TEAM 1682 SOLDAN G

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

BETWEEN:

Vemma Holdings Inc.

Claimant

AND

The Federal Republic of Mekar

Respondent

MEMORIAL FOR RESPONDENT

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

TRIBUNAL:

Ms. Twyla Sands (President)

Mr. Long Feng

Professor Jaqen H'ghar

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AF Rules	ICSID (Additional Facility) Arbitration Rules (2006)
Arrakis-Mekar BIT	Treaty Between the Federal Republic of Mekar and the Kingdom of Arrakis for the Promotion and Protection of Investments (2006)
CEPTA	Comprehensive Economic Partnership and Trade Agreement between the Commonwealth of Bonooru and the Federal Republic of Mekar (15 October 2014)
CETA	EU-Canada Comprehensive Economic and Trade Agreement (2017)
ICSID	International Convention on Settlement of Investment Disputes, 18 March 1965
ILC Articles	Articles on Responsibility of States for Internationally Wrongful Acts adopted by International Law Commission (2001)
FTC Note (2001)	NAFTA Free Trade Commission, North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions (2001)
Japan-China-Korea Trilateral Investment Agreement	Agreement Among the Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment (2012)
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
Transparency Rules	The United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration (2014)

US-Korea FTA	United States – Korea Free Trade Agreement (2007)
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GLOSSARY

BIT	Bilateral Investment Treaty
Caeli	Caeli Airways JSC
CBFI	The Consortium of Bonoori Foreign Investors
CBFI's Application	*Amicus* Submission by the Consortium of Bonoori Foreign Investors dated 19 April 2021
CCM	The Competition Commission of Mekar
CILS	Centre for Integrity in Legal Services
CRPU, the Advisors	The external advisors to Mekar's Committee on Reform on Public Utilities
CRPU's Application	*Amicus* Submission by the External Advisors to the Committee on Reform of Public Utilities dated 19 April 2021
First Investigation	*Suo moto* investigation by the CCM in September 2016
FET	Fair and Equitable Treatment
FTC	NAFTA Free Trade Commission
Lapras	Lapras Legal Capital
Mekar or Respondent	The Federal Republic of Mekar
MFN	Most Favored Nation
Moon Alliance	Alliance of five major airlines from Europe, Asia, Latin America, North America and the Royal Narnian (1991)
MRTPA	Monopoly and Restrictive Trade Practice Act, as amended in 2009
MST	Minimum Standard of Treatment
PO	Procedural Order

Problem	2021 Case of FDI Moot
SCC	Sinnoh Chamber of Commerce
Second Investigation	Investigation of the CCM initiated upon a complaint of small regional airlines in Greater Narnia
SOE	State-Owned Enterprise
SoF	Statement of Uncontested Facts
Tribunal	Tribunal in the ICSID Case No. ARB(AF)/20/78 between Vemma Holding Inc. and the Federal Republic of Mekar
Vemma or Claimant	Vemma Holdings Inc.
¶, ¶¶	paragraph, paragraphs

STATEMENT OF CASE

1. This case is about an investor who tries to renegotiate an impatiently concluded deal by bringing frivolous claims before an investment treaty tribunal. Vemma (Claimant) is a state-controlled investor from a powerful state Bonooru. Bonooru used Vemma as an instrument of expansion of its political presence in Mekar (Respondent), a state with a developing airline industry. On March 5, 2011 Vemma acquired the 85% stake in Mekar's leading airline company, Caeli, via participating in the tender process. However, it turned out that Mekar let a Trojan horse inside under a mask of a promising development program. Vemma's participation in Mekar's airline market was damaging to the competition and other competitors, and Mekar was forced to react.

Jurisdiction

2. Mekar submits that the Tribunal does not have jurisdiction *ratione personae* over the present case, because this is not an investor-state dispute, and Vemma is not, and was not, a private investor. Vemma always performed state functions and in fact was a state-controlled entity, that is why this dispute should be considered under the auspices of the state-to-state dispute settlement mechanism.

Amicus submission

3. Two *amici curiae,* the External Advisors to the Committee on Public Utilities Reform ("**CRPU**") and the Consortium of Bonoori Foreign Investors ("**CBFI**"), brought applications for leave to file submissions. It is submitted that CRPU's intervention will provide valuable information on jurisdictional matters, whereas CBFI is attempting to disrupt the proceedings unfairly prejudicing Respondent and acting not as a friend of Tribunal, but as a friend of Claimant. For that reason, the Tribunal should grant the leave to CRPU to submit its *amicus curiae* and reject CBFI's submission.

Merits

4. Mekar treated Vemma and its investment fairly and equitably. Claimant tries to blame Respondent for its own failures including the risky economic strategy it chose and lack of respect to the host state laws. Respondent's actions were a mere reaction to Claimant's violation of law endangering the competition. Similarly, Respondent provided Claimant with favorable access to justice. Claimant now tries to speculate about an alleged violation of the fair and equitable treatment obligation, when none of the Respondent's

measures was either in breach of national legislation or unlawful from the international law perspective.

Standard of compensation

5. The Tribunal should apply market value standard of compensation as it is specifically prescribed by Art. 9.21 CEPTA. It should reject any Claimant's allegation that another standard should be applied either according to international law or to the MFN obligation.

6. In any case, the amount of compensation should be reduced because Claimant sufficiently contributed to its losses and to avoid crippling consequences for Mekar.

SUMMARY OF FACTS

7. In September 2010 Mekar conducted a privatization process of its only airline company, Caeli. Vemma won that tender and acquired the 85% stake in Caeli on March 5, 2011. Vemma was a part of a powerful Moon Alliance and was going to secure Caeli's membership in the alliance. Mekar made it clear that Caeli should not engage in high-level cooperation with Moon Alliance members on competition parameters such as prices, schedules, capacity, facilities, and other sensitive aspects.

8. On October 28, 2011, mere seven months after the investment, Vemma received a sufficient subsidy from its shareholder, Bonooru, under the "Horizon 2020" program to expand its presence on Mekari market and finance new routes from Mekar to Bonooru. After that additional influx, in 2012, Caeli started to offer low-fare prices and expanded the routes operated, having special focus on travelling customers from Mekar to Bonooru. At the end of 2015 Caeli launched another flying program offering several discounts to attract customers.

9. Caeli violated its commitment not to engage into a high-level cooperation with the Moon-Alliance, besides its growth was very rapid and aggressive. As a result, in September 2016, it attracted attention of Mekar's antitrust organ, the CCM, which *suo moto* launched an investigation under the MRTPA ("**the First Investigation**"). Simultaneously, in December 2016 the CCM received complaints from small regional airlines which could not compete with such an aggressive player as Caeli, offering law-fare prices and discounts having Bonooru's and Alliance's supports. The CCM reacted to the complaint and launched another investigation ("**the Second Investigation**").

10. As an interim measure the CCM placed airfare caps to prevent Vemma from possible abuses of benefits acquired due to dumping the market. The caps did not affect Caeli's profitability and were not contested by the company.

11. However, Mekar faced an economic crisis starting in late 2016, which resulted in inflation and economic downturn. Following Caeli's short-run focus, it could not secure a steady stream of revenue as of July 2017. As a measure of aid to Caeli, in 2017 Mekar allowed Caeli to denominate its airfares in US Dollars to soften the consequences of the crisis. In January 2018, however, it was forced to denominate its prices in national currency, MON, to prevent further economic deterioration.

12. Caeli tried to renegotiate its position in Mekar. In 2018 it asked to remove the airfare caps, however the CCM could not do it while the Investigation was pending. Caeli applied for a court hearing. Noting the urgency of a matter, the hearing was scheduled in a year, which is more than two-times shorter than an average length of commercial proceedings in Mekar.

13. By the end of August 2018, the CCM completed the First Investigation and found a breach of MRTPA. Accordingly, it imposed a MON 150 million fine.

14. Meanwhile, airline industry faced more obstacles. In 2018 oil prices rose to the highest. In March 2019 it was confirmed that Boeings 737 MAX, which constituted Caeli's fleet, suffered technical failure, and had to be grounded. All these facts hit Claimant's financial stability.

15. On January 1, 2019, the CCM completed the Second Investigation and found another violation of the MRTPA. Therefore, it imposed MON 200 million fine. Until this time, the airfare caps were still in place to prevent Caeli from further growth.

16. As soon as Caeli's market share dropped by the third quarter of 2019, airfare caps were removed. Despite this decision, Vemma decided that it did not want to proceed with the investment and started looking for a buyer of its stake in Caeli in November 2019.

17. Vemma again used the benefit of being the Moon Alliance member and found a buyer among its fellow partners. However, the offer from an affiliated person could not be considered as an arm's length, as it was required under the Shareholder Agreement between Vemma and Mekar. In February 2020 Mekar was forced to initiate an arbitration and contested that the offer was *bona fide*.

18. On May 9, 2020 a sole arbitrator declared that the offer was not *bona fide* in violation of the Shareholder Agreement. Mekar applied for recognition of this award in Mekar. Simultaneously, Vemma applied for setting aside the award at the place of arbitration, in Sinnoh. On August 1, 2020 the Supreme Arbitrazh Court of Sinnograd set aside the award. On August 23, 2020 High Commercial Court of Mekar rendered its independent decision to recognize the award. The Superior Court of Mekar confirmed the decision of the High Commercial Court and denied Vemma's appeal.

19. On March 2, 2021 Bonooru's stake in Vemma increased to 55% making Vemma completely controlled by the state. In November 2020 Vemma filed a notice of arbitration against Mekar alleging Mekar's breach of the CEPTA.

PART 1: PROCEDURAL ISSUES

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

20. To consider a case, a tribunal should first analyze the main issue – the presence of jurisdiction over a dispute.[1] A tribunal establishes jurisdiction when there are jurisdictions *ratione voluntatis*, *ratione temporis*, *ratione materiae* and *ratione personae*.[2] The absence of at least one of the mentioned types of jurisdictions means the absence of tribunal's jurisdiction over the dispute.[3]

21. In this case Respondent does not object the presence of jurisdiction *ratione voluntatis* under Art. 9.17(1) CEPTA,[4] *ratione temporis* under Art. 1.6 CEPTA[5] and *ratione materiae* under Art. 9.1 CEPTA.[6] What Respondent submits is that the Tribunal lacks jurisdiction *ratione personae* as the present dispute is a state-to-state one. In its turn, Claimant distorts the real facts trying to prove that Vemma is not controlled by Bonooru and, hence, the Tribunal has jurisdiction *ratione personae*. Though, Claimant does not deny that it is a state-owned enterprise (**"SOE"**).

22. Respondent recognizes that participation of SOEs in arbitration is possible in principle but subject to certain conditions, which are not present in this case.[7] Claimant in this dispute was controlled by its home state and acted on its behalf and those actions were attributable to Bonooru.

23. The Tribunal will appreciate that **(A)** the Tribunal does not have jurisdiction *ratione personae* as Vemma is controlled by Bonooru, and **(B)** interstate disputes do not fall within jurisdiction *ratione personae* of the Tribunal.

[1] *Abaclat Dissenting Opinion*, ¶10.
[2] Pauker (2018), p.5.
[3] Ranjah (2021), ¶11.
[4] Problem, CEPTA, p.79, line 2890.
[5] Id. p.72, line 2550.
[6] Id. p.73, line 2575.
[7] Kovács (2018), p.270.

A. THE TRIBUNAL DOES NOT HAVE JURISDICTION *RATIONE PERSONAE* AS VEMMA IS CONTROLLED BY BONOORU

24. Respondent submits that this Tribunal lacks jurisdiction *ratione personae* in light of the fact that Bonooru has (and had) actual control over Vemma. Vemma's actions bore more governmental rather that commercial aim.

25. Two main questions which a tribunal has to address in a case when a claimant is a state-owned enterprise are: 1) whether the BIT specifically allows a state-controlled claimant to bring a claim, and 2) if it does not, how to distinguish if a claimant acted as a commercial enterprise or a governmental agent.[8] The second question comprises the so-called Broches test, which is frequently used to determine in what capacity a SOE acted.[9]

26. As to the first criterion, sometimes the definition of "*investor*" in the BITs directly includes SOEs.[10] However, this is not the case for the CEPTA, which determines the notion of investor as following:[11]

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

27. Under "*an enterprise*" the parties meant:[12]

> *(a) an enterprise that is constituted or organized under the laws of that Party and has substantial business activities in the territory of that Party; or*
>
> *(b) an enterprise that is constituted or organized under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under paragraph (a).*

28. Obviously the CEPTA does not specifically address the possibility of participation of SOEs as parties to an arbitration. Comparing to the previous 1994 BIT, the parties deliberately replaced the provision allowing participation of SOEs in the investor-state disputes. 1994 BIT reads:[13]

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[8] Feldman (2016), p.26.
[9] E.g. *CSOB*, ¶20*; Rumeli*, ¶210; *BUCG*, ¶40.
[10] Japan-China-Korea Trilateral Investment Agreement; US–Korea FTA.
[11] Problem, CEPTA, p.73, lines 2499-2591.
[12] Id, lines 2592-2597.
[13] Problem, 1994 Bonooru-Mekar BIT, Art. 1, p. 69.

> *"enterprise" means any entity constituted or organized under applicable law, whether for profit or not, whether privately-owned or* ***government-owned****, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association; and a branch of any such entity* [emphasis added]

29. CEPTA does not contain any mention of government – owned entities in the determination of an "enterprise" (see ¶27 above). Obviously, if the parties intended to remain SOEs as parties, they would not have omitted that provision. Thus, CEPTA prohibits participation of the SOEs as claimants in investment disputes. This is the end of the matter.

30. Assuming, for the sake of argument, that CEPTA exists without the context of the previous BIT and is just silent about participation of the SOEs (which would be incorrect). Now according to the second step of the procedure, the Tribunal should be guided by the Broches test to determine whether Claimant acted within the "*boundaries of sovereign conduct*".[14]

31. Claimant alleges that it acted with purely commercial aims and had no governmental purpose whatsoever. This is very convenient for Claimant. It is also not credible. The distinction between a private and a public aim and the issue of governmental control should be made with the application of the following criteria:[15]

> 1) if a SOE acts as an agent of its home state in connection with an investment made;[16]
>
> 2) the main function of a SOE in relation to a particular investment;[17]
>
> 3) the main goal of an enterprise in general.[18]

32. In the present case Vemma was and is a state-controlled enterprise and satisfies all the mentioned above criteria and, therefore, falls out of the jurisdiction *ratione personae* of the Tribunal.

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[14] Feldman (2015), p.27.
[15] Broches (1972), p.202.
[16] *BUCG*, ¶40.
[17] Kovács (2018), p.273.
[18] Id., p.270.

33. Vemma acted as an agent of Bonooru because it performed public functions. To establish that the Tribunal should consider if Vemma "*perform*[ed] *public, governmental functions on behalf of the Contracting State or one of its constituent subdivisions*".[19] Vemma did.

34. In 2011 Bonooru's Secretary of Transportation and Tourism announced the "Horizon 2020" Scheme. The very aim of the scheme was the expansion of tourism market of Bonooru, including by the investment of Vemma in Caeli.[20] Vemma received a significant subsidy from Bonooru immediately after the investment in Caeli.[21] Caeli, in turn, often performed flights important for the state as far as "*Bonooru attracted business travellers from Mekar and other neighbouring countries*".[22] The reason for such a scheme and investment in Caeli was obvious – improvement of Bonooru's economy through its tourism sector.

35. In addition, Bonooru always had a large stake in Vemma. It varied from 31% to 38% during the period of the incorporation of Vemma and up to March 2020.[23] Bonooru has always had "*a sizable stake in Vemma*" which is even proved by Bonooru's own courts: "*State* [Bonooru] *shareholding in Vemma was preserved at all times for it to continue to perform the governmental functions of its State-owned predecessor*".[24] Thus the state was always the largest shareholder in Vemma and could significantly influence its activities. In 2020 the stake rose up to 55% and Bonooru received a full control over Vemma and became capable of adopting corporate decisions disregarding the other shareholders' position.[25] This is explained by the importance of aviation industry for Bonooru, it contributed nearly 13% of Bonooru's GDP and provided 11.6% of total employment in the state.

36. Additionally, founding document of Claimant – Articles of Association establish that regardless of the number of shares in Bonooru's possession the Ministry of Transport and Tourism nominates members of the Board of Directors.[26] This equally shows control of the state over Vemma. Therefore, Vemma was controlled by Bonooru and acted as its agent. Hence, the first criterion of the Broches test is met.

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[19] Schreuer (2009), p.153.
[20] Problem, SoF, p.32, ¶28.
[21] Ibid.
[22] Id. p.32, ¶26.
[23] Id. p.29, ¶10.
[24] Problem, p.6, ¶3.
[25] Id. ¶4.
[26] Problem, Articles of Association of Vemma, p.46, Art. 152.4.

37. The functions of Vemma in relation to its investment in Caeli were governmental in their nature because Vemma's aim is to act in favor of the state. Vemma's Memorandum of Association in Art. 3(h) directly prescribes one of the aims of the company:[27]

> *[t]o assist in developing the aviation industry as well as the civil aviation infrastructure in Bonooru for the benefit of its population in accordance with Article 70 of the Constitution Act, 1947 including servicing remote communities.*

38. The goal of the investment was the attraction of tourists and other travelers to Bonooru. The best way to achieve this goal was to acquire a foreign airline, Caeli, through Vemma. Under the "Horizon 2020" Vemma received subsidies from Bonooru, the first of which the entity got on October 28, 2011.[28] Such subsidies would help Vemma to contribute to the tourism market of Bonooru using Caeli as a vehicle for that. The plan "Horizon" itself had public aims:[29]

> *[…] "optimally tap the potential of Bonooru's emerald beaches, its fascinating national parks, and its human, cultural and historical treasures".*

39. A key part of this Scheme was to offer recurring subsidies to companies investing in tourism-related infrastructure in Bonooru. Shortly after receiving the mentioned subsidies Vemma started expansion of Caeli activities. Thus, the investment in Caeli was driven by the governmental aim – development of Bonooru's tourism infrastructure and its economy in general.

40. Since, the aim of Vemma's investment was governmental, the second criterion of the Broches test is met.

41. The last element of the test, the general goal of the enterprise, also indicative. Vemma's aims were always generally governmental. The courts of Bonooru recognized that: "[Bonooru] *shareholding in Vemma was preserved at all times for it to continue to perform the governmental functions of its State-owned predecessor*".[30]

42. Besides, Vemma's Memorandum of Association establishes among the objectives of the company the following:[31]

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[27] Problem, Memorandum of Association of Vemma, p.44.
[28] Problem, SoF, p.32, ¶28.
[29] Ibid.
[30] Problem, p.6, ¶3.
[31] Problem, Memorandum of Association of Vemma, p. 44, line 1520.

To assist in developing the aviation industry as well as the civil aviation infrastructure in Bonooru for the benefit of its population in accordance with Article 70 of the Constitution Act, 1947 including servicing remote communities;

43. Thus, Vemma has always had governmental aims. Therefore, the third criterion of the Broches test is met.

44. Since all three criteria are met, Vemma was not just owned by the state, Bonooru indeed controlled the company at all the time from the date of the decision to invest up to this arbitration. For that reason, the present dispute is an interstate dispute and should not be considered by the investment treaty tribunal, which does not have jurisdiction *ratione personae* over Vemma.

B. INTERSTATE DISPUTES DO NOT FALL WITHIN THE JURISDICTION *RATIONE PERSONAE* OF THE TRIBUNAL

45. First of all, the CEPTA does not even prescribe the mechanism of the resolution of state-to-state disputes and contains only the provisions concerning investment arbitration. The jurisdiction of the Tribunal over the disputes bases on the provisions of the CEPTA where the parties stipulated the following:[32]

If a dispute has not been resolved through mutual agreement, a claim may be submitted under this Section by:
(a) an investor of a Party on its own behalf; or
(b) an investor of a Party, on behalf of a locally established enterprise which it owns or controls directly or indirectly.
A claim may be submitted under the following rules:
(a) the ICSID Convention and Rules of Procedure for Arbitration Proceedings;
(b) the ICSID Additional Facility Rules if the conditions for proceedings pursuant to paragraph (a) do not apply; or
(c) any other rules on agreement of the disputing parties.

46. This article of the CEPTA prescribes the resolution of the disputes between a state and an investor and do not mention possibility of interstate proceedings. It is further

[32] Problem, Art. 9.16 CEPTA, p.79, lines 2855-2865.

supported by the choice of the AF Rules which govern only the proceedings in an investment-treaty arbitration which is directly enshrined in Art. 2:[33]

> *The Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rules, proceedings* ***between a State*** *(or a constituent subdivision or agency of a State)* ***and a national of another State*** [emphasis added]

47. Therefore, the Tribunal does not have jurisdiction to hear the present dispute as far as it is a state-to-state arbitration, and which does not fall within the jurisdiction *ratione personae* of the Tribunal.

II. THE TRIBUNAL SHOULD GRANT THE LEAVE FOR CRPU'S *AMICUS CURIAE* APPLICATION BUT NOT FOR CBFI'S ONE

48. CRPU and CBFI have brought applications for a leave to file written submissions as *amicus curiae*. Respondent submits that the Tribunal should grant the leave to CRPU's Application and reject CBFI's Application.

49. In this section Respondent will discuss **(A)** rules applicable to the submissions, **(B)** criteria, which the Tribunal should use, and **(C)** explain why the Tribunal should grant leave to CRPU's submission and reject CBFI's one.

A. THE TRIBUNAL SHOULD EXERCISE ITS DISCRETION UNDER THE CEPTA AND APPLY THE TRANSPARENCY RULES

50. The CEPTA provides three sets of rules that establish Tribunal's power to consider *amicus* submissions and admissibility criteria: the AF Rules, Section E of the Chapter 9 CEPTA, and the Transparency Rules.

51. Respondent submits that the Tribunal should apply Art. 9.19(3) CEPTA to decide the issue of the admissibility of *amicus* submissions and consider the requirement of the Transparency Rules.

[33] Art. 2 AF Rules.

52. Pursuant to Art. 9.16(5) CEPTA the specific rules of dispute settlement have priority over the other rules.[34] Therefore, the Tribunal cannot apply the AF Rules, because provisions of the CEPTA override the application of the AF rules to these proceedings.

53. Additionally, the Tribunal should apply the Transparency Rules pursuant to Art. 9.20(6) CEPTA. The Article reads that:[35]

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

54. Appropriate request was done by Respondent.[36]

B. THE TRIBUNAL SHOULD CONSIDER CRITERIA EXPRESSLY PROVIDED FOR IN ART. 9.19(3) CEPTA, IMPLICIT CRITERION OF INDEPENDENCE, AND THE REQUIREMENT OF PUBLIC INTEREST OF THE TRANSPARENCY RULES

55. Art. 9.19(3) CEPTA expressly provides the following criteria of amicus submission admissibility: amicus should a) address a matter of fact or law within the scope of the dispute, b) assist to the Tribunal in evaluating the submissions and arguments of the disputing parties, c) be a person or entity that is not a disputing party, and d) have a significant interest in the arbitral proceedings.[37]

56. The Tribunal should also consider the criterion of independence. This criterion is implicit in the rule that requires *amicus* to assist to the Tribunal in evaluating the arguments of disputing parties and at the same time to be a non-disputing party. The reason for that is that it is for the parties to provide arguments within their submissions, and the purpose of amicus is to help the tribunal arrive at a correct decision by providing it with arguments that the parties may not have provided. This approach was accepted by other tribunals which faced the problem of *amicus* dependency and held proceedings under rules that contain identical *amicus* criteria.[38] Therefore, a red line should be drawn between the

[34] Problem, CEPTA, p.79, lines 2874-2876.
[35] Id. p.82, lines 3013-3015.
[36] Problem, Respondent's Comments on Applications for Leave to File *Amicus* Submissions, p.24, lines 771-772.
[37] Problem, CEPTA, p.80, lines 2930-2933.
[38] *Von Pezold*, ¶49; *Border Timbers*, ¶49.

parties to the dispute, entities who are dependent on the parties, and real friends of the Tribunal.

57. The Tribunal should equally consider the requirement of public interest provided by the Transparency Rules.[39] This requirement is expressly provided by Art. 1(4) Transparency Rules as it reads:

> *Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account:*
>
> *a) The public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings.*

58. The requirement to consider public interest does not contradict to Art. 9.19(3) CEPTA. The Transparency Rules prescribe that "*where there is a conflict between the Rules on Transparency and the treaty, the provisions of the treaty shall prevail*".[40] Art. 1(4) Transparency Rules reads that "***where the Rules*** *on Transparency* ***provide*** *for the arbitral tribunal* ***to exercise discretion****…* [emphasis added]". Art. 5 Transparency Rules provide for the tribunal to exercise discretion on submission by a non-disputing Party to the treaty.[41] Notwithstanding the fact that Art. 5 Transparency Rules is not a source for the Tribunal's power to exercise its discretion in these proceedings, the requirement should be applied because the Tribunal's source of power – Art. 9.19(3) CEPTA – contains similar discretionary power.

59. Moreover, there is a general prohibition in the Transparency Rules to derogate from them by agreement or otherwise, unless permitted to do so by the treaty.[42] The requirement to consider public interest is a general rule, it is provided for in Art. 1 Transparency Rules. The CEPTA does not provide for a similar provision that would be in conflict with the requirement and does not provide an opportunity to derogate from it. Hence, the application of public interest criterion is an obligation of the Tribunal.

60. Based on the above, the Tribunal should consider six criteria: amicus should a) address a matter of fact or law within the scope of the dispute, b) assist to the Tribunal in evaluating the submissions and arguments of the disputing parties; c) be a person or entity that is not

[39] Art. 1(4(a)) Transparency Rules; Born&Forrest (2019), p.651.
[40] Art. 1(7) Transparency Rules.
[41] Art. 5 Transparency Rules.
[42] Art. 1(3(a)) Transparency Rules.

a disputing party and d) has a significant interest in the arbitral proceedings, e) be independent of other parties, f) pursue public interest in proceedings.

C. THE TRIBUNAL SHOULD GRANT LEAVE TO CRPU'S APPLICATION AND DISMISS CBFI'S SUBMISSION

61. In this section Respondent will show why **(1)** the Tribunal should grant leave to CRPU's submission and **(2)** reject CBFI's submission.

1. The Tribunal should grant leave to CRPU's Application

62. The Tribunal should grant leave to CRPU's Application since it complies with all criteria set out in ¶60 of the Memorandum.

63. CRPU's Application addresses a matter of fact and law within the scope of the dispute because the scope of the jurisdictional issues is not limited by parties' observations and CRPU addresses a jurisdictional issue. It is well established that international tribunals should rule on their jurisdiction *proprio motu*, even in the absence of a jurisdictional challenge in accordance with competence-competence doctrine.[43]

64. CRPU addresses a matter of the Claimant's investment illegality.[44] The legality of the investment is a part of *ratione materiae* jurisdiction irrespective of the existence of an express wording in a treaty to that effect.[45] Therefore, the illegality of the investment constitutes a bar for the tribunal's jurisdiction.

65. Thus, as the scope of the dispute on the jurisdictional issues is not limited by Parties' observations and CRPU addresses a jurisdictional matter, the *amicus* submission complies with the criterion of addressing a matter within the scope of the dispute.

66. CRPU assists the Tribunal in evaluating the submission of Respondent. In order to establish a test which would indicate the fulfilment of this criterion the Tribunal should rely on *Apotex III* test:[46]

> *The question is whether [an amicus] could provide a different perspective and a particular insight on the issues in dispute, on the basis of either substantive knowledge or relevant expertise or experience that go beyond, or differ in some respect from, that of the disputing parties themselves.*

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[43] *Raiffeisen*, ¶128; *Berkowitz*, ¶225; *Malicorp*, ¶98.
[44] Problem, CRPU's Application, p.19, lines 650-656.
[45] *Ampal*, ¶301; *Frankfurt Airport*, ¶332; *Phoenix Action*, ¶¶102, 104.
[46] *Apotex III*, ¶31.

67. The external advisors, having expertise focus in investment banking and being involved in the entirety of the privatisation process,[47] are in the unique position to adduce facts of the illegal investment. This information would be otherwise unavailable to the Tribunal because the state itself the was unaware of the alleged impropriety of the investment, and, could not have pleaded that. Hence, the submission meets the criteria of assistance to the Tribunal.

68. CRPU also has a significant interest in the proceedings. In order to prove its significant interest, CRPU must show "*how the rights or principles it may represent or defend might be directly or indirectly affected*".[48]

69. The outcome of the arbitration may have an indirect impact on the rights and principles the applicants defend. Vemma received its rights in Caeli by means of bribes paid to the Chairperson of Committee promoting corrupt practices in Mekar. The corrupt practices impact the financial operations of the external advisors who regularly advise potential investors' prospecting opportunities in Mekar as the investors are less likely to invest in a highly corrupted state because of additional expenses. Thus, CPRU need to bring evidence of investor's illegality since they are directly dependent on a healthy business environment.

70. CRPU meets the criterion of independence. The external advisors are individuals that are not a disputing party. None of the Advisors is connected with the disputing parties having at the same time financial interest in the outcome of the dispute.[49]

71. Finally, CRPU pursuits public interest since the outcome of this proceeding is likely to affect third parties beyond this dispute. The notion of public interest was explained in *Apotex*:[50]

> *[t]he subject-matter of an arbitration proceeding is to be considered of public interest when the decisions to be issued in that arbitration are likely to affect individuals or entities beyond the Disputing Parties.*

72. CRPU pursuits public interest in anti-corruption efforts as it addresses the illegality of Vemma's investment. Corruption has insidious nature and the damaging effects, as the UN states: "*corruption not only distorts economic decision-making, it also deters*

[47] Problem, CRPU's Application, p.19, lines 616-623.
[48] *Apotex III*, ¶38; *Apotex I*, ¶28; *Eco Oro*, ¶34.
[49] Problem, CRPU's Application, p.19, lines 660-661.
[50] *Apotex III*, ¶42.

investment, undermines competitiveness and, ultimately, weakens economic growth".[51] And amicus submission in these proceedings is the most effective and direct way to struggle it. Thus, the submission is filed clearly in public interest.

73. Based on all above, the Tribunal should grant leave to the CRPU's Application as: a) it addresses a matter within the scope of the dispute, b) assists the Tribunal in evaluating arguments of the parties; c) its members are not a disputing party, d) have a significant interest in the arbitral proceedings, e) independent, and f) filed the submission in pursuit of public interest.

2. The Tribunal should reject CBFI's Application

74. The Tribunal should reject CBFI's submission since: a) it does not assist the Tribunal in evaluating the submissions and arguments of the disputing parties; b) failed to show its significant interest, c) is dependent on the Claimant and d) pursues no public interest.

75. CBFI's Application fails to assist the Tribunal in evaluating the submissions of the disputing parties because it does not offer any novel perspective or insight different from that of Claimant. The Tribunal should assume that the Parties will provide all materials they can.As the tribunal in *Apotex I* stated:[52]

> *[t]he assessment as to the likely utility of a non-disputing party's submission should be made on the* ***assumption that the Disputing Parties will provide all the necessary assistance and materials*** *required by the Tribunal to decide their dispute.* [emphasis added]

76. CBFI does not provide any novel argument that is unavailable for Claimant. It alleges that Boonoru's business landscape is primarily comprised of state-owned entities and that the nature of enterprises' activities is the guidance in the jurisdictional question.[53] However, Claimant alleges the same argument and is in the condition to represent before the Tribunal the same information concerning the regulatory framework and business landscape as it is part and parcel of it. Thus, the submission does not assist the Tribunal in evaluating any arguments of the Parties.

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[51] Anti-Corruption Toolkit, p.5.
[52] *Apotex I*, ¶24.
[53] Problem, CBFI's Application, p.17, ¶10.

77. CBFI fails to show its significant interest. In *Apotex III* the tribunal rejected an *amicus* submission on the basis that he was "*not representing or defending his own rights but, rather, representing and defending the interests of his professional clients*".[54]

78. Here the Tribunal has the same case: CBFI is an association that is a national leader in public policy advocacy and represents its clients – Bonoori investors investing in the Great Narnian region.[55] It represents and defends the interests of its professional clients – state-owned businesses and investors.[56]

79. CBFI also alleges that it consists of investors relying on arbitration mechanism under the CEPTA and that the interpretation of ISDS provisions in this case can impact accessibility of this mechanism for other investors.[57] However, the occurrence of such event is impossible, because no investment tribunal as well as any other is obliged to settle a dispute under *stare decisis* principle – in accordance with previous cases.[58]

80. Thus, CBFI has no significant interest in the proceedings except to the interest of its clients, and its alleged interest is not at stake in these proceedings.

81. Additionally, CBFI cannot act as an *amicus* because it lacks independence to bring submission. As the tribunal stated in *Suez*:[59]

> *An amicus curiae […] is not a party to the proceeding […] An amicus curiae is a volunteer, a friend of the court, not a party.*

82. A CBFI Executive Committee member, Lapras, is advising Vemma on funding strategies with respect to its claim.[60] In accordance with CBFI's resolution on 29th March 2021 Lapras could vote in respect of the *amicus* submission in Vemma's claim against Mekar on the basis that it does not have direct financial interest in the case.[61] However, the Tribunal should consider indirect interest that Lapras can receive. This interest includes good standing before the investors that funded Vemma's claim.

83. In addition, two members of CBFI, SRB Infrastructure and Wiig Wealth Management Group, are currently pursuing claims against Mekar,[62] which give rise to a direct conflict

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[54] *Apotex III*, ¶39.
[55] Problem, CBFI's Application, p.16, ¶2.
[56] Id. ¶3.
[57] Id. ¶8.
[58] *Kılıç*, ¶7.6.2; Sornarajah (2010), p.87; Redfern&Hunter (2015), p. 33.
[59] *Suez*, ¶ 13.
[60] Problem, CBFI's Application, p.16, ¶7.
[61] Problem, PO No. 3, p.87, ¶12.
[62] Problem, CBFI's Application, p.16, ¶6.

of interest. Their conflicting interest includes creating favorable case law and burdening the proceedings for Mekar.

84. The participation of Lapras, SRB and Wiig in CBFI deprives it of independence by raising a conflict of interest between protecting its clients and acting as a "friend of court". Thus, the Tribunal should reject the submission because CBFI acts as a friend of Claimant and lacks independence.

85. CBFI also fails to identify public interest its submission would advance. As the tribunal stated in respect to *amicus* submission in *Apotex III*: "*asserted public interest is a particular and professional interest and not a "public interes*t".[63] CBFI is a national leader in Bonooru in public policy advocacy on national and international issues.[64] Protecting the interests of its clients does not comprise public interest. Thus, CBFI fails to comply with this criterion.

86. Based on all above, the Tribunal should reject CBFI's Application as a) CBFI does not assist the Tribunal in evaluating submissions of the parties, b) does not have significant interest in the proceedings, c) is dependent and d) does not pursue public interest.

[63] *Apotex III*, ¶43.
[64] Problem, CBFI's Application, p.16, ¶2.

PART 2: SUBSTANTIVE ISSUES

III. MEKAR HAS ACCORDED VEMMA'S INVESTMENT FAIR AND EQUITABLE TREATMENT AND DID NOT VIOLATE ART 9.9 CEPTA

87. In the present case Claimant blames Mekar for bringing the investor to the brink of bankruptcy submitting that the accorded treatment was unfair and inequitable and ultimately led to the Respondent's renationalization of the investment to the detriment of Vemma.[65] Claimant alleges that actions taken by Respondent, and by organs of the Mekari State were illegal and that the cumulative effect of these actions put Vemma in a dire financial situation.[66] However, it was just a foreseeable failure of the Claimant's ill-advised and aggressive economic policy which led to a foreseeable reaction of Mekari antitrust organ within a limit of its sovereign powers.

88. By way of a reminder Respondent first outlines the relevant legal provisions and explains the threshold that the Tribunal should apply when deciding on the alleged violation of the FET standard.

89. Art. 9.9(1) CEPTA stipulates that:[67]

> [e]*ach Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7.*

90. Art. 9.9(2) CEPTA further provides a list of substandards, breach of which constitute a breach of Art. 9.9 CEPTA.[68] The list includes, *inter alia*, (a) denial of justice in criminal, civil or administrative proceedings, and (c) arbitrary or discriminatory conduct.

91. Art. 9.9 CEPTA is titled as "Minimum standard of treatment" which makes the FET standard "*qualified*",[69] i.e. the Tribunal should interpret Art. 9.9 CEPTA according to customary international law.[70] This requires the Tribunal to apply an extremely high threshold by establishing that host states actions were "*outrage*",[71] "*egregious*" or

[65] Problem, p.3, ¶12.
[66] Id. ¶21.
[67] Problem, CEPTA, p.76, lines 2735-2737.
[68] Ibid. lines 2738-2746.
[69] UNCTAD FET (2012), p.105.
[70] Dumberry (2013), p.63.
[71] *Neer*, ¶4.

"*shocking*" from the international perspective.[72] This was confirmed by many NAFTA Tribunals, which were faced with a similarly structured FET clause, e.g. *S.D. Myers,*[73] *Glamis Gold*[74] or *Cargill v. Mexico.*[75]

92. Thus, the tribunal must apply high liability threshold while assessing Respondent's individual acts and omissions.

93. In order to be sure that the intent of the parties to the CEPTA, Mekar and Bonooru, was to limit FET standard by high threshold of customary international law, the Tribunal may refer to the *travaux préparatoires* of the CEPTA.[76] The history of Mekar-Bonooru relationships indicates that the CEPTA was drafted, in particular, because Mekar lost several high profile investment arbitration disputes and the Parties wanted to made more comprehensive and balanced trade and investment agreement.[77] Similar happened with the interpretation of NAFTA when wide application of the FET standard[78] made FTC issue the Note[79] limiting the application of Art. 1105 NAFTA by high threshold of customary international law.[80]

94. Respondent submits that **(A)** Mekar's actions were in accordance with Art. 9.9 CEPTA as they were fair and equitable, and that **(B)** Claimant's loss cannot be imputed to Respondent as they are result of Claimant's own failures and risky steps.

A. MEKAR'S ACTIONS WERE IN ACCORDANCE WITH ART. 9.9 CEPTA

1. The Investigations, imposed airfare caps and fines were fair and equitable

95. The Respondent submits that Mekar's actions neither constitute any breach nor meet the threshold for a violation of Art. 9.9 CEPTA. None of the actions can be even close to being described as "shocking" as all the measures were completely legal both under domestic legislation and from international perspective. Respondent treated Claimant fairly and equitably while conducting the investigations.

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[72] *Glamis Gold*, ¶627.
[73] *S.D. Myers*, ¶263.
[74] *Glamis Gold*, ¶617.
[75] *Cargill v Mexico*, ¶¶286, 296.
[76] Art. 32 VCLT.
[77] Problem, PO 3, p.87, ¶14.
[78] E.g., *Pope&Talbot*.
[79] FTC Note (2001).
[80] Stepanov (2018), p.55.

96. Claimant in the present proceeding is a powerful company having sufficient state-connections and benefits. Claimant alleges that Mekar conducted arbitrary treatment when Mekari's antitrust organ, the CCM, initiated Investigations, imposed fines and maintained airfare caps as sanctions of them.[81] The Respondent submits that the Investigations were a mere reaction to the Claimant's damaging behavior conducted in strict compliance with the rule of law and based on the real need.

97. In absence of a precise meaning in the CEPTA, "arbitrariness" should be defined by its ordinary meaning, which is usually described as a measure "*founded on prejudice or preference rather than on reason or fact*"[82] or on substitution of rule of law.[83] However, as noted by the *Nelson* tribunal, "*arbitrariness requires more than a showing of illegality under domestic law, […] the arbitrariness analysis consists in reviewing the stated purposes of a certain measure and whether the measure effectively addresses the stated purposes*".[84]

98. Thus, establishing an arbitrariness on the side of a host state requires a tribunal to undertake the following steps:

    1) estimate whether the actions were based on reasons and rule of law; and

    2) compare stated purpose of the measure and the result of it.

99. Application of this test to the present case will show that Mekari Investigations were based on the rule of law and the real need to protect competition and competitors. These measures effectively fulfilled the stated purpose.

100. Respondent would also like to stress that it is not the task of the investment treaty tribunal to determine whether the measures were illegal under the national law of Mekar.[85] The Tribunal instead should determine if the measures were adopted based on the fair and equitable grounds or they were biased, unfounded and constituted an arbitrary treatment.

[81] Problem, pp.3-4, ¶¶15-16.
[82] *Lauder*, ¶221.
[83] *Lemire II*, ¶263.
[84] *Nelson*, ¶325.
[85] *National Grid*, ¶92.

a) The Fist and the Second Investigations were lawful and reasonable

101. Vemma accuses Mekar in unlawful launch of two Investigation. That was lawful. Mekar's competition law, the MRTPA, provides that the CCM may commence investigations in two instances:

> 1) *suo moto*, if the CCM finds that there is a unique threat to competition from a corporation having market share more than 50% (or less in important industries), and there is evidence that corporation's actions may push competitors out of the market;[86]
>
> 2) in any other cases upon the complaint of a direct competitors based on sufficient evidence, if a corporation possess more than 10% market share.[87]

102. In September 2016 the CCM was forced to launch a *suo moto* investigation into Caeli's activities (the "**First Investigation**") because there was an urgent need to prevent Caeli from pushing competitors out of Mekari market.[88] With Vemma's participation Caeli started to receive sufficient influx of funds from Bonooru which allowed Caeli to lower ticket prices,[89] introduce discount programs[90] and extend the routes.[91] Other competitors did not have such benefits and could not compete with Caeli on the same footing.

103. Despite Caeli's market share was 43% which is slightly lower than the percentage required under the MRTPA, the First Investigation was totally legal. Firstly, the MRTPA allows to launch an investigation "*in industries that require special attention*",[92] which indeed is the characteristic of Mekari airline industry as Caeli's airline services are of paramount significance for Mekar.[93] MRTPA establishes that the use of such discretion should be exceptionally rare – indeed, there is no evidence that the CCM often refers to this instrument – it had never investigated neither any of the Moon Alliance members[94] nor Jet Green, the second biggest airline company with the 21% market share.[95]

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[86] Problem, Chapter III MRTPA, p.47, lines 1598-1606.
[87] Id, lines 1607-1612.
[88] Problem, SoF, p.34, ¶36.
[89] Id. p.33, ¶29.
[90] Id. p.34, ¶35.
[91] Id. p.33, ¶29.
[92] Problem, MRTPA, p.47, line 1601.
[93] Problem, PO 3, p.87, ¶10.
[94] Problem, SoF, p.34, ¶36.
[95] Problem, PO 3, p.86, ¶6.

104. Secondly, Claimant was caught in preferential secondary slot-trading.[96] Slot-trading given to one company[97] was reasonably considered as a market-disruptive agreement between two allied enterprises. Slot-trading has special importance for antitrust organs if the slots in question are essential to compete, as was confirmed in the European Commission's case *Sea Containers*.[98] Given the fact that the slots in question were at Phenac International Airport located in the capital of Mekar, they could not be other but essential for all the competitors.

105. Therefore, the First Investigation was not only a proper exercise of legal authority under the MRTPA,[99] but also was consistent with an objective "*to promote conditions of fair competition in the free trade area*" of the CEPTA.[100] Actions of the CCM were legal and aimed at the protection of the competition in the market which Claimant was going to disrupt.

106. Shortly after the First Investigation the CCM received a complaint from a consortium of small regional airlines in Greater Narnia alleging that Caeli is abusing dominant position on specific regional routes in the way that was damaging to the small airlines.[101] Under the MRTPA, the CCM is obliged to commence an investigation in such circumstances, which resulted in the Second Investigation. In the end, the complaint turned to be reasonable and Caeli was fined for the violations of MRTPA.

107. Therefore, the Second Investigation was also commenced in pursuit of Mekari law and with the aim to protect competition. In no way, the measures were aimed at squeezing Vemma out of Caeli, Mekar was happy to admit a foreign investor, but the investor should have obeyed to the laws of the host state.[102]

b) <u>The interim measures and fines imposed on Caeli due to the Investigations were lawful and reasonable</u>

108. Vemma also accuses Mekar of imposing allegedly illegal airfare caps and unlawful fines. This is untrue, both measures corresponded to the MRTPA, which stipulates:[103]

[96] Problem, SoF, p.34, ¶36.
[97] Ibid.
[98] OECD Airline Competition (2014), ¶149; *Sea Containers*.
[99] Problem, MRTPA, p.47, lines 1615-1627.
[100] Problem, CEPTA, p.72, line 2525.
[101] Problem, SoF, p.35, ¶38.
[102] *Al Warraq*, ¶663.
[103] Problem, MRTPA, p.47, lines 1623-1626.

in cases of urgency due to the risk of serious and irreparable damage to competition, the Tribunal, acting on its own initiative may by decision, on the basis of a prima facie finding of infringement, order interim measures for preventive purposes. Such a decision shall apply for a specified period of time and may be renewed insofar this is necessary and proportionate.

109. As an interim measure for the First Investigation, the CCM placed caps on Caeli's airfare to prevent it from earning supra-competitive profits.[104] Claimant recognized that the caps were reasonable.[105] Caeli did not protest the caps, and the caps did not hurt Caeli's profitability in 2016.[106]

110. The caps were an interim measure upon the First Investigation which lasted by the end of August 2018,[107] and since Caeli continue to enjoy sufficient market share, the interim measure was slightly extended for another three month, until the Second Investigation was completed on January 1, 2019.[108] After the Second Investigation, the caps remain in force because Caeli's market share did not drop,[109] and therefore there was still a risk of abuse of privileges obtained due to dumping the market. International antitrust practice confirms that airfare caps are a valid measure against abuse of dominance and may be applied for quite a long term.[110]

111. The airfare caps were merely a measure against a company which seized the market due to predatory pricing policy. As soon as Caeli's market share fell below 40%, the CCM lifted the airfare caps.[111] This proves that the airfare caps were a measure against damaging Mekari market, and they effectively addressed this purpose. In any event, Mekar could not have pursued a goal of squeezing Vemma out of Caeli in such a way. In the end it was Mekar which had to fix all the consequences of Vemma's wrongdoing.

2. There was no discrimination in the refusal to grant subsidies

112. On September 25, 2018, the President issued Executive Order 9-2018 which granted subsidies to airlines travelling Mekari citizens.[112] Under the Order, the Secretary of Civil

[104] Problem, SoF, p.34, ¶37.
[105] Problem, p.3, ¶15.
[106] Problem, SoF, p.35, ¶37.
[107] Id. p.36, ¶45.
[108] Id, p.37, ¶49.
[109] Ibid.
[110] OECD Airline Competition (2014), p.42.
[111] Problem, SoF, p.38, ¶55.
[112] Id, p.36, ¶46.

Aviation has a discretion to grant subsidy or deny an application.[113] Claimant alleges that denial of subsidies to Caeli constituted discriminatory conduct.[114]

113. To prove a discrimination-based FET breach, it is necessary to show:

> 1) appropriate comparator(s);
>
> 2) that the State has accorded the comparator(s) treatment more favorable than that accorded the Claimant; and
>
> 3) there is a lack of a reasonable or objective justification for any difference of treatment.[115]

114. In *El Paso* the tribunal considered that in order to prove discriminatory conduct the Claimant needs to show that two similar investors were not treated similarly.[116] The same approach was adopted by the tribunal in *Total*.[117] However, it is not the case in the present dispute as Respondent submits.

115. The only proper comparator at that time was Larry Air – another airline company operated in Mekar and owned in a significant part by a foreign government.[118] The criterion of the appropriate comparator is met on a parameter of foreign state participation.[119]

116. Applying the second criterion, the Tribunal should note that neither of the two comparators received subsidies.[120] Thus, comparators were treated equally.

117. As to the third criteria, the denial of subsidies was justified. Mekar's deputy Minister of Transportation explained that "[i]*t would be unfair to grant certain State-owned companies even more of an advantage in our airline market to the detriment of our people*".[121]

118. Vemma has already received significant subsidies from Bonooru, which allowed Caeli to stay afloat. On the other side, Mekar was found in a state of crisis where there are tight limits on the disposal of capital. In such situation, Mekar reasonable exercised its discretion under the Order and denied Caeli' application, as otherwise would create an

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[113] Problem, SoF, p.36, ¶46.
[114] Problem, p.4, ¶18, lines 91-96.
[115] *Cengiz*, ¶525; *SASL*, ¶711.
[116] *El Paso*, ¶305; see also *Mobil*, ¶886.
[117] *Total*, ¶210.
[118] Problem, SoF, p.37, ¶47.
[119] Ibid.
[120] Ibid.
[121] Problem, SoF, p.37, lines 1261-1265.

unfair result. This position is fully consistent with the finding of the tribunal in *Blusun*, that "[i]*n the absence of a specific commitment, the state has no obligation to grant subsidies*".[122]

119. Thus, the test for discrimination is not met in this case.

3. Claimant cannot rely on frustration of its legitimate expectations

120. Trying to justify its claims Claimant could attempt to rely on frustration of its legitimate expectations to participate in the Moon Alliance, to benefit from Caeli's airport facilities or some others under Art. 9.9(3) CEPTA.[123] However, these allegations should be rejected because **(a)** Vemma did not have legitimate expectations it pretends to have and **(b)** in any case, they were not frustrated.

a) Vemma did not acquire legitimate expectation protected under the CEPTA

121. By way of background, the legitimate expectations are not a standalone standard under the CEPTA. They can only be taken into account while considering if the other standards of the FET were violated. Art. 9.9(3) CEPTA states:[124]

> *When applying the above fair and equitable treatment obligation, a Tribunal may consider whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.*

122. This Article ensures very restrictive approach towards the interpretation of legitimate expectations.[125] Under this Article, Claimant should prove the following elements:

1) the state made a specific representation of this kind to induce the investment,
2) the investor relied on such a representation in making the investment decision, and
3) the state frustrated that expectation.[126]

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[122] *Blusun*, ¶319(5).
[123] Problem, CEPTA, p.76, lines 2747-2750.
[124] Ibid.
[125] See, e.g. interpretation of similar provision in CETA: Puccio (2017), p.1.
[126] Id. p.2.

123. The term "specific representation to induce the investment" was described by lot of investment tribunals as "*specific commitments*" embodied in enforceable obligations[127] such as contracts, licenses or permits.[128] For legitimate expectations to be created, a host state should at least "*invited the foreign investors to participate in a bidding process*".[129] However, if an investor willfully came to a particular market and realized that the market was in bad condition, then it is unlikely that such investor could legitimately expect "*that their investments would not be subject to the ups and downs*".[130]

124. Vemma willfully came to Mekari market by making its bid in the tendering process.[131] Vemma made it by careful analysis of the opportunities offered by purchasing the stake in Caeli, "*one* [Vemma was] *keen to take advantage of*".[132] Mekar did not induce Claimant to participate in the privatization process and did not invite it.

125. The only enforceable obligations towards Vemma were embodied in the Share Purchase Agreement and the Shareholders' Agreement,[133] which did not contain any specific commitments that could be imputed to Vemma in the present case.

126. Therefore, Claimant cannot rely on frustration of legitimate expectation since they have never occurred.

b) <u>In any case, Vemma's legitimate expectations were not frustrated</u>

127. Frustration of legitimate expectations occurs "*when a State repudiates former assurances*".[134] In other words, frustration occurs when a host states deviates from the specifically proposed line of behaviour, on which an investor relied. However, this is not the case in the present dispute.

128. When the CCM approved Claimant's acquisition of the 85% stake in Caeli, it sought an undertaking that the company should not cooperate with its Moon Alliance partners on prices, facilities or other sensitive matters.[135] Therefore, it would be unfair to claim that Vemma was not supposed to be restricted by the antitrust organ when such behavior occurs.

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[127] *M.C.I.*, ¶278.
[128] *Metalpar*, ¶185; *Methanex*, Part IV, Chapter D, ¶10.
[129] *Metapar*, ¶185.
[130] Id. ¶187.
[131] Problem, SoF, p.31, ¶22.
[132] Id. p.31, ¶23.
[133] Id. p.32, ¶26.
[134] *Azurix*, ¶287.
[135] Problem, SoF, p.32, ¶25.

129. Vemma invested in a company which was in a state of deep financial distress.[136] Moreover, Mekar is known as a state with a prolonged political instability and is merely in an early stage of post-independence growth.[137] In such conditions, Vemma could not rely that the investment would not be affected by ups and downs.

130. All that happened to Vemma is a reasonable and foreseeable result of a risky investment in a company with burdensome heritage, coupled with short-sighted economic policy and host state's instability. Therefore, Vemma cannot rely that something in the present case frustrated its expectations.

4. Claimant was never denied justice

131. Claimant alleges that during the time of operating the investment in Mekar it was consistently denied justice.[138] In particular, Claimant alleges that Respondent denied justice in (a) judicial review of the CCM's airfare caps[139] and (b) enforcement of the annulled award.[140]

132. To prove denial of justice, it is not enough for Claimant to show that the decisions were erroneous or in breach of national law, but explain "*the failure of a national system as a whole to satisfy minimum standards*".[141] This high threshold is not met in the present case, because the administration of justice was in compliance with the national laws and on the fair basis.

a) Judicial review of the CCM's airfare caps

133. Claimant alleges that there were "*significant delays in hearing urgent matters*" and that "*when its pleas were finally heard, Caeli's claims on the merits were dismissed prematurely*".[142] However, there was no undue delay in hearings and Caeli's claims were properly addressed by Mekari courts.

134. To remind the facts, Mekari court system suffered from mass migration when it could not expand at the rate of population increase.[143] As a measure to face the problem, Mekar prioritized criminal matters, and for the commercial ones an average length of a

[136] Problem, SoF, p.31, ¶21.
[137] Id. p.29, ¶12.
[138] Problem, p.5, ¶28.
[139] Id. p.4, ¶20.
[140] Id. p.5, ¶27.
[141] *Oostergetel*, ¶273.
[142] Problem, p.4, ¶20.
[143] Problem, SoF, p.29, ¶¶12, 13.

proceeding was set at 27 month (more than 2 years).[144] While making the investment, Vemma should have known that.

135. In its turn, Caeli's claim to contest the airfare caps was submitted on March 27, 2017, and the hearing was scheduled only in April 2019, just slightly above 12 months.[145] The decision was rendered on 15 June 2019.[146] This administration of cases is twice as fast as what Vemma could have expected.

136. As was highlighted in *Krederi*, a tribunal deciding a question of denial of justice "*ought to be willing to concede that various factors may contribute to delays which are not thus to be considered unreasonable*".[147]

137. Considering the context of business operation in Mekar and the state of its court system, Mekari courts gave Claimant every opportunity to voice its grievances before the appropriate judicial authority. They noted the urgency of the Caeli's claim and thus administered the justice in the most efficient way possible. The practice of investment tribunals is aware of the cases where severe delays were pleaded, but which were the consequences of the context in a particular host state and thus were not considered as a denial of justice (e.g., *White Industries*).[148]

138. On a separate note, Respondent highlights that the question of removal of airfare caps was considered several times, and the contested court hearing was the earliest point. In any event, the court decided to leave the caps as they were legal. Therefore, even if the case was dismissed earlier – it would change nothing for Vemma. Thus, the claimed delay in justice caused no harm to Vemma, and therefore cannot be a violation of FET.[149]

b) <u>Enforcement of the set aside award</u>

139. Claimant also asserts that Mekar denied it justice when recognized and enforced the set aside arbitral award.[150] That award was rendered in a dispute initiated by Mekar Airservices in the Sinnoh Chamber of Commerce's ("**SCC**") Arbitration Institute according to the arbitration clause in the Shareholders' Agreement between Mekar

[144] Problem, SoF, p.30, ¶13.
[145] Id. p.36, ¶44.
[146] Ibid.; Id. p.38, ¶54.
[147] *Krederi*, ¶457.
[148] *White Industries*, ¶¶ 10.4.22, 10.4.23.
[149] *AES Corporation*, ¶¶470-471.
[150] Problem, p.5, ¶27.

Airservices and Vemma.[151] Mekar Airservices asked the Tribunal to decide whether the offer obtained by Vemma from its affiliated Moon Alliance partner, Hawthorne Group qualifies as a *bona fide* offer,[152] and consequently whether it gives rise to Mekar's right of first refusal.

140. The sole arbitrator Mr. Cavannaugh was appointed by the SCC Secretariat. On May 9, 2020 it rendered an expected decision that offer from an affiliated person is not a *bona fide*.[153]

141. In a month the Centre for Integrity in Legal Services ("**CILS**") issued a Report groundlessly alleging that Mekari organs bribed Mr. Cavannaugh. The repost is prepared by a non-profit organization of Mekar, recognized as "*an entity funded by foreign donations to interfere in Mekar's domestic affairs*".[154] The Report was mainly based on the audio-recordings without proper identification of personalities[155] and strongly contested by Mekar.[156] It has never led to any administrative or criminal proceedings against alleged perpetrators.

142. On August 1, 2020 the Supreme Arbitrazh Court of Sinnograd set aside the award.[157] In the same month, the award was recognized in Mekar upon Mekar Airservices' prior application to the High Commercial Court of Mekar.[158] Vemma tries to persuade this Tribunal that Mekari court improperly recognized the award. However, this allegation had no support neither in law nor in logic.

143. Both Bonooru and Mekar are parties to the VCLT and the New York Convention. The arbitration laws of Bonooru and Mekar are based on UNCITRAL Model Law.[159] Both Art. V New York Convention and Art. 36 UNCITRAL Model Law are drafted in a permissive, rather than mandatory fashion. The provisions in question state that enforcement "may be" (rather than "shall be") refused on one of the specified grounds.[160] The court may enforce the award, even if one of the objections of Art. V New York Convention has been established.

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[151] Problem, Art. 48 Shareholders' Agreement, p.53, lines 1794-1806.
[152] Problem, SoF, p.39, ¶57.
[153] Ibid.
[154] Problem, High Commercial Court of Mekar ruling, p.66, ¶13.
[155] Problem, CILS Report, p.61, ¶2, line 2078.
[156] Problem, SoF, p.39, ¶60.
[157] Id. p.39, ¶61.
[158] Id. ¶62.
[159] Id, p.40, ¶66.
[160] Art. V New York Convention.

144. Number of national courts have taken the position that they are not required to refuse recognition or enforcement of an award even in instances in which one of the grounds for non-recognition or enforcement has been established.[161] In the *Chromalloy decision* the US court enforced the annulled award since it recognized that the annulment was illegal. US public policy in favor of final and binding arbitration of commercial disputes compelled it to enforce the award despite its annulment at the seat of arbitration.

145. The very same reasoning is applicable in the present case. The setting aside was based on mere allegations of bribery,[162] despite an extremely high threshold for proving it,[163] and lacking any other reasonable grounds for annulment. The court in Sinnograd did not find corruption and openly admitted it. For that reason, the High Commercial Court of Mekar had all the reasons to consider this annulment illegal and disregard it in an enforcement proceeding.

146. In order to constitute denial of justice there must be an administration of justice in in a seriously inadequate way or a clear and malicious misapplication of the law.[164] The facts of the present case illustrate that there was no such grave violation that could reach to this high standard, as actions of Mekari courts were based on law and justifiable reasons.

5. There was no "creeping violation" of FET standard

147. Claimant alleges that "*taken together [...], such acts and omissions constituted unfair and inequitable treatment of the investor by Mekar*".[165] In other words, Claimant submits that the Tribunal should take into account the cumulative effect of the Respondent's actions. However, this does not have any justification in wording of the CEPTA or in general law.

148. The very idea of a possibility to breach FET by cumulative effect is of limited application and even more limited utility.[166] Unlike expropriation, the notion of FET has no clear definition,[167] and should be approached with precise application.

149. This is especially the case with such a precisely drafted FET provision as Art. 9.9(2) CEPTA.[168] It provides an extremely high standard by both linking FET to the

[161] *Chromalloy*; Born (2014), p.3394; Cheng (2009), p.680.
[162] Problem, Judgment of the Supreme Arbitrazh Court of Sinnograd, p.64, ¶¶12-13.
[163] *Churchill Mining*, ¶466.
[164] *Azinian*, ¶¶102-103.
[165] Problem, p.3, lines 62-63.
[166] Vessel (2014), p.563.
[167] Id, p.559.
[168] Problem, CEPTA, p.76, lines 2738-2746.

customary international law and enumerating substandards, breach of which constitute breach of FET (see ¶¶88-93 above). The Parties to the CEPTA made it clear that FET can be breached only by specific violations of indicated substandards, but not the general FET standard of customary international law *per se*. Different interpretation would deprive Art. 9.9 CEPTA of its meaning and *effet utile*.[169]

150. Therefore, creeping expropriation should be treated like eating an apple – bit by bit, but the same apple. One cannot plead that different individual lawful measures, some of which did not raise to the standard of arbitrary treatment, some – were not discriminatory and some did not constitute denial of justice, taken together would amount to a violation of the FET standard. State actions which were individually consistent with individual FET substandards, could not, cumulatively, amount to a violation of those substandards.[170]

151. Therefore, the Tribunal should not consider any action or omission independently of the closed list of the situations established by Art. 9.9(2) CEPTA. In this case, the only way for a measure to breach the FET obligation is to constitute one of the situations. In the present case Claimant pleads breach of different substandards, namely arbitrary treatment, discrimination and denial of justice. Given the precise wording of the CEPTA, there cannot be a synergy effect in them.

152. Thus, this Tribunal should declare that there is no case for Claimant's claim for cumulative effect of the Respondent's actions.

B. RESPONDENT CANNOT BE HELD LIABLE FOR THE DEPRECIATION IN VALUE OF THE CLAIMANT'S INVESTMENT

153. The Claimant in the present proceeding tries to renegotiate a commercial deal it was forced to conclude due to the deteriorating situation it occurred in. However, Respondent submits that all Claimant's suffer was the result of its own actions, which is the ground to exempt Respondent from international liability.

154. If the host state's actions are too remote from the negative consequences, then a tribunal should declare such host state not liable. As was stated in *Micula*:[171]

[169] *Eureko*, ¶248; see also, *Pan American*, ¶132; *Salini*, ¶95.
[170] Vessel (2014), p.560.
[171] *Micula*, ¶926-927.

> *An intervening event will only release the State from liability when that intervening event is (i) the cause of a specific, severable part of the damage, or (ii) makes the original wrongful conduct of the State become too remote [...] Therefore, the question seems to be whether the intervening event is so compelling that it interrupts the causal link, thus making the initial event too remote.*

155. In similar cases, if an investor chooses too risky economic path, if an investor's decisions are not well informed, then a tribunal finds no violations on host state's side for the investor's state of insolvency. For example, in the *Vocklinghaus* tribunal held that investor's poor choice of a business partner and lack of attention to the company's profitability and financial stability is one of the reasons to deny an investment claim:[172]

> *PV's 'hands-off' approach to the business of KOMFORT was, to put it no higher, a significant contributory factor to the difficulties with which he came to be faced. It left him vulnerable to the actions of others […]*

156. Similarly, in *Olguin* the tribunal denied investor's protection based on, *inter alia*, investor's personal bad-informed choices:[173]

> *To the contrary, the Tribunal feels that prudence would have prompted a foreigner arriving in a country that had suffered severe economic problems to be much more conservative in his investments.*

157. The present dispute is based on similar premises. Claimant indeed undertook too risky economic path which is the only cause of its loss. From the very beginning, Respondent was noting the risk and the optimism of the proposed strategy which did not account for serious volatility of fuel prices and potential take-over of the long-distance routes by competitors.[174]

158. Further, Claimant continued to follow a very risky strategy, despite many warnings and advice from Respondent's authorities.[175] However, the economic crisis made Claimant no more able to realize its modest early forecasts and benefit from the extravagant approach.

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[172] *Vocklinghaus*, ¶131.
[173] *Olguín*, ¶75.
[174] Problem, SoF, p.31, ¶24.
[175] Id. p.33, ¶¶29, 33; Id. p.34, ¶34.

159. It was a common business risk that made Claimant lose its investment. Respondent should not be held liable for Claimant's choice of an ill-advised strategy that did not turn success, because fair and equitable treatment "*is not an insurance policy or guarantee against all political or other risks associated with […] investment*".[176]

160. Therefore, the Respondent's actions in any case were too remote from the harm imputed by the Claimant, as it was solely the result of Claimant's poor business judgment. Based on that, the Tribunal should declare that the Respondent is not liable for the breach of Art. 9.9 CEPTA.

IV. IF THE TRIBUNAL FINDS MEKAR'S VIOLATION OF THE CEPTA, IT SHOULD CALCULATE COMPENSATION AT MARKET VALUE STANDARD

161. Even if the Tribunal finds that Mekar is responsible for violation of the CEPTA, the Tribunal should disregard Vemma's allegation for application of fair market value standard and apply market value standard of compensation. The Tribunal should consequently declare that market value was already paid under the genuine commercial deal between Mekar and Vemma and therefore Claimant has no monetary claim in this arbitration.[177] The Respondent argues that **(A)** Art. 9.21 CEPTA establishes straightforward rule to apply market value standard of compensation for breaches of FET. **(B)** Even if the Tribunal finds a room for broad interpretation, market value should be applied according to international law since the Mekar's actions did not lead to total loss of investment. **(C)** The Tribunal should not apply MFN clause to the question of compensation to import fair market value standard from Arrakis-Mekar BIT. **(D)** In any case, the Tribunal should reduce compensation.

A. THE TRIBUNAL SHOULD APPLY MARKET VALUE STANDARD OF COMPENSATION ACCORDING TO THE CLEAR RULE OF ART. 9.21 CEPTA

162. Claimant asserts that the Tribunal should apply fair market value standard if finds violation of Art. 9.9 CEPTA. However, this assertion is not based on the CEPTA, which clearly and unambiguously establishes that the Tribunal should award market value compensation.

[176] *Tidewater*, ¶184; *Urbaser*, ¶591.
[177] Problem, SoF, p.40, ¶63.

163. According to Art. 9.21(a) CEPTA:[178]

> [w]*here a tribunal makes a final award against a respondent, the tribunal may award separately or in combination: (a) monetary damages* ***at a market value****, except as otherwise provided for in Article 9.12.* [emphasis added]

164. Art. 31 VCLT provides that a treaty should be interpreted, in the first instance, according to the ordinary meaning of the text of its clauses.[179] It is a universally recognized rule that "*it is not allowed to interpret what has no need of interpretation*".[180] The Tribunal should read the provision and stop since its clear what was meant.[181]

165. The wording of Art. 9.21 CEPTA leaves no room for discussion as to the applicable standard – it clearly says that the Tribunal should award damages at fair market value of the investment, except for breaches of Art. 9.12 CEPTA (expropriation). Claimant expressly invoked Art. 9.9 CEPTA to substantiate its claim which requires to apply market value standard if a breach is established.[182] It was Claimant's own will to rely on the breach of FET and not on expropriation.

166. Therefore, the Tribunal should apply Art. 9.21 CEPTA as it is written and apply market value of the investment.

B. IN ANY CASE, EVEN INTERNATIONAL LAW REQUIRES TO APPLY MARKET VALUE STANDARD BECAUSE MEKAR'S ACTIONS DID NOT LEAD TO A TOTAL LOSS OF THE INVESTMENT

167. Claimant may also invoke an argument that international law requires to apply fair market value standard.[183] Despite the Respondent's main position that the Tribunal cannot derogate from the CEPTA, it nevertheless insists that even international law calls for application of market value standard.

168. Usually, tribunals apply fair market value standard in cases of expropriation and where the treaty is silent on the issue of compensation.[184] It sometimes may be extended to severe non-expropriation cases where an investor suffered full deprivation of its investment. However, when an investor did not lose its entire investment, the Tribunal

[178] Problem, CEPTA, p.82, lines 3018-3020.
[179] See Gardiner (2015), p.165.
[180] *AAPL*, ¶40; see also *Canfor*, ¶324, *Alpha Projektholding*, ¶223; *Zhinvali*, ¶307; *Iran v. US*, ¶83.
[181] *Foresight*, ¶202; *Eiser*, ¶205; *Eskosol*, ¶80; *Nissan-Motor*, ¶209; *Wintershall*, ¶¶79,84.
[182] Problem, p.13, ¶17.
[183] Problem, p.5, ¶30.
[184] World Bank Guidelines, p.41; Christie&Turtoi (2021).

should rather come to the conclusion that fair market value standard should not be applied.

169. For example, in *S.D. Myers* the Tribunal held that "*fixing the fair market value of an asset that is diminished in value may not fairly address the harm done to the investor*".[185] Similarly, in *Windstream Energy* the Tribunal doubted the applicability of fair market value standard to a FET breach where held:[186]

> *The Tribunal recalls that the purpose of the compensation to be awarded is to make the Claimant "whole," keeping in mind the Tribunal's determination that the Claimant has not lost the entire value of its investment […] The compensation […] must therefore reflect the Claimant's loss (damage to the investment) rather than the full value of the investment. This latter would be relevant only if the Claimant has lost the entirety of its investment as a result of an expropriation, which is not the case here.*

170. These cases illustrate that if a measure (if established) only leads to diminution of investment value, fair market value should not be applied as it would allow an investor to receive more than it lost. Similarly, even if the Tribunal in the present case establishes a breach of Art. 9.9 CEPTA, this breach only led to diminution of the value of the Vemma's investment but not to the deprivation of the investment.

171. It is Vemma's own statement that "*illegal actions taken by Mekar, and by organs of the Mekari State, caused Vemma's investment* ***to depreciate in value***" [emphasis added].[187] After that, it was Vemma's own decision to sell its stake in Caeli. In other words, even if there was a measure on behalf of Respondent, in only influenced investment's value, but selling the investment was only and exclusively Vemma's will. It is Vemma's choice that it does not possess its investment now.

172. Moreover, Vemma alleges that FET was breached by investigations and imposing airfare caps. However, the airfare caps were removed as soon as Vemma's market share dropped in October 2019.[188] "*Despite this decision*"[189] Vemma chose to sell its share in Caeli.

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[185] *S.D. Myers*, ¶310.
[186] *Windstream Energy*, ¶473.
[187] Problem, p.5, ¶28.
[188] Problem, SoF. p.38, ¶55.
[189] Id. ¶56.

173. Therefore, Vemma's desire to sell its share was not driven by the illegal actions, since illegal actions ceased to exist at the time of the decision. This illustrates that Mekar's measures, if any, could only led to diminution in value of the share and which could be easily recovered (and indeed was[190]). However, the fact that Vemma occurred to be without its share in Caeli was driven by its own decision and only by it. Investment arbitration cannot be a tool to fix bad business judgments.[191] As opposed to expropriation, where an investor suffers against its will and for that end can claim fair market value, Claimant suffered because of its own actions and now can only receive market value of its investment.

174. Therefore, the Tribunal should apply market value standard to award compensation as it would be a fair balance between the harm found and the consequences caused.

C. THE TRIBUNAL SHOULD NOT APPLY MFN CLAUSE TO IMPORT FAIR MARKET VALUE PROVISION FROM ARRAKIS-MEKAR BIT

175. Claimant also asserts that fair market value standard might be imported to the present case from Art. 13 Arrakis-Mekar BIT under the MFN clause contained in Art. 9.7CEPTA.[192] The Tribunal should reject this argument because **(1)** the question of compensation is not covered by Art. 9.7 CEPTA and **(2)** application of MFN would make Art. 9.21 CEPTA meaningless.

1. The question of compensation is not covered by the scope of MFN clause in Art. 9.7 CEPTA

176. Art. 9.7(1) CEPTA provides a closed list cases for application of MFN being "*establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory*". Art. 9.7(2) CEPTA further expressly states that MFN clause applies only to substantive protection but not to a process of dispute resolution.[193]

177. The question of compensation does not fall within the exclusive list of cases under Art. 9.7(1) CEPTA. The question of compensation also is not a substantive protection but part of dispute settlement. As was confirmed by Ian Brownlie, compensation provision cannot be imported under the MFN clause because "[t]*he presumption must be that the*

[190] Problem, SoF, p.40, ¶64.
[191] *Maffezini*, ¶64.
[192] Problem, p.5, ¶30.
[193] Problem, CEPTA, p.75, lines 2715-2717.

clause promises MFN treatment only in matters of treatment of an investment, and not to the process of dispute settlement".[194]

178. Even if application of Art. 9.7 CEPTA to the question of compensation is still obscure, a tribunal may refer to context of a provision,[195] as well as to the structure of an article or a treaty.[196] The structure of the CEPTA supports that compensation awarded by the Tribunal is a procedural issue, because the Parties put it in Section E – "Settlement of Disputes".[197] The context of Art. 9.21 illustrates that it is invoked "[w]*here a tribunal makes a final award*",[198] i.e. in the process of dispute settlement. Art. 13 Arrakis-Mekar BIT, which Claimant tries to invoke in the present case, is structured in a similar fashion.

179. Therefore, the Tribunal cannot import compensation provision from Arrakis-Mekar BIT.

2. Clear wording of Art. 9.21 CEPTA precludes application of the MFN clause

180. Even if the Tribunal finds that compensation falls within the scope of the MFN clause, it should not apply it because otherwise parties' intent would be neglected.

181. Art. 31 VCLT implies internationally recognized principle of *effet utile,* which requires that "*provisions of a treaty be read together and that "every provision in a treaty be interpreted in a way that renders it meaningful rather than meaningless (or inutile)*".[199]

182. The *effet utile* principle became even more important in the era of global reforming of investor-state dispute settlement system when states are trying to negotiate more careful and precise terms of the investment treaties. In such cases improperly applied MFN can totally nullify state's effort. Therefore,

> *the sheer implausibility that States A and B negotiated treaty language that would have absolutely no effect might justify precluding the application of the MFN clause in the A-B treaty*[200]

183. Similar is approved by Ian Brownlie in *CME* case: "[t]*he express choice of a compensation clause becomes nugatory if the mfn clause applies in this form*".[201]

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[194] *CME Brownlie's Opinion*, ¶11.
[195] Art. 31 VCLT.
[196] E.g., *Venezuela US*, ¶124.
[197] Problem, CEPTA, p.79, line 2853.
[198] Ibid. line 3018.
[199] *Renco*, ¶177, *Eureko*, ¶248.
[200] Cole (2012), p. 576.
[201] *CME Brownlie's Opinion*, ¶11.

184. The Parties to the CEPTA were very precise while drafting Art. 9.21 CEPTA representing their will towards the applicable standard of compensation (see Section A above). Mekar and Bonooru made an express indication that breach of any provision of the CEPTA except for expropriation is accompanied with payment of market value of the investment. Application of MFN clause would make Art. 9.21 meaningless and parties nugatory.

185. Therefore, the Tribunal should not deprive the provisions of the CEPTA of their meaning and should award compensation at market value standard.

D. IN ANY CASE, THE TRIBUNAL SHOULD REDUCE COMPENSATION

1. Vemma contributed to its losses

186. According to Art. 39 ILC Articles "[i]*n the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought*". Therefore, an obligation to consider contributing actions of an injured party is an international law obligation owed by the Tribunal.

187. To conclude that there is a contributory fault of an investor, a tribunal can consider ill-advised steps taken by an investor[202] or whether an investor's decisions increased business risk.[203] A tribunal may also reduce the damages by concluding that the investor's actions triggered host state's measures, if found.[204] The Tribunal should reduce compensation "*by a percentage reflecting the investor's role in the events leading to a loss*".[205]

188. In the present case and if the breach is established, the Tribunal should declare that Claimant sufficiently contributed to the amount of damages which should be the basis for the reduction of damages to what is already paid by Respondent.

189. Claimant indeed took many ill-advised steps which increased business risk. Vemma's decisions embodied in Caeli's actions were concentrated on rapid and quick expansion without trying to ensure its profit in the long-term perspective. Vemma's business model was based on the seasoned revenue with a high fall-winter decline.[206] Vemma maintained

[202] *RosInvestCo*, ¶¶634-635.
[203] *CME*, ¶549.
[204] *Yukos*, ¶1605.
[205] *Stati*, ¶1331.
[206] Problem, SoF, p.33, ¶30.

the unused part of the fleet hoping for future revenues,[207] while it is evident for any well-informed investor that idle assets should be either reused or sold.[208]

190. Vemma's short-sighted economic policy is perfectly illustrated when it decided to invest all its revenues in expanding Caeli's fleet with old Boeing 737,[209] while it was "*especially due to its continued operation of old aircraft* [Boeing 737] *until this time*" that Caeli occurred in a state of deeper financial distress.[210] Moreover, Boeing 737 occurred to have technical failure which was the reason to ground all Caeli's fleet. Vemma decided to put all Caeli's eggs in one basket and should be responsible for these actions.

191. Claimant's actions also triggered Respondent's measures, if established. The Investigations, imputed in the present case, started solely because "*Caeli's rapid expansion drew the attention of the CCM*".[211] In its turn, Caeli's economic policy were driven by Vemma's decisions: e.g. when Vemma wanted to expand the fleet and Mekar Airservices opposed this decision, Caeli expanded the fleet;[212] when Mekar Airservices wanted to focus on domestic flights and Vemma wanted to expand routes,[213] Caeli's board of directors indeed decided to expand the routes.[214]

192. Therefore, the Tribunal should reduce compensation and held, that the amount which was already paid by the Tribunal (400 million USD) is enough to wipe out all the negative consequences of alleged measures.

2. The compensation should be reduced since it would allow Respondent to avoid crippling consequences

193. While deciding the question of compensation, investment and international tribunal are not only guided by texts of applicable treaties and norms of international law, but may exercise discretion.[215] In particular, if an investment tribunal sees that the compensation would sufficiently damage the host state and, what is more important, would undermine its obligation towards its nationals, then a tribunal should carefully consider this factor in rendering the decision on amount of compensation.

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[207] Problem, SoF, p.33, ¶31.
[208] E.g., Vundavilli (2019).
[209] Problem, SoF, p.34, ¶35.
[210] Id. p.37, ¶48.
[211] Id. p.34, ¶36.
[212] Id. ¶35.
[213] Id. p.33, ¶30.
[214] Id. ¶31.
[215] *El Paso Annulment*, ¶207; Weisburg&Ryan (2006), p.169.

194. For example, in *Sempra* the tribunal held that[216]

> *[…] the manner in which the law has to be applied cannot ignore the realities resulting from a crisis situation, including how a crisis affects the normal functioning of any given society. This is the measure of justice that the Tribunal is bound to respect. The Tribunal will accordingly take into account the crisis conditions affecting Argentina when determining the compensation due for the liability found in connection with the breach of the Treaty standards.*

195. Similar question arose in *Eritrea v. Ethiopia* since both disputing states were in the state of financial distress. The Commission held that "[a]*wards of compensation of the magnitude sought by each Party would impose crippling burdens upon the economies and populations of the other*". [217] This led the Commission to the need to consider parties' overall economic positions and cap the possible award by saying:

> *Is function [function of compensation] is remedial, not punitive […] The difficult economic conditions found in the affected areas of Ethiopia and Eritrea must be taken into account in assessing compensation there. Compensation determined in accordance with international law cannot remedy the world's economic disparities.*

196. Therefore, the Tribunal in the present dispute should reduce compensation taken into account Mekar's harsh economic situation. It is evident that "*to pay the USD 700 million that Vemma demands, Mekar would have to transfer about twice its consolidated annual public spending to Vemma*".[218] Paying the compensation would undermine Respondent's obligation towards its nationals and public as a whole, which does not worth meeting unsubstantiated demands of an ill-advised investor able to rely on anti-competitive measures to extract revenues. The consequences are so harsh since people of Mekar who are in desperate need given the conditions of economic crisis would not receive any funds.

197. Thus, the Tribunal should reduce compensation to the market value of the investment which was already paid by Mekar for the stake in Caeli.[219]

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[216] *Sempra*, ¶397.
[217] *Ethiopia v. Eritrea*, ¶21.
[218] Problem, PO 3, p.86, ¶4.
[219] Problem, SoF, p.40, ¶63.

PRAYER FOR RELIEF

198. In light of the above, Respondent respectfully requests the Tribunal:

    a. Find that the Tribunal has no jurisdiction over the present dispute;

    b. Grant the leave to the *amicus curiae* submission of the External Advisors to the Committee on Reform of Public Utilities;

    c. Reject the *amicus curiae* submission of the Consortium of Bonoori Foreign Investors;

    d. Find that the Respondent did not violate Article 9.9 CEPTA;

    e. Alternatively, order that Respondent has no monetary obligations to Claimant; and

    f. Order Claimant to reimburse Respondent for all costs and expenses associated with this arbitration.

199. Respondent reserves its rights to modify its prayer for relief at any time in the course of this proceedings.

Respectfully submitted on behalf of Respondent

23 September 2021

Team 1682 SOLDAN G