE CONSORTIUM OF BONOORI FOREIGN INVESTORS ["CBFI"] FAILS TO MEET THE REQUIREMENTS.

[43] Respondent submits that this Tribunal shall not grant leave to CBFI's request, since there is a conflict of interest with CBFI's application **[2.2.1]**; and that the CBFI's submission does not serve a public purpose **[2.2.2]**.

2.2.1. CBFI's submission has 'conflict of interest'.

[44] The "conflict of interest" requirement can be construed within Article 41(3) AF Rules. The wording in Article 41(3) AF Rules provides that the requirements outlined in (a) through (c) are not exhaustive.[55] This means the Tribunal can look to other factors in deciding whether or not to allow an amicus application.

[45] Pursuant to Article 31 VCLT, the literal interpretation of the provision indicates the independence and impartiality of the non-disputing parties as an implicit requirement within the meaning of the Article.[56]

[46] Hence, to ensure the independence and objectivity of CBFI's amicus submission, the Tribunal should assess whether the participant or the participant's company or firm: (i) is a party to the case; (ii) is related to a party to the case; (iii) has a direct financial interest in the outcome of the case; or (iv) represents an entity that is a party, is related to a party, or has such a direct financial interest.

[54] Mekar's application, § 770.
[55] Benjamin Miller, p. 6.
[56] Article 31, VCLT.

[47] In similar vein, the *Von Pezold* Tribunal, successfully allowed the Claimant's contention where the amici was working with the NULC and Mr. Sacco.[57] The Tribunal stated:

> "that the circumstances of their Application give rise to legitimate doubts as to the independence or neutrality of the Petitioners. The apparent lack of independence or neutrality of the Petitioners is a sufficient ground to deny the NDP Application."[58]

[48] Likewise, as 'friends of the court', the primary purpose of amici should be to assist tribunals by providing additional information and arguments. The petitioners in *Biwater* effectively demonstrated that it is well-suited to comment on the dispute, by describing itself as the "first and premier public interest environmental law organization in Tanzania" and hence established its interest and relevant expertise.[59]

[49] In the present case, Lapras Legal Capital is advising the Claimant on funding strategies with respect to its claim against the Respondent.[60] The participation of Lapras Legal Capital through CBFI in this arbitration raises reasonable doubts because of their association with Vemma Holdings Inc. The Applicants do not bring a perspective, particular knowledge or insight that is different from that of the Claimant or relevant because of their lack of independence.[61]

[50] In particular, CBFI supports Claimant's position against Claimant. The conduct of CBFI prior to the commencement of the dispute indicates that it worked closely with the Claimant.[62] In the brief, CBFI has not raised any arguments which do not support Claimant's contention. In fact, CBFI fiercely defended the jurisdiction of the Tribunal. Those acts amounted to the expropriation of Claimant's Investment.

[51] The above mentioned facts prove that CBFI has always supported the Claimant. Given that there are no objective evidence stating that CBFI is independent from Claimant, this Tribunal shall be aware that the allowance of CBFI to the present proceedings will be contrary to the IBA Guidelines and lead to the discrimination of Claimant.[63] To sum up, equal treatment of the parties can only be attained by rejection of CBFI's submission.

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[57] Von Pezold, § 36.
[58] Border Timbers, § 56.
[59] Biwater, § 46.
[60] Amicus Submission by CBFI, § 520.
[61] Border Timbers, § 29.
[62] CBFI's Submission, § 505-510.
[63] Methanex, § 35-37.

2.2.2. CBFI's submission lacks 'Public Interest'.

[52] International investment arbitration, by definition, implicates the public interest, and tribunals are often tasked with assessing state execution of state duties.[64] In light of the impact that investment arbitration has on stakeholders beyond the two direct parties to the dispute, there is a critical space to be filled by amici. When determining whether a given dispute has that something "*extra*" to justify allowing an amicus brief, tribunals tend to consider the importance of the public interest and the closeness of the connection between the public interest concern and the dispute.

[53] For example, in *Suez v Argentina*, the Tribunal permitted filing of an amicus brief on the basis that the dispute had the potential to affect "basic public services" to millions of people. In this case, the concern for the public interest was severe. Consequently, the Tribunal in *Biwater* also used this reasoning in granting amicus status to CIEL and a number of other organizations.

[54] Tribunals have acknowledged repeatedly that allowing a submission from amicus curiae have the benefits of supporting ICSID's legitimacy by increasing transparency, demonstrating a concern for the public interest and thus "securing wider confidence in the arbitral process itself."[65] In similar vein, the Tribunal in the *Apotex*, considered that "*a particular or professional interest does not form part of public interest*."[66]

[55] Likewise, in the present case, CBFI is a commercial entity with its headquarter established in Bonooru. The consortium is a profit driven entity and represents Bonoori investors investing round the globe. The relationship between Vemma and CBFI along with Lapras Legal Capital is more of a commercial interest, demonstrating that the organization requesting amicus status is not well-suited to present the public interest concern to the Tribunal. Therefore, the main cost the Tribunal will bear allowing CBFI's submission is the risk that the submission will create a bias in favor of one party and hence, should be rejected.

[64] Eric De Brabandere, § 102.
[65] Apotex, § 42.
[66] Ibid, § 43.

2.3. THE AMICUS SUBMISSION BY THE EXTERNAL ADVISORS TO THE COMMITTEE ON REFORM OF PUBLIC UTILITIES ["CRPU"] MEETS THE REQUIREMENTS.

[56] Respondent submits that this Tribunal shall grant leave to CRPU's request, because it fulfils all the requirement, viz. the submission is within the scope of the dispute and may assist the Tribunal **[2.3.1]**; CRPU has a significant interest **[2.3.2]**; and the submission has a public interest element **[2.3.3]**.

2.3.1. The submission addresses matters within the scope of the dispute.

[57] It is perfectly conceivable for non-disputing parties to raise issues of jurisdiction, in which they may be well-placed to provide assistance and perspectives or insights beyond those of the disputing parties.[67]

[58] In *Biwater v Tanzania*, the Claimant argued for a strict definition of the "scope of the dispute," seemingly claiming that the Tribunal must be directly considering a human rights or environmental issue in order for an amicus submission to be considered "within the scope of the dispute."[68] However, the Tribunal rejected this interpretation, accepting as sufficient the petitioners' assurance that their argument would be relevant and reserving for itself the right to disregard any part of the submission that was not relevant.[69]

[59] In the present dispute, CRPU's submission is relevant in assisting the assessment of the legality of Vemma's investment and, subsequently crucial, in the determination of the Tribunal's competence related to the present proceeding, thus addressing factual matters within the scope of the dispute.[70]

[67] Apotex, § 33.
[68] Biwater, § 32-34.
[69] Ibid, § 50.
[70] Philip Morris, § 23.

A. The submission is competent in assisting the determination of the Tribunal's competence in the arbitration.

[60] According to the principle of "Kompetenz-Kompetenz"[71], Tribunals have the power to determine the limits of their own competence[72] and marshal evidence. Article 45 of AF rules provides that "The Tribunal shall have the power to rule on its competence."[73]

[61] In *IBM v. Ecuador*, the Arbitral Tribunal met in Quito, and pursuant to article 41 of the Convention, which empowered it to resolve upon its own competence, it discussed and resolved on the objections raised by the Republic of Ecuador.[74] The Tribunal considered that submissions from the Commission on the legal question specified in the Application - "*the legal consequences of the judgment of the Court of Justice in Achmea*", could potentially assist the Tribunal.[75]

[62] In the present case, Mr. Dorian Umbridge, chairperson of the committee responsible for supervising the bidding process of Caeli Airways in 2010.[76] CRPU, as independent advisors involved in the entirety of the privatisation process, are in a unique position to adduce unbiased facts to this effect before the Tribunal that may not be obtained from either disputing party.[77] The legality of Vemma's investment is critical in determining the ability to approach public policy concerns fairly and objectively.

[63] Moreover, corruption thrives in investor-state relationships because of their inherent nature. To preclude this "insidious plague" from undermining investor-State arbitration, caution must be exercised in evaluating Vemma's claims, which are tainted by corruption accusations.[78]

[71] RosInvestCo, § 35.
[72] Article 45, AF Rules; Delaume, 224.
[73] Ibid.
[74] IBM, § 10; Kaiser, § 25.
[75] Tallinn, § 12.
[76] Amicus submission by CRPU, § 635.
[77] Ibid.
[78] Amicus submission by CRPU, § 650.

2.3.2. CRPU has a significant interest in the arbitration.

[64] The impact of the decision in this case on the interpretation of ISDS provisions of investment agreements in Mekar holds significant interest for the CRPU. The stagnation in anti-corruption efforts in Mekar also impacts the financial operations of the CRPU, who regularly advises potential investors prospecting opportunities in Mekar.[79] Consequently, the involvement of the CRPU was official and extensively important during the privatisation of Caeli Airways.[80]

2.3.3. CBFI's submission possesses public interest.

[65] In matters of public interest, the Tribunal considers that the requirement of a different expertise, experience or perspective from that of the Disputing Parties ought to be construed broadly, so as to allow the Tribunal access to the widest possible range of views. By ensuring that all angles on, and all interests in, a given dispute are properly canvassed, the arbitral process itself is thereby strengthened.[81]

[66] The Tribunal in *Apotex* considered that amici is required to point out any knowledge, experience or expertise with respect to any particular perspective or insight beyond that of the Disputing Parties.[82]

[67] As premise, CRPU's submission indicate allegations of bribery[83] against Mr. Dorian Umbridge, recognised as a public policy concern. In addition, since the application for amicus curiae submission became public, the Constitutional Court of Bonooru has taken suo moto cognizance of the allegations against Mr. Dorian Umbridge[84], thereby inducing a public interest.

[79] Ibid, § 645.
[80] Ibid.
[81] Apotex, § 22.
[82] Ibid, § 23.
[83] Amicus submission by CRPU, § 615.
[84] Procedural Order 3, § 3210.

3. MEKAR DID NOT VIOLATE ITS OBLIGATION OWED TO THE CLAIMANTS UNDER ARTICLE 9.9 OF THE CEPTA.

[68] Article 9.9 CEPTA encompasses numerous standards of investment protection.[85] In assessing these elements, Claimant has the burden of "bringing sufficient proof that it did not receive treatment amounting to breach of FET."[86]

[69] Under both customary and autonomous interpretations of the FET standard,[87] a breach of FET depends on the reasonableness and proportionality of a state's measures in the specific circumstances of the case.[88] Therefore, the tribunal must balance the legal interests of an investor against the State's sovereign right to pass legislation and to adopt decisions for the protection of its public interests.[89]

[70] Furthermore, the said standards shall be interpreted in accordance with the principles of interpretation, in light of Article 31(1) VCLT.[90] In specific, a contextual interpretation by reference to the preamble and Article 9.8 of CEPTA is of great assistance.[91] It recognises Respondent's right to regulate and its flexibility to achieve legitimate policy objectives.[92] Thus, Respondent's actions do not amount to a breach of Article 9.9 CEPTA.

[71] Accordingly, Respondent submits that Claimant has failed to establish that Respondent breached any strands of the FET standard because Respondent has at all times accorded fair and equitable treatment **[3.1]**, and that Claimant could not have relied on an expectation that Respondent would not change the law **[3.2]** as State possess sovereign rights to act in legitimate public policy interest.**[3.3]** Moreover, Claimant cannot adopt a creeping FET violation theory as it has no basis under CEPTA or customary international law **["CIL"]**. **[3.4]**

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[85] CEPTA, § 2740.
[86] Tudor, § 138.
[87] El Paso, § 330; Saluka (Partial-Award), § 291; Rumeli, § 611; Duke-Energy, § 337.
[88] Schreuer, FET, §17; CMS, § 284; Saluka, § 291; Azurix, § 361; Noble-Ventures, § 181; Waste-Management, § 99; Continental-Casualty, § 255; El Paso, § 373; Electrabel, § 7.77.
[89] Lemire, § 285.
[90] Crawford (2012), § 381; Dörr & Schmalenbach, § 541.
[91] CEPTA, § 2725.
[92] Brownlie, p. 532; CEPTA, § 2730.

3.1. RESPONDENT AT ALL TIMES, ACCORDED FAIR AND EQUITABLE TREATMENT TO THE CLAIMANT.

[72] Claimant alleges that CCM's actions violated its rights under the CEPTA by breaching the FET standard. The Respondent denies the same and submits that the Claimant was not denied justice **[3.1.1]**; Respondent consistently acted with transparency and in a manner which is not unreasonable, arbitrary or discriminatory. **[3.1.2]**

3.1.1. No denial of justice was committed by Mekar's judicial system.

[73] Several factors are indicative of Denial of Justice[93], which may breach the FET as set out in Article 9.9. Some of which are unwarranted delays, obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide guarantees which are generally considered indispensable to the proper administration of justice or a manifestly unjust judgment.[94]

[74] The above-mentioned criteria have been illustrated in the *Azinian v. Mexico* case.[95] This stands as a logical corollary to the standard mentioned in the *ELSI*, by the ICJ, which stated that only a '*particularly serious shortcoming*' and '*egregious conduct by the host state and its judicial organs*' that '*shocks, or at least surprises, a sense of judicial propriety*' would constitute breach of this standard.[96]

[75] Hence, the test for establishing a denial of justice sets a high threshold.[97] As illustrated in the *Mondev* case, a denial of justice is said to be demonstrable through: refusal by a relevant court to entertain a suit; subjection to undue delay by a court; administration of justice in a seriously inadequate manner; or a clearly malicious application of the law by the courts. All these conditions are to be viewed in totality for the Tribunal to decide denial.[98]

[76] On this account, Respondent will establish that the conduct of Mekar's Judiciary does not amount to denial of justice in relation to the enforcement proceedings. **[A]** On the contrary, Mekari courts ensured the Claimant's fair right to judicial remedy. **[B]**

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[93] Robert Azinian, § 102.
[94] Ibid.
[95] Ibid.
[96] ELSI, § 128.
[97] Mondev, § 126-127; Azinian, § 102-103.
[98] Ibid; Glamis Gold, § 22.

A. The conduct of Mekari Courts in relation to the enforcement proceeding was in respect to Article 1 New York Convention.

[77] Mekar, having ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[99] **["New York Convention"]**, is obliged to enforce the arbitral award passed by SCC under article 1 of the Convention.

[78] Concomitantly, the proviso in Article V(2) of the New York Convention, uses the phrase "*a court — may set aside or refuse enforcement of an award if a party successfully establishes any one of the stipulated grounds*".[100] Hence, even if the contravention of public policy is made out by the Court of the seat, it is not mandatory for the national courts to annul the award or refuse to enforce it. The court has the discretion to determine the nature of forum public policy violation which warrants interference with the award.[101]

[79] Claims of public policy protection from an arbitration award are entirely dependent upon the laws of individual states for its application,[102] allowing national courts to interpret public policy entirely at their own discretion.[103] Despite that, the interpretation varies from one state to another, most developed countries commonly bear a pro-enforcement attitude towards arbitral awards which they consider to be a stand-alone element of public policy itself.[104] Mekar as a developing country possesses narrowly interpreted public policy by the domestic courts.

[80] As premise, in *Hilmarton*, the contract for the purchase of influence in Algeria, which was illegal under Algerian law, but valid under the governing Swiss law, was nonetheless enforced by the English High Court, since such contracts at most violated English domestic public policy, rather than international public policy.[105] Consequently, similar approaches have been followed by the Amsterdam Court of Appeal[106] and French court of Appeal[107] while enforcing a set aside award.

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[99] Facts, § 1415.
[100] Yukos, § 75.
[101] Sattar, § 4
[102] Ibid.
[103] Ibid.
[104] Sattar, § 5.
[105] Hilmarton at 224-225.
[106] Yukos Capital, p. 19.
[107] Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd and ors [2000] 1 QB 288

[81] Moreover, an international arbitral award is independent of a national legal order and its validity is to be ascertained by the laws of the court, where the enforcement is sought.[108] As in the present case, the recognition of an award that had been set aside for unsubstantiated reasons at the seat was not contrary to the Mekari conception of international public policy.

[82] Claimant's mere reliance on the CILS report[109], an entity recognised to be funded by foreign donations to interfere in Mekar's domestic affairs[110], to allege the arbitrator's biasness does not meet the threshold of proof of public policy.[111] On the contrary, the Mekari Court's perusal of the award reflects the correct position of law applied by the arbitrator with respect to Right of First Refusal offers, when balanced against the final decision, the circumstantial and hearsay evidence concerning his bias.[112]

[83] Nevertheless, it is important to note that international public policy is not a transnational principle.[113] Notwithstanding the universal denunciation of corruption, the English courts have been reluctant to find that corruption contravenes international public policy.[114] As stated by the English Court in *Westacre* case:

> "even if the court were to re-examine the tribunal's findings and determine that the intermediary agreement was tainted by bribery, the court would still enforce the award, since bribery does not stand in the scale of opprobrium quite at the level of contravening international public policy."[115]

[84] In this regard, the arbitral award cannot be set aside since there are no sufficiently serious, specific and consistent indicia of corruption.

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[108] Ibid.
[109] Facts, § 1370.
[110] Annex XIII, § 2285.
[111] Annex XIII, § 2255.
[112] Annex XIII, § 2265; Sourgens/Duggal/Laird, 80; O'Malley, 208.
[113] Cosar, p. 248.
[114] Hilmarton, p. 224.
[115] Westacre, p. 117.

B. Mekari courts ensured the Claimant's fair right to judicial remedy.

[85] Under the customary minimum standard of treatment, "denial of justice implies the failure of a national legal system as a whole to satisfy minimum standards."[116] Both Parties did not intend to create broader obligations regarding justice than that provided for by the minimum standard as the CEPTA's Preamble does not create any substantive obligation.[117]

[86] In assessing denial of justice, tribunals operate a minimum control respecting sovereign States' independence as States to the greatest extent possible, are free to organize their judicial system as they deem fit.[118] In this regard, Respondent submits that Claimant was not denied justice as the Mekari Court caused no undue delay **[i]** and the judge was impartial and reasonable to dismiss Vemma's Claims **[ii]**.

i. Mekari Court caused no undue delay.

[87] As to the delays, international law does not set a specific time limit for delays to amount to denial of justice.[119] In some cases, 9 or 10 years of proceedings did not amount to denial of justice.[120]

[88] Tribunals also find relevant that the investor's applications are heard within a year instead of years.[121] Whether delays qualify as denial of justice requires a fact-specific analysis.[122]

[89] In addition, the FET standard is always assessed given the political and economic situation of the State.[123] As part of FET, denial of justice also requires that these circumstances be taken into consideration[124], in particular the level of development of the State.[125] Specifically, Mekar is a developing State, struggling with an economic crisis. The delays must be assessed in light of these specific circumstances that justify the overburdened docket of the Court.

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[116] Paulsson, p.130.
[117] Bayindir, § 230.
[118] Paulsson, p.108.
[119] Toto, § 155.
[120] Jan de Nul, § 204.
[121] White Industries, § 10.4.17, § 10.4.22.
[122] Chevron, § 250; White Industries, § 10.4.10; Toto, § 163.
[123] Bayindir, § 192-193; Duke Energy, § 340; Parkerings, § 335; Generation Ukraine, § 20.37.
[124] Toto, § 165.
[125] White Industries, § 10.4.18.

[90] Moreover, the nature of the proceedings preclude the need for swift resolution as only criminal proceedings, as opposed to commercial proceedings can justify such a need.[126] In application of the finality requirement, delays cannot, in principle, amount to a denial of justice.[127]

[91] In the present case, no evidence was brought to establish that the delays were so important as to render impossible for Claimant to avail the entire judicial system of Mekar. Conversely, the Proceedings complied with due process as the Mekari courts managed to dispense justice speedily, as compared to the time it usually takes Mekari courts to render decisions in commercial matters.[128]

ii. The dismissal of Vemma's claims does not amount to denial of justice.

[92] Claimant alleges that Caeli's claims on the merits were dismissed prematurely.[129] The Respondent denies the same. On the contrary, despite being overwhelmed by cases, Mekari courts gave the Claimant every opportunity to voice its grievances before the appropriate judicial authority.[130]

[93] In *Mondev*, the ICSID tribunal on referring to this standard opined that "*the test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome*."[131]

[94] In the present case, the Mekari Court found that there existed sufficient reasonable evidence that the Claimant was involved in anti-competitive measures as the decision reached by the CCM was within a range of potentially reasonable conclusions. Hence, the Court did not foresee the possibility of arriving at a different final decision.

[95] In fact, the Makari Courts have a duty to avoid the parties waiting in anticipation. Therefore, to save the precious resources of our courts the Court dismissed the merits of the Applicant's appeal in light of the given facts before it. In view of these elements, the conduct of the proceedings does not amount to a denial of justice.

[126] White Industries, § 10.4.14.
[127] Guerrero Report, p. 29.
[128] PO3, § 3180.
[129] Notice, § 100.
[130] Response, § 260.
[131] Mondev, § 127.

3.1.2. Mekar acted in a reasonable and fair manner.

[96] Mekar acted consistently in a reasonable and fair manner as the two investigations conducted by the CCM into Caeli Airways, and consequent fines imposed, were proper applications of the domestic laws of Mekar **[A]**; and that the currency denomination was a *bona fide* measure in light of the prevailing currency crisis **[B]**. Likewise, the enactment of Executive Order 9-2018 was non - discriminatory and had no effect on the claimant**.[C]**

A. There was nothing unfair and arbitrary in CCM's investigations.

[97] Claimant incorrectly states that CCM acted in bad faith and arbitrary manner when it carried out the investigations.[132] On the contrary, CCM exercised its power under Article 2 of Monopoly and Trade Practice Act **["MRTP Act"]** based on the fact that Vemma received foreign subsidies under the Horizon 2020 programme[133], enabling Caeli to adopt predatory pricing strategies. Its actions were justified by objective reasons and therefore, even if the investigations injured Claimant's investment, they do not constitute a breach of the fair and equal treatment obligation.

[98] It is to be noted that treatment cannot be considered as arbitrary if the actions of a host state were justified by certain reasonable goals.[134] Hence, the measures adopted by a host state do not have to be the most appropriate or efficient.

[99] In *LG&E v. Argentina* the Tribunal held that it was sufficient that the measures adopted by Argentina "*were not taken lightly, without due consideration*".[135]

[100] It is important to note that even before the Claimant made its investment in Mekar, Mekar had revised the MRTP Act, envisaging the creation of CCM as an autonomous body to review any anti-competitive behaviour.[136] The investigation carried out by CCM on Caeli was preceded by the rapid expansion of Caeli Airways, drawing the attention of CCM and Caeli's competitors.[137]

[132] Notice, § 75.
[133] Facts, § 1245
[134] Enron, § 281.
[135] LG&E, § 28.
[136] Facts, § 995.
[137] Facts, § 1145.

[101] Even if Caeli's market share was only 43% at the time of investigation, the results of both the investigations were worrying.[138] CCM was fully justified to take proactive action instead of waiting for the consequences as any delay may have driven out smaller competitors in the Mekari market. It must also be stressed that the Claimant also agrees that CCM chose the most reasonable measure at this stage, placing caps on Caeli Airways' airfare to prevent it from earning supra-competitive profits in the future.[139]

[102] In conclusion, both the investigation carried were justifiable and in pursuance of their rights and duties under MRTP Act.

B. Respondent's enactment of the denomination decree was bona fide and in good faith.

[103] The notion that there is some "inconsistency" between new and old (non-existent) regulations, if taken seriously, would "freeze" any regulatory regime simply by virtue of a mechanical application of the FET standard. FET is not a recipe for inaction or legislative paralysis. Indeed, the argument that these regulations are inconsistent with previous public policies in Mekar is false, as the aviation industry had been regulated from long before Claimant invested in Mekar.

[104] As to the unreasonableness of the administrative regulation imposing a uniform company practices is far from unpredictable in the light of the deteriorating economic situation. Surely a prudent investor in the aviation industry such as the Claimant cannot sensibly claim "surprise" here or argue that the regulations are "unreasonable" by any plausible stretch of the word and common practice in the industry the world over.

[105] Mekar is aware of statements made in *Tecmed v. Mexico*, where it was emphasized that the host country authorities should act consistently, without ambiguity and transparently, making sure the investor knows in advance the regulatory and administrative policies and practices to which it will be subject, so that it may comply with them.[140] However, the above-mentioned list is too demanding and nearly impossible to achieve in practice, and, furthermore, "[t]he Tecmed

[138] Facts, § 1150.
[139] Notice, § 80.
[140] Tecmed, § 154.

"standard" is actually not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain."[141]

[106] Furthermore, in cases where the international tribunals had found a breach of FET, it was highlighted that in those circumstances the laws were changed continuously[142], which is quite opposite to the situation in the present case where no unconditional changes of law on large scale have been adopted; it was a necessary, legitimate and an immediate change of legal regulation for sale of goods and services.[143]

[107] Taking into account the above-mentioned assertions, Mekar firmly believes that the Claimant, as a prudent investor, must have expected a more rigorous regulation for the aviation industry services itself. Moreover, Respondent was transparent with its legal objectives **[i]** and based its decision on a rational view. **[ii]**

i. Mekar was transparent with its legal objectives.

[108] The ordinary meaning of the requirement of "transparency" requires that the "legal framework for the investor's operations is readily apparent, and that any decision affecting the investor can be traced to that legal framework".[144] This legal framework consists of legislation, executive assurances, and contractual undertakings.[145]

[109] Mekar's policies embodied in the decree requiring all companies operating in the country to offer goods and services denominated exclusively in MON do not violate the transparency requirement because of its underlying reasonable objective. The decree is but another act of the government to protect the public interest in light of the prevailing currency crisis.[146] It is a cautionary act to protect the citizens of the ill-effects that the Mekar may pose against the nosediving currency.[147] The decree applies to all sale and purchase of goods and services in Mekar[148] , and hence, Claimant alone cannot claim that the measure fails to be transparent.

[141] Ibid.
[142] PSEG, § 252-253.
[143] Facts, § 1155.
[144] Dolzer and Schreuer, § 133-134.
[145] Ibid.
[146] Facts, § 1325.
[147] Facts, § 1180.
[148] Facts, § 1325.

ii. The measure was reasonable, being based on a rational view by the IMF.

[110] In the unfolding economic crises in Mekar, the steep decline in its GDP and the skyrocketing inflation resulted in, not only Vemma, but the entire airline industry suffering a huge setback.[149] Based on the IMF report and the suggestions made, given the expertise IMF hold in the situation of economic crisis[150], Mekari government was required to protect small, indigenous airlines in Mekar from perishing in the compromising situation it found itself in and prevent the degrading of Mekar's economic condition further.

[111] Therefore, induced by the need to establish credibility in the MON to avoid a debilitating economic situation", Mekar denominated all goods and services in MON.

C. The Executive Order was non - discriminatory and had no effect on the claimant.

[112] The Executive Order 9-2018 **["Order"]** is not discriminatory because the restrictions therein, including the denial to grant subsidies to state-owned enterprises, were applied industry-wide.[151] When Mekar enacted the said Order, it did not distinguish what company will be affected. As such, the order affected all the state-owned enterprises in the aviation industry, not just Caeli.[152]

[113] Moreover, it must be noted that before an act to be considered discriminatory, there must be unjustifiable differential treatment with similar concerns.[153] In fact, there is nothing in the Order that specifically constrains Caeli compared to other companies.[154] Mekar did not isolate Vemma from the rest, as the subsidies were not granted to Caeli and Larry Air, the two state-owned airlines in Mekar.[155] Although there seems to be a differentiation of treatment, the act is a form of regulation applicable to all.

[149] PO3, § 3160.
[150] Ibid.
[151] Annex VIII, § 1920.
[152] Facts, § 1265.
[153] DOLZER AND SCHREUER. 194; Bjorklund/(2018), §§ 21-22; Pope-&-Talbot, §§ 77.
[154] Annex VIII, § 1915.
[155] Facts, § 1265.

3.2. CLAIMANT COULD NOT HAVE RELIED ON AN EXPECTATION THAT RESPONDENT WOULD NOT CHANGE THE LAW.

[114] Claimant incorrectly states that Respondent violated its obligations under CEPTA by changing the legal framework of the Claimant's investment despite having created certain allegedly reasonable expectations. Contrary to what Claimant states, Respondent made no representations to the Claimant. **[3.2.1]** Moreover, Claimant cannot expect that the Respondent will not change the law in future. **[3.2.2]**

3.2.1. Mekar made no representations or commitments to the Claimant.

[115] The notion of legitimate expectation is limited by several requirements allowing a state to exercise its legislative powers.[156] First, the expectations are legitimate only when they arise from state's specific representations or commitments made to the investor. Second, the investor must take into account the general regulatory environment in the host country. Finally, investor's expectations must be balanced against legitimate regulatory activities of a host state.[157]

[116] Hence, an investor may only rely on the expectations that were induced only as specific representations by the host state. As it was stressed in *Methanex v. United States*, where the tribunal found that the United States did not make any specifications or commitments allowing the Claimant to believe that such regulatory changes would not occur, hence no violation.[158]

[117] Furthermore, even if there is a contractual relationship between the Claimant and Mekar, it does not automatically create any legitimate expectations under international law. As aptly stipulated by the *Parkerings* Tribunal:

> "Contracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law".[159]

[118] Consequently, even if an investor and a host state are parties to a contract, the investor still cannot rely on any expectations that were not specifically induced by the host state.

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[156] Saluka, § 262.
[157] Duke Energy, § 373.
[158] Methanex, § 10.
[159] Parkerings, § 344.

3.2.2. Claimant was obliged to be aware of the general regulatory environment in Mekar.

[119] As already noted above, Mekar maintains that there is no breach of FET because Claimant was aware of the regulatory changes in the legal framework as well as the political changes in Mekar.

[120] Tribunals in the past have recognised that in the light of the political changes of the preceding years, investors cannot reasonably expect that no further political or regulatory changes would occur.[160] Consequently, Genin v. Estonia stated:

> "there can be no expectation of stability of legislation if an investor is aware of the state's political transformation."

[121] In this context, it is noteworthy to point out to the Tribunal that LPM was required to act in light of the prevailing currency crisis and a failed government.

3.3. RESPONDENT'S MEASURES CONSTITUTE A LEGITIMATE EXERCISE OF ITS RIGHT TO REGULATE.

[122] Unless expressly stipulated by contracting parties, BITs do not modify rights of a state arising from customary international law,[161] such as its regulatory power to adapt its legal order as necessary.[162] Thus, states may lawfully exercise regulatory powers, even if it affects the investor's interests.[163] Moreover, CEPTA also recognises such rights.[164] However, an exercise of these powers must be aimed at securing a public purpose **[3.3.1]**, and constitute a *bona fide* exercise of a state's sovereign power. **[3.3.2]**

[160] Parkerings, § 335-336; Bayindir, § 195
[161] El-Hage, p. 459: Montt, p. 232.
[162] Total (Liability), § 115.
[163] Brownlie, p. 532.
[164] Article 9.8, CEPTA.

3.3.1. Respondent has exercised its Right to Regulate for a legitimate public policy objective.

[123] Contrary to Claimants' allegations, Mekar's measures were not intended to impair Vemma's investment, but rather to mitigate the economic crisis in the country.[165] International law accords Mekar the margin of appreciation to take such regulatory measures. **[A]** Alternatively, the balance of probabilities in this regard is also in Mekar's favour. **[B]**

A. Respondent is afforded the 'margin of appreciation' to take measures in pursuit of a legitimate objective.

[124] Regulatory measures are designed to pursue the general welfare of a state,[166] including political, economic, or social ends.[167] Since the state is best equipped to secure public welfare in its territory,[168] it is afforded the right to determine what constitutes a legitimate public interest warranting regulatory action.[169] Thus, a state may reasonably exercise its margin of appreciation in this regard.[170] The actions of a state premised on a public purpose are prima facie valid in international law.[171]

[125] In addition, the concept of "national security" under Article 9.8 CEPTA is broad and potentially ambiguous. Thus, while the safety of the nation and its people is clearly at the core of the provision, one could reasonably argue threats to the general political, economic and financial system of a country.[172]

[126] Tribunals have also concurred in the view that national security under BIT encompasses economic emergencies and thus did not only relate to military and political threats.[173] As aptly put by *CMS* tribunal:

> "nothing in the context of customary international law or the object and purpose of the treaty… excludes major economic crises from the scope of Article XI."[174]

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[165] Facts, § 85.
[166] Saluka, § 255.
[167] Saluka, § 259.
[168] Benvenisti, p. 843; Shany (2005), p. 907.
[169] Maffezini, § 67.
[170] El-Hage, 459: Montt, 232; Glamis, § 625, 803, 805; Saluka, § 272.
[171] James, § 47; Pressos Compania, § 37.
[172] Saluka (Partial-Award), § 259; OECD: Protection of Property, p. 18.
[173] CMS § 360; Enron § 306; Continental Casualty § 175.
[174] CMS, § 359-360.

B. In any event, Respondent's actions were motivated by a 'demonstrable' public purpose.

[127] The necessity to protect the essential security interests of the host state's citizens as well as the present issue on balancing investor's interests against legitimate regulatory activities of the host state were also highlighted in the case of *Saluka v. Czech Republic*.[175] Thus, the tribunal agreed that "the host state's legitimate right subsequently to regulate domestic matters in their essential interest must be taken into consideration as well."[176]

[128] Consequently, in *Parkerings v. Lithuania*, the Tribunal noted that the "State has a right and privilege to exercise its sovereign legislative power to enact, modify, or cancel laws at its own discretion."[177] Vemma must thus have anticipated that the circumstances could change, and must thus structure its investment in order to adapt to the potential changes in the legal environment.[178]

3.3.2. Respondent exercised its right to regulate in good faith.

[129] In the light of the aforesaid, it must be stipulated that it is up to states to take individual measures to protect the public policy objectives, and even if these measures affected negatively the Claimant, such conduct of Mekar does not violate the standard of FET because the new legal framework has been adopted by the state of Mekar in bona fide manner, i.e. on the basis of the possible negative impact of the currency crisis in Mekar, concentrated towards the citizens.[179]

[130] In the unfolding economic crises in Mekar,[180] such adverse policy decisions adopted in light of the economic crisis are not considered to be arbitrary since they were what the government believed and understood to be the best response to the unfolding crisis.

[175] Saluka, § 255.
[176] Saluka, § 304-308.
[177] Parkerings, § 332.
[178] Ibid.
[179] Dolzer and Schreuer, § 133,134.
[180] Facts, § 1250, 1270.

3.4. THE CREEPING FET VIOLATION HAS NO BASIS UNDER CEPTA OR CIL.

[131] The Respondent submits that there is no basis for creeping violation that can be found in the CEPTA or CIL, and therefore Claimant had no basis to allege such a theory. The Tribunal cannot analyze this very case as a creeping FET violation case.

[132] Subsequently, the obiter of *El Paso* Tribunal[181] is not applicable in the present case as there is an issue of applicable law. Firstly, the formulation of the FET standard in CEPTA varies remarkably from the Argentina-US BIT.[182] Secondly, it is unclear to what extent Article 15(1) of the ILC Articles reflects or codifies customary law. Conversely, customary law only requires the State conduct to constitute "a breach of an international obligation".[183]

[133] Furthermore, the use of the phrase "measure or measures" do not indicate a cumulative effect but a pluralistic approach, whereby the investor may contend the discrete violation of one or more measures to claim compensation.[184] Article 31 VCLT requires parties to interpret its meaning in its context and in light of the treaty's object and purpose.

[134] Moreover, the preamble of CEPTA recognises the regulatory rights of Mekar and thereby gives flexibility to implement changes in the legal structure of Mekar.[185] Likewise, it is a fact that law naturally changes over time, and indeed it should. Therefore, investors should not be entitled to invoke any general and gradual regulatory change to claim compensation as a part of creeping violation, since this would distort the FET standard.[186]

[135] In conclusion, the theory does not apply in the present case. On the contrary, as mentioned above Respondent has accorded fair and equitable treatment to the Claimant at all times and have acted in pursuance of its rights under CEPTA and CIL.[187]

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[181] El Paso, § 518.
[182] UNCTAD Series, § 17-35
[183] Article 2(a), ILC Articles.
[184] CEPTA, § 2735-45.
[185] CEPTA, § 2500.
[186] Newcombe and Paradell, supra, p. 279
[187] Burlington, § 340.

4. THE APPROPRIATE STANDARD OF COMPENSATION SHALL BE MARKET VALUE UNDER CEPTA.

[136] The Claimant alleges that the respondent is liable to compensate, equivalent to the "fair market value" **["FMV"]** of their investment. However, Respondent denies the same and submits that any compensation if to be awarded, it must be according to the "market value" standard as provided under CEPTA **[4.1]**; the FMV standard cannot be imported from the Arrakis-Mekar BIT **[4.2]**; and in any case if the Tribunal applies FMV, the compensation should be reduced. **[4.3]**

4.1. COMPENSATION MUST BE AWARDED ACCORDING TO THE "MARKET VALUE" STANDARD UNDER CEPTA.

[137] Respondent submits that it is not FMV but "market value" standard that is applicable in the present case. Pursuant to Article 31(1) VCLT, a treaty must be interpreted primarily according to "the ordinary meaning to be given to the terms." The language of Article 9.21 clearly demonstrates the market value standard for all monetary damages to be awarded under the agreement.[188]

[138] The intention of the parties can be construed from the comparison of Article 9.12 and Article 9.21 of CEPTA, limiting the FMV only for the cases of expropriation. Moreover, the literal interpretation of Article 9.21 also stipulates the same conclusion.

[139] By requesting both lost profits and sunk costs, Claimants are attempting double recovery for the value of their investments, which is prohibited under customary international law.[189] Hence, the compensation standard applicable is only market value and any consideration of FMV would be an outright disregard of the treaty standard and unjust.

[140] In conclusion, the Respondent has already awarded the "market value" for the Claimant's investment by purchasing its original stake in Caeli Airways for USD 400 million, the Claimant is thus not entitled to any further compensation.[190]

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[188] CEPTA, § 3020.
[189] Chorzów Factory, 59; Sabahi/Duggal/Birch, 343.
[190] Facts, § 1390.

4.2. CLAIMANT CANNOT IMPORT COMPENSATION STANDARDS FROM ARRAKIS - MEKAR BIT VIA THE MFN CLAUSE OF CEPTA.

[141] Respondent refutes Claimant's invocation of CEPTA's MFN Clause to access Arrakis-BIT's compensation provision to apply FMV. Respondent submits that CEPTA's MFN Clause does not apply to the procedural or substantive obligation; thus cannot fulfill Claimant's demand to access another BIT.[191]

[142] The treaty interpretation under Article 31 VCLT is to examine the ordinary meaning.[192] Here, CEPTA's MFN Clause ordinary meaning is apparent and it does not apply to Article 21, the dispute settlement provision or the compensation as substantive obligation. CEPTA's MFN Clause in its relevant parts, stipulates:

> "Each Party shall accord [...] no less favourable than the treatment it accords in like situations, [...] For greater certainty, the treatment referred to in paragraph 1 does not include procedures for the resolution of investment disputes [...] Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment" […]."

[143] Based on its structure, CEPTA's MFN Clause is drafted narrowly to exempt all procedural and substantive obligations; in contrast to 'broad' MFN clauses in other BITs using the language of 'all matters'.[193]

[144] Respondent submits that MFN clauses should not be abused by investors to escape CEPTA's prescribed standard because *first*, such is a condition construed under the umbrella of dispute settlement provision, subjecting it to be an issue of procedure. The provision exhibits the intention of both the parties to have linked the compensation within the procedural requirement, dispute settlement clause in the present case. And *second*, the duty to compensate as a substantive obligation is also exempted.[194]

[145] Furthermore, as result of its limited scope, pursuant to the *ejusdem generis* principle, which is a general principle of treaty interpretation and has been regarded as being derived from the very

[191] Daimler, § 214.
[192] Article 31, VCLT.
[193] Argentine-Spain BIT; Argentine-Italy BIT.
[194] ILC Articles commentary, p. 65.

nature of MFN clause itself, CEPTA's MFN clause can only "attract matters belonging to the same category of subject" as to which the clause itself relates.[195] In other words, MFN clause's beneficiaries can only acquire rights falling within the limits of the MFN clause's subject matter.[196]

[146] Here, CEPTA MFN Clause's subject matter exempts the 'treatment' in regards to procedural as well as substantive obligations of other treaties. As shown above, dispute settlement provision falls within those limitations.

[147] In a similar vein, the *RosInvest* tribunal recognized the distinction between treatments and concluded that procedural protection, i.e. access to arbitration, is not part of the treatment in light of the narrowly worded BIT.[197]

[148] On account of the above mentioned facts, it is evident that the compensation provision falls outside the scope of treatment under CEPTA's MFN Clause's and therefore cannot operate as to access another BIT's compensation provision.

4.3. IN ANY EVENT, IF ANY COMPENSATION TO BE AWARDED, SHOULD BE REDUCED.

[149] Contributory fault and failure to mitigate the damage are both circumstances that reduce compensation and relate to the general matter of causation.[198] In order to receive full compensation, one party's loss must be a fully attributable consequence of the other party's wrongful act or be attributable to the wrongful act as a proximate cause.[199] In the present, the compensation should be reduced because the Claimant materially contributed to its own losses **[4.3.1]**, and there exists an economic crisis in Mekar **[4.3.2]**.

[195] Ambatielos, p. 107.
[196] ILC-MFN, p. 27.
[197] RosInvestCo, § 128.
[198] Ripinsky p. 15.
[199] Mixed Claims Commission p. 30; Ripinsky p. 16.

4.3.1. As a matter of fact, Vemma materially contributed to its own losses.

[150] Customary international law provides that in the assessment of reparation, a claimant's contribution to the injury, whether deliberate or negligent, must be taken into consideration in the calculation of the quantum of damages.[200] As aptly provided under Article 39, ILC Articles:

> "in the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured state or any person or entity in relation to whom reparation is sought."[201]

[151] Likewise, several investment tribunals have relied on the doctrine of contributory fault in determining compensation. The tribunal in *Occidental* held that although the cancellation of the claimant's exploration rights by Ecuador was an unlawful expropriation, this cancellation was provoked by the claimant's failure to obtain necessary governmental approvals; therefore, the award was reduced by 25%.[202]

[152] Concomitantly, this notion was confirmed in *MTD v. Chile*, as the tribunal decided to reduce the awarded damages by 50 per cent following the finding that the investor should have performed its own assessment of its legal situation instead of relying on the representations of Chile.[203]

[153] In the present case, as in Occidental, acts of corruption limit the State's responsibility. Vemma took part in an act of corruption when it procured Caeli by means of paying bribes to Mr. Dorian Umbridge, the chairperson of the bidding committee. In this way, just as Occidental was involved in an act of corruption to profit from the Caducidad Decree, the similar way the profits made through Caeli was induced by an act of bribery.

[154] Simultaneously, the risky investment choices by Caeli, long-standing debts that Caeli has failed to service since its privatisation, and large fines payable to the CCM also contributed significantly to Caeli's dire financial situation.

[155] Furthermore, a party's failure to mitigate its loss is another factor considered by arbitration tribunals when faced with an issue of contributory negligence. The duty to mitigate loss does

[200] Article 39, ILC Articles; Gemplus, § 11.12, RosInvestCo, § 634-635.
[201] Ibid.
[202] Occidental, § 679.
[203] MTD, § 243.

not need to be expressly stated in a treaty because it is considered a principle of international law.[204] In fact, investors should always act reasonably to minimize their losses, especially after having seen indicators that their investments could be in danger.[205]

[156] In a similar vein, Vemma's ill-advised expansion at the time when Mekar suffered a natural and economic crisis implies Claimant's lack of due care in order to avoid future losses.

[157] In conclusion, even if this Tribunal finds that Claimant's investment suffered a significant loss due to Respondent's Executive Order, Claimant's acts of corruption, failure to mitigate his losses and the direct and foreseeable nature of Respondent's Executive Order make Claimant contributorily negligent and liable for a portion of the damages sought.

4.3.2. The Tribunal should take into account the economic crisis in Mekar.

[158] Article 31 VCLT requires the Tribunal to interpret CEPTA in good faith, enabling the Tribunal to take cognizance of the intention of parties to recognise the differences in their levels of development and diversity of economies, before making a final award.[206]

[159] Mekar is experiencing a severe economic crisis, four consecutive quarters of negative growth with an 8 per cent fall in GDP, and a 2600 per cent average inflation rate in 2020.[207]

[160] Consequently, to pay the USD 700 million that Vemma demands, Mekar would have to transfer about twice its consolidated annual public spending to Vemma, deteriorating the already worse situation in Mekar.[208] Hence, the Tribunal is required to consider the prevailing circumstances and reduce the compensation significantly.

[161] Furthermore, in the calculation of damages, "country risk" refers to the risk associated with investing in a country, especially developing or emerging economies.[209] The risk of doing business in such economies is elevated due to increased political, economic, and social concerns.[210]

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[204] Middle East Cement, § 167.
[205] MTD, § 240.
[206] CEPTA, § 2500.
[207] PO3, § 3160.
[208] Ibid, § 3165.
[209] Marboe, ¶25.53.
[210] Bouchet/Clark/Groslambert, 17; Schumacher/Klönne, 222.

[162] Accordingly, the *Tidewater* tribunal noted that in determining the value of an investment, due consideration must be given to the risk associated with investing in a specific country since it might affect the prospects of the likely cash flow of the business going forward.[211]

[163] In conclusion, the Tribunal should apply the market value standard provided under CEPTA and grant no compensation since Respondent has already paid 400 million USD to the Claimant. Conversely, if the Tribunal applies the FMV, the compensation should be reduced significantly in light of the Claimant's failure to mitigate losses as well as the prevailing economic crisis in Mekar.

[211] Tidewater, §186-190.

PRAYER FOR RELIEF

The Respondent respectfully requests the Tribunal to:

1. Find that the Tribunal lacks jurisdiction over the present dispute.
2. Grant leave to CRPU's submission and reject CBFI's submission.
3. Declare that Respondent has not violated Article 9.9 of CEPTA.
4. Order Claimant is not entitled to any further compensation under market value standard.

All of which is respectfully submitted.

ON BEHALF OF RESPONDENT