TEAM VICUNA

FOREIGN DIRECT INVESTMENT MOOT COMPETITION

Seoul, Korea 31 October - 3 November 2021

IN THE MATTER OF AN ARBITRATION UNDER THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES ARBITRATION ADDITIONAL FACILITY RULES

- between -

VEMMA HOLDINGS INC.

Claimant

- and -

FEDERAL REPUBLIC OF MEKAR

Respondent

MEMORIAL ON BEHALF OF RESPONDENT

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

23 September 2021

TABLE OF CONTENTS

TABLE OF CASE LAW

Ampal-American	Ampal-American Israel Corporation and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017.
Apotex	Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1, Procedural Order No. 2 on the Participation of a Non-Disputing Party, 11 October 2011.
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Bayindir	Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009.
BUCG	Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No ARB/14/30, Decision on Jurisdiction, 31 May 2017.
CMS	CMS Gas Transmission Company v. Republic of Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005.
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CSOB	Ceskoslovenska Obchodni Banka (CSOB), A.S v. Slovak Republic, ICSID Case No ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999.
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Goetz	Antoine Goetz et consorts v. Republic of Burundi, ICSID Case No. ARB/95/3, Award, 10 February 1999.
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Iberdrola	Iberdrola Energía S.A. v. Republic of Guatemala, ICSID Case No. ARB/09/5, Award, 17 August 2012.
Ickale	İçkale İnşaat Limited Şirketi v. Turkmenistan, ICSID Case No. ARB/10/24, Award, 8 March 2016.
Jan de Nul	Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, 6 November 2008.
Levy de Levi	Renée Rose Levy de Levi v. Republic of Peru, ICSID Case No. ARB/10/17, Award, 26 February 2014.
Liman Caspian	Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan, ICSID Case No. ARB/07/14, Award, 22 June 2010.
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Parkerings	Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007.
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INDEX OF ABBREVIATIONS

§/§§	Section(s).
¶/¶¶	Paragraph(s).
1994 BIT	Agreement Between the Federal Republic of Mekar and the Commonwealth of Bonooru for the Promotion and Reciprocal Protection of Investments, signed on 24 August 1994.
2020 Arbitral Award	Arbitral award rendered on 9 May 2020 by the Tribunal comprised of the sole arbitrator Mr Rett Eichel Cavannaugh, in favour of Mekar Airservices Ltd.
BIT	Bilateral Investment Treaty.
Bonooru	Commonwealth of Bonooru.
Caeli/Caeli Airways	Joint-Stock Company Caeli Airways, a Mekari airline owned by Vemma Holdings Inc. and Mekar Airservices Ltd.
Caps	CCM's airfare caps imposed over Caeli.
CBFI	Consortium of Bonooru Foreign Investors (CBFI).
CBFI Submission	Consortium of Bonooru Foreign Investors Submission made on 19 April 2021.
CCM	The Competition Commission of Mekar.
CEPTA/Treaty	Comprehensive Economic Partnership and Trade Agreement between the Commonwealth of Bonooru and the Federal Republic of Mekar entered into force on 15 October 2014.
Contracting Parties/Contracting Party	Federal Republic of Mekar and Commonwealth of Bonooru, jointly or indistinctly.
CRPU	Mekar's Committee on Public Utilities Reform.

CRPU Submission	Mekar's Committee on Public Utilities Reform submission made on 28 May 2021.
Disputing Parties	Vemma Holdings Inc. and the Federal Republic of Mekar, jointly.
Executive Order	Executive Order 9.2018.
Facts	Statement of Uncontested Facts.
FET	Fair and Equitable Treatment established in Article 9(9) of the CEPTA.
First Investigation	Investigation launched into Caeli's activities by the CCM on September 2016.
ICSID	International Centre for Settlement of Investment Disputes.
ICSID AFR/ AFR	International Centre for Settlement of Investment Disputes Arbitration Additional Facility Rules.
L/LL	Line(s).
Lapras	Lapras Legal Capital, a member of CFBI.
Mekar's Application on CBFI	Mekar's application to bar the *amicus* submission by the Consortium of Bonoori Foreign Investors, submitted on 18 June 2021.
Mekar/Respondent	Federal Republic of Mekar.
MFN	Most Favoured National clause, Article 9(7) of the CEPTA.
MON	Mekar's currency.
Monopoly Act	Monopoly and Restrictive Trade Practice Act, as amended in 2009.
Notice	Notice of Intent to Submit a Claim to Arbitration Under Chapter 9 of the CEPTA by Vemma, filed on 15 November 2020.

P/PP	Page(s)
PCIJ	Permanent Court of International Justice
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
PO3	Procedural Order No. 3
PO4	Procedural Order No. 4
Response	Response to Notice of Intent to Submit a Claim to Arbitration Under Chapter 9 of the CEPTA by Mekar.
Second Investigation	Investigation launched into Caeli's activities by the CCM on December 2016.
Shareholders' Agreement	Shareholders' Agreement between the Federal Republic of Mekar and the Commonwealth of Bonooru
USD	United States Dollar.
VCLT	1969 Vienna Convention on the Law of Treaties, which entered into force on 27 January 1980.
Vemma's Application on CRPU	Vemma's application to bar the *amicus* submission by the external advisors to the Mekar's Committee on Reforms of Public Utilities, filed on 15 June 2021.
Vemma/Claimant	Vemma Holdings Inc.

MEMORIAL ON BEHALF OF RESPONDENT

1. In accordance with the International Centre for Settlement of Investment Disputes Arbitration Additional Facility Rules ("**ICSID AFR**" or "**AFR**"), the Republic of Mekar ("**Mekar**" or "**Respondent**") respectfully submits this Memorial in the proceedings filed by Vemma Holdings Inc. ("**Vemma**" or "**Claimant**") arising out of the Bonooru-Mekar Comprehensive Economic Partnership and Trade Agreement (the "**CEPTA**" or "**Treaty**"), to which both Respondent and the Commonwealth of Bonooru ("**Bonooru**"), are signatories ("**Contracting Parties**" jointly or "**Contracting Party**" indistinctly).

STATEMENT OF FACTS

2. *Man is condemned to be free; because once thrown into the world, he is responsible for everything he does*.[1] Since the beginning, Vemma's business decisions were guided by an overly optimistic forecast. Instead of assuming the consequences of its own business choices, it sought to transfer the burden of its acts to Mekar. Vemma could never have expected Mekar to bail it out of a no longer profitable investment. Indeed, a State must not be held responsible for the risks that were freely undertaken by an experienced investor.

3. Respondent is the Federal Republic of Mekar, a State in the tracks of development.[2] While attracting potential investors that could boost economic activity, it has historically prioritized its regulatory capabilities to safeguard the prosperity of its population. [3]

4. Claimant is Vemma Holdings Inc., an airline holding company incorporated under the laws of Bonooru.[4] Throughout its existence, Vemma pursued a public objective in the airline industry.[5] For this purpose, Bonooru has been deeply entrenched in Vemma's business by retaining 55% of Vemma's shares.[6]

5. In 2011, Vemma invested in Mekar by signing a Shareholders' Agreement ("**Shareholders' Agreement**") to acquire a majority stake in Caeli Airways ("**Caeli**" or "**Caeli Airways**") —a Mekari airline in which Respondent had a minority stake.[7] Prior to

[1] *Jean-Paul Sartre*, P. 37.
[2] Facts, ¶¶12, 20.
[3] Facts, ¶19.
[4] Facts, ¶10.
[5] Annex III, L. 1485; Annex IV, LL. 1519-1520.
[6] Facts, ¶65.
[7] Facts, ¶26.

the signature of the Shareholders' Agreement, the Competition Commission of Mekar ("**CCM**") approved the transaction subject to the condition that Caeli would not engage in any anti-competitive behaviours.[8] In a similar vein, and subject to the condition that they would not be employed abusively, Claimant inherited certain beneficial discounts on airport services and fees at Phenac International Airport ("**Phenac Airport**").[9]

6. However, driven by ambition, it was not long until Vemma began to abuse its position in the market. Steadily, Caeli retained almost half of the market share at the expense of consumers and performed preferential practices that enabled it to push out competitors.[10]

7. In 2016, Caeli's anticompetitive behaviour caught the eye of the CCM which, by virtue of its regulatory duties, decided to investigate it and to apply airfare caps with the aim of securing competition and protecting consumers ("**Caps**").[11] In 2019, Caeli appealed the CCM's decision to maintain the Caps before Mekari courts, even though it had initially consented its application.[12] Claimant was able to voice its grievances since all of Mekari judicial organs heard its claims and confirmed the legitimacy of the Caps.[13]

8. By 2018, a severe economic crisis had ensued in Mekar. As a primary response, Mekari authorities had to secure the national currency ("**MON**") by enacting a series of measures in view of financial stability.[14] For this purpose, Respondent required all airlines to operate in MON.[15]

9. Furthermore, Mekar passed the Executive Order 9.2018 ("**Executive Order**") that granted subsidies to companies in order to alleviate the crises. The Executive Order laid down the eligibility requirements that excluded applicants that would skew market conditions or that would not be capable of securing the loan.[16] Caeli's request was declined since it did not meet these legal requirements.[17]

10. Aware of the limitations imposed by the severe economic crisis, Vemma failed to adjust its strategy to the conditions of financial volatility. Against the clear and persistent

[8] Facts, ¶¶19, 25.
[9] Facts, ¶26.
[10] Facts, ¶¶34, 35.
[11] Annex V, LL. 1590-1594; Facts, ¶¶36, 37.
[12] Facts, ¶50.
[13] Facts, ¶54.
[14] Facts, ¶39.
[15] Facts, ¶¶39, 42.
[16] Facts, ¶46.
[17] Annex VIII, LL. 1918-1925.

warnings given by Mekari representatives and aviation experts, Caeli took far-sighted decisions that led to distressing outcomes.[18] The high-risk business approach adopted by Vemma drew Caeli to a precarious financial situation that did not allow it to survive the upcoming crisis.[19]

11. In November 2019, Vemma announced its intention to sell its stake in Caeli.[20] The only offer received by Vemma was from Hawthorne Group LLP, an airline associated with Vemma through the Moon Alliance.[21] However, this offer was not compatible with the purchase option established in the Shareholders'Agreement[22]. When disputing the validity of such offer before an arbitral tribunal, the competent authority deemed the offer invalid.[23] In the face of such invalidity, Vemma decided to sell its stake in Caeli to Mekar for USD 400,000,000.[24]

12. In November 2021, desperately attempting to recover its losses, Vemma decided to file a Notice for Arbitration against Mekar by alleging an ill-founded breach of Article 9(9) of the CEPTA ("**Notice**"). However, not a single act or omission taken by Mekar can be construed to give rise to a breach of the CEPTA. Vemma was free to make its business choices and must now bear the responsibility of such actions.

[18] Facts, ¶40; Annex IX.
[19] Annex VII; Annex IX.
[20] Facts, ¶56.
[21] Facts, ¶¶56, 57.
[22] Annex VI, L.1756.
[23] Facts, ¶¶56-58.
[24] Facts, ¶64.

SUMMARY OF ARGUMENTS

Jurisdiction

13. The Tribunal lacks jurisdiction over the present dispute as Claimant is not a protected investor under Article 9(1) of the CEPTA since (**I**) the Contracting Parties deliberately decided to exclude State-owned enterprises from treaty protection; and (**II**) Vemma's governmental nature precludes this Tribunal's jurisdiction.

Admissibility

14. Since the arbitral proceedings began, two amicus curiae submissions were filed. In this respect, (**I**) the CRPU Submission brings a matter of public interest. On the contrary, (**II**) the CBFI Submission does not meet the requirements of Article 41(3) of the AFR and Article 9(19) of the CEPTA and, therefore, should be rejected.

Merits

15. Respondent has at all times treated Claimant in a fair and equitable manner since Mekar: (**I**) acted within its regulatory powers, (**II**) did not discriminate against Caeli when granting State aid, and (**III**) granted Vemma's access to justice.

Compensation

16. Mekar owes no compensation to Vemma. However, (**I**) if the Tribunal concludes that Respondent owes compensation to Claimant, it must apply the "market value" standard contained in Article 9(21) of the CEPTA. Moreover, (**II**) any compensation awarded to Claimant must be reduced in light of Vemma's contribution to Caeli's losses and due to the economic crises in Mekar.

PART ONE: THE TRIBUNAL LACKS JURISDICTION OVER THE PRESENT DISPUTE

17. Vemma initiated the present dispute turning a blind eye to the facts. In 2014, Mekar and Bonooru decided to change their consent regarding foreign investors.[25] By signing a new treaty, the Contracting Parties deliberately decided to exclude State-owned enterprises from treaty protection. In this sense, Vemma —owned and completely controlled by Bonooru— is not a protected investor under the CEPTA and therefore cannot invoke the protection of the Treaty under the AFR.

18. Article 9(1) of the CEPTA defines "investor" as "*an enterprise with the nationality of a Party or seated in the territory of a Party that (…) has made an investment in the territory of the other Party*".[26] In order to be considered a protected investor, an enterprise must be incorporated under the laws of a Contracting Party and either: (a) have substantial business activities under its territory; or (b) be controlled by a natural person of that Party or by an enterprise as mentioned under paragraph (a). As we shall see, this is not Vemma's case.

19. Vemma submitted for arbitration under Article 9(16)(2)(b) of the CEPTA by choosing the ICSID AFR. However, Article 2 of the AFR only contemplates "*proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State*". ICSID's AFR was created to open access to a variety of disputes which were submitted to the ICSID by States —including those not covered by ICSID— and by private investors.[27] In all cases, at least one side must be either a Contracting State or a national of another Contracting State of the ICSID Convention.[28]

20. When analysing Vemma's submission, it becomes clear that Claimant cannot be considered a protected investor under Article 9(1) of the CEPTA. Indeed, the present dispute virtually is between Mekar and Bonooru: two Contracting States.[29]

21. Since Vemma's incorporation in 1984, Bonooru has maintained a substantial stake in the enterprise.[30] Indeed, Bonooru's ownership was not merely coincidental, but rather a

[25] Facts, ¶32.
[26] CEPTA, L. 2589.
[27] *Toriello*, P. 61.
[28] *Schreuer*, P. 85.
[29] Response, ¶2.
[30] Facts, ¶10.

deliberate attempt to control the aviation industry. After the privatization of BA Holdings —Vemma's predecessor—, Bonooru retained a shareholding in Vemma which ranged between 31% and 38%.[31] As years passed by, the presence of Bonooru became even more undeniable. By March 2021, Bonooru exponentially increased its shareholding to a 55% controlling stake.[32]

22. Bonooru's majority stake when it came to shares also resulted in a majority of voting members within Vemma's Board of Directors: Bonooru could vote crucial decisions, such as the election of directors, without needing to negotiate or make any compromises[33]. From the outset, Bonooru's representatives on Vemma's board were present for every single meeting and did not limit themselves to mere attendance, but rather actively participated in them.[34] Nowadays, Vemma's Board is fully integrated with government officials and has gained an active role in paramilitary activities.[35] In addition, in this arbitration, Claimant is being assisted by lawyers from Bonooru's justice department.[36]

23. Bonooru's control of Vemma's business is undeniable. With the aim of achieving the public purpose of enhancing tourism in Bonooru, Vemma proved to be the adequate mean to control the aviation industry. In fact, Vemma's acquisition of Caeli was no stranger to this interest.

24. It is generally considered that consent is the cornerstone of arbitration.[37] In this sense, the offer to arbitrate provided in the CEPTA only covers disputes with private foreign investors. This does not include State-owned enterprises as protected investors. Therefore, the text of the Treaty —no matter what Vemma pretends to argue— cannot be construed so as to include State-owned enterprises.

25. As it will be shown, Vemma is not entitled to bring the present claim under Article 9(1) of the CEPTA nor under the ICSID AFR. As a matter of fact: (**I**) The Contracting Parties deliberately decided to exclude State-owned enterprises from the Treaty protection; and (**II**) Vemma's governmental nature precludes this Tribunal's jurisdiction.

[31] Facts, ¶10.
[32] Facts, ¶65.
[33] PO3, ¶3.
[34] PO3, ¶3.
[35] Facts, ¶65.
[36] Facts, ¶65.
[37] *Park*, P. 3.

I. THE CONTRACTING PARTIES DELIBERATELY DECIDED TO EXCLUDE STATE-OWNED ENTERPRISES FROM THE TREATY PROTECTION

26. The CEPTA was conceived from the Contracting Parties' will of change: they intended to move on from the outdated Bonooru-Mekar ("**1994 BIT**"). Amongst other aspects, the desire to enact a more stringent treaty resulted in modifying the definition of "protected investor". Indeed, Bonooru and Mekar departed from their initial agreement when the CEPTA deliberately removed State-owned enterprises from the scope of the Treaty protection. In this context, Vemma is not entitled the investor status.

27. International investment law has been deemed "*to apply to foreign private investment rather than the foreign public investment carried out by SOEs*".[38] In this regard, the CEPTA can only be construed so as to protect only private investors. And, when a non-private investor —such as Vemma— initiates a dispute under the international investment arbitration, the truth and confidence that "*lies at the heart of every investment decision*" is contradicted.[39]

28. Besides the importance of the aforementioned, in the instant case the exclusion of State-owned enterprises arises explicitly from Bonooru and Mekar's will. In fact, the shift in the text of the Treaty mirrors the change of the Contracting Parties' intention.

29. Following the principle of *pacta sunt servanda*, Article 54 of the Vienna Convention on the Law of Treaties ("**VCLT**") stipulates that the termination of a treaty takes place at any time by consent of all the parties.[40] In this regard, when signing a new treaty, States are undoubtedly changing the scope of their consent by replacing substantial expressions that better meet the State's policy objectives.[41]

30. As Prof. Villiger established, this situation requires the interpretation of the treaty's text to elucidate the contracting parties' intention to abrogate the previous one.[42] In this sense, *"those intentions are best regarded as being expressed in the text*".[43] Consequently, as the

[38] *Blyschak*, P. 2.
[39] *Dolzer-Schreuer*, P. 6.
[40] *Villiger*, P. 686. See also: *Dörr-Schmalenbach*, P. 1018.
[41] *Gordon-Pohl*, P. 32.
[42] *Villiger*, P. 726.
[43] *Zarbiyev*, P. 256.

argument goes, the text is to be considered the most important element when elucidating the parties' will.[44]

31. In the present case, the Contracting Parties' intention radically changed when they terminated the 1994 BIT. This treaty defined an enterprise as "*any entity constituted or organized under applicable law, whether for profit or not, whether privately-owned or government-owned*".[45] In this concern, the Contracting Parties expressly decided to include State-owned enterprises as protected investors.

32. However, this treaty created a disproportionate situation. Historically, Bonooru's core industries were operated by the State to achieve centrally planned output targets.[46] These State-owned companies sought protection under the 1994 BIT by filing several investment arbitrations against Mekar.[47] Even more, the treaty was perceived as "*the worst BIT in the history of BITs*".[48] Following a change in public sentiment and with the aim of improving the States' economic interdependence, the Contracting Parties decided to exclude State-owned enterprises from the scope of their consent by signing the CEPTA.[49]

33. In the instant case, there is no doubt that the intention of the Contracting Parties radically changed. If Bonooru and Mekar had wanted to continue protecting governmental enterprises, they would have maintained the same wording. Nevertheless, and in light of Article 31(1) of the VCLT, the fact that they eliminated the inclusion of "government-owned enterprises" must be considered as a departure from their previous understanding. In this regard, Vemma —as a State-owned enterprise— cannot be deemed a protected investor under the Treaty.

34. All in all, by terminating the 1994 BIT and signing the CEPTA, Bonooru and Mekar made their will to exclude State-owned enterprises from Treaty protection. Therefore, Vemma cannot be considered a protected investor.

[44] *Zarbiyev*, P. 256.
[45] 1994 BIT, LL. 2405-2407.
[46] Facts, ¶3.
[47] PO3, ¶14.
[48] Facts, ¶¶20, 32; PO3, ¶14.
[49] PO3, ¶14.

II. VEMMA'S GOVERNMENTAL NATURE PRECLUDES THIS TRIBUNAL'S JURISDICTION

35. Since its date of incorporation, Vemma's pursuit of a public interest has overstepped any other commercial interest. Claimant has always been *a means to an end* for Bonooru: the purpose behind the maintenance of a majority stake in Vemma and the subsequent acquisition of Caeli was to achieve the governmental goal of enhancing tourism. Consequently, Vemma's claims are not suitable for investment arbitration.

36. One of the advantages of the investment arbitration system is the depoliticization of the dispute as it avoids confrontation between States.[50] Indeed, "*the main singularity of investment arbitration lies in the fact that one of the parties is a State and the other is a private person*".[51] Although under very exceptional circumstances a State-owned enterprise was considered a protected investor, investment arbitration tribunals have applied a high threshold.[52] For this purpose, a State-owned enterprise must not act as an agent of the government nor discharge an essentially governmental function.[53]

37. Under public international law, the conduct of an entity can be attributed to the State if the former exercises elements of governmental authority or is controlled and directed by the State.[54] In this regard, arbitral tribunals have defined "government instrumentality" as an entity of the State which: (i) has its own legal personality; (ii) was created by the State with a specific purpose; and (iii) is controlled by the State.[55]

38. This standard is reflected in Articles 5 and 8 of the ILC Draft Articles, that deal with the attribution to the State of conduct of entities. [56] *Prima facie* corporate entities —owned by and consequently controlled by the State— are considered to be separate. However, if the entity was authorized by the State to exercise governmental authority or was controlled and directed by the State, its conduct can be attributable to it. In this respect, Prof. Crawford states that these articles do not attempt to identify precisely the scope of governmental authority. Beyond a certain limit, what is regarded as *governmental* depends on the particular society, its history and traditions.[57]

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[50] *Dolzer-Schreuer*, P. 20. See also: *Kaufmann-Kohler-Potestà*, P. 19.
[51] *de Nanteuil*, P. 244.
[52] *Broches*, P. 202.
[53] *Broches*, P. 202. See also: *CSOB*, ¶17; *BUCG*, ¶34.
[54] *Silva Romero*, P. 35.
[55] *Silva Romero*, P.36.
[56] *Feldman*, P. 12.
[57] *Crawford*, PP. 100-101.

39. In this sense, in *Flemingo*, on the grounds of control, the conduct of a State-owned enterprise was attributed to Poland. In the case, the claimant stated that Polish Airports State Enterprise was a State-owned enterprise within the control of the respondent, Poland. When analysing the attribution of a company's acts to Poland, the tribunal considered that it "*perform[ed] strategic functions for the existence of the State*", as its privatization would be a big threat to the national security and functioning of the State. The arbitrators concluded that the State control was structural and remained substantial.[58]

40. Similarly, in *Maffezini*,[59] the tribunal held that a private corporation operating for profit while discharging essentially governmental functions must be considered as an organ of the State. In particular, the intention of carrying out governmental functions was evidenced in the intent of the State to utilize the enterprise as an instrument of State action. Thus, the tribunal concluded that the claimant was a State entity acting on behalf of Spain.

41. In the present case, the facts are clear: Vemma exercises an undeniable essentially governmental function.

42. Article 70 of the Constitution of Bonooru compels the State to ensure transportation to its population living in remotes areas.[60] Until 1979, Bonooru fully managed the national carrier and monopoly civil airline operating in the country, *i.e.*, Bonooru Air.[61] Although this enterprise was privatized and split into three airlines in 1980,[62] the privatization process was only partial: Bonooru maintained a prominent position in the aviation industry.

43. Bonooru never relinquished its protagonic role in the aviation industry.[63] All facts together lead to the conclusion that Vemma's interest was not only economic, but also had a political agenda. Bonooru's interest went beyond the distribution of dividends and this was clear even before the privatization was completed. Indeed, at that time, Bonooru's Prime Minister stated that it planned to maintain a significant interest and guarantee flights to remote islands, regardless of profitability.[64]

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[58] *Flemingo*, ¶429.
[59] *Maffezini*, ¶86. See also: *Ampal-American*, ¶146.
[60] Facts, ¶¶5, 6; Annex III, LL. 1495-1497.
[61] Facts, ¶6.
[62] Facts, ¶9.
[63] Annex III, LL. 1495-1497.
[64] Facts, ¶8.

44. Vemma's Memorandum of Association explicitly established as one of Vemma's objectives 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*".[65] Vemma holds the 100% ownership of shares in Royal Narnian, Bonooru's national carrier that, as ruled by the Constitutional Court of Bonooru, serves for public benefit by connecting remote areas of Bonooru territory.[66]

45. Traditionally, Bonooru attracted business travellers from Mekar —routes that Caeli Airways had frequently flown under Mekari ownership.[67] In 2011, —year in which Vemma acquired Caeli— Bonooru's Secretary of Transportation and Tourism launched the 'Horizon 2020' Scheme to exploit the potential of Bonooru's beaches, national parks, and its human, cultural and historical landmarks.[68] Caeli turned out to be the perfect instrument to achieve this goal: under Vemma's management, Caeli's business model was strictly led by the intention of drawing more travellers from Mekar to Bonooru in order to boost tourism.[69]

46. This was publicly voiced by Sabrina Blue, Bonooru's Secretary of Transport and Tourism, when stating that: "*Vemma's expansion into Mekar will offer substantial benefits not only to Vemma but to all of Bonooru by enhancing the aviation network available to prospective tourists*".[70] Such statement was reinforced through the recurring payments received by Vemma under the 'Horizon 2020' Scheme between 2011 and 2016.[71] Indeed, Bonoori officials publicly recognized Vemma's substantial contribution to tourism infrastructure.[72]

47. Overall, Bonooru's control over Vemma allowed it to use Caeli to perform strategic functions for the State. Vemma's governmental nature precludes the Tribunal's jurisdiction. Therefore, Claimant should not be granted the foreign investor status.

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[65] Annex IV, L.1519.
[66] Facts, ¶10.
[67] Facts, ¶28.
[68] Facts, ¶28.
[69] Facts, ¶28.
[70] Facts, ¶28.
[71] PO4, ¶4.
[72] Facts, ¶28.

48. In conclusion, (**I**) the Contracting Parties deliberately decide to exclude State-owned enterprises from treaty protection; and (**II**) Vemma's governmental nature precludes this Tribunal's jurisdiction Therefore, the Tribunal lacks jurisdiction over the present dispute.

PART TWO: THE TRIBUNAL MUST ALLOW CRPU'S *AMICUS CURIAE* SUBMISSION AND REJECT CBFI'S SUBMISSION

49. After Vemma submitted the present ill-founded arbitral proceedings, two *amici curiae* submissions were filed.[73] Both are diametrically opposed in form and substance: whilst one targets a public interest matter and complies with the applicable rules, the other fails to provide any significant information and is not submitted by an independent non-disputing party.

50. On the one hand, in May 2021, external advisors of the Mekar's Committee on Reform of Public Utilities ("**CRPU**") submitted an *amicus curiae* remarking that the assessment of the legality of Vemma's investment is relevant to the Tribunal's competence ("**CRPU Submission**").[74] The submission provides evidence that Vemma's share acquisition was procured by means of bribes paid to Mr. Dorian Umbridge, the Chairperson of the CRPU.[75] This is of undoubted relevance to the present proceedings as it directly puts into question Claimant's credibility.

51. On the other hand, in April 2021, the Consortium of Boonori Foreign Investors ("**CBFI**") submitted an *amicus curiae* offering scattered data on business in Bonooru ("**CBFI Submission**").[76] This submission does not pursue any public interest nor advances any novel arguments, failing to provide an insight different from Mekar and Vemma ("**Disputing Parties**").

52. In the instant case: (**I**) the CRPU Submission brings a matter of public interest. Therefore, it should be granted. Whereas, (**II**) the CBFI Submission does not meet the requirements of Article 41(3) of the AFR and Article 9(19) of the CEPTA so it must be rejected.

[73] CBFI Submission, L. 464; CRPU Submission, L. 578.
[74] CRPU Submission, L. 650.
[75] CRPU Submission, L. 635.
[76] CBFI Submission, LL. 544-555.

I. THE CRPU SUBMISSION BRINGS A MATTER OF PUBLIC INTEREST

53. The CRPU Submission was filed by external advisors to the Committee on Reform of Public Utilities, composed by Mekari investment bankers.[77] Selected through a transparent and competitive process, the CRPU was approved by the Cabinet of Ministers of Mekar to advise on the privatisation, liquidation, and/or restructuring of Caeli Airways.[78] CRPU's members focus on promoting fair business practices and combating corruption in Mekar.[79] In its submission, the CRPU included evidence that the rights received by Vemma were procured by means of bribes.[80]

54. When challenging this submission, Vemma stated that Article 41 of the AFR and Article 9(19) of the CEPTA require *amicus curiae* submissions to be limited to a matter within the scope of the dispute ("**Vemma's Application on CRPU**").[81] Conveniently, Vemma seeks to set aside a submission that depicts its truest form, whilst urging for an *amicus* submission that has nothing to add to these proceedings.

55. *Amicus curiae* submissions regarding a matter of public interest ought to be analysed in the context of investment arbitration proceedings as they provide transparency.[82] For example, in *Methanex*, the tribunal considered that, since there was a public interest at stake, the *amicus curiae* should be granted. In point of fact, arbitral processes can benefit from being perceived as more open and transparent. On this subject, the tribunal's *"willingness to receive amicus submissions might support the process in general and [this] arbitration in particular, whereas a blanket refusal could do positive harm"*.[83]

56. In this regard, an arbitral tribunal has the power and jurisdiction to consider issues of illegality and can do so of its own motion if the issue was not brought by the parties.[84] In fact, assessing the legality of the investment contributes to the procedural legitimacy and transparency of the arbitral process and serves to improve the legal quality of the award.[85]

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[77] CRPU Submission, LL. 612-613.
[78] CRPU Submission, LL. 619-620.
[79] CRPU Submission, LL. 642-645.
[80] CRPU Submission, L. 635.
[81] Vemma's Application on CRPU, L. 711.
[82] *Levine,* P. 218. See also*: Methanex*, ¶49.
[83] *Methanex*, ¶49. See also: *Philip Morris*, ¶30.
[84] *Kinyua*, P. 38. See also: *Levine*, P. 218.
[85] *Levine*, P. 217.

57. In the present case, the public interest involved in the CRPU Submission is beyond dispute. The submission provides evidence of the bribes offered by Vemma to secure its place as Caeli's purchaser.[86]

58. This Tribunal should note that, since the CRPU Submission became public, the Constitutional Court of Bonooru has taken cognizance —of its own motion— of the allegations against Mr. Dorian Umbridge.[87] This fact further confirms the relevance of the matter submitted by the CRPU. Indeed, assessing the legality of Vemma's investment and corrupt conduct is of key importance as it supports the transparency and legitimacy of the arbitral process.

59. All in all, having assessed the public inherent to the CRPU Submission, the Tribunal should grant it.

II. THE CBFI DOES NOT MEET THE REQUIREMENTS OF ARTICLE 41(3) OF THE AFR AND ARTICLE 9(19) OF THE CEPTA

60. The Consortium of Bonooru Foreign Investors is an association of Bonoori investors that has submitted a repetitive, unnecessary and biased *amicus curiae*. As such, CBFI submission should be rejected as it does not meet the requirements provided in Article 41(3) of the AFR and in Article 9(19) of the CEPTA.

61. Article 41(3) of the AFR states that when analysing an *amicus curiae* filing, the tribunal shall consider, among other things, the extent to which the non-disputing party: (a) would assist the Tribunal by bringing an insight different from that of the disputing parties, (b) would address a matter within the scope of the dispute; and (c) has a significant interest. In turn, Article 9(19)(3) of the CEPTA establishes that each submission shall identify the author, disclose any affiliation and identify any person or entity which provides any assistance in preparing such submission.

62. As it will be shown, the CBFI Submission does not comply with these requirements as: (**A**) it does not provide an insight different from that provided by the Disputing Parties; and (**B**) the CBFI is not independent from Vemma.

[86] CRPU Submission, L. 636.
[87] PO3, ¶13.

A. The CBFI Submission does not provide an insight different from that provided by the Contracting Parties

63. According to article 41(3)(a), the Tribunal has to evaluate whether the submission would assist in its ruling by bringing a perspective, particular knowledge or insight that is different. This is not the case of the CBFI Submission, which only attempts to point out a repetitive and unnecessary set of facts.

64. The requirement to provide a new perspective is not only embodied in the AFR alone. Article 5(2) of the UNCITRAL Rules on Transparency in Investor State Arbitration[88] states that any *amicus curiae* submission must assist the tribunal in the determination of factual or legal issues by bringing a perspective, particular knowledge or insight different from the disputing parties.

65. In the case *Apotex*, the tribunal rejected an *amicus curiae* submission as it considered that it did not meet the criteria to be granted participation. In particular, the tribunal considered that the submission made by the non-disputing party was not able to provide any assistance to the tribunal that otherwise might not be available to it. As the submission fell short in terms of knowledge, experience or expertise which would grant it any particular perspective or insight beyond that of the disputing parties, the tribunal rejected it.[89]

66. In the present case, the CBFI Submission offers some inconsequential facts that cannot be of any assistance for the Tribunal in its ruling. In its submission, CFBI provided context about the regulatory framework of Bonooru, the business landscape and the nature of activities of the aviation industry.[90] However, by briefly describing the aforementioned, CFBI is offering nothing new for the Tribunal. In fact, the business climate and the nature of the aviation industry was described by the Contracting Parties in the documents attached by them in the file case.[91]

67. As previously exposed, *amici curiae* must be able to serve the Tribunal by offering a different point of view from that of the Disputing Parties. The failure to meet this threshold

[88] CEPTA, LL. 3011-3011. Article 9(20)(6) of the CEPTA establishes that the UNCITRAL rules on transparency shall apply to any international arbitration proceedings against any of the Contracting Parties pursuant to the CEPTA.
[89] *Apotex*, ¶¶21-23.
[90] CBFI Submission, LL. 557-559.
[91] Annex VII; Annex IX.

should result in the rejection of the application. Hence, the requirement crystalized on Article 41(3)(a) of the AFR is not met.

B. The CFBI is not independent from Vemma

68. Article 9(19)(3) of the CEPTA requires applicants of *amicus curiae* to be independent from the disputing parties. This is far from being the present case, as the CBFI is not independent from Claimant.

69. As per Article 9(19)(3) of the CEPTA, the relevant question to ask is whether an influence of a party to the dispute on the writing of the brief can be ascertained.[92] As the tribunal stated in *Von Pezold*, "*the apparent lack of independence or neutrality of the [p]etitioners is a sufficient ground to deny*" the application.[93]

70. This reasoning was followed by the tribunal at *Philip Morris*.[94] In this case, the tribunal rejected a submission made by the Inter-American Association of Intellectual Property as it considered it lacked independence from the claimants. Indeed, the tribunal sustained that the close connection between the claimants and the association could not be ignored: claimant's lawyers participated in the petitioners' board of management and specific thematic committees.

71. In the instant case, Vemma is a member of the CBFI.[95] As a matter of fact, there is a strong connection between Vemma and the petitioners since the membership implied actively contributing with the organization.

72. Furthermore, Lapras Legal Capital ("**Lapras**"), another member of CBFI, is currently advising Vemma on funding strategies with respect to its claim against Mekar.[96] CFBI's internal "Amicus Brief Submission Guidelines" establish that a conflict of interest exists when an Executive Committee member is a party to the case or has a financial interest.[97] In this respect, CFBI admitted the participation of Lapras's Chief Executive Officer in the

[92] *Schliemann*, P. 390.
[93] *Von Pezold,* ¶56.
[94] *Philip Morris*, ¶55.
[95] CBFI Submission, L. 520.
[96] CBFI Submission, L. 521.
[97] PO3, ¶12.

amicus submission on the grounds that its connection with Vemma was restricted to litigation funding.[98]

73. The fact that Lapras is directly advising Vemma and, simultaneously, submitting an *amicus curiae* in its favour allows for a scenario characterized by a serious conflict of interest. CBFI's independence has been predominantly disputed as there exists a close connection between Claimant and the petitioners.

74. All things considered, Vemma's membership to CFBI and the participation of Lapras in this arbitration through the petitioners raises a conflict of interest. Therefore, the Tribunal should not accept the CBFI Submission due to a lack of independence.

* * *

75. Altogether, as it was illustrated: (**I**) the CRPU Submission brings a matter of public interest and, therefore, it should be admitted by the Tribunal. Incompatibly, (**II**) the CBFI does not meet the requirements of Article 41(3) of the AFR and Article 9(19) of the CEPTA so it must be rejected.

PART THREE: MEKAR ENSURED FAIR AND EQUITABLE TREATMENT TO VEMMA

76. When Vemma decided to invest in Mekar in 2011, it was thoroughly aware of the volatility in the airline industry.[99] Driven by the eagerness of success, Vemma consistently overlooked the red flags that appeared in its path. Under Vemma's control, and in a greedy attempt for rapid profitability, Caeli took far-sighted decisions that led to distressing outcomes. Although Mekari representatives clearly and persistently warned Caeli about the short-comings of its strategy, it chose to maintain its high-risk business plan that conducted the investment to a devastating end.[100]

77. Notwithstanding, Claimant contends that Mekar has violated the fair and equitable treatment ("**FET**") standard provided in Article 9(9) of the CEPTA.[101] In light of the

[98] PO3, ¶12.
[99] Facts, ¶24.
[100] Facts, ¶¶29, 31, 33, 35.
[101] Notice, ¶¶15, 18, 28.

aforementioned, it will be demonstrated that Mekar has treated Vemma at every step fairly and equitably and, thus, that Claimant's allegations lack legal and factual grounds.

78. Caeli's expansion grew at the expense of its competitors since it adopted exclusionary strategies that involved charging predatory prices and abusing its dominant position to push competitors out of the market.[102] This persistent unlawful behaviour alarmed the authorities, who duly took the necessary action to protect consumers and competition.[103]

79. Eventually, when the economic crisis arose, Caeli was unable to overcome it due to the weakness of its strategy. Its close partner, Hawthorne Group LLP, offered an unrealistically inflated price for its stake in Caeli.[104] This *non bona fide* offer frustrated Mekar's right of first refusal, as corroborated by the arbitral tribunal that ruled on the issue.[105] Nonetheless, Claimant capriciously and unfoundedly attempted to challenge the award that had rejected the validity of its offer.[106]

80. Instead of owning up to its own wrongdoings, Claimant sought to transfer the burden of its actions to Mekar. However, Respondent should not be held accountable since all of the disputed conducts were exercised in a lawful and reasonable manner. No act or omission taken by Mekar can be construed to give rise to a breach of the FET standard under the CEPTA.

81. Thus, Mekar has assured Vemma fair and equitable treatment of its investment, in accordance with Article 9(9) of the CEPTA. This will be demonstrated by portraying that (**I**) Mekar's administrative organs and authorities acted within their regulatory powers, (**II**) Mekar did not discriminate against Caeli when granting State aid, and (**III**) Vemma was always guaranteed access to justice by Mekari courts.

[102] Facts, ¶¶45, 49.
[103] Facts, ¶36.
[104] Facts, ¶56.
[105] Facts, ¶¶57, 58.
[106] Facts, ¶60.

I. MEKAR'S ADMINISTRATIVE ORGANS AND AUTHORITIES ACTED WITHIN THEIR REGULATORY POWERS

82. Although Claimant contends that several measures taken by Mekar breached the CEPTA[107], each of them was framed within the limits of Mekar's regulatory powers and enacted with the legitimate purpose of protecting consumers and competition.

83. Article 9(8) of the CEPTA explicitly recognizes Mekar's right to regulate in order to achieve legitimate public policy objectives, such as consumer protection. It also provides that even when a regulation negatively affects an investment, it does not amount to a breach of the Treaty. These provisions serve as a rationale for carving out regulatory space from the scope of the application of the Treaty.[108]

84. The State's regulatory power has been recognized as a rule of customary international law and thus enjoys a presumption of legitimacy.[109] Moreover, arbitral tribunals have reconciled treaty or contractual obligations with the sovereign right of the State, as the guardian of the general public interest, to regulate economic activities in its territory.[110] For this purpose, tribunals have accorded a high degree of deference to the State's decisions and policies.[111]

85. In this regard, *bona fide*, non-discriminatory and proportional regulations, aimed at the general welfare of the State, do not breach international standards.[112] Hence, the measures taken by Mekar in the lawful exercise of its regulatory powers, that aimed at securing competition in the airline market, were imparted in full compliance with the CEPTA. As such, they shall be accorded a wide degree of deference.

86. It will be demonstrated that Mekar acted within its regulatory powers since (**A**) The CCM lawfully investigated and regulated Caeli's anti-competitive behaviour (**B**) Mekar acted within its police powers when requiring all companies to offer goods and services in MON.

A. The CCM lawfully investigated and regulated Caeli's anti-competitive behaviour

[107] Notice, ¶29.
[108] *Korzun*, PP. 380, 295.
[109] *Tza Yap Shum,* ¶95; *El Paso,* ¶238.
[110] *Pellet*, P. 447.
[111] *ELSI,* ¶¶124, 128*; Philip Morris,* ¶399*; Glamis,* ¶597.
[112] *Hydro Energy,* ¶568.

87. Claimant alleges that Respondent adopted an arbitrary conduct when issuing antitrust investigations on Caeli and implementing airfare caps as a measure to protect the airline market conditions.[113] Nonetheless, this enforcement was legally grounded on the Monopoly Act, and enacted by the competent regulatory authority, the CCM. Thus, all measures were applied in full observance of the CEPTA.

88. Article 9(9) of the CEPTA prohibits the adoption of arbitrary conduct towards investors. A measure is deemed arbitrary when it inflicts damage on the investor without serving any legitimate purpose and without a rational explanation.[114] Most importantly, arbitrariness is a standard with a high threshold that may only be breached by an act that shocks a sense of judicial propriety.[115]

89. Indeed, in *Enron* the tribunal held that a measure may breach the arbitrary standard only if it denotes a manifest impropriety that is "entirely surprising".[116] Similarly, the International Court of Justice in the *ELSI* case held that "*arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law*".[117]

90. For this purpose, the investor must prove that such treatment rises to a level that is unacceptable from the international perspective.[118] That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.[119] Particularly, regulatory and administrative organs, which are called to make decisions of technical nature, enjoy a high degree of deference for reasons of their expertise,[120] such as the protection of competition.[121] In this sense, arbitral tribunals also afford deference to a State's policy objective's importance.[122]

91. As the tribunal in *Myers* held, "*tribunals do not have an open-ended mandate to second-guess government decision-making*".[123] When analysing its scope of interference, the tribunal stated that the correctness of a State regulation is not for the arbitrators to judge.

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[113] Notice, ¶¶14-16.
[114] *UNCTAD Report*, P. 78.
[115] *ELSI,* ¶128; *Enron,* ¶281*; Myers,* ¶263.
[116] *Enron,* ¶28.
[117] *ELSI*, ¶124.
[118] *Myers,* ¶263.
[119] *Myers,* ¶263.
[120] *Crystallex*, ¶952; *Myers,* ¶263; *Philip Morri*s, ¶399.
[121] *Philip Morris,* ¶399.
[122] *Philip Morri*s, ¶399; *Crystallex,* ¶952.
[123] *Myers*, ¶261.

What may be perceived as a wrongful government decision—such as a misguided judgment of the facts or even a misguided procedure— should rather be appealed before the State's own legal system.[124]

92. In the case at hand, the CCM always acted pursuant to its regulatory powers and within the margins provided by the law to ensure fair competition in the airline industry. Despite Vemma's best efforts to argue otherwise, there were many circumstances that attracted the CCM's attention, including: (i) Caeli's surprising rapid growth as a consequence of capturing the market share lost by its competitors, owning almost half of the Mekari airline industry;[125] (ii) receiving substantive subsidies from Bonooru;[126] (iii) engaging in preferential business strategies with members of the Moon Alliance;[127] and (iv) adopting undercutting policies regarding tariffs.[128] Given the serious concerns about Caeli's threat to competition, the CCM was fully entitled to conduct such investigations and impose the challenged measures.[129]

93. In this sense, it will be proven that (**i**) the First Investigation was initiated in compliance with the Monopoly Act due to serious concerns about Caeli's predatory pricing, (**ii**) the Second Investigation was lawfully enacted given the contentions brought by Caeli's competitors, and that (**iii**) the maintenance of airfare caps was proportional to the threat Vemma posed to competition.

i. The First Investigation was initiated in compliance with the Monopoly Act due to serious concerns about Caeli's predatory pricing

94. According to Chapter III of the Monopoly Act, the CCM is entitled to initiate *suo moto* investigations in its discretion when a company: (i) takes part in an industry that requires special attention or has more than 50% of the market share; (ii) poses a unique threat to competition; and (iii) there is evidence that the corporation's actions have, or are likely to in the near future, push competitors out of the market. The First Investigation fully complied with all these requirements.[130]

[124] *Myers*, ¶261.
[125] Facts, ¶34.
[126] Facts, ¶28.
[127] Facts, ¶36.
[128] Notice, ¶10.
[129] Monopoly Act, Chapter III (2), Annex V, LL. 1598-1606.
[130] Facts, ¶36.

95. *First, Caeli belonged to an industry that required special attention*. Airline companies, and the alliances they might form, demand careful attention from regulatory authorities since some markets can only efficiently sustain one or a limited number of carriers.[131] This sort of environment can easily give rise to collusion or price-fixing between airlines.[132] These types of exclusionary practices can directly affect competition and consumers.[133] In addition, the aviation industry plays a vital role in economic growth as it facilitates international trading and production.[134] Thus, the industry Caeli belongs to requires close control from antitrust agencies.[135]

96. *Second, Caeli posed a unique threat to competition.* Caeli engaged in preferential secondary slot trading ("**SST**") with its Moon Alliance partner, Royal Narnian. This practice involves the exchange between two airlines of slots (permits to use an airport's infrastructure during a certain time range). Although normally permitted, the practice poses a risk when done between allies since it may enable airlines to reinforce dominant positions and encourage the abuse of market power[136] by valuing their slot holdings much higher as a means of precluding entry by competitors.[137] In this respect, Caeli's preferential SST with Royal Narnian was even more threatening since not only were they members of the same alliance, but they were also controlled by the same shareholder: Vemma.[138] Indeed, the risk Caeli posed to competition was not merely theoretical since, in practice, small airlines were unable to get better slots allocations on equal footing.[139]

97. *Third, Caeli was likely to push competitors out of the market.* Throughout 2011, Claimant received subsidies from its home State under the "Horizon 2020" Scheme.[140] Such subsidies, together with the significantly low prices it charged to its clients, allowed Caeli to earn supracompetitive profits.[141] As a consequence, it was capturing market share lost by its Mekari counterparts, who were being slowly squeezed away.[142] Moreover, Caeli's loyalty programmes (frequent flyer programmes and corporate discounts), could also likely

[131] *OECD Working Paper*, P. 6.
[132] *ATCONF*, ¶1.1.
[133] *OECD Working Paper*, P. 7.
[134] *Aviation Benefits Report*, P. 29.
[135] *OECD Working Paper*, P. 4.
[136] *Pheasant-Giles*, P. 32.
[137] *de Wit-Burghouwt*, P. 155.
[138] Facts, ¶¶10, 36.
[139] Facts, ¶36.
[140] Facts, ¶28.
[141] Facts, ¶36.
[142] Facts, ¶34.

push competitors out of the market.[143] Such advantages pose one of the main threats to competition since they act as barriers for new competitors to enter the market by raising the cost of switching air carriers and may also deeply harm consumers.[144] These circumstances, along with the preferential SST, evidenced that Caeli could and was likely to keep on pushing competitors out of the market.

98. All in all, the CCM was entitled to investigate Caeli since it had reasonable and legal grounds to believe that it posed a serious threat to competition. In fact, the outcome of the First Investigation proved that these concerns were reasonable since it found Caeli liable for breaching Mekar's antitrust legislation in the form of predatory pricing.[145] The CCM acted within its regulatory powers and, as such, this decision shall be accorded a wide margin of appreciation.

ii. The Second Investigation was lawfully enacted given the contentions brought by Caeli's competitors

99. The Monopoly Act also allows the CCM to investigate a company that has at least a 10% market share if there is sufficient evidence of potential anti-competitive behaviour brought by competitors.[146] This was precisely what the CCM did when launching the Second Investigation on Caeli, after a consortium of small regional airlines brought a complaint regarding Claimant's attempts to push them out of the market.[147]

100. The competitors held that Caeli was taking advantage of the privileges it enjoyed at Phenac Airport to charge low prices in specific routes with the sole purpose of pushing them out of the market.[148] Knowing that Phenac Airport could not afford to lose the largest airline in the country, Caeli was threatening to shift its traffic to other airports in the regions if it was not granted significant additional privileges in terms of airport service fees.[149] By squeezing out concessions, Caeli would then use these benefits to charge undercutting prices on certain routes to and from Phenac Airport.[150] It was nearly impossible for competitors to penetrate this market, which effectively became a "fortress hub" for Caeli,

[143] Facts, ¶35.
[144] *OECD Working Paper*, P.4.
[145] Facts, ¶45.
[146] Annex V, LL. 1610-1611.
[147] Facts, ¶38.
[148] Facts, ¶38.
[149] PO3, ¶7.
[150] Facts, ¶38.

whose market share on its own amounted to 43%.[151] This was sufficient evidence to investigate Caeli, who was later found guilty of abusing its dominant position.[152]

101. It is undeniable that the factual circumstances fall within the requirements of the law, and therefore the CCM was not only entitled but duty-bound to investigate Caeli. Hence, the Second Investigation was issued within the CCM's regulatory power in pursuit of protecting competition and consumers.

iii. The maintenance of airfare caps was proportional to the threat Caeli posed to competition.

102. Despite having originally recognized that the implementation of the Caps was reasonable,[153] Claimant now pretends to convince the Tribunal that the Caps maintained by the CCM were unfair and arbitrary.[154] This line of reasoning simply lacks foundation since the maintenance of the Caps was within the CCM's regulatory powers: they were a necessary means to keep Caeli's anti-competitive behaviour in line with the law.

103. Chapter III of Article 4 of the Monopoly Act allows the CCM to impose enforcement actions that target noncompliance. Particularly, it is entitled to order interim measures for preventive purposes, on the basis of a *prima facie* finding of an infringement or in cases of urgency due to the risk of serious and irreparable damage to competition. Moreover, these corrective measures must be necessary and proportional to the infringement committed.[155]

104. When a regulatory authority implements measures aimed at protecting the general welfare of its country, its weighing of necessities must be broadly appreciated and must be accorded a high degree of deference.[156] Indeed, as the tribunal in *Electrabel* held, a measure will not be arbitrary if it is reasonably related to a rational policy.[157] That is, there needs to be an appropriate correlation between the State's public policy objective and the measure adopted to achieve it.[158] This assessment includes the requirement of proportionality: the impact of the measure on the investor needs to be suitable to achieve

[151] Facts, ¶38.
[152] Facts, ¶49.
[153] Notice, ¶15.
[154] Notice, ¶16.
[155] Annex V, L. 1625.
[156] *Saluka*, ¶¶272-273.
[157] *Electrabel*, ¶179.
[158] *Electrabel*, ¶179.

a legitimate policy objective, necessary for that objective, and not excessive considering the relative weight of each interest involved.[159]

105. In the case at hand, the CCM had no choice but to take appropriate and urgent action to protect the airline industry since there was strong evidence of Caeli's anticompetitive behaviour.[160] For this purpose, it imposed airfare caps on Caeli to ensure that it stopped earning supracompetitive profits that would enable it to continue pushing competitors out of the market.[161] These Caps, as Claimant itself has recognized,[162] were set reasonably above the rates Caeli charged on set routes.[163]

106. Given the serious threats Caeli posed to competition, the CCM could not lift the Caps, which in principle were applied until the First Investigation concluded.[164] However, given the worrisome results obtained after the First Investigation, the CCM decided to further maintain the Caps until the Second Investigation was terminated.[165] In point of fact, the results of the Second Investigation revealed that Caeli was abusing its dominant position to push competitors out of the market.[166] Thus, it decided to lift them only when its market share dropped so that it would not abuse its dominant position.[167]

107. In addition, Caeli capriciously complained that the Caps did not adjust to inflation.[168] However, the CCM ensured that the Caps were pegged to Mekar's official inflation rate calculated by the Central Bank[169], further proving that the CCM was trying to minimize the impact on Vemma's investment.

108. Moreover, the Caps were proportional. Much as *Electrabel*, they served a legitimate public purpose: containing Caeli's unlawful market growth and securing competition. Furthermore, the Caps maintenance was also necessary. Otherwise, Caeli would have enjoyed a free pass to further consolidate its dominant position and drive competitors out of the market through its exclusionary strategies at the risk of becoming a monopoly. In

[159] *Electrabel*, ¶179.
[160] Facts, ¶36.
[161] Facts, ¶36.
[162] Notice, ¶15.
[163] Facts, ¶37.
[164] Facts, ¶43.
[165] Facts, ¶45.
[166] Facts, ¶49.
[167] Facts, ¶49.
[168] Facts, ¶43.
[169] Facts, ¶43.

addition, it also constituted the least harmful measure since the CCM had the competence to enforce other measures such as forcing Caeli to sell its shareholding.[170]

109. Overall, the CCM had serious and reasonable concerns regarding Caeli's anti-competitive behaviour when launching both investigations and when imposing Caps. Therefore, the enacted measures deserve a high degree of deference since Mekar has always acted within its regulatory powers for the legitimate purpose of securing competition and protecting consumers. To conclude, no arbitrary conduct was adopted so as to construe a breach of the FET standard.

B. Mekar acted within its police powers when requiring all companies to offer goods and services in MON

110. Claimant alleges that Respondent breached Article 9(9) of the CEPTA when passing a decree requiring companies to offer goods and services denominated exclusively in MON.[171] Nevertheless, this measure fully falls within the sphere of Mekar's police powers and was exercised within the legitimate discretion recognized by the CEPTA itself.

111. Article 9(8) of the CEPTA expressly recognizes Mekar's right to regulate to achieve legitimate policy objectives. In particular, it provides that a "*modification to [State's] laws"* which negatively affects an investment or interferes with an investor's expectations does not breach the FET standard.[172] As outlined above, customary international law also recognizes the State's police powers as the inherent right to regulate in protection of the public interest.[173]

112. The tribunal in *Total* held that modifying the regulatory framework is a fundamental and sovereign prerogative of the States. In that case, Total alleged that Argentina had breached the FET standard when forcing companies to convert its dollar-denominated tariffs into Argentine pesos at a one-to-one rate. The tribunal reasoned that in absence of a specific promise of the State, the legal regime in force is not subject to a "guarantee" of stability. Furthermore, it held that treaties do not relinquish the State's competence to amend their legislation in order to adapt it to the emerging needs of their people.[174]

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[170] Annex V, L. 1615.
[171] Notice, ¶17.
[172] CEPTA, L. 2724.
[173] *OECD Working Paper*, P. 5.
[174] *Total,* ¶¶114-119.

113. In the instant case, when Vemma decided to invest in Mekar, the regulatory framework obliged businesses to charge their tariffs in MON, the local currency.[175] Later, a currency crisis arose in Mekar along with an increasing inflation that led the MON to deeply depreciate.[176] To alleviate the effects of the crisis, Mekari authorities decided to grant airlines an exemption from the law, and they were exceptionally allowed to charge their fares denominated in U.S. dollars.[177] Nonetheless, as the macroeconomic situation in Mekar continued to deteriorate, and in an attempt to stabilise its currency, such an exception was retracted. Consequently, all airlines were once again submitted to the initial regulation which required them to charge their tariffs in MON.[178]

114. As provided in Article 9(8) of the CEPTA, Mekar deliberately preserved its right to modify the regulatory framework. Moreover, as held by the tribunal in *Total*, such a regulatory change by no means violates the CEPTA: it constitutes a legitimate exercise of Mekar's police powers. So as to deal with the ongoing financial crisis, Mekar was fully entitled to resort to the means suitable to stabilize the currency crisis, and this included enacting laws on currency control.[179] Indeed, it had a clear public interest which was to preserve the stability and credibility of the national currency.[180]

115. Overall, Mekar lawfully exercised its police powers when amending the regulatory framework since it was fully entitled to adapt the law to the currency crisis in order to protect its public welfare. Therefore, Mekar has not breached Article 9(9) of the CEPTA when acting within the sphere of its police powers.

II. MEKAR DID NOT DISCRIMINATE AGAINST CAELI WHEN GRANTING STATE AID

116. Claimant alleges that Mekar discriminated against it when denying its request for subsidies.[181] However, the Secretary of Civil Aviation lawfully granted subsidies according to the eligibility requirements established by the Executive Order 9.2018.[182] In this sense, it did not discriminate against Caeli when granting subsidies to companies that complied with the requirements of the law.

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[175] Facts, ¶¶40, 42.
[176] Facts, ¶39.
[177] Facts, ¶40.
[178] Facts, ¶42.
[179] Facts, ¶42.
[180] Facts, ¶42.
[181] Notice, ¶18.
[182] Facts, ¶46.

117. The Executive Order was the binding legal basis and, to this purpose, it authorized the Secretary of Civil Aviation only to grant loans to businesses that met the requirements provided. The following criteria had to be met by the applicants: (i) that the intended obligation would not skew market conditions, and (ii) that the loan was sufficiently secured. Since these requirements were decisive, a company that did not comply with them was not eligible to receive subsidies.[183]

118. In this regard, the Secretary of Civil Aviation was bound to make distinctions based on the legal criteria. When a differential treatment is justified, it cannot entail a discrimination. While Article 9(9)(C) of the CEPTA prohibits the adoption of a discriminatory conduct, this standard only encompasses an unjustified differential treatment to those who are in similar circumstances.[184] Thus, tribunals ought to compare only like-with-like cases.[185] But if a differential treatment is justified, it does not breach the standard.[186]

119. Additionally, in *Marvin Roy Feldman* the claimant argued that Mexico discriminated against it when it was denied subsidies, while granting them to its competitors. In this regard, the tribunal sustained that States are allowed to differentiate between investors, without breaching the discrimination standard. In particular, it held that, regarding limited economic resources: "*governments must be free to act in the broader public interest through the granting or withdrawal of government subsidies*."[187]

120. In the instant case, Caeli was not similar to the airlines receiving subsidies. Indeed, Caeli was not an eligible candidate to receive State-aid. It did not fit the criteria provided by the Executive Order since: (i) it would skew market conditions in its favour, and (ii) the loan was not sufficiently secured.

121. Regarding the first requirement, subsidies were solely granted to smaller airlines. In fact, the predominant recipients of subsidies were airlines with less than 5% of the market share[188] while Caeli owned a 43% share.[189] Given the aforementioned abuse of Claimant's dominant position,[190] there was no guarantee that it would not use these subsidies to

[183] Annex VIII, LL. 1920-1925.
[184] *Dolzer-Schreuer*, ¶¶173, 177; *Parkerings*, ¶¶283, 287; *CMS*, ¶290; *Goetz*, ¶121; *Saluka*, ¶313; *Myers*, ¶¶252-254.
[185] *Nycomb,* ¶34.
[186] *Levy de Levi,* ¶396; *Bayindir,* ¶¶403-411.
[187] *Marvin Roy Feldman*, ¶103.
[188] PO4, ¶7; PO3, ¶6.
[189] PO3, ¶6.
[190] Memorial on Behalf of Respondent, Part Three, §I.

generate even more anticompetitive conducts than the ones found in the investigations enacted by the CCM.[191]

122. As for the second requirement, the loan would not have been sufficiently secured due to Caeli's risky investment choices and its long-standing debts that had failed to service since its privatisation.[192] As a matter of fact, Caeli had recently refused a loan from the First National Phenac Bank because it would not be able to repay it.[193] Thus, Caeli was not even entitled to apply for subsidies since it did not meet the criteria established in the Executive Order.

123. In any event, Caeli's treatment was reasonably justified due to its governmental nature. In this sense, State owned enterprises enjoy certain benefits and assurances that other private companies do not have, such as protection, assistance and financial support from their government.[194] But more importantly, State-owned companies can and often are bailed out by the State when they are in a situation of financial distress.[195] This was to be expected in the case at hand, since Caeli performed a strategic function for Bonooru by providing the constitutionally guaranteed mobility to its citizens.[196] Indeed, in 2021, Bonooru implemented a bail-in program to rescue Vemma.[197]

124. Caeli was treated equally to the rest of the companies that applied for subsidies. Since it did not comply with the legal requirements, Mekari authorities reasonably declined its request for subsidies according to the discretion granted by the Executive Order. Thus, Mekar did not discriminate against Caeli.

III. VEMMA WAS ALWAYS GUARANTEED ACCESS TO JUSTICE BY MEKARI COURTS

125. Claimant alleges that it was denied justice by Mekar when seeking judicial remedy in different instances.[198] However, Mekari courts adequately ensured Vemma's right to access justice in all the opportunities it was requested. Respondent gave Claimant the possibility

[191] Facts, ¶49.
[192] Facts, ¶51.
[193] Facts, ¶51.
[194] *Nielsen*, P. 57.
[195] *Nielsen*, P. 61.
[196] Facts, ¶¶5, 8, 9.
[197] Facts, ¶65.
[198] Notice, ¶¶20, 27.

to address its claims before the appropriate judicial authority and in a reasonable time frame.

126. Denial of justice is defined as a gross misadministration of justice by domestic courts resulting from the ill-functioning of the State's judicial system.[199] For this purpose, an elevated standard of proof is required. [200] There must be "*clear evidence of an outrageous failure of the judicial system"* or a demonstration of "*systemic injustice*".[201] A State is internationally liable for denial of justice only if justice is administered "*in a seriously inadequate way*", resulting in a "*manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety*".[202]

127. In the case at hand, Vemma approached Mekari courts on two different occasions: when challenging the application of the Caps, and later when appealing the enforcement of the arbitral award rendered on May 9, 2020 ("**2020 Arbitral Award**").[203] While it unfoundedly contends that justice has been denied, Mekar has provided Vemma every opportunity to voice its grievances before the appropriate judicial authority and has resolved its claims in a reasonable manner.[204]

128. Therefore, it will be shown that **(A)** Mekari courts enacted judgements in a reasonable time frame and that **(B)** Mekar secured Vemma's access to justice when addressing its claims regarding the enforcement of the 2020 Arbitral Award.

A. Mekari Courts enacted judgements in a reasonable time frame

129. Vemma contends that the delay of Mekari Courts when attending its claims amounted to a denial of justice.[205] However, Mekari courts gave Claimant every opportunity to voice its grievances before the appropriate judicial authority in a timely manner.

130. Arbitral tribunals have only allowed delays in proceedings to constitute a denial of justice in limited cases. Indeed, in *White Industries*, the tribunal also stated that a 9 years delay was not an "*unreasonable pace in the context of a denial of justice assessment*".[206]

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[199] *Focarelli*, P. 1.
[200] *Philip Morris*, ¶499.
[201] *Philip Morris*, ¶500; *Paulsson*, P. 130.
[202] *Mondev,* ¶136.
[203] Facts, ¶62.
[204] Response, ¶16.
[205] Notice, ¶20.
[206] *White Industries*, ¶¶10.4.21-10.4.22.

Similarly, in *Jan de Nul*, the tribunal held that a delay of 10 years to obtain a first instance judgement did not raise to the level of denial of justice.[207]

131. In the case at hand, in April 2019, Mekar's High Court heard Caeli's submissions regarding the maintenance of airfare caps. By June 2019, the High Court had already released an interim decision on the matter.[208] This is a clear example of how Mekari courts provided Caeli with a fast and efficient legal response, given the average time they take to arrive to final decisions, and also according to the international parameters. [209] Hence, by no means can a delay of less than 2 years constitute a denial of justice.

132. Therefore, Mekari courts appropriately granted justice to Claimant since they dispensed justice in a reasonably fast manner and provided Vemma every opportunity to voice its grievances.

B. Mekar secured Vemma's access to justice when addressing its claims regarding the enforcement of the 2020 Arbitral Award

133. Claimant alleges it was denied justice when challenging the 2020 Arbitral Award based on unsubstantiated claims of corruption.[210] Nevertheless, Mekar secured Vemma's access to justice before all possible judicial instances.

134. As outlined above, a very high threshold has to be met in order for a claim of denial of justice to prevail. Only the acts of a State's judiciary that "*surprise a sense of judicial propriety*", may breach the standard.[211] In this regard, an erroneous decision or even an incompetent judicial procedure are not sufficient unless it can be shown that it manifestly shocks a sense of judicial correctness.[212]

135. In *Iberdrola,* the claimant contested that Guatemala had denied justice to it by enacting an unsubstantiated judgement that allegedly lacked grounds and did not correctly address its claims.[213] According to the tribunal, denial of justice may be breached only by "*an error that no merely competent judge could have committed and that shows that a minimally*

[207] *Jan de Nul*, ¶¶202-204.
[208] Facts, ¶54.
[209] Facts, ¶¶3, 54.
[210] Facts, ¶60.
[211] *Staur Eiendom AS*, ¶¶472-473.
[212] *Kaufman-Kohler-Potestà*, ¶162. See also: *Jan de Nul,* ¶193*; Azinian,* ¶1102*; White Industries* ¶¶10.4.1-11.4.20.
[213] *Iberdrola,* ¶483.

adequate system of justice has not been provided".[214] Hence, arbitral decisions shall not address the legality of the case under domestic law but rather focus on the issues submitted to arbitration. Their function "*is not to correct errors of domestic procedural or substantive law which may have been committed by the national courts*".[215]

136. When allegations of denial of justice are based on the enforcement of a supposedly corrupt award, the party must provide clear, convincing, and irrefutable evidence to sustain its claim.[216] In this sense, a high standard of proof of corruption is required.[217] Indeed, the tribunal in *EDF* held that an audio tape, which allegedly recorded a conversation where the State requested a bribe, was not a clear and convincing piece of evidence.[218]

137. In addition, according to Article V(1)(e) of the New York Convention, a State has the competence to enforce the award, even if it has been set aside by the court of the seat. Hence, the enforcement of an award annulled due to corruption allegations shall not necessarily constitute a case of denial of justice.

138. Regarding the enforcement of the 2020 Arbitral Award, Mekari courts ensured a fair treatment to Vemma and rendered reasonable well-founded decisions.[219] While Vemma endeavoured to challenge the court's decision based on an alleged corruption, Mekar's judicial system ensured procedural and substantive justice to Claimant.

139. Indeed, Mekar secured its access to all possible judicial instances to voice its grievances, including the Superior Court of the country.[220] Moreover, these judgments were substantively well-founded, insofar as they duly weighed the arguments of both parties, considered existing case law and provided a coherent reasoning.[221] Even when they decided to dismiss allegations of corruption, this was due to the fact that the unsubstantiated evidence was highly circumstantial. As a matter of fact, not only the two Mekari courts, but also the court of the seat held that such evidence constituted no more than a mere "indicia" and that it could not affirm if the alleged bribe had actually existed.[222] Taking into consideration the high threshold necessary for proving allegations of

[214] *Iberdrola,* ¶432.
[215] *Liman Caspian,* ¶274.
[216] *EDF*, ¶222.
[217] *EDF*, ¶¶225-226.
[218] *EDF*, ¶¶225-226.
[219] Facts, ¶62.
[220] Annex XV, LL. 2373-2380.
[221] Annex XIV, Annex XV.
[222] Annex XIII, LL. 2181-2186.

corruption, giving credence to such circumstantial evidence would go against Mekar's own public policy.

140. In the absence of convincing evidence, the enforcement of an award could never constitute a denial of justice. Following the *EDF* reasoning, no violation of the Treaty could be found in the instant case. Furthermore, this was consistent with the legal framework under the New York Convention, which entitles domestic courts to enforce awards even if they had been annulled at the seat.[223]

141. Overall, both procedural and substantive justice has been ensured by Mekari courts. Therefore, Claimant has not been denied justice by Respondent.

* * *

142. In conclusion, (**I**) Mekar's administrative organs and authorities acted at all times within their regulatory power, (**II**) Mekar did not discriminate against Caeli when granting State aid, and (**III**) Mekari courts have ensured Vemma's access to justice. Therefore, at all times Mekar provided fair and equitable treatment to Vemma, in accordance with Article 9(9) of the CEPTA.

PART FOUR: MEKAR OWES NO COMPENSATION

143. Vemma alleges that Respondent owes compensation according to the "fair market value" of its investment.[224] Nonetheless, this departs from the "market value" standard expressly agreed in the CEPTA. In addition, Mekar has already paid the "market value" of Vemma's investment when purchasing its stake in Caeli Airways for USD 400 million, and hence owes no compensation.

144. Thus, it will be demonstrated that (**I**) Claimant has already received compensation according to the "market value" of its investment, and that (**II**) if further compensation is awarded, it must be reduced.

[223] Annex XV, LL. 2341-2349.
[224] Notice, ¶30.

I. CLAIMANT HAS ALREADY RECEIVED COMPENSATION ACCORDING TO THE "MARKET VALUE" OF ITS INVESTMENT

145. In light of Article 9(21) of the CEPTA, the "market value" standard is the binding standard of compensation for alleged FET breaches. In this sense, (**A**) Vemma cannot depart from the "market value" standard specifically provided by the CEPTA; and no compensation is owed since (**B**) Mekar has already paid the "market value" of Claimant's investment.

A. Claimant cannot depart from the "market value" standard specifically provided by the CEPTA

146. Vemma intends to receive compensation according to the "fair market value" standard by invoking customary international law and the most favoured nation ("**MFN**") clause in the CEPTA.[225] However, none of these grounds allows Claimant to derogate from the "market value" standard, expressly prescribed in Article 9(21).

147. On the one hand, according to customary international law, the appropriate standard for quantifying compensation is the one prescribed in the relevant treaty.[226] This election is decisive for achieving adequate quantification. In the instant case, Article 9(21) of the CEPTA provides that non-expropriatory breaches must be compensated according to the "market value" standard. Therefore, despite Vemma's attempt to argue otherwise, customary international law does not allow the Tribunal to depart from the "market value" standard expressly prescribed in the CEPTA.

148. On the other hand, as to the MFN standard, its analysis must take into consideration the specific terms provided in each treaty and must focus on its distinctive details.[227] In order to allow the importation of any substantive provision ―such as compensation― the wording of the MFN clause must be sufficiently broad. However, Article 9(7) of the CEPTA portrays a restrictive interpretation. It provides that investors ought to be accorded treatment no less favourable than the treatment Mekar accords "*in like situations*" to investors of a third country. More importantly, the clause contains the following clarification:

> substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute 'treatment,' and

[225] Notice, ¶30.
[226] *UNCTAD Report*, P. 90.
[227] *Batifort and Heath,* P. 913.

> thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.

149. Similarly worded MFN clauses were interpreted by the tribunals in *İçkale* and *Muhammet.* In these cases, the tribunals had to evaluate whether the applicable MFN provisions were wide enough so as to encompass the importation of substantive standards of treatment. Both clauses constrained the application of the MFN clause to treatment "*no less favourable than that accorded in similar situations*". [228] The tribunals held that such wording limited its scope of application to differences in actual treatment granted by the State to investors, rather than to mere theoretical differences.[229] On that account, there must be factual evidence of measures taken by the host State directed towards investments of actual investors that are in a similar situation.[230]

150. This sort of clauses set an extra boundary for the MFN standard since they only admit *de facto* more favourable treatments given to other parties.[231] In this regard, there must be an existent and concrete more favourable treatment received by a third party, in comparison to that received by the investor.[232] Considering such restrictive wording, the concept of "treatment" is limited to specific measures taken by the State like favourable conditions to participate in specific economic activities or preferential approval for the operation of the business.[233]

151. In the present case, Vemma seeks to depart from the standard expressly agreed by the Contracting Parties.[234] Nonetheless, Claimant cannot use the MFN clause to conveniently cherry pick any provision. Article 9(7) of the CEPTA expressly establishes that the MFN standard can only be triggered when investors are "in like circumstances".[235] As above mentioned, this does not extend to abstract or hypothetical scenarios of treatment. In this sense, the notion of "treatment" provided in the CEPTA is circumscribed to the existence of a specific more favourable measure.

152. According to the MFN Clause provided in the CEPTA, a compensation standard could not constitute "treatment" under the Treaty. The "fair market value" standard of compensation

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[228] *Muhammet,* ¶790; *Ickalo,* ¶780.
[229] *Ickale*, ¶329; *Muhammet*, ¶¶783, 789.
[230] *Muhammet,* ¶784.
[231] *Sharmin*, P. 268.
[232] *Sharmin*, P. 268.
[233] *UNCTAD Report*, P. 16.
[234] Notice, ¶30.
[235] CEPTA, LL. 2710-2720.

constrains the Tribunal's sphere of action when assessing the quantification of damages, but does not imply any specific measure taken by the State. To this extent, the compensation that may be awarded by the Tribunal could never be construed as a treatment granted by the State towards an investor.

153. Overall, this Tribunal must reject Claimant's submission to import the "fair market value" in the present procedure since it does not fall within the limited scope of the MFN clause provided in the CEPTA. Hence, compensation should be assessed according to the "market value" of the investment, in accordance with Article 9(21).

B. Mekar has already paid the "market value" of Claimant's investment

154. Respondent has already paid the "market value" of Vemma's investment when purchasing its stake in Caeli Airways for USD 400,000,000, a price that was accepted by Vemma.[236]

155. The "market value" of an asset is calculated by the actual price received in an arm's-length transaction for the sale of that very asset.[237] If the asset subject to the dispute has been recently sold, the selling price reflects its "market value".[238]

156. When Vemma decided to sell its stake in Caeli, it organized an open-ended competitive bidding process. The only offer received by Vemma was a *mala fide* one, and was thus unacceptable under the terms of the Shareholders' Agreement.[239] Claimant's efforts to yield another buyer for its shares failed. [240] Given the scenario in which Vemma pretended to sell its shares, Mekar offered a reasonable price for its investment, USD 400,000,000. This emerged as the only *bona fide* offer. In such conditions, the price paid by Mekar amounted to the "market value" of Vemma's investment.

157. Overall, this Tribunal should find that Mekar has already compensated Vemma when purchasing its stake in Caeli Airways for USD 400,000,000. Therefore, Vemma is not entitled to receive further compensation.

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[236] Facts, ¶63.
[237] *Trenor,* P. 261.
[238] *Trenor,* P. 261.
[239] Facts, ¶57.
[240] Facts, ¶55.

II. IF FURTHER COMPENSATION IS AWARDED, IT MUST BE REDUCED

158. In the event that the Tribunal considers that further compensation shall be awarded, this amount must be reduced on the grounds of (**A**) Claimant's contribution to the causation of the damage and (**B**) the economic crisis in Mekar.

A. Claimant contributed to the causation of the damage

159. It was the risky business strategy adopted and maintained by Vemma that precipitated into a precarious financial situation for Caeli when the economic downturn hit Mekar. This conduct cannot be attributed to Respondent, since it was Claimant's ill-advised business strategy that caused the alleged damages.

160. Article 39 of the ILC Draft Articles provides that compensation shall be reduced when there is a negligent action or omission by the investor that materially contributes to the damage it suffered. An award of damages may be reduced if the claiming party committed a fault which negligently contributed to the prejudice it suffered.[241] In the same vein, negligence is manifested when an enterprise acknowledges a dangerous situation, yet still voluntarily encounters it.[242] When assessing if such negligent conduct materially contributed to the damage, arbitral tribunals often refer to the 'but-for' test by asking: "*would the investor's damage occur but for its own act?*".[243]

161. In *Occidental*, the investor's unlawful behaviour had contributed to the State's decision to terminate the concession previously granted.[244] In such context, the tribunal considered whether the causal chain leading to the harm suffered by the investor could be traced back to its own conduct.[245] Consequently, the tribunal reduced compensation awarded to the claimant by a 25%.

162. Furthermore, in *MTD*, the tribunal reduced compensation on the basis that the claimant did not act as a "wise investor" since it had acted negligently in assessing risks.[246] In this sense, it held that compensation can also be reduced due to the investor's mismanagement since bilateral investment treaties are not insurance policies against bad business judgments.[247]

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[241] *Occidental*, ¶¶678, 687.
[242] *Crawford,* ¶240.
[243] *Yukos*, ¶¶1633, 1790, 1798.
[244] *Occidental,* ¶678.
[245] *Occidental*, ¶669.
[246] *MTD,* ¶¶242-243.
[247] *Maffezini*, ¶64.

The tribunal finally reasoned that the investor could have mitigated the damages suffered if it had deployed a better business judgment.[248] On that basis, compensation was reduced.

163. In the instant case, Vemma has contributed in two ways to Caeli's downfall.

164. Firstly, Claimant's anticompetitive behaviour was the main cause of the damages it suffered.[249] The causal chain leading to the harm suffered by Caeli can be traced back to its own misconduct. In fact, if Claimant had complied with the law, its investment would not have suffered the damages it is now trying to pinpoint on Respondent.

165. Secondly, Caeli's risky business choices were from the beginning ill-advised and bound to fail. Actually, Claimant adopted a negligent conduct when deciding to expand its fleet, having a declining profit and being cautioned otherwise.[250] This was specifically discouraged by Mekari board members and authorities who, instead, advised Caeli to cut back its operations on certain routes.[251] Furthermore, if Caeli had focused on its debts, this situation would have been avoided since the failure to honour them prevented it from receiving loans that could have alleviated the crisis.[252]

166. Instead, Caeli adopted an imprudent conduct with respect to the oil price crisis and took careless decisions which left it in a situation of financial distress when prices increased.[253] Despite being aware that many Mekari airlines had to shut down due to the effects of rising fuel prices, Claimant maintained its business strategy untouched.[254] Aviation Analytics, a leading international quarterly, pinned Caeli's fate on enthusiastic overexpansion that was decisively ill conceived.[255] In light of such behaviour, it was Caeli's own choices that led its profitability to deeply decrease.[256]

167. Only when its strategy turned sour, Respondent was finger pointed and blamed by Claimant for the losses caused by its own mismanagement. As a consequence, Mekar cannot be held responsible for what was indeed poor economic performance of Claimant's investment despite the constant warnings of its failing approach.[257] The compensation

[248] *MTD,* ¶¶242-243.
[249] Annex IX, LL. 1958-1959.
[250] Facts, ¶¶31, 35.
[251] Facts, ¶¶33, 35.
[252] Facts, ¶51; Annex IX, L. 1958.
[253] Facts, ¶48.
[254] Facts, ¶34.
[255] Annex IX, L. 1956.
[256] Facts, ¶53.
[257] Facts, ¶¶29, 33.

seeked by Vemma (USD 700,000,000) does not account for the consequences caused solely by its mismanagement and unlawful acts.

168. All in all, it has been demonstrated that Caeli chose to be consistently negligent when assessing its business strategy, although it was expressly advised to adopt another approach. This materially contributed to the damages Claimant brought upon itself. Therefore, the Tribunal must reduce compensation proportionally to the extent to which Claimant contributed to the damage.

B. Mekar's economic crisis must be taken into consideration to reduce compensation

169. If any compensation is awarded, it must also take into account the dire financial and economic situation in Mekar.[258] Otherwise, the Tribunal would be awarding a crippling compensation that would be contrary to the purpose of the CEPTA.

170. There is an international trend towards drafting more comprehensive treaties that is deeply associated with a general commitment against crippling compensations. [259] In fact, Prof. Crawford sustains that this trend is consonant with the modern understanding of compensation.[260] Hence, arbitral tribunals must endorse the notion of equity when assessing compensation.[261]

171. The CEPTA falls within the scope of this trend. Indeed, the CEPTA's preamble provides for an encompassing approach that explicitly recognizes the importance of human rights and the relevance of economic differences between contracting States.[262] The incorporation of such notions denotes that the Contracting Parties sought to ensure a guideline towards modern principles.

172. In this vein, the tribunal in *Sempra* had to analyse whether Argentina's economic crisis could justify a reduction in compensation. For this purpose, it established that the "*manner in which the law has to be applied cannot ignore the realities resulting from a crisis*

[258] PO3, ¶4.
[259] *Crawford,* P. 885.
[260] *Crawford,* P. 885.
[261] *Sornarajah*, P. 131; *EECC*, ¶29.
[262] CEPTA, L. 2490.

situation".[263] Following this criterion, the tribunal concluded that it should take into account the crisis conditions affecting Argentina when determining the compensation.[264]

173. The currency crisis that ensued in Mekar at the beginning of 2017 had very severe economic consequences[265]. An IMF report released in 2019 predicted four consecutive quarters of contraction for Mekar and an 8% fall in the GDP, together with an annual inflation rate of up to 2600% in 2020. [266] The report also noted that Mekar was facing a potential third debt default in as many decades.[267] Consequently, Respondent was unable to guarantee solvency towards many business sectors, amongst which was the airline industry.[268]

174. If Mekar were to pay the USD 700,000,000 that Claimant demands, it would have to disburse an amount that is twice its consolidated annual public spending.[269] This would result in a deprivation of Mekar's means to subsist and to guarantee the welfare of its own population. Respondent would not have sufficient resources to prioritize the basic necessities of its people, such as health, education and security.[270]

175. If such compensation is not reduced, the purpose of the CEPTA would be contradicted, together with the modern notion against crippling compensations that the Treaty depicts. Thus, the Tribunal must reduce compensation.

* * *

176. Overall, as demonstrated above, (**I**) Mekar has already paid the "market value" of the investment when purchasing Vemma's shares and, thus, does not owe further compensation. In the event that any compensation is awarded, (**II**) this Tribunal must reduce the quantum considering Claimant's contributory fault and the ongoing economic crisis in Mekar.

[263] *Sempra*, ¶397.
[264] *Sempra*, ¶¶396-397. See also: *EECC*, ¶22.
[265] Facts, ¶39.
[266] PO3, ¶4.
[267] PO3, ¶4.
[268] Facts, ¶39.
[269] PO3, ¶4.
[270] PO3, ¶4.

REQUEST FOR RELIEF

In light of the above submissions, Respondent respectfully requests this Tribunal to:

(**i**) Find that it lacks jurisdiction over the present dispute.

(**ii**) Grant the CRPU's Submission.

(**iii**) Reject the CBFI's Submission.

(**iv**) If the Tribunal finds it has jurisdiction to hear this dispute:

a. Find that Mekar ensured fair and equitable treatment to Vemma.

b. Find that Mekar did not breach its obligations under Article 9(9) of the CEPTA.

c. Find that Mekar owes Claimant no compensation.

(**v**) Order Vemma to reimburse Mekar for all costs and expenses associated with this arbitration.

Submitted on 23 September 2021 by Team Vicuna

On behalf of Respondent

THE FEDERAL REPUBLIC OF MEKAR.