TEAM SETTE

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

Vemma Holdings Inc.

(Claimant)

v.

The Federal Republic of Mekar

(Respondent)

MEMORIAL FOR RESPONDENT

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TABLE OF ABBREVIATIONS

cited as	*full citation*
Mekar	The Federal Republic of Mekar
Vemma	Vemma Holdings Inc.
Bonooru	The Commonwealth of Bonooru
SOE	State-owned enterprise
CBFI	The Consortium of Bonoori Foreign Investors
CRPU	The Committee on Reform of Public Utilities
MRTPA	Monopoly and Restrictive Trade Practice Act
CCM	Competition Commission of Mekar
Caeli	Caeli Airways JSC
MA	Mekar Airservices Ltd
Lapras	Lapras Legal Capital
BPB	PJSC Bonoorian People's Bank

MFN	Most-favoured-nation treatment
FET	Fair and equitable treatment
CILS	The Centre for Integrity in Legal Services

LIST OF AUTHORITIES

I. TREATIES AND CONVENTIONS

cited as	*full citation*
CEPTA	Comprehensive Economic Partnership and Trade Agreement between the Commonwealth of Bonooru and the Federal Republic of Mekar (2014)
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 159 (1965)
AFR	ICSID Additional Facility Rules (2014)
VCLT	Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969)
ILC Articles	The Draft Articles on Responsibility of State for Internationally Wrongful Acts, No.10 (A/56/10）
Transparency Rules	United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (A/68/462)
UN Convention against Corruption	The United Nations Convention against Corruption (A/58/422)
New York Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
EU-Canada CETA	The EU–Canada Comprehensive Economic Trade Agreement (2016).

II. INVESTMENT ARBITRAL AWARDS, DECISIONS, AND OTHER DOCUMENTS

cited as	*full citation*
CSOB	Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision on Objection to Jurisdiction
Bosh	Bosh International, Inc. and B&P, LTD Foreign Investments Enterprise v. Ukraine, ICSID Case No. ARB/08/11, Award

Salini	Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction
MHS	Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10, Award
Joy Mining	Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award
EDF	EDF (Services) Limited v. Republic of Romania, ICSID Case No. ARB/05/13, Award
Mitchell	Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Final Award
Philip Morris	Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Urguay, ICSID Case No. ARB/10/7, Final Award.
Apotex I	Apotex Inc. v. the Government of the United States of America (I), Award on Jurisdiction and Admissibility, ICSID Case No. UNCT/10/2, 14 June 2013.
Apotex II	Apotex Holdings Inc. and Apotex Inc. v. United States of America (II), Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party, ICSID Case No. ARB(AF)/12/1, 4 March 2013.
Biwater	Biwater Gauff Ltd., v. United Republic of Tanzania, ICSID Case NO. ARB/05/22, Final Award.
Inceysa	Inceysa Vallisoletana, S.L. v. Republic of El Salvador, ICSID Case No. ARB/03126, Final Award.
World Duty Free Company	World Duty Free Company Limited v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, 4 October 2006, Final Award.
Bear Creek Mining Corporation	Bear Creek Mining Corporation v. Republic of Peru, Procedural Order No.6, 21 July 2016.
Suez	Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Final Award.

UPSA	United Parcel Service of America Inc. v. Government of Canada, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001.
Resolute Forest Products	Resolute Forest Products Inc. v. Government of Canada, Procedural Order No. 6 - Decision on Amicus Application, 29 June 2017.
Bernhard von Pezold	Bernhard von Pezold v. Republic of Zimbabwe, ICSID Case NO. ARB/10/15, Final Award.
Loewen Group	Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3.
White Industries	White Industries Australia Limited v. The Republic of India, IIC 529 (2011), Award
Azinian	Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States, ICSID Case No. ARB(AF)/97/2, Award
Lemire(II)	Joseph Charles Lemire(II), ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability
CMS	CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8, Award
LG&E	LG&E Energy Corp. and Others v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability.
Siag	Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award.
Paushok	Sergei Paushok, CJSC Golden East Company and CJSCVostokneftegaz Company v. The Government of Mongolia, Ad hoc Arbitration, Award on Jurisdiction and Liability.
GAMI	GAMI Investments, Inc. v. United Mexican States, Ad hoc Arbitration, Award.
Impregilo	Impregilo S.p.A. v. Argentine Republic (I), ICSID Case No. ARB/07/17, Award

El Paso	El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Award
Azurix	Azurix Corp. v. The Argentine Republic (I), ICSID Case No. ARB/01/12, Award
MTD	MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile, ICSID Case No. ARB/01/7, Award.
CME	CME Czech Republic B.V. v. The Czech Republic, IIC 62 (2003), Separate Opinion on the Issues at the Quantum Phases of CME v. Czech Republic by Ian Brownlie, C.B.E., Q.C.
OECD Guidelines	The OECD Guidelines on Corporate Governance of State-Owned Enterprises (2015)
India Model BIT	Model Text for the Indian Bilateral Investment Treaty (2016)

III. DECISIONS OF INTERNATIONAL COURTS AND TRIBUNALS

Costa Rica v. Nicaragua	Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009, p. 213.
China National Oil	China National Oil Joint Service, Shenzhen Branch v. Gee Tai Holdings Co. Ltd. (1992 No. MP 2411).

IV. TREATISES

Broches	Broches, Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law.
Rubins, the Notion of "Investment"	Dugan, C., Wallace, D., Rubins, N. and Sabahi, B., 2011. Investor-state arbitration, Oxford University Press.
Campbell McLachlan, Laurence Shore and Matthew Weiniger	McLachlan, C., Shore, L., & Weiniger, M. (2017). International investment arbitration: substantive principles (2nd ed., pp. LXVII, 630), Oxford University Press.
WBG	WBG, History of the ICSID Convention, Vol. II, SID/LC/SR/19 (Jan. 4, 1965).
Wolff	Wolff R. New York Convention: Convention on the Recognition and

	Enforcement of Foreign Arbitral Awards (10 June 1958).
James Crawford	James Crawford, SC, FBA, Brownlie's Principles of Public International Law, Oxford University Press.
Duncan	Duncan B. Hollis, The Oxford Guide To Treaties, Oxford University Press.
Dörr O.	Dörr O., Schmalenbach K. Vienna convention on the law of treaties, Springer.

V. JOURNALS

Gary Born & Stephanie Forrest	Gary Born & Stephanie Forrest, Amicus Curiae Participation in Investment Arbitration, ICSID Reviews, Vol. 34, No. 3(2019).
Feldman	Mark Feldman, State-owned enterprises as Claimants in international investment arbitration, 31 ICSID REV. 24–35 (2016).
Ghouri	Ahmad Ghouri, International and Conflict of Treaties in Investment Arbitration, Kluwer Law International Vol.31 (2015).
F. A. Mann	British Treaties for the Promotion and Protection of Investments (1981) 52 BYbIL.
R Dolzer	R Dolzer, New Foundations of the Law of Expropriation of Alien Property, 1981, 75 AJIL.
Mario Prost	Mario Prost, Hierarchy and the Sources of International Law: A Critique, 39 Hous. J. INT'l L. (2017).
Hersch Lauterpacht	Hersch Lauterpacht, International Law – Collected Papers Vol.1 (1970).
Nicholas J. Diamond	Nicholas J. Diamond (Assistant Editor), 'Pandemics, Emergency Measures, and ISDS', Kluwer Arbitration Blog, April 13 2020. http://arbitrationblog.kluwerarbitration.com/2020/04/13/pandemics-emergency-measures-and-isds/

STATEMENT OF FACTS

1. **Vemma Holdings Inc. ("Vemma")** is a legal entity established under the domestic law of **the Commonwealth of Bonooru ("Bonooru")** and is mainly engaged in the airline business. As its actual controller, Bonooru owns 31%-38% of Vemma, while the rest of the shares are held by other private companies, none of which exceeds 7%.

2. As part of a privatization program, **the Federal Republic of Mekar ("Mekar")** decided to sell a controlling stake in the State-owned **Caeli Airways JSC ("Caeli")**. Mekar set up a competitive bidding process, securing bids from various airlines. Vemma's bid was successful and on 5 January 2011, Vemma acquired an 85% stake in Caeli. Mekar maintained 15% ownership through **Mekar Airservices Ltd ("MA")**.

3. Although Vemma invested significant capital into Caeli and turned Caeli into a venture generating net profit, Vemma adopted a competitive strategy of offering excessively low prices to attract more customers. Its pricing relied on the low price of petroleum and would cause certain regular losses. Such a business pattern would drive out smaller competitors and lead to monopoly. It hindered fair competition and normal market order.

4. On 9th Sep. 2016, **Competition Commission of Mekar ("CCM")** initiated an investigation against Caeli in violation of the Mekari law and the CEPTA. Under **the Monopoly and Restrictive Trade Practice Act ("MRTPA")**, as amended in 2009, such an investigation lies within the discretion of the CCM.

5. The fines associated with the first CCM investigation, along with the consequence of the second investigation that was requested by Caeli's competitors would not be enforced until the end of court reviews. As an interim measure of these investigations, the CCM placed airfare caps on Caeli. Caeli did not protest these caps.

6. Meanwhile, in the context of a deteriorating economic situation in Mekar in late 2016, the State must adopt necessary policies to maintain the value of its currency. In January 2018, as the crisis continued, Mekar required that all airlines price services exclusively in MON despite the constantly fluctuating price of the currency, which is crucial to the financial health of the State. Although it could hurt Caeli's profitability, Caeli's financial difficulty was mainly due to its

irrational and risky expansive strategy in the past.

7. On September 25, 2018, Mekar's President passed Executive Order 9-2018 which granted subsidies for airlines operating in Mekar. Executive Order 9-2018 denied subsidies to Caeli because Bonooru owns a significant stake in Vemma.

8. Vemma protested these actions in Mekari courts, but its claims were denied. Although Mekar's judicial resources were limited, the courts managed to hear the cases in due time.

9. Vemma then decided to sell the stake of Caeli and acquired an offer from the third party, Hawthorne Group LLP. Under the Shareholders' agreement between Vemma and MA, Vemma was required to offer MA the right to purchase the shares at the price offered by Hawthorne Group. Hawthorne Group could not be deemed an arm's length buyer due to its Moon Alliance membership, therefore Mekar could not regard the price bona fide and rejected the deal. MA instead offered the market value price for the stake.

10. On 11 February 2020, the dispute over the validity of Hawthorne Group's offer was submitted to arbitration under the rules of the Sinnoh Chamber of Commerce with the seat of the arbitration in Sinnoh. Mr. Rett Eichel Cavannaugh was selected as the sole arbitrator by the SCC Secretariat, given that the parties failed to agree on the candidacy of the arbitrator in good time.

11. On 9 May 2020, Mr. Rett Eichel Cavannaugh ruled that Hawthorne Group's offer was not an arm's length offer, given that the latter was affiliated with Vemma by virtue of their membership in the Moon Alliance. After the release of the award, Mr. Cavannaugh was accused of lack of impartiality and accepting bribery, and on 1 August 2020, the Supreme Arbitrazh Court of Sinnograd set aside the 9 May 2020 award. Yet as per **the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")**, Mekar retains the right to enforce the arbitral award in its discretion.

12. On 23 August 2020, Mekar's court enforced the award. Vemma tried to appeal this decision, yet its claim was denied. Ultimately, it sold its shares at the rate offered by MA.

SUMMARY OF ARGUMENTS

1. The Claimant, Vemma has invested in the aviation industry of Mekar, Respondent, through buying Caeli's stock by bribery. This investment finally failed because of unreasonable operating strategies of Vemma. It also caused a terrible damage on Mekar's economic environment. Therefore, the Mekari government took some measures on these illegal operating actions under the domestic law and the international law.

2. Claimant would like to raise the following four issues in this dispute:

2.1 First, the Tribunal has no jurisdiction over the dispute. The Tribunal has no jurisdiction *ratione personae* because Claimant is a government agent and performs essential government functions; it also has no jurisdiction *ratione materiae* because Claimant's business activities do not satisfy the *Salini* test.

2.2 Second, the Tribunal should reject amicus submissions from **the Consortium of Bonoori Foreign Investors ("CBFI")** and grant leave to file amicus submissions to **the external advisors to the Committee on Reform of Public Utilities ("CRPU")** of Mekar. The amicus submissions from the external advisors satisfy orders for a qualified amicus curiae's submission, while that from CBFI does not.

2.3 Third, Respondent has not violated **fair and equitable treatment ("FET")** stipulated in Article 9.9 of CEPTA. Mekar has not exerted denial of justice upon Vemma, and its actions are not in contrary to its commitment of protection from arbitrary or discriminatory treatment. Besides, Mekar's actions are not in contrary to its commitment of protection from arbitrary treatment. And Mekar does not have a separate obligation to safeguard Vemma's legitimate expectation under the CEPTA. Even if such an obligation exists, Mekar did not breach that obligation.

2.4 Fourth, the fair market value standard should not be applied. Claimant submits that Claimant should be compensated in accordance with the fair market value standard. However, Respondent submits that Claimant's argument is unfounded, because the compensation standard stipulated in CEPTA should be applied with priority. The **most-favoured-nation treatment ("MFN")** clause in CEPTA cannot render the application of fair market value standard. Besides, the compensation should be reduced because of Claimant's contribution to losses and Respondent's economic situation.

ARGUMENT

I. THE TRIBUNAL HAS NO JURISDICTION UNDER CHAPTER 9 OF THE CEPTA.

1. The CEPTA concluded between Bonooru and Mekar defines a qualified investment and investor respectively. As per Article 2 of the **ICSID Additional Facility Rules ("AFR")**, the Tribunal has jurisdiction only when Claimant is a qualified investor and the stake it purchased as well as the business it operated constitutes an investment. In the present case, the activities of Claimant and Vemma itself are not qualified under the CEPTA and the ICSID system. Therefore, the Tribunal does not have jurisdiction over the unqualified investment **(A)** and investor **(B)**. Respondent did not agree to resolve the dispute with Claimant via State-to-State arbitration.

A. The Tribunal has no jurisdiction *ratione personae*.

2. For the Tribunal to have jurisdiction *ratione personae*, Article 2 of the AFR requires either the State party to the dispute or the State whose national is a party is a contracting state to **the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention")**. Bonooru has signed and ratified the ICSID Convention, and Mekar has not.[1] Claimant must meet the requirements for an investor set in the CEPTA and the AFR (with reference to the ICSID instruments) simultaneously before initiating arbitration against Mekar.[2] Claimant is not a national as per Article 2 of the AFR because its actions are attributed to Bonooru.

3. By March 2021, Bonooru increased its shareholding in Vemma to a controlling 55% stake.[3] Even though the State did not hold a dominant percentage of stake before, with reference to **the OECD Guidelines on Corporate Governance of State-Owned Enterprises ("OECD Guidelines")**, any corporate entity recognized as an enterprise by national law and in which the state has ownership rights shall be considered a **state-owned enterprise ("SOE")**.[4] The Tribunal can apply the *Broches test* to decide if Claimant, as a SOE, is a qualified national. The tribunal in the *CSOB* case cited this test that a mixed economy or a government-owned company should not be disqualified,

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[1] Statement of Uncontested Facts, ¶ 20.
[2] Ghouri, p. 24.
[3] Statement of Uncontested Facts, ¶ 65.
[4] OECD Guidelines, ¶ 14.

unless it acts as a government agent (*1*) or performs essential governmental functions (*2*).[5] An action-focused approach should be used.

1. Claimant is a government agent.

4. Aron Broches did not elaborate what kind of deeds shall constitute a government agent and governmental functions. Well-developed customary international law attribution rules are applicable in delineating the boundary of the home State's participation.[6] Although **the Draft Articles on Responsibility of State for Internationally Wrongful Acts ("ILC Articles")** was originally designed for attributing enterprises' responsibilities to the host State, the language and the approach of the ILC Articles indicate that they refer to the attribution of conduct generally.[7] As per Article 5 of the ILC Articles, if an entity possesses and exercises governmental authority in the instance at issue, it shall be covered by the first limb of the *Broches test* and its actions are attributed to its home state.[8]

5. To prove that Claimant acts as a government agent, approval from the authority and specific actions conducted according to this allocated authority are requisite.[9] In accordance with Article 70 of the Constitution Act of Bonooru and the decisions of the Bonoori Constitutional Court, the State has the obligation to promote aviation infrastructure and to ensure the Bonoori people's mobility rights. Claimant has actually performed the task, as is reflected in its Memorandum of Association and the speech of the Prime Minister of Bonooru[10]. As the head of Vemma's board of directors as well as a government official, Ms. Sabrina Blue also acknowledged that Claimant's shareholding and operation in Caeli has promoted the development of the corresponding infrastructure for air routes and enhanced the mobility rights of the Bonoori people in the Greater Narnian Region[11]. In other words, Claimant adopts the appropriate authority and has exercised such authority in its investment in Caeli. Therefore, Claimant's actions as a government agent should be attributed to Bonooru.

2. Claimant performs essential governmental functions.

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[5] Broches, p. 201
[6] Feldman, p. 32.
[7] Broches, p. 133.
[8] Bosh, ¶¶ 153-154; EDF, ¶ 200.
[9] WBG, pp. 288-289, 321, 366, 393, 396-397, 446-447, 507.
[10] Statement of Uncontested Facts, ¶ 8.
[11] Statement of Uncontested Facts, ¶¶ 22, 28; Procedural Order No. 4, ¶ 6.

6. Furthermore, Claimant performs essential governmental functions. As per Article 8 of the ILC Articles, the conduct of an entity shall be considered as the State's conduct under international law if its action is in fact instructed or directed by that State. One significant distinction between SOEs and private enterprises is that there exist potential non-commercial purposes, which can sometimes even impair national security. In such circumstances, corporate interests are secondary, while the purposes to be achieved through authorization deserve the Tribunal's concern. With the largest shareholder status and active participation in the board of directors, the Bonoori government is capable of establishing effective control of Vemma's strategic operations.[12]

7. For example, in the bidding process, Claimant made a commitment to refinance Caeli's debts,[13] but such a commitment should be made by the lender, **PJSC Bonoorian People's Bank ("BPB")**. It can be inferred that such a commitment was essentially made by the Bonoori government**,** the controller of both Caeli and BPB. In other words, the government of Bonooru is the real bidder. In the operation process, Claimant has been implementing the Caspian Project proposed by the government**,** which includes facilitating international air services for the State's diplomatic strategy.[14] In accordance with the Caspian Project, Claimant has been subsidized by Bonooru and its abnormal operations via Caeli indicate the direction of the government behind.[15] Even if its operating model was riskier, as it generated regular losses and such a pattern was warned by MA and other professionals, Claimant still insisted on its development strategy depending on the low price of petroleum to promote the project.[16] Therefore, Respondent has reasons to believe that Claimant's bidding and operations were under the control and command of the Bonoori government. Claimant performed essential governmental functions in the process of bidding and operations in Caeli. In conclusion, the Tribunal has no jurisdiction over the case.

B. The Tribunal has no jurisdiction *ratione materiae*.

8. The Tribunal has jurisdiction on legal disputes arising directly out of an investment as per Article 2 of the AFR. In examining whether the requirements for investment have been met, most tribunals

[12] Statement of Uncontested Facts, ¶ 10; Procedural Order No. 3, ¶ 3; Procedural Order No. 4, ¶ 2.
[13] Statement of Uncontested Facts, ¶ 23.
[14] Statement of Uncontested Facts, ¶¶ 4, 28.
[15] Statement of Uncontested Facts, ¶ 28.
[16] Statement of Uncontested Facts, ¶¶ 30-31.

applied a dual test: whether the activity in question is covered by the parties' consent and whether it meets the ICSID Convention's requirements.[17] The stake of Caeli that Claimant purchased and the business it operated cannot constitute an investment as per both standards. Therefore, the Tribunal has no jurisdiction *ratione materiae*.

9. The ICSID Convention and the AFR do not define investment. The ICSID cases suffice as references in the interpretation of investment as per **the Vienna Convention on the Law of Treaties ("VCLT")**. The *Salini test* set in the *Salini* case provides an approach to distinguish if an alleged investment falls under the proper category of investment. The Test requires an investment to satisfy a factor, substantial contribution to the economic development of the host State[18]. Some tribunals pointed out that investment should be interpreted as an activity promoting some form of positive economic development for the host State[19]. In the *Joy Mining* case, the tribunal even noted that to satisfy the *Salini test*, the contribution an investment made to the host state should be significant. The *Joy Mining* tribunal also decided that it lacked jurisdiction over the case because the business activity involved could not make significant contribution to the State[20].

10. As wider references, the Preamble of the ICSID Convention notes "the need for international cooperation for economic development". The preamble of the CEPTA includes the objective to "bring economic growth and social benefits" as well. However, Claimant's business conduct under the direction of its home State violated the MRTPA of Mekar and hindered fair competition, leaving a terrible influence on Mekar's economic environment.[21] Therefore, the stake of Caeli owned directly by Claimant does not constitute an investment due to its failure to contribute to the economic development of Respondent. Therefore, Claimant's stake of Caeli cannot constitute an investment due to its failure to contribute to Respondent's economic development.

II. THE TRIBUNAL SHOULD REJECT AMICUS SUBMISSIONS BY CBFI AND GRANT LEAVE TO FILE AMICUS SUBMISSIONS TO EXTERNAL ADVISORS TO CRPU.

[17] MHS, ¶ 55; Salini, ¶ 36, 44; Rubins, pp. 289–290.
[18] Salini, ¶ 52.
[19] CSOB, ¶ 64; MHS, ¶ 68; Mitchell, ¶ 56.
[20] Joy Mining, ¶ 53.
[21] Statement of Uncontested Facts, ¶¶ 34-38.

11. The Tribunal may accept and consider written amicus submissions that satisfy the following requirements[22]: the amicus submission can assist the Tribunal in determining a factual or legal issue **(A)**; the non-disputing party has a significant interest in the proceeding **(B)**; the submission would address a matter within the scope of the dispute **(C)**; the submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party **(D)**. Further, Respondent may ask the Tribunal to consider the public interest involved in arbitration **(E)**.[23]

A. Assistance in the determination of a factual or legal issue related to the proceeding.

12. The *Philip Morris* tribunal and *Apotex I* tribunal hold the view that assistance in the determination of a factual[24] or legal[25] issue related to the proceeding means that "*the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different*[26] *from that of the disputing parties*".[27] In general, the applicant must demonstrate that its submission will be sufficiently 'different' in content and perspective from those of the disputing parties.[28] Respondent holds the view that the external advisors of CRPU's submission caters to this standard (*1*), CBFI's submission, nevertheless, fails to do so (*2*).

1. CRPU's amicus submission provides a different perspective from that of disputing parties.

13. As the external advisors to the CRPU, the amici had actively participated in the deliberations of the Committee in the process of the acquisition of Caeli by Claimant, including performing an audit and an analysis of economic.[29] Due to the nature of their profession, the external advisor to the CRPU conduct audits and other work independently from Respondent.[30] Such a position can acquire information about bribery of Claimant in the acquisition, which Respondent does not

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[22] AFR, Article. 41.2.
[23] Transparency Rules, Article 1.4(a).
[24] Philip Morris, ¶ 46.
[25] Apotex I, ¶ 21.
[26] Apotex I, ¶ 21.
[27] AFR, Article 41.3.a.
[28] Gary Born & Stephanie Forrest, ¶¶ 646–647.
[29] Amicus Submission by CRPU, ¶¶ 2-3.
[30] Amicus Submission by CRPU, ¶ 3.

have.[31] Besides, the court probably has difficulties gaining evidence against Claimant through other channels except external advisors' submission. Therefore, the independent participation in the entire privatisation process gives external advisors a unique position to adduce unbiased facts[32] before the Tribunal that may not be obtained from either disputing party.

14. Furthermore, the fact that the rights received by Claimant were procured by means of bribery paid to Mr. Dorian Umbridge[33] is significant to the jurisdiction of the Tribunal, because as the *Inceysa* tribunal says, the legality of investment will affect jurisdiction under international law.[34] The ICSID tribunal does not have jurisdiction over the investment made by illegal ways under international law, such as international public policy.[35] The *World Duty Free Company* tribunal thinks that anti-corruption is an international public policy.[36] Claimant's action to make an investment violated this international public policy, thus it will influence the jurisdiction of Tribunal. Besides, anti-corruption is also an objective of the CEPTA,[37] so this fact will also influence the rights and obligations of the parties under the CEPTA.

15. Therefore, the external advisors' submission would address a matter within the scope of the dispute and can assist the Tribunal in determining a factual or legal issue from a unique perspective.

2. CBFI's amicus submission does not provide a different perspective from that of disputing parties.

16. Beyond the submissions by the disputing parties, in *Bear Creek Mining Corporation* case, the tribunal holds that an amicus application needs to contribute further information or arguments that would assist the Tribunal in the determination of a factual or legal issue related to the arbitration.[38]

17. The information CBFI provided includes the business climate of Bonooru, the existing corporate framework in which enterprises operate, and the nature of the aviation industry in Bonooru.[39]

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[31] Amicus Submission by CRPU, ¶ 4.
[32] Biwater, ¶ 377.
[33] Amicus Submission by CRPU, ¶¶ 4-5.
[34] Inceysa, ¶ 245.
[35] Inceysa, ¶ 252.
[36] World Duty Free Company, ¶ 134.
[37] CEPTA, preface, ¶ 5.
[38] Bear Creek Mining Corporation, ¶ 38.
[39] Amicus Submission by CBFI, ¶ 10.

However, these facts have been adequately stated by disputing parties in the Statement of Uncontested Facts.[40] Therefore, the CBFI's amicus submission cannot contribute further information or argument as it mainly repeats existing information. CBFI's submission does not meet the requirement on "different".

B. Significant interest in the proceeding.

18. The *Apotex I* tribunal holds that significant interest means the outcome of the arbitration may have a direct or indirect impact on the rights or principles the applicant represents and defends.[41] Besides, although the outcome of arbitration may influence on the third party, the third party shall be independent in the proceeding.[42] Like the *Suez* case, as an independent party, the external advisors to CRPU have significant interest in the proceeding (*1*), however, CBFI does not (*2*).

1. The external advisors have a significant interest in the proceeding.

19. To promote fair business practices in Mekar is a very important objective of the external advisors and stagnation in anti-corruption efforts in Mekar also impacts the financial operation of them.[43] If the Tribunal recognizes this bribery fact and supports it, it will destroy the financial operation of Mekar fundamentally. Hence, the external advisors have a significant interest in the proceeding.

20. Furthermore, as a non-governmental organization, CRPU operates independently of the Mekar government and is not funded by any government-related sources. Therefore, the external advisors are independent from the proceeding.

2. Lapras fails to meet the requirement of independence.

21. The amicus curiae should be independent from both disputing parties, i.e., should not receive any financial or other support or interests from either disputing party.[44] As the tribunal in *Suez* case says, the apparent lack of independent or neutrality of the applicants was sufficient ground to deny the application.[45] Therefore, the amicus curiae under ICSID Rules should own an independent

[40] Statement of Uncontested Facts, ¶¶ 2-3.
[41] Apotex I, ¶ 21.
[42] Suez, ¶ 19.
[43] Amicus Submission by CRPU, ¶¶ 4-5.
[44] Suez, ¶ 20.
[45] Bernhard von Pezold, ¶ 49.

status, or at least provide sufficient information on financial or other of interests or supports from disputing parties. Financial interests, business interests and property interests may be considered here.[46]

22. In the pending case, the amicus curiae only adduced the fact that **Lapras Legal Capital ("Lapras")**, a member of the amicus curiae, is advising Vemma on funding strategies with respect to its claim against Mekar.[47] Without information on whether Lapras was receiving any financial or other support from Claimant or owing any financial interest relevant with Claimant, Lapras fails to meet the requirement of an independent status as amici curiae. Hence, such conflicts of interests[48], like situations in *Bernhard von Pezold* case, challenge CBFI's independent position.

C. The matter is in the scope of the dispute.

23. Contrast to Claimant's statement, the external advisors' submission is in the scope of the dispute. The AFR read that "the non-disputing party submission would address a matter within the scope of the dispute."[49] It means that amicus curiae cannot be used to turn the dispute the subject of the arbitration into a different dispute[50], as the *UPSA* case's tribunal holds, emphasizing the matter of amicus submission should be in the scope of the dispute.[51]

24. The external advisors' amicus submission mainly concerns Claimant's bribery in the acquisition of Caeli. The presence of such bribery could affect the assessment of the legality of Vemma's investment, which is crucial to the determination of the Tribunal's competence-competence.[52] Therefore, the matter of amicus submission by the external advisors CRPU is in the scope of the dispute.

D. Participation of the amicus does not undermine the fairness or efficiency of the arbitral process.

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[46] Suez, ¶ 17.
[47] Procedural Order No.3, ¶1 2.
[48] Bernhard von Pezold, ¶ 49.
[49] AFR, Article 41.3.b.
[50] UPSA, ¶ 60.
[51] Biwater, ¶3 85.
[52] World Duty Free Company, ¶ 134.

25. The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party".[53] Fairness and efficiency are not merely factors or criteria to be considered by tribunals, but mandatory safeguards that tribunals must "ensure".[54] Amicus submission by the external advisors by CRPU does not undermine the fairness or efficiency of the arbitral process (*1*). However, Amicus submission by CBFI unduly burdens the disputing parties (*2*).

1. Amicus submission by the external advisors by CRPU does not undermine the fairness or efficiency of the arbitral process.

26. Considering the fact that the substantive trial has not taken place yet, the timing of the filing of the amicus submission by the external advisors is appropriate and not unduly burdensome. As mentioned above, the bribery facts included in the amicus submission by the external advisors have a crucial impact on determination of the Tribunal's competence-competence. Therefore, the review of the amicus submission by the external advisors is necessary and is not disruptive to the proceedings.

2. Amicus submission by CBFI unduly burdens the disputing parties.

27. In *Resolute Forest Products* case, the tribunal thinks if the application of an amicus curiae would unnecessarily burden the disputing parties by imposing further work, time and expense on them.[55] Pursuant to the ICSID Additional Facility Rules, the Tribunal has the duty to ensure the non-disputing party submission does not unduly burden the disputing parties.[56] As mentioned above, most of the facts in the CBFI's amicus submission have been adequately stated by disputing parties in the Statement of Uncontested Facts. CBFI's amicus submission is only a repetition of existing information. Therefore, there is no necessity to consider the CBFI's amicus submission. Amicus submission by CBFI unnecessarily burdens the disputing parties.

E. Pursuit of "Public Interest".

[53] AFR, Article 41.3.
[54] Gary Born & Stephanie Forrest, ¶ 652–653.
[55] Resolute Forest Products, ¶ 4.8.
[56] AFR, Article 41.2.

28. Under the CEPTA, **the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration ("Transparency Rules")** is available to proceeding with the consent of Mekar.[57] The public interest is one of the considerations in deciding whether to grant the leave sought for filing amici submissions.[58] The "public interest" factor has generally been satisfied if the applicant has shown that the tribunal's decision is likely to affect persons other than the parties to the arbitration,[59] it means that the general welfare of the public that warrants recognition and protection.[60] The submission of the external advisors shows public interest exits (*1*), but CBFI does not (*2*).

1. The submission of the external advisors shows public interest exits.

29. Claimant acquired Caeli's property through bribery and thus acquired the rights under CEPTA. The fight against corruption, as a matter of international consensus,[61] especially Claimant and Respondent,[62] is a matter of public interest.[63] In addition to this, as it relates to the ability to arbitrate, as *Inceysa* tribunal says, such corruption has a direct impact on the fairness and impartiality of international investment arbitration.[64] Therefore, the external advisors' submission challenge to the legality of Claimant's investment property is related to the public interest.

2. The submission of CBFI does not show a public interest exits.

30. CBFI has only presented the impact of the tribunal's decision on its own interests, and has not addressed the public interest. The impact of Respondent's judicial system presented by CBFI is only a subjective speculation, not supported by relevant facts. Also, CBFI does not argue that this effect is related to the public interest. Therefore, CBFI's opinion is not associated with public interest.

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[57] CEPTA, ¶ 9.20.6.
[58] Transparency Rules, Article 1.4.a.
[59] Apotex II, ¶ 35–6; Suez, ¶ 18.
[60] Suez, ¶ 18.
[61] UN Convention against Corruption.
[62] CEPTA, preface, ¶ 5.
[63] World Duty Free Company, ¶ 134.
[64] Inceysa, ¶ 245.

31. In addition, the CBFI may argue that its amicus curiae opinion contributes to the transparency of the arbitration and that there is therefore a public interest consideration.[65] But the public interest itself is derived from the guarantee of transparency,[66] and therefore the public interest in transparency should not be considered in the public interest determination here.

III. RESPONDENT HAS NOT VIOLATED FET STIPULATED IN ARTICLE 9.9 OF CEPTA.

32. Article 9.9 of the CEPTA stipulates the FET referred to the investors.[67] Article 9.9 (2) lists explicitly the circumstances where Respondent breached the FET. Here, Respondent has not violated the FET because Respondent's organ[68] did not deny justice upon Claimant**(A)**, take arbitrary or discriminatory conduct **(B)** or frustrate investor's legitimate expectation **(C)**. The actions taken by Respondent are necessary regulatory conducts **(D)**.

A. Mekar has not exerted denial of justice upon Vemma.

33. Vemma claims it had to submit the dispute to arbitration because it suffered from denial of justice in Mekar. However, denial of justice includes situations where Claimant is denied access to local judicial remedies (*1*) or undergoes undue delays in seeking relief (*2*). Mekar acknowledges these standards and shall explain that Mekar has not exerted denial of justice upon Vemma.

1. Vemma has not exhausted local remedies before turning to arbitration.

34. Article 26 of the ICSID Convention provides, "A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention." In *Loewen Group,* the local remedies rule is explained as "an obligation to exhaust remedies which are effective and adequate and are reasonably available to the complainant in the circumstances in which it is situated".[69] In the view of exhausting local remedies, the State is not yet responsible for the misjudgments of domestic courts before the decision made by the court of last resort comes out, so the State responsibility should be taken into account only when the final

[65] Amicus Submission by CBFI, ¶ 4-5.
[66] Transparency Rules, Article 1.4.a.
[67] CEPTA, Article 9.9.
[68] ILC Draft, Article 4.
[69] Loewen Group, ¶ 49.

action comes out representing the State's judicial system as a whole. In other words, the State still possesses the opportunity of correcting the breach of rights through its legal system. Vemma has reached final results of its appeals against the airfare caps and the enforcement of the Sinnoh arbitration, yet the written decision for the May 2020 hearing with respect to fines has not been released yet.[70] Therefore, Vemma has not fully resolved all its disputes in Mekar before applying for an ICSID arbitration. With the hope of final justice, it is not necessary for Vemma to claim all tremendous compensation through arbitration, yet Vemma insists taking these inappropriate actions. Therefore, the Tribunal should not find Mekar responsible for denial of justice in this respect.

2. Vemma has not undergone undue delays in seeking relief.

35. In *White Industries*, the tribunal applied the "effective means" standard, of which one section is "indefinite or undue delay in the host State's courts dealing with an investor's 'claim' may amount to a breach of the effective means standard".[71] It indicates it is not necessary to exhaust local remedies when facing undue delays in seeking judicial relief.

36. Yet this example does not support Vemma's application, as the undue delay of the Indian Supreme Court in the case was over seven years, while the situation in Mekar is not comparable in seriousness. Due to limited judicial resources, Mekar's policy prioritizes criminal cases while the legal system tries its best to resolve important investment disputes. Vemma's disputes occurred in March 2018. CCM imposed fines in August 2018 and hearing was scheduled , and the hearing was scheduled in May 2020.[72] For reference, the average time to receive the final decision of commercial cases is 27 months.[73] The length of the proceeding in this case is normal, and Vemma still maintained nearly 40% of market share in Mekar.[74] With expectation for the final result in due time and opportunities to recover its financial health, Vemma could have kept running its business rather than inevitably sold its stake. The Tribunal should not find Respondent caused

[70] Statement of Uncontested Facts, ¶ 64.
[71] White Industries, ¶ 11.3.2.
[72] Statement of Uncontested Facts, ¶ 50.
[73] Statement of Uncontested Facts, ¶ 13.
[74] Statement of Uncontested Facts, ¶ 55.

undue delay in the procedures so that Vemma could not exhaust judicial remedies before applying for arbitration.

37. Claimant submits that enforcing the award set aside by court in Sinnograd constitutes denial of justice. Clear and malicious misapplication of the law is the fourth type of denial of justice.[75] However, Claimant has to prove that Respondent court's judgment is so insubstantial, or so bereft of a basis in law.[76] This means that if enforcement of Respondent's courts is complying with law, Respondent does not exert denial of justice.

38. Here, under Article V of New York Convention, the domestic court of contracting countries has the discretion, even the grounds for refusal of enforcement are satisfied.[77] Article V of New York Convention stipulates that recognition and enforcement may be refused, if the grounds listed are satisfied.[78] The wording *may* indicates the possibility to do rather than required to do.[79] Many jurisdictions adopt such understanding about the Article V of New York Convention. The Hong Kong court discussed such problem in *China National Oil*. The court finds that even though a ground has been proved, the court retains a residual discretion to enforce the award.[80] Therefore, Respondent's court has the discretion to enforce an award which is set aside, and such enforcement is complying with New York Convention.

39. Even if the Tribunal agreed with the Claimant that the content of judgement can constitute denial of justice, this requires Claimant to prove Respondent's court misapplies law in a clear and malicious way. However, in this case, Respondent's court is exercising the discretion empowered by New York Convention. Such activity cannot be deemed as denial of justice.

B. Mekar's action are not in contrary to its commitment of "protection from arbitrary or discriminatory treatment".

[75] Azinian, ¶ 103.
[76] Azinian, ¶ 105
[77] Wolff, p. 277.
[78] New York Convention, Article 5.
[79] Black Law Dictionary
[80] China National Oil, ¶ 3.

40. Protection from arbitrary and discriminatory treatment originates from the customary international law. Precedents[81] under ICSID have established standards for determination of arbitrary and discriminatory treatment. *CMS* case set up the standard that "the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of the investment must be impaired by the measures adopted".[82]

41. The international customary law requires that the agreement between foreign investors and the home state should involve clauses providing protection from arbitrary and discriminatory treatment. In the pending case, no such clauses have been found in the available information yet. Even if such clauses are given, Mekar's actions are not in contrary to its commitment of protection from arbitrary (*1*) or discriminatory treatment (*2*), nor constitute abusive treatment (*3*).

1. Mekar's actions are not in contrary to its commitment of protection from arbitrary treatment.

42. The *CMS* and *EDF* tribunals have accepted the following categories of measures as arbitrary[83]: a measure that inflicts damage on the investor without serving any apparent legitimate purpose; that is not based on legal standards but on discretion, prejudice, or personal preference; that is taken for reasons that are different from those put forward by the decision maker; and taken in willful disregard of due process and proper procedure.

43. Claimant submits that three major actions of Mekar on Caeli were arbitrary: the two investigations, the caps and fines laid on Caeli; the rejection of granting subsidies to Caeli (*a*); the change of the economic policy in Mekar (*b*).

(a) CCM opened the investigations appropriately under the MRTPA.

44. Chapter III (2) of MRTPA provides that CCM has the power to open an investigation *suo Moto* on a corporation which obtains a market share lower than 50% in industries that require special attention[84]. The corporation poses a unique threat to the competition in a particular market and

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[81] Lemire(II), ¶ 262.
[82] CMS, ¶ 290.
[83] EDF, ¶ 303; Lemire(II), ¶ 262.
[84] MRTPA, Chapter III (2).

there is evidence the corporation's actions have, or are likely to push competitors out of the market in the near future.

45. In the First Investigation, CCM exercised its discretion in accordance with the provisions. The calculation of composite market shares of Caeli and the Royal Narnian is reasonable. The Moon Alliance members, especially the Royal Narnian, provided Caeli with overwhelming advantages over its competitors. For instance, the consequent equipment and fuel efficiency allowed it to avoid the deep losses faced by its competitors. [85] Consequently, Caeli was able to continue its strategy catering for customers and gain more market shares.

46. Even though the calculation is regarded as unreasonable, the preferential secondary slot-trading between the Royal Narnian and Caeli constructed the situation where CCM may open an investigation on a corporation that owns a lower market share than 50%. The aviation industry of Mekar is an industry that requires such special attention. One of Caeli's main market targets has been customers from Mekar to Bonooru, which is a particular market. As Ms. Sabrina Blue stated, Vemma's expansion into Mekar will offer substantial benefit to Bonooru[86], especially by attracting more tourists from Mekar and the Great Narnian Region to Bonooru. Therefore, there is a strong argument that the "Horizon 2020" Scheme is aimed at expanding Bonooru's interest in the particular market. There is another strong argument that Bonooru has helped Vemma so that Vemma could operate its bold and often risky business strategies. Such strategies for Caeli have been regarded as ill advice among industry experts[87]. Faced with such enormous support from a prosperous state, probably no individual aviation company can maintain their market shares. Therefore, there is a real risk that Caeli is likely to push competitors out of the market soon.

47. The caps on Caeli are also necessary to restrain Caeli's anti-competition. Caeli did not protest the aircraft caps, and there is no evidence the caps cast material loss on its profitability in 2016[88]. Moreover, CCM has never exercised its discretion in a similar way before. Thus, the frequency of CCM's use of such discretion does not exceed the standard of required "extraordinary rareness".

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[85] Statement of Uncontested Facts, ¶ 27.
[86] Id, ¶ 28.
[87] Aviation Analytics, ¶¶ 3-4.
[88] Statement of Uncontested Facts, ¶ 13.

48. In the Second Investigation, CCM exercised its discretion in accordance with the provisions. Chapter III (3) of MRTPA provides that CCM has the power to open an investigation into potentially anti-competitive behavior of a corporation if CCM has received a complaint and sufficient evidence brought by a direct competitor in the market.[89] As per Chapter IV of MRTPA, selling articles at a price lower than the acquisition cost to discipline or eliminate a competitor belongs to anti-competitive acts.

49. CCM has found that Caeli had undercut its ticket fares so that Caeli has overwhelming advantages in prices overweighing its competitors. Meanwhile, Caeli had gained significant additional privileges in terms of airport service fees from Phenac International Airport. Such income made up its loss resulting from low ticket fares, while other competitors did not have similar advantage. Moreover, Caeli had introduced excessively low prices only on routes to and from Phenac International and the strategy could not help Caeli gain new customers or increase revenues. By combining a significant market share with excessively low price, other competitors will find it impossible to gain profit in the market. Caeli should have been aware that its strategy will force its competitors out of the market, even if Caeli's initiative is only to provide Bonooru citizens with accessible flies according to the Bonoori constitution. Therefore, Caeli's act is a deliberate anti-competitive act and such an act will push its competitors out of the market. CCM's investigation was highly necessary.

50. In both investigations CCM has taken factors provided in MRTPA into full consideration and has conducted the investigations following legal procedures. As per Chapter IV of MRTPA, CCM granted prohibitive orders in that the results of both investigations show that Caeli's actions are in accordance with the definition of anti-competitive actions. The fines were legitimate and reasonable in that they were necessary warnings for Caeli to stop its anti-competitive actions. Justice Van Duzer's interim decision explained that the large market share that Caeli enjoys allows it to recover quickly from the economic crisis. Thus, the caps do not cast material consequences on Caeli.

[89] MRTPA, Chapter III (3).

51. Therefore, the two investigations, aircraft caps and the fines do not construct arbitrary treatment in that they are in accordance with the domestic law of Mekar.

(b) The policy of Mekar's government that all companies operating in the country to offer goods and services denominated exclusively in MON does not construct arbitrary treatment.

52. In *LG&E,*[90] the tribunal stated that "the charges imposed by Argentina to Claimant's investment, though unfair and inequitable, were the result of reasoned judgment rather than simple disregard of the rule of law". The motivation of the charges was to protect Argentina's economy from serious deterioration. Therefore, the charges did not construct arbitrary treatment.

53. In this case, Mekar's government made the decision out of similar purpose: to maintain the stability of Mekar's currency and to protect Mekar's economy from full collapse due to the economic crisis. The decision, along with a series of policies Mekar had launched in December 2017, was the result of reasonable consideration.

54. Therefore, the currency policy of Mekar's government does not construct arbitrary treatment.

2. Mekar's actions are not in contrary to its commitment of protection from discriminatory treatment.

55. The concept of non-discrimination does not prohibit all distinctions between individuals. In the human rights context, it is well accepted that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."[91] Practice dealing with discrimination has concentrated on two key issues. One concerns the basis of comparison for the alleged discrimination; the other concerns the question whether discriminatory intent is a requirement for a finding of discrimination or whether the fact of unequal treatment is sufficient.

56. Mekar's declining to provide Caeli with subsidies is out of legitimate purpose as well as reasonable and objective standards. Bonooru owns a significant part in Caeli through its shares in Caeli, which ranges from 26% to 32%, with no other shareholder owning more than 7% of Caeli's shares.[92].

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[90] LG&E, ¶ 162.
[91] Campbell McLachlan, Laurence Shore and Matthew Weiniger, p. 324.
[92] Procedural Order No. 4, ¶ 2.

Thus, Bonooru has a significant influence in making Caeli's business strategies and can promote the low-pricing strategy in favor of Bonooru's interest. The standard of differential treatment to Caeli is the advantages of SOE. Bonooru's support for Caeli has prevented it from significant loss due to the economic crisis as its competitors suffered. As a company with more than 40% market share, Caeli also receives subsidies from Bonooru's "Horizon 2020" Scheme. As per Procedural Order No. 4, the predominant recipients of subsidies were airlines with less than 5% market share. If Mekar had granted subsidies to Caeli, the subsidies would skew market conditions in favor of Caeli, which is in contrary with (c) (1) (B), Section 3101 of the Executive Order 9-2018[93]. The subsidies were attributed to help maintain a normal market environment. Such goal would not be achieved if Caeli had received the subsidies. Since Caeli did not need such subsidies, and Royal Narnian did not even apply for subsidies, Mekar considered it unnecessary to inform Caeli Mekar' decision in advance. In other words, Mekar did not need to inform Caeli of a potential change which actually would not take place.

57. Claimant may argue that the standard is not reasonable or objective, because 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 that Vemma received under the Horizon 2020 Regime[94]. The reason of such a decision is that these companies are not owned directly by their home states, thus do not have unique advantages that enable them to outcompete privately-owned companies. For example, the home state's participation promotes the competitiveness of the companies through state policies other than single financial support[95]. Moreover, the amount of subsidies Claimant and the two aforementioned foreign airlines receive are not comparable since they received subsidies in different times and faced different market situations.[96]

58. Therefore, Respondent declined to grant Caeli subsidies in the purpose of maintaining the fair and competitive market environment. Mekar's act does not constitute discrimination.

3. MA's actions do not constitute abusive treatment.

[93] Executive Order 9-2018.
[94] Statement of Uncontested Facts, ¶ 46.
[95] Aviation Analytics, ¶ 4.
[96] Procedural Order No.4, ¶ 7.

59. Abusive treatment is contrary to the international customary law[97]. As per international practices of BITs, abusive treatment commonly includes coercion, duress and harassment[98]; a manifestly abusive treatment includes continuous, unjustified and outrageous coercion or harassment[99]. In the pending case, Article 9.9 of CEPTA provides that abusive treatment includes coercion, duress and harassment. MA's actions do not constitute abusive treatment under CEPTA or the international customary law, for that Mekar sought to arbitration in appropriate reasons (*a*), the arbitration between Caeli and MA proceeded with due process (*b*).

(a) Mekar sought to arbitration in appropriate reasons.

60. MA questioned the validity of the Hawthorne offer with appropriate reasons. Hawthorne significantly benefits from its membership in the Moon Alliance and its relationship with Caeli in facilities, prices and market shares. Thus, Respondent believed that the price was not arms-length. Since both parties could not reach a consensus on the dispute, Mekar submitted the dispute to arbitration as per Article 48 of the Shareholders' Agreement among MA, Vemma Holdings and Caeli.

(b) The arbitration between Caeli and MA proceeded with due process.

61. First, since MA reasonably questioned the validity of the Hawthorne offer, the submission of the dispute to arbitration should be a fair and mutually beneficial resolution for both MA and Caeli. MA submitted the dispute as per the rules of the Sinnoh Chamber of Commerce (SCC) and the CEPTA, which has been agreed by Vemma. To submit the dispute to arbitration is also a protection of Caeli's legal rights. Second, Caeli's accusation of bribe solely relied on the circumstantial and hearsay evidence from **the Centre for Integrity in Legal Services ("CILS")**. Mekari Ministry of Home Affairs has recognized CILS as "an entity funded by foreign donations to interfere in Mekar's domestic affairs" and has taken restrictions towards CILS. Therefore, the evidence that Caeli presented was insufficient and the source of the evidence was not credible. CILS might act in the purpose of interfere with Mekar's domestic economy and nomocracy, which is well suggested by the nature of the organization.

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[97] F. A. Mann, pp. 241, 243.
[98] EU-Canada CETA , Article 8.10(2).
[99] India Model BIT, Article 3.

62. Second, the time of the dismissal made by Superior Court of Mekar on Phenac is reasonable. The facts and legal rules in this case were clear and sufficient, since the only evidence that Caeli presented could not support Caeli's accusation. The fact that Caeli's claim against CCM exceeded more than one year is irrelevant to this case. In that case the court needed much time and effort to investigate the evidence and demonstrations.

63. Therefore, MA's actions do not constitute abusive treatment to Vemma.

64. In conclusion, Respondent had the legal purpose of restraining Caeli's anti-competition to maintain the order of its domestic market. Mekar rigorously followed the provisions of MRTPA and conducted its investigations with due process. The caps and fine on Caeli did not cast material loss on Caeli. Respondent changed its domestic economic policies due to legitimate reasons. Therefore, Respondent did not breach Article 9.9 of the CEPTA.

C. Mekar does not have an independent obligation to safeguard Vemma's legitimate expectation under the CEPTA, and even if it does, Mekar does not breach that obligation.

65. Respondent had no separate obligation to safeguard Vemma's legitimate expectation under the CEPTA (*1*). Even if Mekar had an independent obligation, it was not breached (*2*).

1. Mekar had no separate obligation to safeguard Vemma's legitimate expectation under the CEPTA.

66. Under Article 9.9.3 of the CEPTA, when considering the obligation of FET[100] enumerated in Article 9.9.2, the tribunal may examine whether the Contracting Party has made a commitment to the investor in relation to the investment and whether that commitment constitutes a legitimate expectation. [101] Therefore, the obligation of legitimate expectation should be specifically considered in the context of each specific factor considered in the obligation of FET *as per* Article 9.9.2 of the CEPTA, rather than constituting a specific obligation of FET on its own. Therefore, Claimant cannot separately claim a breach of such obligation by Respondent. Furthermore, as stated above, Respondent does not constitute a specific breach of FET as set forth in Article 9.2.2

[100] CEPTA, Article 9.9.2.
[101] CEPTA, Article 9.9.3.

of the CEPTA, and therefore, Claimant cannot claim a legitimate expectation of incidentality even if it does exist.

2. Even if Mekar had an independent obligation, it was not breached.

67. The obligation of legitimate expectation is expressed as *Representation* in the CEPTA[102], and the tribunal generally considers that it consists of two specific parts, one is the specific and explicit commitment made by the host country to the investor in the process of bidding and other procedures, and the other is the legal system of the host country.[103] In this case, Respondent has not made any specific and explicit commitment to Claimant in the investment process (*a*). Also, the change of Respondent's legal system is not the legal system on which Claimant's investment is based (*b*), even if Claimant has actually relied on such changed legal regime, the change is acceptable (*c*). Further, even there is a legitimate expectation, Respondent acted in its own public interest thus such action is appropriate (*d*).

(a) Mekar has not made any clear or specific commitments related to the investment rights and obligations in the investment process.

68. If there is a legitimate expectation of express warranties and representations originating from the host country, it is necessary for the host country to make a commitment through a contract or other means of expression.[104] Mekar did not make any specific commitment regarding its investment rights and obligations during the investment contract process,[105] nor were they reflected in the text of the investment contract[106]. Even if there was some agreement between Mekar and Vemma regarding the transfer of property during the bidding process, this agreement was actually fulfilled and did not concern the material rights and obligations of the investment.[107] Therefore, Claimant's claim that Respondent breached its promise in the bidding process and thus violated Claimant's legitimate expectations is invalid.

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[102] CEPTA, Article 9.9.3.
[103] Biwater, ¶ 602. Siag, ¶ 450. Lemire(II), ¶ 284. Paushok, ¶ 253.
[104] R Dolzer, ¶ 553.
[105] Statement of Uncontested Facts, ¶ 23-25.
[106] Shareholders' Agreement Relating to Caeli.
[107] Statement of Uncontested Facts, ¶ 24.

(b) The changed legal system of Mekar State is not the legal system on which Vemma's investment is based.

69. The Tribunal emphasizes that the legal framework that existed at the time the investment was made was decisive in creating any reasonable expectation,[108] and that some of Mekar's decrees on the privatization process in 2017[109] and the regulations on the settlement currency[110] were not the decisive legal framework on which Vemma relied to make its investment. In the case of privatization, the privatization of Caeli has been completed and therefore the adjustment of the companies in the ongoing privatization process does not affect Vemma's investment in Caeli.[111] In the case of currency, a country's monetary policy is a matter of national sovereignty, and Mekar's own monetary policy is highly volatile, so Vemma cannot rely on such a volatile legal matter. Hence, the law changed in Mekar is not the decisive law on which Vemma relied when investing and Vemma cannot claim that its legitimate expectations were violated because of such a change in law.

(c) Even if Mekar's changed legal regime was relied upon by Vemma's investment, the change was acceptable.

70. The requirement of stability in the legitimate expectation is not absolute, nor does it preclude the host country from adopting national sovereign legislation and adapting the legal system to the changing circumstances.[112] The key question is whether these measures go beyond the usual scope of regulation and whether significant changes to the regulatory framework for investment are beyond the acceptable scope.[113] The restrictions on Vemma's investments are mainly based on the unchanged MRTPA,[114] and therefore the changes in the legal framework are not beyond acceptable limits. Moreover, the main reason for the impairment of Vemma's investment is the change in the international environment,[115] including resources, which is not directly related to the change in Mekar's law.

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[108] GAMI, ¶ 93.
[109] Statement of Uncontested Facts, ¶ 41.
[110] Statement of Uncontested Facts, ¶ 42.
[111] Statement of Uncontested Facts, ¶ 23.
[112] Suez, ¶ 209.
[113] Paushok, ¶ 302. Impregilo, ¶ 290. El Paso, ¶¶ 344-352.
[114] MRTPA, ¶ 1590.
[115] Statement of Uncontested Facts, ¶ 48.

(d) Granted that there was a legitimate expectation, Mekar acted in its own public interest.

71. The Tribunal should weigh the reasonable expectation of the investor and the responsibility of the host country when public interest is involved.[116] Even if Mekar's change in the law was to some extent detrimental to Vemma's legitimate expectation, it was also conducted to protect its own public interest. Mekar itself is facing a serious economic and financial crisis, jeopardizing the lifeblood of the national economy.[117] Therefore, it is reasonable to do so.

D. Should Tribunal conclude Respondent breached FET, necessity can free Respondent from liability.

72. Necessity is the circumstance precluding the wrongfulness under customary international law. ILC Articles which is customary international law contains necessity as one of the circumstances precluding wrongfulness. Besides, it has been invoked by States and has been dealt with by a number of international tribunals.[118] More specifically, necessity is invoked by tribunals in investment arbitration. For example, in *LG&E*, the tribunal affirmed that necessity "should be only strictly exceptional and should be applied exclusively when faced with extraordinary circumstances."[119]

73. Here, Respondent's actions satisfy the requirements of Article 25 ILC Articles. Article 25 of ILC Articles sets out the requirements of necessity. Under Article 25 of ILC Articles, the action should be "the only way for the State to safeguard an essential interest against a grave and imminent peril".[120]

74. Respondent is preserving the political and economic survival, which is the essential interest of Respondent. In the *LG&E* case, Argentina passed Emergency Law to struggle with the economic crisis.[121] The tribunal in this case finds that essential interest is extendable to economic and financial interests related to protection of State against danger seriously compromising its internal or external situation.[122] Here, Respondent faces severer situation than Argentina. Because of the poor economic situation, governing party was overridden, and LPM was elected back to take

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[116] EDF, ¶ 217.
[117] Statement of Uncontested Facts, ¶ 41.
[118] ILC Articles , Commentary on Article 25, ¶ 3. For example, Fisheries Jurisdiction case.
[119] LG&E, ¶ 2.
[120] Nicholas J. Diamond, ¶ 5.
[121] LG&E, ¶ 64.
[122] Id, ¶ 251.

power.[123] This means that the political existence of the governing government collapsed. In order to avoid being overridden again, the new LPM government has to take measures like using MON exclusively to preserve its political and economic existence.

75. Respondent is facing the severe economic and currency crisis, which is an actual peril. As tribunal finds in *LG&E* case, the peril in Article 25 of ILC Articles must be established objectively and not only deemed possible.[124] Additionally, the peril should be extremely serious. Here, Respondent encountered 2008 financial crisis and 2017 currency crisis,[125] which hurt Respondent's economy severely. Mekar has lost MON 238 million since the enactment of the Emergency Recovery Act 2009.[126]

76. Claimant submits that Respondent's miserable status do not justify the State's conduct in view of the losses it caused. However, in the development of international investment treaties, there's tendency that newly concluded treaties replace the older treaties, which overprotected investor interests at the expense of hosting state's normative flexibility and pursuit of public welfare objectives.

77. This state-friendly, and public interest-friendly tendency is also reflected in our case. CEPTA substituted the older BIT between Bonooru and Mekar, and the changes in the provisions regarding FET deserves our special attention. In CEPTA, measures are explicitly listed out to help disputing parties identify whether FET has been violated[127]. This change also restricts the Tribunal's discretion so that the Article would not be applied to overprotect the investor. Article 9.8 of CEPTA is also added to ensure the State's right to regulate or modify its laws[128]. Negative effect caused by such measures does not constitute a breach of obligation.

78. Moreover, Article 9.14 of CEPTA is not a regulation regarding Mekar's mandatory obligation to ensure investment in Mekar, but only a goal that both contracting parties endeavor to achieve. In this regard, Respondent submits that the Tribunal consider the dilemma Mekar lies in, take the

[123] Statement of Uncontested Facts, ¶ 41.
[124] LG&E, ¶ 253.
[125] Statement of Uncontested Facts, ¶ 39.
[126] Procedural Order No. 3, ¶ 13.
[127] CEPTA, Art 9.9.
[128] CEPTA, Art 9.8.

public interest and general welfare of Mekar and its nationals into consideration and recognize that Respondent has not violated the FET.

IV. THE FAIR MARKET VALUE STANDARD SHOULD NOT BE APPLIED.

79. Claimant submits that it should be compensated in accordance with the fair market value standard. However, Respondent submits that Claimant's argument is unfounded, because the compensation standard stipulated in CEPTA should be applied with priority **(A)**, the MFN clause in CEPTA cannot render the application of fair market value standard **(B)**, and the compensation should be reduced because of Claimant's contribution to losses and Respondent's economic situation **(C)**.

A. Compensation standard prescribed in CEPTA should be applied.

80. Claimant submits that the fair market value standard should be applied in accordance with the principle of international law. But the convention i.e., CEPTA should be applied with priority (*1*), other sources of international law should not be applied (*2*), and additional 700 million USD should not be paid to Claimant (*3*).

1. CEPTA should be applied with priority.

81. The Article 38 of the Statue of the International Court of Justice lists the sources of international law. Although scholars argue that the sources of international law listed in this article does not have hierarchy,[129] treaties are regarded as the principal or primary source of international law.[130] This is justified by the clarity and contracting parties' willing. Treaties have written characters, conferring a greater degree of precision and textual determinacy to treaty norms, especially when compared to customary international law and principle of international law.[131] Besides, the contracting parties are purposely opting out of general international law to establish a special, derogatory regime by concluding treaties. Therefore, when disputes concerned parties' rights and duties should be adjudicated first on the basis of treaties between them.[132]

82. Here, the CEPTA which is concluded between Mekar and Bonooru should be applied first to the disputes between Mekar government and Bonoori national instead of the principle of international law or customary international law. The Article 9.21 of CEPTA stipulates that in the final award

[129] James Crawford, pp.19-20.
[130] Duncan, p. 14.
[131] Mario Prost, p. 285.
[132] Hersch Lauterpacht, pp. 87-88.

if the Tribunal awards Claimant compensation, such compensation should be calculated based on the market value standard.[133] This article clarifies the compensation standard, and thus, the market value standard provided by the CEPTA which is concluded between hosting state and investor's home state should be applied with first instance. Therefore, the market value standard should prevail over the fair market value standard.

2. Other sources of International Law should not be applied.

83. The customary international law and principles of international law are vague concerned the compensation standard in non-expropriation breaches, and tribunals have considerable discretion in this field.[134] But in this case, CEPTA stipulates a clear compensation standard which should be applied to all of the compensation awards except the compensation for expropriation. Therefore, in this situation, Tribunal's discretion should be limited and Tribunal should adopt the compensation standard stipulated in CEPTA rigidly.

3. Additional 700 million should not be paid to Claimant.

84. As per Procedural Order No. 4, 1.1 billion USD is not the accurate assessment of Vemma but the peak valuation of Vemma.[135] Since this price does not represent the valuation of Claimant, it cannot be relied on by Claimant to claim compensation from Respondent.

B. The MFN clause in CEPTA cannot render the application of fair market value standard.

85. Claimant submits that under the MFN clause in CEPTA, the fair market value standard should be applied. However, the Article 9.7 of CEPTA stipulates that the MFN does not include procedures for the resolution of investment disputes.[136] Under CEPTA, compensation standard is a procedural issue for the resolution of investment disputes.

86. Article 31 of VCLT sets out the principle of interpreting treaties. It stipulates that when interpreting treaties, context should be considered.[137] This means that the position of a term or phrase should be considered to establish the ordinary meaning.[138] The ICJ considers it decisive to allow the entire

[133] CEPTA 9.21.
[134] Azurix, ¶ 421–2.
[135] Procedural Order No. 4, ¶¶ 3-4.
[136] CEPTA Article 9.7.
[137] VCLT, Article 31 (1).
[138] Dörr O., p. 544.

sentence in a treaty provision to be given a coherent meaning.[139] Thus, when interpreting a phrase in an article, the meaning of the phrase cannot conflict with the article and the chapter.

87. Here, the compensation standard lies in the SECTION E of CEPTA, which regulates the settlement of disputes.[140] This section contains articles relating to the proceeding of investment arbitration, including selection of arbitrators, conduct of arbitration and transparency of arbitration. These issues are typical procedural issues of resolution of disputes. If compensation standard set in the same chapter was interpreted as substantive issues, it contradicts with other articles in this chapter and the title of this chapter.

88. The special meaning in CEPTA should be respected. Article 31 (4) of VCLT sets out that special meaning prevails.[141] As analyzed above, contracting parties put compensation standard in the chapter for settlement of disputes. It indicates that both parties deem compensation standard as issues relating to settlement of disputes. So, even if this meaning conveyed is different from common meaning, such interpretation should be respected.

C. Even if compensation is due and "fair market value" standard is applicated, the compensation should be reduced since Vemma's own wrongful conduct contributed to the losses.

89. In the remote cases that the tribunal finds the compensation due, such compensation should be reduced due to Claimant's wrongful conduct (*1*) and the deteriorated economic situation in Mekar (*2*).

1. Compensation should be reduced due to Claimant's own wrongful conduct.

90. Wrongful investor conduct constitutes a mitigating factor in view of the hosting state's compensation. The *MTD* tribunal[142] found that half of the responsibility for the investor's losses lay with the investor's own failure to investigate properly the Chilean planning laws applicable to the proposed investment, and reduced the damages accordingly. Likewise, even if Respondent's compensation is due, the remedies should be reduced.

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[139] Costa Rica v. Nicaragua, ¶ 52.
[140] CEPTA Article 9.21.
[141] VCLT, Article 31 (4).
[142] MTD, ¶ 113.

91. To qualify as a prudent decision-maker, the Vemma and its representatives on Board of Caeli shoulder the responsibility of not only achieving the best interests of the enterprise but also taking all potential threat and risks during the operation into account, and making the decision on the basis of comprehensive consideration. Yet it failed. When profits were yielded at harvesting seasons, representatives from MA declared the risks of not paying the debt and gave advice. Vemma's representatives were able to understand the probable risk in its decision and consider the advice thoroughly. Still, with its majority of seats on board, it implemented the radical expanding policies regardless of the timely and cordial proposals from MA[143]. Thus, Claimant has fallen way short of his duty to make prudent decisions for its investment in Mekar.

92. Claimant's reckless investment decisions also cut off its approach to preferential loans. In face of financial risk, it was offered a loan with inflated interest rate due to "risky investment choices by Caeli, long-standing debts that Caeli has failed to service since its privatisation, and large fines payable to the CCM"[144]. Were advice from Mekar adopted, there's a chance that financial risk would not hit Vemma. Even if it happened, Claimant would not be charged with such an inflated risk. Therefore, Claimant is negligent in deciding not to pay off its debts and this decision in turn led to the increase of its financial losses. Respondent submits that the Tribunal decides that the compensation be reduced.

93. In summary, Mekar, as the hosting state, has no duty to pay for losses caused by negligence of investors and the compensation should be reduced even if "fair market value" standard is applied.

2. The Compensation should be reduced in light of the deteriorated economic situation in Mekar.

94. Furthermore, in order to ensure that the host State pays an award without seriously undermining the general welfare of its population, compensation may be reduced for FET breaches.

95. Professor Brownlie's Separate Opinion on the Issues at the Quantum Phase in *CME* points to the potentially deleterious impact of an award of damages in investor-state arbitration and, more generally, highlights the potential intersection between the remedies awarded in investor-state arbitration and matters of public interest: "It would be strange indeed, if the outcome of acceptance

[143] Statement of Uncontested Facts, ¶ 35.

of a bilateral investment treaty took the form of liabilities 'likely to entail catastrophic repercussions for the livelihood and economic well-being of the population' of [the host state]."[145]

96. The economic status of Mekar was deteriorating. As noted in the 2019 IMF report, the USD 700 million that Vemma demands equals to twice of Mekar's consolidated annual public spending[146]. Given the USD 400 million already paid to Vemma, to grant additional compensation would heavily burden or even disintegrate the domestic economic system. In this vein, Mekar would not have sufficient fund to support its own various public sectors. Thus, taking the public interest of Mekar into consideration, the standard of remedies should be lowered accordingly.

V. PRAYER FOR RELIEF

97. In light of the above, Respondent respectfully requests the Tribunal to find that it lacks jurisdiction, since:

a. Claimant is a state-owned enterprise that is a government agent and performs essential governmental functions;

b. Claimant's investment does not pass the *Salini* Test;

c. The evidence about bribery provided by the external advisors challenges the legality of Claimant's investment.

98. Should the Tribunal find that it has and should exercise jurisdiction, Respondent urges it to recognize that:

a. Respondent treated Claimant's investment fairly and equitably and thereby did not breach Chapter 9 of the CEPTA;

b. Respondent should not pay Claimant 700 million USD;

c. Even if the Tribunal finds that compensation is due, Claimant contributed to its losses and compensation due should be reduced.

[145] CME, ¶¶ 31, 32, 58, 74-80.
[146] Procedural Order No. 3, ¶ 4.