# THE INTERNATIONAL CENTRE

# FOR SETTLEMENT OF INVESTMENT DISPUTES

**Vemma Holdings Inc.**

**Claimant**

**v.**

**The Federal Republic of Mekar**

**Respondent**

## Memorial for Respondent

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

| **TREATIES and CONVENTION** | |
|---|---|
| *63rd Session ILC Report* | General Assembly Official Records, *Report of the International Law Commission of its sixty-third session,* 2011, U.N. Doc. A/66/10 |
| *ARIO* | International Law Commission, *Draft Articles on the Responsibility of International Organizations, with commentaries*, 2011 |
| *ARSIWA* | International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* 2001 |
| *New York Convention* | *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* 10 June 1958 |
| *UNCITRAL Arbitration Rules* | United Nations Commission on International Trade Law (UNCITRAL), *UNCITRAL Arbitration Rules*, 2010, General Assembly Resolution 31/98 |
| *VCLT* | United Nations, *Vienna Convention on the Law of Treaties* (23 May 1969) |

| **INVESTMENT DISPUTE CASES** | |
|---|---|
| *ADC* | *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary,* Award of the Tribunal (2006) ICSID Case No. ARB/03/16 |
| *Bayindir* | *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Award (2009) ICSID Case No. ARB/03/29 |
| *BG Group* | *BG Group Plc. v. The Republic of Argentina*, Final Award (2007) |

| | |
|---|---|
| | UNCITRAL |
| *CMS* | *CMS Gas Transmission Company v. The Argentine Republic,* Award (2005) ICSID Case No. ARB/01/8 |
| *El Paso* | *El Paso Energy International Company v. Argentina,* Award (2011) ICSID Case No. ARB/03/15 |
| *Enron* | *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, Award (2007) ICSID Case No. ARB/01/3 |
| *LG&E* | *LG&E Energy Corp and others v. Argentina,* Decision on Liability (2006) ICSID ARB/02/1. |
| *Maffezini* | *Emilio Agustín Maffezini v. The Kingdom of Spain*, Decision of the Tribunal on Objection to Jurisdiction (2000) ICSID ARB/97/7 |
| *Methanex* | *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (2005) UNCITRAL |
| *MTD* | *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, Award (2004) ICSID Case. No. ARB/01/7 |
| *Occidental I* | *Occidental Exploration and Production Company v. Republic of Ecuador*, Award (2004) LCIA Case No. UN3467 |
| *Occidental II* | *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador*, Award (2012) ICSID ARB/06/11 |
| *Parkerings* | *Parkerings-Compagniet AS v. Republic of Lithuania*, Award (2007) ICSID Case No. ARB/05/8 |
| *Philip Morris* | *Philip Morris Asia Limited v. The Commonwealth of Australia*, Award on Jurisdiction and Admissibility (2015) UNCITRAL, PCA Case No. 2012-12 |
| *Saluka* | *Saluka Investments BV v. The Czech Republic,* Partial Award (2006) UNCITRAL- PCA |
| *SD Myers* | *S.D. Myers, Inc. v. Government of Canada,* Partial Award (2000) UNCITRAL |
| *Tecmed* | *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, Award (2003) ICSID Case No. ARB(AF)/00/2 |
| *Telekom* | *Deutsche Telekom v. India,* Interim Award (2017) PCA Case No. 2014-10, |
| *Thunderbird* | *Thunderbird v. Mexico, International Thunderbird Gaming Corporation v. The United Mexican States,* Arbitral Award (2006) UNCITRAL |
| *Waste Management* | *Waste Management Inc. v. United Mexican States*, Final Award (2004) ICSID Case No. ARB/AF/003 |

| **BOOKS** | |
|---|---|
| Baumgartner | Baumgartner, Jorun. *Treaty Shopping in International Investment Law* (Oxford: Oxford University Press, 2017) |
| Buckley | Buckley, Ralf. *International Trade, Investment, and Environment Regulation. An Environmental Management Perspective* ( Switzerland: Werner Publishing, 1993) |
| Casteleiro I | Casteleiro, Andrès Delgado. *The International Responsibility of the European Union: From Competence to Normative Control* (Cambridge: Cambridge University Press, 2016) |
| Casteleiro II | Casteleiro, Andrès Delgado 'United We Stand: The EU and its Member States in the Strasbourg Court' in Vasiliki Kosta, Nikos Skoutaris and Vassilis Tzevelekos *The EU Accession to the ECHR* (S.L: Hart Publishing, 2016) |
| Craig | Craig, William Laurence., *et al. International Chamber of Commerce Arbitration* (New York: Oceana Publ, 2001) |
| Crawford | Crawford, James, and Kate Parlett. *The Law of International Responsibility* (Oxford: OUP, 2013). |
| Dimopoulos | Dimopoulos, Angelos. *EU Foreign Investment Law* (Oxford: OUP, 2012) |
| Dolzer and Schreuer | Dolzer, Rudolf, Christoph Schreuer. *Principles of International Investment Law* (Oxford: Oxford University Press, 2012) |
| Fink | Fink, Melanie. *Frontex and Human Rights: Responsibility in Multi-Actor Situations under the ECHR and EU Public Liability Law* (Oxford: Oxford University Press, 2019) |
| Kläger | Kläger, Roland. *Fair and Equitable Treatment in International Investment Law* (Cambridge: Cambridge University Press, 2011) |
| Kovács | Kovács, Csaba. *Attribution in International Investment Law*. (Netherland: Kluwer Law International, 2018) |
| Kuijper & Paasivirta II | Kuijper, Pieter Jan, and Esa Paasivirta. 'EU International Responsibility and its Attribution: From the Inside Looking Out' in Malcolm Evans and Panos Koutrakos *The International Responsibility of the European Union: European and International Perspectives* (London: Hart Publishing, 2013) |
| Muchlinski | Muchlinski, Peter, et al. *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) |
| Nanteuli | Nanteuli, Arnaud. *International Investment Law* (Northampton: Edward Elgar Publishing, 2020) |

| | |
|---|---|
| Newcombe | Newcombe, Andrew Paul, and Paradell Lluís. Law and Practice of Investment Treaties: Standards of Treatment (Austin: Wolter Kluwer Law and Business, 2009) |
| Ortino | Ortino, Federico. *Basic Legal Instruments for the Liberalisation of Trade: A Comparative Analysis of EC and WTO Law* (Portland: Hart Publishing, 2004) |
| Scheuer | Scheuer, Christoph. 'Protection Against Discriminatory or Arbitrary Measures' in Catherine A. Rogers, Roger P. Alford *The Future of Investment Arbitration* (New York: Oxford University Press, 2009) |
| Snell | Snell, Jukka. *Goods and Services in EC Law: A Study of the Relationship Between the Freedoms* (Oxford: Oxford University Press, 2005) |
| Stefan | Stefan, Talmon. 'Responsibility of International Organizations: Does the European Community Require Special Treatment?' in Maurizio Ragazzi *International Responsibility Today: Essays in Memory of Oscar Schachter* (Boston: Martinus Nijhoff Publishers, 2013). |
| Stegmann | Stegmann, Philipp Theodor. *Responsibility of the EU and the Member States under EU International Investment Protection Agreements* (Cham: Springer International Publishing, 2019) |

| **JOURNALS** | |
|---|---|
| Dannenbaum | Dannenbaum, Tom. "Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers" (2009) 51 Harvard International Law Journal 1 |
| Goh | Goh, Nelson. "The Assignment of Investment Treaty Claims: Mapping the Principles" (2019) 10 Journal of International Dispute Settlement 1 |
| Handeyside | Handeyside, Hugh. "The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?" (2007) 29 Michigan Journal of International Law 71 |
| Hoffmeister | Hoffmeister, Frank. "Litigating against the European Union and Its Member States - Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?" (2010) 21 European Journal of International Law 3 |
| Johansen | Johansen, Stian Øby. "Dual Attribution of Conduct to Both an International Organisation and a Member State" (2019) 6 Oslo Law Review 3 |

| | |
|---|---|
| Kirtley | Kirtley, William Lawton. "The Transfer of Treaty Claims and Treaty-Shopping in Investor-State Disputes" (2009) 10 The Journal of World Investment and Trade 3 |
| Kochenov | Kochenov, Dimitry. "Article 7: A Commentary on a Much Talked-About Dead Provision" (2018) 38 Polish Yearbook of International Law |
| Kuijper & Paasivirta I | Kuijper, Pieter and Esa Paasivirta, "Further Exploring International Responsibility: The European Community and the ILC's project on responsibility of international organizations" (2004) 1 International Organizations Law Review 1 |
| Palchetti | Palchetti, Paolo. "International Responsibility for Conduct of UN Peacekeeping Forces: The Question of Attribution" (2015) 36 Seqüência: Estudos Jurídicos e Políticos 70 |
| Paul Blyschak | Paul Blyschak, State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protection, 6 J. INT'l L & INT'l REL. 1 (2011). |
| Sari | Sari, Aurel. "Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases" (2008) 8 Human Rights Law Review |
| Schill | Schill, Stephan "Arbitrator Independence and Academic Freedom" (2015) 15 J. The Journal of World Investment & Trade 1 |
| Waelde & Ndi | Waelde, Thomas, and George Ndi. "Stabilizing International Investment Commitments" (1996) 31 Texas International Law Journal 2 |
| Wehland | Wehland, Hanno. "The Transfer of Investments and Rights of Investors under International Investment Agreements -- Som--Some Unresolved Issues" (2014) 30 Arbitration International 3 |

# TABLE OF ABBREVIATIONS

| | |
|---|---|
| Bonooru/Respondent | the Commonwealth of Bonooru |
| Caeli Airways JSC | Caeli |
| CBFI | Consortium of Bonoori Foreign Investors |
| CCM | Competition Commission of Mekar |
| CEPTA | the Bonooru-Mekar Comprehensive Economic Partnership and Trade Agreement |
| CILS | Centre for Integrity in Legal Service |
| CRPU | Committee on Reform of Public Utilities |
| FET | fair and equitable treatment |
| ICSID Additional Facility Rules | the International Centre for the Settlement of Investment Disputes Additional Facility Rules |
| Mekar | the Federal Republic of Mekar |
| MON | Mekari Mon |
| MRTP Act | the Monopoly and Restrictive Trade Practice Act, as Amended in 2009 |
| SCC | Sinnoh Chamber of Commerce |
| SOEs | State-owned enterprises |
| Vemma/Claimant | Vemma Holdings Inc. |

# STATEMENT OF FACTS

## Parties to The Dispute

1. Vemma("Claimant"), an airline holding company incorporated pursuant to the laws of the Commonwealth of Bonooru, is the privatized successor of Bonooru Air.

2. Mekar("Respondent"), an developing country. Following its independence from Pevensie in 1947, it moved from an agrarian economy to one heavily reliant on rich resource deposits in order to secure rapid industrialisation.

3. In April 2014, Mekar and Bonooru signed CEPTA. The agreement entered into force on 15 October 2014. Mekar and Bonooru agreed to terminate the pre-existing BIT on 15 October 2014.

## Vemma's connection with Bonooru and Its Extravagant Approach

4. The Royal Narnian was chosen as the flag carrier of Bonooru, owned and operated by Vemma, BA Holdings' successor.

5. The Group's tender valued at 800 million USD was accepted on 5 January 2011. However, select members of Mekar's Committee on Reform of Public Utilities noted that Vemma's proposal relied on an overly optimistic forecast which did not account for serious volatility of fuel prices and potential takeover of the long-distance routes by

competitors.

6. In this period, it was also able to refinance its inherited debt liability from BPB at more favourable rates than available on the market.

7. While its revenues declined during the fall and winter quarters of these operating years, its summer and spring revenues cushioned its losses. The fall-winter decline was more than Vemma, which was accustomed to constant demand from business travellers in Bonooru, had expected.

8. At the end of 2015, Caeli placed orders for 45 Boeing 737 MAX aircraft and increased flying hours of its older aircraft, whose operational expenses were reduced in the wake of plummeting oil prices.

## The CCM's Anti-competitive Investigations

9. The CCM sought an undertaking from Caeli that it would not engage in high-level co-operation on competition parameters such as prices, schedules, capacity, facilities, and other sensitive information with Moon Alliance members, which was duly submitted.

10. By the end of August 2018, the CCM concluded its First Investigation into the commercial activities of Caeli Airways and issued a voluminous report on the results of the investigation. The CCM report found a breach of Mekar's antitrust legislation in the form of predatory pricing resulting from low airfares and loyalty programmes. The report also noted that the subsidies received by Vemma under the Horizon 2020 scheme helped

Caeli drastically reduce its airfare below its average avoidable costs. Accordingly, the CCM imposed a total penalty of MON 150 Million on Caeli. The CCM also decided to keep the airline caps in place pending the Second Investigation.

11. On 1 January 2019, the CCM completed its Second Investigation into Caeli. Its report concluded that Caeli had engaged in anti-competitive behaviour in conducting its business activities in Phenac International Airport. Specifically, it was found to have abused its dominant position to extract significant additional privileges in terms of airport service fees from Phenac International Airport, which allowed it to undercut ticket fares and eventually push other competitors off the market consisting of routes to and from Phenac International. Consequently, a fine in the amount of MON 200 million was imposed on Caeli Airways. The CCM also decided to continue to impose airfare caps until Caeli Airways' market share, with its fellow Moon Alliance member factored in, were to fall below 40%. While this market share stood at 42% at the time, Caeli continued to incur significant losses on the routes it operated.

12. By the third quarter of 2019, Caeli's market share in Mekar dropped below 40%, with its operations on most routes generating deep losses. The CCM lifted the applicable airfare caps in October 2019.

## The Secretary of Civil Aviation's Subsidies

13. On 25 September 2018, the President passed Executive Order 9-2018

(Annex VIII), granting subsidies to airlines for each Mekari citizen travelling on board. Caeli Airways' application for subsidies under this Order was rejected by the Secretary.

14. Caeli Airways was one of the only two airlines owned in any significant part by a foreign government operating in Mekar at the time, the other being the wholly government-owned Larry Air. Neither received subsidies under Executive Order 9-2018.

## Hawthorne Group LLP's Offer and the Arbitration

15. At the November 2019 meeting of Caeli Airways' board, representatives of Vemma announced their intention to sell their stake in Caeli Airways, given the burgeoning liabilities of the enterprise. Vemma secured an offer from Hawthorne Group LLP.

16. Mekar Airservices filed a request for arbitration on 11 February 2020 with the ("SCC") Arbitration Institute. It requested the tribunal to find that Vemma had failed to secure a bona fide third party offer under Article 39 of the Shareholders' Agreement. Following a fast-track arbitration procedure, the sole arbitrator rendered an award in favour of Mekar Airservices on 9 May 2020.

## Mekari Courts' Proceedings

17. The average time taken from commencing an action to receiving a

final decision in Mekari courts rose from 9 months in 1980 to 22 months in 2015. This was even higher in commercial matters (~27 months), as Mekar prioritized criminal cases to avoid prolonged detention for the accused.

18. Under Executive Order 5-2014, which grants a court the ability to dismiss without appeal a case by way of summary judgment where the judge finds there is very little chance of success on the merits. Mekar's President passed Executive Order 5-2014 in 2014 to expedite court proceedings and alleviate the backlog in Mekari courts.

19. On 20 January 2019, representatives of Caeli appealed both orders of the CCM in the Mekari courts. Caeli asked that this appeal be joined with the April 2019 hearing on the airfare caps. The registrar denied this request on 26 January 2019. The registrar subsequently scheduled an initial hearing on the Competition Authority' s fines for May 2020.

20. On 15 June 2019, Justice VanDuzer released his interim decision on the airfare caps, declining to remove them.

21. On 23 August 2020, the Court issued a ruling recognizing and enforcing the 9 May 2020 award in Mekar (Annex XIV). Vemma appealed the judgment before the Superior Court of Mekar, arguing that the award could not be enforced once it was set aside at the seat of the arbitration. On 25 September, the Superior Court dismissed Vemma's appeal (Annex XV).

# SUMMARY OF ARGUMENTS

## PROCEDURAL ISSUE: JURISDICTION

The Tribunal does not have jurisdiction over the present dispute pursuant to Article 9.16 of the CEPTA and Article 2 of the ICSID Additional Facility Rules. Firstly, the Tribunal does not have jurisdiction *ratione personae* as the Claimant falls out of the definition of investor under Article 9.1 of the CEPTA and its investment conducts were attributable to Bonooru. Secondly, the Tribunal does not have jurisdiction *ratione volutatis* as the Respondent never consented to a State-to-State arbitration under the CEPTA.

## PROCEDURAL ISSUE: ADMISSIBILITY

The Tribunal has the discretion to accept or reject an *amici* submission pursuant to Article 9.19 of the CEPTA and Article 41 of the ICSID Arbitration Facility Rules. The Tribunal should grant leave to the *amicus* submission from the external advisors to the CRPU as it can assist the Tribunal with new perspectives and has a significant interest in the proceeding. On the other hand, the Tribunal should reject the *amicus* submission from the external advisors to the CRPU for the opposite reason.

## MERITS: FAIR AND EQUITABLE TREATMENT

The Respondent did not violate fair and equitable treatment under Article 9.9 of the CEPTA. To specify, firstly, the measures implemented by the CCM have not constituted fundamental breach of due process, or arbitrary and discriminatory conducts. Secondly, the judicial proceedings implemented by Mekari courts have not constituted denial of justice. Thirdly, the refusal to grant subsidies to Caeli by the Secretary of Civil Aviation have not constituted discriminatory conduct. Fourth, the Claimant's expectation on the stability of legal framework should be balanced by the Respondent's regulatory right in the economic crisis.

## MERITS: COMPENSATION

As the Respondent did not violate FET, no compensation is due. Hower, if there was any, the compensation standard should be the market value as the most favoured nation treatment under Article 9.7 of the CEPTA is not applicable in this case. Besides, any compensation should be reduced considering the Claimant's contributory fault and the ongoing economic crisis in Mekar.

# ARGUMENTS

## PROCEDURAL ISSUES

**SUBMISSION 1: The Tribunal does not have jurisdiction over the present dispute.**

1. Pursuant to Article 9.16 of the CEPTA, if a dispute has not been resolved through mutual agreement, an investor of a party may submit a claim to Arbitration invoking this Tribunal's jurisdiction under the ICSID Additional Facility Rules.[1] Thus, this Tribunal may hear the dispute if Claimant fulfills the requirements set forth by the CEPTA and the ICSID Additional Facility Rules. However, the Claimant does not fulfill such requirements.
2. Presently, the Claimant argues that it qualifies as an "investor" under the CEPTA and an "national of another Contracting State" under Article 2 of the ICSID Additional Facility Rules. The Claimant further argue that the Respondent has consented to this arbitration under Article 9.16 of the CEPTA.
3. In response to this, the Respondent submits that this Tribunal should not hear Claimant's claims because it does not have jurisdiction **(A)** *ratione personae* and **(B)** *ratione volutatis*.

### A. The Tribunal does not have jurisdiction *ratione personae*.

4. The Respondent submits that the Tribunal does not have jurisdiction

[1] Moot Problem, the CEPTA, Article 9.16, ¶1,2.

*ratione personae* as **(1)** the Claimant does not fall into the scope of investor in the CEPTA and **(2)** the Claimant's conducts are attributable to Bonooru.

**1. The Claimant does not fall the scope of investor in the CEPTA.**

5. Pursuant to Article 9.1 of the CEPTA, the definition of investor reads as follows:

"Investor means a natural person with the nationality of a Party or an enterprise with the nationality of a Party or seated in the territory of a Party that seeks to make, is making or has made an investment in the territory of the other Party."[2]

6. According to Article 31 of the VCLT, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.[3]

7. If only looking at the definition of the investor, the Claimant may has the standing to the arbitration as Vemma is an enterprise constituted under the laws of Bonooru and has substantial business activities in Bonooru.[4] However, under Article 9.16 of the CEPTA, a claim submitted for dispute settlement strictly follow the procedures under the ICSID convention or the ICSID Additional Facility Rules,[5] which

---

[2] Moot Problem, the CEPTA, Article 9.1.
[3] VCLT, Article 31, ¶1.
[4] Moot Problem, Statement of Uncontested Facts, ¶10.
[5] Moot Problem, the CEPTA, Article 9.16.

only has jurisdiction between a State and a national of another State.[6] On the other hand, this excludes a State-to-State arbitration.

8. Besides, in the 1994 Bonooru-Mekar BIT, the definition of investor explicitly include enterprise whether privately-owned or government-owned.[7] However, in the CEPTA, the expression of State-owned enterprise has been deleted. This reflect the caution between the disputing parties concerning to the standing of State-owned enterprise in investor-State dispute settlement.

9. Therefore, the accordance with the literal definition of the investor in Article 9.1 of the CEPTA does not equivalent to the qualification of the arbitration. As the Claimant is a State-owned enterprise controlled by Bonooru, it has the standing to the arbitration only when its investment activities are not attributable to Bonooru, which is not in the present case.

**2. The Claimant's conducts are attributable to Bonooru.**

10. When analyzing whether an investor's behaviour is attributable to its home state, the Borches standard is widely applied in international investment arbitration jurisprudence.

11. According to the Borches standard first developed in the case *CSOB v. The Slovak Republic*, the decisive test is whether the company is acting as an agent for the government or is discharging essentially

[6] The ICSID Convention, Article 25; the ICSID Additional Facility Rules Article 2.
[7] Moot Problem, the 1994 Bonooru-Mekar BIT, Article 2.

governmental functions.[8]

12. Further, the Borches standard is closely related to Article 5 and 8 of the ARSIWA, which has been regarded as customary international law.[9] Pursuant to the ARSIWA, a conduct of a private entity is attributable to the state when the entity exercises governmental authority or is under the instruction, direction or control of the State.

13. The Respondent submits that those elements are satisfied in the present case as **(a)** the Claimant acted as a state agent and discharge essentially governmental functions during the investment, and **(b)** the Claimant acted under the control of Bonooru during the investment.

**a. The Claimant acted as a state agent and discharge essentially governmental functions during the investment.**

14. In the case *CSOB v. The Slovak Republic*, the tribunal held that according to the Broches standard, the judgment of discharging essentially governmental functions should focus on the nature of the activities.[10]

15. In the present case, Vemma's investment activities were combined with the governmental nature.

16. <u>*Firstly*</u>, the foreign investment in Mekar actually had a link with the governmental functions in Bonooru. The activities of Caeli Airway,

---

[8] CSOB v. The Slovak Republic, ¶19.
[9] Paul Blyschak, State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protection, 6 J. INT'l L & INT'l REL. 1 (2011).
[10] CSOB v. The Slovak Republic, ¶20.

namely the airline services were transnational, especially between Mekar and Bonooru.[11]

17. This airline services were considered as a tourism-related infrastructure in Bonooru, and providing the public infrastructure was a typical form of discharging governmental functions.[12] That's why Vemma receive the recurring subsidies under the Horizon 2020 of the Caspian project.[13]

18. Moreover, Vemma's investment was also directly subject to Bonooru' Caspian Project, which was initiated to facilitate the movement and infrastructure building in its neibouring Narnian States, with Bonooru's long-term goals of redefining trade patterns.[14]

19. <u>*Secondly*</u>, the nature of Vemma's investment activities, were substantially different from commercial activities conducted by market entities for the purpose of profit maximization.

20. As is confirmed by the Tribunal in case *Beijing Urban Construction Group v. Public of Yemen*, the issue is not the corporate framework of the State-owned enterprise, but whether it functions as an agent of the State in the fact specific context.[15]

21. For instance, Caeli Airways used to mainly operate routs for business

---

[11] Moot Problem, Statement of Uncontested Facts, ¶28.
[12] Moot Problem, Statement of Uncontested Facts, ¶29.
[13] Moot Problem, Statement of Uncontested Facts, ¶32.
[14] Moot Problem, Statement of Uncontested Facts, ¶4.
[15] Beijing Urban Construction Group v. Public of Yemen, ¶39.

travelers.[16] However, when Vemma started its investment, it instead attracted customers travelling from Mekar to Bonooru.

22. This decision was not totally profit-maximization, but was actually within the governmental nature, because it seemed to more benefit Bonooru than Vemma or Caeli.[17] As Bonooru can enjoy the change of traveller flows and promote its tourism industry, while the company suffered the losses and risks of profits in low-demand seasons.[18]

23. *Thirdly*, Vemma's investment activities were not strictly complied with the free-market competing principle. Vemma took many unusual, risky and extravagant commercial strategies, partly because it can always get the assurances and support from Bonooru due to its ownership of the national carrier and the assisting role of guaranteeing mobility rights.[19]

24. Therefore, Vemma's investment activities in Mekar were actually discharging governmental function.

**b. The Claimant acted under the control of Bonooru during the investment.**

25. According to Article 8 of the ARSIWA, control means the group of persons is in fact acting on the instruction of, or under the direction or

[16] Moot Problem, Statement of Uncontested Facts, ¶28.
[17] Moot Problem, Annex VII.
[18] Moot Problem, Statement of Uncontested Facts, ¶31.
[19] Moot Problem, Statement of Uncontested Facts, ¶9.

control of that state in carrying out the conduct.[20]

26. Admittedly, the ownership structure is an important factor to determine control, and Bonooru's 31%-38% shares did not itself constitute a controlling status in ownership.[21]

27. However, the ownership structure cannot be the dominant factor, the Respondent suggest the Tribunal to take into consider other factors; when put together, they actually show the controlling status of Bonooru.

28. Other factors that the Tribunal may consider, include

29. *Firstly*, the majority voting rights of Bonoori representatives in Vemma's regular meetings, including meetings for electing directors.[22]

30. *Secondly*, Bonooru's nomination right of Vemma's non-executive director.[23]

31. *Thirdly*, the fact that former head of Vemma’s board of directors had been appointed as Bonooru's Secretary of Transport and Tourism.[24]

32. *Lastly*, the governmental policies and interests that the company is pursuing and assisting, as clearly stated in the Memorandum of Association of Vemma.[25]

---

[20] The ARSIWA, Article 8.
[21] Moot Problem, Statement of Uncontested Facts, ¶10.
[22] Moot Problem, Procedural Order No.3, ¶3.
[23] Moot Problem, Annex IV, ¶152.4.
[24] Moot Problem, Statement of Uncontested Facts, ¶22.
[25] Moot Problem, Annex IV, ¶3(h).

33. All these factors, combined with the sizeable shares, can support the control of Bonooru.

34. To sum up, The Claimant's investment activities in Mekar is attributable to Bonooru and the Tribunal has no jurisdiction *ratione personae*.

**B. The Tribunal has jurisdiction *ratione volutatis*.**

35. Consent is a basic premise for the arbitration. Pursuant to Article 9.16 of the CEPTA, the consent in the CEPTA should be deemed to satisfy the requirements of the ICSID Additional Facility Rules for written consent of the parties to the dispute.

36. However, under the CEPTA, the consent of the Respondent is strictly limited to Investor-to-State arbitration, but not a State-to-State Arbitration.

37. To conclude, the Tribunal has jurisdiction over the present matter.

**SUBMISSION 2: The Tribunal should grant the leave sought for filing *amici* submission from the external advisors to the CRPU and reject the submission from the CBFI.**

38. Pursuant to Article 9.19 of the CEPTA and Article 41 of the ICSID Arbitration Facility Rules, the Tribunal has the discretion to accept or reject an *amici* submission. The Tribunal should consider (i) whether the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by

bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (ii) whether the non-disputing party submission would address a matter within the scope of the dispute; and (iii) whether the non-disputing party has a significant interest in the proceeding.[26]

39. Considering the aforementioned standards, the Claimant submits that **(A)** the Tribunal should grant leave to the *amicus* submission from the external advisors to the CRPU, and **(B)** the Tribunal should reject the *amicus* submission from the CBFI.

## A. The Tribunal should grant leave to the *amicus* submission from the external advisors to the CRPU.

40. The Tribunal should reject the *amicus* submission from the external advisors to the CRPU as **(1)** the submission of the external advisors to the CRPU falls into the scope of the dispute and can assist the Tribunal with new perspectives on laws and facts, and **(2)** the members of external advisors to the CRPU have significant interest in the proceeding.

### 1. The submission of the external advisors to the CRPU falls into the scope of the dispute and can assist the Tribunal with new perspectives on laws and facts.

41. The non-disputing party's submission should address a matter within

[26] The CEPTA, Article 9.19; the ICSID Arbitration Facility Rules, Article 41.

the scope of the dispute, which is also consistent with the rule of autonomy of the will and the consent between disputing parties.

42. The submission especially pointed out the bribery issue of the Claimant's investment. Taken the anti-corruption as an important issue of public policy in investor-state dispute settlement, the Tribunal may be more cautious when assessing Vemma's claims, and may consider the unlawfulness of Vemma's investment when deciding the issues on liability and compensation.[27]

**2. The members of the external advisors to the CRPU have significant interest in the proceeding.**

43. The Tribunal in case *Eli Lilly and Company v. The Government of Canada* held that significant interest requests the *amicus* parties to state that the outcome of the case may have impact on the rights and principles they represent or defend.[28]

44. The members of the external advisors to the CRPU have significant interest in the proceeding given that the corruption issue in the investment would directly influence the profitability of the external advisors to the CRPU.

45. Therefore, the *amicus* submission from the external advisors to the CRPU should be accepted.

**B. The Tribunal should reject the *amicus* submission from the CBFI.**

---

[27] Moot Problem, Amicus Submission by the external advisors to the CRPU, ¶6.
[28] Eli Lilly and Company v. The Government of Canada, ¶20.

46. The Tribunal should reject the *amicus* submission from the CBFI as **(1)** the CBFI submission falls out of the scope of the dispute and cannot assist the Tribunal with new perspectives on laws and facts, and **(2)** the CBFI members do not have significant interest in the proceeding.

**1. The CBFI submission falls out of the scope of the dispute and can assist the Tribunal with new perspectives on laws and facts.**

47. For the purpose of saving time and costs during the arbitral proceedings, the non-disputing party's submission should fall into the scope of the dispute and should be helpful to the judgment of the Tribunal.

48. However, the CBFI submission failed to meet this threshold because its concerns about the standing of State-linked enterprises were just the repetition of the Claimant's arguments and the legal framework had already been well recognized in the Uncontested Fact.[29]

49. Therefore, it cannot provide the Tribunal with particular knowledge or insight that is different from the disputing parties.

**2. The CBFI members have significant interest in the proceeding.**

50. In the present case, however, Vemma is the only investor involved in this arbitration, so the decision of this arbitration will not have any impact on the rights or interests of other investors that the CBFI is

[29] Moot Problem, Amicus Submission by the CBFI, ¶10.

representing.

51. Therefore, the *amicus* submission from the CBFI should be rejected.

## MERITS

**SUBMISSION 3: The Respondent have not violated fair and equitable treatment under Article 9.9 of the CEPTA.**

52. Under Article 4 of ARSIWA, any conduct of a state organ shall be considered an act of the state under international law whether the organ exercises legislative, executive, judicial, or any other functions.[30] Therefore, the conducts of the CCM, Mekari courts, the Secretary of Civil Aviation and the government are attributable to the Respondent. Besides, pursuant to Article 11 of ARSIWA, a conduct should be considered an act of the State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.[31] Presently, the Respondent has agreed to accept that all actions taken by Mekar Airservices Ltd. were at all material times attributable to Mekar.[32]

53. Having established that the conducts of the above organs and company are attributable to Mekar, the Respondent submits that these conducts have not violated FET contained in Article 9.9 of the CEPTA. The provision reads as follows:

---

[30] ARSIWA, Article 4.
[31] ARSIWA, Article 11.
[32] Moot Problem, Procedural Order 1, ¶17.

"Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7."[33]

54. Interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose,[34] along with State practice and judicial or arbitral case law[35], Article 9.9 impose imposes several obligations for the Respondent.

55. The Respondent have acted in compliance with these obligations as **(A)** The measures implemented by the CCM did not violate FET; **(B)** The judicial proceedings implemented by Mekari courts did not constitute denial of justice; **(C)** The refusal to grant subsidies to Caeli by the Secretary of Civil Aviation did not constitute discriminatory conduct; **(D)** The Claimant's expectation on the stability of legal framework should be balanced by the Respondent's regulatory right in the economic crisis.

## A. The measures implemented by the CCM did not violate FET.

56. The CCM's anti-competitive investigations did not violate FET. To specify, its administrative procedures did not violate due process under paragraph 2(b), Article 9.9 of the CEPTA, and its substantive decisions were not arbitrary or discriminatory under paragraph 2(3),

---

[33] Moot Problem, the CEPTA, Article 9.9, ¶1.
[34] VCLT, Article 31, ¶1.
[35] ADF, para. 184; see also Mondev, para. 119.

Article 9.9 of the CEPTA.

57. The Respondent submits that **(1)** the investigations of the CCM did not constitute fundamental breach of due process including transparency; **(2)** the *First Investigation* of the CCM was reasonable and did not frustrate the Claimant's legitimate expectation; **(3)** the *Second Investigation* of the CCM was reasonable and did not frustrate the Claimant's legitimate expectation; **(4)** the decision to stay the airfare caps during the economic crisis of the CCM was reasonable and proportionate.

**1. The investigations of the CCM did not constitute fundamental breach of due process including transparency.**

58. Fundamental breach of due process including a fundamental breach of transparency, in judicial and administrative proceedings violates FET.[36]

59. As for the concept of due process, in case *ADC Affiliate Ltd and others v. Hungary*, the Tribunal held that due process of law demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily

[36] Moot Problem, the CEPTA, Article 9.9, ¶2(b).

available and accessible to the investor to make such legal procedure meaningful.

60. And as for transparency, at a most general level, a legal system may be deemed transparent if its legal texts are clear, unambiguous and readily accessible, if the relevant information is provided in order to foresee the government's activities and policies, and if clear procedures are available, by means of which compliance to the announced rules and policies may be reviewed.[37]

61. In this case, the Respondent has acted in compliance with the principle of due process and transparency,because even before the Claimant ' s investment was admitted in Mekar, it was sufficiently notified that any anti-competitive behaviour would be subject to the review and investigations of the CCM.[38]

**2. The *First Investigation* of the CCM was reasonable and did not frustrate the Claimant's legitimate expectation.**

62. Arbitrary and discriminatory conducts violate FET.[39] Arbitrary is characterised as "[d]epending on individual discretion; ... founded on prejudice or preference rather than on reason or fact".[40] Pursuant to paragraph 3, Article 9.9 of the CEPTA, when applying the above FET

---

[37] C. S. Zoellner, 'Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law', Mich. J. Int'l L. 27 (2006), pp. 583 585; and P. Craig, EU Administrative Law (2006), pp. 350 351.

[38] Moot Problem, Statement of Uncontested Facts, ¶12.

[39] Moot Problem, the CEPTA, Article 9.9, ¶2(c).

[40] Garner (ed.).

obligation, the investor's legitimate expectation should also be taken into consideration.[41]

63. Pursuant to paragraph 3, Article 9.9 of the CEPTA, a legitimate expectation is created when the State made a specific representation to an investor to induce a covered investment, upon which the investor relied in deciding to make or maintain the covered investment.[42] Arbitral practice confirms that specific representations made by the host state are capable of generating legitimate expectations and must be protected under the FET if they are later repudiated by the state.[43]

64. However, as emphasized in case *LG&E v. Argentina*, not every expectation of the investor is protected, but only legitimate expectations should be protected and only if there was reasonable reliance on them.[44]

65. In the present case, during the First investigation, the Claimant's expectation is not legitimate.

66. *Firstly*, in the CCM's approval decision of March 2011 concerning to Vemma's investment, the CCM sought an undertaking from Caeli that it would not engage in high-level co-operation on competition parameters such as prices, schedules, capacity, facilities, and other

---

[41] Moot Problem, the CEPTA, Article 9.9, ¶3.
[42] Moot Problem, the CEPTA, Article 9.9, ¶3.
[43] Parkerings, ¶98; Glamis Gold, ¶799.
[44] LG&E v. Argentina, ¶55.

sensitive information.[45]

67. That is to say, the Claimant was fully notified and aware of the fact that high-level cooperation would raise anti-competitive concerns.

68. However, after the First Investigation, clear and sufficient evidence shows that there was preferential secondary slot-trading between the Royal Narnian and Caeli[46], which constituted a violation of the Claimant’ s undertakings not to engage in high level cooperation in schedules, capacity and facilities.

69. As recognized internationally, slots are viewed by many major airlines as a particularly valuable asset and an essential facility, especially at congested airports. Although the secondary slot-trading may be common and efficient in a free market, however, the secondary slot-trading in the present case between the Royal Narnian and Caeli was preferential, which means it was against the free competition principle and allows great possibilities of consolidation, collision and abuse of dominant market power.

70. Therefore, considering the collision issue, it was reasonable for the CCM to calculate Caeli’s market share in conjunction with Royal Narnian, which was more than 50% and met the threshold of investigation under the amended MRTP Act.

71. *Secondly*, the Claimant contends that the subsidies did not constitute

---

[45] Moot Problem, Statement of Uncontested Facts, ¶25.
[46] Moot Problem, Statement of Uncontested Facts, ¶36.

violation of the amended MRTP act. However, the CCM clearly expressed its regulatory concerns for foreign subsidies ,and released a White Paper noting that the foreign subsidies can be covered by the disciplines of the amended MRTP Act concerning 'Agreements or Arrangements that Prevent or Lessen Competition Substantially'.[47]

72. As the CCM's voluminous report of the first investigation also clearly showed that with the subsidies it enjoyed through the Horizon 2020, Vemma adopted predatory pricing strategies, with the aim of hindering competition on the domestic market, which constituted the offense of abuse of dominant position and thus violated chapter 4 of the amended MRTP Act.[48]

73. To sum up, the Claimant cannot expect that its anti-competitive behaviors would get away with the punishment. Therefore, the CCM's first investigation was reasonable and did not frustrate any legitimate expectations.

**3. The *Second Investigation* of the CCM was reasonable and did not frustrate the Claimant's legitimate expectation.**

74. Relating to the legitimacy of the investor's expectations, the Tribunal in case *Parkerings-Compagniet AS v. Lithuania* held that it is necessary to analyse not only an explicit promise or implicit representation received from the host state, but also the circumstances

[47] Moot Problem, Statement of Uncontested Facts, footnote 3.
[48] Moot Problem, the amended MRTP Act, ¶45.

surrounding the conclusion of the agreement and the conduct of the state at the time of the investment.[49]

75. As for the Claimant ' s privileges in the Phenac Airport, the Respondent never promise it will not regulate misuse of such privileges, especially concerning the Claimant ' s anti-competitive behaviour in this case.

76. In the second investigation, clear and sufficient evidence shows that Caeli again have abused its business position against the law, to extract significant additional privileges from Phenac International airport to push other competitors off the market.[50]

77. Therefore, Caeli ' s activities again constituted abuse of dominant position and violated the amended MRTP Act.

78. To conclude, the Claimant cannot expect its anti-competitive behaviors would not be punished, that was not a legitimate expectation. Therefore, the CCM ' s anti-competitive investigations did not frustrated any legitimate expectations, and did not violate fair and equitable treatment.

**4. The decision to stay the airfare caps during the economic crisis of the CCM was reasonable and proportionate.**

---

[49] See Parkerings Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8 (Award of 11 September 2007), at paras. 331 333; similarly, see EDF (Services) Ltd v. Romania (above fn. 454), at paras. 216 219.

[50] Moot Problem, Statement of Uncontested Facts, ¶49.

79. As has been widely applied in arbitral jurisprudence[51], the proportionality test can provide a structured reasoning for the Tribunal to access the arbitrariness of a measure.[52] The proportionality analysis consists of three steps as follows:[53] firstly, the adopted measure is suitable to achieve the objective it pursues (suitability); secondly, the suitable measure must be necessary to achieve the objective (necessity); thirdly, the effects of the adopted measure are not disproportionate in relation to other rights and interests affected and that a fair balance between the competing interests is established.

80. Pursuant to the amend MRTP Act, the interim measure implemented by the CCM must be proportionate to the infringement committed and only to the extent necessary to bring the infringement effectively to an end.[54]

81. In this case, at the beginning, the airfare caps were reasonably set to prevent Caeli from earning supra-competitive profits.[55] Although the economic crisis happened, however, at the same time the two investigations confirmed the anti-competitive behaviors of the Caeli,

---

[51] S.D. Myers Inc. v. Canada,at para. 263; Pope & Talbot Inc. v. Canada,at para.155; BG Group Plc. v. Argentina,at para. 342; EDF (Services) Ltd v. Romania, at para. 293.

[52] Confer O. Corten, 'The Notion of "Reasonable" in International Law', ICLQ 48 (1999),, pp. 621 623.

[53] K. Hesse, Grundzu¨ge des Verfassungsrechts der Bundesrepublik Deutschland, 20th edn (1995), p. 142; and J. Schwarze, European Administrative Law, rev. 1st edn (2006), p. 687.

[54] Moot Problem, Annex V, the Amended MRTP Act, ¶4(d).

[55] Moot Problem, Statement of Uncontested Facts, ¶37.

and in the Second Investigations, it clearly stated that the airfare caps would be canceled as long as the mark share of Caeli fell below 40%, and as the market share fell later, the CCM did canceled the airfare caps as soon as reasonable in accordance with the proportionality principle.[56]

82. Therefore, the CCM's decision to maintain airfare caps during the economic crisis was not arbitrary.

**B. The judicial proceedings implemented by Mekari courts did not constitute denial of justice under paragraph 2(a), Article 9.9 of the CEPTA.**

83. Denial of justice in criminal, civil or administrative proceedings violates FET.[57] Although the meaning of the term 'denial of justice' does not follow a clear-cut definition, an impression is given by Article 9 of the 1929 Harvard Research Draft on the Law of State Responsibility:

"Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice or a manifestly unjust judgment."[58]

---

[56] Moot Problem, Statement of Uncontested Facts, ¶55.
[57] Moot Problem, the CEPTA, Article 9.9, ¶2(a).
[58] E. M. Borchard, 'The Law of Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners', AJIL Spec. Suppl. 23 (1929), p. 131 at p. 173. On the development of denial of justice, see also Focarelli (above fn. 939), mnn. 4 10.

84. As the domestic remedies have been exhausted,[59] the Respondent submits that Mekari courts fully guaranteed justice as **(1)** there was no undue delay; **(2)** there was no obstruction of access to courts; and **(3)** there was proper discretion when recognizing and enforcing the arbitration award.

**1. Mekari courts guaranteed justice as there was no undue delay.**

85. In case *Victor Pey Casado and others v. Chile*, in its analysis on fair and equitable treatment, the tribunal affirmed that it comprised aspects of procedural fairness and the commitment not to deny justice to foreign investors. The tribunal then ascertained that extraordinarily long protraction in a court procedure constituted one of the classical forms of committing a denial of justice.[60]

86. *Firstly*, in the present case, the average time taken by Mekari courts for commercial matters is 27 months.[61] And it only took the Claimant less than 15 months to receive a final decision, from March. 2018 to June. 2019, which was nearly half of the average time.[62] Therefore, there was no delay at all.

87. *Secondly*, the Claimant mentioned the urgency in the economic crisis, however the Respondent respectfully requires the Tribunal to consider the limited resources and the backlog of cases in Mekari courts and

---

[59] Loewen Group Inc. and Raymond L. Loewen v. United States, ¶158 164.

[60] Victor Pey Casado and Pre´sident Allende Foundation v. Chile, ¶656 657 659.

[61] Moot Problem, Statement of Uncontested Facts, ¶13.

[62] Moot Problem, Statement of Uncontested Facts, ¶44 54.

Mekar's sovereign right to prioritize criminal matters due to their far-reaching consequences.[63]

88. *Thirdly*, in the case Loewen Group Inc. and others v. United States[64], the tribunal held that ' the finding of a denial of justice had to be accompanied by a discriminatory act or bad faith.' However, in this case, Mekari did not treat any commercial cases with discrimination, on the contrary, the Mekari courts have acted in good faith to speed up as possible as they could.

89. *Lastly*, Some tribunals have found that FET is only violated if State's action caused harm to the investor.[65] The Claimant contends that the so-called delay may bring significant loss to Caeli. However, the airfare caps were canceled as long as the extra market share of Caeli fell down and did not hurt the normal and lawful profits of Caeli.[66] And under Mekari law, any fines cannot be enforced pending Court review[67] Therefore,Caeli did not suffer any actual losses before attending the hearings of the court.

90. Therefore, there was no undue delay.

**2. Mekari courts guaranteed justice as there was no obstruction of access to courts.**

---

[63] Moot Problem, Statement of Uncontested Facts, ¶36.
[64] Loewen Group Inc. and Raymond L. Loewen v. United States, ¶136; see also Saluka Investments BV v. Czech Republic, ¶442.
[65] F.i. Joseph C. Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 21 January 2010, ¶284.
[66] Moot Problem, Statement of Uncontested Facts, ¶38.
[67] Moot Problem, Statement of Uncontested Facts, ¶50.

91. According to the scholar Jan Paulsson[68], a prohibition of denial of justice does not mean the access to justice must be guaranteed without any limitation; limitations of access to justice are acceptable as long as they are reasonable and do not impair the essence of the right.

92. In Mekar, under the Executive Order 5-2014, in order to alleviate the backlog of cases in courts, the right of appeal is limited when success on merits is very little.[69] As there were clear and sufficient evidence of Caeli's anti-competitive behaviour,the success on merits was very little. Therefore the dismissal of the right to appeal did not impair the essence of the Claimant's right.

93. The Tribunal in case *Loewen Group Inc. and others v. United States* held that the procedural defects of the trial and its resultant verdict were thus "clearly improper and discreditable" and could not conform to treatment that could be considered fair and equitable.[70]

94. However, in this case, the Mekari courts have acted in good faith to balance the justice and efficiency in the economic crisis as best as they could, therefore the dismissal of appeal did not reach the standard of 'clearly improper and discreditable' .

**3. Mekari courts guaranteed justice as there was proper discretion when recognizing and enforcing the arbitration award.**

---

[68] J. Paulsson, Denial of Justice in International Law (CUP 2005), page 138.
[69] Moot Problem, Procedural Order No.3, ¶8.
[70] Loewen Group Inc. and Raymond L. Loewen v. United States, at para. 136.

95. The proceedings concerning to the recognizing and enforcement of an arbitration award also reflects access to justice.

96. *Firstly*, as developed in arbitral jurisprudence, the interpretation of Article 5 of the 1958 New York Convention and section 36 of the Commercial Arbitration Act tends to give more discretion to the enforcing court to enforce an award set aside at the seat of the arbitration.

97. This statement is supported by emerging jurisprudence in France, for instance, in the Hilmarton case[71], the French Supreme Court held that the arbitration award was an international award which by definition was not integrated into the legal order of the seat of the arbitration.

98. Therefore, the nullification of the award at the seat of the arbitration did not necessarily affect its existence and validity in the enforcing country.

99. *Secondly*, Mekar has consistently reserved the possibility of domestic review of international arbitration awards conflicting with Mekar's public policy[72].

100. In this case, recognizing and enforcing the award is not contrary to transnational public policy, because there were not sufficiently serious, specific and consistent evidence of corruption.[73] The

---

[71] Société Hilmarton Ltd v. Société Omnium de traitementet de valorisation ( OTV) , French Cour de Cassation, 23 March, 1994.

[72] Moot Problem, Statement of Uncontested Facts, ¶20.

[73] Moot Problem, Annex XIV, ¶14.

evidence was not direct and circumstantial, and the provider of the evidence, the CILS lacked the basic impartiality.[74]

101. Therefore, enforcing the award did not constitute denial of justice.

**C. The refusal to grant subsidies to Caeli by the Secretary of Civil Aviation did not constitute discriminatory conduct under paragraph 2(c), Article 9.9 of the CEPTA.**

102. Arbitrary and discriminatory conducts violate FET.[75] In the case *Saluka Investments BV v. Czech Republic*, the Tribunal developed a test for the determination of discriminatory conduct which is "if (i) similar cases are (ii) treated differently (iii) and without reasonable justification",[76] which can also be applied in the present case.

103. *Firstly*, there were not similar cases/investments.

104. It has been recognized worldwide that state-owned enterprise have unique advantages over other companies and they can better resist and recover from the negative effects of the economic crisis.[77] For instance, according to an OECD report, compared with private enterprises, state-owned enterprises can obtain greater competitive advantages, such as direct subsidies, preferential financing, state support guarantee, preferential regulatory treatment or exemption

[74] Moot Problem, Annex XIV, ¶13.
[75] Moot Problem, the CEPTA, Article 9.9, ¶2(c).
[76] Saluka Investments BV v. Czech Republic, at para. 313.
[77] Owalski，P. ，et al. (2013)，"State-Owned Enterprises: Trade Effects and Policy Implications"，OECD Trade Policy Pa-pers，No. 147，OECD Publishing，Paris，https: / / doi. org /10. 1787 /5k4869ckqk7l-en.

from anti-monopoly law enforcement or bankruptcy rules.

105. The Claimant mentioned that the private companies received more subsidies from their home states than Caeli did. However,the amount of subsidies should not be the only factor to be considered.

106. Especially, as there was clear and sufficient evidence to show that Caeli, by using its close and various connections with Bonooru as a state-owned enterprise, was not substantially affected by the economic crisis as it still enjoyed the extra market shares from its anti-competitive behaviors.

107. The tribunal may consider that, if the subsidies were given to Caeli, it may reinforce the dominant position of Caeli and further impair the market in the aviation industry, which is totally against the purpose of the subsidy to alleviate the difficulty in aviation industry.[78]

108. *Secondly*, similar cases were treated without difference.

109. On the other hand, as for the similar cases and comparable investments, it is noted that another state-owned enterprise, Larry Air did not get the subsidies either.[79]

110. Therefore, as the Secretary of Civil Aviation has exercised its discretion reasonably and without differential treatment on similar cases, it did not violate fair and equitable treatment.

---

[78] Moot Problem, Annex VIII.
[79] Moot Problem, Statement of Uncontested Facts, ¶47.

**D. The Claimant's expectation on the stability of legal framework should be balanced by the Respondent's regulatory right in the economic crisis under paragraph 3, Article 9.9 of the CEPTA.**

111. Maintenance of a stable legal and business environment is an essential element of fair and equitable treatment.[80]

112. Claimant alleged that Respondent violated Claimant's legitimate expectation on stable and predictable regulatory framework. However, previous tribunals decided to weigh investors' legitimate expectations against states' duty to act in public interests.[81] In light of this, any investors should have expected that the law can change overtime when public interest requires the state to respond to new challenges and changing circumstances.[82] In particular, environmental law is prone to change as it is open-ended and responsive to public pressure.[83]

113. *Firstly*, for specific representation to give rise to legitimate expectations, the promise made by host state must be unambiguous[84] and sufficiently specific to the investor.[85]

114. There was no specific stabilization clause between the two dispute

---

[80] Enron Award, ¶ 260; Occidental Award, ¶ 183; CMS Award, ¶¶ 274-276.

[81] Sempra, ¶¶298-299.

[82] Charanne, ¶510; Continental, ¶258; Parkerings, ¶¶332-333; Saluka, ¶305; Total, ¶¶123, 309(h), 312.

[83] Waelde & Kolo, p. 820.

[84] Feldman, ¶148.

[85] El Paso, ¶¶375, 376; Total, ¶119; Thunderbird, ¶147.

parties, and the Respondent never made any assurance that the legal framework would be frozen under the circumstance of economic crisis.

115. Especially, the Claimant mentioned that the government's decree requiring all goods and services be denominated exclusively in MON frustrate the Claimant's legitimate expectations.[86] However,when Vemma made its investment in Mekar, the Respondent never made an explicit promise or guarantee that the pricing currency will be the dollar.

116. Secondly, as widely recognized by arbitral jurisprudence such as *Pope & Talbot Inc. v. Canada*[87] and *International Thunderbird Gaming Corp. v. Mexico*[88],the legitimate expectation and the right to regulate need to be balanced and discussed in specific circumstances.

117. According to scholar Roland Klager, legitimate expectation cannot delimit the legislator's ability and flexibility to pursue or change certain economy-related laws or policies.[89]

118. In this case, Article 9.8 of the CEPTA also states that, negative impacts on investor's expectations do not amount to a breach of the obligation of investor protection, if the state party uses its right to

---

[86] Moot Problem, Statement of Uncontested Facts, ¶42.
[87] Pope & Talbot Inc. v. Canada, ¶37.
[88] International Thunderbird Gaming Corp. v. Mexico, ¶44.
[89] Roland Klager, FET in International Investment LAW, p164.

regulate to achieve legitimate public policy objectives.[90]

119. In this specific case of economic crisis, the Respondent has the right to decide the pricing manner, its inflation framework and its nationalization policy, in order to combat the economic crisis effectively and proportionately, to achieve legitimate public policy objectives such as national security and social and consumer protection.

120. Therefore, the Respondent did not frustrate the Claimant ' s legitimate expectations when changing its economic policies to combat the economic crisis.

121. To conclude, the Respondent did not violate FET.

**SUBMISSION 4: The appropriate compensation for violations of Article 9.9 of the CEPTA should be based on the market value.**

122. Primarily, concerning that the Respondent did not violate FET, no compensation is due.

123. However, if the Tribunal does not agree with this argument, then **(A)** the compensation standard should be based on the market value. If the Tribunal does not agree, then **(B)** any compensation awarded to the Claimant should be reduced.

**A. The Respondent should compensate in market value because the MFN clause is not applicable.**

[90] Moot Problem, the CEPTA, Article 9.7.

124. The term fair market value, is intentionally distinct from similar terms such as market value or appraised value because it considers the economic principles of free and open market activity, whereas the term, market value, simply refers to the price of an asset in the marketplace.

125. In this case, the market value refers to USD 400 million in the real market in the circumstance of economic crisis. However, the fair market value refers to USD 1.1 billion calculated under the ideal business environment of Caeli.

126. In the present case, market value should be the compensation standard as follows.

127. *Firstly*, the market value standard is expressly prescribed in Article 9.21 of the CEPTA for violation of fair and equitable treatment. In this case, the market value is 400 million USD, which is offered by the only available purchaser at the actual market development of economic crisis. This also complies with the ex post approach, which is a general principle of international law.

128. *Secondly*, the Most Favoured Nation treatment under Article 9.7 of the CEPTA is not applicable in this case, because no less favorable treatment is only accorded in like situations. According to the OECD report and the case Parkerings v. Lithuania and the case Bayindir v. Pakistan, like situations requires the same economic sector.

129. However, the Claimant failed to invoke an actual measure taken by the Respondent, that under the Arrakis-Mekar BIT, the Respondent actually compensate the investor for similar FET violations in the airline industry.

130. Therefore, the Most Favoured Nation Treatment is not applicable in this case.

**B. Any compensation awarded to the Claimant should be reduced.**

131. Any compensation should consider **(1)** the Claimant's contributory fault and **(2)** the Respondent's ongoing crisis.

**1. The Claimant's contributory fault.**

132. The Respondent should only be liable for the potential injury caused by its violations within factual and legal causation. Therefore, the Respondent should not be held accountable for the Claimant's contributory fault.

133. According to Article 39 of the ARSIWA, in the determination of reparation, account shall be taken of the contribution to the injury by negligent action or omission.[91]

134. In this case, The Claimant had taken an unique and extravagant approach by continuously expanding its routes and aircrafts when the demand was unstable, by applying for loans many times when its debts were already massive and by its own anti-competitive behavior

[91] The ARSIWA, Article 39.

that incurred CCM's fines, which represent negligent and reproachable behaviour, and had played a major role in the chain of events leading to the loss.

135. Therefore, the value cannot reach the peak of 1.1 billion USD after such negligence and the economic crisis.

**2. The Respondent is suffering from the ongoing economic crisis.**

136. The award of compensation must consider the ongoing economic crisis in Mekar and the public interests of Mekari people. Especially noting that if the Respondent were to pay 700 million USD that Vemma demands, Mekar would have to transfer about twice its consolidated annual public spending to Vemma.[92]

137. Therefore, the amount of the compensation should be reduced no matter which standard is applied by the tribunal.

[92] Moot Problem, Procedural Order No.3, ¶4.

# PRAYERS FOR RELIEF

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

a. FIND that it do not have jurisdiction to hear the Claimant's claims;

b. If the Tribunal finds it has jurisdiction to hear the dispute:

i. REJECT the *amicus* submission from the CBFI and ACCEPT the submission from the external advisors to the CRPU;

ii. DECLARE that the Respondent treated the Claimant's investment fairly and equitably and thereby did not breach Chapter 9 of the CEPTA;

iii. ORDER the Respondent owns the Claimant no compensation.