**YusufW**

**INTERNATIONAL CENTRE FOR SETTLEMENT OF**

**INVESTMENT DISPUTES**


**VEMMA HOLDINGS INC.**

(*CLAIMANT*)

**V.**

**FEDERAL REPUBLIC OF MEKAR**

(*RESPONDENT*)

**INTERNATIONAL INVESTMENT ARBITRATION**

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

# MEMORANDUM FOR RESPONDENT

**FOREIGN DIRECT INVESTMENT MOOT, 2021**

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## LIST OF ABBREVIATIONS

| *CODE* | CITATION |
|---|---|
| ***AOJ*** | Award on Jurisdiction. |
| ***AR*** | Arbitration Rules. |
| ***BIT*** | Bilateral Investment Treaty. |
| ***DO*** | Dissenting Opinion. |
| ***DOJ*** | Decision on Jurisdiction. |
| ***DOJ&A*** | Jurisdiction and Admissibility. |
| ***FET*** | Fair and Equitable Treatment. |
| ***FMV*** | Fair Market Value. |
| ***ICJ*** | International Court of Justice. |
| ***ICSID*** | International Centre for Settlement of Investment Disputes. |
| ***MRTP*** | Monopoly and Restrictive Trade Practice Act, 2009. |
| ***NOA*** | Notice of Arbitration. |
| ***PCA*** | Permanent Court of Arbitration. |

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| ***PO*** | Procedural Order. |
| ***SUF*** | Statement of Uncontested Facts. |
| ***U/A*** | Under Article. |
| ***UIT*** | Unfair and Inequitable Treatment. |
| ***UNCITRAL*** | United Nations Commission on International Trade Law. |
| ***USCC*** | United States Chamber of Commerce. |

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| ***CONVENTIONS*** | |
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| ***ICSID AFR*** | ICSID Additional Facility Rules. |
| ***ICSID*** | ICSID Convention. |
| ***ICSID ARBITRATION RULES*** | ICSID Arbitration Rules. |
| ***ILC ASR*** | ILC Articles on State Responsibility. |
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| ***NAFTA*** | North American Free Trade Agreement |
| ***NYC*** | New York Convention. |
| ***UNCITRAL, TRANSPARENCY*** | UNCITRAL, Rules on Transparency in Treaty-based Investor-State Arbitration. |
| ***VIENNA CONVENTION*** | Vienna Convention. |

## STATEMENT OF FACTS

1. The Commonwealth of Bonooru is a developing country with GDP greater than the next five largest countries in the region. Being an archipelagic state, Art. 70 of the Bonooru Constitution assigns a positive obligation on the state to ensure the mobility rights of its population.

***Incorporation of Vemma and the beginning of the Moon Alliance***

2. Civil aviation became a major mode of transportation which led to formation of the Civil Aviation Authority (the "CAA"). It was responsible for management of Bonooru's national carrier and monopoly civil airline, Bonooru Air.
3. BA Holding's planned privatisation took place on 19 December, 1984, where the Royal Narnian was chosen as the flag carrier of Bonooru, owned and operated by Vemma Holdings Inc. ("Vemma", the "Claimant"), BA Holdings' successor.
4. While Vemma Holdings enjoyed 100% ownership in Royal Narnian, Bonooru retained minority shareholdings in Vemma between 31% to 38%. Royal Narnian created the Moon Alliance, along with the major airlines.

***Acquisition of Caeli Airways by Vemma Holding in Mekar***

5. Both state-owned civil airlines of Mekar, Aer Caeli and Caeli Airways, witnessed staggered and stagnated growth under the Labourers' Party of Mekar ("LPM").
6. In 2003, Aer Caeli and Caeli Airways were merged under a common head of Caeli Airways ("Caeli").
7. Following extreme losses, Mekar decided to extend government assistance to the airline and amended the decree in 2005 and 2006 to expand the scope of permissible infusions to debt forgiveness, tax and fees of aid.
8. After the 2008 financial crisis, Mekar launched a second bailout plan which failed. After which LPM lost their majority to the Common Man's Party ("CMP").
9. CMP launched a privatisation program, under which Mekar decided to sell a controlling stake in the Caeli Airways through a competitive bidding process. Vemma secured the bid.
10. On 5 January 2011, Vemma acquired an 85% stake in Caeli and Mekar maintained 15% ownership through Mekar Airservices Ltd.

***Vemma Holding turns Caeli Airways into a profitable airline.***

11. From August 2011 to December 2013, Caeli Airways was able to capitalise, both domestically, and internationally. It was also able to refinance its inherited debt liability. Further, it increased passengers flying to and from Mekar.

12. Despite rising fuel prices, Caeli's operational costs did not overwhelm its revenues. One of the pillars of Caeli Airways' business model during this period was catering to customers travelling from Mekar to Bonooru.

13. Caeli Airways' low-pricing strategy expanded its consumer base. Caeli recorded a consistently high load factor over the course of the operating year. Additionally, it captured the market share lost by its Mekari counterparts.

***Violation of CEPTA by Mekar/ FET of Vemma Holdings by Mekar.***

14. Although Vemma's investment strategies and various schemes such as the frequent-flyer programme and the corporate-discount scheme were earning profit for Caeli. Mekar began to actively impede Vemma's efforts of expansion.

15. However, Vemma's investment in Caeli began to turn sour due to a series of acts and omissions deliberately pursued by the Mekari State organs, Government and the Mekari courts.

16. The CCM initiated an investigation i.e. the *First Investigation*, against Caeli taking into cognizance of Caeli's market share along with Royal Narnian's.

17. Mekar's administrative bodies used the Moon Alliance membership and benefits obtained to unfairly prejudice Vemma. As a result of the investigation, the CCM placed airfare caps on Caeli Airways as an interim measure.

18. In December 2016, based on certain complaints by small regional airlines, the CCM launched the *Second Investigation* on Caeli focusing specifically on its pricing strategies on specific regional routes, which again did not have satisfactory grounds as Caeli did not enjoy any dominance on these short-distance routes. Most of Caeli's business was on long-haul routes from Phenac International, which these regional airlines were not flying.

19. By March 2017, a currency crisis had ensued in Mekar and while the economy was in freefall, in November 2017 the LPM was elected back as the ruling party. It blamed the economic catastrophe on privatisation and sought to re-nationalise various sectors "returning the country back to the Mekari people".

20. Despite various requests from Caeli to remove the interim airfare caps imposed on it in September 2016, the CCM denied Caeli's request. Moreover, Mekar required Caeli to price its services in the constantly fluctuating currency of MON which hurt Caeli's profitability.

21. On 8 March 2018, Caeli filed for judicial review of the CCM's interim airfare caps. However, the hearing was delayed and scheduled only in April 2019. The Court Registrar rejected the request of the immediate hearing to remove airfare caps.

22. In August 2018 the CCM concluded its first investigation and imposed a penalty of MON 150 Million and arbitrarily decided to keep the airline caps in place while the Second Investigation was pending.

23. On September 25, 2018 Mekar passed Executive Order 9-2018 which granted subsidies for airlines operating in Mekar. Nevertheless, the same Order denied subsidies to Caeli. Other airlines received the subsidy despite the fact that other airlines in Mekar received greater subsidies from their home jurisdictions.

24. On 1 January 2019, the CCM finished its Second Investigation into Caeli and a fine of MON 200 million was imposed. The CCM also decided to continue to impose airfare caps until Caeli Airways' market share were to fall below 40%.

25. On 20 January 2019, representatives of Caeli appealed both orders of the CCM in the Mekari courts. However, Caeli's claims on merits were dismissed prematurely and subsequently scheduled for May 2020 while Caeli suffered in the interim.

26. May through June 2019, Caeli was forced to shut down several loss-making routes, return aircraft to their lessors, lay off 30% of its staff, cancel existing purchase orders, and ground large parts of its fleet.

27. On 15th June 2019, the Court released its interim judgement on the airfare caps and declined to remove them. The Court also dismissed the merits of Appeal in the case and Caeli had no further Appeal. As Caeli's market share dropped below 40% the CCM lifted the airfare caps in October 2019.

28. Given the financial distress faced, the Claimant announced their intention to sell their stake in Caeli. Subsequently, they received an offer from Hawthorne Group LLP. Mekar Airservices was duly informed and rejected the offer.

29. After failed negotiations between the two parties, Mekar Airservices filed for arbitration under Art. 39 of the Shareholders' Agreement whereby the arbitrator rendered the final award in favour of the Respondent.

30. A report released on 14 June 2020 by the Centre for Integrity in Legal Services ("CILS") (Annex XII), a non-profit organisation in Mekar, alleged that the arbitrator had received bribes from representatives of Mekar Airservices to render a favourable decision. Additionally, CILS released an audio-recording as part of its leaks.

31. Pursuant to the Claimant's application, the Supreme Arbitrazh Court of Sinnograd set aside the arbitral award. Nevertheless, the Mekari Court issued a ruling recognizing and enforcing the award. Vemma appealed the judgment, but the Superior Court dismissed the Appeal.

32. The Claimant's failure to find another buyer for its shares in Caeli between February-September 2020 resulted in them selling them to Mekar Airservices on 8 October 2020 for $400 million.

33. Subsequently, the Claimant filed for a notice of arbitration against the Respondent to seek compensation for its losses under CEPTA and hence the present claim lays.

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## ARGUMENTS

### ISSUE 1: THE TRIBUNAL LACKS JURISDICTION OVER THE PRESENT CLAIM.

34. The Respondent submits that the Tribunal lacks jurisdiction since, (I) The Claimant *failed* to qualify as an investor on the *date* of *filing* for arbitration., (II) Dispute constitutes *State-State* Arbitration, and (III) The Investment was acquired through *illegal* means

#### *(I) JURISDICTIONAL REQUIREMENTS SHOULD BE MET AS ON THE DATE OF FILING FOR ARBITRATION*

35. In the present case, the parties have consented to the ICSID jurisdiction through a treaty (CEPTA)[1] between the State Party (Respondent) and the Claimant - Investor's State of

[1] CEPTA, Art 9.16.

nationality (Bonooru), as the Respondent is not a signatory to the Convention,[2] whereas Bonooru had signed and ratified the Convention.[3]

36. The decisive date for the ICSID to be applicable has to be the date of the institution of the arbitration proceedings.[4] Art. 4(2)[5] states that the jurisdictional requirements have to be met at the time when proceedings are set in motion.[6] Jurisdictional standing of the tribunal is determined by the reference to the date on which the proceedings are instituted in that jurisdiction.[7]

37. In ***El Paso***,[8] where the Claimants' claim was contested on the grounds that, shortly after the institution of the proceedings, the Claimant had lost its *jus standing*. The ICSID tribunal held that the decisive point for deciding the jurisdiction was at the time when the claim was registered by the secretary general and not before or thereafter.[9]

38. The Respondent submits that in the present dispute, the Claimant filed for arbitration on *15th November, 2020* and on that date failed to meet the jurisdictional requirements laid down under the ISCID and the Additional Facility Rules as they failed to qualify as a valid *investor in lieu* of there not being a valid investment on the date of filing for arbitration.

## (II) *DISPUTE CONSTITUTES STATE - STATE ARBITRATION*

### (A) ***DISPUTE FAILS TO CONSTITUTE AN INVESTOR-STATE DISPUTE UNDER THE ICSID***

39. The Respondent submits that the present dispute is *inadmissible* before this tribunal as the present dispute fails to meet the jurisdictional requirements of the ICSID as it does not constitute an Investor-State Dispute under the Convention since, (a) Essentials of *Investment* and, (b) *Investor*, under *CEPTA*, as well as, the *ICSID* are not satisfied as on the date of filing for arbitration.

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[2] SUF, 31, ¶20.

[3] NOA, 2.

[4] Pierra Alive, 142-6; Amco Asia, DOJ; LETCO, DOJ.

[5] ICSID, Art. 4 (2).

[6] ICSID AFR, Art. 5(2).

[7] Enron, ¶396.

[8] El Paso, DOJ.

[9] El Paso, DOJ, ¶135.

40. The ICSID AFR requires the application of the definition of '*investmen*t' and '*investor'* that is applicable under the ICSID.[10]

41. In ***Noble Energy,***[11] the tribunal has adopted the '*double keyhole approach*' to determine the nature of the operation. Both the investment as well as the investor must meet both the definitions contained in the treaty as well as criteria developed under the ICSID and is a test used by arbitral tribunals[12] to determine their general and special jurisdiction U/A 25 of the ICSID and the applicable trade agreement clause.

***(i) The Claimant's Investment Qualifies fails to qualify as a Valid Investment:***

42. The Respondent submits that the *investment* of the Claimant fails to qualify as a *valid investment* under the rules laid down in (a) *CEPTA* and (b) *ICSID.*

**(a) Investment is not valid under CEPTA**

43. It is essential for the Claimant's investment to be valid under the definition of *"investment"* provided in the pre-existing BIT[13] between the investor and the host countries.*[14]*

44. The Respondent has submitted that the jurisdictional requirements need to be met on the date of filing for arbitration[15] and as such the requirement of commitment of capital needs to be met on the date of filing for arbitration i.e. *15th November, 2020.*[16]

45. In the present dispute, the Claimant's *investment* in Caeli was established on the date when they won the tender for the airways. However, after incurring substantial losses the Claimant disposed of their *investment* by selling their stake in Caeli to Mekar Airservices on *8th October, 2020*[17] consequently losing their status as an investor due to lack of a valid *investment* on the date of filing for arbitration as there was no commitment of capital, anticipation of profit and an assumption of risk.

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[10] ICSID AFR, Art. 4(2).

[11] Noble Energy, DOJ.

[12] CMC, ¶201; Italba, ¶285; Orascom, ¶257.

[13] CEPTA, Art.9.1.

[14] Noble Energy, DOJ.

[15] ICSID, Art. 4 (2).

[16] SUF, 40, ¶63.

[17] *Ibid.*

46. The Claimant in the present dispute lacks admissibility as the disposal of the *investment* was voluntary and the Respondent bore no responsibility as the sale was done out of the free will of the Claimant and not any legal requirement.

47. In ***Aven***,[18] the ICSID tribunal adopted the position that the relevant date for assessing the ownership or control of *investment* for jurisdictional purposes is the date of initiation of arbitration: any subsequent disposal of an investment does not affect jurisdiction, while only in "*special circumstances*" will jurisdiction extend to cases where the *investment* was transferred prior to bringing a claim claiming that an investor who disposes of ownership of the investment in question before arbitral proceedings should not be eligible to seek the Treaty's protection, unless special circumstances are present.

48. Such circumstances include, *inter alia*, the loss of the *investment* by the actions of a third party or the retroactive application of a treaty both of which were not the case in the present dispute.

49. As such the Respondent submits that the Claimant's *investment* fails to qualify as a valid *investment* under CEPTA.[19]

**(b) Investment is not valid under ICSID Art. 25**

50. With respect to the ICSID, Art. 25 (1)[20] of the same establishes the existence of a "*legal dispute arising directly out of an investment*" as a jurisdictional requirement, the fulfilment of which is essential for the convention to be applicable on such investment.

51. However, the convention nowhere provides the definition of the term "*investment*". To overcome this disparity, the Tribunals, through various cases, have developed a list of prerequisite essentials that have overtime been accepted as the requisite standards of definitional elements of "*investment.*"

52. These criteria are: (1) certain duration; (2) risk; (3) contribution of money or assets and (4) contribution to the economic development of the host State.[21]

53. These essentials were again introduced as a definition of investment U/A 25 of the ICSID known as the "*Salini test*" by the tribunal in ***Salini***.[22] For the purposes of Art. 25,[23] the tribunal had to be

[18] Aven, ¶¶297–301.

[19] CEPTA, Art. 9(1).

[20] ICSID, Art 25(1)

[21] ICSID, Art 25.

satisfied that all of the necessary elements of an investment had been fulfilled. Following ***Salini***,[24] a number of tribunals[25] have followed this test.

54. In the present dispute, and as previously established, the jurisdictional requirements need to be met on the date of filing and as such needed to be met on the *15th of November, 2020*.[26]

55. The Claimant disposed their investment in Mekar on *8th October, 2020*[27] and consequently while filing for the NOA on *15th November, 2020* failed to establish risk or contribution of money or assets in the vicinity of Mekar thus failing to meet the requirements on the *Salini* test.

56. Furthermore, in the present dispute, the Claimant does not have substantial business activities in the territory of the host state, i.e. Mekar as a consequence of their disposal of the investment.

57. In ***Alps***,[28] the tribunal agreed that tax returns and other business formalities are immaterial to satisfy to find that company conducts real business activities in the State. Instead, a company needs to run – in the territory of that State – an actual, independent and verifiable activity, produce or sale visible and tangible goods or services, earn profits and eventually foster.[29]

58. As such the Respondent submits that the Claimant's *investment* fails to qualify as a valid *investment* under the rules mentioned by ICSID.

**(ii)** ***The Claimant fails to qualifies as a valid investor:***

59. The Respondent submits that this Tribunal lacks jurisdiction over the present dispute *in lieu* of the present case constituting a State-to-State dispute as the Claimant is indistinguishable from the State of Bonooru as they were discharging an *essential government function*.

60. Those two elements reflect a test proposed by Aron Broches, the first Secretary General of ICSID, which has come to be known as the "*Broches test*[30]" and mirror the customary

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[22] Salini, DOJ.

[23] ICSID, Art 25.

[24] *Ibid.*

[25] Bayindir, DOJ, ¶130; Jan de Nul, DOJ, ¶91; Ioannis, DOJ, ¶116; Quiborax, DOJ, ¶219.

[26] SUF, 40, ¶63.

[27] *Ibid.*

[28] Alps, ¶ 224-226.

[29] *Ibid.*

[30] A. Broches, 359.

international law rules on attribution of internationally wrongful acts to States which are codified U/A 5 and 8 of the ILC.[31]

61. The tribunals,[32] have taken a uniform approach: they have focused on the functions of the claimant in relation to the particular investment, rather than the direction and control exercised over the claimant by their State or its functions in advancing their government policies more broadly.[33] The cases confirm that the following evidence will be relevant in applying the Broches test.[34]

62. For the first limb of the test: *the extent to which the SOE acts as an agent of the State*, rather than a commercial contractor or investor, in the particular context of the investment; and for the second limb of the test: *the extent to which the SOE discharges an essential function in the particular context of the investment is determined.*

63. To satisfy these elements, a focus is required on the nature of the activities of the SOE in relation to the particular investment, rather than the extent to which they are directed or controlled by the State, or its underlying State policies.[35] The authorities suggest that the scope and meaning of "*essentially governmental function*" is one which require consideration on a case-by-case basis, taking account of the content of the powers, the way they have been conferred on the SOE, the purpose for which they are exercised and to the extent to which the SOE is accountable to the government for their exercise.[36]

[31] UN, ILC Report.

[32] BUCG.

[33] Feldman, 27–28.

[34] A. Broches, 359.

[35] Feldman, 27–28.

[36] Essex Street.

64. The first case to be examined in this section is ***Maffezini***.[37] The tribunal drew inspiration from the above-mentioned Broches test and elaborated a method of analysis based on the two criteria: one devoted to ascertaining the *existence of an agency relationship*, and a second test, aimed at verifying whether the function carried out by the Claimant might be deemed "*public in nature*."[38] The ***Maffezini*** approach was later employed by the ***Chevron***[39] tribunal, which quoted directly the ***Maffezini*** decision as a point of departure for its inquiry.[40]

65. In the present case, the Claimant, by way of Royal Narnian, the flag carrier of Bonooru, and the successor of BA Holdings,[41] was entrusted to perform a positive obligation of the Government of Bonooru[42] by way of Art. 70 of the Bonoori Constitution[43] which bestowed an obligation on the State of Bonooru relating to the mobility rights of the citizens.

66. The Claimant, upon acquiring BA Holdings' successor; Royal Narnian, inherited the responsibility to provide mobility to the citizens of Bonooru by way of air travel,[44] recognized as the dominant means to connect Bonooru's disparate communities.[45]

67. The obligations carried out by the Claimant included, but were not limited to assisting the State of Bonooru in developing the aviation industry as well as the civil aviation infrastructure in Bonooru for the benefit of its population in accordance with Art. 70 of the Constitution Act, 1947.[46] These obligations further included operating routes to the most remote islands, regardless of profitability[47] were responsibilities that though the state was entrusted with in accordance of Art. 70,[48] were carried out by the Claimant.

68. The Respondent submits that the Claimant is a government agency which has been discharging *essentially governmental functions* throughout its existence and, more specifically, with regard to

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[37] Maffezini, DOJ, ¶79.

[38] *Ibid.*

[39] Chevron.

[40] *Ibid.*

[41] SUF, 29, ¶9.

[42] SUF, 28, ¶5; Case file, Annex II, 42.

[43] Case file, Annex I, 41.

[44] SUF, 29, ¶¶8-9.

[45] *Ibid*, 28, ¶6.

[46] Case file, Annex IV, Art. 3h.

[47] SUF, 29, ¶8.

[48] Case file, Annex I, 41.

all events pertinent to this dispute. In this regard, the Respondent seeks to show that since its inception the Claimant has served as an agent or representative of the State of Bonooru.

69. The ICSID has expressed that the term "*Investor*,"[49] did not exclusively concern the companies with private capital but also companies partially or entirely controlled by a state.[50] It therefore decided that a legal person could have access as an investor to proceedings under ICSID unless it acts as a state agent or undertakes a governmental function.[51]

70. Art. 25 of the ICSID notes that "*nationals of another contracting state*" are eligible to file for arbitration under ICSID, however, under the ICSID AFR, where one state is a party to the convention, the party can file for arbitration under the ICSID. In the present case, the Claimant fails to qualify as a national of another contracting state as the Claimant exhibits essential government functions.

71. As such, the Respondent submits that the *Investor*, exhibiting essential state functions was an extension of the State of Bonooru and as such the present dispute constitutes a State-State arbitration and the ICSID does not have jurisdiction to adjudicate on the present issue.

72. The ICSID in ***CSOB***,[52] expressed that a legal person could not have access as an investor to proceedings under ICSID if it acts as a state agent or undertakes a governmental function. A similar view was expressed by the Tribunal in ***Maffezini***,[53] The ICSID Tribunal held that to determine if an entity was a State organ and its doings attributable to the latter two tests were required: *structural* and *functional*.

73. The question whether or not the Claimant is a State entity must be examined first from a formal or structural point of view. Here a finding that the entity is owned by the State, directly or indirectly, gives rise to a rebuttable presumption that it is a State entity. The same result will be obtained if an entity is controlled by the State, directly or indirectly. A similar presumption arises if an entity's purpose or objectives is the carrying out of functions which are governmental in nature or which are otherwise normally reserved to the State, or which by their nature are not usually carried out by private businesses or individuals.

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[49] ICSID, Art. 25.

[50] CSOB, ¶16.

[51] *Ibid*, ¶¶17, 20-25.

[52] *Ibid*, ¶16.

[53] Maffezini.

**(a) Claimant was controlled directly or indirectly by the State of Bonooru**

74. U/A 9.1,[54] The term "*investor*" has been defined to include an "*enterprise of a party*" that makes an "*investment*" into the territory of the other party. It has already been established that the investment made by the Claimant into the Respondent's territory satisfies all the essentials of the valid covered investment under both the applicable trade agreement CEPTA, as well as Art. 25.[55]

75. In order to determine whether an enterprise had been controlled directly or indirectly by its origin state, the tribunal[56] elaborated a *structural* test devoted to ascertaining the existence of an agency relationship, between the enterprise and the state.

76. In the present case, the Claimant company may have been owned partly by the state of Bonooru, however, the state of Bonooru has asserted control over the company on multiple occasions.

77. It is uncontested that the claimant company operates by way of a vote taken by the board of the company, wherein representatives from the state of Bonooru are present.[57]

78. Additionally, as provided, the representatives from Bonooru have, on various occasions formed the majority vote[58] of the company thereby influencing the company to act according to the Bonoori Government thereby acting in accordance with the will of the Government and not as individuals distinguishable from the state of Bonooru. Therefore, such actions, at the least, exhibit state control over the company.

79. Furthermore, On *23 November 2010*, Ms. Sabrina Blue, erstwhile head of Vemma's board of directors, was appointed as the Secretary of Transport and Tourism in a cabinet reshuffle in Bonooru.[59] The Claimant was also able to refinance the debt from Caeli Airways at more favorable rates than present on the market[60] by yet another organ of the state of Bonooru, the PJSC Bonoorian People's Bank.

80. Notwithstanding the fact that the Claimant on various occasions has been controlled by the Bonoori Government, or that the head of the board of directors was appointed as a state minister,

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[54] CEPTA, Art 9.1.

[55] ICSID, Art 25.

[56] Jan de Nul, DOJ, ¶85; Saipem, DOJ, ¶144.

[57] PO 3, ¶3.

[58] *Ibid.*

[59] SUF, 31, ¶22.

[60] *Ibid,* 33, ¶30.

the Claimant was owned, although partly by the state of Bonooru. The Claimant, by way of the inherit duties as the successor of Royal Narnian had ensured that the State of Bonooru was liable to ensure the functions carried out and had assured the constitutional court of Bonooru that the access to mobility of the citizens would be protected. The extent of this ensurity can be seen when the Claimant, due to lack of operational funds was nationalised in Bonooru to ensure such participation from the Claimant towards the essential government functions exhibited by them.

81. Additionally, a test has been developed, a *functional* test, which looks at the functions of or role to be performed by the entity.[61]

**(b) Claimant was exhibiting essential Governmental Functions.**

82. This functional test has been applied, in respect of the definition of a national of a Contracting State, in the recent decision of an ICSID Tribunal on objections to jurisdiction in ***CSOB***.[62] Here it was held that the fact of State ownership of the shares of the corporate entity was not enough to decide the crucial issue of whether the Claimant had standing under the Convention as a national of a Contracting State.

83. The tribunals[63] used the functional test to ascertain the identity of the enterprise as a State organ and its function and conduct were attributable to state function.

84. In the present case, and as previously submitted the Claimant was exhibiting *essential government function*s towards the citizens of Bonooru by providing services that were held by the constitutional court of Bonooru[64] to be a protected right of the citizens and the court ascertained the obligation to provide such services to the government of Bonooru in The Ferry Workers case.[65]

85. The present dispute is brought to this ICSID tribunal by Vemma Holdings, the Claimant, which inherited such obligation[66] with the privatisation of Bonooru Air.

86. This *functional* test has been applied, in respect of the definition of a national of a Contracting State, in the recent decision of an ICSID Tribunal[67] on objections to jurisdiction.

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[61] Goodwin, 136.

[62] CSOB.

[63] OAO, Partial AOJ; Gustav; Beijing Shougang.

[64] Case file, Annex II, 42.

[65] *Ibid.*

[66] SUF, 29, ¶¶8-9.

87. Here it was held that the fact of State ownership of the shares of the corporate entity was not enough to decide the crucial issue of whether the Claimant had standing under the Convention as a national of a Contracting State as long as the activities themselves were "*essentially commercial rather than governmental in nature.*[68]"

88. By the same token, a private corporation operating for profit while discharging *essentially governmental functions* delegated to it by the State could, under the *functional* test, be considered as an organ of the State and thus engage the State's international responsibility for wrongful acts.[69]

89. In the Present case, it was submitted that the Claimant had undertaken operations to routes to Bonooru's most remote islands, irrespective of profitability or gain.[70]

90. Therefore, it is evident that in the present case the claimants company is intrinsically linked with the state of Bonooru which exerts control over the enterprise as well as through the governmental functions that it carries out and conducts in its daily functioning.

91. Hence, the Respondent submits that the Claimant cannot be distinguished from the state of Bonooru in this case and the company must be deemed to be state itself and thus should be treated as same.

92. Therefore, it is an extension of the State of Bonooru, and as such, the Respondent submits that this tribunal lacks jurisdiction over the present dispute as the present dispute constitutes a State - State dispute.

### (III) *THE INVESTMENT IS ILLEGAL*

93. The Respondent submits that the present dispute is not admissible as the Claimant's investment was acquired through illegal means.

94. U/A 9.1 of CEPTA, a valid "*investment*" has been defined to include investments "*made in accordance with the host state laws."*[71] However, in light of the amicus submission by EACRPU

[67] CSOB, ¶¶257-261.

[68] *Ibid.*

[69] Maffezini, ¶80.

[70] SUF, 29, ¶8.

[71] CEPTA, Art. 9.1.

the Respondent submits that the present dispute is not admissible as the investment was *illegal* and violated the principles of Good faith.

95. As submitted in the amicus submission by CRPU,[72] The Claimant had acquired the investment by means of bribing Mr. Dorian Umbridge, the Chairperson of the Committee that advised Mekar during the privatisation of Caeli Airways done by way of state subsidiary Mekar Airways.[73]

96. While the members of the Committee noted that the Claimant's proposal relied on overly optimistic forecasts which did not account for serious volatility of fuel prices and potential take-overs of the long-distance routes by competitors, and expressed concern regarding the forecast of Caeli according to the Claimant's ideas.[74]

97. However, the Chairperson of the Committee, while supporting such expansion plans, was a strong proponent of the idea of giving the bid to Vemma.[75]

98. As such, the assessment of the *legality* of Vemma's investment is crucial to the determination of the Tribunal's *kompetenz-kompetenz.*

99. Notwithstanding the Claimant failing to meet the requirement to qualify as an "*investment*" under CEPTA, several ICSID tribunals have *inter-alia* considered the legality of the investment while determining the existence of a valid investment.[76] Whereby these tribunals[77] and various and commentators[78] have classified corruption as contrary to and in violation of international and transnational public policy.

100. It has been noted by various tribunals[79] that when new evidence has been introduced, international public policy requires tribunals to rule on allegations of corruption irrespective of the applicability of the principle of *res judicata.*

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[72] Amicus Submission by CRPU, 19, ¶635.

[73] *Ibid.*

[74] SUF, 31-32, ¶24.

[75] *Ibid.*

[76] Cortec, ¶261; RSM, ¶58; Phoenix, ¶114.

[77] Unión Fenosa Gas, DO of Arbitrator Mark Clodfelter, ¶3; Fynerdale Holdings, SO of Dr. Wolfgang Kühn, ¶6; Unión Fenosa Gas, ¶7.48; Chevron, Second Partial Award on Track II, ¶¶9.16-9.19; Kim, DOJ, ¶593; Churchill, ¶493; Metal-Tech, ¶292; Niko Resources DOJ, ¶¶432-434; EDF, ¶221; Siag, DO of Professor Francisco Orrego Vicuña.

[78] Llamzon, 462.

[79] Unión Fenosa Gas, ¶7.48; Chevron, Second Partial Award on Track II, ¶¶9.16-9.19; Kim, DOJ, ¶593; Churchill, ¶493.

101. Tribunals, especially in the commercial arena, have accepted the methodology of "*indices graves, precis et concordants,"* which is similar to the "*connect-the-dots*" methodology identified by the ICSID Tribunal in ***Methanex***,[80] to the extent that this approach reflects nothing more than the close analysis of a chain of circumstantial evidence.

102. As such, the Chairperson Mr. Dorian Umbridge, who was a strong proponent of selecting the Claimant throughout the bidding process, despite the well placed concerns of select members of CRPU regarding the over optimistic nature of the Claimant's bid,[81] against whom evidence of *bribery* has been submitted before this Tribunal goes to prove that the Claimant Company, who was keen to take advantage of the unparalleled access to Mekar's airline market[82] engaged in extra, under-the-counter transactions with the Chairperson to ensure that the "lucrative" business opportunities were not missed by the Claimant in case their Bid was not accepted.

103. As such, the Respondent submits that, this Tribunal should conduct an inquiry[83] towards these submissions in light of the evidence produced by the CRPU and upon finding them to be true, should rule the investment to be illegal and therefore, rule the present issue to be inadmissible.

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[80] Methanex.

[81] SUF 31, ¶24.

[82] *Ibid*, ¶23.

[83] ICISD Arbitration Rules, Chapter IV.

## ISSUE 2: ADMISSIBILITY OF AMICI SUBMISSIONS.

104. The Respondent duly submits that The Claimant duly submits that (I), Amicus submission by *Consortium of Bonoori Foreign Investors* ("CBFI") should be rejected *in lieu* of their submission not being in accordance with the rules prescribed by ICSID and this Tribunal. (II), Amicus submission by *External Advisors to The Committee On Reform of Public Utilities of Mekar* ("CRPU") should be accepted as their submission is in accordance of the rules prescribed by ISCID and this Tribunal.

### (I) *THE TRIBUNAL SHOULD NOT ALLOW THE AMICUS SUBMISSION BY CBFI*

105. The *CBFI* is a non-profit industry association that represents Bonoori investors investing in the Narnian Region and internationally.[84] They have as much as 38 members who hold investment rights in Mekar.[85]

106. The Respondent submits that the Amicus submission by CBFI is not accordance with Art. 41(3)[86] of the ICSID AFR as the submission is outside the scope of Art. 41(3)(a)[87] and Art. 41(3)(c)[88] as well as the rules laid down in the PO[89] and as such should not be accepted.

107. The Respondent has invoked the UNCITRAL transparency rules[90] under CEPTA and as such the rules put a prohibition for Amicus submissions in this care relating to serving a public function in addition to the already mentioned 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; and the requirement of a significant interest in the proceeding in addition to being an independent party.[91]

108. Furthermore, The CBFI, fails to qualify as an independent party, according to the UNCITRAL Rules,[92] due to their links with the Claimant, Vemma when a member of the committee is

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[84] Amicus Submission, CBFI, 16.
[85] *Ibid,* ¶6.
[86] ICSID AFR, Schedule C, Art. 41(3).
[87] *Ibid,* Art. 41(3)(a).
[88] *Ibid,* Art. 41(3)(c).
[89] PO 1, 13-14.
[90] UNCITRAL Rules.
[91] *Ibid,* Art 4.
[92] UNCITRAL, Working Group, ¶ 49.

advising the Claimant in the present case,[93] is clearly in violation of Rule 37(2) of the Arbitration Rules,[94] the requirements laid down in the PO by this tribunal,[95] as well as Art. 41(3) of the ICSID AFR.[96]

109. The Respondent submits that the submission by *CBFI* is in violation of the procedural safeguards established in ***Aguas***,[97] as well as in ***UPS***,[98] and the procedure established by this Tribunal in the PO,[99] as well as in ***Bernhard***,[100] where the Tribunal has established the limitations of Amicus submissions and construed the requirement not to cause an undue burden or unfair prejudice, in a way so as to extend this requirement to the substantive legal arguments presented in the amicus submissions.[101]

110. The Respondent further submits that the Tribunals regarding amicus submissions have frequently required that the dispute be a matter of *public interest*, although this is not provided for in ICSID Rule 37 (2),[102] nor the UNCITRAL draft.[103]

111. When it comes to the notion of *public interest* in investment arbitration, in its first order in ***Vivendi***,[104] the tribunal held that, because governmental measures and the responsibility of the State as such were at stake, the dispute did indeed entail public interest,[105] as well as the UNCITRAL Transparency Rules.

112. However, the Claimant is using the CBFI's submissions to further their own standing in the case. The CBFI has 38 members[106] who hold investment rights in Mekar and is representing their interests in this case and should not be allowed to file for amicus submissions.[107]

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[93] Amicus Submission, CBFI, 16, 17.
[94] ICSID, Arbitration Rules, Rule 37(2).
[95] PO 1, 13-14.
[96] ICSID AFR, Art. 41(3).
[97] Aguas, 2019.
[98] UPS.
[99] Bernhard.
[100] *Ibid.*
[101] *Ibid*, ¶ 51.
[102] *Ibid.*
[103] Biwater, ¶¶ 51–53.
[104] Aguas, 2019.
[105] *Ibid*, ¶ 19, Biwater, ¶¶ 51-53.
[106] Amicus Submission, CBFI, 16, ¶6.
[107] Resolute Forest.

113. The tribunal went on to highlight the fact that the proceedings did involve more than the regular public interest, as the dispute centred on a *basic public service* to millions of people. They concluded that any decision rendered in the case has the potential to affect the operation of those systems and thereby the public they serve.[108] This is a form of definition that recurs in other decisions.

114. It has been held that NGO amicus curiae participants did not have direct legal interests in the outcomes of the dispute. Rather, they represented broad concerns with key thematic issues. For instance, a review of the amicus submissions in the ***Methanex***[109] case indicates that the NGOs focused primarily on human rights, such as the right to potable water and general health concerns.[110] The briefs submitted by these NGOs were somewhat "*opinion-driven*" in nature, and not directly connected with the primary and substantive legal issues implicated in the proceedings[111] which is the situation in the present case.

115. Therefore, the Claimant submits that on the basis of the above mentioned cases and instances the Submission by CBFI be barred as they violate the standard set in the PO.[112]

### (II) *THE TRIBUNAL SHOULD ALLOW THE AMICI SUBMISSION BY EXTERNAL ADVISORS TO THE COMMITTEE ON REFORM OF PUBLIC UTILITIES (CRPU)*

116. The CRPU are members of Mekari civil society whose professional focus is investment banking. In 2010, Amici were engaged as external advisors to the Committee on Reform on Public Utilities set up under the Law on Privatisation of State Property to advise on the privatisation, liquidation, and/or restructuring of Caeli Airways.[113]

117. The CRPU has submitted their amicus in accordance with Art. 9.19 of CEPTA,[114] Art. 41(3) of the ICSID AFR,[115] and the rules laid down in the PO.[116]

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[108] Aguas, 2019, ¶ 20.

[109] Methanex.

[110] Bluewater Network.

[111] Andrea K.

[112] PO 1, 13-14.

[113] Amicus Submission by CRPU, 19, ¶615.

[114] CEPTA, Art. 9.19.

[115] ICSID AFR, Schedule C, Art. 41(3).

[116] PO 1, 13-14.

118. The Respondent submits that the Amicus submission should be granted as in accordance with Art. 41(3)[117] of the ICSID AFR as the submission is within the scope of Art. 41(3)(a)[118] and Art. 41(3)(c)[119] as well as the rules laid down in the PO.[120]

119. The amicus should be accepted as (1) CBFI has a *significant* and *public interest* in the present dispute. (2) The submission does *not* create an *undue burden* or *unfair prejudice* to either of the parties. (3) The submission would assist the tribunal to bring a *new perspective* to the present dispute.

**(A) *CRPU HAS A SIGNIFICANT INTEREST IN THE PROCEEDING AS WELL AS A PUBLIC INTEREST.***

120. As the foremost requirement, tribunals have to ascertain whether either a *public interest* and/or a *significant interest* of the petitioner is involved in an investment arbitration.[121]

121. Tribunals regarding amicus submissions have frequently required that the dispute be a matter of *public interest*, although this is not provided for in ICSID Rule 37 (2),[122] nor the UNCITRAL draft.[123] When it comes to the notion of *public interest* in investment arbitration, in its first order in ***Vivendi,***[124] the tribunal held that, because governmental measures and the responsibility of the State as such were at stake, the dispute did indeed entail public interest, as, however, do all investment arbitrations,[125] as well as the UNCITRAL Transparency Rules.

122. The tribunal went on to highlight the fact that the proceedings did involve more than the regular public interest, as the dispute centred on a *basic public service* to millions of people. They concluded that any decision rendered in the case has the potential to affect the operation of those systems and thereby the public they serve.[126] This is a form of definition that recurs in other decisions.

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[117] ICSID AFR, Schedule C, Art. 41(3).

[118] *Ibid*, Art. 41(3)(a).

[119] *Ibid*, Art. 41(3)(c).

[120] PO 1, 13-14.

[121] ICSID AFR, Rule 37 (2).

[122] *Ibid.*

[123] Biwater, ¶¶ 51–53.

[124] Aguas, 2019.

[125] *Ibid*, ¶ 19, Biwater, ¶¶ 51-53,

[126] Aguas, 2019, ¶ 20.

123. According to the tribunal in ***Aguas***,[127] where the tribunal decided that a matter is of *public interest* when the final decision in an investment dispute has the potential to affect, directly or indirectly, persons beyond those immediately involved as parties in the case.[128]

124. The Respondent submits that in light of the above decisions the amicus submission by the *CRPU* should be allowed as there is a *significant interest* of *CRPU* in the matter as the Amici possess a general interest in promoting fair business practices in Mekar.[129]

125. The decision rendered would further help in determining the future of the investment market in Mekar, one which the Amici are in the constant effort to advise investors looking for opportunities in Mekar.[130] Finally, The Amici have constantly engaged in anti-corruption practices and the decision of the present dispute will have far reaching consequences towards those practices affecting the entire investment market of Mekar.

126. The present dispute is regarding an investment made by the Claimant in the Aviation Sector in the territory of the Respondent and thus also affects a large number of people who avail these services.

127. Furthermore, the amicus submission also satisfies the need to represent facts from both sides to serve a specific legal purpose in securing the rights of persons who are directly affected as held in ***Apotex***.[131]

**(B) *THE SUBMISSION BY CRPU CAUSES NO UNDUE BURDEN OR UNFAIR PREJUDICE TO ANY PARTY***

128. Amicus curiae should not create an *undue burden* on or *unfair prejudice* to either one of the parties.[132] From the procedural angle, any tribunal can ensure that non-disputing party participation does not overly *burden* the proceedings by establishing procedural safeguards, such as time limits.[133] The tribunal in the ***UPS***[134] arbitration mitigated the burden by resorting to various procedural guarantees, including a limitation on the length of the submission, a

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[127] Aguas, 2017.

[128] *Ibid*, ¶18.

[129] Amicus Submission, CRPU, 19.

[130] *Ibid.*

[131] Apotex.

[132] UPS; Grand River, Amicus Submission, USCC, ¶ 9.

[133] UNCITRAL, Working Group, ¶ 77.

[134] UPS.

requirement for timely submission and such. This approach is widely shared in the jurisprudence of other tribunals.[135]

129. This tribunal has directed the Parties regarding amicus submissions towards guidelines which were issued in the PO[136] dated *March 25, 2021* which have been duly complied with by the submission made by CBFI.

130. Furthermore, it is important to note that petitioners merely favouring one of the parties does not always *prejudice* the other side; various petitioners have explicitly supported the companies involved in disputes.[137] Often the degree to which non-disputing party participation will substantively impact the proceedings to the benefit of one or the other party simply depends on the content of each case.

131. Reflecting on the practice of amicus participation and its substantive impact, the UNCITRAL documents therefore only state that both parties should be given the opportunity to present their observations.[138]

132. As held in ***Aguas***,[139] amicus submissions should help the decision maker arrive at its decision by providing arguments, perspectives, and expertise, which is relevant to the present dispute, and any such information cannot be held to be causing an unfair burden on the other party.[140]

133. An *unfair or undue burden* is not a danger, as long as the procedural safeguards put in place by any tribunal are respected by the amici.[141]

134. Thus it is submitted that the submission made by CRPU is valid and does not cause *Undue Burden* or *Unfair Prejudice* to One or any of the Parties involved in the dispute and simply, is within the ambit established by this tribunal in the PO.[142]

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[135] Aguas, 2017; Aguas, 2019; Biwater; Tunari.

[136] PO 1, 13-14, ¶ 21.

[137] Grand River, Amicus Submission by USCC.

[138] UNCITRAL, Working Group, ¶ 35.

[139] Aguas, 2017.

[140] *Ibid*, ¶ 27

[141] Border Timbers; Bernhard, PO No. 2.

[142] PO 1, 13-14.

### (C) *THE SUBMISSION BY CRPU WOULD ASSIST THE TRIBUNAL TO BRING A NEW PERSPECTIVE*

135. In arbitral decisions, it is held that amici may provide a particular insight on the issues under dispute, on the basis of either *substantive knowledge* or *relevant expertise* or *experience* that exceeds or differs from that of the disputing parties.[143] The importance of receiving factual information through amicus participation was highlighted in the UNCITRAL elaboration process on the new standard for transparency.[144]

136. Organizations which, due to their membership or grass roots activity, can provide salient data about the actual public impact of companies' activities or regulatory State action that is hard to obtain otherwise are most appropriate to participate.[145]

137. Taking into account the procedural limitation of ICSID tribunals that do not investigate on their own and rely entirely on the information provided by the parties, the value of *additional factual information* may sometimes become essential for a tribunal's evaluation of the facts.[146] In relation to legal arguments, the tribunal in the ***Aguas***[147] case highlighted that the traditional role of an amicus curiae is to help the decision maker arrive at its decision, by providing the decision maker with arguments, perspectives, and expertise that the litigating parties may not provide."[148]

138. In their amicus submission, the additional factual information submitted, being evidence of corruption on the part of the Claimant, Vemma on securing the investment for Caeli Airways in Mekar provide valuable information to the tribunal in matters relating to this dispute helping them reach a decision.[149]

139. Unlike the CBFI submissions, which the claimant is using to further their standing in the arbitration, the submissions by EARPU provide actual valuable additional information to the public based on their experience and expertise.

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[143] Aguas, 2019; Biwater; Piero Foresti; Cayman.

[144] UNCITRAL, Working Group, ¶¶5, 35.

[145] Triantafilou, 38–46.

[146] Anthony, 681–723, 684–687, 695–697; Ross Paul.

[147] Aguas, 2017.

[148] *Ibid.*

[149] Amicus Submission, CRPU, 19, ¶650.

140. Hence, the Respondent submits that the amicus submission by the CRPU should be allowed as it showcases additional valuable factual information of the dispute to this tribunal.

## ISSUE 3: THE RESPONDENT DID NOT VIOLATE ART. 9.9 OF CEPTA.

141. The Respondent submits that their conduct did not amounted to the breach of the *FET Clause* U/A 9.9 of CEPTA and that their conduct did not result in *Unfair and Inequitable Treatment* "*UIT*" of the Claimant's investment.

142. U/A 9.9.2 of CEPTA,[150] FET is said to be violated if a measure(s) as under the art. constitutes: (I) Denial of Justice in Civil and Administrative proceedings; (II) Fundamental breach of due process, including a fundamental breach of transparency; (III) Arbitrary or discriminatory conduct; (IV) Abuse of treatment towards the investor.

143. The Conduct of the Respondent, taken individually or cumulatively did not amount to a violation of Art. 9.2.2 of CEPTA.

### (I) *THERE HAS BEEN NO DENIAL OF JUSTICE IN CIVIL AND ADMINISTRATIVE PROCEEDINGS*

144. The Respondent submits that their actions have not been in contravention to Art. 9.9.2[151] and that there has been no "*Denial of Justice*" towards the Claimant as (A) The implementation of the annulled award cannot amount to *Denial of Justice*, and (B) There has been no Delay in Justice amounting to *Denial of Justice*.

### (A) IMPLEMENTATION OF THE ANNULLED AWARD CANNOT AMOUNT TO DENIAL OF JUSTICE

145. On *9 May 2020*, Mr. Cavanaugh, the sole arbitrator, had rendered the award in favour of the Respondent with regards to the arbitration concerning Hawthorne Group's offer in respect of the Claimant's shares.[152] However, upon the application of the Claimant, on *1 August 2020*, the Supreme Arbitrazh Court of Sinnograd had set aside the referred award.[153] This Award had been implemented in Mekar.[154]

146. There are several precedents that show that the enforcement of annulled arbitration awards cannot be categorized as Denial of Justice. In ***Putrabali***,[155] the French court of Cassation while enforcing an award which was set aside reasoned that the independence and validity of the award were to be ascertained according to the laws of the country where the enforcement is

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[150] CEPTA, Art. 9.9.2.

[151] *Ibid.*

[152] SUF, 39, ¶58.

[153] *Ibid*, ¶61.

[154] *Ibid*, ¶62.

[155] Putrabali.

sought and as such the award rendered by Sinnohgrad fails to meet and qualify as a valid award according to Mekari legal standards.

147. Similarly, in ***Hilmarton***,[156] the annulled arbitral award was still implemented in France. Art. V(1)(e) of NYC,[157] specifically use "*may*" for implementation of annulled awards.

Clearly, "*the local courts of the seat of arbitration may, depending on the local law, have the opportunity to intervene to designate the arbitral tribunal grant interim measures, or, rule on applications to set aside or vacate awards."*[158]

148. In another case of ***Yukos Capital***,[159] the award was implemented even after it was set aside by the seat of the arbitration because it was tainted with bias, same as the present dispute.

149. The High commercial court of Mekar rejected the arbitration award in lieu of powers granted to them by legislative action.[160] The decision of the High commercial court of Mekar was based on circumstantial evidence.[161] Efficiency in the performance of courts or administrative organs, which do not offend procedural propriety, are not considered violations of the FET standard's due process requirement.[162]

150. The Claimant has to meet a high threshold for establishing a denial of justice.[163] It can be regarded as:

"*a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."*[164]

151. The claims which were the basis of the judgment of Sinnoh Chambers were heavily tainted by the government's extreme take on corruption. As such, any such judgment, in the eyes of Mekari law does not hold.[165] Hence, the claim made by the Claimant *fails* to meet a high threshold for establishing a *denial of justice.*

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[156] Hilmarton.

[157] NYC, Art. V(1)(e).

[158] Jan Paulsson.

[159] Yukos Capital.

[160] Case file, Annex. XV, ¶16.

[161] Case file, Annex. XV.

[162] Global Telecom, ¶¶608, 612; Vannessa Ventures, ¶227; Cargill, ¶¶292-293.

[163] Agility, ¶¶210, 216.

[164] Jan de Nul, ¶¶192-193.

[165] Case file, Annex XV.

**(B) THERE IS NO DELAY IN JUSTICE AMOUNTING TO DENIAL OF JUSTICE**

152. Neither the Treaty nor international law establishes a fixed time limit to establish *denial of justice*.[166] In ***Toto***,[167] the tribunal rightly stated that:

*"it has to be conceded that international law has no strict standards to assess whether court delays are a denial of justice. [...] In fact, whether justice is rendered within a reasonable delay depends on the circumstances and the context of the case."*[168]

153. Hence, delays are to be properly assessed in light of existing circumstances, which include the reasonable expectations of the investors given the knowledge of the Judicial system which they have to work within and the consequential limitations of such a regime. For example, a substantial time frame of 9 years[169] or even 10 years[170] had not been found to constitute denial of justice considering the circumstances of the cases.

154. In the present case, the Claimant's allegations against the conduct of Mekar's judiciary come to nothing. It was common knowledge that 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*, which was even higher in commercial matters with approximately 27 months.[171]

155. Despite being overwhelmed by cases, Mekari courts gave the Claimant every opportunity to voice its grievances before the appropriate judicial authority. By scheduling the case regarding Caeli's claim against the CCM in April 2019, which is no more than mere 12 months after the case was registered in March 2018,[172] courts even managed to dispense justice speedily.[173]

156. Caeli Airways, with years of prior experience is expected to understand the burden and time constraints faced by an overworked judiciary.

157. Further, delay in the present case had not reached a stage where it could be counted as egregious or unfair and inequitable; this is the same delay undergone by all such cases in the Judicial system of Mekar due to unavoidable constraints.

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[166] H&H Enterprises, ¶405.

[167] Toto, ¶¶155, 163.

[168] *Ibid.*

[169] White Industries.

[170] Jan de Nul.

[171] SUF, 29, ¶13.

[172] SUF, 36, ¶44.

[173] Response to NOA, 8, ¶16.

158. The Claimant, being an investor, is expected to and should have been aware of the Judicial circumstances prevalent in Mekar wherein the average time taken from commencing and action to its final decision were around 27 months in commercial matters.[174]

159. It is important to note that arbitral tribunals have adopted a "*high threshold*"[175] for denial of justice and it entails "*the failure of the entire domestic legal system*"[176] towards providing justice to the Claimant. Already known legal circumstances in the present case cannot amount to failure of the entire domestic legal system.

160. Additionally, if anything an error of a national court that does not produce manifest injustice is not a *denial of justice.*[177] Hence, the Respondent has *not* violated Art. 9.9.2.*[178]*

**(II)** ***THERE HAS BEEN NO FUNDAMENTAL BREACH OF DUE PROCESS, INCLUDING A FUNDAMENTAL BREACH OF TRANSPARENCY, IN JUDICIAL AND ADMINISTRATIVE PROCEEDINGS***

161. The Respondent did not violate the requirements of *due process* and of *transparency* in judicial and administrative proceedings.

162. *Due Process* is an essential part of the procedural aspect of FET.[179] It includes omitting investors to be a part of hearings; making a decision without the investor's presence and undue influences by the host government.[180] The tribunals[181] have explained the standards for evaluating the violation of due process in ***Waste Management***, it reads as follows:

*"Involving a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process."[182]*

163. The breach of *due process* requires that there has to be the existence of grave procedural irregularities. Due process requires a fair procedure

*"that grants an affected investor a reasonable chance, within a reasonable time to claim its legitimate rights and have its claims heard."[183]*

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[174] SUF, 29-30, ¶13.

[175] Jan de Nul, ¶¶192, 193; H&H Enterprises, ¶400.

[176] Apotex, AOJ, ¶281; H&H Enterprises, ¶400.

[177] Harvard, ILC, Art. 9.

[178] CEPTA, Art. 9.9.2.

[179] Paulsson, J, 82, 98.

[180] Al-Bahloul, Partial Award on Jurisdiction and Liability, ¶221.

[181] S.D. Myers, ¶134; Rumeli, ¶¶609, 617; Jan de Nul, ¶187; Glamis Gold, ¶616; Bayindir, ¶¶178, 344; Oostergetel, ¶277.

[182] Waste Management, ¶98.

164. There has to be Transparency in order to fulfil the requirements of Due process.[184] The ICSID Tribunal in ***Metalclad***[185] set the standard for absolute transparency. In this case, the tribunal emphasized that "*all relevant legal requirements*" must be "*readily known to all affected investors*" with "*no room for doubt or uncertainty.*"[186]

165. Moreover, as laid in ***Tecmed***,[187] the host state is expected to act in a manner "*free from ambiguity and totally transparently in its relations with the foreign investor*," so that the foreign investor may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives.

166. In the present case, none of the incidents falls under this ambit. The CCM launched a *suo moto* investigation[188] in accordance with the requirements listed under MRTP Act. Caeli's market share exceeded 54% along with Royal Narnia, given the evident preferential secondary slot trading between them. This investigation was laid down to check on the predatory pricing strategies.[189]

167. Activities carried by the Claimant were hampering the competition on the domestic market.[190] Additionally, Steps taken by the CCM were proactive and necessary in nature and didn't harm *due process* or *transparency*.[191]

168. Hence, there has been no *fundamental breach* of *due process*, including a *fundamental breach* of *transparency*.

### (III) *THERE HAS BEEN NO ARBITRARY OR DISCRIMINATORY CONDUCT*

169. Most investment treaties impose an obligation upon the host state not to impair the management or operation of the investment by *arbitrary* or *discriminatory* measures, as is the case here, whereby the standard of affording all investments treatment which is neither

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[183] EDF, ¶435.
[184] Ying Zhu, 345.
[185] Metalclad.
[186] *Ibid*, ¶76.
[187] Tecmed.
[188] SUF, 34, ¶36.
[189] *Ibid.*
[190] SUF, 35, ¶38.
[191] *Ibid*, 34, ¶36.

*arbitrary* nor *discriminatory* is highlighted U/A. 9.9.2(c)[192] of the investment treaty between Bonooru and Mekar.

170. In the present case, the Investment treaty between Mekar and Bonooru has wrongfully alleged violation of the FET clause relating to Arbitrary conduct under CEPTA.[193] However, the treaty fails to define the term "*arbitrary*" or "*unreasonable*". In such cases, the ICSID tribunals have referred their dictionary definitions,[194] or adopted[195] the approach of the ICJ[196] in the ***ELSI** case,*[197] which defined arbitrariness as

*"a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."*[198]

171. Measures are reasonable if they are rationally and proportionally connected to a state's public policy,[199] and consistent with contemporary state practice.[200] Tribunals afford deference corresponding to a state's policy objective's importance.[201]

172. The respondent submits that their conduct is not of an *arbitrary and discriminatory nature* and cannot be held to have violated the FET provisions under CEPTA in relation to (A) The LPM Government's Anti-privatisation practices and programmes, (B) The CCM investigations, and (C) Subsidies granted under Executive Order 9-2018.

**(A) *LPM GOVERNMENT'S ANTI-PRIVATISATION PRACTICES AND PROGRAMMES***

173. The Respondent submits that Mekar acted reasonably under the circumstances.[202] At the time when the State of Mekar introduced the policy The Respondent state was witnessing an economic crisis of catastrophic proportions at an unprecedented scale. The socio – political scenario of the State of Mekar[203] has been evident since before the Claimant made their

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[192] CEPTA, Art. 9.9.2(c).

[193] *Ibid.*

[194] Tza Yap Shum, ¶187; Siemens, ¶318; Occidental, ¶162; Lauder, ¶221.

[195] Duke Energy, ¶378; Siemens, ¶318; LG&E, DOL, ¶146; Azurix, ¶391; Noble Ventures, ¶176; Loewen, ¶131.

[196] ELSI, ¶128; Neer, ¶4.

[197] Hamrock, 837.

[198] Toto, ¶157; Duke Energy, ¶381; Sempra, ¶318; Enron, ¶281; Noble Ventures, ¶¶177, 178; ELSI, ¶128.

[199] Schefer, 281; Schwarzenberger, 89-90, 99-100; Dolzer, 173; Cheng, 132-134; Saluka, ¶460; AES, ¶10.3.7.

[200] ADF, ¶188; Noble Ventures, ¶¶178, 182; Philip Morris, ¶126.

[201] Philip Morris, ¶399.

[202] Philip Morris, DO of Born, ¶141; Lemire ¶283.

[203] SUF, 35, ¶39.

investment in Mekar and a failure to perform due diligence towards the same was a fault on the part of the claimant.

174. Investment tribunals have considered that an investor investing in a host state should be able to rely on a certain degree of stability relating to its investment.[204] This does not however imply that investors should expect that the legal framework will not change at all. Tribunals have emphasised that a state's legal framework is by definition subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative acts.[205]

175. Additionally, as expressed by the ICSID tribunal in ***Biwater***,[206] in reference to establishing a violation, countervailing factors such as the responsibility of foreign investors, both in terms of prior due diligence as well as subsequent conduct should be considered.

176. As such, under normal circumstances, following the economic crisis,[207] as well as the election campaign of the LPM which clearly stated their intent to reduce the privatisation taken on by the previous government, the changes to the regulatory framework was, in the least, expected. This point was also made by the tribunal in ***Parkerings***,[208] wherein the tribunal stated that considering the socio-political and economic transition in the state, the investor should have anticipated changes to the regulatory framework. The tribunal provided:

"*[a]s any businessman would, the Claimant was aware of the risk that changes of laws would probably occur after the conclusion of the Agreement.*"[209]

177. Therefore, the investor is expected to consider business risks, which to a large extent depend on the country in which the investment is being made.[210] It would not be reasonable for an investor investing in a highly volatile political environment, whatever the assurances received, that the investment will no longer be affected by further disruptions.[211]

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[204] Parkerings, ¶333.

[205] AES, ¶9.3.29; Parkerings ¶333; Continental Casualty, ¶258.

[206] Biwater, ¶601.

[207] SUF, 35, ¶39.

[208] Parkerings, ¶335.

[209] *Ibid.*

[210] Levashova, 233-255.

[211] Viñuales (2017), 363.

178. Finally, as expressed by the ICSID Tribunal[212] previously wherein the tribunal expressly acknowledged the pivotal role of the hardship experienced by the host state that had "*just overcome a highly repressive and isolationist communist regime*" and experienced a "*severe economic and financial crisis, which brought it to the brink of the complete collapse of its State structures*."[213] The tribunal explained that an investor could not expect that the legal framework at the time of the investment would remain stable, considering that the Albanian system was still rooted in communist traditions.

179. As such, the Respondent submits that The LPM Government's Anti-privatisation practices and programmes which were taken due to a severe economic and financial crisis in the country with the aim to restore the economy of the country and as such cannot be considered to be a violation of the FET standard, neither under the BIT nor under customary international law.

**(B) *INVESTIGATIONS BY THE CCM.***

180. Caeli Airways, under the Control of the Claimant turned into the only consistently profitable carrier on over half the routes to and from its base airport, Phenac International[214] following an incredibly risky expansion policy[215] against the recommendation of the board representatives of Mekar Airservices.[216]

181. The rapid expansion of Caeli Airways drew the attention of the CCM[217] who launched an investigation towards Caeli to identify whether Caeli had adopted predatory pricing strategies with the aim of hindering competition on the domestic market,[218] who expressed their intention in a press release dated *9th September, 2016*.[219]

182. It is well established that the states have the power to exercise their sovereign laws,[220] what is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.[221]

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[212] Mamidoi, ¶634.
[213] *Ibid*, ¶625.
[214] SUF, 34, ¶35.
[215] SUF, 34, ¶35.
[216] *Ibid*, 33, ¶31; 34, ¶35.
[217] *Ibid*, 34, ¶36.
[218] *Ibid.*
[219] *Ibid.*
[220] Parkerings, ¶¶334–338.

183. In the present case, as under the MRTP ACT[222] the CCM had every right to launch such an investigation as they had full competence to initiate an investigation concerning potentially anti- competitive behaviour. As such, any exercise of sovereign law by way of an investigation in the present case does not amount to a violation of the FET standard of treatment by way of arbitrary or discriminatory behaviour on part of the Respondent.

184. Under the MRTP ACT,[223] the CCM had the competence to impose any interim and final remedy it deems just under Mekari law which are proportionate to the infringement committed and only to the extent necessary to bring the infringement effectively to an end. As such, the predatory pricing strategy investigation of the CCM was just to provide for an interim airfare cap regarding the Claimant, wherein the CCM placed caps on Caeli Airways' airfare to prevent it from earning supra-competitive profits in the future.[224] Additionally, these airline caps were set reasonably above the rates Caeli Airways charged on set routes,[225] which had no evidence of hurting the profitability of Caeli Airways.[226]

**(C) *REJECTING THE APPLICATION FOR SUBSIDIES UNDER EXECUTIVE ORDER 9-2018 OF THE CLAIMANT'S SUBSIDIARY COMPANY, CAELI AIRWAYS***

*"To amount to discrimination, a case must be treated differently from similar cases without justification; a measure must be 'discriminatory and expose the claimant to sectional or racial prejudice'; or a measure must 'target Claimant's investments specifically as foreign investments."*[227]

185. *Discrimination* exists when there is unequal treatment of equal circumstances without any justified[228] motive (i.e. arbitrary, grossly unfair, unjust or idiosyncratic). Thus, *discriminatory* measures: (i) inflict damage on the investor without serving any apparent legitimate purpose and are not based in legal standards but on discretion, prejudice or personal preference; (ii) are applied for reasons different from those put forward by the decision maker; or (iii) are in wilful disregard of due process and proper procedure.[229]

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[221] *Ibid*, ¶332.

[222] Case file, Annex V, 47, Sec. 2.

[223] *Ibid*, (4)(d).

[224] SUF, 34, ¶37.

[225] *Ibid.*

[226] SUF, 35, ¶37.

[227] Lidercón, ¶169; Cengiz, ¶525; Lemire, DOJ, ¶261; Plama, ¶184; Saluka, ¶307.

[228] Lidercón, ¶169; Crystallex, ¶616; Electrabel, ¶175; Enron, ¶282.

[229] EDF, ¶303.

186. Following the 2016 fall of the Mekari currency, a currency crisis ensued in Mekar by March 2017.[230] Which caused an increasing inflation leading to a surge in costs of everyday items and reduced consumer spending power. The IMF emphasised "*the need to establish credibility in the [local] currency to avoid a debilitating economic situation."*[231] The economic crisis in the state witnessed a change in the political regime as the earlier isolationist communist party returned to power.

187. The President of Mekar, by way of *Executive Order 9-2018* authorised the Secretary of Civil Aviation to sanction loans with subsidies to provide liquidity to eligible businesses related to losses incurred as a direct result of the 2017 crisis.[232] Caeli Airways' application for subsidies under this Order was rejected by the Secretary.[233]

188. The Respondent submits that the rejection was in no way *discriminatory* towards the claimant and the discretion available to the Secretary of Civil Aviation was applied with reason and meaning.

189. The Secretary of Civil Aviation under the order was entitled to use the discretionary power to allow only such enterprises to avail loans for whom (i) necessary credit is not reasonably available at the time of the transaction; or (ii) the intended obligation by the obligor is prudently incurred; or (iii) the loan is sufficiently secured.[234]

190. Caeli Airways had been found guilty of breaching of Mekar's antitrust legislation in the form of predatory pricing by the CCM,[235] while another investigation regarding anti-competitive activities of the Claimant's investigation was underway.[236] Additionally, the Claimant, owing to being partly owned by the Bonoori Government had easy access to a line of credit which they had demonstrated by using their Bonoori connections to refinance the inherited debt of Caeli Airways at rates more favourable than available on the market.[237]

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[230] SUF, 35, ¶39.
[231] *Ibid.*
[232] Case file, Annex VIII, 56.
[233] SUF, 36, ¶46.
[234] Case file, Annex VIII, 56, Sec. 3101(c).
[235] SUF, 36, ¶45.
[236] *Ibid*, 35, ¶38.
[237] *Ibid*, 33, ¶30.

191. Lastly, Over the course of the previous year, the claimant had been unable to secure a steady stream of revenue and repeatedly stressed that the airline would not be able to maintain sustainable revenues during the less profitable winter season.[238]

192. As such, the decision to deny Caeli benefits of the Executive order after the Claimant's investment failed to meet the required criteria cannot be held to be a discriminatory measure by the Respondent.

### (IV) *THERE WAS NO ABUSE OF TREATMENT*

193. *Abusive* conduct includes coercion, duress, and harassment that involve unwarranted and improper pressure, abuse of power, persecution, threats, intimidation, and use of force.[239]

194. The ICSID Tribunal has in a variety of cases established an FET breach on account of abusive treatment if episodes of harassment and coercion are "*repeated and sustained*,"[240] amount to a "*deliberate conspiracy […] to destroy or frustrate the investment*"[241] or a "*conspiracy to take away legitimately acquired rights*"[242] that the question of whether a specific State conduct constitutes impermissible harassment will turn on the facts of each case.[243]

195. The Respondent humbly submits before this Hon'ble Tribunal that no conduct of the same has been violative of Art. 9.9.2(d) of CEPTA, and may be construed as abusive treatment of investors.

196. Notably, the ICSID has also established the need for cogent or solid evidence in order to establish serious misconduct or abuse of treatment, such as intimidation or harassment[244] or alleged "*conspiracy*"[245] or "*campaign*"[246] by the host State.

197. With reference to the case in hand, the Claimants in *November 2019,* announced their intention to sell their stake in Caeli Airways, in furtherance of the same they secured an offer from Hawthorne Group LLP, the terms of which were communicated via notice dated *9 December,*

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[238] *Ibid*, 35, ¶40.
[239] Saluka, ¶231.
[240] Eureko, ¶237.
[241] Waste Management, ¶138.
[242] PSEG, ¶245.
[243] IMFA, ¶228; Lemire, DOJ, ¶284.
[244] Rompetrol ¶¶182, 273.
[245] Besserglik, ¶362.
[246] Tokios Tokelės, ¶¶123, 136.

*2019*.[247] In its response dated *17 December 2019*, the Respondent invoked their "*Right to First Refusal*" as rightly vested in Art. 39 of the Shareholders' Agreement.[248]

198. Notably, the decision to reject the referred offer was taken in light of the Respondent's contractual performance and the right to "*First Refusal*" vested in them. It was an ordinary step of a contracting counterparty, not in pursuance of any abusive treatment of the claimant and thus the same cannot be considered as a violation of an FET Standard.[249]

199. Furthermore, it was only a result of the Claimant's failed efforts to yield another buyer for its shares from *February, 2020* to *September 2020*, that they sold their stake in Caeli Airways to the Respondent.[250]

200. It is here that the Respondent would like to establish and reiterate that the same was not due to any *coercion, duress* or *harassment* of the Claimants but simply as a result of the latter being unsuccessful in finding another buyer. Furthermore, there does not exist any solid or strict evidence which indicates or exhibits the Respondent's abusive treatment towards the Claimant.

201. The Respondent thus humbly submits that the same has not violated Art 9.9.2(d) of CEPTA and that there has been no *abusive treatment* of the Claimants.

## (V) *THE ACTIONS OF THE RESPONDENT DID NOT RESULT IN A CUMULATIVE VIOLATION OF THE FET STANDARD*

202. Under CEPTA, violation of FET standard is provided as a violation of distinct acts under which these violations are assessed independently.[251]

203. While the measures can be taken together but the mere mention of different FET Standards forbids the Claimant from taking the defence of "*creeping violation*" of the cumulative act.[252] These acts are not independently strong enough to violate the FET Standards. There is no provision under CEPTA that specifically deals with the concept of *cumulative acts* resulting in creeping violation.

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[247] SUF, 39, ¶56.

[248] Case file, Annex. VI, Art. 39.

[249] Biwater, ¶¶697, 700.

[250] SUF, 40, ¶63.

[251] CEPTA, Art 9.9.

[252] Infinito Gold, ¶229.

204. Hence, the contention of a cumulative or creeping violation by the Claimant cannot be claimed under CEPTA.

### (VI) *ARTICLE 15 OF ILC IS NOT APPLICABLE IN THE PRESENT CASE*

205. It is to be submitted that Composite acts covered under Art. 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such.[253] The term *"composite act"* refers to obligations that can only be breached through a series of measures rather than through an individual act.[254]

206. Hence, it fails to apply in standards such as FET which can only be violated through single act**s**.

207. Art. 15 is not applicable in the present case, as argued in ***El Paso***,[255] the present case also involves multiple acts that led to the same case rather than in different cases and it cannot be covered under the definition of *composite act* but rather the definition of the *complex act*, which is not retained in the final ILC Articles.

208. Hence, the actions of the Respondent cannot be covered U/A 15 of ILC.

### (VII) *ACTIONS OF THE RESPONDENT WERE JUSTIFIED U/A 9.8 OF CEPTA*

209. Even if this tribunal were to find out that Art. 9.9[256] has been violated, it is submitted that the actions of the Respondent were justified as per the rights listed U/A 9.8[257] of CEPTA.

210. Art. 9.8[258] gives the right to the host state to regulate, under which the Respondent is enshrined with the right to regulate its internal affairs amid an economic crisis. Since *2016*, the currency of Mekar has been nosediving resulting in a heavy economic crisis.[259]

211. Actions of the Respondent are justified under this ambit.

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[253] ILC, Art. 15.
[254] ILC, Commentary.
[255] El Paso, ¶77.
[256] CEPTA, Art. 9.9.
[257] *Ibid.*
[258] *Ibid.*
[259] SUF, 35, ¶39.

## ISSUE 4: MEKAR DOES NOT HAVE ANY LIABILITY TO COMPENSATE THE CLAIMANT.

212. The Respondent submits that "*market value*" should be paid in accordance with Art 9.21[260] if this tribunal nevertheless determines that the Respondent is obligated to pay compensation. The Respondent also contends that (I) MFN does not apply, (II) ILC, contributory negligence, and (III) Economic crisis should be taken into consideration.

### *(I) THE RESPONDENT HAS NO OBLIGATION UNDER ART. 9.21 OF CEPTA*

213. Art 9.21(1)[261] read with Art 9.21(1)(a)[262] states:

"*Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination",* "*monetary damages at a market value.*"

214. The Claimant, Vemma, sold their stake in Caeli Airways to Mekar Air Services for USD 400 million.[263]

215. As per Art. 9.21, the Respondent was obligated to pay monetary damage at a *market value* which was duly followed by the Respondent when they bought the Claimant's share in their investment into the territory of Mekar.[264]

216. Hence, the Respondent is not liable to pay any further damages under Art. 9.21 of CEPTA.

### **(II) *THE MOST FAVOURED NATION CLAUSE IS NOT APPLICABLE***

217. The Respondent submits that *FMV* standard of compensation cannot be imported from 2006 Arrakis-Mekar BIT because of two-fold reasons; Firstly, Art. 9.7.1 does not extend to or include the standard of *FMV* compensation.[265] Secondly, substantive obligations such as "*compensation*" cannot be adopted using MFN from any treaty other than the governing BIT.[266]

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[260] CEPTA, Art. 9.21.
[261] *Ibid*, Art. 9.21(1).
[262] *Ibid*, 9.21(1)(a).
[263] SUF, 40, ¶63.
[264] CEPTA, Art. 9.21.
[265] *Ibid*, Art. 9.7.1.
[266] CEPTA, Art. 9.7.2.

218. MFN clause cannot be used to import substantive obligations. This can also inferred from case of ***Ickale***,[267] which talks about Turkey-Turkmenistan BIT, where it was laid down that substantive obligations cannot be imported using *MFN clause* from other BITs. Art. 9.7.2 clearly states that *MFN* is not extended to procedures and since compensation is matter of procedure *MFN* cannot apply.[268]

219. Additionally, Art. 9.13 of ARRAKIS[269] and Art. 9.21 of CEPTA[270] are corollary in nature and they serve the same function. The Parties to this dispute agreed to be governed under CEPTA.[271]

220. The already existing articles that have been agreed upon cannot be eliminated by using *MFN* clause. If done so, it would frustrate the purpose of Art. 9.21 which both parties to the dispute willing accepted when the treaty came into force.

221. Hence, *MFN* clause cannot be used to import *FMV* standard of compensation in the present dispute.

### *(III) THE RESPONDENTS ACTIONS DO NOT INSPIRE CONTRIBUTORY FAULT.*

222. Losses incurred by Claimant were a consequence of their own actions and thus, as such the Respondent owes *no damages* to the Claimant

223. The Respondent submits that the losses incurred by the Claimant were a consequence of their own actions and thus, as such the Respondent owes no damages to the former. The Respondent would further like to further point out that CEPTA cannot be treated as a *bulwark* against business risks and that the investors should bear the consequences of their own risky actions undertaken during the period of ownership. In the present case, the Claimant is solely responsible for its own losses and actions.

224. Investors remain responsible for their own actions and omissions during the investment processes.[272] As such, the Claimant's failure to conduct an adequate and equivalent risk

[267] İçkale.
[268] CEPTA, Art. 9.7.2.
[269] Case file, 84, Art. 9.13.
[270] CEPTA, Art. 9.21.
[271] SUF, 33, ¶32.
[272] Biwater. Amici Brief, ¶373.

assessment will affect their investment and invariably the right to seek investment protection under any relevant BIT.[273]

225. It is widely recognised among arbitral tribunals that there are two obligations which an investor is required to fulfil and perform while operating the investment under international investment law.[274] Firstly, (A) the obligation of *due diligence* and, Secondly, (B) the duty to act in *good faith*.

**(A) *THE OBLIGATION TO PERFORM DUE DILIGENCE OR OBLIGATION TO MAKE RISK ASSESSMENT***

226. As laid down by the ICSID Tribunal in ***Biwater***,[275] any losses incurred as a result of an investor's inability to undertake an appropriate *risk assessment* will be borne by the investor and cannot be recoverable under the provisions of any investment treaty. For instance, the losses incurred by the Claimant due to the risky operational activities they have undertaken cannot be protected under any FET violation clause of CEPTA.[276]

227. Additionally, as held in the matter of ***Duke Energy***,[277] the ICSID Tribunal established that it is not only the level of *risk* assumed by the investor which is assessed before an investment is made, but also the political, socio-economic, cultural as well as historic conditions prevailing in the whole of the host State.[278] Notably, such assessment is not only limited to the time when the investment is made, but also should be conducted during the continuance of the entire investment.[279]

228. In the present case, the Claimant was aware of all the factors governing its investment. Vemma was capable of eliminating the *risk* by complying with the recommendations of Mekar Airservices, which they chose to ignore at every point.[280]

229. The Claimant should have also noted that the rock bottom prices of fuel would not last forever and those prices were bound to increase.[281] The Claimant furthermore should have analysed the

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[273] *Ibid.*

[274] Kaldunski, 111-124.

[275] Biwater.

[276] CEPTA, Art. 9.9.2.

[277] Duke Energy.

[278] *Ibid*, ¶¶340-347.

[279] *Ibid*, ¶¶340-347.

[280] SUF, 34, ¶35.

[281] *Ibid*, 33, note 2.

economic situation and cannot blame Mekar for taking steps to ensure trust in their own currency in accordance with the recommendations of the IMF,[282] which may have asked the Claimant to provide services in exchange for the currency of Mekar.

230. Additionally, the air-fare caps imposed by the CCM were a result of their own activities which were proven to be in contravention of domestic laws.[283]

**(B) *THE OBLIGATION TO ACT IN GOOD FAITH***

231. The Claimant had an obligation to operate and maintain its investment in *good faith*. As per the rule of "*ex turpi causa non oritur action,"* no one who can benefit will be able to pursue legal relief and damages if it arises in connection with their own tortious act.[284]

232. *Good faith* is a critical component in investment arbitration, as the principle permeates every aspect of a foreign investor's relationship with a host country.[285] In the present dispute, the Claimant has tainted its relation with the host state by performing a series of actions that resulted in betrayal, and were thereby against *good faith*.

233. Art. 31(1) of the Vienna Convention mandates the interpretation of a treaty in *good faith.*[286] The UNCITRAL Tribunal laid great emphasis on the "*doctrine of clean*" *hands* in the matter of ***Al-Warraq***.*[287]* The investor in this case was found to be in breach of an international obligation established by an international agreement.[288] Notably, as the investor breached the international obligations, the Tribunal relying on the aforementioned doctrine, declined to award damages to the same.[289]

234. Similarly, actions carried by the Claimant cannot have been done in *good faith*. *Good faith* is *Quid pro quo* for operating and maintaining investment in a host state.[290] Owing to various business losses, the Respondent constantly cautioned the Claimant regarding the exorbitant

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[282] *Ibid*, 35, ¶39.
[283] *Ibid*, 36, ¶45.
[284] Margaret Fordham.
[285] Ponce, 35.
[286] Vienna Convention, Art. 31(1).
[287] Al-Warraq.
[288] *Ibid.*
[289] Al-Warraq.
[290] Attila Tanzi, 189–220.

costs in relation to maintaining the airline fleet during low-business season.[291] However, the Claimant disregarded these concerned warnings and continued expanding the business' gamut.

235. Furthermore, in order to maintain healthy and sound business, the Respondent preferred injecting the profits made by Caeli Airways into repaying the outstanding debts.[292] Even so, these well-founded concerns were suspiciously ignored by the Claimant and the generated profits were employed in expanding the business instead of improving the financial health of the company. All these activities attracted the attention of the CCM as they were hindering the competition on the domestic market.[293]

236. Additionally, the Claimant also ignored the claim regarding oil-price rise given by the CEPO Secretary-General.[294] CEPO coordinates petroleum supply policies as well as ensures price stability on the international market.[295] It is irregular of an investor like the Claimant to not take cognizance of such a key factor.

237. The Claimant was a highly experienced investor who had great dominance and expertise in the airline industry owing to their success in the Bonoori Airline Industry[296] as well as their strong relations with Moon Alliance.[297] The highly risky nature of their business strategies as well as neglecting the concerns of Mekari authorities is inconsistent with the competence of a reasonable investor.

**(C) *THE CONTRIBUTORY NEGLIGENCE AS LISTED U/A 39 OF INTERNATIONAL LAW COMMISSION'S ARTICLES OF STATE RESPONSIBILITY.***

238. *Alternatively*, if this tribunal still finds that the Respondent is liable to pay compensation, then in such circumstance, the *contributory fault* of the Claimant should be taken in cognizance while determining the amount of compensation to be paid by the Respondent.

239. The ILC Articles, adopted in draft form by the Commission in 2001 U/A 39 considers the possibility that the Claimant might have contributed to his or her own loss and limits the

[291] SUF, 33, ¶31.
[292] SUF, 34, ¶35.
[293] *Ibid*, ¶36.
[294] *Ibid*, 33, Note 2.
[295] *Ibid*, 32, ¶28.
[296] *Ibid*, ¶24.
[297] *Ibid*, 29, ¶11.

liability of the Respondent in this regard.[298] As emphasised in the commentary to Art. 39,[299] the liability of the parties may be limited if the victim has "*substantial contribution*" to its loss by a manifest lack of due care.[300]

240. While considering *contributory negligence*, the tribunal is required to assess whether it is "*just and equitable*" to reduce the damages having regard to the claimant's share of responsibility for the damage. This requires consideration of such actions of the Claimant which "*represent negligent and reproachable behaviour*,"[301] or as determined by the ***Occidental***[302] tribunal, "*the contribution must be material and significant*." This was later also used and upheld by the ***Yukos***[303] Tribunal.

241. In ***MTD Equity,***[304] the tribunal determined that failure of the Claimant to perform *due diligence* and exercise of poor business judgement was a significant misconduct and portrays negligent behaviour putting the investors at fault and making the Claimant liable for *contributory negligence* even in the case where the respondent was found to have violated the FET obligations contained under the relevant BIT.

242. Similarly, in the present case, the Claimant attracted losses for Caeli and is significantly responsible for its poor financial conditions owing to the various poor business decisions taken by the Claimant during the course of investment which in turn led to commercial risk.

243. Firstly, the Claimant did not pay heed to the CEPO Secretary-General's warning regarding the consequent price rise of the fuel prices, and kept reducing their air fares.[305] Secondly, the low rates of air fare attracted administrative actions such as airfare caps which were necessary to protect the competition of the regional airlines.[306] Lastly, the Claimant kept on expanding the

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[298] ILC ASR, Art. 39.

[299] *Ibid.*

[300] ILC ASR, ¶¶500-503.

[301] Marboe, 121, ¶3.243.

[302] Occidental.

[303] Yukos, 502, ¶1601.

[304] MTD Equity.

[305] SUF, 33, ¶31.

[306] *Ibid*, 36, ¶43.

business instead of repaying debt that further lead to the poor financial condition of the company.[307]

244. Therefore, it is evident that the lack of *due diligence* exercised by the Claimant in conjunction with the poor and negligent business decisions undertaken by the Claimant were indeed the *significant* and *material* conduct primarily responsible for the injuries caused.

245. Hence, the tribunal must take the actions of the Claimant into consideration and recognise that the negligent decisions and actions of the claimant were "*material and significant*" and had significantly increased their risks in the transactions and accept the Respondents' *contributory fault* defence finding that the Claimants should bear the consequences of their own actions as experienced businessmen.

## (IV) *THE ECONOMIC SITUATION IN THE RESPONDENT STATE SHOULD BE CONSIDERED WHILE DETERMINING THE AMOUNT OF COMPENSATION.*

246. The Respondent finally submits that the tribunal must take into account the circumstances of the Host State while determining the amount of compensation in this case.

247. It is a matter of fact that Mekar is a developing country with an ongoing economic crisis of unprecedented degree.[308] Since 2016, the currency of Mekar has been nosediving resulting into heavy economic crisis.[309]

248. Preamble of CEPTA[310] reads as "*RECOGNISING the differences in their levels of development and diversity of economies."*

249. The Preamble serves as essence of an agreement.[311] Therefore compensation being part of CEPTA is to be interpreted in light of the preamble. Current economic condition of Mekar should be duly considered.

250. Thereby, taking into consideration the plummeting economy as well as the abysmal financial circumstances prevalent in Mekar, the same must be held to different standards while

[307] *Ibid*, 34, ¶35.
[308] *Ibid*, 35, ¶41.
[309] *Ibid*, ¶39.
[310] CEPTA, Preamble, 71.
[311] Hulme, 1281–1343.

computing the amount payable as compensation in order to prevent further financial strain.

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## PRAYER FOR RELIEF

*The* Respondent *hereby requests this Arbitral Tribunal to find that:*

1. This Tribunal **lacks Jurisdiction** over this dispute;
2. Mekar **has not** breached **Article 9.9** of CEPTA and has afforded the Claimant's Investment Fair and Equitable Treatment;
3. The Amicus submission by Consortium of Bonoori Foreign Investors **should be rejected** while the submissions of External Advisors to Mekar's Committee on Reform of Public Utilities **should be accepted**.
4. The Respondent's actions individually, or collectively does not amount to a **Creeping violation** of the prescribed **FET standard**;
5. Declare that the Respondent has paid **sufficient Compensation** i.e. **Market Value** to the Claimant which is applicable in the present dispute;
6. **Award** the Respondent **All Costs and Fees** related to these proceedings; and

*Pass any other Order that it may deem fit.*

*For this act of Kindness, the Respondent shall be forever grateful.*

On behalf of the Respondent,

Vemma Holdings Inc.

Team YUSUFW