INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

BETWEEN:

Vemma Holdings Inc.

Claimant

AND

The Federal Republic of Mekar

Respondent

MEMORIAL FOR RESPONDENT

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Broches	Aaron Broches, *Selected Essays, World Bank, ICSID, and other Subjects of Public and Private International Law,* Martinus Nijhoff Publishers (1995)
IBA Guideline	IBA Guidelines on Conflict of Interest in International Arbitration, Adopted by resolution of the IBA Council on Thursday 23 October 201
ICSID Rules	ICSID Additional Facility Rules Article II Additional Facility ICSID Additional Facility Rules Schedule B, Chapter II Institution of Proceedings, Article 2 ICSID Additional Facility Rules Schedule C, Article 41 (3)
Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006 Article 36
OECD Guidelines on SOE	OECD Guidelines on Corporate Governance of State-owned Enterprises (2015 edition)
OECD MAI	The Multilateral Agreement on Investment Article III
UNCITRAL Rules on Transparency	United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules

Treaties

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France Model BIT	France Model BIT (2006) 14 February 2006
ICSID AFR	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States Additional Facility Rules
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New York Convention	New York Convenetion Article V, VI, VII

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Abdulhay Saye	Abdulhay Sayed, *Corruption in International Trade and Commercial Arbitration*, Kluwer Law International (2004), pp.81-82
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UNCAC	United Nations Convention Against Corruption 2003

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BUCG	Beijing Urban Construction Group Co. Ltd v. Republic of Yemen ICSID Case No. ARB/14/30 Decision on Jurisdiction; date 31 May 017
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Electrabel	Electrabel S.A. v. The Republic of Hungary ICSID Case No. ARB/07/19 Judgment of the Court of Justice of the European Union 1 October 2015
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Hilmarton	Hilmarton Ltd. v. Omnium de Traitement et de Valorisation S.A. ICC Rules of Conciliation and Arbitration 1975 Judgment of the French Court of Cassation 10 June 1997
Lauder	Ronald S. Lauder v. Czech Republic UNCITRAL Rules Award 3 September 2001
LG&E	LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic ICSID Case No. ARB/02/1 Decision of the Arbitral Tribunal on Objections to Jurisdiction 30 April 2004
MTD	MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile ICSID Case No. ARB/01/7 Award 25 May 2004
Noble Ventures	Noble Ventures, Inc. v. Romania ICSID Case No. ARB/01/11 Award

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Nykomb	Nykomb Synergetics Technology Holding AB v. The Republic of Latvia SCC Case No. 118/2001 Arbitral Award 16 December 2003
Putrablali	PT Putrabali Adyamulia v. Rena Holding GAFTA Arbitration Rules (version not specified) Judgment of the French Court of Cassation 29 June 2007
RCA	MNSS B.V. and Recupero Credito Acciaio N.V v. Montenegro ICSID Case No. ARB(AF)/12/8 Award 4 May 2016
RFP	Resolute Forest Products Inc. v. Canada PCA 2016 No.13 Procedural order No.6 on the participation of Prof.Robert Howse and Mr. Barry Appleton as amici curiae 27 June 2019
Saluka	Saluka Investments BV v. The Czech Republic PCA Case No. 2001-04 Decision on Jurisdiction over the Czech Republic's Counterclaim 7 May 2004
Toto	Toto Costruzioni Generali S.p.A. v. Republic of Lebanon ICSID Case No. ARB/07/12 Award 7 June 2012
WDF	World Duty Free Company v. Republic of Kenya ICSID Case No. ARB/00/7 Award 4 October 2006
Yukos	Yukos Capital SARL v. The Russian Federation PCA Case No. 2013-31 Judgment of the Swiss Federal Supreme Court 4A_98/2017 20 July 2017

Miscellaneous

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Black's Law Dictionary	Black's Law Dictionary Sixth Edition, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern, Henry Campbell Black, M. A.
In the Eyes of the Beholder: Host State's Refusal to Pay under a Contract as Breach of a BIT	In the Eyes of the Beholder: Host State's Refusal to Pay under a Contract as Breach of a BIT, Inna Uchkunova, International Moot Court Competition Association, 7 May 2013

TABLE OF ABBREVIATIONS

Abbreviation	Term
AFR	Additional Facility Rules
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
BIT	Bilateral Investment Treaty
BUCG	Beijing Urban Construction Investment & Development Co.,Ltd
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	Comprehensive Economic Partnership and Trade Agreement
CFO	Chief Financial Officer
CILS	Centre for Integrity in Legal Services
CPUR	Committee on Reform of Public Utilities
CSOB	Ceskoslovenska Obchodni Banka, A.S
FET	Fair and equitable treatment
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
IMF	International Monetary Fund
ISDS	Investor to State Dispute Settlement
LLC	Lapras Legal Capital
LPM	Labourers' Party of Mekar
MFN	Most Favoured Nation
NHA	National Highway Authority of Pakistan
OECD	Organization for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
SOE	State-owned enterprises
TTIP	Transatlantic Trade and Investment Partnership

UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
USD	United States Dollars

STATEMENT OF FACTS

[1] Vemma Holdings Inc. (the Claimant), the successor of Bonooru Air Holdings, owned and operated the Royal Narnian, the flag carrier of Bonooru's aviation industry, with 100% ownership. From its date of incorporation until May 2020, Bonooru retained minority shareholding in Vemma, which ranged between 31% to 38%.

[2] Federal Republic of Mekar (the Respondent) is a country with a period of prolonged political instability. Transparency International has consistently scored Mekar between 30/100 and 36/100 on its corporation percentage index.

Privatization of Caeli Airways

[3] From 2003 to 2009, attempts were made to privatize Caeli Airways, an influential composer of the Mekari aviation industry, including the pass of some executive documents and the release of a policy paper. However, given its precarious financial condition, the privatization of Caeli took priority in Mekar's new cabinet's agenda in 2010. Vemma Holdings Inc. was one of the four bidders who competed in the tendering process, assisted by several organizations in Mekar, including the CRPU. Vemma's bid was the highest and provided a financially attractive business model for Caeli's short and medium-run development. Under the support of the Chairman of CRPU, Vemma won the bid and acquired an 85% stake in Caeli, proved by the Competition Commission of Mekar.

Bonoori Government's Participation in Caeli Airways

[4] Between 2011 and 2013, one of Caeli's business model pillars was catering to customers travelling from Mekar to Bonooru under the "Horizon 2020" Scheme by the Bonoori Government, with subsidies received from the government. Besides, the geographic positioning of Phenac International

Airport guaranteed the stability of Cali's operation despite the rising fuel prices and extravagant routes choice, which benefited Bonooru more than Caeli itself. With the assistance of the Bonoori Government and its expanding strategy, Caeli gradually became the only consistently profitable carrier on over half the routes to and from its base airport, Phenac International.

CCM's regulation on foreign subsidies in Mekari companies

[5] Until 2015, the CCM maintained that "[w]here foreign subsidies take the form of financial flows facilitating acquisitions of Mekari companies or where they directly support the operation of a company in the Mekari market, or facilitate bidding in a public procurement procedure, there appears to be a regulatory gap." In July 2016, CCM released a White Paper wherein it noted that "the disciplines of the amended MRTP Act concerning 'Agreements or Arrangements that Prevent or Lessen Competition Substantially' are wide enough to envisage market-disruptive agreements between two enterprises operating in Mekar, one of whom is a state-owned enterprise providing financial contribution to the other".

CCM's Investigation about Caeli Airways

[6] In June 2016, Caeli's rapid expansion drew the attention of the CCM; the first investigation was installed. The purpose was to investigate whether Caeli had adopted predatory pricing strategies to hinder competition in the domestic market.

[7] In December 2016, a consortium of small regional airlines in the Great Narnia, led by a Mekar member, complained that Caeli's launched flights on specific regions were solely to push its competitors off these routes. Caeli hopes to capitalize on the undercutting policies and the privileges it enjoyed at Phenac International Air. According to the complaint, Caeli's action made it

impossible for the rest of the companies to penetrate the market linked to Phenac International. Therefore, the CCM launched the second investigation according to the complaint. The purpose of the investigation focused on price undercutting on specific routes to and from Phenac International. Caeli maintained that it did not favor any dominance and stressed that most of its business was on long-haul routes from Phenac International.

Caeli Airways Request to Remove Airfare Caps

[8] Due to the first investigation's interim measure, the CCM placed caps on Caeli airway's airfare, the reason to prevent it from earning supra-competitive profits in the future. According to the rates Caeli Airways charged on set routes, the airline caps were enforced. While Caeli Airways objected to the CCM's investigation about the subsidies received under the Horizon 2020 Scheme, Caeli cooperated with the CCM at every step. Furthermore, there is no evidence showing that the caps hurt the profitability.

[9] Caeli requested the CCM to remove the interim airfare caps imposed and the calculation of the inflation rate. Caeli emphasized the need to raise its fares due to the high inflation. Caeli's request was denied because the investigation was yet finished and interference with inflation rates was beyond its competence.

[10] In March 2018, Caeli's board voted to seek a judicial review about the airfare caps imposed. They sent multiple request letters to the Central Bank about the calculation of the inflation rate. However, They received no response due to the Central Banks's long-standing policies of not responding to individual corporate requests.

Mekar's Economic Crisis

[11] Starting in late 2016, MON began to fall rapidly. The most often mentioned reasons were its shaky investor sentiment, State interference with the central

bank, tariff threats from trading partners, and its high foreign-currency debt.

[12] By March 2017, there was a currency crisis in Mekar. At the same time, the high inflation rate results in a surge in costs of everyday items and reduced consumer spending power.

[13] On 30 January 2018, Mekar's currency was stabilized.

Denomination of Caeli's Airfare

[14] As of July 2017, due to the failure to secure a steady stream of revenue, Caeli requested meetings with Mekar's Secretary of Civil Aviation to seek permission to denominate its airfare in US Dollars instead of the MON until the economy in Mekar is stable.

[15] In October 2017, Mekari authorities approved the denomination of airfare for all airlines operating Mekar.

[16] On 30 January 2018, the new Mekari government passed a decree requiring all companies operating in Mekar to offer goods and services denominated exclusively on MON. The Deputy Chairman of Caeli Airways' board of directors, senior director of Vemma, protested this denomination, calling for an urgent meeting.

CCM's First Investigation

[17] The CCM report found a breach of Mekar's antitrust legislation through predatory pricing resulting from low airfares and loyalty programs. The subsidies received by Vemma under the Horizon 2020 scheme also helped Caeli to reduce its airfare below its average avoidable costs significantly. As a result, the CCM imposed a total penalty of MON 150 Million on Caeli. The CCM also decided to keep the airline caps in place pending the Second

Investigation

Executive Order 9-2018

[18] On 25 September 2018, the President passed Executive Order 9-2018 (Annex VIII), granting subsidies to airlines for each Mekari citizen travelling on board. Caeli Airways' application for subsidies under this Order was rejected by the Secretary, who did not indicate the reasons for the dismissal. However, foreign airlines such as Star Wings and JetGreen, both owned by holding groups from Arrakis, received subsidies under this program despite having received subsidies from their home States greater than Vemma received under the Horizon 2020 program. The other being the wholly government-owned Larry Air. Neither received subsidies under Executive Order 9-2018.

The Second Investigation

[19] On 1 January 2019, the CCM completed its Second Investigation into Caeli. Its report concluded that Caeli had engaged in anti-competitive behavior in conducting its business activities in Phenac International Airport. Moreover, Caeli's exclusionary strategy was inferred from the fact that it had introduced excessively low prices only on routes to and from Phenac International. Its strategy could only run competitors out of the market without helping Caeli create new customers or increase revenues. Consequently, a fine of MON 200 million was imposed on Caeli Airways. The CCM also decided to continue to impose airfare caps until Caeli Airways' market share, with its fellow Moon Alliance member factored in, fell below 40%.

Caeli's Several Appeals

[20] On 20 January 2019, representatives of Caeli appealed both orders of the CCM in the Mekari courts. Caeli asked that this appeal be joined with the April 2019 hearing on the airfare caps.

[21] On 29 January 2019, the request was denied, with the reason that "the hearing was solely concerned with the airfare caps and that to protect CCM's due process rights. Under the Mekari law, any fines cannot be enforced pending Court review. The registrar subsequently scheduled an initial hearing on the Competition Authority's fines for May 2020.

[22] From 25 April 2019 to 27 April 2019, Mekar's High Court heard submissions from Caeli Airways and the CCM concerning a stay on the imposition of airfare caps.

[23] On 15 June 2019, Justice VanDuzer released his interim decision on the airfare caps, declining to remove them. The reason was that the Court found that the decision reached by the Commission was within a range of potentially reasonable conclusions given the facts before it. There were also previous conduct of the party seeking the temporary injunction. The Court does not foresee the possibility of arriving at a different final decision. Therefore, to save the precious resources and to avoid the parties waiting in anticipation, the Court also dismisses the merits of the Applicant's appeal at that point.

Mekar purchased Vemma's shares in Caeli

[24] In November 2019, representatives of Vemma announced their intention to sell their stake in Caeli Airways, given the burgeoning of liabilities of the enterprise. Vemma secured an offer from Hawthorne Group LLP, which Mekar Airservices rejected for deeming the price to be artificially inflated and not an arm's length commercial price. Besides, the connection between Vemma and Hawthorne through the Moon Alliance led that Hawthorne was not a *bona fide* third-party purchaser.

[25] To adjudicate the dispute, Mr. Cavanaugh, a renowned scholar in the arbitration sphere, rendered an award in favour of Mekar on 9 May 2020, whose legal

reasoning was heavily criticized after multiple publications emerged. Then a report released by the CILS on 14 June 2020 alleged that Mr. Cavanaugh had received bribes from representatives of Mekar Airservices to render a favourable decision, with unambiguous evidence to prove the process of bribing. The Supreme Arbitrazh Court of Sinnograd set aside the award on 1 August 2020 pursuant to Vemma's application because bribery would be contrary to the public policy of Sinnoh. Nonetheless, High Commercial Court of Mekar enforced the award and dismissed Vemma's appeal. On 8 October 2020, Vemma sold its stake in Caeli to Mekar Airservices for 400 million USD and filed a notice of arbitration against Mekar on 15 November 2020 to seek compensation for its losses under the CEPTA.

PLEADINGS

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE CLAIMANT'S CLAIMS UNDER CEPTA

[1] Pursuant to Article 9.16 paragraph 2(b) of CEPTA, a claim of dispute between the parties may be submitted under ICSID Additional Facility Rules if the conditions for proceedings under ICSID convention do not apply. Because the Respondent is not a Contracting party of the ICSID convention,[1] the jurisdictional requirements should be in accordance with those in ICSID Additional Facility Rules. In light of Article 2(b) of ICSID Additional Facility Rules, from which the Center's jurisdiction and the resulting competence of the Tribunal derive, it is stated that:

> '*The Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rules, proceedings between an Additional Facility Rules State (or a constituent subdivision or agency of a State) and a national of another State, falling within the following categories: (a) conciliation and arbitration proceedings for the settlement of legal disputes* ***arising directly out of an investment*** *which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is* ***not a Contracting State****;*'[2]

[2] To determine whether these objective requirements are met in the present case, the Tribunal must also regard the Parties' own understandings or definitions as contained in CEPTA, the applicable investment agreement. The jurisdictional requirements deriving from Article 2(b) ICSID Additional Facility Rules as well as CEPTA are fulfilled and shall be addressed in turn in the following paragraphs. Among them, the Respondent submit that the Tribunal does not have jurisdiction *ratione personae* and *ratione materiae*, and the arguments are concretely stated in following paragraphs.

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[1] Record, p.7.
[2] ICSID AFR, art.2(b).

[3] In judging the investor status of Vemma, the Claimant may apply the Broches test, which was concluded from the draft of ICSID Convention by Mr.Aron Broches. The test was applied in case *CSOB* and *BUCG* in determining the Claimant's investor status.[3] The Respondent firstly submit that there is a prohibition on the application of Broches test in our case under ICSID AFR. Pursuant to Article 3 of ICISD AFR,

> '*Since the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre,* ***none*** *of the provisions of the Convention* ***shall*** *be applicable to them*'[4]

[4] The Broches test, which is a theory created by the drafters to support and explain Article 25 of the ICSID Convention, is not allowed to be applied because it has the same nature as provisions in ICSID Convention.

[5] The Respondent submit that Article 5&8 of the ILC ARSIWA, which is a customary international law widely used by Tribunals around the world, is applicable in our case as the standard to judge the investor status. Article 5 shares the same nature as the examination of '**state agent'** and Article 8 shares the same nature as the examination of '**discharging essentially governmental functions**' in Broches test.

A. Vemma is not a qualified '*investor*' (*ratione personae*)

i. Vemma's situation does not accord with the definition of 'investor' under CEPTA

[6] Pursuant to Article 9.1, investor means:

> '*a natural person with the nationality of a Party or an* ***enterprise*** *with the nationality of a Party or seated in the territory of a Party that seeks to make,* ***is making or has made an investment*** *in the*

[3] *BUCG*, ¶¶36-44, *CSOB*, ¶17.
[4] ICSID AFR, art.3.

territory of the other Party'.[5]

[7] The Respondent submit that as an enterprise investing in Mekar, Vemma seemingly meets the requirements for an '*investor*' under CEPTA. However, in Caeli's investment, Vemma was controlled by the Bonoori Government. The investment was actually an act of State, and Vemma carried it out on the instructions and under the direction of the government. In light of Article 5&8 of ARSIWA, the Respondent submit the objections on Vemma's investor status accordingly.

ii. The Claimant is not qualified as an 'investor' under the standard of international law

(a) The disputing investment was an act of the State

[8] Pursuant to Article 5 of ARSIWA,

> '*The conduct of a person or entity empowered by the law of that State to exercise* ***elements of the governmental 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***.'[6]

[9] In Caeli's investment, Vemma's operation was empowered by Constitution Act of Bonooru to exercise elements of the governmental authority. According to Article 70 paragraph (2) *Mobility Rights* of the Constitution,

> '*Recognizing the unique geography of Bonooru, Bonooru shall ensure that every citizen is* ***guaranteed travel to and from*** *its many islands*'.[7]

[10] As stated in the facts, Bonooru is an archipelagic State comprising 109 islands, of which only four are 'major islands' spanning over 5000 square kilometres.[8]

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[5] Record, p.73.
[6] ILC ARSIWA, art.5.
[7] Record, p.41.
[8] ibid, p.28.

Due to the disparate nature of Bonooru's geography, its major public facilities such as healthcare and educational institutions are concentrated on these 'major islands', which is restrictive for its development. To tackle this disproportionate distribution, Article 70 of the Constitution of Bonooru assigns particular importance to mobility rights of its population.[9] Therefore, an intensive function of the Bonoori aviation industry has been to ensure people's mobility rights, especially those in remote islands.

[11] During Vemma's operation, the choices of routes by Caeli were more beneficial for Bonooru, with fewer profits compared to other alternative routes. Commercially, according to Phenac Business Today Podcast Transcript, 17 November 2014, Professor Misty pointed out that as a citizen and previous government official from Bonooru, she was

> '*well aware of how our corporations can be different than it tends* ***not to be fully independent of the government*** *[...] that the enterprise receives quite a lot of State aid*' and '*significant resources are put into flights between Mekar and Bonooru, and these routes are* ***not profitable for Caeli***'.[10]

[12] In other words, considering from a commercial light, Vemma's decisions of routes were unreasonable because of the relatively low profits and high risks compared to other international routes.

[13] Politically, the 'Horizon 2020' Scheme under the Caspain Project offered subsidies to Vemma with the aim of developing tourism-related aviation industry in Bonooru, which allowed Vemma to choose routes which are less profitable but can serve for the mobility rights of Bonoori citizens.[11]

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[9] Record, p.41.
[10] ibid, p.54-55.
[11] ibid, p.32.

[14] Furthermore, holdings of the highest court of Bonooru show the attitude of the Bonoori government towards Vemma. According to the judgment of the Constitutional Court of Bonooru on Privatisation of BA Holdings,

> *'The government has ensured that there are protections for our citizens' access to mobility. The airline will also continue to enjoy subsidies under Bonoori law for flights offered on routes* ***of significance to mobility of disparate communities****. Combined with* ***Bonooru's continued, although minority, participation*** *through Vemma Holding Inc., we are sufficiently convinced that Bonooru will be able to ensure the utilization of the Royal Narnian for* ***public benefit****.'*[12]

[15] The language and attitude show that Bonoori government has always regarded Vemma as a tool to fulfill citizens' mobility rights. It anticipated that Vemma would continue to enjoy subsidies from the government, which provide assistance to run routes of significance to mobility rights. Most importantly, the participation by the government was directly stated by the court.

[16] In conclusion, Vemma's investment was empowered by the Constitution of Bonooru to exercise governmental elements to fulfill mobility rights. Pursuant to Article 5 of ARSIWA, the investment in Caeli was an act of State.

(b) Vemma carried out the investment on the instructions of, under the direction and control of Bonoori Government

[17] Since Vemma's inception, the government has utilized it for public purposes. This was proved in the founding document of Vemma. According to Article 3 paragraph h) of the Memorandum of Association of Vemma Holdings Inc.,

> *'h) to assist in* ***developing the aviation industry*** *as well as the civil aviation infrastructure in Bonooru* ***for the benefit of its***

[12] Record, p.42.

> ***population*** *in accordance with Article 70 of the Constitution Act, including* ***servicing remote communities***'.[13]

[18] The Memorandum shows that Vemma's functions have been to assist Bonoori government in developing the aviation industry in Bonooru and ensuring people's mobility rights. Considering the continuity and persistence of an enterprise's nature and purpose, evidence in the founding documents shows the connection between Vemma and the government that may affect Vemma's investments in the future.

[19] Besides, the Bonoori government took advantage of the number of its representatives in Vemma to conduct direction and control over Vemma to perform governmental functions. According to facts in procedure No.3,

> '*Vemma's Board of Directors passes decisions by a* ***majority vote****. Vemma's articles of incorporation require 50 per cent of voting shares for a quorum at regular meetings, which includes meetings for electing directors. Bonooru's representatives on Vemma's board are present for every meeting. Consequently, for some meetings, Bonooru's representatives* ***form a majority*** *of members present and voting when* ***not all other shareholders attend***'.[14]

[20] Votes that were made only by representatives from Bonoori government constituted the direct control. Consequently, during Vemma's investment in Caeli, the decisions were not totally made for the purpose of commercial interests. Combined with the connection between Vemma and the government in history, the nature of the investment is not purely '**commercial**'.

[21] Furthermore, the appointment of Ms.Sabrina Blue shows the close connection between Vemma and the Bonoori government. On 23 November 2010, the same day as Vemma submitted its bid for the purchase of Caeli, the *Szeto Times* reported that Ms. Sabrina Blue, erstwhile head of Vemma's board of

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[13] Record, p.44.
[14] ibid, p.86.

directors, had been appointed as the Secretary of Transport and Tourism in a cabinet reshuffle in Bonooru.[15]

[22] If this can be constrainedly interpreted as a coincidence, Ms.Blue's statement before the House of Commons further proved Vemma's governmental functions. In June 2011, when pressed on the rationale behind the subsidies under the Horizon 2020 Scheme by the opposition party members, Ms.Blue stated that,

> '*In its application, Vemma has credibly outlined how its investment in Caeli Airways would draw more travelers from Mekar and the Greater Narnian region to Bonooru's emerging tourism markets. Vemma's expansion into Mekar will offer substantial benefits not only to Vemma but to all of Bonooru by* ***enhancing the aviation network available to prospective tourism****. This will boost the tourism infrastructure at our disposal.*'[16]

[23] Years later, according to facts provided in procedure No.4, Ms.Sabrina Blue lauded Vemma's '*contribution to the enhancement of Bonooru's tourism infrastructure, which has, in turn,* ***enhanced the mobility rights*** *of our population within the Great Narnian region*' in a press conference on 31 May 2016, after Vemma received recurring subsidies from Bonooru's Ministry of Transport and Tourism from October 2011 to June 2016. She also commented that Vemma '*has certainly lived up to the standards set by its predecessor in Bonooru*', which means the initial purpose of setting up Vemma was recorded in the Memorandum of Vemma.[17] This statement showed that the objective outcome of the governmental subsidies was that Vemma performed governmental functions and fulfilled Bonoori citizens' mobility rights with aid from the government.

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[15] Record, p.31.
[16] ibid, p.33.
[17] ibid, p.89.

[24] Vemma's expansion into Mekar was partly due to the demand for tourism development in Bonooru, and the government provided recurring subsidies to support the strategy. Both political and economic instructions taken by the government show that Vemma was not a qualified '*investor*' according to ARSIWA Article 5&8.

iii. The Respondent only consent to investor-State arbitration under CEPTA

[25] Pursuant to Article 9.16 paragraph 1(a) of CEPTA, the Respondent only consents to investor-State arbitration for settlement of dispute.

> '*If a dispute has not been resolved through mutual agreement, a claim may be submitted under this Section by* ***an investor of a Party*** *on its own behalf.'*[18]

[26] There are no other regulations in Chapter 9 permitting a State to submit a claim under CEPTA, so State-State arbitration is not an acceptable solution to dispute between the parties. Based on the submissions above, the actual 'investor' was the Bonoori government rather than Vemma in Caeli's investment, because the investment was an act of the State and was carried out on the instructions of and under control of the government. Thus, Vemma is not a qualified claimant to submit a claim to arbitration and the Tribunal lacks jurisdiction *ratione personae.*

B. Vemma's business activities in Caeli did not constitute as an 'investment' (*ratione materiae*)

[27] Pursuant to Article 2 paragraph (a) of ICSID AFR, the Tribunal has jurisdiction over '*legal disputes arising directly out of an investment*', in determining jurisdiction *ratione materiae*, standard of 'investment' in CEPTA and international law should both be considered.

[18] Record, p.79.

[28] Definition of 'investment' in CEPTA Article 9.1 lists some of the inexhaustive elements which an investment may contain. However, even if Vemma's activities include some of the elements listed, it can still not be proved to be a qualified investment.

[29] The ICSID AFR does not provide definition of investment, either. So, in determining whether the activities constituted an 'investment', the Respondent submit that the Salini test, which is an interpretation of 'investment' in Article 25 of the ICSID Convention that was widely used by tribunals around the world, should be applied here as a standard. The Salini test requires that an investment should contain the following elements: (1) contribution of money or assets, (2) risk, (3) duration and a (4) substantial economic development or contribution to the host State's economy.[19]

[30] Vemma's activities did not meet (4) of the requirements, because it did not promote any positive developments for Mekar's economy and even caused damages to it. Firstly, during Vemma's operation in Caeli, it flies routes which are more beneficial to Bonooru and less profitable for Caeli to perform governmental functions, which was stated before.

[31] Besides, Vemma took a risky strategy in operation, regardless of Mekar Airservices's advice several times. After the Eldin volcanic eruption, Vemma decided to offer low-fare, long-distance flights into Mekar. It also expanded routes for cross-continental travel using its A430 fleet, adding 20 new destinations in 2012. After the fall-winter decline, Vemma's representatives still argued that limiting expansion would mean forfeiting unclaimed market share. The extravagant approach by Vemma turned out to be more unprofitable than expected.[20]

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[19] *Salini*, ¶¶50-58.
[20] Record, p.33.

[32] After a series of risky strategies taken by Vemma, the Aviation Analytics, a leading international quarterly, pinned Caeli's fate on enthusiastic overexpansion in the unforeseen financial situation in Mekar.[21] As the pillar of Mekar's civil aviation industry for international routes, the decline of Caeli Airways causing massive damages to the aviation industry and the already depressed economy situation in Mekar.

[33] Vemma's activities in Caeli did not contribute to Mekar's economy but aggravated the economy crisis, which violated the requirement (4) in Salini test. Therefore, Vemma's activities did not constitute an 'investment' and the Tribunal lacks jurisdiction *ratione materiae*.

II. THE TRIBUNAL SHOULD NOT GRANT THE LEAVE SOUGHT BY CBFI AND SHOULD GRANT THE LEAVE SOUGHT BY CPUR FOR FILING *AMICI* SUBMISSIONS

[34] Pursuant to Article 9.19 paragraph 3 of CEPTA,

> '*The tribunal may accept and consider written amicus curiae submissions regarding a matter of fact or law* ***within the scope of the dispute*** *that may* ***assist*** *the tribunal in* ***evaluating the submissions and arguments*** *of the disputing parties from a person or entity that is* ***not a disputing party*** *but has a* ***significant interest*** *in the arbitral proceedings*' and '*the tribunal shall ensure that the submissions do* ***not disrupt or unduly burden*** *the arbitral proceedings,* ***or unfairly prejudice*** *any disputing party*'.[22]

[35] Concluded from the paragraph above, the requirements for an *amicus curiae* in this arbitration are mainly divided into the following four points: first, the *amici* should be a non-disputing party; second, the *amici* should have significant interest in the arbitral proceeding; third, the submission must regard a matter of fact or law within the scope of dispute, or it will disrupt or unduly

[21] Record, p.38.
[22] ibid, p.80.

burden the arbitral proceeding and unfairly prejudice the disputing party, which violated the impartiality of *amicus curiae*; fourth, the submission would assist the Tribunal in evaluating the submissions or arguments of the disputing parties.

[36] A similar rule can be found in ICSID AFR Article 41 paragraph(3). Both rules set a standard for an *amicus curiae* in arbitration, which requires an independent and impartial third party to help improve the transparency and comprehensiveness of the Tribunal's evaluation.[23]

A. CBFI's submission did not meet the requirements for *amicus curiae* under CEPTA

[37] The Respondent submit that CBFI's submission cannot assist the Tribunal in evaluating the submissions and arguments by disputing parties because there exists a conflict of interest within CBFI and the submission concerning nothing about public interest cannot provide the Tribunal a different angle of view.

i. The participation of LLC constituted a conflict of interest

[38] As a member with good standing in CBFI, LLC is advising Vemma on funding strategies with respect to its claim against Mekar.[24] As a closely related enterprise to calculate the fund and develop ways of raising capitals for Vemma, LLC must have financial and legal connection with the Claimant. The Respondent submitted that to be *amicus curiae* of the Tribunal, members who have financial and legal connection with the Claimant are prohibited due to the lack of independence and impartiality for a more open and transparent arbitration.

[23] ICSID AFR, art.41(3).
[24] Record, p.16.

[39] Due to the similarity between the role that *amicus curiae* and arbitrators play, the Respondent here apply the IBA Rules on conflict of interest for arbitrators in international arbitration to test the impartiality and independence of *amicus curiae.* Pursuant to Part II *Practical Application of the General Standard* Article 2.3.7 of IBA rules on conflict of interest in international arbitration, which is on the Waivable Red List,

> '*The arbitrator regularly advises one of the parties, or an affiliate of one of the parties, but neither the arbitrator nor his or her firm derives a* ***significant financial income*** *therefrom*.'[25]

[40] According to IBA Rules, situations on Waivable Red List led to the prohibition on the appointment of arbitrators unless the parties agree to accept the facts and believe the situations will not impact the impartiality and independence of the arbitrators.[26] In our case, the funding strategies LLC provided negatively impacted the impartiality and independence of CBFI because representatives from LLC can vote in respect of the *amicus* submission.[27] The Respondent deny the assistance that the submission may provide based on the conflict of interest.

ii. CBFI's submission does not concern about public interest, which cannot assist the Tribunal in evaluating the parties' submissions and arguments

[41] Pursuant to Article 9.20 paragraph 6,

> '*The Federal Republic of Mekar shall duly consider the application of the* ***UNCITRAL rules on transparency*** *in treaty-based investor-State arbitration to any international arbitration proceedings initiated against the Federal Republic of Mekar pursuant to this Agreement*'.[28]

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[25] IBA Guidelines, Part II, art.2.1.1.
[26] ibid, Part II, art.2.
[27] Record, p.87.
[28] ibid, p.82.

[42] UNCITRAL rules on transparency should be applied to judge relevant factors which may affect the transparency of the arbitration. *Amicus curiae*, a third party to assist the Tribunal in evaluating, shall be independent and impartial to improve the transparency. According to UNCITRAL rules on transparency Article 4(a), *discretion and authority of the Tribunal*,

> '*the **public interest** in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings **shall** be taken into account*'.[29]

[43] To improve the transparency, '*public interest*' is one of the crucial factors for the Tribunal to consider. CBFI is '*the national leader in public policy advocacy on national and international business issues and focuses on fostering a strong, competitive economic environment*'.[30] The nature of CBFI determines that the *amicus* submission of CBFI only focus on 'interest of enterprises'. The submission provides the Tribunal with information about the regulatory framework and the business landscape in Bonooru and the impacts of the arbitration on future capital flows. By submitting these, CBFI aims to voice their grievances and to pursue commercial interests. However, the impacts of the arbitration decision are not only limited to the investment and interests of Bonoori enterprises. The submission does not concern anything about public interest and provides a similar angle of view to the Claimant, which will negatively impact the transparency of arbitration.

[44] Similar logic can be found in case *APOTEX*, the Tribunal rejected the *amicus* submission by BNW, a management consulting enterprise, by concluding that the submission did not show the concern of '*public interest*'. The Tribunal stated that '*even if the submission refers to the impact of a decision on pharmaceutical industry, the question was **moot** by then*', so it had not met the

[29] UNCITRAL Rules, art.4(a).
[30] Record, p.16.

requirement of concerning '*public interes*t'.[31] In case *RFP*, the Tribunal rejected the *amicus* submission by Professor Robert Howse and Mr. Barry Appleton because of the lack of public purpose in their submission. That Tribunal accepted that the *amicus* submission will '*impact upon individuals and entities beyond the disputing parties, however it did not show any link between their application and the* ***furtherance of public interest***'.[32]

[45] Above all, CBFI's submission cannot assist the Tribunal because of the conflict of interest and lack of public interest. The Tribunal should not grant the leave sought of a submission that did not meet the requirements in CEPTA.

B. CPUR's submission met the requirements under for *amicus curiae* under CEPTA

i. CPUR is a non-disputing party, whose submission is within the scope of dispute

[46] Firstly, CPUR was not a disputing party. It is selected through a transparent and competitive process approved by the Cabinet of Ministers of Mekar and based on criteria of competence as identified in the Law on privatization.[33]

[47] Besides, CPUR's submission is within the scope of the dispute, which is up to the discretion of the Tribunal. Pursuant to Chapter 8 Article 45 paragraph 1 of ICSID AFR, '*the Tribunal shall have the power to rule on its competence*'.[34] The Tribunal has discretion to determine the boundary on the definition of '*scope within the dispute*'. The Respondent submit that the reasonable boundary should be established to contain the evidence of corruption related to Vemma's legality, which is a crucial factor for the Tribunal to consider guaranteeing the justice and public interest of the arbitration because corruption

[31] *APOTEX*, ¶36.
[32] *RFP*, ¶4.7.
[33] Record, p.19.
[34] ICSID AFR, art.45.

is contrary to both international and Mekari public policy.[35] The scope of dispute is not only limited to concrete operation by Vemma, but also about relevant factors that may influence the disputing investment, so the legality of Vemma shall be defined within the scope of dispute.

ii. CPUR have significant interest in the arbitral proceedings

[48] The allegation of corruption is in accordance with CPUR's significant interest in the arbitral proceedings. The tasks of the *amici* in Caeli's operation process included:

> '*performing an audit, an analysis of the economic, technical and* ***financial performance of Caeli Airways****, bringing indicators in the financial statements in line with accounting standards, the preparation of a financing model,* ***the determination of the attractiveness of the enterprise for investors*** *and ways to improve it, setting of the initial price and the preparation of an information package on the airlines, as well as* ***identification of potential investors***'.[36]

[49] If there exists corruption during the tendering process, the potential investor will probably impede the business development of Caeli, which is contrary to the *amici*'s significant interest. In other words, if the submission is granted by the Tribunal and Vemma's corruption is taken into consideration, CPUR's significant interest of identifying potential investors for Caeli by disclosing risky investors who got involved in corruption is guaranteed.

iii. CPUR's submission contains the evidence of Vemma's corruption, which can assist the Tribunal by improving the openness and transparency of the arbitration

[50] As independent advisors involved in the entirety of the privatization process, the *amici* are in the unique position to adduce unbiased facts to this effect

[35] UNCAC, art.60.
[36] Record, p.19.

before the Tribunal. By reading the submission by CPUR, the Tribunal will figure out the reason for the abnormal preference for Vemma by Mr.Dorian Umbridge, the Chairperson of CPUR by then and reconsider the legality of Vemma.

(a) Corruption during the tendering process impacted the legality of Vemma's investment

[51] The assessment of the legality of Vemma's investment is crucial to the determination of the Tribunal's competence-competence. The investment was an illegal one due to the corruption in the tendering process. Evidence in CPUR's submission proves that Vemma won the bidding by means of bribes to Mr. Dorian Umbridge, which violated the fairness of competition. Illegal investments are considered outside the scope of the applicable treaty, irrespective of the existence of an express wording to that effect. Thus, the illegality constitutes a bar for the Tribunal's jurisdiction.

[52] Similarly, in case *Ampal-American*, the Tribunal concluded that '*it is a* ***well-established principle of international law*** *that a tribunal constituted on the basis of an investment treaty has* ***no jurisdiction*** *over a claimant's investment which was made* ***illegally in violation of the laws and regulations of the Contracting State***'.[37] Although Mekar's anti-corruption law system was not stated in the record, corruption as a method to win the bid is contrary to public policy of every State. Therefore, corruption-based investment falls outside the scope of protection by CEPTA.

(b) Corruption is contrary to international public policy, which should be considered by the Tribunal

[37] *Ampal-American*, ¶301.

[53] The nature of investor-State relations provides fertile ground for acts of corruption by foreign enterprises. To prevent this 'insidious plague' from upending investor-State arbitration, caution must be exercised in assessing Vemma's claims that remain tainted by allegations of corruption. Pursuant to Article 8 paragraph 5 of United Nations Convention Against Corruption (UNCAC),

> '*Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems* ***requiring public officials*** *to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a* ***conflict of interest*** *may result with respect to their functions as public officials*'.[38]

[54] As a public official, Mr. Dorian Umbridge's corruption was contrary to both Mekari and international public policy against corruption in investment. The Respondent suffered from corruption for an extended period of time and objected to any corruption behaviors by either local officials or foreign investors. This arbitration raises important issues regarding the ability of investor-State dispute settlement to address public policy issues fairly and in an unbiased manner, taking the regulatory interests of the State into account.

[55] In case *WDF*, the Tribunal listed various Conventions during the past decades to conclude that,

> '*States have shown their* ***common will to fight corruption****, not only through national legislation, as they did before, but also through* ***international cooperation****. In doing so, States not only reached a new stage in the* ***fight against corruption****, but also solidly confirmed their* ***prior condemnation*** *of it*'.

[56] The Tribunal also notes that,

[38] UNCAC, art.8.

> '*in some of the previous cases, it was alleged that corruption is widespread either within the purchasing country or in the particular sector of activity. However, all arbitral tribunals concluded that such facts* ***do not alter in any way the legal consequences*** *dictated by the prohibition of corruption*'

[57] The decision means that whenever the corruption took place, the consequences caused by corruption cannot be neglected by the Tribunal for the purpose of defending international public policy.[39]

[58] The submission by CPUR will not disrupt or unduly burden or prejudice the disputing parties. Just the reverse, it will assist the Tribunal in evaluating the submissions by Claimant after reconsidering the legality of Vemma and guaranteeing the arbitration is in accordance with current public policy. The *amici* submission meets all requirements in CEPTA and will improve the transparency of the arbitration.

III. THE RESPONDENT HAS NOT VIOLATED ARTICLE 9.9 UNDER CEPTA

A. The Respondent has not violated Article 9.9(2) under CEPTA

[59] According to the Black's Law dictionary the definition of denial of justice is '*a deficiency in the administration of justice*'[40].

i. There were no substantial denial of justice under Article 9.9(2a)

(a) All acts from the Respondent were reasonably reached by the Mekari state organs

[60] In the *Arif* case, the Respondent submits that the Claimant's argument towards the denial of justice should not be judge in the international tribunal hearing. It is authorized to act as an ultimate appellate court, reviewing decisions of

[39] *WDF*, ¶¶146-148,156-157.
[40] See Black's Law Dictionary.

domestic supreme courts for correctness. Denial of justice should only be confirmed in the international hearing if it has reached a level of arbitrariness that they could not possibly have been rendered in good faith[41]. In this case, all decisions made by the Mekari State are supported with solid reasoning and pieces of evidence from the investigation made by CCM. Therefore, there is no deficiency in the Respondent's administration of justice.

[61] Furthermore, if the judicial system is not tested as a whole, the FET standard is not violated, meaning a denial of justice. The State could not mistreat a foreign investor unfairly and inequitably by denying justice through an appealable decision of a first instance court. The State may only mistreat through the final product of its administration of justice which the investor cannot escape.

(b) Caeli's application for subsidies under the Executive Order 9-2018 was rejected due to it was not applicable under the Secretary's discretion

[62] According to *Executive Order-9 2018*, According to *Chapter 31 clause (c1)*, the Secretary has authority in reviewing, deciding, and determining the qualification for the applications of loans and loans guarantees.[42] Therefore, the ruling about the Claimant's request was strictly ruled according to the Executive Order.

[63] Regarding an allegation of discriminatory treatment, the Claimant must demonstrate that it has been subjected to unequal treatment in circumstances where there appears to be no reasonable basis for such differentiation. As stated by the Tribunal in *LG&E*: '*[A] measure is considered discriminatory if the intent of the measure is to discriminate or if the measure has a discriminatory effect.*[43]' Even though evidence of discriminatory intent may be relevant and

[41] *Arif*, ¶¶260-263.
[42] Record, p.56.
[43] *LG&E*, ¶146.

may reinforce such a finding, it is a fact of unequal treatment, which is the core of the definition.

[64] To prove unequal treatment, the Claimant must have made a comparison with a homogeneous group. For example, in *Nykomb*, the Tribunal compared the treatment of several companies in the same area of endeavor, which were the electricity generation and distribution in *Nykomb*[44] and that in the *Saluka* case, banks of similar size and market position in Saluka[45]. In each case, one company from a small and homogeneous group received markedly less favorable treatment than the others, without explanation or justification. In this case, the comparison is between Caeli Airways and other non-State-owned airlines in Mekar. However, unlike the other airlines, Caeli is a state-owned airline. It is clearly stated that Bonooru owns a significant stake in Vemma[46]; therefore, Caeli is not qualified for the subsidized.

[65] Hence, the Respondent has not impaired the Claimants' investments through discriminatory measures.

ii. There were no procedural denial of justice

(a) The Claimant had every opportunity to voice its denial of justice in all aspects of authorities

[66] The Claimant's request to remove airfare caps was rejected as Justice VanDuzer has already released his interim decision to have airfare caps was reasonably reached by the CCM according to given facts beforehand[47]. The Claimant would also recover quickly according to the large market share the Claimant enjoys in Mekar. Therefore, the airfare caps removal was decline due to the balance of convenience.

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[44] *Nykomb*, ¶¶3-5.
[45] *Saluka*, ¶¶314-347, 466.
[46] Record, p.4.
[47] ibid, p.38.

[67] Regarding the allegation on the inflation rate calculation, CCM did not have authority when asking for the inflation rate as the Central Bank is calculating it[48], Due to fairness, the Central Bank rejected Caeli's request.

[68] Compared to the cases judged with similar matters by the Mekari courts, The Claimant's case managed to dispense judgment relatively speedily. Due to the economic crisis, Mekar had suffered, there was an immediate rise in volume in cases[49] from the economic crisis, resulting in limited resources the Mekar courts could use. Moreover, the Mekari courts prioritize relevant criminal matters cases compared to commercial matters because they have far-reaching consequences[50]. However, to emphasize, all Mekari court's rulings were made according to apparent pieces of evidences; hence, the Respondent has not impaired the Claimants' investments through any arbitrary measures.

(b) The enforcement of the 9 May Award is justifiable

[69] According to the *Hilmarton* case, ICC arbitration in Geneva, Switzerland, between Hilmarton and OTV. The arbitral tribunal renders an award against Hilmarton. Upon Hilmarton's request, an appellate court in Switzerland annulled the award. OTV seeks enforcement of the annulled ICC award in France. Hilmarton argued that *Article V(1)(e)* of the *New York Convention* applied and that, therefore, enforcement of the annulled ICC award must be refused. Under the provisions of *Article VII (1)* of the *New York Convention*, OTV relied upon the applicable French law[51].

[70] Furthermore, according to the *Putrabali* case, the set-aside award was also enforced. Putrabali challenged the award on the point of law before the High Court based on the *Arbitration Act 1996 for England and Wales*[52], which

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[48] Record, p.36.
[49] ibid, p.36.
[50] ibid, p.36.
[51] *Hilmarton*, ¶¶1-6.
[52] *Putrabali*, ¶10.

partially set aside the award and held that the Rena Holding's failure to pay for the cargo amounted to a breach of contract. In a second award, the arbitral tribunal ruled in favor of Putrabali and ordered Rena Holding to pay the contract price. An enforcement order was issued by the President of the First Instance Court of Paris, allowing recognition and enforcement of the *2001 award* in France. Putrabali challenged the decision of the Paris Court of Appeal of 31 March 2005, which dismissed the appeal against the enforcement order, because, *inter alia*, the setting aside of an arbitral award in a foreign country does not prevent the interested party from seeking enforcement of the award in France. Further, the Paris Court of Appeal held that the enforcement of the *2001 award* would not be contrary to international public policy. The Supreme Court affirmed the decision of the Paris Court of Appeal.

[71] In addition, the *Chortzow* case would not lead to a different compensation standard as the standard does not allow the Claimants to ignore any fact that negatively affects value. But it instead included all factors, negative as well as positive, that 'in all probability' would have been present must be considered.

[72] In a scholarly article it stated that:

> '*[A] mere finding of a breach of due process at the time of the expropriation does not warrant mechanically awarding the full value of the asset as of the date of the Award. Rather, when applying the Chorzów rule, tribunals should analyse what the actual damage sustained by the injured party was as a direct consequence of the given procedural irregularity*[53]'.

[73] Furthermore, the High Commercial Court of Mekar's rulings has given clear reasoning to the Claimant. It stated that: '*The Superior Court of Mekar has previously affirmed that a high standard must be met for refusing enforcement of an arbitral award*'.

[53] Chorzów, ¶ ¶309-311.

[74] In the *Hebei* case, the court also reasoned that an award should only be set aside if upholding '*would violate the most basic notions of morality and justice [which] would take a very strong case before such conclusion can be properly reached*'[54]. Therefore, in this case, the arbitral award cannot be set aside since corruption is not sufficiently severe enough to raise the level that the award must be set aside in this case.

iii. Mere breach of the FET standard does not constitute to a violation of the entire Article 9.9 under CEPTA

[75] In the *BIVAC* case, the Tribunal dismissed *BIVAC*'s claim about the Respondent's violation of the FET standard. In that case, the Tribunal stated that the Respondent has not acted '*in a manner that is qualitatively different from an ordinary contracting party*'[55]. The Respondent's refusal to pay invoices under a pre-shipment inspection contract is within regular acts of an enterprise. The Tribunal upheld the traditional distinction of a breach of the FET standard, noting that: '*[s]omething more than mere breach of contract is needed*'[56].

[76] All decisions made by Mekar's judicial and administrative proceedings were under justifiable reason and manner of a contracting party. Furthermore, as proven in *CDSE* that according to ARSIWA Article 4 :

> '*the breach by a State of a contract does not as such entail a breach of international law. Something further is required… such as a denial of justice by the courts of the State…*[57]'

[77] In addition, all intentions were due to the positiveness of public interest behind the rulings. Therefore, mere breach of the contract would not be equivalent to a violation of international law or the FET standard. Instead FET standard is a

[54] *Hebei*, ¶8.
[55] *BIVAC*, ¶90.
[56] ibid, ¶227.
[57] *CDSE*, ¶95.

more general standard, as stated in *Noble Ventures*:

> '*[The FET] standard… can be consider[ed] to be a more general standard which finds its specific application in inter alia the duty… to observe contractual obligations towards the investor*'[58].

B. The Respondent has not violated the Claimant's legitimate expectation under Article 9.9(3) of CEPTA

i. The Respondent has provide a stable and predictable legal environment

[78] Regarding the transparency and unpredictability of the Mekar legal environment, Mekar had sufficiently notified Vemma that any anti-competitive behavior would be subject to the review of the CCM before the investment was even made.[59] The Claimant provides no analysis of how he could have legitimately expected to be exempt from mandatory Mekar law protecting consumers from anti-competitive measures. Moreover, due to the Claimant's aggressive investment approach, the two investigations conducted by the CCM into Caeli Airways, and consequent fines imposed, were merely proper applications of the domestic laws of Mekar, which were in force when the Claimant made its investment[60]. A State's right to reduce reliance on foreign currencies to mitigate against capital outflows and secure its macroeconomic situation should not be put on trial before this Tribunal[61]. This does not conduct arbitrary measures.

[79] For example, the Tribunal in *Electrabel* deemed that a measure will not be arbitrary if related to a rational policy and considered the need for an appropriate correlation between the State's public policy and the measure adopted to achieve such policy. The Tribunal then added that '*this includes the requirement that the impact of the measure on the investor be proportional to*

[58] *Noble Ventures*, ¶182.
[59] Record, p.48.
[60] ibid, p.47.
[61] Ibid, p.8.

the policy objective sought'[62]. Mekar was only putting a cautious approach towards its economic situation and that the possible investigation was notified beforehand.

[80] According to the *Saluka* case, such expectations have an objective basis and are not fanciful or the result of misplaced optimism, then they are described as 'legitimate expectations'. '*Their expectations, in order to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances*'[63]. A breach of an investor's legitimate expectations does not *ipso facto* amount to a violation of the FET obligation. Quite simply, not every expectation of an investor is protected; rather, it must be an expectation recognized and protected in international law. Some expectations may merely be too minor for this end.

[81] For example, in the *Arif* case, the Claimant has not been able to open a duty-free store at Chisinau Airport for reasons that Respondents responsibility under public international law, namely the decisions by the Moldovan courts that the Airport Lease Agreement was null and void. The Claimant has legitimate expectations of an investment does not make the State guarantor that the expectations will be fulfilled; rather, the State is obliged to respect the legitimate expectations and not be the operative cause of their frustration. In this case, the frustration of the legitimate expectation was the direct result of the intervention of a State organ. It is important to emphasize that the legitimate expectation that is breached in this case is not that Respondent has failed to perform a lease contract for a duty-free shop at Chisinau Airport, but rather the expectation of a secure legal framework based on the conduct of State organs that authorized and encouraged the investment in the leased

[62] *Electrabel*, ¶179.
[63] *Saluka*, ¶304.

premises at Chisinau Airport[64].

ii. The government officials from Bonooru have often exerted pressure on Mekar to treat the Claimant favourably

[82] In addition, the government officials from Bonooru have often exerted pressure on Mekar to treat the Claimant favourably through threatening to hold back funds promised to rebuild Phenac's port as part of the Caspian Project[65]. Boonoru promised on both the Caspian project and the update of Mekar's port and the Phenac International Airport. However, the Bonoori construction firms working on these projects halted all work due to the withdrawal of funding by Bonooru[66]. Knowing that if the Claimant's government have created legitimate expectation, should satisfy such expectations. As mentioned, the Claimant have often exerted pressure that if their needs were not fulfilled, the Claimant's government would withdraw from these projects. Knowing that both of these projects remain incomplete to this day[67].

[83] Moreover, to resolve the regulatory gap found, CCM released a White Paper noting in a report made in the first investigation from CCM found evidence on the breach of Mekar's antitrust legislation through predatory pricing[68]. In the second investigation made by CCM, the report concluded that Caeli had engaged in anti-competitive behaviour in conducting its business activities in Phenac International Airport. If regulations were not taken, it would drive out small competitors of Mekar to take corrective steps.

C. The Respondent has not violated its obligations relating to the '*full protection and security*' under Article 9.9(4) of the CEPTA

[64] *Arif*, ¶¶49-124.
[65] Record, p.8.
[66] ibid, p.89.
[67] ibid, p.89.
[68] ibid, p.34.

i. The '*full protection and security*' standards limit to the physical safety of the investor and investment

[84] According to the *Gas Natural* case, the full protection and security standard create an obligation for the host State:

> '*(i) not to directly harm investors/investments through acts attributable to the State; and*
> *(ii) to protect investors and investments against actions of private parties, e.g., in the course of civil unrest, as well as actions or inactions*[69]'.

[85] According to the France Model BIT, '*full'* means '*full and complete*'. This Respondent would like to emphasize that the vast majority of investment treaty awards have limited the obligation of full protection and security to ensuring the physical safety of the investment property and personnel in the host state consistent with the resources available to the host state.

[86] The host State is not required '*to prevent each and every injury*'[70] but must exercise reasonable care and take reasonable actions within its power to prevent injury of the investor. The Claimant is unable to demonstrate that Mekar's actions exceed the regulatory authority that the CEPTA secures for its contracting parties. Hence, rejects the assertion that it is under an obligation to ensure that a regulatory and commercial framework to ensure full protection and security for foreign investments is maintained at all cost, noting the subjectivity of the level of protection and security that might be expected by a particular investor.

ii. The State has the right to regulate its economic circumstances

[87] The right to regulate in the public interest is one of the customary rights of a

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[69] *Gas Natural*, ¶563.
[70] ibid, ¶¶570-574.

sovereign State. In the investment arbitration context, the right to regulate in the public interest is understood as a State's power and right to regulate certain activities affecting the public interest, which may originate in a duty to regulate such activities. Mekar's regulatory acts were due to the economic crisis it suffers.

[88] According to *Article 3* of *The Multilateral Agreement on Investment* under *OECD* it stated that:

> '*[A] Contracting Party may adopt, maintain, or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to healthy, safety or environmental concerns provided that such measures are consistent with this agreement*'[71].

[89] Furthermore, in the *preambles* of the *CEPTA* it stated that:

> '*RECOGNISING that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals, and the promotion and protection of cultural diversity*[72]*'*

[90] To stabilize the currency crisis, the IMF emphasize '*the need to establish credibility in the [local] currency to avoid a debilitating economic situation*'[73]. Therefore, the Respondent's rejection regarding to the Claimant's request to denominate its airfare in USD was due to public interest of the country. Economists has also cited reasons for the predominant cause of the currency fall was partly due to '*shaky investor sentiment*[74]', this had further proven that necessity for CCM investigations.

IV. THE RESPONDENT IS ENTITLED TO SUBMIT FOR APPROPRIATE COMPENSATION

[71] OECD MAI, art.3.
[72] Record, p.71.
[73] ibid, p.35.
[74] ibid, p.35.

A. The Tribunal should conclude Mekar has already purchased the Claimant's investment at the '*market value*'

[91] The market value is more favourble than fair market value as the fair market value includes compensation for the recovery of the Claimant's which the Respondent strongly believes that the Respondent has justice under article 9.9 of the CEPTA. Therefore, should not pay for the full loss of the Claimant, meaning that the market value is more favourable and appropriate compensation standard.

[92] Mekar has already paid the '*market value*' for Claimant's investment by purchasing its stake in Caeli Airways for USD 400 million[75]. Hence, owes no more compensation to the Claimant.

B. In the alternative, the Tribunal should reduce any compensation awarded considering the Claimant's contributory fault

i. The Claimant should bear its responsibility for the losses it has incurred

[93] Despite the volatility, the Claimant, aggressively took an approach in its investment activities, funneling funds towards rapid expansion and ill-strategized business plans[76] instead of tending to maintain Mekar's long-term financial health.

[94] According to the principle of contributory negligence[77], which has been applied by investment tribunals to reduce the amount of damages awarded to a claimant, where the claimant's own conduct contributed to the loss suffered.

[95] Mekar has first presented clear warnings to the representatives on the Caeli Airways' board at the first annual shareholders' meetings about the expected

[75] Record, p.40.
[76] ibid, p.57.
[77] ILC ARSIWA, art.39.

decline in its revenues.[78] With the loss in its revenues after the fall-winter of 2013, representatives of Mekar Airservices once again cautioned Caeli's expansion would cause further loss.

[96] Furthermore, according to a third party rating system Fitch Ratings, regarding to ill-strategized business plans, it provides that Vemma's debt structure '*provides it with little financial flexibility and leaves insufficient funds for overall for overall sustainable growth*[79]'. Regarding to future plans of Vemma, Fitch Rating has also proved that Vemma is '*under pressure to conclude a sale of its airline operations in Mekar to shore up liquidity unless it finds alternative financing sources*.[80]' This further proves that Vemma's loss in its investment was largely due to its own immature financial plannings, and therefore, the Claimant should pay responsibility in its own losses.

[97] In the *Yukos* case, the tribunal reduced the compensation by 25% due to the tribunal have found that the Claimant's aggressive tax avoidance strategies were abusive and unlawful[81]. And also, in the *MTD* case, tribunal made a total of 50% deduction to the compensation reasoning that the Claimant in that case failed to investigate pre-existing regulations in the country resulting in not being able to use the land as the Claimant had hoped[82]. In *Occidental*, the tribunal reduced the compensation by 255 with the reason that the Claimant has transfer its rights on concession contract to a third-party without the Respondent's consent causing a breach of explicit prohibitions in transferring such rights[83].

[98] Furthermore, as mentioned the Claimant themselves has breached the contract first through having ill-strategized business plans and engaged in

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78 Record, p.34.
79 ibid, p.89.
80 ibid, p.89.
81 *Yukos*, ¶¶1694, 1763, 1767-1768.
82 *MTD*, ¶¶93-101.
83 *Occidental,* ¶¶575-582.

anti-competitive behaviours which were explicitly prohibited in Mekar. The tribunal should take into considerations in applying the principle of contributory negligence and decrease the Respondent's compensation due to the Claimant's own negligence.

ii. The MFN Clause under CEPTA Article 9.7(1) does not apply in this case

[99] According to clause 9.7(2)[84], it stated clearly that the treatment referred to in paragraph 1 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. and that substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.

C. The Respondent sincerely request the Tribunal to consider that Mekar is currently suffering an economic crisis

[100] Mekar is currently taking cautious approach towards its economic situations, and that such approach was the fundamental reason of why CCM and Mekar enforce its anti-competitive investigations, thus the Claimant would not be exempt from the consistence regulation State organs apply to its investors and investments.

[101] In addition, according to the *preambles* of the *CEPTA*, it stated that: '*RECOGNISING the differences in their levels of development and diversity of economies*'[85]. The goal of this CEPTA is to promote and protect investors and investments. However, if Mekar's economy is suffering a low development and

[84] Record, p.76.
[85] ibid, p.71.

negative economic growth, it is reasonable that the State priorities its economic status over foreign investors and investments.

PRAYER FOR RELIEF

The Respondent respectfully requests the Tribunal to adjudicate and declare that:

1. The Tribunal does not have jurisdiction over the Claimant's claim under CEPTA;

2. The Tribunal should not grant the leave sought of CBFI and should grant that of CPUR for filing the *amici* submissions;

3. The Respondent has not violated article 9.9 of the CEPTA;

4. The Respondent is entitled to submit for the appropriate compensation standard, which is the market value standard.