International Centre for Settlement of Investment Disputes

Vemma Holdings Ltd.

(**Claimant**)

vs.

The Federal Republic of Mekar

(**Respondent**)

ICSID Arbitration

MEMORIAL FOR RESPONDENT

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SUMMARY OF FACTS

1. The Federal Republic of Mekar ("Mekar," "Respondent") is a country recovering from a period of prolonged political instability, characterized by mass migration into the country, as well as exploitation of resource deposits by intermediate occupying powers.[1]

2. The population of Mekar grew from 6 million to 10.8 million between 1980 and 2015.[2] This ensures a large number of workers and high demand. Albeit, the judicial system expanded at a slower rate than the population[3], which doesn't stop Mekar from continuously working on the problem. Altogether the Mekari state is a great opportunity for an international investment, with promising conditions and solid accompanying circumstances.

3. In 1994 the Commonwealth of Bonooru ("Bonooru") and Mekar entered into the Mekar - Bonooru BIT.

4. After the elections in Mekar 2008, the newly elected party decided to privatize most of Mekar's state-owned entities ("SOE"s). One of those was Caeli Airways, as a part of Mekar Airservices Ltd., a state-owned company which owned part Caeli assets and debt liability. Another project implemented in the new governmental period was the *Monopoly and Restrictive Trade Practice Act* ("MRTPA") in 2009. This Act created the *Competition Commission of Mekar* ("CCM") to independently monitor the actions on the Mekari market.

5. The investment in question concerns an investment by *Vemma Holdings Inc.* ("Claimant") into Caeli Airways. Historically, the country of Bonooru owned a significant stake in Vemma, ranging between 31% and 38%.[4] Vemma is also the successor of the state-owned company BA Holdings[5] and a part of the Moon Alliance ("MA"), which is an alliance of aviation companies.

6. In 2010, Vemma bid to purchase Caeli Airways. In 2011, Vemma entered into a Share Purchase Agreement with Mekar for 85% of Caeli Airways, with Mekar Airservices Ltd. retaining the remaining 15%.

[1] SOUF, para. 12.
[2] SOUF, para. 13.
[3] SOUF, para. 13.
[4] SOUF, para. 10.
[5] SOUF, para. 9.

7. In 2014, Bonooru and Mekar signed the *Comprehensive Economic Partnership and Trade Agreement* ("CEPTA")[6] and terminated the pre-existing BIT at the same date.[7]

8. Caeli profited from the extremely low fuel prices, allowing it to offer very low airfares as well. Around 2012 and 2013 there were the first hints on the investor's risky and difficult strategies, which were pointed out by Mekari representatives or the IICRA without any reactions or accommodations of the investor.[8] For example, Vemma´s economic success was made dependent on the fluctuating demand in long-haul flights served for tourism purposes, instead of continuing to expand the offering of domestic flights with constant demand in Mekar.[9]

9. In June 2014, oil prices around the globe crashed.[10] The economic situation in Mekar changed correspondingly.

10. The profits earned by the investor and the market share he reached were so high anyway that the CCM was forced to become active twice to protect a fair market or restrict unfair strategies in 2016[11], once even because of a complaint from a consortium of small regional airlines in Greater Narnia.[12] The CCM placed airfare caps on Caeli Airways´ airfares. The big problem of this period was the inability of the Claimant to secure a steady stream of revenue.[13] Therefore, Caeli received the first subsidies of Bonooru under Horizon 2020 at the same time to continue to pursue its business strategies in the spirit of its home state.[14] The "Horizon 2020" Scheme as part of the Caspian Project to "optimally tap the potential of Bonooru's emerald beaches, its fascinating national parks, and its human, cultural and historical treasures" by the Bonoori government.[15]

11. Nevertheless, the economic success of the investor was built on sand. Additionally, the MON began to nosedive in 2016.[16] Mekar had to enact measures against the economy's decline

[6] 2014 Bonooru - Mekar CEPTA.
[7] SOUF, para. 32.
[8] SOUF, para. 51.
[9] SOUF, para. 29.
[10] SOUF, para. 33.
[11] SOUF, para. 36.
[12] SOUF, para. 38.
[13] SOUF, para. 40.
[14] SOUF, para. 28.
[15] SOUF, para. 28.
[16] SOUF, para. 39.

knowing that they could not satisfy all market participants. For instance, all entities in the aviation sector had to denominate their airfares in MON.[17]

12. Furthermore, the Claimant has attempted to take legal action against the measures. The result was that the legality of these measures was confirmed. He also asked for an offer of a bank loan, which he received but also refused.[18]

13. In the following, it became clear how difficult the investor's strategies were for his own economic situation. He decided to sell the shares in Caeli, although there was a huge chance for Caeli to recover after the crisis.[19] One offer was made by Hawthorne Group LLP. As an offer made by a member of the Moon Alliance, it was not an arm - length offer. Therefore, the Respondent denied it, and made an offer about USD $400 million by himself, which was accepted without any negotiations later on.[20]

[17] SOUF, para. 42.
[18] SOUF, para. 51.
[19] SOUF, para. 54.
[20] SOUF, para 63.

SUMMARY OF ARGUMENTS

1. **Jurisdiction:** The tribunal lacks jurisdiction according to Art. 25 (1) ICSID Convention because Vemma is not "a national of another contracting state." Vemma is effectively controlled by Bonooru and consequently is not an independent commercial entity. Therefore, the Claimant does not qualify as "a of another Contracting Party" and the Tribunal does not have jurisdiction over the present dispute.

2. **Amicus Curiae:** The Tribunal should accept the amicus submission from the Committee on Reform on Public Utilities according to Art. 41 III ICSID Additional Facility Rules because the submission brings knowledge regarding Vemma's corruption of a state officer and the Committee has a significant interest in the proceedings. The Committee was also involved in Caeli´s privatization and therefore can provide new insights on the case. The tribunal should allow the amicus submission from the Committee.

   The Tribunal should bar the Consortium of Bonoori Foreign Investor's amicus submission because the submission only provides information about financial interest and does not fulfill any requirements of Art. 41 III ICSID Additional Facility Rules. Furthermore, Lapras Legal, an entity that is advising Vemma in its case against Mekar, is also a member of the CBFI. An amicus submission from a party involved cannot be recognized, therefore, due to Lapras Legal's involvement in the CBFI, the CBFI's submission should be barred.

Standard of fair and equitable treatment ("FET"): The Tribunal should find that the Respondent did not breach an obligation of Art. 9.9 CEPTA. First, the Respondent did not deny justice to the Claimant under Art. 9.9.2. CEPTA because the standard for finding a denial of justice is high and the Claimant's arguments are unfounded. Second, a denial of justice requires "the failure of the entire domestic legal system;" there was no failure of Mekar's entire legal system because the Claimant submitted a claim to the Mekar courts that was decided in a reasonable and timely manner in accordance with domestic law.

The Respondent also did not violate the legitimate expectations of the Claimant according to Art. 9.9.3 CEPTA. Instead, the Respondent used its right to regulate according to Art. 9.8. CEPTA to properly manage the domestic market, and therefore did not violate the legitimate expectations of the Claimant.

3. **Compensation:** The Tribunal should find that the Respondent did not breach any obligations under 9.9. CEPTA, and therefore the Claimant is not entitled to any compensation. However, if the Tribunal finds that the Claimant is entitled to compensation, the compensation standard according to Art. 9.12 CEPTA is market value, which has already been paid to the Claimant. The Tribunal should not apply the fair market value standard from the Arrakis-Mekar BIT is not applicable because Art. 9.7.2. CEPTA excludes procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements from most favored nation treatment. Thus, the Claimant is not entitled to compensation.

PART ONE: JURISDICTION

I. The Tribunal lacks jurisdiction over the present dispute because under the ICSID Convention the Claimant is not "a National of another Contracting State."

1. Both parties have consented to the submission of a claim to arbitration under ICSID Rules in Art. 9.16 CEPTA. Art. 25(1) of the ICSID Convention extends jurisdiction to disputes between "a Contracting State" and "*a National of another Contracting State*." Mekar, as the Respondent, is the "*Contracting State*." However, the Claimant, Vemma Holdings Inc. ("Vemma"), is a Bonoori state-owned enterprise ("SOE") and consequently is not an independent commercial entity. Therefore, the Claimant does not qualify as "*a national of another Contracting Party*" and the Tribunal does not have jurisdiction over the present dispute.

1. Vemma is not a National of another State.

2. According to Art. 25(2) of the ICSID Convention a party is "a National of another Contracting State" when it is (i) a juridical person that has (ii) the nationality of another state than the Contracting State (iii) on the date on which the parties consented to submit such dispute to conciliation. Under Art. 25(2), two states may not arbitrate under ICSID rules.

3. SOEs should not be considered "Nationals of other Contracting States" because such classification would frustrate the purpose of ICSID arbitration. The ICSID Convention was largely developed by the World Bank in significant part to encourage 'private international investment' as distinguished from public international investment. This should be considered when differentiating between State-to-State and investor-State arbitration.[21] Moreover, the preamble of the ICSID Convention refers in particular to private international investments.[22]

4. In exceptional cases, some tribunals have accepted jurisdiction over SOEs by applying the so-called Broches Test to determine whether or not the company was acting in a commercial capacity. The Broches Test states that a government-owned entity:

> *"should not be disqualified as a 'national of another Contracting State' unless it is* ***(i) acting as an agent for the government*** *or is* ***(ii) discharging an essentially governmental function****."*[23]

[21] Mark Feldman, State-Owned Enterprises as Claimants in International Investment Arbitration, page 5.
[22] Preamble, ICSID Rules.
[23] Aron Broches, Selected Essays, World Bank, ICSID, and other Subjects of Public and Private International Law (Martinus Nijhoff Publishers 1995) 202; Rumeli v. Kazakhstan, Award, para. 211.

5. Vemma is not a National of another Contracting State, because (a) Vemma is a state-owned entity and (b) even if arbitration under ICSID is possible for SOEs, because Vemma is (i) acting as an agent of the government and is (ii) discharging an essentially governmental function, it still cannot be characterized as a national of another contracting state.

a) Vemma is not a National of another Contracting State because Vemma is a SOE.

6. An SOE "*[...]may be defined as a legal entity in which the State [...] has a controlling interest, that enables the State to take part in commercial activities separately from its public administrative functions.*"[24]

7. Bonooru has a controlling interest in Vemma. It historically owns a significant stake in Vemma, ranging between 31 and 38%.[25] This sizable stake gives Bonooru significant influence. Vemma´s board of directors indicates this as well. Bonooru´s representatives on Vemma´s board are present for every meeting. The fact that "[...] *for some meetings, Bonooru's representatives form a majority of members present and voting when not all other shareholders attend*,"[26] underlines that this is a controlling interest, despite not being the majority.

8. Bonooru also takes part in commercial activities through Vemma, separately from the state's public administrative functions. Vemma is designed to pursue financial objectives by commercial means.

9. Vemma is the successor of the state-owned company BA Holdings.[27] The Claimant received the first subsidies under the Horizon 2020 programme which was initiated to support the economy of Bonooru.[28] Those subsidies led to the fact that Vemma was able to undercut the prices on specific routes.[29] Bonooru has made it possible for Vemma to reduce its airfare below its average avoidable costs.[30] Due to the low airfare, the destination Bonooru became much more attractive for tourists and thus Bonooru benefited from Vemma's activities. This shows that through Vemma, the Bonoorian government is acting commercially in Mekar, and Vemma is using their state-granted benefits to obtain economic advantages.

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[24] Muchlinski, P., *State Owned Transnational Corporations and the UN Guiding Principles*, 2011, p. 3.
[25] SOUF, para. 10.
[26] Procedural Order ("PO") No. 3, para. 3159.
[27] SOUF, para. 9.
[28] SOUF, para. 28.
[29] SOUF, para. 36.
[30] SOUF, para 45.

10. Even a former high-ranking employee within Bonooru stated:

> "*You need to contextualize Vemma's investment in the context of Bonooru's Caspian Project and the Horizon 2020 scheme. [...] These routes seem to benefit Bonooru more than Vemma or Caeli*."[31]

Vemma also acted in the interest of Bonooru when they offered cheap flights between Mekar and Bonooru.[32]

11. Bonooru did not hesitate to provide financial support to bail out Vemma after the financial crisis. Bonooru did not only provide financial support, they implemented a bail-in program through the Airways Infrastructure Rescue Act and purchased 55% of Vemma's shares. The increase of the stake was followed by a restructuring of Vemma. Bonooru replaced Vemma's board of directors with governmental functionaries, its functions were expanded to include paramilitary activities, and its legal team was equipped with lawyers from Bonooru´s justice department.[33] Bonooru has an interest in keeping this unsuccessful company afloat by all means in order to use them commercially.

12. During the course of the Claimant's investment, government officials from Bonooru also often exerted pressure on Mekar to treat the Claimant favorably.[34] Vemma has not only received financial support from Bonooru, but Bonooru has also threatened the host with holding back "[...] *funds promised to rebuild Phenac's port as part of the Caspian Project.*"[35] This shows once again the close connection between Bonooru and Vemma. Due to the low airfare, the destination Bonooru became much more attractive for tourists and thus Bonooru benefited from Vemma's activities. The fact, that Vemma acted against it own commercial interest and more for the benefit of Bonooru shows that they must have acted on behalf of the Bonoori government..

13. Vemma is an SOE and therefore not a National of another Contracting State.

b) An arbitration under ICSID can still be possible for SOEs, but not Vemma.

[31] Annex VII, para 1868.
[32] SOUF, para. 22.
[33] SOUF, para. 65.
[34] Response to the notice of arbitration, para. 18.
[35] Response to the notice of arbitration, para. 18.

14. Even if the Tribunal takes the Broches Test into account, Vemma does not fulfill the requirements to be considered a National of another Contracting State because Vemma is (i) an agent of the government and (ii) discharges governmental instructions.

i. Vemma is an agent for the government.

15. As per Art. 8 of the International Law Commission's Draft Articles on State Responsibility, a SOE acts as an "agent for the government" when "*the person or group of persons is in fact acting on (1) the instructions of, or (2) under the direction or control of, that State in carrying out the conduct*."[36] As explained by the Tribunal in *Tulip v. Turkey*, when deciphering the Art. 8 definition for a government agent, one must read the words "*instruction*," "*direction*," and "*control*" disjunctively.[37] Accordingly, only one of these elements needs to be present in order to find that a state acted as an agent of the government according to Art. 8.[38] The Tribunal in *Tulip v. Turkey* also states that "*effective control*" is the relevant test for determining if an entity is under the "*control*" of the state.[39] The questions before this Tribunal must therefore be whether Bonooru exercised effective control over Vemma, whether Vemma was instructed by Bonooru, and whether Vemma was under the direction of Bonooru. If the answer to any one of these questions is yes, then Vemma is a state-owned entity.

(1) Vemma is acting on the instructions of Bonooru.

16. Vemma did not always act to serve its interests as a company, but it did always act to prioritize Bonooru´s interests.

17. Bonooru instructed the Claimant's actions when Bonooru made several payments to Vemma under the Horizon 2020 Scheme, a measure that was part of the Caspian project, intended to boost tourism in Bonooru. Vemma received the first subsidies distributed under the Horizon 2020 Scheme.[40] Due to this significant financial support, the Claimant made decisions, as explained below, that served Bonooru's specific interests.

18. It is in Bonooru's interest to further increase its growth in the aviation sector in order to secure the country's wealth. 13% of the Bonoorian GDP is attributed to civil aviation. 11.6% of

[36] Art. 8 International Law Commission's Draft Articles on State Responsibility, BUCG v Yemen, Decision on Jurisdiction, para. 31.
[37] *Tulip Real Estate v. Turkey*, Award, para. 303.
[38] *Tulip Real Estate v. Turkey*, Award, para. 303.
[39] *Tulip Real Estate v. Turkey*, Award, para. 304.
[40] SOUF, para. 28.

Bonoorians are employed in the civil aviation sector.[41] Vemma's rapid expansion contributed to the growth of the aviation sector in Bonooru; Vemma's aggressive business strategy and its subsequent supra-competitive profits protected the Bonoori tourism industry, while Vemma was simultaneously being subsidized by the Bonoorian government.

19. Vemma managed Caeli in a way not just to gain profits, but to draw more travelers from Mekar and the Greater Narnian region to Bonooru.[42] Vemma's goal of drawingmore travelers to Bonooru to support tourism is evidenced byVemma's irresponsible actions with their investment. As the expert MS Misty Kasumi outlined, the conduct of the Claimant benefits Bonooru more than it does Vemma or Caeli.[43] Instead of saving money for harder economic times, Vemma expanded recklessly to increase the frequency of flights to and from Bonooru.[44] Vemma's behavior shows a pattern that proves that the board of directors does not serve the economic interests of the company, as is to be expected from private companies, but that decisions are made to benefit Bonooru. There is no plausible reason put forth as to why Vemma would act against its own economic interests, other than pressure to make decisions based on Bonooru's instructions.

20. This clearly proves that the Claimant acted on the instructions of Bonooru.

(2) Vemma is under the direction or control of Bonooru.

21. As the Tribunal in *Tulip v. Turkey* states, "*effective control*" is the relevant test for determining if an entity is under the "*control*" of the state.[45]

22. Vemma is effectively controlled by Bonooru. The representatives of Bonooru are present for every meeting and for some meetings and Bonooru's representatives form a majority of members present and voting.[46] Accordingly, compared to other board members, Bonooru's representatives have the greatest influence on decisions at Vemma due to their permanent presence. Therefore, there are times when business decisions for Vemma are made entirely by Bonooru government representatives. This constitutes effective control.

23. There can be no doubt that Vemma is under the direction or control of Bonooru.

[41] SOUF, para. 6.
[42] SOUF, para. 28.
[43] Annex VII, para. 1870.
[44] SOUF, para. 31.
[45] *Tulip Real Estate v. Turkey*, Award, para. 304.
[46] PO No. 3, para. 3.

ii. Vemma discharges a governmental function.

24. According to Art. 5 of the International Law Commission's Draft Articles on State Responsibility, an SOE discharges an essentially governmental function when it is:

> "*empowered by the law of that State to exercise elements of the government authority [...] provided the person or entity is acting in that capacity in the particular instance."*[47]

25. The Tribunal in *CSOB* clarifies that, in assessing whether an entity discharges an essential government function, *"[t]he focus must be on the nature of these activities and not their purpose.*"[48] Further, the activities must be commercial in nature.[49] Activities that are, by their very nature, typically governmental tasks not usually carried out by private entities, cannot be considered commercial in nature.[50]

26. Private companies pursue the goal of profit maximization to satisfy potential investors as well as to ensure as much money as possible for reinvestment in their own company. In capitalist economic systems, companies are usually concerned with profit maximization.

27. Governments and SOE's do not have a duty to maximize profits. Rather, it is part of the government's duties to perform a wide variety of tasks, such as legislating, enforcing laws, maintaining social peace and general human rights.[51] These tasks must be performed by the government without a profit motive. One of these human rights is the freedom of movement of its own citizens. [52]

28. The Claimant performs for its home state the function of economic protection of the Bonoori tourism sector. The financial support coming from the mentioned Horizon 2020 Scheme underscores this dependency; the consequences of Claimant's decisions fulfill Bonooru's governmental functions. Vemma contributes to the growth of the aviation sector, protecting the Bonoori tourism industry while being subsidized by the Bonoorian government.

29. The Claimant discharged a governmental function by inflating the routes between Mekar and Bonooru while acting under the veil of commerciality. Vemma did not act like a private entity would usually do. Whenever commercial interests do not serve the entity itself,

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[47] Art. 5 International Law Commission's Draft Articles on State Responsibility, *BUCG v. Yemen*, Award, para. 31.
[48] *CSOB v. Slovakia*, Decision of the Tribunal on Objections to Jurisdiction, para. 20.
[49] *CSOB v. Slovakia*, Decision of the Tribunal on Objections to Jurisdiction, para. 20.
[50] *Maffezini v. Spain*, Decision on objection to jurisdiction, para. 86.
[51] Definition Governmental Function, https://www.lawinsider.com/dictionary, visited: 08.09.2021.
[52] Article 13 I. Universal Declaration of Human Rights.

this shows a worrisome development, especially when it rather fulfils a state's interest. Bonooru benefits the most from the routes between Mekar and Bonooru. Even reputed economic scholars have concluded that Bonooru profited from Vemma's growth tactics more than Vemma or Caeli.[53] The actions of the Claimant are mainly about the ideal of the Bonooru government to boost tourism in the areas served by the flights. When focusing on the activity itself, as the Tribunal did in *CSOB*, it is clear that Vemma´s activities were not purely commercial in nature.

30. Vemma's behavior also shows that they are not concerned with maximizing profits, as private companies are, but that they assume the duties of the government, for example, by ensuring compliance with Art. 70.[54] Through Royal Narninan, Vemma both fulfills the government's duty to implement the general right to freedom of movement,[55] and to comply with Art. 70.

Vemma discharges a governmental function and it therefore does not operate in a commercial capacity. Even with the exception of the Broches Test, Vemma cannot be seen as a National of another Contracting State, and accordingly, the Tribunal does not have jurisdiction under the ICSID arbitration rules.

[53] Annex VII, 1870.
[54] SOUF, para. 5.
[55] Article 13 I. Universal Declaration of Human Rights.

PART TWO: ADMISSIBILITY

I. The amicus submission from the Committee on Reform on Public Utilities ("Committee") should be accepted under the Art. 41 III ICSID Additional Facility Rules.

31. According to Art. 41 III ICSID Additional Facility Rules,

> *"[i]n determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:*
> *(a) 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 from that of the disputing parties;*
> *(b) the non-disputing party submission would address a matter within the scope of the dispute;*
> *(c) the non-disputing party has a significant interest in the proceeding."*

32. Amicus submissions provide important support to the tribunal in reaching expeditious and fair decisions. Therefore, the Amicus submission made by members of the Mekari civil society and an already approved external organization like the Committee, guarantee a sustainably useful support.

1. The non-disputing party submission assists the Tribunal by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

33. As the Tribunal in *Apotex* determined, a submission by a non-disputing party should be allowed if it will "*provide any assistance to the Tribunal that might not otherwise be available to it.*"[56]

34. Here, the Committee shows a new perspective by bringing forward unbiased facts "that may not be obtained by either disputing party."[57] The Committee's submission provides essential facts regarding the corruption of a state officer. Corruption of a state officer by bribery is synonymous with the most heinous crimes because it can cause huge economic damage.[58] Credible information to this end shines new light on Vemma´s conduct in general.

[56] *Apotex v. USA I*, Procedural Order No. 2 on the participation of a non-disputing party, para. 23.
[57] Amicus submission by the Committee, para. 639.
[58] *Duty Free v. Kenya*, Award, para. 173.

35. The amicus submission shows a new perspective on the dispute and on Vemma´s conduct.

2. The non-disputing party submission addresses a matter within the scope of the dispute.

36. The Tribunal in *Petzold* defines matters within the scope of the dispute as "*factual and legal issues related to the proceeding.*"[59]

37. During the proceedings Vemma brought forward a claim made by the Centre for Integrity in Legal Services ("CILS") that, during a separate Arbitration on May 9, 2020,[60] the sole arbitrator Mr. Cavannaugh was bribed to decide in Mekar´s favor.[61] The allegations, made by the CILS,[62] have never been confirmed. Further, the Mekari court decided to reject the allegation stating that it is only "circumstantial evidence."[63] As Vemma included the bribery that the Committee refers to in their own submissions, the alleged bribery is part of the dispute. Therefore, the Committee's submission addresses a matter within the scope of the dispute.[64]

3. The non-disputing party has a significant interest in the proceedings.

38. Additionally, the Committee has a significant interest in promoting fair business practices in Mekar.[65] The Committee has been involved in the tendering process and privatisation and it was their obligation to overview the proceedings. The amici were selected to secure a transparent and competitive privatisation process. Therefore, it is in their interest to further anti-corruption efforts in Mekar. Corruption "impacts the financial operations of the amici who regularly advise potential investors prospecting opportunities in Mekar."[66] In conclusion, the Committee has a significant interest in the proceedings and its outcome and thus meets all requirements of the Art. 41 III ICSID Additional Facility Rules. Accordingly, the amicus submission from the "Committee" should be accepted Art. 41 III ICSID Additional Facility Rules.

II. The Tribunal should bar the amicus submission from the Consortium of Bonoori Foreign Investors (CBFI).

[59] *Pezold v Zimbabwe*, Procedural Order No. 2, para 42.
[60] SOUF, para. 58.
[61] SOUF, para. 60.
[62] Annex XII.
[63] Annex XIII, 2200.
[64] Amicus submission by the Committee, p. 636.ff.
[65] Amicus submission from the Committee, para. 641, 645.
[66] Amicus submission from the Committee, para 645

39. There are also amicus submissions that, because of their content and originator, are not suitable to enrich a process in a fair and useful way, and therefore cannot be admitted under Art. 41 III ICSID Additional Facility Rules. The CBFI submission is such a submission.

40. When determining whether to allow a submission, the Tribunal should apply Art. 41 III ICSID Additional Facility Rules, the CBFI's "Amicus Brief Submission Guidelines," and jurisprudence. Art. 41 III ICSID Additional Facility Rules requires that a submission addresses a new perspective. According to the CBFI's "Amicus Brief Submission Guidelines," the thirdparty submission is not allowed to have a conflict of interest because of participation.

1. The CBFI´s submission does not provide a new perspective.

41. Under Art. 41 III ICSID Additional Facility Rules, the non-disputing party needs to provide a new perspective. In *Apotex*, the Tribunal found that a third-party submission that provided just pure legal analysis did not provide a new perspective to the Tribunal.[67] The CBFI amicus submission also only provides legal analysis[68], and thus does not provide any new knowledge, experience or expertise. CBFI only refers to issues that were already discussed. Therefore, the CBFI submission cannot provide a new perspective.

2. The CBFI´s submission does not comply with its own "Amicus Brief Submission Guidelines" and therefore cannot be used.

42. The CBFI's "Amicus Brief Submission Guidelines" forbid participation in processes whenever "*discussions or votes in relation to a dispute in which they have a conflict of interest*" arise.[69] Such a conflict occurs if a "*party to the case or has a direct financial interest in the outcome of the case*."[70]

43. This rule is intended to prevent a clear shift of interest towards the impartiality of the organization and is aimed at ensuring a clear demarcation from possible entanglements.

44. As shown here, the Guideline securing the independence of the organization, is not fulfilled here. Although the situation was strained, Executive Committee member Horatio Velveteen, CFO of Lapras Legal Capital, could vote in respect of the amicus submission in Vemma's claim against Mekar since "*Lapras' activities in relation to this dispute were*

[67] *Apotex v. USA I*, Procedural Order No. 2 on the participation of a non-disputing party, para. 23.
[68] Amicus submission by the CBFI, p. 557ff.
[69] PO No. 3, para. 12.
[70] PO No. 3, para. 12.

restricted to advising Vemma in respect of potential litigation funding and funders."[71] Velveteen was interested in a decision in favor of the Claimant to improve his own prospects arising from his financial interest in his case and investment. The voting of Velveteen shows the inadequate behavior of the CBFI and the improper nature of its submission, and disqualifies the CBFI´s submission. The CBFI is not independent because of the participation of Mr. Velveteen.

45. The CBFI´s amicus submission does not meet the requirements of Art. 41 III ICSID Additional Facility Rules and the Tribunal should bar the amicus submission from the Consortium of the CBFI.

[71] PO No. 3, para. 12.

PART THREE: MERITS

I. The Respondent did not treat the Claimant unfairly and inequitable and therefore did not violate Art. 9.9 CEPTA.

46. The Respondent did not treat the Claimant unfairly or inequitably, and thus did not violate the ensured minimum standard of treatment of Art. 9.9 CEPTA. The Respondent (1) did not breach obligations under the FET standard under Art. 9.9.2 CEPTA, and (2) did not violate the Claimant´s legitimate expectations under Art. 9.9.3 CEPTA.

1. The Respondent did not breach an obligation of Article 9.9.2 CEPTA.

47. Under Art. 9.9.2 CEPTA, a measure violates fair and equitable treatment when it constitutes: (i) denial of justice in criminal, civil, or administrative proceedings; (ii) fundamental breach of due process; (iii) arbitrary or discriminatory conduct; (iv) abusive treatment of investors; or (v) a breach of any further elements of FET adopted by the parties in accordance with Art. 9.2.2 CEPTA. In particular, the Respondent denies that its measures constitute (i) a denial of justice, (ii) a breach of standard of due process, (iii) arbitrary and discriminatory conduct, or (iv) breach any further elements of the fair and equitable treatment standard.

a) The Respondent did not deny justice to the Claimant.

48. The standard for a finding of denial of justice is high.[72] As the Claimant had the opportunity to use Mekar's legal system fully ,Mekar's judicial system judged in an appropriate period of time, and the Mekari judge properly applied the law of Executive Order 5-2014, the Claimant has not been denied justice.

i. The Claimant had the possibility to use Mekar´s legal system fully.

49. The standard for finding denial of justice is high, especially when it comes to a denial of justice for lack of access to a functioning legal system.[73] It requires "*the failure of the entire domestic legal system*."[74] As extensively stated in *Ambatielos*, the full use of a legal system is means appearing before the courts and having access to all procedural remedies or guarantees provided by the law of the land in order that justice may be administered on a footing of equality

[72] *Bridgeston v. Panama*, Award, para. 317.
[73] *Bridgeston v. Panama*, Award, para. 317.
[74] *Bridgeston v. Panama*, Award, para. 362.

with nationals of the country. This includes the ability to deliver any pleading or counterclaim or to adduce evidence.[75]

50. The Claimant was able to use the Court fully and to avail himself of any procedural remedies or guarantees provided by the national legislation of the Respondent. As stated above, the Claimant had the opportunity to claim against any of the Respondent's measures, and did so twice. The date of the hearing had no influence on the possibility to use the Court fully. The Claimant was able to use the Court fully from April 25, 2019 to April 27, 2019.[76] Judge VanDuzer's decision to dismiss the Claimant's claims can be traced to Executive Order 5-2014, which means Judge VanDuzer applied existing law, not that the Claimant could not use the legal system fully.[77] Judge VanDuzer judged according to the law of Mekar.[78]

51. As the Claimant was able to fully use the procedural remedies, the Respondent´s legal framework fulfills the requirements of a functioning legal system and the Respondent did not deny justice to the Claimant.

ii. The Mekari judicial system judged in an appropriate time period.

52. Delays significantly longer than the one-year delay the Claimant faced are common whether in arbitral or in local proceedings and have consistently not been seen as a denial of justice.[79] In *Jin Hae Seo*, the hearing took place one year after the notice of arbitration;[80] in *Doutremepuich*,[81] the Notice of Arbitration was on March 30, 2018 and the first hearing was on June 12, 2019; in *Bayindir v. Pakistan*, the Notice of Arbitration was on April 15, 2002, but the first hearings were held on February 6, 2004.[82] Further, in *White v. India*, the Tribunal concluded that the various factors that led to a delay of over nine years did not reach the stage of constituting a denial of justice.[83] In particular, in *White*, the Tribunal supported distinguishing

[75] *Ambatielos v. Great Britain*, Award, 111.
[76] SOUF, para. 52.
[77] PO No.3, para. 8.
[78] PO No.3, para. 8.
[79] *Jan de Nul v. Egypt*, Award, para. 203; *Jin Hae Seo v. Republic of Korea*, Award, para. 5, 16; *Doutremepuich v. Republic of Mauritius*, Notice of Arbitration, Transcript of Hearing I; *Bayindir v. Pakistan*, Award, para. 48, 50.
[80] *Jin Hae Seo v. Republic of Korea*, Award, para. 5, 16.
[81] *Doutremepuich v. Republic of Mauritius*, Notice of Arbitration, Transcript of Hearing I.
[82] *Bayindir v. Pakistan*, Award, para. 48, 50.
[83] *White v. India*, Award, para 10.4.22.

between commercial matters and criminal cases "*where there is a particular need for the urgent resolution of cases, and purely commercial matters such as are involved here*."[84]

53. The period between the claim in question and the first hearing for that claim was 13 months. Regardless of the situation in Mekar, it is not unusual for a hearing to take place one year or more after a claim is made. As seen in the Tribunal decisions referenced above, a period of one year between the claim and the first hearing is not unusual and therefore definitely does not meet the high standard of denial of justice.

54. The CCM has requested time to respond to Caeli´s notice, which must be afforded to protect the Claimant's due process rights.[85] It cannot be expected of the Respondent to deny the CCM the opportunity to review the complaints Vemma brought forward in their appeals concerning the two CCM investigations for the sake of speeding up the judicial process, especially considering that a one-year delay is not unusual.

55. The judicial system of Mekar judged in an appropriate time period.

iii. VanDuzer's decision on the preservation of the airfare caps did not violate the FET standard by denying justice to the Claimant.

56. According to the tribunal in *Bridgeston*, a denial of justice occurs when "*the entire domestic legal system fails.*"[86]

57. Judge VanDuzer's decision on airfare caps was made on the basis of Executive Order 5-2014. This Order grants a court the ability to dismiss without appeal a case by way of summary judgment where the judge finds there is a very little chance of success on the merits.[87] Between 1980 and 2015, the population of Mekar grew from 6 million to 10.8 million.[88] This is why the government has come up with solutions to make the legal system more effective. One of those solutions was the Executive Order 5-2014. The Claimant could have known about the Order and should not be surprised when a practice that has been in place for years is applied.

[84] *White v. India*, Award, para. 10.4.14.
[85] SOUF, para. 1295ff.
[86] *Bridgeston v. Panama*, Award, para. 362.
[87] PO 3, para 8.
[88] SOUF, para. 13.

VanDuzer´s decision did not breach the FET standard by denying justice, but rather applied the domestic law of Mekar.[89] The Tribunal should keep in mind that:

> *"[i]t is a fact of life [that] everywhere individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints*."[90]

58. Even if the Claimant argues that the decision of Judge VanDuzer is not in conformity with the applicable domestic law, this does not mean the decision breached international law.[91]

59. Judge VanDuzer's decision on the preservation of the airfare caps did not violate the FET standard by denying justice to the Claimant

b) The High Commercial Court of Mekar has the competence to enforce the May 9 award.

60. According to Art. III. of the New York Convention, "*each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon*."[92] Art. 34 of the UNCITRAL arbitration rules adds that each party of the arbitration proceeding has the obligation to "*carry out all awards without delay*."[93] But it must be recognized that "*ICSID Tribunals are not directly concerned with the question whether national judgments have been rendered in conformity with the applicable domestic law*."[94] Above all, the Tribunal must verify whether a national judgment is a violation of international law, which would constitute a denial of justice.[95]

61. Since Mekar is a Contracting States to the New York Convention,[96] it has the competence under the New York Convention to recognize and execute arbitral awards. The Respondent fulfilled this competence when the High Commercial Court of Mekar enforced the May 9th arbitral award. At that time the Claimant did not issue the Award nor claim to have it set aside. Therefore, the High Commercial Court of Mekar has the competence and the

[89] SOUF, para 54.
[90] *Azinian v. Mexico*, Award, para. 83.
[91] *Teco v. Guatemala*, Decision on Annulment, para. 96.
[92] Article III. New York convention.
[93] UNCITRAL arbitration rules, Article 34, para. 2.
[94] *Swisslion v. Macedonia*, Award, para. 264.
[95] *Swisslion v. Macedonia*, Award, para. 264.
[96] SOUF, para. 66.

obligation to enforce the May 9th award, and the Claimant must respect the decision of the independent High Court of Mekar, which had the full rights to enforce it.

c) The Respondent did not breach the standard of due process.

62. A breach of due process:

> *"...requires evidence of "fundamental" breaches of due process, that is, "serious" breaches. For example, "lack of access to any court, absence of an impartial decision maker; absence of any opportunity to be heard; and absence of a reasoned decision"."*[97]

63. The standard of due process is "*extremely high*," and it entails "*the failure of the entire domestic legal system.*"[98] The Respondent did not breach this standard as the Claimant did not (1) lack access to any court and had every opportunity to be heard. Further, (2) the decisions of the Mekari courts were reasoned, and (3) the Respondent did not bribe arbitrator Mr. Cavannaugh.

i. Judge VanDuzer's decision was reasoned because it was based on and related to Executive Order 5-2014, which is a rational policy because it is logical and addresses a public interest matter.

64. In its ordinary meaning, the term "*fair*" means "*reasonable*."[99] An act is reasonable when it is based on a rational policy and is reasonable in relation to the policy.[100] A policy is rational when it follows a logical (good sense) explanation and is taken with the aim of addressing a public interest matter.[101] A rational policy must "*be assessed objectively by the Tribunal.*"[102]

65. Judge VanDuzer based his decision to dismiss any further appeal on the Executive Order 5-2014. To prove that the decision was reasonable, the Respondent has to prove that the Executive Order 5-2014 is based on a rational policy and is reasonable in relation to the policy.

66. Mekar's courts are dealing with a very high volume of cases. To help provide relief for the courts, the government passed Executive Order 5-2014, which grants a court the ability to

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[97] *Bridgeston v. Panama*, Award, para. 367.
[98] *Bridgeston v. Panama*, Award, para. 362.
[99] *National Grid v. Argentine*, Award, para. 168.
[100] *AES v. Hungary (II)*, Award, para. 10.3.7.
[101] *AES v. Hungary (II)*, Award, para. 10.3.8, *Micula v. Romania*, Award, para. 489.
[102] *AES v. Hungary (II)*, Award, para. 10.1.1.

dismiss without appeal. Mekar issued Executive Order 5-2014 lawfully under the right to regulate granted to them in Article 9.8.1 CEPTA. The Executive Order results in proceedings being conducted more effectively and judgments being rendered more quickly, which is in the interest of all parties involved. Considering that another court does not come to a different decision,[103] it is in accordance with the policy to prohibit the further appeal and save resources of the court. The Executive Order 5-2014 follows the public policy to speed up the judicial system and to guarantee a more efficient proceeding.

67. Executive Order 5-2014 is rational because it also addresses a public interest matter. The Respondent has the right to regulate in order to achieve legitimate public policy like social protection, safety, and public morals.[104] In addition, Mekar can handle more criminal cases as well as civil cases and protect both public morals and security through criminal proceedings. Therefore, the Executive Order 5-2014 achieves legitimate public policies. The right to regulate is applicable to the Executive Order.[105] As shown above the Executive Order 5-2014 is based on a rational policy and is reasonable in relation to the policy. This means that the Executive Order 5-2014 is reasonable, and therefore fair.[106]

68. The Claimant's accusations of excessively lengthy procedures are groundless. The Claimant complains about a too long procedure, but Vemma also complains about measures which shorten already acceptable waiting times even further. The decision was based on a rational policy and was reasonable and therefore the judgment was fair.

ii. There is no conclusive evidence that the Respondent bribed Mr. Cavannaugh.

69. Corruption is seen as one of "*the most heinous crimes.*"[107] In the case of *EDF*, an allegation of corruption was made against one of the highest government officials; this is comparable to Mr. Cavannaugh serving as the main arbitrator in this case. There is general consensus among international Tribunals and commentators regarding the need for a high standard of proof of corruption.[108] The allegation that Mr. Cavannaugh was bribed during the

[103] SOUF, para. 54.
[104] Art. 9.8.1. CEPTA.
[105] Art. 9.8.1. CEPTA.
[106] *National Grid v. Argentine*, Award, para. 168.
[107] *Duty Free v. Kenya*, Award, para. 173.
[108] *EDF v. Romania*, Award, para. 221.

SCC arbitral proceedings is only based on a report of the ILCS. The Claimant raises allegations of considerable magnitude on an unspecified basis.

70. Furthermore, the report states that "*the recorded conversation indicate[s] that the sole arbitrator agreed to receive a kickback from the Claimant in return for rendering the award in its favor.*"[109] In clear terms, the allegation of a bribe requires proof, while the report just indicates corruption. The allegations brought forward by the Claimant are not clear and convincing enough to accept the claim of corruption.

71. There is not sufficient evidence to prove that the Respondent bribed Mr. Cavannaugh, and therefore, the Respondent did not breach the due process standard.

d) The Respondent did not discriminate the Claimant during the CCM investigations or the grounding of the Boeings.

i. The first investigation by the CCM was not discriminatory.

72. Discrimination requires intentional treatment in favor of a party to the detriment of another one, a treatment that does not apply to other parties in a similar situation.[110]

73. The first CCM investigation is not discriminatory because the Claimant stated that they accept the interim airfare caps from the first investigation as reasonable.[111] Mainly, the Claimant stands out because of his anti-competitive behavior. In fact, the Claimant did not only enjoy the benefits at Phenac International Airport reviewed by the CCM,[112] but also amassed those benefits in a way that was on the border of legality. The CCM commented as follows: "*Caeli has squeezed out concessions from Phenac International Airport by threatening to shift its traffic out of Phenac International Airport to other airports in the region*."[113] Vemma used its dominance at the Phenac airport, its "*fortress hub*,"[114] to elicit more benefits. As these actions were anti-competitive, the CCM pursued its obligation laid out by the MRPTA to initiate an investigation concerning potentially anti-competitive behavior.[115]

74. Therefore, the first CCM investigation was not discriminatory.

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[109] Annex VII, para 2.
[110] *CMS v. Argentine Republic*, Award, para. 288, *LG&E v. Argentine Republic*, Decision on Liability, para. 146, *National Grid v. Argentine*, Award, para. 192.
[111] Notice of Arbitration, para. 15.
[112] SOUF, para. 25.
[113] PO No.3, para 7.
[114] SOUF, para. 38.
[115] MRTPA, Chapter III (1).

ii. The second CCM investigation was not discriminatory.

75. Chapter III (3) of the MRTPA states that the CCM shall open an investigation when:

> *"(a) a complaint is brought to the CCM by a direct competitor in the market; and (b) the corporation has at least a 10% market share. (c) The CCM must consider whether sufficient evidence is brought by the direct competitor before exposing a corporation to a potentially costly investigation."* [numeration added]

76. The CCM received a complaint by a direct competitor in the market. The second investigation was indicated by another complaint from a consortium of small regional airlines in Greater Narnia.[116] In response, the CCM opened an investigation.

77. At the time when the second investigation started in December 2016, Vemma had a market share of 43%, well exceeding the 10% threshold needed to open an investigation.[117]

78. Caeli operated certain routes without making any profit or fulfilling an obligation.[118] This behavior was especially confusing in light of Caeli's usual conduct, which was characterized by taking high risks and being very profit-oriented. Even experts like Misty Kasumi, a former high-ranking employee within Bonooru's Ministry of Tourism,[119] stated that *"Caeli Airways' business model is based around undercutting competition with low prices.*"[120] Further, in their complaints, the companies brought forward that it was nearly impossible for them to penetrate the market linked to Phenac Airport, which became a fortress hub for Caeli. The companies brought forward enough evidence to indicate that Caeli launched flights on specific regional routes with the sole purpose of pushing its competitors off these routes, capitalizing on its undercutting policies and the privileges it enjoyed at Phenac International Airport.[121] The CCM decided that the evidence was sufficient and started an investigation according to the MRTPA. The result of the second investigation shows that Caeli breached Mekar´s antitrust legislation in the form of predatory pricing resulting from low airfares and loyalty programs and that the subsidies received by Vemma under the Horizon 2020 scheme helped Caeli drastically reduce its airfare below its average avoidable costs.[122]

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[116] SOUF, para. 38.
[117] Notice of arbitration, para. 14.
[118] SOUF, para. 49.
[119] Annex VII, para. 1815.
[120] Annex VII, para. 1890.
[121] SOUF, para. 38.
[122] SOUF, para. 45.

79. The second CCM investigation was properly executed under the MRTPA. Therefore, the second investigation was not discriminatory but, according to Mekar´s law, necessary and legitimate.

iii. The decision of grounding all Boeings after the awful plane crash was not discriminatory.

80. When Mekar decided to ground all Boeings after the first plane crash, they did not act discriminatory. The decision did not only affect the Claimant´s fleet, but also every other entity that operated Boeings 737 Max in Mekar.

81. The precautionary grounding of the Boeing's 737 Max proved to be reasonable after the second dramatic crash in March 2019 with the same airplane type. To demand that the Claimant continue to use the type of aircraft, of which two crashed very quickly one after the other, shows how ruthless and inhumane is the pursuit of profit of the Claimant.

82. The decision of grounding all Boeings was not discriminatory.

e) The Respondent did not breach any further elements of the fair and equitable treatment obligation.

i. The rejection of the Hawthorne offer was reasoned and legitimate.

83. A reasoned and legitimate expectation is based on a specific promise or commitment.[123]

84. The Claimant cannot have any reasonable or legitimate expectations that the Hawthorne offer would be accepted because, according to the Shareholders Agreement, the Respondent has the right of the first refusal of arm-length offers received by the Claimant. Therefore, the Hawthrone offer needs to be an arm-length offer of a *bona fide* third party. As determined by the Tribunal of the SCC, the offer was not an arm's-length offer of a third party. There is no specific promise or commitment of the Respondent accepting any offer that is not an arm-length-offer.

85. Therefore, the rejection of the Hawthorne offer was legitimate and reasonable and was not a breach of the fair and equitable treatment standard.

[123] *Crystallex v. Venezuela*, Award, para. 486a.

ii. The bank loan offered to the Claimant was fair and equitable by mirroring the current situation of the Mekari bank system.

86. The Respondent has the right to regulate business activities in order to achieve safety and public morals and make decisions in the financial interest of the public.[124] A state bank needs the opportunity to assess an applicant's solvency. In public morals, a bank must consider its own economic options. Otherwise, the economic situation will continue to deteriorate and the entire population will be confronted with the negative consequences.

87. Caeli asked and received an offer for a bank loan in February 2019, which the Claimant denied. Next to the mentioned rating and the study, this decision was influenced by "*risky investment choices by Caeli, long-standing debts that Caeli has failed to service since its privatization, and large fines payable to the CCM.*"[125]

88. This shows that the conditions of receiving a bank loan deteriorated significantly, in the public eye, and accordingly, all market participants would have to deal with the consequences.

89. As shown, the denial was a fair decision, only influenced by external circumstances, and not by the Respondent itself.

90. The Respondent did not breach any further elements of the fair and equitable treatment obligation, and there did not treat the Claimant unfairly or inequitably at any point in time. Thus, the Respondent did not breach any obligations of Art. 9.9.2 CEPTA.

2. The Respondent has not violated the legitimate expectations of the Claimant according to Art. 9.9.3 CEPTA.

91. Art. 9.9.3 CEPTA offers a definition of creating legitimate expectations and of breaching the FET standard by violating the legitimate expectations of the Claimant. A party may create legitimate expectations by entering into a specific agreement with an investor to induce the investor to make a covered investment that the investor relied on in deciding to make or keep the covered investment. As many Tribunals stated: *"[t]o be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the*

[124] Art. 9.8.1. CEPTA
[125] SOUF, para. 51.

investment."[126] The experience of an investor needs to be considered when legitimate expectations are determined. According to the Tribunal to *Olguin*, a businessperson or entity "*with a track record as an entrepreneur going back many years and experience acquired in the business world in various countries*,"[127] has to be aware of the situation in the host state. The Tribunal in *Impregilo* observes that the existence of legitimate expectations and the existence of contractual rights are two separate issues.[128]

92. A subjective consideration of the investor is not a specific commitment unless there is a confirming act by the state, from which the subjective consideration can be seen as an objective consideration that the state intended to create a trustworthy basis.[129]

93. But a state still has the right to regulate its own domestic matters in public interest.[130] There can be no legitimate expectation for anyone that the legal framework will remain unchanged.[131]

94. The Respondent did not violate the Claimant's legitimate expectations, and therefore did not breach Art. 9.9.3 CEPTA.

a) The first CCM investigation was to be legitimately expected.

95. The Tribunal should apply the standard of the Tribunal in *El Paso* and balance between the legitimate expectations of the Claimant and the important right to regulate of the Respondent, considering the proportionality of commitment to international rules of conduct and the interest of a state in the welfare of its own citizens or public interest.

96. As a state´s organization, the CCM's acts were predictable because the CCM intervenes in competition matters only on the grounds of fixed regulations. As the statutory guidelines for CCM investigations were in place when the Claimant invested in Caeli, an investigation launched on statutory grounds should be legitimately expected.

97. Furthermore, the Claimant only assumed that the CCM would assess the companies market share a certain way, although specific commitments were never made. It is not

[126] *Duke Energy v. Ecuador*, Award, para. 340; *Tecmed v. Mexico*, Award, para. 154; *Occidental v. Ecuador*, Award, para. 185; *LG&E v. Argentine*, Award, para. 127.
[127] *Olguin v. Paraguay*, Award, para. 65b.
[128] *Impregilo v. Argentine*, Award, para. 292.
[129] *Antin v. Spain*, Award, para. 538.
[130] *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award (17 Mar. 2006), para. 305; *Belenergia v. Italy*, Award, para. 572.
[131] *Micula v. Romania*, Award, para. 529.

determined in the MRTPA how the CCM can assess market shares. A subjective consideration of the investor is not a specific commitment unless there is a confirming act by the state, from which the subjective consideration can be seen as an objective consideration that the state intended to create a trustworthy basis.[132]

98. There were also no specific commitments leading to a different assessment. A commitment can be considered specific if its precise object was to give a real guarantee of stability to the investor.[133] The contract between Vemma and Mekar contained no specific commitment. and, the Respondent did not make any guarantees of stability to the Claimant to bypass existing borders of the free market. The Respondent did not make any specific commitments and therefore the right to regulate of the Respondent outweighs the potential legitimate expectations of the Claimant.[134]

99. Accordingly, the Respondent did not violate the legitimate expectations with the first CCM investigation.

b) The second investigation did not violate any legitimate expectations of the Claimant.

100. The Tribunal should apply the standard of the Tribunal in *El Paso* and balance between the legitimate expectations of the Claimant and the important right to regulate of the Respondent, considering the proportionality of commitment to international rules of conduct and the interest of a state in the welfare of its own citizens or public interest.[135]The Respondent is allowed to set a frame of right to regulate, that address multiple complaints by different investors and therefore the Claimant did not have a legitimate expectation, that could justify the second CCM investigation..

101. As stated in National Grid, the "*high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders*."[136]

[132] *Antin v. Spain*, Award, para. 538.

[133] *El paso v. Argentine*, Award, para. 377.

[134] Art. 9.8.2 CEPTA

[135] *El paso v. Argentine*, Award, para. 575.

[136] *National Grid v. Argentine*, Award, para. 166.

102. The Tribunal in *Micula* adds:

> *"the default position in international law is that a state is free to adopt, change, and repeal regulations as it sees fit – so long as its actions are reasonably related to a legitimate public interest and are not discriminatory"*[137]

103. And as it is stated by the Tribunal in Olguin, a businessperson or entity "with a track record as an entrepreneur going back many years and experience acquired in the business world in various countries,"138 has to be aware of the situation in the host state.

104. The Claimant states that the legitimate expectations related to the second CCM investigation arose out of the privileges the Claimant had at the time of the purchase of Caeli. However, even legitimate expectations can be limited by the rights of the domestic authorities. As mentioned above, the second CCM investigation was not discriminatory; it was launched, per the responsibility of the CCM, in response to viable complaints from industry competitors. Addressing the interest of other investors operating in the state clearly serves the public interest and should be expected by an experienced business entity such as Vemma.

105. Furthermore, subjective considerations must be considered. The Claimant knew about the CCM and the CCM's responsibility to provide a fair and equitable economic environment. Furthermore, the second investigation was brought forward by a consortium of small regional airlines in Greater Narnia.[139] The CCM is "armed with an independent enforcement directorate" and takes action separately from governmental instructions whenever an alarming event appears. Therefore, the CCM acted per its guidelines and the Claimant, as an experienced investor, must have been aware of this circumstance.

106. Consequently, the Claimant cannot have a legitimate expectation not to be subject to an investigation from a competition authority as a result of multiple complaints from industry competitors.

107. The second investigation did not violate any legitimate expectations of the Claimant.

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[137] *Micula v. Romania*, Award, para. 527.

[138] *Olguin v. Paraguay*, Award, para. 65b.

[139] SOUF, para. 38.

c) The withdrawn permission to receive the airfares in USD does not violate the Art. 9.9.3. CEPTA because it is not a legitimate expectation.

108. The permission to receive the airfares in USD does not violate the Art. 9.9.3. CEPTA because the Claimant could not have legitimate expectation to use the USD at the time of the investment**.**

109. Further, the Tribunal in Impregilo observes that the existence of legitimate expectations and the existence of contractual rights are two separate issues.[140] According to Article 9.9.5. CEPTA "*a breach of another provision of this Agreement does not establish a breach of […] Article [9.9. CEPTA]*." Accordingly, even if not allowing the Claimant to denominate in USD was a breach of the CEPTA, this would be a contractual breach, which is a separate issue and cannot be used to argue for a breach of fair and equitable treatment.

110. By withdrawing the permission to receive the airfare in USD the Respondent did not violate the legitimate expectations of the Claimant.

111.

3. Mekar has not breached the FET standard with the individual acts nor with them counted together.

112. The threshold for finding a violation of the minimum standard of treatment remains high and is deliberately set.[141] While the Tribunal of *El Paso* found that a so-called "creeping violation" of the FET standard that is analogous to the creeping expropriation is possible,[142] no creeping violation has occurred here. The Tribunal in *El Paso*, relying on Art. 15 of the International Law Commission's Draft Articles on State Responsibility,[143] found that to constitute a creeping violation, a party's acts must amount to a 'composite act.' The Tribunal defined a 'composite act' as "a series of actions and omissions defined in the aggregate as wrongful."[144] The Commentary of the Draft Articles on Responsibility of States for

[140] *Impregilo v. Argentine*, Award, para. 292.

[141] *Thunderbird v. Mexico*, Award, para. 194; *Crystallex v. Venezuela*, Award, para. 496*; Bayindir v. Pakistan*, Award, para. 174.
[142] *El paso v. Argentine*, Award, para. 518.
[143] *El paso v. Argentine*, Award, para. 515.
[144] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 62 (2001); Vesel, Scott, A 'creeping' violation of the Fair and Equitable Treatment Standard?, page 556.

Internationally Wrongful Acts provides examples of acts that amount to a 'composite act.' Such examples include acts of genocide or systemic racial discrimination. No acts of this proportion are present in this case. The Draft Articles even define that acts as serious as intentional killing are not considered genocide, and therefore not a creeping violation, unless there has been an accumulation of killing. Clearly, Art. 15 aims to regulate statutory breaches of significantly different proportions than the issues before the Tribunal. It is therefore not fitting to conceive a new possibility of violating the FET standard, based on Article 15 which cannot be used for this purpose.

113. There is no evidence in CEPTA to suggest that many small measures constitute a breach of the fair and equitable standard and the Respondent fails to see why the Tribunal should find that the measures are lawful but together break the standard.

114. Mekar has not breached the FET standard with any single individual act, nor with any acts counted together, and therefore, did not violate Art. 9.9 CEPTA.

PART FOUR: COMPENSATION

115. The Claimant is not entitled to receive compensation in the amount of USD 700 million, nor to be reimbursed for any interest. In addition, the Claimant should bear all costs and expenses in connection with the arbitration.

I. The Claimant is not entitled to receive USD 700 million compensation.

116. The Claimant is not entitled to compensation of USD 700 million because, even if the Tribunal affirms the aforementioned claims, the amount paid out to the Claimant should only be (1) the market value already paid, and (2) not fair market value. Further, Respondent (3) is not responsible for the Claimant's losses; rather, (4) the Claimant caused its own losses.

1. The standard for compensation is the market value.

117. The Respondent did not violate any obligations under the CEPTA and is confident that the Tribunal will also come to this conclusion.[145] However, if the Tribunal finds that the Respondent has violated the CEPTA and owes the Claimant compensation, the Tribunal should apply the "market value" standard that is contained in Art. 9.21. CEPTA[146] and find that the market value of Claimant's stake in Caeli has already been paid to the Claimant.

a) The standard for compensation in market value is fixed in Art. 9.12 CEPTA.

118. Article 9.21.1 (a) CEPTA provides a standard for compensation. The market value standard applies to every compensation, except the compensation for expropriations according to Art. 9.12 CEPTA. The Respondent did not expropriate the Claimant's investment, therefore an exception from the market value standard is not applicable.

b) If the Tribunal concludes that the Claimant is entitled to compensation, the market value has already been paid to the Claimant because the Respondent's purchase of the Claimant's stake in Caeli was an arms-length offer that can be used to determine market value.

[145] Response to the notice of arbitration, para 19.
[146] Response to the notice of arbitration, para 19.

119. Market value is defined as "*the fair value of the transaction on an arms'-length basis, where both parties to the transaction have knowledge of the applicable circumstances*."[147]

120. The offer was an arm's length offer, made by two independent parties that were willing buyer and seller. The Claimant and the Respondent had a broken relationship at the time of the transaction. Due to the broken relationship, communication and cooperation ceased.[148] Both parties acted independently of each other and in their own interests, willing to buy or sell.

121. Both parties had all the relevant knowledge of the situation. The Claimant knew about the Respondent as potential buyer because they invested in Mekar years ago and the Respondent was well informed about the condition of the Claimant and all the problems he had over the last years. There is no party which could have known better about the Airline and all of the circumstances of the transaction. Therefore, the parties had the relevant knowledge.

122. The Respondent offered Vemma USD 400 million after the Claimant was unable to obtain an arms'-length offer for the sale of its shares.[149] The Claimant accepted the offer without any negotiations.[150] The Respondent paid out USD 400 million to the Claimant. Therefore, the transaction between Vemma and Mekar Airservice, as an arms-length offer, determines the market value of the sold shares, and the Respondent has already completed this transaction, meaning the Claimant has received market value for its shares. Even if the Respondent breached Art. 9.9 CEPTA, the Respondent does not owe the Claimant any compensation as the market value has already been paid to the Claimant.

2. It is not possible to apply the standard of fair market value because of international law and the most favored nation treatment.[151]

123. The Claimant is not entitled to fair market value based on most favored nation treatment.

124. Art. 9.7.1. CEPTA states:

> *"Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords in like situations, to investors of a third country and to their investments with respect to the establishment, acquisition, expansion, conduct, operation,*

[147] *Tecmed v. Mexico*, Award, para 191.
[148] SOUF, para 40.
[149] SOUF, para 63.
[150] SOUF, para 63.
[151] Notice of arbitration, para. 30.

> *management, maintenance, use, enjoyment and sale or disposal of their investments in its territory."*

125. According to the Tribunal in *ATA Construction*, the most favored nation ("MFN") provision entitles a Claimant's investment to benefit from substantive guarantees contained in other BITs concluded by the host State.[152]

126. However, the Arakkis-Mekar BIT of 2006 does not entitle the Claimant to compensation in fair market value.[153] While the Arakkis-Mekar BIT does list fair market value as the compensation standard,[154] the Claimant is not entitled to most-favored nation treatment under Art. 9.7.2 CEPTA.

a) Firstly, most-favored nation treatment based on the Arakkis-Mekar BIT is prevented by Art. 9.7.2. CEPTA.

127. Art. 9.7.2 CEPTA states that the most favored nation treatment cannot be applied to procedures for the settlement of investment disputes between investors and States provided for in other international investment treaties and other trade agreements. Art. 9.7.2. CEPTA also states:

> *"[s]ubstantive obligations in other international investment treaties and other trade agreements* ***do not in themselves constitute 'treatment',*** *and thus cannot give rise to a breach of this Article."*[emphasis added]

128. To apply Art. 9.7.2 CEPTA to the present case, the Tribunal must interpret the article by its ordinary meaning as required by Art. 31 of the Vienna Convention on the Law of Treaties.[155] An ordinary reading of Art. 9.7.2 would find that the compensation standard in the Arakkis-Mekar BIT is a standard provided for in another investment treaty or trade agreement, and therefore cannot be used in the present dispute under Art. 9.7.2.

129. Further, the compensation standard in the Arakkis-Mekar BIT cannot be seen as a substantive obligation that constitutes treatment that would invoke most favored nation treatment. Obligations in other international investment treaties do not in themselves constitute "treatment." In the light of the teleological interpretation, the purpose of Art. 9.7.2. CEPTA is

[152] *ATA Construction v. Jordan*, Award, para. 73.
[153] Arrakis-Mekar BIT, para. 3076.
[154] Arrakis-Mekar BIT, para. 3092 f.
[155] Vienna Convention on the Law of Treaties, Article 31.

not to provide the same investment treaty to every state, but to ensure that the specific states' measures do not discriminate against investors of one state.

130. The Rules of the Vienna Convention on the Law of Treaties needs to be the standard of interpretation of the CEPTA because Bonooru and Mekar are both parties to it.[156] Article 31 of the Vienna Convention on the Law of Treaties ensures that agreements are interpreted both fairly and neutrally and in the context of specific circumstances.

131. Accordingly, the CEPTA first must be interpreted in good faith. According to *SunReserve,* the phrase "*good faith*" means "*fairness*."[157] Art. 9.7.2 CEPTA ignoring a norm that was freely and willingly negotiated by two parties is not fair, and therefore not in good faith.

132. Both parties to the CEPTA signed the Vienna Convention, which guarantees the sovereign equality and independence of all States.[158] On the basis of this principle, it can be deduced that the parties may regulate in their agreements as they wish. Two subjects of international law can autonomously regulate their relationship with each other.[159]

133. The most favored nation treatment is not a standard which has universal validity but needs to be implemented in the treaties by the parties.

134. Mekar and Bonooru implemented the standard of most-favored nation treatment with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.[160]

135. The freedom of contract design does also include to exclude certain points from the most-favored nation treatment. The parties agreed that they wanted to exclude procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements.[161] Mekar and Bonooru have agreed to limit the MFN standard in Article 9.7.2 CEPTA. Thus, CEPTA is not an exception, but follows, for example, the 1998 German Model BIT,[162] or the Dutch Model BIT.[163]

[156] SOUF, para. 66.
[157] SunReserve v. Italy, Award, para. 636.
[158] Vienna Convention on Law and Treaties.
[159] Parkerings v. Lithuania, Award, para. 410.
[160] Article 9.7.1. CEPTA.
[161] Article 9.7.2. CEPTA.
[162] Article 3.(3) 1998 German Model BIT.
[163] Article 3. (3) Dutch Model BIT.

136. Therefore, it is not possible to apply the fair market value standard contained in the Arakkis-Mekar BIT of 2006 to the present claim, and the proper standard of compensation is the market value standard contained in the CEPTA.[164] The most-favored nation treatment based on the Arakkis-Mekar BIT is prevented by Article 9.7.2. of CEPTA.

b) Second, the Claimant is not entitled to the most favored nation treatment in this case, even if the Tribunal comes to a different conclusion, then the Respondent suggested above regarding Art. 9.7.2. CEPTA.

137. In order to interpret the particular application in light of the CEPTA, it is important to determine "whether factors exist which could justify any difference in treatment so found."[165] Furthermore "it is important that states are able to negotiate with each other freely and that those state agents charged with the conduct of such activities should be able to perform their functions without harassment by other states."[166]

138. The CEPTA and the BIT have different compensation standards for a reason. This difference is not accidental. Mekar and Bonooru have explicitly agreed to the wording of the CEPTA. The parties agreed that the standard of compensation for all incidence other that expropriation should be market value.[167] The intent to use market value standards is reinforced by the fact that, in CEPTA, most favored nation treatment was limited to the extent that other compensation standards do not apply as treatment.[168]

139. According to the preface of the Vienna Convention, which is signed by both parties,[169] international relationships are based on the principle of sovereign equality. Therefore, the states may exercise their right of sovereignty by freely deciding on the content of the treaty and the contracting parties. International law does not impose any obligation that the most favored nation treatment be applied. Rather, it emphasizes the sovereignty of the subjects of international law.

[164] Article 9.7.2. CEPTA.
[165] *Grand River Enterprises v. United States of America*, Particularized Statement of Claim, para E III. 33.
[166] European Journal of International Law, Volume 21, Issue 4, November 2010, Pages 815–852.
[167] Article 9.12.2. CEPTA.
[168] Article 9.7.2. CEPTA.
[169] SOUF, para 66.

140. As the Claimant's home country and the Respondent both agreed to the explicit terms set out in the CEPTA, the compensation standard should remain expressly as prescribed in the CEPTA.[170]

141. The Claimant is not entitled to compensation in fair market value.

3. The Respondent is not responsible for Caeli´s losses and therefore does not have to pay another USD 700 million compensation to the Claimant.

142. The party requiring compensation "*must prove that the chain of events is neither too remote nor too aleatory*" and needs to track every single element of the chain of events.[171]

143. Even if the Tribunal finds that the Respondent breached any obligations under the CEPTA, the "*Claimant [...] must show that Respondents' treaty breaches caused its loss*."[172]

144. The Respondent is not responsible for Caeli´s losses and therefore does not have to pay another USD 700 million compensation to the Claimant because (a) the Claimant caused its own losses and (b) suffered from an economic crisis not attributable to the Respondent.

a) The Claimant caused his own losses by risky business strategies.

145. As the Tribunal in *Middle East Cement* states, compensation is not for covering "*losses occurring to an investor due to commercial risks."*[173] Other Tribunals even follow the approach that compensation can be reduced if the investor's losses were caused by the investor´s own actions.[174]

146. The Claimant caused his own losses because of his risky business choices, which is stated by several independent observers and can be seen on further economic indicators. [175]As Ms. Misty Kasumi evinced, the Claimant´s business strategies would have bad long term consequences for the investment.[176] An article from The Aviation Analytics noted that "*if Caeli Airways had focused on its debts, this situation would not have occurred*."[177] The Investment Information and Credit Rating Agency (IICRA) reasoned an inflated interest rate with "*risky investment choices by Caeli, long-standing debts that Caeli has failed to service since its*

[170] Response to the notice of Arbitration, para. 20.
[171] *Lemire v. Ukraine*, Award, para 166.
[172] *Tethyan Copper v. Pakistan*, Award, para. 207
[173] *Middle East Cement v. Egyp*t, Award, para. 153.
[174] *MTD v. Chil*e, Award, para. 117, 128; *Bogdanov v. Moldova*, Award, para. 5.2.
[175] Response to the notice of arbitration, para. 11.
[176] Annex VII, para. 1845.
[177] Annex IX, para. 1958.

privatisation, and large fines payable to the CCM."[178] Not only were the IICRA and others concerned by the choices of Caeli made, but the Respondent also repeatedly warned the Claimant not to make risky business decisions.[179]

147. Furthermore, the Claimant is responsible for not closely tracking the economic situation in Mekar. A 2019 IMF report predicted four consecutive quarters of negative growth for Mekar.[180] There were also other indicators showing that the Claimant failed to act on crucial information. For instance, the IMF predicted an 8% fall in GDP, and a 2600% average inflation rate in 2020.[181] A considered and sustainable investor would have considered these facts in his business strategies and would have been aware of the immense risk and bad developments. Yet, the Claimant ignored the Respondent's explicit warning, along with numerous other warning signs, despite the volatility of demand in the region, and especially in Mekar, during fall and winter months, and made risky decisions that resulted in significant loss.[182]

148. An excellent example to underline the Claimant´s imprudent decisions is its conduct surrounding the oil price. The Claimant took advantage of the collapse of the oil price to invest and did not take into account the probability and the premonition of many that the oil price would soon rise again.[183]

149. It was precisely such risky decisions that led to the Claimant´s losses. The conduct of the Claimant, not the Respondent, caused the Claimant's losses.

b) The Respondent used its regulatory powers in order to contain the economic crisis and therefore not the Respondent, but the economic crisis caused the Claimant´s losses.

150. A state cannot be required to pay compensation for damages suffered by a foreign investor in the exercise of the state´s own regulatory powers for the general welfare.[184]

151. Therefore, measures the Respondent took as a consequence of the economic crisis for the general welfare cannot cause damages of the Claimant that must be compensated by the Respondent.

[178] SOUF, para. 51.
[179] SOUF, para 29.
[180] PO No. 3, para. 4.
[181] PO No. 3, para. 4.
[182] SOUF, para. 29
[183] Annex VII, para. 1845.
[184] *Occidental v. Ecuador*, Award, para. 430.

152. The Respondent's measures were taken in good faith for the general welfare, in particular when the Respondent took action to stabilize the national currency. The MON began to nosedive in late 2016.[185] As a result of the inflation, confidence in the currency was very low.[186] Therefore, the IMF argued that Mekar "*need[ed] to establish credibility in the [local] currency to avoid a debilitating economic situation*."[187] To stabilize and increase the trust in the MON, the government had to reduce the reliance on foreign currencies and minimize capital outflows.[188] Therefore, the withdrawn permission to denominate the airfares in USD was a regulation that aimed at the general welfare of Mekar. Furthermore, all entities in the aviation sector had to denominate their airfares in MON, not just the Claimant.[189] Mekar's measures to contain the economic and the currency crisis were thus not discriminatory against the Claimant.

153. The Respondent has clearly demonstrated that the measures taken were in the interest of general welfare.

154. The Claimant failed to prove that the alleged breaches by the Respondent caused its losses, rather himself and the economic crisis are the reasons.

II. The Respondent argues that any possible interest of the Claimant should be rejected.

155. In many cases, Tribunals refer to the circumstances of the investment to determine the interest rate depending on the loss of use of their investment.[190] As the Tribunal in *Maffezini* states, "*Bilateral Investment Treaties are not insurance policies against bad business judgements*."[191]

156. As explained above, the Respondent is not responsible for the losses of the Claimant. One of the main reasons for the Claimant's financial situation are his risky business choices made since the investment. Even if the Tribunal finds that some of the Respondent´s measures are breaches of the CEPTA, these measures had no influence on the interest of the Claimant. For example, the rise of the oil prices left Caeli Airways in deep financial distress.[192] Furthermore, the economic crisis which was not caused by the Respondent, led to financial harm for the Claimant. The Claimant was unable to secure a steady stream of revenue.[193] These

[185] SOUF, para. 39.
[186] Response to the notice of arbitration, para. 14.
[187] SOUF, para. 39.
[188] Response to the notice of arbitration, para. 14.
[189] SOUF, para. 42.
[190] *Vivendi v. Argentine*, Award, para. 9.2.8.
[191] *Maffezini v. Spain*, Award para. 64.
[192] SOUF, para. 48.
[193] SOUF, para. 40.

acts are attributable to the Claimant or to the open market, not the Respondent, and therefore, the Respondent cannot be held accountable for the Claimant's losses.

157. As the Respondent has already paid the "market value" for Claimant's investment by purchasing its stake in Caeli Airways for USD 400 million, the Claimant is owed no compensation.[194]

III. The Claimant should bear all costs and expenses associated with this arbitration.

158. Art. 61 (2) ICSID Rules contains the relevant information on the costs of the proceedings. It states:

> *"In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid."*

159. According to Art. 61 (2) ICSID Rules, the decision on the costs and expenses rests entirely with the Tribunal. Thus, according to Art. 28 ICSID Rules, the Tribunal also has the freedom to decide to order only one party to the dispute to bear the costs. In addition, reference can be made to the UNCITRAL Rules closely related to the ICSID Rules, in particular Art. 42 (1) ICSID Rules, which states thatthe costs of the arbitration proceedings are in principle to be borne by the unsuccessful party or parties.[195]

160. Accordingly, most ICSID Tribunals act in this way and decide in favor of the successful party.[196] In these cases, like for instance in *Lighthouse*, it is essential to achieve a fair distribution of the legal costs.[197] Also, in *Eiendom*, the Tribunal ordered the Claimant to pay all costs and expenses after all of the Claimant's complaints were dismissed.[198] If one side is successful and has to appear in court unjustly and spend resources, it is only fair that this side does not have to bear any costs.

161. The Respondent is confident that this Tribunal will find that the Respondent did not commit a breach of the treaty. Therefore, the Respondent asks the court not to burden the Respondent with further costs for which he is not responsible. Mekar has gone through

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[194] Response to the notice of arbitration, para. 21.
[195] Article 42 (1) of the Uncitral Arbitration Rules.
[196] ADC v. Hungary, Award, para 531, CSOB v. Slovakia, Award, para. 372.
[197] Lighthouse v. Timor - Leste, Award, para. 345, 346.
[198] Eiendom v. Latvia, Award, para. 526.

economic crises in recent years, has survived a currency crisis, and is still in the process of recovering. The public expenditure of Mekar is about USD 350 million per year.[199] Any additional costs would negatively impact the people of Mekar. Therefore, the Claimant should bear all costs and expenses associated with this arbitration, and is not entitled to receive USD 700 million plus interest compensation.

[199] PO No. 3, para. 4.

PRAYER FOR RELIEF

162. The Respondent herby request the Arbitral Tribunal:

(1) Find it has no jurisdiction over the dispute because Vemma is not a national of another contracting state according to Art. 25(1) ICSID;

(2) Find that the submission from the Committee on Reform on Public Utilities should be accepted under Art. 41 III ICSID Additional Facility Rules;

(3) Find that the submission from the Consortium of Bonoori Foreign Investors should be bared;

(4) Find that the Respondent did not breach any obligation of Article 9.9.2 CEPTA;

(5) Find that the Respondent has not violated the legitimate expectations of the Claimant according to Art. 9.9.3. CEPTA;

(6) Find that Mekar did not breach any other obligations undern 9.9. CEPTA;

(7) Recognize that the Claimant is not entitled to compensation and if the Tribunal finds otherwise that the standard is market value, which had already been paid;

(8) Find that the Claimant should bear all cost and expenses associated with this arbitration.