TEAM TRINDADE

FOREIGN DIRECT INVESTMENT

INTERNATIONAL MOOT COMPETITION

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

BETWEEN:

Vemma Holdings Inc.

Claimant

AND

Federal Republic of Mekar

Respondent

MEMORIAL FOR THE RESPONDENT

23 September 2021

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11.	*Consorzio*	*Consorzio Groupement L.E.S.I. - DIPENTA v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award (10 January 2005).
12.	*Duke Energy*	*Duke Energy Electroquil Partners v. Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008).
13.	*Electrabel* (Jurisdiction)	*Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012).
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16.	*Glamis Gold*	*Glamis Gold Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009).
17.	*Global Telecom*	*Global Telecom Holding v. Canada*, ICSID Case No. ARB/16/16, Award (27 March 2020).
18.	*Hamester*	*Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010).
19.	*InterAguas*	*InterAguas ervicios Integrales v. The Argentine Republic*, ICSID Case No ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae (17 March 2006).
20.	*Jan de Nul*	*Jan de Nul v. Egypt*, ICSID Case No. ARB/04/13, Award (6 November 2008).
21.	*Kaliningrad*	*Kaliningrad v. Lithuania*, ICC, Final Award (28 January 2009) (unpublished) cited in IA Reporter, *Lithuania Prevails in Investor-State BIT Claim over Enforcement of ICC Award in case brought by Russian Regional Government* (17 March 2019).
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26.	*Maffezini*	*Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction (25 January 2000).
27.	*Methanex*	*Methanex Corp. v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae under the NAFTA and the UNCITRAL Arbitration Rules (15 January 2001).
28.	*Mondev*	*Mondev v. United States of America*, ICSID Case No. Case No. ARB(AF)/99/2, Award (11 October 2002).
29.	*MTD*	*MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment (21 March 2007).
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33.	*Philip Morris* (Order)	*Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Procedural Order No. 3 (17 February 2015).
34.	*Philip Morris* (Award)	*Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016).

35.	*Phillips Petroleum*	*Phillips Petroleum Co. Iran v. Iran*, 21 Iran-U.S. Claims Tribunal, Award (29 June 1989).
36.	*S.D. Meyers*	*S.D. Meyers Inc. v. Government of Canada*, UNCITRAL, Partial Award (13 November 2000).
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41.	*South American Silver*	*South American Silver v. Bolivia*, PCA Case No. 2013-15, Award (22 November 2018).
42.	*Tatneft*	*OAO Tatneft v. Ukraine*, PCA Case No. 2008-8, Partial Award on Jurisdiction (28 September 2010).
43.	*Tecmed*	*Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003).
44.	*von Pezold*	*Bernhard von Pezold and others v. Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2 (26 June 2012).
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46.	*White Industries*	*White Industries v. India*, UNCITRAL, Final Award (30 November 2011).

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1.	*Copperweld*	*Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (United States).
Treaties		
1.	ICSID AF Rules	International Centre for Settlement of Investment Disputes Additional Facility Rules (1978).
2.	ICSID Convention	Convention on the Settlement of Disputes Between States and Nationals of Other States, (entered into force 14 October 1966).
3.	VCLT	The Vienna Convention on Law of Treaties (entered into force 27 January 1980).
4.	NAFTA	North American Free Trade Agreement (entered into force 1 January 1994).
5.	UNCITRAL Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2013).
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1.	Broches (SE)	Aron Broches, Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law (1995).
2.	Brownlie	Ian Brownlie, *System of the Law of Nations: State Responsibility, Part I* (1983).
3.	ILC Draft Articles	Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001).
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6.	EU Guidelines	*Guidelines on the applicability of art. 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, Official Journal of the European Commission, [2011] OJ C11/1 (2011).
7.	Feldman	Mark Feldman, *The Standing of State-Owned Entities Under Investment Treaties*, Yearbook on International Investment Law & Policy 2010-2011 (2012).
8.	FET (UNCTAD)	*Fair and Equitable Treatment*, UN Conference on Trade and Development, UNCTAD Series on Issues in International Investment Agreements II (2012).
9.	Goldberg	John C.P. Goldberg & Benjamin C. Zipurksy, *The Oxford Introductions to U.S. Law: Torts*, Oxford University Press (2010).
10.	ILC Report	Report of the International Law Commission on the work of its fifty third session, U.N. Doc. A/56/10, 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (reprinted in 2001).
11.	Knoll	Joachim Knoll, Tania Singla, *Causation in International Investment Law: Putting Article 23.2 of the India Model BIT into Context*, 8 Indian Journal of Arbitration Law 2 (2020).
12.	Marboe	Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law*, Oxford University Press (2017).
13.	McLachlan	McLachlan, C., Shore, L. and Weiniger, M., International Investment Arbitration: Substantive Principles, Oxford University Press, 1st ed. (2018).
14.	Notes of Interpretation	Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission (31 July 2001).
15.	Paulsson	Jan Paulsson, Denial of Justice in International Law (2005).
16.	Resolution 687	United Nations Security Council Resolution 687 [Iraq-Kuwait], S/RES/687 (3 April 1991).
17.	Ripinsky	Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law*, British Institute of International and Comparative Law (2008).

18.	Schreuer	Christoph Schreuer, L. Malintoppi, A. Reinsich and A. Sinclair, The ICSID Convention: A Commentary (2009).
19.	UN Conference	United Nations Conference on the Law of Treaties: Official Records: Documents of the Conference, 2 Y.B. Int'l L. Comm'n 218 (1966).
20.	Wöss	Herfried Wöss and Adriana San Román, *Full Compensation, Full Reparation and the But-For Premise,* The Guide to Damages in International Arbitration, Global Arbitration Review, 4th ed. (2021).
21.	Ziyaeva	Diora Ziyaeva, *Arbitral Tribunals Tend to Pay Lip Service to the Chorzow Factory Full Reparation Principle, Disregarding the Context and Full Implication of the Dictum*, 2 Journal of Damages in International Arbitration 2 (2015).

TABLE OF ABBREVIATIONS

¶ (¶¶)	Paragraph(s)
Arrakis BIT	Arrakis-Mekar Bilateral Investment Treaty, 2006
Art./Arts.	Article/Articles
Articles of Association	Articles of Association of Vemma Holdings Inc.
Aviation Analytics	Aviation Analytics June 7, 2019 (Annex IV)
Bonooru	The Commonwealth of Bonooru
Bonooru BIT	Bonooru-Mekar Bilateral Investment Treaty, 1994
Caeli	Caeli Airways JSC
CBFI	Consortium of Bonoori Foreign Investors
CCM	The Competition Commission of Mekar
CEPTA	Bonooru - Mekar Comprehensive Economic Partnership and Trade Agreement, 2014
CILS	The Centre for Integrity in Legal Services
CRPU	Committee on Reform of Public Utilities
Facts	Statement of Uncontested Facts
FET	Fair and Equitable Treatment
fn.	footnote
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ILC Draft Articles	ILC Draft Articles on State Responsibility

ISDS	Investor-State Dispute Settlement
Kyoshi v. Bonooru	*The People's Council of the Island of Kyoshi v. Bonooru* (Attorney General)
Lawsuit 1	Judicial review of airfare caps filed by Caeli in March 2018
Lawsuit 2	Judicial review of CCM investigation decisions filed by Caeli in January 2019
Mekar	The Federal Republic of Mekar
MFN	Most Favored Nation
MRTP Act	Monopolies and Restrictive Trade Practices Act as amended in 2009
MST	Minimum Standard of Treatment
Notice	Notice of Arbitration
p. / pp.	Page / Pages
PIA	Phenac International Airport
Response	Response to the Notice of Arbitration
SCC	The Sinnoh Chamber of Commerce
SCC Award	Award rendered by Rett Cavannaugh on 9 May 2020
Shareholders' Agreement	Shareholders' Agreement relating to Caeli Airways
Superior Court Ruling	Superior Court of Mekar Ruling, 25 September 2020
Sinnograd Ruling	Supreme Arbitrazh Court of Sinnograd Ruling, 1 August 2020
UNCITRAL	United National Commission on International Trade Law
Vemma	Vemma Holdings Inc.

SUMMARY OF FACTS

1. Vemma Holdings Inc. ("**Vemma**" or "**Claimant**") is an airline holding company incorporated in the Commonwealth of Bonooru ("**Bonooru**").[1] Prior to the creation of Vemma, BA Holdings was a Bonooru-owned airline holding company and the parent of Bonooru Air, Bonooru's national carrier and monopoly civil airline.[2] Bonooru's Civil Aviation Authority ("**CAA**"), an arm of Bonooru's Ministry of Transport and Tourism, who also managed Bonooru Air until 1979, devised a scheme to sell a 70% stake in BA Holdings while maintaining a minority share of ownership in order to enhance its profitability.[3] Following this restructuring by the CAA, Vemma became the new successor of BA Holdings and Bonooru Air was split into three airlines, one of which was Royal Narnian.[4] Vemma owns 100% of the shares of Royal Narnian, the airline the Bonooru Government selected as its national carrier.[5]

2. The Federal Republic of Mekar ("**Mekar**" or "**Respondent**") is a country just south of Bonooru that experienced immense regulatory intervention and economic reform subsequent to its 1994 independence.[6] Following the financial losses stemming from the 2008 financial crisis, the Mekar Government was concerned with the amount of aid it was providing to its State-owned enterprises.[7] In 2010, the Mekar Government sought to privatize various State-owned enterprises, including Caeli Airways JSC ("**Caeli**"), Mekar's national airline which had been operating at a loss.[8] To spur additional investor confidence, the Mekar Government created the Competition Commission of Mekar ("**CCM**"), an independent agency under Mekar's Monopoly and Restrictive Trade Practice Act in 2009 ("**MRTP Act**").[9]

3. In an effort to sell a controlling stake in Caeli, Mekar set up a competitive bidding process, with four companies participating.[10] Mekar Airservices Ltd. ("**Mekar Airservices**"), a

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1 Facts, ¶10.
2 Facts, ¶6.
3 Facts, ¶¶6-7.
4 Facts, ¶9.
5 Facts, ¶¶9-10.
6 Facts, ¶12.
7 Facts, ¶17.
8 Facts, ¶¶16, 18, 21.
9 Facts, ¶19. The president of the CCM, Ms. Moira Rose, aimed "to see the CCM function as an autonomous body independent of government influence."
10 Facts, ¶¶21-22.

transition vehicle, marketed Caeli's assets to bidders, which included its brand, valuable slots at two international airports, its profitable ground handling company, and its technical base in Mekar's capital.[11] Vemma submitted its bid for Caeli on 23 November 2010, the same day that the head of Vemma's board of directors, Sabrina Blue, was appointed as Bonooru's Secretary of Transport and Tourism.[12]

4. Mekar's Committee on Reform of Public Utilities ultimately selected Vemma, as Vemma had placed the highest bid for Caeli and the Chairperson of the Committee advocated for Vemma's selection throughout the bidding process.[13] However, select committee members noted that Vemma's bid over-valued Caeli by not taking into account the significant volatility of fuel prices and the potential takeover of long-distance routes by competitors.[14] As a condition of the CCM's approval of Vemma's acquisition, Caeli pledged that it would not engage in high-level cooperation on prices, schedules, capacity, facilities, and other sensitive information with Moon Alliance members.[15]

5. In 2011, following Vemma's acquisition of Caeli, Ms. Blue in her new government role unveiled the "Horizon 2020" Scheme, which provided recurring subsidies to companies investing in tourism-related infrastructure in Bonooru.[16] Bonooru awarded Vemma the first subsidy under the Scheme on 28 October 2011.[17]

6. Assured of Bonooru's support, Vemma pursued several risky strategies after acquiring Caeli. Vemma expanded its routes for cross-continental travel to Mekar, adding twenty new destinations in 2012 and increasing its number of international routes in 2014, despite Mekar Airservices cautioning Vemma against taking an "extravagant approach" given the volatility of demand in Mekar during the fall and winter months.[18] Vemma's board chose to expend its profits on expanding its fleet, ordering 45 Boeing 737 MAX, rather than paying down its outstanding debt.[19]

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[11] Facts, ¶21.
[12] Facts, ¶22.
[13] Facts, ¶24.
[14] *Id.*
[15] Facts, ¶25.
[16] Facts, ¶28.
[17] *Id.*
[18] Facts, ¶29.
[19] Facts, ¶35.

7. On 15 October 2014, the CEPTA between the Federal Republic of Mekar ("**Mekar**" or "**Respondent**") and Bonooru entered into force.[20]

8. In September 2016, the CCM initiated an investigation into Caeli to determine whether it adopted predatory pricing strategies.[21] Under Chapter III of the MRTP Act, the CCM may use its discretionary power under Section III(2)(a) to open an investigation *suo moto* into corporations owning a market share below 50% for suspected anti-competitive behavior in "industries that require special attention."[22] The airline industry is such an industry given the prevalence of airline alliances that may facilitate anti-competitive behavior between corporations.

9. In order to prevent Caeli from increasing its prices to earn supra-competitive profits in the future, in September 2016, the CCM placed airfare caps on Caeli pegged to Mekar's official inflation rate calculated annually each December by the Central Bank.[23] These interim caps were set reasonably above the rates Caeli charged on set routes and did not affect Caeli's profitability in 2016.[24]

10. The CCM launched a second investigation into Caeli in response to a complaint by a consortium of small regional airlines in Greater Narnia.[25] Those airlines alleged that Caeli added flights on specific regional routes to and from Phenac "with the sole purpose of pushing competitors off these routes" making it impossible for them to penetrate the market due to Caeli's price undercutting and monopolization.[26]

11. In October 2017, the Mekar Government permitted the denomination of airfare in US dollars for all airlines operating in Mekar territory to maintain their revenues during the winter season in response to the Mekari MON currency's decline in value.[27] Mekar never committed to maintaining this exemption for any particular period of time, and—in the midst of a severe and prolonged financial crisis—was eventually forced to withdraw the exemption

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[20] Facts, ¶32.
[21] Facts, ¶36.
[22] MRTP Act, Ch. III, ¶2.
[23] Facts, ¶43.
[24] Facts, ¶37.
[25] Facts, ¶38.
[26] *Id.*
[27] Facts, ¶¶39-40.

and reestablish the requirement that all airline price in MON beginning on 30 January 2018 in order to stabilize the MON currency.[28]

12. On 25 September 2018, Mekar issued Executive Order 9-2018, which granted subsidies for airlines operating in Mekar in addition to foreign airlines with Mekari citizens traveling on board.[29] Mekar's Secretary of Civil Aviation denied Caeli's application for a subsidy, given that State-owned airlines maintained advantages over privately-owned airlines. As Aviation Analytics also noted in their report of 7 June 2019, "Vemma has near assurances that Bonooru would step in if anything bad were to happen to its prized national carrier's owner."[30] Larry Air, a foreign, State-owned airline like Caeli, also did not receive any subsidies.[31]

13. Vemma sought to sell its investment in Caeli due to its dire financial situation. After acquiring an offer from Hawthorne Group LLP ("**Hawthorne**"), Vemma was required to offer Mekar Airservices the right to purchase the shares at the price offered by Hawthorne in accordance with the Shareholders' Agreement between Vemma and Mekar Airservices.[32] Mekar Airservices rejected Hawthorne's offer because the price was "artificially inflated and not an arms-length commercial price" given Hawthorne's membership in the Moon Alliance.[33] On 11 February 2020, Mekar Airservices filed a request for arbitration with the Sinnoh Chamber of Commerce's ("**SCC**") Arbitration Institute, requesting that the Tribunal find that Vemma had failed to secure a *bona fide* third party offer under Article 39 of the Shareholders' Agreement.[34] The SCC-appointed sole arbitrator, Mr. Rett Cavannaugh, issued an award in Mekar Airservices' favor on 9 May 2020.[35]

14. The Supreme Arbitrazh Court of Sinnograd set aside the award. While the Sinnoh court decided that the award was tainted by alleged bribery, it simultaneously acknowledged that it was not "in a position to conclusively rule on whether the act of bribery had in fact taken

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[28] Facts, ¶41.
[29] Facts, ¶46.
[30] Aviation Analytics, lines 1947-48.
[31] Facts, ¶47.
[32] Facts, ¶22.
[33] Facts, ¶¶56-57.
[34] Facts, ¶57.
[35] Facts, ¶58.

place."[36] Mekar Airservices filed to enforce the award before the High Commercial Court of Mekar and the High Commercial Court recognized and enforced the award, dismissing Vemma's appeal.[37] The Superior Court of Mekar confirmed the High Commercial Court's decision on 25 September 2020.[38] Under the New York Convention and Mekari arbitration law, courts have the discretion to enforce an award that has been annulled in the country where it was issued.[39] The Mekari courts chose to exercise that discretion.

15. On 8 October 2020, Vemma sold its stake in Caeli to Mekar Airservices for USD 400 million.[40] On 15 November 2020, Vemma filed its notice of arbitration against Mekar seeking compensation for its losses under the CEPTA.[41]

16. Through the Airways Infrastructure Rescue Act, Bonooru bailed out Vemma by purchasing a majority 55% share in Vemma on 2 March 2021.[42] Under the ownership of Bonooru, Vemma underwent a large-scale restructuring, replacing its board of directors with government functionaries, and expanding its capabilities to include paramilitary activities.[43] Bonooru also equipped Vemma's legal team with lawyers from Bonooru's justice department to assist in its arbitration against Mekar.[44]

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[36] Facts, ¶¶11, 14.
[37] Facts, ¶62.
[38] *Id.*
[39] Superior Court Ruling, lines 2345-48.
[40] Facts, ¶63.
[41] *Id.*
[42] *Id.*
[43] Facts, ¶65.
[44] *Id.*

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION UNDER THE ICSID AF RULES

17. Vemma is a State entity acting on behalf of Bonooru. Consequently, Vemma fails to satisfy the jurisdictional requirements of Article 2 of the ICSID AF Rules and this Tribunal lacks jurisdiction over Vemma's claims. Since Vemma is structurally a creation of the Bonooru State and functionally performs acts that are governmental in nature, Vemma is a State entity acting as an agent of Bonooru.

A. A MULTIFACTOR TEST, WITH AN EMPHASIS ON PURPOSE, APPLIES TO DETERMINE WHETHER VEMMA IS A "NATIONAL OF ANOTHER STATE"

18. Through its narrow interpretation of the Broches test, Vemma suggests that it is "a national of another State" because it is not acting as an agent of the Bonooru Government and it is not discharging governmental functions. This analysis is incorrect, however, because it fails to incorporate customary international law, as expressed in Articles 5 and 8 of the ILC Draft Articles, in its understanding of the Broches test. To properly apply the Broches test to the present dispute, the entity's purpose must be taken into particular consideration, in accordance with customary international law.

19. In order to properly apply the Broches test in accordance with customary international law, the Tribunal must employ both a structural test and a functional test. A structural test examines the government's share of ownership, its Board representation, and its control of corporate management to determine whether the entity is acting as an agent of the State. A functional test then analyzes the entity's purposes and objectives to determine whether it is discharging governmental functions.

(i) Customary international law attribution rules should be employed to properly interpret and apply the Broches test to the case at hand

20. The ICSID Additional Facility Rules only permit the ICSID Secretariat to administer proceedings between "a State (or a constituent subdivision or agency of a State) and a national of another State."[45] As Aron Broches, the first Secretary General of ICSID and one of the principal architects of the ICSID system, explained, the purpose of this language was to ensure that ICSID would provide an international forum for resolving Investor-State

[45] ICSID AF Rules, Art. 2.

disputes, rather than disputes between States (which could be submitted to the International Court of Justice), or disputes between private parties (which could be submitted to commercial arbitration forums).[46] The primary purpose of ICSID is to facilitate private international investment by establishing the appropriate mechanisms to settle disputes between private investors and States.[47] Thus, the ICSID system is reserved only for those government-owned corporations "who are practically indistinguishable from the completely privately owned enterprise both in their legal characteristics and in their activities."[48]

21. Under the ICSID system, Broches posited that a mixed economy company or State-owned entity should not be deemed a "national of another Contracting State" if it is either "acting as an agent for the government or is discharging an essentially governmental function."[49]

22. Moreover, CIL attribution rules closely mirror the Broches test for determining whether an entity qualifies as a "national of another Contracting State." Broches' two factors closely reflect Articles 5 and 8 of the ILC Draft Articles on State Responsibility. Specifically, the conduct of the entity should be attributed to the State if, according to Article 5, the entity is "acting on the instructions of, or under the direction or control of, that State," or, according to Article 8, "is empowered by the law of that State to exercise elements of the governmental authority" in the particular instance at issue.[50]

23. To fill gaps in treaty text, tribunals often look to underlying principles of international law.[51] Given that neither the ICSID AF Rules nor the CEPTA establish guiding principles for determining whether a particular entity is a State body, the Tribunal must look to applicable rules of international law.[52] Tribunals have applied these rules of international law in the form of a multi-factor test, considering factors such as "ownership, control, the nature, purposes and objectives of the entity whose actions are under scrutiny, and to the character

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46 Feldman, p.619 (citing Broches (SE), p.16).
47 ICSID Convention, Preamble.
48 Schreuer, p.161, ¶271.
49 *Id.*
50 ILC Draft Articles, Arts. 5, 8.
51 *See, e.g.*, *Maffezini*, ¶76 ("Since neither the Convention nor the Argentine-Spanish BIT establish guiding principles for deciding the here relevant issues, the Tribunal may look to the applicable rules of international law in deciding whether a particular entity is a state body.")
52 *Maffezini*, ¶76.

of the actions taken."[53] The *Hamester* tribunal was guided by the ILC Articles as a codification of customary international law and explicitly utilized Article 5 of the ILC Draft Articles to determine whether the State-owned entity exercised governmental authority.[54] The *Electrabel* tribunal invoked Article 8 of the ILC Articles to determine whether the State-owned entity in that case was acting on the instructions of or under the direction or control of Hungary.[55]

(ii) The purpose of an entity's activities must be taken into particular consideration in determining whether an entity is exercising governmental authority

24. The commentary to ILC Article 5 explicitly states that the purpose of an entity's activities is "of particular importance" for identifying acts attributable to the State, noting, "[o]f particular importance will be not just the content of the powers, but the way they are conferred on an entity, *the purposes for which they are to be exercised* and the extent to which the entity is accountable to government for their exercise."[56]

25. Under the test articulated in *Maffezini*, if an entity's objective is to perform functions that are governmental in nature, a rebuttable presumption arises that the entity is controlled by the State.[57] In *Hamester*, the tribunal found that, because the State-owned entity had "*the mission* to regulate the marketing and export of cocoa, coffee and sheanuts; to encourage the development of all aspects of cocoa production and transformation; and to fight diseases of cocoa beans," it was endowed with governmental functions.[58]

B. VEMMA IS NOT A "NATIONAL OF ANOTHER STATE" UNDER ARTICLE 2 OF THE ICSID AF RULES

26. The Tribunal must examine multiple factors to determine whether Vemma was acting as an agent of the State and whether it discharged essentially governmental functions. In order to properly apply the Broches test, while also taking Articles 5 and 8 of the ILC Articles into account, the *Maffezini* tribunal creates two categories of factors: structural and functional.

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53 *Id.*
54 *Hamester*, ¶¶171, 192.
55 *Electrabel*, ¶¶7.63-64.
56 ILC Draft Articles, Commentary, ¶6 (emphasis added).
57 *Maffezini*, ¶77.
58 *Hamester*, ¶190 (emphasis added).

Structural factors include ownership and control, while functional factors include "the nature, purposes and objectives of the entity" and "the character of the actions taken."[59] Thus, the tribunal employed both a structural test and a functional test to determine whether the State-owned entity's conduct was attributable to the State.

(i) Structurally, Vemma is an agent of the Bonooru State

27. From a structural point of view, the Tribunal must look to the government's share of capital, its Board representation, and its control of corporate management, to determine whether Vemma is controlled and managed by the Bonooru State.[60]

28. Bonooru Air was the Bonooru State's monopoly civil airline, and, until 1979, was managed by the Civil Aviation Authority (CAA), an arm of Bonooru's Ministry of Transport and Tourism.[61] BA Holdings, the State-owned parent company of Bonooru Air, was restructured in 1984, with the splitting of Bonooru Air into three airlines.[62] The government then chose the Royal Narnian, one of the three airlines, as the flag carrier of Bonooru, and gave 100 percent ownership stake of the Royal Narnian to Vemma, BA Holdings' successor.[63]

29. Since the date of incorporation, the Bonooru Government has continuously held a significant shareholding in Vemma, ranging from 31 percent to a controlling 55 percent.[64] Moreover, the government's entitlement to hold such a significant ownership stake is enshrined in Vemma's Memorandum of Association.[65] Moreover, although Bonooru's share mostly fell within the range of 31 to 38 percent, no other shareholder held more than a 7 percent stake in Vemma.[66] Thus, Bonooru maintained a substantial degree of ownership in Vemma relative to Vemma's other shareholders. Because the remaining stake in Vemma was broadly dispersed to multiple investors, no single investor held any significant amount of ownership to counterbalance the ownership Bonooru possessed.

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59 *Maffezini*, ¶76.
60 *Salini*, ¶32.
61 Facts, ¶6.
62 Facts, ¶¶7, 9.
63 Facts, ¶¶9, 10.
64 Facts, ¶¶10, 65.
65 Memorandum of Association, ¶¶4, 5.
66 Procedural Order No. 4, ¶2.

30. Furthermore, the Bonooru Government's significant presence and power on Vemma's Board is indicative of the State's control over Vemma, given its prescribed decision-making authority.[67] Vemma's Articles of Association empower Bonooru's Ministry of Transport and Tourism to appoint a director to the Board.[68] After Vemma initiated this arbitration, Bonooru replaced Vemma's entire Board with government functionaries through its implementation of a bail-in program via the Airways Infrastructure Rescue Act.[69] Bonooru also equipped Vemma's legal team with lawyers from Bonooru's justice department to assist in its arbitration against Mekar.[70] Such control over Vemma's management and operational decisions is indicative of structural State ownership.

31. Moreover, in connection with the structural test, tribunals have also examined whether the nature of the activity undertaken by the entity is indicative of some form of exercise of sovereign authority.[71] While majority-owned by Bonooru, Vemma expanded its capabilities to include paramilitary activities through Bonooru's bail-in program.[72] Paramilitary activities are not commercial in nature and are instead a quintessential example of governmental functions. Unlike the State-owned entity in *Jan de* Nul that invested in a downstream refinery to process its oil, paramilitary activities are distinctively governmental in nature.[73] In some states, oil production and refining are undertaken by public entities, while in others they are undertaken by private entities.[74] Paramilitary activities, however, are exclusively performed by governmental entities.

32. In addition, the Mekar government provided Caeli with state aid under the "public interest" exception of the MTRP rules, which permits infusion of state aid into services identified as "being of particular importance to citizens."[75] In its approval, the CCM noted the importance of Caeli's "public functions," adding that "Caeli is expected to undertake activities of public importance such as search and rescue operations, emergency medical evacuations, and

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67 Articles of Association, Art. 152.
68 Articles of Association, Art. 152.4.
69 Facts, ¶65.
70 Facts, ¶65.
71 *Tatneft*, ¶133.
72 Facts, ¶65.
73 *Tatneft*, ¶¶122,133. *See also*, *Jan de Nul*, ¶¶166, 171.
74 *Id.*
75 Facts, ¶64; Procedural Order No. 4, ¶9.

distributing humanitarian aid."[76] These activities are clearly governmental in nature, as these types of services are frequently reserved for government agencies to perform, and the CCM explicitly labeled these activities as "public functions."

33. Collectively, the Bonooru Government's shareholding in Vemma, and its control over the Board's decision-making authority clearly demonstrate that Vemma is structurally an agent of the Bonooru State.

(ii) Functionally, Vemma is an agent of the Bonooru State

34. A functional test looks to the role that the entity performs to determine its main objectives.[77] Thus, a private, for-profit corporation that discharges essentially governmental functions that were delegated to it by the State would be deemed an agent of the State.[78]

35. A finding that Vemma's purpose or objectives is to carry out functions which "are governmental in nature or which are otherwise normally reserved to the State, or which by their nature are not usually carried out by private businesses or individuals" creates a rebuttable presumption that Vemma is an entity of the Bonooru State.[79]

36. Vemma carried out Bonooru's governmental objective to provide air transportation to Bonooru's remote communities at the expense of its commercial objective to sustain profitability. In Vemma's Memorandum of Association, it explicitly states an objective to assist Bonooru in developing its aviation industry and its civil aviation infrastructure "for the benefit of its population in accordance with Article 70 of the Constitution Act, 1947 including servicing remote communities."[80] This objective aligns with a statement made by Bonooru's Prime Minister, that Bonooru Air's successor—Vemma—"will be directed to ensure that it operates routes to our most remote islands, *regardless of profitability*" (emphasis added).[81]

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[76] Procedural Order No. 4, ¶10.
[77] *Maffezini*, ¶79; *Salini*, ¶33. *See also*, Brownlie, pp.135-37.
[78] *Maffezini*, ¶80.
[79] *Maffezini*, ¶77.
[80] Memorandum of Association, ¶3(h).
[81] Facts, ¶8.

37. Vemma forfeited profit in pursuit of this governmental objective, as evidenced by Vemma's investment of significant resources into unprofitable flights between Mekar and Bonooru.[82] A former high-ranking employee of Bonooru's Ministry of Transport and Tourism notes that Bonooru appears to receive the most benefit from these routes as opposed to Vemma or Caeli, suggesting that these routes could be the result of a closed-door deal or arrangement with the Bonooru Government "where Vemma ensures that Caeli flies these routes to benefit Bonooru."[83]

38. Furthermore, like the State-owned entity in *Maffezini*, it is clear from the background resulting in the formation of Vemma that the intent of the Bonooru government was to create an entity to carry out governmental functions. The *Maffezini* tribunal concluded that the State-owned entity was established to carry out governmental functions on the basis of the participation of various government bodies.[84] The CAA, an arm of Bonooru's Ministry of Transport and Tourism, which regulates all civil aviation in Bonooru, restructured BA Holdings, the parent company of Bonooru Air, which the CAA was also responsible for managing.[85] The Constitutional Court of Bonooru rejected constitutional challenges to its privatization, stating that "the Court is satisfied that the government has ensured that there are protections for our citizens' access to mobility," which effectively allowed for Vemma to emerge as BA Holdings' successor.[86] Vemma owned and operated Royal Narnian, the airline chosen as the flag carrier of Bonooru in order to fulfill the government's assurance that Vemma will operate routes to remote communities.[87] Thus, similar to *Maffezini*, where the proposal to create the State-owned entity originated in the Ministerio de Industria, the proposal to create Vemma originated with Bonooru's Ministry of Transport and Tourism.[88] The entity's creation was vetted and approved by the Government of Spain's Ministry of Finance and the Council of Ministers; similarly, Vemma's creation was approved by the Constitutional Court of Bonooru.[89] Lastly, the intention of the Government of Spain to utilize

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82 Phenac Business Today Podcast Transcript, lines 1863-64.
83 Phenac Business Today Podcast Transcript, lines 1870-71, 1875-77.
84 *Maffezini*, ¶85.
85 Facts, ¶¶6-7.
86 Constitutional Court of Bonooru on Privatisation of BA Holdings, ¶59; Facts, ¶9.
87 *Id.*
88 *Maffezini*, ¶85.
89 *Id.*

the entity as an instrument of State action is evidenced in the preamble to the decree, which states that one of the purposes for the entity's creation is the promotion of regional industrial development in Galicia.[90] Vemma's Memorandum of Association states that one of Vemma's objectives is "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."[91] This statement, along with the historical creation of Vemma by the Bonooru Government, evidences the government's clear intent to utilize Vemma in order to carry out its governmental functions of developing Bonooru's aviation industry.

39. Additionally, the Bonooru government's influence over Vemma in the bidding process to acquire Caeli is of significance in determining whether Vemma was carrying out the governmental functions of the Bonooru government. If the State retains an important or dominant influence in the negotiation of a contract with an enterprise, the responsibility of the State is engaged.[92] In *Consorzio*, for example, although the contract was signed by an independent agency of the Algerian State, the Algerian government indirectly participated in the negotiation of the contract and had a significant influence over the agency.[93] In the present case, the Chairperson of the Committee, Mr. Dorian Umbridge, advocated strongly on behalf of Vemma during the bidding process resulting in Vemma's acquisition of Caeli, emphasizing Vemma's significant ties to Bonooru.[94] Independent advisors who advised Caeli's privatization found that Vemma procured the rights to Caeli through the payment of bribes to Mr. Umbridge.[95] Thus, not only did Mr. Umbridge view Vemma as an agent of Bonooru, his decision to select Vemma over other investors was improperly influenced through bribery. The fact that the Constitutional Court of Bonooru has taken *suo moto* cognizance of the allegations against Umbridge, justifying the acts of bribery as "a friendly

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90 *Maffezini*, ¶86.
91 Memorandum of Association, Art. 1(h).
92 *Consorzio*, ¶19(ii). *See also*, *Maffezini*, ¶¶71-89.
93 *Consorzio*, ¶19(iii).
94 Facts, ¶24.
95 *Amicus Submission by* External Advisors to the Committee on Reform of Public Utilities, lines 636-38.

custom that is a part and parcel of doing business" is indicative of the Bonooru Government's active participation and influence in the bidding process.[96]

40. Moreover, Bonooru privatized Vemma, and subsequently invested in Caeli with the purpose of promoting and carrying out the governmental policies of Bonooru. Ms. Sabrina Blue was appointed Secretary of Transport and Tourism of the Bonooru Government immediately after Vemma submitted its bid to acquire Caeli.[97] In her new governmental role, she unveiled "Horizon 2020," a scheme aimed at strengthening Bonooru's tourism industry by providing recurring subsidies to companies that invested in tourism-related infrastructure in Bonooru.[98] Vemma received Horizon's first subsidy, and continued to receive recurring payments from Bonooru's Ministry of Transport and Tourism over a span of five years—between October 2011 and June 2016.[99] Ms. Blue justified the government's decision by stating that, "Vemma's expansion into Mekar will offer substantial benefits […] to all of Bonooru by enhancing the aviation network available to prospective tourists [which] will boost the tourism infrastructure at our disposal."[100] Additionally, after acquiring Caeli, Vemma received a loan from BPB, a State-owned Bonooru bank, to refinance Caeli's significant debt liabilities at rates more favorable than market.[101] Consequently, by financing Vemma's investment in Caeli, the Bonooru Government made an investment in Mekar with the purpose of carrying out a governmental policy to bolster Bonooru's tourism sector. Ms. Blue confirms this governmental purpose by commending Vemma's "contribution to the enhancement of Bonooru's tourism and infrastructure" while noting that Vemma's investment in Caeli has enhanced the mobility rights of the Bonooru population, "liv[ing] up to the standards set by its predecessor in Bonooru"—Bonooru Air, a wholly State-owned entity.[102]

41. Moreover, after Vemma filed its notice of arbitration, the Bonooru Government expanded Vemma's functions to include paramilitary activities through its bail-in program, thus

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96 Procedural Order No. 3, ¶13.
97 Facts, ¶22.
98 Facts, ¶28.
99 Procedural Order No. 4, ¶6.
100 Facts, ¶28.
101 Facts, ¶30.
102 Procedural Order No. 4, ¶6.

dropping any pretense that Vemma engages in entirely commercial activities for a wholly commercial purpose.[103]

42. Therefore, Vemma satisfies both the structural test of significant State ownership and State creation and the functional test of carrying out functions which are governmental in nature with the purpose of promoting and carrying out the governmental policies of Bonooru. For these reasons, Vemma is a State entity acting on behalf of Bonooru, and therefore fails to meet the jurisdictional requirements of Article 2 of the ICSID AF Rules.

[103] Facts, ¶65.

II. THE AMICUS SUBMISSIONS FROM CRPU, ONLY, IS ADMISSIBLE

43. The Tribunal should admit the *amicus* submission from external advisors to the Committee on Reform on Public Utilities ("**CRPU**") and reject the submission from the Consortium of Bonoori Foreign Investors ("**CBFI**"). The ICSID AF Rules, the CEPTA and the UNCITRAL Rules on Transparency [104] expressly grant tribunals the authority to accept amicus submissions at their discretion.[105] In determining whether to allow such a filing, the Tribunal shall consider, among other things, whether the submission addresses a matter within the scope of the dispute; whether the submission will assist the Tribunal in resolving a factual or legal issue by bringing a different perspective, knowledge, or insight; and whether the amici have a significant interest in the proceeding.[106] Considering the above factors as a whole, CRPU's proposed submission satisfies this criteria [**A**]; and CBFI's does not [**B**].

A. CRPU'S AMICUS SUBMISSION SHOULD BE ADMITTED

44. The Tribunal should admit CRPU's proposed *amicus* submission because (i) CRPU's submission is within the scope of the dispute; (ii) CRPU's submission could provide novel insight into the issues in dispute; and (iii) CRPU has a significant interest in the proceedings. In addition, CRPU also satisfies the disclosure requirement under the CEPTA and the UNCITRAL Rules on Transparency.[107]

(i) CRPU's submission addresses matters within the scope of the dispute

45. A threshold criterion for admission of a proposed *amicus* submission is whether it will address matters within the scope of the disputes.[108] Several tribunals have interpreted the scope of dispute broadly so as to include matters of interest to both disputing parties and third persons.[109]

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[104] Art. 9.20(6) of the CEPTA, which concluded in April 2014, stated that the UNCITRAL Rules on Transparency shall apply. Also, according to Art.1.1 of the UNCITRAL Rules on Transparency, it shall apply to investor-State arbitration pursuant to a treaty concluded on or after 1 April 2014.

[105] *See* the ICSID AF Rules, Art. 41; CEPTA, Art. 9.19(3); UNCITRAL Rules on Transparency, Art. 4.

[106] *Id*.

[107] *See* the CEPTA, Art. 9.19(3) and the UNCITRAL Rules on Transparency, Art. 4.2, which require disclosure of any affiliation or assistance between the *amici* and any disputing party.

[108] *See* ICSID AF Rules, Art. 41(3)(b); UNCITRAL Rules on Transparency, Art. 41(1); CEPTA, Art. 9.19(3); *see also* Born, ¶649.

[109] *See Methanex*, ¶49; *Biwater*, ¶358.

46. Here, CRPU does not only raise the jurisdictional question, but it also raises another issue within the scope. Specifically, CRPU will submit clear evidence concerning allegations that the rights received by Vemma Holdings were procured by means of bribes paid to Mr. Dorian Umbridge, the Chairperson of the Committee.[110] The specific issue the submission would address is well within the scope of the issues raised in the arbitration because it impacts the ability of investor-State dispute settlement to address public policy issues fairly and in an unbiased manner.

47. Therefore, the matter addressed by CRPU's submission is directly related to and inseparably intertwined with the core legal and factual issues that will be addressed in the arbitration.

(ii) CRPU's submission would assist the Tribunal in the determination of a factual or legal issue related to the proceedings

48. The requirement that CRPU should bring a "perspective, particular knowledge or insight that differs from that of the disputing parties" is also satisfied here.

49. *Amicus* participation is proper where the proposed submission will assist the tribunal in resolving a factual or legal issue by providing a new perspective, knowledge, or insight to the tribunal.[111] In general, this requires the submission to be sufficiently different in content and perspective from those of the parties.[112] To determine whether a materially different perspective or insight in regards to the issues in this arbitration is provided, tribunals should consider whether the substantive knowledge or relevant expertise or experience extend beyond or differ from that of the disputing parties.[113]

50. In this case, the independent external advisors to CRPU actively participated in the entirety of Caeli's privatization process, performed an audit, an analysis of the economic technical and financial performance of Caeli, and set the initial price.[114] Therefore, CRPU is in a unique position to adduce facts and special expertise before the Tribunal that are not provided by either disputing party but nonetheless may be beneficial to the Tribunal in its determination.

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[110] Procedural Order No. 3, ¶13.
[111] *See* ICSID AF Rules, Art.41(3)(1); UNCITRAL Rules on Transparency, Art.4(3)(b).
[112] *See, e.g.*, *von Pezold*, ¶57 (applicants sought to make a submission on issues "unrelated to the matters before" the tribunal).
[113] *See Apotex I*, ¶21.
[114] Amicus Submission by External Advisors to the CRPU, ¶3.

(iii) CRPU files its amicus application in pursuit of significant interest

51. CRPU has both significant interest and public interest in participating as an *amici*. To meet the significant interest requirement, "the applicant must demonstrate that the outcome of the arbitration may have a direct or indirect impact on the rights or principles the applicant represents and defends."[115] The external advisors to CRPU have regularly acted as interveners before federal courts in Mekar in relation to judicial proceedings concerning approval of the privatization projects. And stagnation in anti-corruption efforts in Mekar impacts the financial operations of CRPU, who regularly advice potential investors prospecting opportunities in Mekar.

52. Moreover, as required by the UNCITRAL Rules on Transparency,[116] there is also a public interest in the subject matter of the arbitration, which weighs in favor of accepting CRPU's submission. The "public interest" factor as reflected in the UNCITRAL Rules on Transparency "has generally been satisfied if the applicant has shown that the tribunal's decision is likely to affect persons other than the parties to the arbitration."[117] The nature of investor-State relations provides fertile ground for acts of corruption. In its *amicus* submission, CRPU explains that it would take aim at this "insidious plague" upending investor-State arbitration and caution against a status quo that corruption and privatization are synonymous in Mekar.[118] Therefore, CRPU's participation in this arbitration concerns public interest.

53. Considering all the foregoing factors, the Tribunal should allow the *amicus* submission filed by CRPU, an independent third party, in this proceeding regarding the matters in dispute and considering that in view of the public interest involved in this case, granting the submission would support the transparency of the proceeding and its acceptability by users at large.[119]

B. CBFI'S PROPOSED SUBMISSION SHOULD NOT BE ADMITTED

54. According to Article 9.19 of the CEPTA, Article 41 of the ICSID AF Rules and Article 4 of the UNCITRAL Rules on Transparency, CBFI's *amicus* submission should be rejected

[115] *Id.*, ¶38.
[116] UNCITRAL Rules on Transparency, Art. 4(a).
[117] *Apotex II*, ¶¶35–36; *Apotex III*, ¶¶41–43; *InterAguas*, ¶18.
[118] Procedural Order No. 3, ¶13.
[119] *Philip Morris*, ¶28.

because: (i) CBFI does not offer any different point of view from that of the disputing parties; (ii) CBFI's *amicus* submission is not in pursuit of any public interest; and (iii) CBFI has a conflict of interest.

(i) CBFI does not provide any different point of view in its amicus submission

55. The Tribunal should consider whether CBFI could provide a materially different perspective or insight on the issues in this arbitration, considering its substantive knowledge or relevant expertise or experience, which extends beyond or differ from that of the disputing parties themselves.[120]

56. Here, CBFI wishes to make an *amicus* submission on the legal framework and commercial circumstances in Bonooru. The disputing parties, however, have already briefed and will elaborate on the context of the business climate in Bonooru, the existing corporate framework, the impact of the decision of this arbitration, etc. Other than the aforementioned matters, CBFI's *amicus* submission offers no unique perspective nor provides expertise in these proceedings. Therefore, the Tribunal should conclude that CBFI's submission would not be of any assistance to the Tribunal in this arbitration.

(ii) CBFI does not file its amicus submission in pursuit of any public interest

57. The *amicus* applicant must possess significant interest in filing its *amicus* submission. To meet this requirement, the applicant needs to show that he has more than a "general" interest in the proceeding.[121] For example, the applicant must demonstrate that the outcome of the arbitration may have a direct or indirect impact on the rights or principles the applicant represents and defends.[122]

58. In this case, while CBFI seems to have a general interest in the impact of the Tribunal's decision regarding the interpretation of invest-State dispute settlement regime, CBFI has not demonstrated its significant interest. Also, it is not at all clear from CBFI's submission which public interest it has identified in this arbitration's subject matter.

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[120] *See Apotex I*, ¶21.
[121] *Apotex III*, ¶38.
[122] *Id*.

(iii) Allowing CBFI's amicus submission would raise a conflict of interest

59. The independence of *amici curiae* from the disputing parties is an essential attribute for it to participate in the arbitral proceedings. CBFI has not demonstrated, however, its independence from the disputing parties, and the participation of Lapras Legal Capital ("**Lapras**") in this arbitration through CBFI would raise a conflict of interest. Lapras is a member of CBFI, who is advising Vemma on funding strategies with respect to its claim against Mekar.[123] And in a meeting, CBFI resolved unanimously that Horatio Velveteen, CFO of Lapras, could vote in respect of the amicus submission in Vemma's claim against Mekar.[124] Therefore, there is an obvious conflict of interest if CBFI is allowed to participate in these proceedings as an *amicus curiae*.

[123] Amicus Submission by the CBFI, ¶7.
[124] Procedural Order No. 3, ¶12.

III. MEKAR ACCORDED FAIR AND EQUITABLE TREATMENT TO VEMMA

60. Even if the Tribunal decides that it has jurisdiction over the present arbitration, which it does not, Mekar did not violate the obligation to accord FET under Article 9.9 of the CEPTA.

61. In this Section, Mekar establishes that the FET clause under the CEPTA is equivalent to minimum standard of treatment under CIL [**A**] and does not cover legitimate expectations as a separate strand of FET [**B**]. Moreover, actions of Mekar did not constitute measures amounting to: arbitrary or discriminatory conduct [**C**], abusive conduct [**D**], or a denial of justice [**E**]. Actions of the Mekari government, courts or administrative bodies, viewed together, also did not violate the FET obligation under the CEPTA [**F**].

A. CEPTA'S FET STANDARD IS EQUIVALENT TO THE MINIMUM STANDARD OF TREATMENT UNDER CUSTOMARY INTERNATIONAL LAW

62. The CEPTA lays down the FET standard in Article 9.9 under the heading "Minimum Standard of Treatment"[125] and Article 31 of the Vienna Convention on the Law of Treaties provides that a treaty should be interpreted in accordance with the ordinary meaning of the terms and in light of its object and purpose.[126] Tribunals have held that the precise meaning of the FET standard is to be determined on the basis of the wordings of the BIT, on a case-by-case basis.[127]

63. The specific wording of the heading to Article 9.9 is a clear indication of the intention of the parties that the FET standard under the CEPTA should be interpreted as equivalent to MST under the CIL.[128] The breach of the MST under CIL is defined as such treatment which amounts to outrage, bad faith or willful neglect so far short of international standards that every reasonable person would recognize its insufficiency.[129] While the standard has evolved since *Neer*, tribunals have held that an investor still has to show that the act of the State exhibits a high level of shock, arbitrariness, unfairness or discrimination.[130] Further, for defining the FET standard, tribunals generally refer to the preamble of the BIT to discern

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[125] CEPTA, Art. 9.9.
[126] VCLT Art. 31 requires that a treaty be interpreted in accordance with its ordinary meaning in its context, and in light of the object and purpose of the treaty.
[127] *Lemire*, ¶284.
[128] CEPTA, Art. 9.9.
[129] *Neer*, ¶4.
[130] *Glamis*, ¶829.

the treaty's object and purpose.[131] The Preamble of the CEPTA states that the object of the CEPTA is, amongst others, to preserve the right of Mekar to regulate within its territories to achieve legitimate policy objectives.[132] Therefore, the FET standard under the CEPTA cannot be read broadly in contravention of this purpose.

64. A comparison to the wording of NAFTA further confirms this. The FET treatment under NAFTA requires treatment no more than the CIL minimum standard.[133] The FET provision under the NAFTA has the identical heading as Article 9.9 of the CEPTA.[134] Hence, like the NAFTA provision, Article 9.9 should be interpreted as no more than the MST under CIL. Further, the ordinary language of Article 9.9 is similar to the FET provision in the CETA, which has been understood to mean the standard currently existing under the minimum standard of treatment in CIL.[135] Vemma has failed to point to any language in Article 9.9 which explicitly obligates Mekar to undertake FET obligations beyond the minimum standard.

65. The Tribunal should therefore interpret the FET standard narrowly and limit it to the MST under the CIL. Such an interpretation of the FET standard establishes a high threshold for Vemma to meet, requiring it to prove that Mekar's actions amounted to outrage, bad faith, or willful neglect of duty short of international standards.

B. A VIOLATION OF LEGITIMATE EXPECTATIONS DOES NOT ITSELF CONSTITUTE A BREACH OF THE CEPTA

66. The Mekari officials carefully negotiated the CEPTA to better balance the rights of host States against that of investors, having regard to public dissatisfaction in Mekar against the CEPTA's predecessor, the 1994 Bonooru BIT.[136]

67. The CEPTA abandons the broad and ill-defined FET standard found in Article II(2) of the 1994 BIT in favor of a clearer and more exacting test.[137] Specifically, under Article 9.9(2) of the CEPTA, the FET standard is only breached by measures which constitute (a) "denial

[131] *Azurix*, ¶360.
[132] CEPTA, Preamble, Art. 1.3.
[133] Notes of Interpretation, §B.1.
[134] CEPTA, Art. 9.9.
[135] Dumberry, pp. 98, 122.
[136] Procedural Order No. 3, ¶14.
[137] Bonooru BIT, Art. II.

of justice"; (b) "fundamental breach of due process"; (c) "arbitrary or discriminatory conduct"; and/or (d) "abusive treatment of investors, such as coercion, duress, or harassment."[138] Thus, to succeed on its FET claim, Vemma must establish one or more of the limbs set out in Article 9.9(2).

68. Notably, a breach of an investor's legitimate expectations is not listed as a limb under Article 9.9(2).[139] Rather, Article 9.9(3) provides that when applying the FET standard, a tribunal may consider whether an investor's "legitimate expectations" were frustrated by the breach of a "specific representation" made by the State "to induce a covered investment," upon which the investor had relied in deciding to make or maintain the investment.[140] Thus, while the frustration of an investor's legitimate expectations might inform the Tribunal's decision as to whether Vemma has established one of limbs under Article 9.9(2), such frustration does not in itself constitute a breach of the FET standard.

C. CONDUCT OF MEKAR WAS NOT ARBITRARY OR DISCRIMINATORY

69. Article 9.9(2)(c) of the CEPTA provides that "arbitrary or discriminatory conduct" is a violation of the obligation to accord FET. Vemma appears to argue that the following actions of Mekar were arbitrary and discriminatory:

(i) imposition of airfare caps and fines as a result of the CCM investigations;

(ii) mandating pricing of goods and services in MON for all industries; and

(iii) a denial of subsidies to Caeli.[141]

70. However, none of these actions were arbitrary or discriminatory. Instead, these actions were a result of Caeli's anti-competitive conduct and the dire economic condition in Mekar.

(i) The CCM investigations and penalties were not arbitrary

71. Arbitrariness has been defined as "a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[142] A measure will not be arbitrary if it is "reasonably related to a rational policy."[143] In *Global Telecom,* the tribunal held:

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[138] CEPTA, Art. 9.9(2).
[139] *Id.*
[140] CEPTA, Art. 9.9(3).
[141] Notice, ¶¶15-19.
[142] *Elsi*, ¶128.
[143] *Electrabel* (Award), ¶179.

> In applying the [arbitrariness] standard, the Tribunal's task is not to second guess the substantive correctness of Canada's regulatory decisions or the policy motivations behind those decisions. The Tribunal considers that deference is due to the competent governmental authorities in the exercise of their mandate.[144]

72. In *Noble Ventures*, the tribunal held that the initiation of judicial re-organization proceedings against the claimant's investment was not arbitrary as such proceedings "are provided for in all legal systems" and the proceedings "were initiated and conducted according to the law."[145]

73. Here, the CCM, an independent regulatory body, commenced two investigations against Caeli to determine if Caeli was engaging in anti-competitive practices such as predatory pricing and abuse of dominance at the PIA.[146] After carefully considering all evidence, the CCM found that Caeli was engaging in anti-competitive conduct.[147] Accordingly, the CCM levied appropriate penalties to remedy the effect of Caeli's illegal conduct and to discourage such anti-competitive conduct in Mekar.[148] The initiation as well as the findings of these investigations was reasonable. In fact, even Vemma admits that these price caps were reasonable when they were introduced.[149]

74. ***First***, in the present case, the CCM's decision to initiate the investigations was legal and reasonable. The MRTP Act authorizes the CCM to initiate unprompted inquiries against corporations with more than 50% of the market share.[150] The CCM initiated the First Investigation in 2016 when the market share of Vemma – through Caeli and the Royal Narnian – was 54%. Caeli and the Royal Narnian, as wholly controlled subsidiaries of Vemma and members of the Moon Alliance, were not truly independent.

75. Tribunals have looked beyond the corporate structure of companies when these structures are used to "perpetrate a fraud or other malfeasance,"[151] or to "evad[e] a legal requirement

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[144] *Global Telecom*, ¶562.
[145] *Noble Ventures*, ¶178.
[146] Facts, ¶¶36-38.
[147] Facts, ¶¶45, 49.
[148] *Id*.
[149] Notice, ¶15.
[150] MRTP Act, Ch. III, ¶2(a).
[151] *Saluka*, ¶230; *Barcelona Traction*, ¶58.

or obligation."[152] It is widely recognized in competition law that companies owned and controlled by the same parent are not truly independent of each other. As the European Commission noted:

> When a company exercises decisive influence over another company, they form a single economic entity and, hence, are part of the same undertaking. *The same is true for sister companies, that is to say, companies over which decisive influence is exercised by the same parent company. They are consequently not considered to be competitors* even if they are both active on the same relevant product and geographic markets.[153]

76. Given that Caeli and the Royal Narnian were both owned and controlled by Vemma, it was reasonable and consistent with basic competition law principles for the CCM to consider their combined market share when deciding whether to open an investigation into anti-competitive conduct by Caeli.

77. Moreover, Caeli and the Royal Narnian engaged in preferential slot trading in Mekar. This *preferential* slot trading did not constitute the mid or low level co-operation approved by the CCM in 2011. Slot trading has been recognized to have a deleterious effect on competition with increased risks of slot concentrations at airports.[154] Such a slot trading agreement between Caeli and the Royal Narnian thereby constituted high-level co-operation prohibited by the CCM in 2011. In any event, Article 9.9(6) of the CEPTA holds that a breach of "domestic law does not, in and of itself, establish a breach of this Article." Therefore, the CCM's reasonable initiation of the First Investigation was not a violation of Article 9.9 of the CEPTA.

78. ***Second***, the penalties levied in the CCM investigations were lawful and reasonable. The CCM is empowered by Mekari law to "order interim measures for preventive purposes."[155] To that end, the CCM imposed airfare caps to prevent Caeli from earning supra-competitive

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[152] *Barcelona Traction*, ¶57 ("[The] veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance…or to prevent the evasion of legal requirements or of obligations.").

[153] EU Guidelines, ¶11 (emphasis added). *See also*, *Copperweld*, p.771 ("[T]he coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of §1 of the Sherman Act.").

[154] De Wit, p.156.

[155] MRTP Act, Ch. III, ¶4(e).

profits in the future. This decision was reasonably linked to the policy goal of preventing anti-competitive practices in Mekar, and therefore not arbitrary.

79. The airfare caps were also set reasonably above the rates that Caeli charged on set routes,[156] and Vemma itself acknowledges that they were reasonable when implemented.[157] Vemma appears to argue that these caps became unreasonable once the MON depreciated in value in late 2016.[158] This argument is without merit. The airfare caps were pegged to Mekar's official inflation rate calculated by the Central Bank, which was revised annually.[159] Vemma has provided no evidence – other than that Caeli's representatives "felt this [timing] was insufficient"[160] - to suggest that the inflation rate in 2018 was inadequate.

80. Moreover, the CCM's findings in both the investigations were not arbitrary. To the contrary, the CCM: (i) gave a detailed report after carefully considering all evidence; (ii) allowed Caeli an opportunity to be heard in such proceedings; and (iii) allowed Caeli to file an appeal against these findings.[161]

81. Vemma appears to argue that the finding in the Second Investigation was arbitrary since the privileges cited at the PIA were a part of Caeli's privatization package offered to Vemma in 2011.[162] This argument is unsupported by the record. The CCM, as part of its detailed report, expressly mentioned that Caeli abused its dominance at the PIA by "extract[ing] significant *additional* privileges in terms of airport service fees from [PIA]."[163] As the CCM concluded, Caeli abused its dominance by extracting more privileges than those were offered by Mekar Airservices as part of the privatization package. Therefore, the findings and penalties levied by the CCM were not arbitrary.

82. In any event, tribunals have cautioned against using the investment arbitration mechanism as a surrogate court of appeal against decisions of national bodies of a State.[164] Accordingly, the CCM's reasonable decisions should be given deference by the Tribunal. Therefore, the

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[156] Facts, ¶37.
[157] Notice, ¶15.
[158] Notice, ¶16.
[159] Facts, ¶43.
[160] *Id.*
[161] Facts, ¶¶45, 49.
[162] Facts, ¶50.
[163] Facts, ¶49.
[164] *Loewen*, ¶64; *Waste Management*, ¶129.

CCM investigations were not arbitrary and Mekar did not violate its obligation under the CEPTA.

(ii) The decree requiring pricing in MON was not arbitrary

83. In 2018, to stabilize a depreciating MON, Mekar introduced a decree mandating all industries in Mekar to price their goods and services in MON.[165] Tribunals and scholars alike have recognized that measures related to a rational and reasonable governmental policy are not arbitrary.[166] As mentioned before, tribunals have held that it is not their role to second guess the substantive correctness of a State's regulatory decisions or policy motivations behind them.[167]

84. In this regard, tribunals have held that a significant leeway must be afforded to a State when assessing the measures that it took to weather an economic crisis. In Electrabel, the tribunal stated that:

> These were also turbulent economic times, with Hungary's economy facing severe financial and fiscal constraints. […] It is all too easy, many years later with hindsight, to second-guess a State's decision and its effect on one economic actor, when the State was required at the time to consider much wider interests in awkward circumstances, balancing different and competing factors.[168]

85. In the present case, Mekar's decree mandating pricing in MON was not arbitrary for at least two reasons. ***First***, the decree, which applied uniformly across all industries, was important to reinstate confidence in the MON to stabilize the currency. Such an objective was consistent with the IMF advisory issued to Mekar.[169] The continued depreciation of the MON after Mekar granted a temporary exemption to pricing in MON in November 2017,[170] compelled Mekar to adopt stringent methods to bring stability to the MON. The decree was a reasonable measure in the circumstances and should not be impugned simply because some companies were adversely affected by it.

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[165] Facts, ¶42 (emphasis added).
[166] *Electrabel* (Jurisdiction), ¶179; Schreuer, p.19.
[167] *Global Telecom*, ¶162.
[168] *Electrabel* (Jurisdiction), ¶181.
[169] Facts, ¶39 (IMF emphasized "the need to establish credibility in the [local] currency to avoid a debilitating economic situation.").
[170] Facts, ¶41.

86. ***Second***, Caeli had no legitimate expectation of pricing in USD when it invested in Mekar. Caeli was required to price in MON before Mekar granted the temporary exemption in November 2017. The short period of three months before this exemption was revoked is insufficient for Caeli to claim that it had a legitimate expectation of pricing in USD. In any event, to assess whether investor's expectations are legitimate, tribunals have considered, among other things, the economic conditions in the State.[171] Therefore, Mekar's introduction of this decree was not a violation of its FET obligation under Article 9.9 of the CEPTA.

(iii) Denial of subsidies to Caeli was not discriminatory

87. In 2018, Mekar introduced subsidies to alleviate the concerns of companies in the airline industry.[172] Vemma has argued that Mekar's refusal to award subsidies to Caeli was discriminatory and therefore a violation of Article 9.9(2)(c) of the CEPTA.[173] Discrimination involves "a differential treatment of people or companies *in like circumstances, without a rational justification* for that differential treatment."[174] To prove discrimination, the claimant bears the burden to prove that: (i) an appropriate comparator which is in a situation similar to the claimant exists, and (ii) such comparator has received a more favorable treatment from the host State.[175]

88. In the present case, Mekar had a rational justification for denying subsidies to Caeli, which was not in like circumstances with other airlines. Under Executive Order 9-2018, the Secretary of Civil Aviation had to decide how to distribute a limited pool of funds (MON 230 billion) among all airlines. An airline qualified for subsidies only if the Secretary determined that it was "an eligible business for which necessary credit is not reasonably available."[176] As Mekar's deputy Minister of Transportation explained, the Secretary decided not to grant subsidies to airlines owned in significant part by foreign governments because such airlines enjoyed certain advantages over private airlines,[177] such as the prospect

[171] *Duke Energy*, ¶340.
[172] Facts, ¶46.
[173] Notice, ¶18.
[174] *South American Silver*, ¶710.
[175] *Cengiz*, ¶¶525-26.
[176] Executive Order 9-2018, §3101(c)(1)(A).
[177] Facts, ¶46.

of being bailed out by their home state. Accordingly, Mekar denied subsidies to all State-owned airlines in Mekar, including Larry Air and Caeli.

89. Analysts have noted that "Vemma has near assurances that Bonooru would step in if anything bad were to happen to its prized national carrier's owner."[178] This is consistent with the actual conduct of Bonooru in 2021 wherein it bailed out Vemma when Vemma was facing financial difficulty.[179] Therefore, it was reasonable for Mekar to conclude that Caeli is not an airline for which "necessary credit" would be unavailable. Other private airlines, such as StarWings or JetGreen, were hence not like comparators to Caeli.

90. Mekar utilized its taxpayers' monies to provide necessary aid to those airlines that were more affected by the decree mandating pricing in MON. It provided (and did not provide) aid on a non-discriminatory basis. Therefore, Mekar did not breach its obligation under Article 9.9 of the CEPTA.

D. MEKAR DID NOT ENGAGE IN ABUSIVE TREATMENT OF CAELI

91. The rejection of the Hawthorne's offer and the benefits extended to Caeli after it was purchased by Mekar were permissible under Article 9.9 of the CEPTA and CIL.[180]

(i) Rejection of the Hawthorne's offer does not constitute abusive treatment

92. Conduct of a state is abusive when there are manifestly no legal grounds for such conduct, and harm is inflicted upon an investment for improper reasons.[181] The standard is not satisfied when the measure is merely an ordinary step of a contracting counterparty and not the exercise of any coercive power by the State.[182] In the present case, Mekar Airservices rejected the offer made by the Hawthorne, in exercise of its ordinary commercial function, as the price offered was artificially inflated and not an arm's length commercial price.[183] Hawthorne, being associated with Vemma through the Moon Alliance, was not a *bona fide*

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[178] Aviation Analytics, ¶3.
[179] Facts, ¶65.
[180] CEPTA, Art. 9.9.
[181] FET (UNCTAD), p.83.
[182] *Biwater*, ¶700; *Krederi*, ¶¶637-38; McLachlan, ¶7.127 ("Care must be taken in such cases to ensure that the hindsight afforded by the arbitral process does not construe mere bureaucratic officiousness—a decision to 'play it by the book'—as a campaign of harassment.").
[183] Facts, ¶57.

third-party purchaser, as required by Article 39(a) of the Shareholders' Agreement.[184] Vemma was always free to find another suitable buyer and Mekar never compelled Vemma to sell Caeli. In fact, Vemma failed to obtain offers from any other party and Mekar had to step in to save Caeli.[185] Therefore, Vemma's claim of abusive treatment amounting to a breach of the FET obligations is devoid of merit.

(ii) Mekar had a legitimate right to change the regulatory framework to revive Caeli

93. States have a legitimate right to regulate domestic matters in public interest and it is unreasonable for an investor to expect that the circumstances will remain totally unchanged for the life of their investment.[186] The FET standard does not give the tribunals an open-ended mandate to second-guess State's decision making.[187] In the present case, as a result of Vemma's poor business decisions,[188] and with Caeli reaching the brink of bankruptcy, Mekar was forced to take all necessary regulatory actions to revive it.[189] Article 9.8 of the CEPTA specifically protects the right of Mekar to regulate within its territory to achieve public policy objective.[190] Therefore, after purchasing Caeli, Mekar took actions that included infusing capital in Caeli, waiving the fines due to CCM and granting tax breaks.[191] Mekar undertook these actions in accordance with its right to regulate its domestic matters.[192] Vemma cannot now ask the Tribunal to second guess Mekar's decision, made in exercise of its regulatory powers.

94. Further, under Articles 9.6 and 9.7 of the CEPTA, Mekar has an obligation to accord Vemma and its investment, treatment no less favorable than the treatment Mekar accords to its own investors and other foreign investors.[193] Mekar has similar obligations to investors under the other BITs executed with other States.[194] Even though Bonooru exerted constant pressure on

[184] Shareholders' Agreement, Art. 39.1.
[185] Facts, ¶63.
[186] *Saluka*, ¶305.
[187] *S.D. Meyers*, ¶261.
[188] Aviation Analytics, ¶¶3-4.
[189] Facts, ¶64.
[190] CEPTA, Art. 9.8.
[191] Facts, ¶64.
[192] *Id.*
[193] CEPTA, Arts. 9.6-9.7.
[194] Procedural Order No. 3, ¶15.

Mekar to provide special assistance to Vemma,[195] Mekar could not bail out Vemma without also discriminating against all other investors. Vemma has failed to show any obligation of Mekar to provide preferential treatment to Vemma.

E. THE MEKARI COURTS DID NOT DENY JUSTICE TO VEMMA

95. Vemma appears to allege that the Mekari courts denied justice to it under Article 9.9(2)(a) of the CEPTA[196] in three ways: (i) delay in scheduling a hearing for Lawsuit 1; (ii) prematurely dismissing its claims on the merits; and (iii) enforcing an award which had been set aside by the court at the seat on the basis of alleged corruption. However, none of these actions amount to a denial of justice under the CEPTA or international law.

96. The threshold for a denial of justice claim is a high one – the impugned decision must be "clearly improper and discreditable."[197] It is not enough to show an incompetent judicial procedure; instead the investor must present clear evidence of an outrageous failure of the judicial system.[198] Mere errors of law would not suffice as a tribunal does not sit as a court of appeal against the decisions of domestic courts.[199] In fact, recently, the tribunal in *Lion* noted that "there is no substantive denial of justice… to determine whether a judgment was outrageous or egregious on the merits would require a tribunal to delve into the decision-making process under national law – it is trite to repeat that international tribunals cannot be and do not constitute domestic courts of appeal."[200]

97. To determine whether a delay is sufficient to constitute denial of justice, tribunals have held that there is a need to consider the need for swiftness in a particular matter, and that there is a greater need for swiftness in criminal matters as compared to commercial matters.[201] Moreover, the tribunals consider the circumstances of the host State. Thus, in *White Industries*, the tribunal, while deciding that a nine-year delay was not sufficient to constitute denial of justice, held:

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[195] *Id.*, ¶3.
[196] Notice, ¶20.
[197] *Mondev*, ¶127.
[198] *Philip Morris* (Award), ¶¶499-500.
[199] *Paulsson,* p.60.
[200] *Lion*, ¶217.
[201] *White Industries*, ¶10.4.14.

> Tribunal considers it also to be relevant, when examining the behavior of the courts, to bear in mind that India is a developing country with a population of over 1.2 billion people with a seriously overstretched judiciary.[202]

98. ***First***, in the present case, the delay of 13 months in scheduling a hearing for Lawsuit 1 is not sufficient to constitute a denial of justice. It is undisputed that like India, Mekar is a developing country with an overstretched judiciary – on average, it takes 22 to 27 months in Mekar to receive a decision in criminal and commercial matters respectively – which was known to Vemma at the time it invested in Mekar.[203] Yet, the Mekari courts heard and brought Lawsuit 1 to a conclusion within 15 months. Taking the behavior of the Mekari courts into account, a delay of mere 15 months does not meet the high standard required for establishing a claim for denial of justice. While Vemma contends Caeli's interim application was urgent and should have been heard sooner (in Vemma's opinion), the Court justifiably prioritized criminal matters due to their far-reaching consequences.[204]

99. In any event, the Mekari courts ultimately ruled against Caeli and declined to remove the airfare caps. Thus, even if Caeli's application had been heard earlier, it would still have been in the same position. Any delay in and of itself caused Caeli no prejudice.

100. ***Second***, Caeli's claim on the merits was not dismissed prematurely but in accordance with lawful procedure. To expedite court proceedings and alleviate the backlog in Mekari courts, Mekar's President passed an Executive Order in 2014 (i.e. four years before Caeli filed its first claim) empowering Mekari courts to dismiss a case by way of summary judgment where the judge finds that there is very little chance of success on the merits.[205] Notwithstanding this expedited procedure, Caeli was still afforded a reasonable opportunity to be heard by way of a three-day hearing,[206] and there is no evidence that it was prejudiced in any way in presenting its case. Since the Tribunal does not sit as a court of appeal from the Mekari courts, the application of Mekari law by the Mekari courts while dismissing Lawsuit 1 should not be subject to independent review by this Tribunal.

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[202] *White Industries*, ¶¶10.4.10, 10.4.18.
[203] Facts, ¶13.
[204] Facts, ¶44.
[205] Procedural Order No. 3, ¶8.
[206] Facts, ¶52.

101. ***Third***, the Mekari courts' decision to enforce the SCC award was not "clearly improperly or discreditable." Under Article V(1)(e) of the New York Convention, courts retain the discretion to enforce awards that had been annulled at the seat, and several jurisdictions (such as Netherlands and the US) have done so in multiple cases. Indeed, in one known case - *Kaliningrad*, the tribunal has taken the view that the enforcement of an award by a State under the New York Convention cannot give rise to a treaty claim.[207] In fact, Mekar has not acceded to the ICSID Convention as the right to review decisions conflicting with Mekar's public policy is paramount to Mekar.[208]

102. Here, it was justifiable for the Mekari courts not to defer to Sinnoh's annulment of the SCC Award. This is because the Sinnoh court acknowledged that it was not "in a position to conclusively rule on whether the act of bribery had in fact taken place" and made its decision on the basis of "circumstantial evidence."[209] Moreover, the Sinnoh court acknowledged that it decided the annulment by relying on merely circumstantial evidence, namely a single report by the CILS, which is an organization that the Mekari Ministry of Home Affairs has recognized as "an entity funded by foreign donations to interfere in Mekar's domestic affairs."[210] Moreover, no independent investigation was conducted of the allegations in the CILS report; Mr. Cavannaugh was not given an opportunity to respond; and Mekar Airservices has strenuously denied the claims of bribery.[211] Such flimsy evidence is not a sufficient basis for making a finding of corruption and denying the enforcement of an award.

103. For the foregoing reasons, the Mekari courts did not deny justice to Vemma and therefore did not violate Mekar's obligation under Article 9.9 of the CEPTA.

F. VIEWED INDIVIDUALLY AND TOGETHER, MEKAR'S ACTIONS DID NOT VIOLATE ITS FET OBLIGATION

104. As established above, no act of Mekar violated its FET obligation under the CEPTA. Vemma has argued that these actions viewed together breached the FET obligation in the

[207] *Kaliningrad* (finding that the tribunal had no jurisdiction to review the Lithuanian court's decision to enforce or recognize an award under the New York Convention).
[208] Facts, ¶20.
[209] Sinnograd Ruling, ¶¶11, 14.
[210] Sinnograd Ruling, ¶13.
[211] Facts, ¶60.

aggregate.[212] This argument lacks any merit. For individual acts or omissions of the host State to amount to a composite breach of the FET obligations, all the acts and omissions when viewed cumulatively should establish a common purpose, i.e., depriving the investor of its investment in violation of the BIT.[213] When each individual action is a routine exercise of legitimate governmental powers for a different purpose, this requirement is not satisfied.[214]

105. In this case, as explained above, the Mekari government, courts and administrative bodies acted in legitimate exercise of their regulatory powers and were not in breach of Mekar's FET obligations. The individual acts and omissions were not directed towards achieving a common purpose of depriving Vemma of its investment in any manner. Vemma has failed to draw a common thread between the separate and distinct actions of the various agencies of Mekar and thus cannot claim a composite breach of the FET obligations.

106. For the foregoing reasons, the Mekar did not violate the FET standard under Article 9.9 of CEPTA, and the Tribunal should dismiss Vemma's claim on the merits.

[212] Notice, ¶¶12, 29.
[213] *Tecmed*, ¶62.
[214] *Global Telecom*, ¶644.

IV. MEKAR HAS PAID COMPENSATION TO VEMMA AT THE MARKET VALUE STANDARD

107. Vemma has claimed damages of USD 700 million along with interest on the basis of fair market value standard. However, Vemma is not entitled to such an amount because: Vemma has not proven causation [**A**]; the applicable standard of compensation is the market value standard [**B**]; and Vemma has negligently contributed to its losses [**C**].

A. THERE IS NO CAUSATION BETWEEN MEKAR'S ACTIONS AND VEMMA'S LOSSES

108. Compensation for violation of the BIT is due where there is a sufficient causal link between the actual breach of the BIT and the loss sustained by the investor.[215] The existence of a causal link between the alleged infringement of obligations under international law and the damage ensuing from it is an indispensable prerequisite for claiming damages.[216]

109. In this case, there is no causal link between Mekar's actions and Vemma's losses as Vemma has failed to prove that Mekar breached any of its FET obligations under Article 9 of the CEPTA. As shown in Section III above, the actions of Mekar were in accordance with the domestic law, the CEPTA and the customary international law. As Mekar has not breached the CEPTA, there is no causal link between Mekar's actions and Vemma's losses, and therefore Vemma cannot claim damages from Mekar.

110. Even if the Tribunal were to conclude that Mekar violated the CEPTA, Vemma nevertheless has not shown that its losses were directly caused by Mekar. A loss qualifies as "direct" if it is the immediate consequence of the wrongful act.[217] As the traditional approach applied in international law focuses on the directness of the harm,[218] to be compensable, the loss suffered must not be "too indirect."[219] Under this "*direct cause test*," only those acts that lead directly to the damage in question are deemed to have caused that damage.[220] In particular, "causing injury" must mean more than simply the wrongful act itself, otherwise

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[215] *Biwater*, ¶779.
[216] *Silver Ridge Power*, ¶513.
[217] *See* Goldberg, pp. 104-05.
[218] *See* Resolution 687, ¶16; ILC Draft Articles, p. 91, ¶10.
[219] *Id*.
[220] Knoll, p.88.

the element of causation would have to be taken as present in every case, rather than being a separate enquiry.[221]

111. Vemma has not met this test. In the present case, in fact, the value of Vemma's investment started to diminish due to its own ill-advised business strategy before any alleged wrongdoing of Mekar took place. Although representatives of Mekar Airservices cautioned Vemma's management against taking an "extravagant approach," representatives of Vemma were still keen on taking high-risk and ill-advised business expansion plans.[222] Therefore, it is Vemma's risky business strategy and mismanagement that directly caused the diminution in value. It is now pursuing this arbitration as an insurance policy for its negligent actions. Therefore, Vemma cannot now claim any damages under the CEPTA or customary international law.

B. ALTERNATIVELY, VEMMA HAS ALREADY BEEN FULLY COMPENSATED FOR ANY ALLEGED LOSSES UNDER A MARKET VALUE STANDARD OF COMPENSATION

112. Alternatively, if the Tribunal concludes that Vemma is entitled to some compensation, the appropriate compensation standard is the market value standard. This is because: (i) Article 9.21(1) of the CEPTA specifically states that the market value standard should be applicable for non-expropriatory breaches of the CEPTA whereas Vemma's alleged fair market value standard is contrary to the parties' intent; and (ii) the compensation standard under the Arrakis-Mekar BIT, 2006 ("**Arrakis BIT"**) cannot be imported by the most favored nation ("**MFN**") clause. In this regard, (iii) the Tribunal should conclude that Mekar has already paid the market value of Vemma's investment and award Vemma no additional compensation.

(i) The CEPTA provides that a market value standard should apply to Vemma's FET claim

113. The parties to the CEPTA intended a market value standard to apply to quantify damages for a purported breach of the CEPTA's FET obligations, and the Tribunal should give effect to that intent.

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[221] *Biwater*, ¶803.
[222] Facts, ¶29.

114. Parties' deliberate choice of different terminology must be given effect. The text of a BIT must be presumed to be the authentic expression of the intentions of the parties.[223] Here, under Article 9.12 and Article 9.21 of the CEPTA, the parties intentionally used two different terms, "market value" and "fair market value," for calculating compensation for different actions of the State. Article 9.12 deals specifically with compensation for expropriation. Thus, only in the event of expropriation must Mekar pay compensation calculated at fair market value, which is in direct contrast to the language in Article 9.21 that provides for calculation of monetary damages at market value. The deliberate act of the parties to specify two different standards of compensation is a clear indicator of their intentions.

115. Further, Vemma's reliance on customary international law to argue for a fair market standard is misplaced. The intention of the parties being clear from the text of the CEPTA, the Tribunal cannot subvert the parties' original intention and adopt fair market value as the standard of compensation for breach of FET. A BIT is considered as the law governing a specific subject matter whose provision will prevail over rules of customary international law while determining the standards of compensation.[224] The general principles reflected in the ILC Draft Articles will give way, in the event of conflict, to more specific rules governing the legal regime or relationship at issue.[225] Tribunals have the discretionary power to identify the suitable standard of compensation only in the absence of precise treaty provisions regarding the compensation in case of FET breaches.[226] As explained, this is not the case here. The specific standard of compensation contained in Article 9.21(1) of the CEPTA prevails over rules of customary international law while determining the standard of compensation. Therefore, in the presence of specific provision in the CEPTA requiring the Tribunal to only award monetary damages equivalent to the market value for breach of the FET obligations, it is not open for the Tribunal to exercise discretion and award damages calculated at fair market value.

116. Finally, contrary to Vemma's submission, the fair market value standard and the market value standard have different meanings and thus cannot be equated or assumed as can be

[223] UN Conference, ¶4.
[224] *Phillips Petroleum*, ¶107.
[225] ILC Draft Articles, Art. 55.
[226] *CMS*, ¶409.

used interchangeably. The fair market value ignores duress or threat or special economic circumstances, thereby removing potential issues of alternative causation. In contrast, the market value takes the actual economic circumstances into consideration even if they represent duress or threat.[227] In many investment arbitration awards, the only reference to *Chorzow*, in which the application of the fair market value standard leads to full reparation in investment arbitration, is to the "wipe-out" rule, in fact what is used is the market value.[228]

(ii) The fair market value standard under the Arrakis BIT cannot be imported by the MFN clause in the CEPTA

117. Vemma contends that under Article 9.7 of the CEPTA, Mekar is obligated to accord Vemma treatment no less favorable than the treatment it accords to investors under the Arrakis BIT and that such treatment includes application of the fair market value standard.

118. In cases where a tribunal has accepted the application of MFN clauses to substantive provisions, like compensation standards of fair market value, the BIT contained a general MFN provision with no exceptions carved out.[229] In particular, tribunals have been reluctant to allow investors to grab a more favorable substantive provision when the MFN clause explicitly states that its scope of application is restricted to where the investors are similarly situated and/or does not apply in all matters.[230]

119. In this case, the MFN clause in Article 9.7 of the CEPTA carves out an exception to its application. Article 9.7(2) specifically provides that substantive obligations in other international investment treaties do not in themselves constitute treatment and thus cannot give rise to a breach of Article 9.7. Simply stated, the CEPTA, which was duly negotiated by Bonooru and Mekar, does not allow the investors to use the MFN provisions to claim a more favorable substantive provisions under any other BITs.

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[227] *See* Wöss, p.112.
[228] *See* Marboe, ¶3.163, fn. 340; Ziyaeva, pp.121, 124.
[229] *CME*, ¶500.
[230] *Muhammet*, ¶¶789-90.

120. Therefore, in view of the exception carved out by Article 9.7(2), the standard of compensation under the Arrakis BIT, i.e., fair market value standard, cannot be imported by the MFN clause of the CEPTA.

121. Further, the scope of application of Article 9.7(1) is restricted to where the investors are in like situation and does not apply in all matters. Indeed, under Article 9.7(1) of the CEPTA, Mekar cannot accord more favorable treatment to investors of a third country who are in like situations as investors of Bonooru. Vemma has failed to prove that it is in a similar situation as another investor from Arrakis. Therefore, the Tribunal should not allow Vemma to import the more favorable substantive provision under the Arrakis BIT when the MFN clause in the CEPTA is clearly limited in its scope of application.

(iii) Mekar has already paid the market value of Vemma's investment

122. As shown above, the language of the CEPTA clearly specifies the standard of compensation for damages is the market value standard, in the event that the Tribunal finds that Mekar breached its FET obligations. Under that correct standard, Vemma has already been fully compensated, as Mekar has already paid the market value for Vemma's losses by purchasing Vemma's shares in Caeli for USD 400 million, and except from Mekar's offer, there were no other willing buyers.[231]

123. The price offered by the Hawthorne, i.e., USD 600 million, is not the accurate market price. Hawthorne, being associated with Vemma through the Moon Alliance, was not a *bona fide* third-party purchaser and had offered an artificially inflated price which was not on arm's length basis.[232] The fact that Vemma had been unable to procure any other offer for its investment in Caeli over a period of several month thus further proving that Hawthorne's offer was not an accurate market price.

124. Therefore, Mekar bought Vemma's investment at the market value of USD 400 million, is not liable to pay any further compensation to Vemma.

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[231] Facts, ¶63.

[232] This was held by the sole arbitrator in award dated 9 May 2020, and subsequently recognized and enforced by the Superior Court of Mekar.

C. AT A MINIMUM, DAMAGES UNDER A FAIR MARKET VALUE MUST BE REDUCED DUE TO VEMMA'S CONTRIBUTORY NEGLIGENCE

125. Even if the Tribunal finds a fair market value has any application here, Vemma is still not entitled to the full damages it claims under that standard because its own negligence contributed to its losses.

126. BITs are not insurance policies against bad business judgments.[233] In accordance with Article 39 of the ILC Draft Articles, a claimant's conduct justifies an exclusion or reduction of damages if it has contributed to the injury.[234] Contributory negligence reflect a party's inadequate assessment of risk and voluntarily acceptance of it.[235] Tribunals have held that States are not responsible for the consequences of unwise business decisions of the investor or for the lack of diligence of the investor.[236] A claimant cannot seek to place on the host State the burden of compensating the claimant for losses that are the consequences of its own actions as experienced businessmen.[237]

127. In this case, the loss sustained by Vemma is the direct consequence of its own poor business decisions. The representatives of Mekar Airservices, who were experienced professionals in the field, constantly cautioned Vemma against its extravagant approach, but Vemma paid no heed and faced a more than expected decline in its revenue.[238] Despite incurring losses and being cautioned to control Caeli's expansion, Vemma's representative continued to project optimism.[239] Vemma continued to operate flights on unprofitable routes to benefit the Bonooru tourism industry.[240] Vemma jeopardized Caeli's long-term financial health by making short-sighted, ill-advised business decisions.[241] Vemma cannot now be allowed to benefit from its own wrongdoing by recovering all its losses from Mekar. Therefore, the

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[233] *Maffezini*, ¶64; *see also MTD*, ¶178 (the tribunal distinguished between the damage suffered due to Chile's breach and that caused due to the claimant's own conduct and found that the claimant should "bear the consequences of their own actions as experienced businessmen." Consequently, the tribunal reduced the compensation payable by 50%); *Azurix*, ¶243.
[234] *Burlington*, ¶572.
[235] Ripinsky, p.315.
[236] *MTD*, ¶¶167, 245.
[237] *Waste Management*, ¶177.
[238] Facts, ¶29.
[239] Facts, ¶31.
[240] Phenac Business Today Podcast Transcript, lines 1867-68.
[241] Aviation Analytics, line 1951.

Tribunal should substantially reduce the amount of compensation after taking into account Vemma's contributory negligence.

REQUEST FOR RELIEF

45. For the aforementioned reasons, Mekar respectfully requests that the Tribunal:

(a) **DISMISS** all of Vemma's claims for lack of jurisdiction, or, in the alternative, on their merits;

(b) **CONCLUDE** that no compensation is payable, even if the Tribunal finds that Mekar violated Article 9.9 of the CEPTA, as Mekar has already purchased Vemma's investment at the appropriate market value. In the alternative, reduce the amount of any compensation awarded to Vemma in light of Vemma's contributory fault and the ongoing economic crisis in Mekar;

(c) **ORDER** Vemma to pay Mekar for all costs and expenses incurred in connection with this arbitration, including without limitation all legal, expert, and arbitration fees.