ARBITRATION PURSUANT TO

ICSID ADDITIONAL FACILITY RULES

IN A DISPUTE BETWEEN

VEMMA HOLDINGS

(CLAIMANTS)

V.

FEDERAL REPUBLIC OF MEKAR

(RESPONDENT)

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

Written Memorial on the behalf of Respondents

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Background of investment

The federal Republic of Makar, located 1600Km south to Bonooru's empire. Unitl 2003, Mekar's civil aviation consisted of Aer Caeli and Caeli Airways, both State Own entities (SOEs) enjoyed monopoly. In 2003, both of them were merged, but the merger was not very successful. In the aftermath of the unfavourbale mergers, there was an attempt to privatise Caeli, but the attempts failed.

It was only in 2009, that Emergency Recovery Act was enacted, authorizing the privatization of SOEs, the Ministry pf Finance released a paper desginating Caeli Airways and other three entities as suitable for privatization.

After not succeeding in first two attempts at restructuration, in September 2010 a third attempt was made. In preparation for the same, renowned aviation consultant Goeffrey Hoytsman was appointed as the managing director of Mekar Airservices Ltd., a State-owned and controlled transition vehicle to which Caeli Airways' assets and part of its debt liability were transferred. Four companies, including Vemma participated in bidding process.

Vemma submitted its bids on November 23, 2010. Vemma Holdings' bid proposal envisaged fleet renewal and expansion, as well as route expansion. Vemma also promised to sign leasing contracts for Boeing 737 aircraft on favourable terms and secure Caeli Airways' membership in the Moon Alliance. Its bid stated 1025 that it would refinance for the remainder of Caeli's debt liability from PJSC Bonoorian People's Bank ("BPB"). The Group's tender valued at 800 Million USD was accepted on January 5, 2011. The CCM approved Vemma's acquisition of an 85% stake in Caeli Airways and the airline's participation in the Moon Alliance on 5 March 2011.

On 29 March 2011, Vemma Holdings entered into a Shareas Purchase Agreement with Mekar Airservices Ltd. to purchase an 85% stake in the company. As part of the transaction, Vemma inherited existing discounts on airport services and landing fees enjoyed by Caeli and twelve young aircrafts.

Background of Vemma

Until 1979, the Civil Aviation Authority of the Republic of Bonooru (Bonooru) controlled entire civil aviation, including Bonooru national carrier and civil airline, Bonooru airline. CAA

in 1980, decided to sell the 70% stakes in BA holdings, parent company of Bonooru Air. The process was completed on 19 December 1984. Simultaneously, Bonooru Air was split into three airlines. Among these, the Royal 930 Narnian was chosen as the flag carrier of Bonooru**.**

Vemma, the investor, was a holding company, with 100% ownership in Royal Narnian. Since its incorporation, Bonooru retained shareholding in Vemma ranging from 31-38% uptill march 2020. The same was increased to 55% after March.

Background of the dispute

The Competition Commission of Mekar launched a *suo moto* investigation into Caeli's activities to investigate whether it had employed predatory pricing strategies to hinder domestic competition. As a result, the CCM applied airfare caps which have been recognised as reasonable and there is no evidence that the imposed caps hurt Caeli's profitability in 2016. The CCM investigation against Caeli Airways was one of its kind.

A consortium of small regional airlines in the Greater Narnian region alleged that Caeli was "capitalising on its undercutting policies it enjoyed at Phenac International Airport". Caeli however maintained that it did not enjoy the alleged dominance on the short-distance routes.

In late 2016, the MON began to fall. Mekar ran deficits in both its fiscal and current accounts. The fall in the value of MON continued, accompanied by rising inflation which, in turn, reduced consumer's' purchasing power. Caeli's application for denominating its airfare in US Dollars was approved by Mekari authorities in October 2017, owing to the issue of maintaining sustainable revenue.

In January 2018, the re-election of the LPM saw a policy requiring all companies operating in the country to denominate all goods and services in MON with a view to stabilise the currency. The approval received by Caeli was undone. This step was protested by Caeli, and so was the airfare cap imposed in September. It was alleged that the airfare cap failed to account for the current exponential increase in inflation. The request was denied by the CCM expressing its inability to suspend the interim caps until the investigations were complete.

In March of 2018, when Caeli's claim against the CCM was finally registered the court registrar rejected Caeli's request for a separate hearing on interim measures, addressing its lack of resources and the general prioritisation of criminal matters. The first investigation by the CCM was concluded by August 2018. A fine of MON 150 million was imposed on Caeli as it was

found in violation of Mekar's antitrust legislation. The subsidies received by Vemma under the Horizon 2020 scheme were also found to have helped Caeli drastically reduce prices.

Caeli's request for subsidies under the Executive Order 9-2018 was rejected without indicating the reasons for dismissal, while other holding groups from Arakkis were allowed subsidies. The second investigation concluded in January 2019 found Caeli engaged in anti-competitive behaviour. A penalty amounting to 200 million MON was imposed subsequently. The airfare caps were also continued. Both the CCM orders were appealed against in the Mekari courts.

Faced with the risk of insolvency, Celi Airways applied for a loan amounting to USD 200 million. Caeli's credit ratings had been adversely affected owing 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"*. The loan was refused by Caeli.

The court rejected Caeli's case on merits in a premature fashion. Towards the end of 2019, Caeli's market share dropped below 40% while it was generating losses on most routes. The airfare caps were lifted in October. Given the mounting liabilities of the enterprise, representatives of Vemma intended to sell their stake in Caeli. An offer was secured from Hawthorne Group LLP, the terms were communicated to Mekar Airservices' representatives.

Owing to the LLP's membership in the Moon Alliance, the offer was rejected by Mekar Airservices. A request for arbitration with the Sinnoh Chamber of Commerce under the SCC Arbitration Rules was filed, to declare Vemma's failure to secure a *bona fide* third-party offer. Cavanaugh was appointed by the SCC Secretariat. An award was rendered in favour of Mekar Airservices. The reasoning employed by Mr. Cavanaugh was widely criticised.

An application for enforcement of the award was filed by Mekar Airservices before the High Commercial Court. Mr. Cavanaugh was alleged of indulging in corruption. The seat of the arbitration set aside the award pursuant to Vemma's application. The award was anyway recognised in Mekar and upheld by the Superior Court. Vemma was left to sell its stake to Mekar Airservices in October 2020 for 400 million USD.

Vemma filed an arbitration notice against Mekar in November 2020 under the CEPTA.

Background of procedure

In 1994, the BIT was entered into between Mekar and Bonooru. In 2010, the two state sstrated negotiation on the new Comprehensive Treaty. In 2014, the Comprehensive Economic Partnership and Trade Agreement (CEPTA) was signed.. The agreement entered into force on

15 October 2014. Mekar and Bonooru agreed to terminate the pre-existing BIT on 15 October 2014.

Pursuant to Article 9.16 of CEPTA, and Article 2 of ICSID additional facility rules, Vemma submitted the dispute against Mekar before the Tribunal.

On March, 21, 2021, the Procedural Order 1 was passed by the tribunal, constituting the tribunal, and stipulating the procedure to be followed during the proceeding and the organization of hearing.

On April 19, 2021, the Consortium for Bonoori Investors, filed an application for making *amicus* submissions. On May, 28, 2021, the External advisors to the CRPU made an application for making *amicus* submissions.

On July 01, 2021, the Procedural Order 2 was passed on amicus submissions and modified the organization of hearing.

On July 16, 2021, the Procedural order 3 was passed setting out additional facts and the tribunal clarified that submissions to be limited to violation of Article 9.9 of CEPTA. Further, additional facts were set out in procedural order 4. in September 2021.

Arguments

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE CURRENT DISPUTE

1. The Respondent admits that the applicable rules are the ICSID Additional Facility Rules. The Respondent had given a standing offer to arbitrate1 and the Claimant accepted the same by filing the current dispute.2 Consent was given for future disputes by Respondent but this consent was not absolute. The consent is subject to the limits imposed by both the Comprehensive Economic Partnership and Trade Association (CEPTA) and the ICSID Additional Facility Rules (AFR).

2. There are two major aspects of jurisdiction which need to be fulfilled to make the tribunal competent to try the current dispute. The first is jurisdiction ratione personae and the second is ratione materiae.[3] In the current case, the Respondent is not contesting the ratione materiae. The Respondent is only contesting the Claimant's standing to bring a claim as it is controlled by the State of Bonooru.

3. The Claimant needs to pass the double-barreled test to have the locus standi to bring a claim as an Investor.[4] Non- fulfillment of the conditions laid down in either the BIT or the ICSID AFR would disqualify the Claimant from the bringing a claim against the Respondent.

4. The Respondent submits that the Claimant fails to qualify under both the BIT and the ICSID AFRs.

A. The Claimant does not fit into the definition of an Investor as set out in Chapter 9 of the CEPTA.

5. The current dispute has been submitted, in accordance with Chapter 9 of the CEPTA. The definition of an investor is laid down in Article 9.1 of the CEPTA. There is no express inclusion or exclusion of State-owned entities (SOEs).[5] The silence to either of them raises an ambiguity with respect to the standing of SOEs.

[1] Article 9.16, CEPTA
[2] Procedural Order No. 2
[3] Schreuer, C, The ICSID Convention: A Commentary, Cambridge University Press, 2009, p. 82.
[4] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I], ICSID Case No. ARB/00/4.
[5] Article 9.1, CEPTA.

6. Both Bonooru and Mekar are parties to the Vienna Convention on Law of Treaties, 1968 (VCLT). There are means of interpretation which are prescribed in VCLT for cases wherein there is an ambiguity in the terms of a treaty. Reliance should be placed on Article 31 for resolving the ambiguity.[6] In the current case, the plain reading of the text does not solve the ambiguity and there are no agreements which were signed post the treaty.

7. Article 32 of the VCLT is relied upon, if the ambiguity is not resolved by relying on the Article 31 of the VCLT.[7] The supplementary means of interpretation as stipulated by Article 32 of the VCLT includes reference to the preparatory work or the *travaux préparatoires* of the treaty.[8]

8. The preparatory work of the treaty has been interpreted to include the drafting history of the treaty.[9] The current treaty was drafted in the background of the 1994 Bonooru-Mekar BIT. Both the parties drafted the current treaty to make some necessary changes to bring the treaty, in line with the changing circumstances.

9. Thus, the previous treaty may be used to ascertain the intention of the parties. There were changes made to the previous treaty and even, the definition of an investor was changed. The previous definition expressly included State-owned entities as it mentioned that both entities owned by private actors and the government fit into the definition. [10]

10. The treaty was repealed as soon as the CEPTA came into force.[11] Thus, the 1994 cannot be used to interpret the CEPTA constructively but the same can be used to draw an adverse implication. The change which was made from an express inclusion to silence reveals that the intention of parties was to exclude SOEs from the definition of an investor.

11. Thus, the CEPTA does not include SOEs in the definition of an investor when interpreted in consonance with Article 32 of the VCLT.

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[6] Art. 31, Vienna Convention on Law of Treaties, 1968.
[7] Art. 32, Vienna Convention on Law of Treaties, 1968.
[8] Id.
[9] Infinito Gold v. Costa Rica, ICSID Case No. ARB/14/5.
[10] Art. 1, 1994 Bonooru – Mekar BIT.
[11] Art 1.6, CEPTA.

B. The Claimant does not fulfil the conditions which have been laid down in the ICSID Additional Facility Rules

12. Similar to the CEPTA, the ICSID AFRs do not expressly exclude or include SOEs. Tribunals have relied on the international jurisprudence to resolve ambiguities arising out of the AFRs.[12] The international tribunals have relied upon the Broches Test for ascertaining the standing of the Claimant when it is either a governmentally owned entity or a mixed enterprise.[13]

13. In the current case, the state was the highest stakeholder in the Claimant and all other shareholders had a share below 7%.[14] Additionally, the regular meetings needed 50 % of the quorum to make a decision and the state officials on board constituted 50 %, on various instances. [15]

14. Moreover, the Government of Bonooru was able to unilaterally increase its funding and materially change the functions of the Claimant. These factors cumulatively prove that the State had the legal capacity to control the Claimant and in turn, the claimant qualifies as a State-owned enterprise.

15. As the Claimant qualifies as a government-owned enterprise, the Broches Test may apply for ascertaining its eligibility to bring a claim. The Broches Test has two prongs and fulfilment of either disqualifies the Claimant as it is a disjunctive test.[16]

16. The first prong of the Broches Test deals with the functions of the Claimant. In order to qualify as an investor, the Claimant should not discharge an essentially governmental function. [17]

17. A governmental function was defined as a governmental function is something which governmental in nature or which are otherwise normally reserved to the State, or which by their nature are not usually carried out by private businesses or individuals.[18]

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[12] Roland Kläger, Fair and Equitable Treatment in International Investment Law (CUP 2011) 35; Lucy Reed, 'The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management' (2010) 25(1) ICSID Rev—FILJ 95.
[13] Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4 (CSOB); Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30 (BUCG).
[14] Procedural Order No. 4,
[15] Procedural Order No. 2
[16] BUCG
[17] CSOB
[18] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7 ¶78. (Maffezini)

18. In a conventional sense, operating an airline may not qualify as a governmental function. But, in the current case, the state had an obligation to ensure that the right to transportation of the citizens of Bonooru was fulfilled. [19]

19. Article 70 of the Constitution of Bonooru assigns special status to mobility rights in Bonooru.[20] The constitutional courts have interpreted the Article 70 to impose a positive obligation on the state to ensure that the right to move in and out of the islands is fulfilled.[21]

20. Thus, the fulfilment of the right to mobility is a governmental function, in context of Bonooru. Thus, fulfilment of the same is a function which has been reserved to State. [22] The Memorandum of association of the Claimant imposes an obligation on the Claimant to assist the government in fulfilment of mobility rights of the citizens of Bonooru.[23]

21. Thus, there was an obligation which was imposed on the Claimant to discharge an essentially governmental function.

22. Furthermore, the Claimant has discharged the essentially governmental function with respect to the investment in Caeli Airways. The Government of Bonooru had launched various schemes to improve the tourism infrastructure in Bonooru. [24]

23. The Government of Bonooru unveiled the Caspian Project in 2010 and declared, in 2012, that a part of the fund would be deployed to update Mekar's port and Phenac International Airport.[25] Additionally, the work on both of these were stopped when the investment was sold back to Mekar. [26]

24. Additionally, the Claimant was operating high-density routes between Mekar and Bonooru. The Claimant was incurring heavy losses on the routes between Mekar and Bonooru and they continued to operate at the same frequency, irrespective of the losses.[27] Additionally, there were various rising debt obligations[28] and it would not

[19] Art. 70, ANNEX I.
[20] UF ¶5.
[21] ANNEX III ¶59
[22] Supra note 14.
[23] Memorandum of Association ¶3(h)
[24] UF ¶28
[25] Procedural Order No. 4 ¶1
[26] Id.
[27] UF ¶30.
[28] UF ¶35.

make commercial sense for any entity to cut back on loss-making operations to maintain financial stability.

25. Thus, the constitutional obligation for ensuring mobility, the Caspian Project, the Horizon 2020 project and the decisions taken by the Claimant proves that the Claimant was discharging an essentially governmental function, in context of the investment in Caeli.

26. The second prong of the Broches test deals with agency. The Claimant is eligible as an investor if it is not acting as an agent of the State.[29] It is submitted that, in the current case, the Claimant is acting as an agent of the State of Bonooru. It has been held that this requirement is mirrored from Article 8 of the ILC Draft Articles.[30]

27. Article 8 of the ILC Draft Articles on State Responsibility stipulate certain conditions which need to be fulfilled to establish State agency.[31] If certain actions are taken under the control, on the direction or under the instructions of the State, they qualify as actions of the State.

28. In the current case, the Memorandum of Association reveal that the Claimant was directed to assist the State of Bonooru in fulfilment of the mobility rights of the citizens.[32] Moreover, the Claimant was instructed to act in accordance with the Article 70 of the Constitution of Bonooru and for the benefit of the Bonoori people.

29. The conduct of the Claimant highlights that it was acting in accordance with Article 70 of the Constitution of Bonooru. The Claimant had operated on loss-making routes between Mekar and Bonooru, the investment in Mekar Port and the subsidies received for improving tourism infrastructure of Bonooru.

30. The Claimant was acting in consonance with the State directives. The Secretary of Tourism and Transport had appreciated the Claimant's contributions to the enhancement of mobility rights of Bonooru.[33] Additionally, the Secretary had expressed that she was convinced that the Claimant was capable of achieving the objectives set

[29] CSOB.
[30] BUCG.
[31] Art. 8, ILC Draft Articles on State Responsibility.
[32] Supra note 19
[33] Procedural Order No. 4 ¶6.

out the predecessor.[34] Thus, there were State's directions and the Claimant had complied with the same through its conduct.

31. Thus, the Claimant fulfils the second prong of the Broches test by acting as an agent of the State. This alone and, more so, in conjunction with the fulfilment of the first prong renders the Claimant ineligible to bring a claim as a national under the ICSID Additional Facility Rules.

C. The Claimant was disqualified from bringing a claim as its actions are attributable to the State.

32. Under the ICSID Convention, there are two relevant dates on which the nationality is supposed to be determined but Article 3 of the ICSID Additional Facility Rules explicitly mentions that the convention does not apply to proceedings under the ICSID Additional Facility Rules.[35]

33. Thus, the relevant dates to determine nationality would not be the dates stipulated by the ICSID Convention. The ICSID Additional Facility Rules are silent with respect to the relevant dates to determine the nationality of the investor.[36] Customary international law shall be relied for ascertaining the relevant dates.[37]

34. Customary international law stipulates that the nationality should be maintained from the date the dispute arose until the date of the award. This was held to be the applicable principle in investment arbitration as well. [38]

35. Thus, the Claimant was supposed to maintain its nationality throughout the pendency of the dispute.

36. In March 2021, the Claimant's personality was substantially changed when the State increased shareholding in the Claimant, expanded the functions to paramilitary functions, replaced the board with government functionaries and the legal team of the Claimant was replaced by justice department of Bonooru.[39]

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[34] Id.
[35] Art. 3, ICSID Additional Facility Rules.
[36] Art. 2, ICSID Additional Facility Rules.
[37] Curtis Bradley, 'Customary International Law Adjudication as Common Law Adjudication' in Curtis Bradley (ed), Custom's Future: International Law in a Changing World (CUP 2016) 1488, 1509; Jeffery Commission, 'Precedent in Investment Treaty Arbitration' (2007) 24 J Intl Arb 129, 158.
[38] Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3.
[39] UF ¶65.

37. It has been held that the state attributability test can be used to determine the investor's eligibility to bring a claim.[40] The ***Maffeizini*** tribunal had set out several factors which need to be taken into account for ascertaining whether an entity's actions can be attributable to the state.[41] The factors which need to be taken into consideration include control, the nature, purposes and objectives of the entity whose actions are under scrutiny, and the character of the actions taken.

38. In the current case, the ownership and control rests with the State as the shareholding is above 50 % and the board of directors is constituted by government functionaries. One of the major objectives of the Claimant are to fulfill the positive obligation which has been imposed by the State enshrined in Article 70 of the Constitution of Bonooru. [42]

39. Thus, the actions of the Claimant are attributable to the State post March 2021 which makes it ineligible for bring a claim as an investor, without prejudice to its ineligibility before March 2021.

D. The Claimant has committed an abuse of process

40. The Claimant have committed a grave abuse of process while pursuing the current claim. The ICSID Additional Facility Rules contemplate proceedings between an investor and State. The Centre is not the adequate forum for State-to-State dispute settlement. It is submitted that the real party in interest is the State and the Claimant have committed an abuse of process by pursuing the current claim.

41. Tribunals have held that an abuse of process is committed when the actions of either party go against the essence of the investor-state dispute settlement process.[43] Any action which was taken in contravention of the process stipulated by the applicable rules cannot be held to be in good faith.

42. Without prejudice to the Claimant's subsisting ineligibility to bring a claim, post-March 2021, the Claimant's personality was converted into a State Organ. The shareholding of the state was increased over 55% and the functions of the State was expanded to include paramilitary functions.[44] Additionally, the board of directors of the Claimant were

[40] Landesbank Baden-Württemberg and others v. Kingdom of Spain, ICSID Case No. ARB/15/45.
[41] Maffeizini ¶76.
[42] Supra note 17.
[43] Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12.
[44] UF ¶65.

replaced by government functionaries and the legal team which is part of the current arbitration as well was equipped with lawyers from the Justice Department of Bonooru.[45]

43. The change in personality of the Claimant has converted the current arbitration into a State-to-State arbitration and the same is both an abuse of the rights which were possessed by the Respondent and the abuse of the process contemplated by the ICSID Additional Facility Rules.

44. Thus, the tribunal does not have jurisdiction over the current dispute as the Claimant has committed an abuse of process.

45. Therefore, the tribunal does not have jurisdiction over the current dispute as the Claimant fails to qualify as an investor under the CEPTA and as a national of a State under the ICSID Additional Facility Rules.

[45] Id.

II. THAT THE SUBMISSIONS BY EXTERNAL ADVISORS TO COMMITTEE ON REFORM OF PUBLIC UTILITIES BE ADMITTED AND THOSE OF CONSORTIUM OF BONOORI FOREIGN INVESTORS BE DENIED.

46. That the Article 41(3) of the ICSID Additional Facility Rules, 2006[46] and Article 9.19(3) of Comprehensive Economic Partnership and Trade agreement (**CEPTA**)[47] lays down the applicable rules to be considered in the present arbitration for deciding on the admissibility of the amicus submissions.

47. The abovementioned rules are consistent with each other and lays down the conditions as mentioned below.

i. That the amicus curiae would address a matter within the scope of the dispute.

ii. That the submission assists the tribunal by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

iii. That the amicus curiae have a significant interest in the proceeding.

48. It is further submitted that there are additional implicit requirements that the submission is made in the pursuit of public interest and the *amicus* i.e., the friends of court are independent from the disputing party.

A. That leave should be granted to External Advisors to the Committee of Reform of Public Utilities.

49. The External Advisors to Committee of Reform of Public Utilities [EACRPU] should be granted a leave to make amicus submissions, as it satisfies the conditions in CEPTA and ICSID Additional Facility Rules **[i]**. Secondly, EACRPU makes the submissions in advancement of public interest which is an implicit requirement **[ii]**. Thirdly, EACRPU is sufficiently independent from the disputing parties, which is also an implicit requirement under ICSID Additional Facility Rules **[iii]**. Lastly, submissions by EACRPU does not disrupt the proceedings **[iv]**.

i. That EACRPU satisfies the criterions laid down in Article 41(3) of the ICSID Additional Facility Rules and Article 9.19 Of CEPTA

a. The Application is within the Scope of the dispute

[46] Art. 41 cl. 3, ICSID Arbitration (Additional Facility) Rules, 2006,
[47] FACTSHEET ¶81.

50. The attention is drawn to the Procedural Order 1[48] in which the tribunal set out the issues of the dispute. The first issue was framed as-

Whether the tribunal has a jurisdiction under the Chapter 9 of CEPTA and ICSID Additional facility Rules?

51. For the purpose of the *amicus* application, the scope of the dispute is to be construe in the light of the Procedural Orders. As the non-disputing party cannot have the knowledge about the exact submissions of the parties in the dispute, they must rely on the information available in the public domain for example the procedural orders. In ***Eco Oro Minerals Corp. v. Republic of Colombia***[49] the tribunal emphasised on the need for perusing the procedural orders for the scope of dispute. As the tribunal raised the issue of jurisdiction under Chapter 9, it is up to the parties to restrict the submissions within that broad scope. It is counterproductive to restrict the scope of dispute solely based on submissions.

52. EACRPU's submissions on the alleged corruption on the procurement of the Vemma Holding is relevant under the chapter 9, for the scope of the dispute. The chapter 9 of CEPTA has to be read in accordance with the international public policy and good faith. The State should not be assumed to be consenting to the investment made in contravention of laws.[50] In ***World Duty Free Company Limited v. Republic of Kenya***[51] it was clearly observed that corruption is against international public policy.

53. Furthermore, if the investment procured through corruption, then it violates the BIT, the preamble of the CEPTA which provides for the elimination of the corruption. The treaty provisions are to be read with the object and purpose of the treaty.[52]

54. It has been observed that the tribunal under the doctrine of Kompetenz-Kompetenz can look into the consent to arbitration[53] or any grounds challenging its jurisdiction, even if they are not raised by the parties.[54] This is consistent with the power of the tribunal under Article 45(3) of the ICSID additional facility rules providing that the tribunal on

[48] Factsheet, pg. 10.
[49] Eco Oro Minerals Corp. Claimant v. Republic of Colombia Respondent, Procedural Order No. 6, ICSID Case No. ARB/16/41.
[50] Phoenix Action, Ltd. v. The Czech Republic, Award, ICSID Case No. ARB/06/5.
[51] World Duty Free Company Limited v. Republic of Kenya, ICSID Case No. ARB/00/7.
[52] Plama Consortium and Republic of Bulgaria, Award on Jurisdiction, ICSID Case No. ARB/03/24.
[53] Malicorp Ltd. v. The Arab Republic of Egypt, Award on Jurisdiction, ICSID Case No. Arb/08/18.
[54] Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, Award, ICSID Case No. Arb/00/2.

its own initiative can adjudicate on its competence. In ***Oded Besserglik v. Republic of Mozambique***[55] the tribunal held that the article mandates the tribunal to look beyond the party submissions.

55. In past, the tribunals have accepted the *amicus submissions* when there are serious allegations of abuse like corruption[56] or treaty shopping[57] are involved, directly impacting the jurisdiction of the tribunal even when the disputing parties have not raised those issues.

56. Further, it is submitted that the tribunal need not necessarily consider the *amicus submission* at the jurisdictional stage itself. The tribunal can take the submissions at any other stage as well. In *Glamis Gold*[58] the amicus made their submission alleging abuse as a bar on jurisdiction, but the tribunal decided to consider the submission at the stage of merits.

57. Thus, EACRPU makes submissions within the scope of the dispute, and the same should be considered.

b. *The application assists the tribunal*

58. After establishing that the submissions by EACRPU shall potentially addresses the issues within the scope of dispute. It is highly probable that the submissions shall be able to assist the tribunal by bringing a different factual set and insights. The amicus was engaged as an external advisor to CRPU which was overseeing the privatisation, liquidation, and/or restructuring of Caeli Airways. As provided, the EACRPU were engaged in various activities of facilitating the transaction. This special position and proximity allow them to bring facts regarding the transaction between Claimants and Caeli airways, which the respondent is not capable of knowing and claimant will be unwilling to produce.

c. The applicants have a significant interest

59. The EACRPU seems to have a significant interest in the proceeding. As letting the claimant benefit of their corrupt practices, harm the principles of ensuring the best business practices in privatization projects, rigorously represented by the EACRPU before federal courts and international tribunals. Moreover, significant interest means

[55] Oded Besserglik v. Republic of Mozambique, Award, ICSID Case No. ARB(AF)/14/2.
[56] Infinito Gold Ltd. Claimant v. Republic of Costa Ric, Procedural Order No. 2, ICSID Case No. Arb/14/5.
[57] Glamis Gold Ltd. v. United States of America, Award, UNCITRAL (2006).
[58] Id.

an interest beyond general interest, the stagnation of the actions against corrupt practices will also impact the financial interests of EACRPU and thereby impacting them personally, they are not furthering the professional interest of their clients, but rather their own significant interests. In ***Alicia Grace v. The United Mexican States***[59] it is clear that an EACRPU have a significant interest as their interests financial, business or otherwise are impacted by arbitration.

60. Thus, EACRPU satisfies the conditions laid down in ICSID Additional Facility Rules and CEPTA.

ii. That there is an implicit criterion for independence of the *amicus applicant* and the EACRPU satisfies the same.

61. It is a settled principle that the *amicus* literally translates to "Friend of Court" should not be a friend of the party, i.e., should be independent from the parties. As the purpose of *amicus* submissions is to bring a different perspective/insight before the tribunal. If *amicus* is not sufficiently independent from the disputing parties, then this objective fails. In ***Bernhard Von Pezold & Others v. Republic of Zimbabwe***[60] the tribunal observed that Article 37(1)(a) of ICSID rules (identical to Article 41(3)(a) of ICSID Additional Facility Rules have an implicit requirement of independence.

62. The disputing parties should not be allowed to bring additional claims, camouflaged as *amicus* submissions. Keeping this in mind, this tribunal through its procedural order no. 1[61] in paragraph 21 (c)(d)(e)(f) laid down the necessary disclosure requirement by the *amici* applicants. These requirements are there to allow the tribunal to assess the independence of the applicants from the disputing parties. The similar disclosure requirements in other documents for instance, FTC statements on non-disputing party participation, has been interpreted to decide on independence of the applicant.[62]

63. The EACRPU are sufficiently independent from both of the parties. EACRPU has not received any financial aid from the parties. The EACRPU has been a member of the civil society with professional focus on privatization activities, whose engagement in the transaction was acquired through independent competitive process. There is no

[59] Alicia Grace v. The United Mexican States, Procedural order No. 4**,** ICSID Case No. UNCT/18/4.
[60] Bernhard Von Pezold & Ors. v. Republic of Zimbabwe, ICSID Case No. Arb/10/15.
[61] FACTSHEET ¶10.
[62] Elli Lilly & Company v. Government of Canada, Procedural Order. 4, CASE NO. UNCT/14/2.

affiliation with either party. Thus, their arises no ground to question their sufficient independence.

iii. That amicus submissions should be made in the furtherance of the public interest and the EACRPU satisfies the requirement.

64. The attention of the tribunal is drawn to the context in which the *amicus* submissions came to be accepted in the earlier cases of *Methanex*[63] *and Aguas del Tunari*[64] which led to the codification in ICSID Rules, the main reasons were the inherent public interest in the proceedings and the interests of the wider public that *amicus* could bring forward. The "*friends of court*" in order to assist the tribunal bring the matter of public interest before the tribunal. The mere personal interest that *amicus* may have in a proceeding is restricted to their professional interest is not significant.[65] The amicus must further the public interest along with their significant private interest. A closer look at ***Gabriel Resources ltd v. Romania***[66] demonstrate that the *amicus'* significant interest should tie up with the public interest being represented.

65. The tribunals under ICSID rules have previously considered the public interest to be an implicit requirement. In ***Biwater Gauff (Tanzania) v. United Republic of Tanzania***[67] while specifically dealing with the Article 41 of the ICSID Additional Facility Rules, the tribunal considered the requirement of the public interest in the arbitration. In ***Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentine Republic***[68] although the tribunal did not apply the Article 37 of the ICSID Convention but observed that the Article was consistent with the requirements laid down in *Aguas del Tunari.*

66. Thus, the tribunal while assessing the application must consider the public interest requirement. It is further submitted that the EACRPU makes the submissions in furtherance of public interest by bringing the allegations of corruption before the

[63] Methanex Corp. v. United States of America, Decision on Amici, (2005) 44 ILM 1345.
[64] Aguas del Tunari SA v Republic of Bolivia, Decision on Respondent's Objections to Jurisdiction, ICSID Case No ARB/02/3.
[65] Apotex Inc. v. The United States of America, Procedural Order on the Participation of the Applicant, BNM, ICSID Case No. ARB(AF)/12/1.
[66] Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. v. Romania, Procedural Order 19. ICSID Case No. ARB/15/31.
[67] Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, Procedural Order No. 5, ICSID Case No. ARB/OS/22.
[68] Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19.

tribunal. Corruption is a subordination of public interest to private interest; it also impacts the public functioning and economies. Merely because, the larger public is not aware of the impact, the duty to preserve their wellbeing is not negated. Further, as submitted before, corruption violates international public policy.

iv. That EACRPU does not disrupt or burden the proceedings. Even if that is the case, it should not bar the application itself.

67. Article 41(3) of Additional Facility rules also provide that the tribunal should ensure that the *amicus* submission should not disrupt or burden the proceeding. There is nothing on the record to show that EACRPU are willing to deliberately disrupt the proceeding. There is a reasonable possibility of corruption being there. As far as the timing of the submissions is concerned, as submitted earlier, the tribunal can decide to peruse the submissions at any phase. In *Biwater Gauff*,[69] the delay was concerned, the tribunal held that the same could be balanced by limiting the scope and length of the submissions.

68. Further, after all the required criterions satisfied, just because the submissions slightly appear to be tilted against the claimants, should not bar the application itself. It should be remembered that only the *amici* are in position to bring potential abuse to light. However, even if the tribunal holds that the submissions are unduly burdensome, then procedural safeguards should be granted instead of barring the application *in toto.*[70] The safeguards can be provided in terms of costs[71] or any other measure.

69. From the arguments submitted above, it is requested that the leave should be granted to EACRPU to make the submissions.

B. The Tribunal Should Not Grant Leave to the Consortium of Bonoori Foreign Investors

70. The Consortium of Bonoori Foreign Investors ["CBFI"] should not be granted leave to make amicus submissions as they fail to satisfy the preliminary requirements for the purpose as at the outset, they fail to demonstrate a public interest in their application **[i]**. In fact, the interest of the CBFI is seemingly limited to persuading the tribunal to adopt an interpretation that would be favorable to the interests of its members **[ii].** Additionally, the CBFI fail to demonstrate sufficient independence from the Claimants

[69] Supra note 66.
[70] Supra note 63.
[71] Soles Badajoz Gmbh v. Kingdom of Spain, Award, ICSID Case No. ARB/15/3.

[iii]. Ultimately, the CBFI do not bring in fresh knowledge or a different perspective to be of any assistance to the Tribunal**[iv]**.

i. The application lacks public interest

71. At the outset, it can be argued that neither the ICSID Additional Facility Rules, UNCITRAL Rules on Transparency, nor Article 9.19 of the CEPTA lay down 'public interest' to be a prerequisite for a grant of *amicus* status. But considering the nature of interest discussed by the CBFI in their submission,[72] it is imperative to look at the public interest alleged in the application.

72. The CBFI claim that the current arbitration is likely to impact capital flows into the Greater Narnian region seems far-fetched. The dispute is rather limited in its scope and a mere claim that it would deal a *"death knell to the collective growth of Mekar"* is unsubstantiated. With the decision of the arbitral tribunal in the case of ***Suez Vivendi v. Argentine Republic***[73], it is well-settled that the nature of public interest involved in the proceeding must be more than a merely general interest. In reference to the CBFI's elucidation, the interest involve cannot be said to be above that threshold.

73. The tribunal in ***Apotex v. USA***[74] described "public interest" as *"*(when) *the decisions to be issued in that arbitration are likely to affect individuals or entities beyond the Disputing Parties"*. It logically follows that involvement of public interest is imperative for *amicus* participation owing to the very nature of *non-disputing parties*.

74. The CBFI however fail to demonstrate a significant public interest for their participation.

ii. The applicant is only interested in persuading for adoption of a favoured interpretation

75. Apart from the requirement of a public interest, Article 41(3)(c) of the ICSID Additional Facility Rules**[75]** lays down the pre-requisite of a significant *personal* interest. This requirement resonates with the requirements under UNCITRAL Transparency Rules**[76]** and Article 9.19 of the CEPTA**[77]**.

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[72] FACTSHEET ¶16.
[73] Supra note 68.
[74] Supra note 65.
[75] Supra note 46
[76] Art. 5, UNCITRAL Rules on Transparency in Treaty Based Investor-State Arbitration, 2013.
[77] FACTSHEET ¶80.

76. Regards being had to the nature of involvement of the CBFI's members with the Claimants and also their nature of interest against the Respondents,[78] it is quite apparent that their interest is limited to persuading the Tribunal to adopt an interpretation of Article 9 of the CEPTA favored by them. The existence of such an interest cannot be denied but it has, in the past, been found insufficient to constitute *'significant interest'* for the Tribunal's purposes.[79]

iii. The application lacks independence from the disputing parties

77. Article 41(3)(a) of the ICSID Additional Facility Rules contains an implicit requirement of independence for granting *amicus* status.[80] It is important for the party being granted the status of *'friend of the court'* to be sufficiently independent so as to avoid prejudice to either party.

78. One of the CBFI's members include *Lapras Legal Capital* ["Lapras"]. Apart from the common membership of both Lapras and the Claimants in the CBFI, the latter is also being assisted in devising its funding strategies with respect to its claim in the current dispute by Lapras.[81]

79. The disclosure on the CBFI's part elaborates on their internal voting procedure in case there lies a conflict of interest.[82] Proper procedural safeguards are claimed to have been followed. Despite such safeguards, the involvement of Lapras in the final drafting exercise cannot be said to be independent of its subjective standing which is undoubtedly influenced by the financial outcome of the current dispute. The Respondents *prima facie* emphasize on the nature of interest of Lapras and express their reservations as to the CBFI's independence.

80. In addition to Lapras, 38 other members of the CBFI hold investment rights in Mekar, with two of them already pursuing claims against the Respondents under Chapter 9 of the CEPTA.[83] This further substantiates the Respondents reservation as to the interest of the CBFI being favorable interpretation. Ancillary to this is the conspicuous silence of the CBFI's as to the involvement of these other members in the procedure.

[78] See infra section [2.4].
[79] Supra note 65.
[80] Supra note 36.
[81] Supra note 77.
[82] Procedural Order 3 ¶87.
[83] Supra note 77.

81. Even if CBFI's interest were to be considered genuine, it is indisputable that the decision of interpretation of the Tribunal would not bind subsequent tribunals that will have to decide the case in the given facts and circumstances.

82. Therefore, the respondents contend that the Applicants should not be granted leave for making *amicus* submissions in consonance with the established principles.

iv. The application lacks fresh perspective and knowledge

83. In ***Eli Lily v. Canada***[84], the arbitral tribunal opined that "*mere membership of a disputing party in an applicant does not mean a lack of independence per se. Rather, such membership is to be viewed in relation to Section B.6(a) of the FTC Statement* (Article 41(3)(a) ICSID Additional Facility Rules for our purposes) , *which directs the Tribunal to consider "the extent to which … the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties".* The respondents contend that even in abeyance of the above-mentioned circumstances, CBFI do not bring in a fresh perspective or knowledge that has not already been presented before the Tribunal.

84. The above-mentioned requirement is listed under the ICSID Additional Facility Rules, UNCITRAL Rules on Transparency, and the CEPTA.

85. The arguments advanced by the CBFI have already been raised by the disputing parties. The application raises no new issues of facts so as to warrant admission on the claim of wider representation.

86. The composition of the CBFI clarifies that its members essentially have the same interests as the Claimants and as such are not likely to bring in a perspective different from the one already presented.[85] The mere fact of representation from companies of varied sizes does not entail a fresh perspective by default, and the application fails to establish any such perspective *prima facie*.

87. CBFI has given no other reason to show how it will be able to assist the tribunal, and merely claims that it shall be able to assist the tribunal without substantiation, it has been observed previously that this is not sufficient.[86]

[84] Supra note 62.
[85] Supra note 51.
[86] Supra note 77.

88. For the reasons stated above, the Respondents urge the Tribunal to deny the CBFI's request to file written *amicus curiae* submissions.

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

A. The actions of the Respondent were driven by due process

89. The claimant was never in its dealing as Caeli, given any treatment which would be understood to be of discriminatory nature. Whenever an exception was made due to the same regard, the exception was driven with keeping in mind Article 9.8 of the CEPTA[87], which conferred upon regulatory powers upon the host state to ensure meeting of legitimate policy objectives

90. Even though Mekar was undergoing a dire economic crisis at the time of the dispute, it granted the respondent due process every step of the way.

91. Even the First investigation was taken place keeping in mind the power of the Host state to undertake discretions in order to weed out anti-competitive behavior. [88]

92. The discretion made here was taken keeping by carefully analyzing the impacts of the Horizon 2020 scheme, which through a white paper was clearly notified to have included foreign aid under the realm of regulatory practices and the potential abusive power that the Caeli along with its Moon Alliance partner, Royal Narnian held at the Phenac International Airport.

93. The presence of the this dominant and potentially abusive position is what allowed the discretion to be made under Mekari Law.

94. As per the CEPTA, this tribunal cannot be used as a super appellate tribunal, i.e., the tribunal does not have the authority to make reservations towards the domestic law of the Mekar.

95. Bearing this in mind, and in accordance with the CEPTA and International law, the Claimants were given a right to appeal which was successfully exhausted and denied by the Mekari courts.

B. The Respondent did not discriminate against the claimant

96. According to the Jurisprudence flowing from the ***SD Myers v Canada*** [89] which laid the down the test for like circumstances, ***Methanex v USA***[90] which laid down the

[87] FACTSHEET ¶77.
[88] ANNEX III
[89] S.D. Myers, Inc. v. Government of Canada, UNCITRAL Partial Award ¶250.
[90] Methanex Corporation v. United States of America, UNCITRAL, Final Award

comparable situations doctrine, and ***Sanayi AS V Pakistan***[91]which is based on the Like situation doctrine, discriminatory behavior can be construed if the same thing is denied or granted to a party in like circumstances, or to the deterrence of a party in comparable situation or in like situation.

97. In the current dispute, the subsidies being denied to the claimants, as was later even expounded by the secretary of Tourism, stemmed out of the fact that, both airlines who were denied Subsidies as per the executive order [92] were airlines which had the capability of functioning despite the financial crisis, since they were supported and financed to a large extent by their home Governments.

98. Had the subsidies been granted to the claimants in such a scenario, it would have resulted in furtherance of the dominant position enjoyed by the claimants, since it would have allowed the claimants to further outspend the rest of its competitors, who being privately owned airlines were not in like, similar or comparable situations as the Claimant, being a largely state enterprise and even arguably the state itself.

C. The Losses suffered by the claimant was due to the actions of the claimants themselves

99. Even though the representatives of the Mekari Govt and financial experts throughout the world had warned Vemma against its aggressive expansion policies, it paid no heed to such warnings and went on abusing an already delicate investment. It was due to these policies and not working towards a financially stable plan that ultimately led to Vemma's Downfall.

[91] Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29.
[92] ANNEX VII

IV. THAT THERE ARISES NO CLAIM FOR COMPENSATION SINCE THE RESPONDENT HAS NOT VIOLATED ARTICLE 9.9 OF THE CEPTA.

100. It has been established through the course of above arguments that the Respondent has not violated Minimum Standard Treatment clause, that is Article 9.9 of the CEPTA. The compensation claim for the violation is enshrined in Article 9.21 of the CEPTA under which the compensation should be provided by the market value standard
101. It is submitted that the actions of the Respondent were within established right to regulate as under Article 9.8 of the CEPTA. The actions of the Respondent were governed by the doctrine of necessity as well as Article 9.8 of the CEPTA.
102. After following due process at the High Commercial Court[93] as well as Superior Court of Mekar[94], the Claimant sold their stake to Mekari Airservices. It is submitted that the 400 million USD paid for the stake is the prompt, adequate and effective compensation, already paid to the Claimant.
103. The Respondent submits that there arises no claim for compensation for the Claimant.

A. Market Value Standard for Compensation should be taken place of Fair Market Value

104. Article 9.21 of the CEPTA deals with Final Award by the Tribunal. Article 9.12 mentions expropriation. We understand that Article 9.12 is not applicable as there is no expropriation and thus, the Tribunal must follow Article 9.21 to decide compensation
105. Article 9.21 (a) mentions the award to be as per 'market value'. The standard of fair market value must not be applied as there is no violation of Article 9.9 and Article 9.12 of the CEPTA. Fair market value concerns with hypothetical parties with ideal conditions but market value approach takes into account realistic concerns.
106. Doctrine of *lex specialis*[95] notes that when there is specific law, then it would replace the general law. Principles of fair market value and full reparation[96] would be replaced by the *lex specialis* as is the CEPTA, specifically Article 9.21.
107. Thus, the respondent submits that only market value standard should be used for calculation of compensation.

B. The Measures Taken were Taken due to necessity and were within established Regulatory Powers

[93] Annex XIV, Factsheet.
[94] Annex XV, Factsheet.
[95] Art. 55, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001.
[96] Factory at Chorzow (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 (July 26).

108. Right to regulate in the territory of the State to achieve "legitimate public policy objectives, such as national security, the protection of public health, safety, the environment, public morals, social and consumer protection or the promotion and protection of cultural diversity"[97] is enshrined in Article 9.8 of the CEPTA.
109. It is submitted that the actions of the Respondent were taken for "consumer protection" and thus, do not violate Article 9.8 of the CEPTA.
110. In ***Upton Case***[98] and ***Sempra v Argentina***[99], it was held that there exists a right to take provisional or interim measures with the State however, such acts must be comensated. It is humbly submitted that the interim measures of the Respondent have been done as per the principles of necessity[100] and have been adequately compensated as shown in next part.
111. It is submitted that the current condition of the Claimant is solely due to anti-competitive and self-defeating business practices rather than the provisional measures of Respondent undertaken as per the CEPTA
112. For the reasons stated above, the Respondent thus submits that actions were taken due to necessity and within established regulatory power.

C. Due Compensation of 400 million USD as Has Already Been Paid, is an Appropriate and Adequate Compensation

113. The Claimant received an offer of 800 million USD from Hawthorne Group LLP. This offer was not a legitimate offer ss was decided by the High Commercial Court of Mekar and the Superior Court of Mekar. Claimant sold the stake to Mekari Airservices for 400 million USD.[101]
114. Adequate compensation, as per the decision in ***Teinver v Argentina***[102], corresponds to the market value of the investment. It is submitted that the market value of the investment is 400 million USD as was paid by the Mekari Airservices.
115. The Respondents thus submit that the 400 million USD, as already paid by the Respondent must be taken as appropriate and adequate compensation.

[97] FACTSHEET ¶76.
[98] Upton Case, Commission US-Venezuela, Opinion of Bainbridge, American Commissioner (1903).
[99] ICSID, Decision on Argentine Republic's Annulment of Award.
[100] Art. 5, ILC Draft Articles on State Responsibility.
[101] FACTSHEET ¶87.
[102] Teinver v. Argentina, Award, Case no. ARB/09/1.

116. Therefore, there arises no claim for compensation since there was no violation of Article 9.9 of the CEPTA and the 400 million USD already paid for the stake in Caeli should be taken as adequate compensation.

Prayer for Relief

Respondent respectfully requests this Tribunal to find that:

1. This Tribunal has jurisdiction over this dispute;
2. The applications made by the external advisors to CRPU should be admitted and applications made by the CBFI should be rejected.
3. The Respondent has not violated Article 9.9 of the CEPTA
4. The Respondent is not liable to pay compensation to the Claimant and cu

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Team Shahbuddeen

On Behalf of Respondent,

Vemma Holdings