**TEAM AGO**

IN THE MATTER OF ARBITRATION UNDER
THE ICSID ADDITIONAL FACILITY RULES

**VEMMA HOLDINGS INC.**
-CLAIMANT-

*v.*

**THE FEDERAL REPUBLIC OF MEKAR**
-RESPONDENT-

# MEMORIAL FOR RESPONDENT

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| ARS | Draft Articles on State Responsibility – International Law Commission (2001) |
| ECHR | European Convention on Human Rights (1950) |
| ICCPR | International Covenant on Civil and Political Rights (1966) |
| ICSID AF Rules | Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (2006) |
| ICSID Convention | Convention on the Settlement of Investment Disputes Between States and Nationals of Other States – International Centre for Settlement Of Investment Disputes (1965) |
| Kazakhstan-Turkey BIT | Agreement Between the Republic of Turkey and the Republic of Kazakhstan concerning the Reciprocal Promotion and Protection of Investments (1995) |
| NAFTA | North American Free Trade Agreement (1992) |
| NYC | United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 3 (1958) |
| Ontario RCP | Ontario Rules of Civil Procedure, O. Reg. 575/07, s. 6 (1) (1990) |

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| UNCITRAL Rules | United Nations Commission on International Trade Law Arbitration Rules (1976, as revised in 2013) |
| UK CPR | United Kingdom Civil Procedure Rules, SI 1998/3132 (1998) |
| UNCLOS | United Nations Convention on the Law of the Sea (1982) |
| US FRCP | United States Federal Rules of Civil Procedure, 28 U.S.C. (1937) |
| VCLT | Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969) |

## INDEX OF ABBREVIATIONS

| | |
|---|---|
| BIT | Bilateral Investment Treaty |
| Caeli | Caeli Airways |
| CBFI | The Consortium of Bonoori Foreign Investors |
| CBFI's Application | *Amicus* submission by the Consortium of Bonoori Foreign Investors. Application for leave to file a non-disputing party *amicus curiae* submission. ICSID Case No.ARB(AF)/20/78. April 19, 2021 |
| CCM | Competition Commission of Mekar |
| CEPTA | Bonooru-Mekar Comprehensive Economic Partnership and Trade Agreement |
| Claimant's application | Claimant's application to bar the *amicus* submission by the External Advisors |
| Committee | The Committee on Reform of Public Utilities |
| EC | European Commission |
| ECCHR | European Center for Constitutional and Human Rights |
| ECtHR | European Court of Human Rights |
| External Advisors | The External Advisors to the Committee on Reform of Public Utilities |
| External Advisors' Application | External Advisor's application for leave to file a non-disputing party *amicus curiae* submission |
| FCA | The Financial Conduct Authority |

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|---|---|
| FET | Fair and Equitable Treatment |
| FMV | Fair Market Value |
| FFP | Frequent flyer program |
| High Court | High Commercial Court of Mekar |
| ICJ | International Court of Justice |
| ICSID | International Centre for Settlement of Investment Disputes |
| IMF | International Monetary Fund |
| ISA | International Standards on Auditing |
| LLC | Low-cost Carrier |
| MFN | Most Favoured Nation |
| MRTPA | Monopoly and Restrictive Trade Practice Act |
| MV | Market Value |
| OECD | Organization for Economic Co-operation and Development |
| PCA | Permanent Court of Arbitration |
| PCIJ | Permanent Court of International Justice |
| PO1 | Procedural Order No.1 |
| PO2 | Procedural Order No.2 |
| PO3 | Procedural Order No.3 |
| PO4 | Procedural Order No.4 |

| | |
|---|---|
| SCC | Sinnoh Chamber of Commerce |
| SOE | State-owned enterprise |
| SUF | Statement of Uncontested Facts |
| Superior Court | Superior Court of Mekar |
| UNCITRAL | United Nations Commission on International Trade Law |
| 1994 Bonnoru-Mekar BIT | 1994 Bilateral Investment Treaty between the Federal Republic of Mekar and the Commonwealth of Bonooru for the promotion and protection of investments |

## STATEMENT OF FACTS

1. Claimant, Vemma Holdings Inc., is an airline holding company incorporated in Bonooru, in which Bonooru holds a 55% stake. Claimant made its investment in 2011 by acquiring an 85% stake in Caeli, Mekar-based airline.

2. Respondent, the Federal Republic of Mekar, is a developing state seeking to boost its economy by attracting foreign investors.

**CCM's Investigations**

3. In 2010, Bonooru launched the state Caspian Project to redefine trade patterns to Bonooru's benefit, which prompted Claimant's investment.

4. In March 2011, CCM launched the First Investigation into Caeli's activities due to Caeli's unjustifiably rapid expansion in the market and cooperation with Claimant-owned Royal Narnian.

5. In December 2016, CCM opened the Second Investigation into Caeli upon complaint of regional airlines and imposed airfare caps to curb Caeli's predatory strategies.

**Maintaining the caps**

6. In late 2016, Mekar faced the currency crisis. To save its economy, in 2018, Mekar required all companies operating in its territory to offer services denominated exclusively in MON.

7. Since Caeli continued to breach Mekari legislation, CCM refused to lift the caps. Reasonableness of CCM's actions was confirmed by the High Court decision dated 15 June 2019.

**Respondent acquires the stake in Caeli**

8. On 9 December 2019, Claimant negotiated the sale of Caeli with Hawthorne Group LLP, another member of the Moon Alliance. Mekar Airservices, owner of the outstanding stake in Caeli, refused to approve the sale due to the artificially inflated price.

9. The dispute over the validity of the offer was submitted to arbitration. The arbitrator found that Claimant failed to secure a *bona fide* third-party offer. The High Court enforced the award, and the Superior Court concurred.

10. In October 2020, Claimant sold its stake to Mekar Airservices for 400 million USD.

## SUMMARY OF ARGUMENTS

11. **TRIBUNAL'S JURISDICTION.** The Tribunal lacks jurisdiction. First, Claimant does not qualify as a "*national*" under the ICSID AF Rules because it acted as Bonooru's agent and discharged governmental function. Second, Claimant is not an investor under the CEPTA since it does not cover SOEs, especially those exercising governmental authority.

12. ***AMICUS* SUBMISSIONS.** The Tribunal shall accept the External Advisors' submission and bar the CBFI's one. First, the CBFI cannot provide an unbiased point of view. Second, the External Advisors' submission on corruption falls within the scope of the dispute, while the CBFI seeks to address irrelevant matters. Third, as opposed to the CBFI, the External Advisors have significant interest in the proceedings. Fourth, the External Advisors will bring a unique insight, while the CBFI cannot assist the Tribunal.

13. **FET BREACHES.** Respondent acted consistently with its FET obligation under the CEPTA. First, Respondent's actions were not arbitrary. CCM's decisions were well-grounded, while the penalties were proportionate. Second, the proceedings in Mekari courts did not constitute a denial of justice. Third, Respondent did not discriminate against Claimant.

14. **COMPENSATION STANDARD.** The Tribunal should not award Claimant any compensation. First, the CEPTA explicitly provides for compensation at MV, which had already been received by Claimant, while FMV is not applicable to FET violations. Second and alternatively, compensation should be reduced due to the mitigating factors, *i.e.* Claimant's ill-advised business decisions, illegal conduct and the crisis.

## I. THE TRIBUNAL LACKS JURISDICTION

15. Investor-state arbitration aims to depoliticize investment disputes and exclude a possibility for a state to circumvent sovereignty of another state through claims of SOEs.[1] Hence, SOEs can file a claim, if two conditions are satisfied cumulatively: it is eligible to claim and qualifies as an investor under the applicable procedural rules and treaty.[2]

16. In this case, the Tribunal shall decline its jurisdiction and not allow Bonooru to sue Mekar through Claimant since Claimant is neither a "*national*" under the ICSID AF Rules (**A**) nor an "*investor*" under the CEPTA (**B**).

### A. CLAIMANT IS NOT A NATIONAL UNDER THE ICSID AF RULES

17. Claimant as an SOE cannot pursue its claim under the ICSID AF Rules.

18. Under Article 2 ICSID AF Rules, a tribunal has jurisdiction over a dispute between a state and a national of another state. To ascertain whether an SOE qualifies as a "*national*", the Tribunal can resort to the ICSID Convention cases as other tribunals did[3] for several reasons. First, the ICSID AF Rules are based on the ICSID Arbitration Rules.[4] Second, these rules have the same aim — to apply to disputes between states and private individuals.[5] Finally, the ICSID AF Rules exist only "*to fill some of the lacunae left by the limited traditional ICSID jurisdictional scope*".[6]

19. The ICSID Convention was designed to eliminate state investment claims,[7] what its preamble reflects by referring to the "*role of private international investment*".[8] In light of this, the ICSID Convention principal architect, Mr Broches, formulated the universally recognized[9] and adopted[10] test to qualify as a "*national*" under Article 25 ICSID Convention.[11] Under this test, an entity in which a state holds a stake does not qualify as a "*national*", if either of the two criteria is satisfied: an entity acts as a governmental agent or discharges an essentially governmental function.[12] In this

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[1] *Nalbandian,* p.16; *Feldman,* p.4; *Rajavuor,* p.1197.
[2] *Wang,* p.37; *Chijioke-Oforji,* p.326; *Annacker,* pp.531, 542.
[3] *Sistem v. Kyrgyzstan*, ¶102; *MNSS v. Montenegro*, ¶178; *Lao Holdings v. Laos (I)*, ¶69.
[4] Introductory Notes to ICSID AF Rules.
[5] *Ezeibe/Umenweke,* pp.58-59; *Mohtashami/El-Hosseny,* pp.378-379; *Cortesi,* p.111.
[6] *Ezeibe/Umenweke,* p.56.
[7] *History of the ICSID Convention,* Volume II-1, ¶401, Volume II-2, ¶¶976, 978, 979, 1018; see also *Feldman,* p.3; *CSOB v. Slovakia*, p.257, ¶16.
[8] ICSID Convention, Preamble, ¶1; see also *Lemaire,* p.443, ¶5; *McNeil,* p.157.
[9] *Schreuer et al*., p.161, ¶271; *Wang,* p.65; *Matthews/Milnes,* p.61.
[10] *BUCG v. Yemen*, p.10, ¶36; *CSOB v. Slovakia,* pp.257-258, ¶17.
[11] *Broches,* p.355; *Feldman,* p.4; *UNCTAD Jurisdiction,* p.16.
[12] *Broches,* p.355.

case, Claimant cannot resort to the ICSID Additional Facility arbitration since it acted or acts as Bonooru's agent (**1**) and discharged an essentially governmental function (**2**).

**1. Claimant acted or acts as Bonooru's agent**

20. The Tribunal lacks jurisdiction because Claimant acted or acts as Bonooru's agent.

21. Under Article 8 ARS, recognized to flesh out the agent's status,[13] an act of an entity is attributed to a state, when it acts under the instructions, directions, or control of that state in carrying out the conduct.

22. In this case, Claimant acted under Bonooru's control as to its investment (**a**) and acts under Bonooru's control as to this arbitration (**b**).

**(a) Claimant acted under Bonooru's control relating to its investment**

23. The Tribunal lacks jurisdiction since Claimant acted under Bonooru's control in relation to the investment.

24. An entity acts under state control, when a state has general control over an entity, and the state has exercised control over particular act.[14]

25. In this case, Bonooru had general control over Claimant (***i***) and exercised control over Claimant's decisions on Caeli (***ii***).

***(i) Bonooru had general control over Claimant***

26. The stake in Claimant and Bonooru's representation in Claimant's decision-making bodies gave Bonooru general control over Claimant.

27. A state has general control over an entity, where it has substantial ownership of voting stock to influence the directors' election and other affairs.[15] Further, the declarations by the highest judicial bodies relating to the presence of state control over an entity can be a basis to find such control.[16]

28. Bonooru had general control over Claimant's decisions on Caeli taken at shareholders' regular meetings and by its Board of Directors. In absence of other shareholders, for some regular meetings, Bonooru's representatives formed a majority needed to pass decisions including those

[13] *Cao,* p.216; *Zhang*, ¶5; *McNeil*, pp.163-164; *BUCG v. Yemen*, ¶34.
[14] *Jan de Nul v. Egypt*, ¶173; *Hamester v. Ghana*, ¶179; *Marfin v. Cyprus*, ¶674.
[15] *Tulip v. Turkey*, ¶92; *Chevron v. Bangladesh,* p.145; *Salini v. Morocco,* p.617.
[16] *Deutsche Bank v. Sri Lanka*, ¶405.

on directors' election.[17] Accordingly, despite the formal entitlement of Bonooru to appoint one director out of eight,[18] Bonooru *de facto* appointed or at least influenced the appointment of more than one director.

29. Moreover, about 30% stake[19] enabled Bonooru to control Claimant. Bonooru's Constitutional Court held that given Bonooru's minority stake in Claimant "*Bonooru will be able to ensure the utilization of [another Claimant's venture] for the public benefit*".[20] It was further deemed that Bonooru would be able to direct Claimant to ensure the operation of the routes to Bonooru's remote islands.[21]

30. Therefore, Bonooru indeed had general control over Claimant.

***(ii) Bonooru controlled Claimant's investment decisions at all material times***

31. Bonooru exercised control over Claimant to make decisions on Caeli's acquisition and operation.

32. A state is presumed to exercise general control over an entity when reasonable grounds exist to conclude that control was exercised[22] over either decision to make an investment or material decisions on investment steering.[23] Reasonable grounds to find exercise of control are present, when an act sought to be attributed accords with state interests, decisions or policies.[24]

33. In this case, Claimant made and steered its investment in Bonooru's interests.

34. In 2010, at the same time when Claimant made its investment bid,[25] Bonooru launched the Caspian Project, an initiative to build infrastructure in the Greater Narnian region to redefine trade patterns to Bonooru's benefit.[26] Claimant's investment in Mekar was an implementation of that project[27] since Caeli's flight patterns indicate that "*significant resources are put into flights between Mekar and Bonooru*",[28] whereas those flights were "*actually not profitable for Caeli*".[29] Further,

[17] PO3, p.86, ¶3, lines 3157-3160.
[18] Annex IX, p.46, lines 1569, 1575-1576 .
[19] SUF, p.29, ¶10, line 934.
[20] Annex, p.43, lines 1493-1497.
[21] SUF, p.29, ¶8, lines 922-925.
[22] *Yukos v. Russia*, ¶1479.
[23] *Blyschak*, p.40; *BUCG v. Yemen*, p.11, ¶¶39-40.
[24] *Yukos v. Russia*, ¶1479; *BUCG v. Yemen*, ¶40.
[25] SUF, p.28, ¶4, line 889.
[26] *Ibid.*, lines 889-892.
[27] Annex VII, p.54, lines 1832-1833.
[28] *Ibid.*, lines 1862-1863.
[29] Annex VII, p.55, lines 1866-1867.

Claimant's expansion into Mekar was deemed to "*offer substantial benefits (...) to all of Bonooru*".[30]

35. Thus, since Claimant made and steered the investment in Bonooru's interests, it is reasonable to find the exercise of Bonooru's control over Claimant's investment decisions.[31]

**(b) Claimant acts in this arbitration under Bonooru's control**

36. The Tribunal lacks jurisdiction because Bonooru controls all Claimant's actions relating to this arbitration.

37. Prof. Schreuer explains that when an issue of a presence of control is relevant for the purposes of jurisdiction, a tribunal can verify such presence after the commencement of proceedings.[32]

38. In this case, following Bonooru's acquisition of the 55% stake in Claimant in March 2021,[33] *i.e.* four months after Claimant commenced arbitration,[34] Bonooru replaced Claimant's Board with governmental officials and equipped Claimant's legal team with lawyers from Bonooru's justice department to assist in this arbitration.[35] Thus, Claimant participates in this arbitration under Bonooru's control.

39. Therefore, the Tribunal lacks jurisdiction since Claimant acted and acts as Bonooru's agent.

**2. Claimant discharged essentially governmental function**

40. The Tribunal lacks jurisdiction because Claimant carried out essentially governmental function relating to its investment.

41. Under Article 5 ARS, an act of an entity is attributable to a state, if an entity is empowered to exercise governmental authority by national law and is acting in that capacity regarding that act. This standard is recognized to establish that an entity discharges essentially governmental function under the Broches test.[36]

42. In this case, Claimant carried out governmental authority (**a**) and was empowered to do so (**b**).

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[30] SUF, pp.32-33, ¶28, lines 1086-1087.
[31] *Ibid*, p.29, ¶10.
[32] *Schreuer at el*., pp.331-332; see also *Amco v. Indonesia*, ¶14(ii); *LETCO v. Liberia*, ¶16.5.
[33] SUF, p.40, ¶65, lines 1410-1411.
[34] *Ibid.*, ¶63.
[35] *Ibid.*, lines 1410-1414.
[36] *Nalbandian,* p.21*; Kovács,* p.271; *BUCG v. Yemen*, ¶34.

**(a) Claimant carried out essentially governmental authority operating Bonooru-Mekar routes**

43. The Tribunal lacks jurisdiction because Claimant discharged essentially governmental function making and operating its investment to implement Bonooru's goals.

44. An entity exercises governmental authority, if it discharges a function pursuing public policy purpose,[37] *i.e.* "*legitimate welfare objective, as opposed to a purely private gain*".[38] Accordingly, the *Paushok v. Mongolia* tribunal held that MongolBank discharged governmental function when it acted "*[w]ith the purposes of increasing the country's reserves*".[39] Further, whether the function is governmental depends on the particular society, its history and traditions.[40] Finally, the term "*essentially*" accompanying "*governmental function*" under the Broches test means "*absolutely indispensable or necessary*",[41] something that goes to the core.[42]

45. Claimant implemented the Caspian Project pursuing the public policy purpose, namely, the development of Bonooru's infrastructure throughout the Greater Narnian region.[43] Moreover, the routes operated under that project were "*not profitable for Caeli*"[44] and seemed "*to more benefit Bonooru than [Claimant] or Caeli*".[45]

46. Additionally, Bonooru's Constitutional Court held that under Article 70 of the Constitution Act, Bonooru has a positive obligation to ensure the mobility of its citizens within and outside its territory[46] comprising 109 islands.[47] Consequently, the provision of air services is governmental authority in Bonooru.

47. This governmental authority went to the core of and was absolutely indispensable or necessary for Claimant's investment. This is because Claimant made its investment in order to develop aviation infrastructure between Bonooru and Mekar.[48]

48. Thus, Claimant discharged as essentially governmental function.

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[37] *Feldman*, p.14; *InterTrade v. Czechia, Kovács*, p.134.
[38] *UNCTAD*, p.49; *Tanchinwuttanakul*, p.173.
[39] *Paushok v. Mongolia*, pp.142-143, ¶588; see also *Hamseter v. Ghana*, pp.56-57, ¶189.
[40] ARS Commentary, Art.5, ¶6; *F-W Oil v. Trinidad & Tobago*, ¶203; *UAB v. Latvia*, ¶808.
[41] *China — Raw Materials*, ¶326; *Argentina — Ceramic Tiles*, ¶4.1127, *India — Solar Cells*, ¶7.348.
[42] *Deutsche Telekom v. India*, ¶236; *Black's Law Dictionary; Argentina — Ceramic Tiles*, ¶4.1127.
[43] Respondent's Memorial, ¶34.
[44] Annex VII, p.55, lines 1866-1867.
[45] *Ibid.*, lines 1870-1871.
[46] *Ibid.*, lines 1454-1458.
[47] SUF, p.28, ¶5, line 895.
[48] Respondent's Memorial, ¶34.

### (b) Claimant was empowered to exercise governmental authority

49. Claimant was empowered to exercise governmental authority.

50. The empowerment with governmental authority may take place through different forms, *e.g.* through the charter.[49]

51. In this case, under Article 3(h) Articles of Association, Claimant was transferred the function to provide air services to develop Bonooru civil aviation "*for the benefit of its population in accordance with Article 70 of the Constitution Act*".[50]

52. Moreover, Bonooru's Constitutional Court held that Claimant would receive subsidies "*for flights offered on routes of significance to mobility of disparate*".[51] Under the Caspian Project, Claimant was subsidized to develop the aviation network between Bonooru and Mekar.[52]

53. Thus, Claimant exercised governmental authority because it was empowered to do so.

54. Therefore, the Tribunal lacks jurisdiction because Claimant does not qualify as a "*national*" under Article 2 ICSID AF Rules.

## B. CLAIMANT IS NOT AN INVESTOR UNDER THE CEPTA

55. Claimant cannot file its claim under the CEPTA because it is not an investor.

56. An SOE can resort to the treaty protection, if it falls within the scope of the treaty's definition of an investor[53] interpreted in accordance with the VCLT.[54] In this case, the interpretation of the CEPTA indicates that SOEs do not qualify as investors (**1**). Alternatively, it evidences that the CEPTA protects only those SOEs which have carried out economic activity (**2**).

### 1. The CEPTA does not cover SOEs such as Claimant

57. The CEPTA does not provide protection to SOEs such as Claimant.

58. Under Article 31(1) VCLT,[55] the terms of the treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in light of its purpose and

[49] *Bosh v. Ukraine*, ¶177.
[50] Annex IV, p.44, lines 1519-1520.
[51] Annex III, p.43, lines 1493-1494.
[52] *Ibid.*, lines 1079-1080, 1084-1088.
[53] *Dugan/Wallace/Rubins/Sabahi*, p.291; *Feldman*, p.2; *Chijioke-Oforji*, p.326.
[54] *Salini v. Jordan*, p.28, ¶75; *Tenaris v. Venezuela*, p.47, ¶134; *Lauder v. Czechia*, ¶292.
[55] VCLT, Art.31(1).

object. To confirm the resulted meaning, a tribunal can resort to the supplementary means of interpretation[56] such as a predecessor treaty.[57] For instance, the *PNG v. Papua* tribunal held that the change in language could be understood as indicating that the state chose to depart from the wording used.[58]

59. In this case, an investor is "*a natural person with the nationality of a Party or an enterprise with the nationality of a Party or seated in the territory of a Party*"[59] (emphasis added). Yet, the provision devoted to SOEs is titled "*[s]tate [e]nterprises*".[60] This difference in wording indicates the Contracting States' intention to distinguish SOEs from covered enterprises.

60. Following the rationale of *PNG v. New Guinea*, the comparison of the CEPTA and the 1994 Bonooru-Mekar BIT[61] reinforces this conclusion. Particularly, drafting the CEPTA Bonooru and Mekar did not include the reference to "*government-owned*" enterprises in the definition of an "*investor*" as they did under the 1994 Bonooru-Mekar BIT.[62]

61. In this case, Claimant is disqualified from the CEPTA's protection as an SOE.

**2. Alternatively, the CEPTA does not cover SOEs discharging governmental functions**

62. If the Tribunal finds that the CEPTA does not entirely exclude SOEs, Claimant is still not an investor because it did not effectuate economic activity.

63. The ordinary meaning of the treaty terms can be discerned from dictionaries[63] in the treaty context[64] and confirmed by the interpretation in light of the predecessor treaty.[65]

64. The dictionary's meaning of the term "*enterprise*" is a "*company organized for commercial purposes*".[66] Further, both Articles 9.4(1)(b) and 9.4(1)(a)(i) CEPTA refer to enterprises that may carry out an "*economic activity*",[67] *i.e.* activity involving the offering of goods or services for

[56] VCLT, Art.32.
[57] *Costa Rica v. Nicaragua*, p.30, ¶55; *Lo*, p.232; *US — Anti-Dumping and Countervailing Duties*, ¶579.
[58] *PNG v. New Guinea*, ¶349.
[59] CEPTA, p.73, lines 2589-2591.
[60] *Ibid.*, p.78, line 2818.
[61] 1994 Bonooru-Mekar BIT, pp.69-70.
[62] *Ibid.*, p.69, line 2407.
[63] *Dörr*, p.581, ¶40; *Azurix v. Argentina*, ¶360; *Myers v. Canada*, ¶285; *CMS v. Argentina*, ¶291.
[64] Respondent Memorial, ¶58.
[65] *Ibid*.
[66] *Dictionary.com.*
[67] CEPTA, p.74, lines 2633-2634, 2617-2619.

profit.[68] Thus, the term "*enterprise*" and context demonstrate that only SOEs which have made and steered their investments to make profit are covered under the CEPTA.

65. The interpretation of the CEPTA in light of the 1994 Bonooru-Mekar BIT corroborates the foregoing meaning. Specifically, it covered enterprises "*whether for profit or not*"[69] (emphasis added), while such wording was not reintroduced into the CEPTA.[70]

66. As demonstrated above, Claimant pursued public policy purposes and operated the Bonooru-Mekar routes regardless of profitability.[71]

67. Therefore, Claimant does not qualify for protection under the CEPTA which either entirely excludes SOEs or those exercising governmental authority.

68. **In conclusion on Issue I,** the Tribunal lacks jurisdiction because Claimant is neither a "*national*" nor an "*investor*" under the ICSID AF Rules and CEPTA.

## II. THE TRIBUNAL SHOULD ACCEPT EXTERNAL ADVISORS' SUBMISSION, BUT BAR CBFI'S SUBMISSION

69. Claimant vigorously supports the CBFI's submission aiming to advocate Claimant's weak position on jurisdiction. Yet, Claimant attempts to silence the External Advisors to avoid inquiry into procuring the investment by corruption.

70. Article 9.19(3) CEPTA and Article 41(3) ICSID AF Rules set four cumulative criteria to accept *amicus* submissions.[72] First, *amicus* should be independent (**A**). Second, it should address a matter within the scope of the dispute (**B**). Third, its interest should be significant (**C**). Fourth, *amicus* should assist the tribunal on issues of the proceedings (**D**).

71. The External Advisors' submission satisfies these criteria, but the CBFI's submission does not.

[68] *McLaughlin*, p.603; *Phoenix Action v. Czechia*, ¶133; *Mohtashami/El-Hosseny*, p.384.
[69] 1994 Bonooru-Mekar BIT, p.69, lines 2407-2408.
[70] CEPTA, p.73, lines 2589-2597.
[71] Respondent's Memorial, ¶¶43-54.
[72] *Bastin*, pp.125-144; *Bear Creek Mining v. Peru*, p.2; *Commerce Group v. El Salvador*, ¶¶39-40.

### A. *AMICI* SHOULD BE INDEPENDENT

72. *Amicus* should present its unbiased point of view to ensure fairness.[73] Otherwise, a non-party cannot qualify as an *amicus*.[74] Hence, Article 9.19(3) CEPTA requires *amici* to disclose any affiliation with the parties.

73. To establish independence, a tribunal needs to assess whether a party influenced *amicus* submission,[75] in particular, through "*professional and financial relationships*".[76] In *Eli Lilly v. Canada*, the tribunal denied submissions from organizations where the claimant or its subsidiary were members.[77]

74. The *von Pezold v. Zimbabwe* tribunal rejected the submission[78] from organization headed by an ally of the respondent's disputed land policies.[79] Thus, independence is absent where the policies of the *amicus* and the party collide.

75. First, Claimant and Lapras, Claimant's financial advisor in this arbitration, are the CBFI members.[80] Second, the CBFI's object is to represent Bonoori investors investing in Mekar.[81] Thus, the CBFI's and Claimant's policies to establish that SOEs may bring claims under the CEPTA collide.[82]

76. Therefore, the CBFI's submission is biased.

### B. *AMICI* SHOULD ADDRESS A MATTER WITHIN THE SCOPE OF THE DISPUTE

77. Claimant seeks to bar the External Advisors' submission because the Parties did not address corruption.[83] However, submission on this matter is admissible since the Tribunal may raise it *proprio motu*.

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[73] *Mourre*, p.269; *Guide for Amici*, p.14.
[74] *Vivendi v. Argentina I*, ¶29; *Eli Lilly v. Canada*, p.2.
[75] *Schliemann*, p.380.
[76] *Gómez*, p.564; *Vivendi v. Argentina I*, ¶32; *Pac Rim v. El Salvador*, ¶50.
[77] *Eli Lilly (PhRMA Amicus)*, ¶6; *Eli Lilly (Innovative Medicines Amicus)*, ¶11; *Eli Lilly v. Canada*, ¶¶6,9.
[78] *Von Pezold v. Zimbabwe*, ¶35; see also *Guide for amici*, p.18.
[79] *Von Pezold v. Zimbabwe*, ¶¶55-56.
[80] *CBFI's Application*, p.16, ¶7, lines 521-522.
[81] *Ibid.*, ¶2, lines 505.
[82] *Ibid.*, p.16, ¶2, lines 505-507.
[83] *Claimant's Application*, p.22, lines 714-716.

78. *Amicus* submission should be within the scope of the dispute[84] generally determined by parties.[85] However, the tribunal may modify the scope of the dispute, if the case concerns transnational public policy.[86]

79. The tribunal may consider corruption, a matter of transnational public policy,[87] *proprio motu*.[88] For instance, in *Infinito v. Costa Rica*, *amicus*, not the parties, informed the tribunal of corruption during obtaining the investment, which the tribunal found relevant in the dispute.[89]

80. The External Advisors address a matter within the scope of the dispute (**1**), while the CBFI does not (**2**).

**1. The External Advisors address a matter within the scope of the dispute**

81. The External Advisors informed that Claimant had procured its investment by bribery.[90]

82. While none of the Parties raised this issue, corruption is a matter of transnational public policy. Therefore, the Tribunal may modify the scope of the dispute and consider corruption.

**2. The CBFI addresses a matter outside the scope of the dispute**

83. The issues the CBFI purports to address fall outside the scope of the dispute.

84. First, Bonoori regulatory framework and business landscape[91] are irrelevant for jurisdiction and FET. Only Claimant's status and activities are relevant for jurisdiction, while FET requires analysis of Respondent's regulations.

85. Second, the CBFI's statement that jurisdiction should be determined based on the nature of SOE's activities[92] is irrelevant since jurisdiction over SOEs should be determined under established international law rules.[93]

86. Third, since jurisdiction over SOEs is determined on a case-by-case basis,[94] the Tribunal's decision will not influence future capital flows and investment protection regime for SOEs.

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[84] CEPTA, Art.9.19(3); ICSID AF Rules, Art.41(3)(b).
[85] *Schliemann*, pp.374-375; *Von Pezold v. Zimbabwe*, ¶61; *UPS v. Canada*, ¶60.
[86] *Mayer*, p.65; *Kinyua*, p.40.
[87] *Kulick*, p.320, *Donovan*, p.283; *Pieth; Mayer*, p.6.
[88] *Mayer*, p.65; *Kinyua*, p.40; *Infinito v. Costa Rica*, ¶33.
[89] *Infinito v. Costa Rica*, ¶33.
[90] *External Advisors' Application*, p.19.
[91] *CBFI's Application*, p.17, ¶10, lines 547-549.
[92] *Ibid.*, p.17, ¶10, lines 547-551.
[93] *Broches*, p.355; *Feldman*, p.4; *BUCG v. Yemen*, ¶36; *CSOB v. Slovakia*, ¶17.
[94] *Yukos v. Russia*, ¶1479; *CSOB v. Slovakia*, ¶20.

87. Thus, the CBFI addresses matters out of the scope of the dispute.

### C. *AMICUS* SHOULD HAVE SIGNIFICANT INTEREST

88. *Amici* should have significant interest in the proceedings,[95] *i.e.* direct interest (**1**)[96] or public interest (**2**).[97]

#### 1. *Amicus* should have direct interest

89. Significant interest is present, if direct interests of *amicus* or social groups it represents are affected.[98]

90. The *Infinito v. Costa Rica* tribunal admitted the submission from *amicus* that had successfully sought the open-pit mining ban in domestic proceedings.[99] Since the claimant challenged the ban,[100] the tribunal found that *amicus* had direct interest so that its efforts will not become fruitless.[101]

91. The External Advisors have direct interest (**a**), but the CBFI does not (**b**).

**(a) The External Advisors have direct interest**

92. The decision would directly affect the External Advisors.

93. First, corruption directly impacts External Advisors' activity, as they advise investors in Mekar.[102] Corruption discourages investors from choosing Mekar, which affects External Advisors' business.

94. Second, the External Advisors promote fair business practices in Mekar by intervening in judicial proceedings on privatization.[103] External Advisors' efforts to combat corruption in Mekar are dependent on the Tribunal's inquiry into the legality of Claimant's investment acquisition.

95. Thus, the External Advisors have direct interest.

**(b) The CBFI does not have direct interest**

96. The dispute will not directly affect the CBFI.

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[95] CEPTA, Art.9.19(3); ICSID AF Rules, Art.41(3)(c).
[96] *Kawharu*, p.5; *Infinito v. Costa Rica*, ¶36; *Biwater v. Tanzania*, ¶15.
[97] *Gruner*, pp.929-932; *Vivendi v. Argentina II (Order)*, ¶18; *Methanex v. USA*, ¶49.
[98] *Reusch*, p.220; *Kawharu*, pp.5-6; *Electrabel v. Hungary*, ¶4.92.
[99] *Infinito v. Costa Rica*, ¶37; Wiik, p.149.
[100] *Infinito v. Costa Rica*, ¶36.
[101] *Ibid.*
[102] *External Advisors' Application*, p.19, lines 644-646.
[103] *Ibid.*, lines 642-643.

97. First, there is no evidence that pending claims of other CBFI members[104] concern the same issues.[105]

98. Second, the award would not affect Bonoori investors. Whether SOEs may bring claims is decided upon a Broches test, which is fact-driven.[106]

99. Third, no doctrine of precedent exists in investment arbitration,[107] and the Tribunal's conclusions are not binding on other tribunals.[108]

100. Therefore, the CBFI does not have direct interest.

### 2. *Amicus* should represent public interest

101. *Amici* may make submissions on public interest,[109] which extends beyond interests of certain defined entities,[110] and includes environment,[111] human rights,[112] or corruption.[113]

102. The public interest of *amicus* is significant, if it overlaps with public interest engaged,[114] and *amicus* represents such public interest.[115]

103. The public interest criterion applies restrictively not to allow *amici* to rely on a far-stretched public interest to bring new information into arbitration.[116] The *von Pezold v. Zimbabwe* tribunal found that the *amicus* lacked significant interest because its expertise, corporate responsibility for human rights abuses, did not coincide with public interests raised.[117] To the contrary, the *Methanex v. USA* tribunal found that the expertise of the *amicus* overlapped with the public interest and accepted the submission.[118]

104. The External Advisors represent public interest (**a**), while the CBFI does not (**b**).

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[104] *CBFI's Application*, p.16, ¶6, lines 518-519.
[105] *Ibid*.
[106] *Broches*, p.355; *Feldman*, p.4; *BUCG v. Yemen*, p.10, ¶36; *CSOB v. Slovakia*, pp.257-258, ¶17.
[107] *Kaufmann-Kohler*, p.368.
[108] *Ibid*.
[109] *Methanex v. USA*, ¶49; *UPS v. Canada*, ¶39.
[110] *Gruner*, pp.929-932; *Levine*, pp.200, 205; *Biwater v. Tanzania*, ¶53.
[111] *Methanex v. USA*, ¶49.
[112] *Choudhury*, p.791; *Gómez*, p.543; *Wiik*, pp.295-296; *Von Pezold v. Zimbabwe*, p.20, ¶¶61-62.
[113] *Kulick*, p.320, *Donovan*, p.283; *World Duty Free v. Kenya*, p.47, ¶188.
[114] *Born*, p.11, *Levine*, p.211. *Vivendi v. Argentina I*, ¶19; *Apotex v. USA II*, ¶¶35–36; *Resolute Forest v. Canada*, ¶4.7.
[115] *Von Pezold v. Zimbabwe*, ¶¶61-62; Wiik, p.296.
[116] *Wiik*, p.521; *Brower*, p.360.
[117] *Von Pezold v. Zimbabwe*, ¶¶61-62; *Wiik*, p.296.
[118] *Methanex v. USA*, ¶¶48-53.

### (a) The External Advisors represent public interest

105. The External Advisors represent public interest engaged in these proceedings.

106. First, combatting bribery in investment procurement is in public interest.[119] Since corruption is a systemic problem in Mekar,[120] corrupt origin of Claimant's investment is relevant. Second, the External Advisors promote fair business practices in Mekar.[121]

107. Therefore, the External Advisors represent engaged public interest.

### (b) The CBFI does not represent public interest

108. Contrary to the CBFI,[122] it does not represent public interest.

109. The CBFI represents a limited group of its Bonoori members,[123] and only some of them are SOEs.[124] It is unclear whether any of these SOEs are suing or considering to sue Respondent.[125] Moreover, advising on access to investment arbitration is not within CBFI's mandate.[126] Thus, the CBFI has no public interest here.

110. Therefore, the CBFI does not have significant interest in this arbitration.

## D. *AMICI* SHOULD BRING A UNIQUE INSIGHT

111. *Amici* should assist the tribunal by bringing a unique insight[127] linked to the disputed issues.[128] Thus, the tribunal should evaluate *amicus*' expertise against its relevance for the dispute and uniqueness.[129]

112. First, the expertise is linked to the disputed issues, if *amici* have directly experienced the relevant events.[130] In *Bear Creek v. Peru*, the tribunal accepted the submission from the *amicus* which had directly witnessed the conflict around which the claims centered.[131]

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[119] *Danileț*, p.11; *Kulick*, p.320.
[120] PO3, p.87, ¶13, lines 3212-3217.
[121] *External Advisors' Application*, p.19, line 641.
[122] *Ibid.*, ¶8, lines 531-532.
[123] *CBFI's Application*, p.16, ¶2, line 505.
[124] *Ibid.*, ¶7, line 520.
[125] *Ibid.*, ¶6, lines 517-519.
[126] *Ibid.*, ¶2, lines 505-509.
[127] ICSID AF Rules, Article 41(3).
[128] *Apotex v. USA I*, ¶¶23, 27-28; *Kawharu*, p.7; *Wiik*, p.170; *Ruthemeyer*, p.248.
[129] *Infinito v. Costa Rica*, ¶¶31-32; *Biwater v. Tanzania*, ¶22.
[130] *Wiik*, p.290-291; *Infinito v. Costa Rica*, ¶¶31-32.
[131] *Bear Creek v. Peru*, ¶44.

113. Second, *amicus* must provide information which the parties cannot.[132]

114. The External Advisors' submission will assist the Tribunal (**1**), while the CBFI's submission will not (**2**).

### 1. The External Advisors will assist the Tribunal

115. The External Advisors will assist the Tribunal by addressing corruption.

116. This is because the External Advisors participated in the privatization of Caeli, had access to all the relevant documents, and communicated with final decision-makers.[133]

117. Therefore, the External Advisors are in a unique position to adduce unbiased facts.

### 2. The CBFI will not assist the Tribunal

118. The CBFI's submission is unhelpful.

119. First, as outlined above,[134] it is irrelevant. Second, Claimant itself may provide information on Bonooru's regulatory framework and business landscape.[135] Moreover, Claimant itself may argue that public purpose of SOEs' activities is irrelevant for jurisdiction, and that the award will influence future capital flows and access of SOEs to investment arbitration.[136]

120. Therefore, the CBFI's submission will not assist the Tribunal.

121. **To conclude on Issue II,** the Tribunal should accept the External Advisor's submission, but reject the CBFI's submission.

## III. RESPONDENT DID NOT VIOLATE FET OBLIGATION

122. Having acquired a major share in Caeli in 2011,[137] Claimant engaged in abusive and predatory expansion strategies facing a righteous reaction of Mekari authorities. Now Claimant brazenly argues that Caeli turned sour due to Respondent's measures.

123. However, Respondent treated Claimant fairly and equitably in compliance with Article 9.9 CEPTA. CCM's Investigations were rational (**A**), while the proceedings before Mekari courts did

[132] *Levine*, pp.200, 217; *Wiik*, p.170; *Resolute Forest v. Canada*, ¶¶2.1-2.4.
[133] *External Advisors' Application*, p.19, lines 617-619, 637-638.
[134] Respondent's Memorial, ¶83-87.
[135] *CBFI's Application*, p.17, ¶8, lines 525-532, ¶10, lines 547-549.
[136] *Ibid.*, p.17, ¶10, lines 547-551.
[137] SUF, p.32, ¶26.

not constitute denial of justice (**B**). Furthermore, Respondent did not discriminate against Claimant (**C**).

## A. CCM'S INVESTIGATIONS WERE RATIONAL

124. The investigations into Caeli were not arbitrary.

125. According to the landmark *ELSI case*, a measure is arbitrary, if it is "*opposed to the rule of law*" constituting a "*willful disregard of due process of law, an act which shocks or at least surprises a sense of judicial propriety*".[138] Arbitrariness thus implies a high threshold and exists where a measure has no justification or rationale at all,[139] but rather is based on mere "*capriciousness*".[140]

126. Neither of CCM's measures met this test. The investigations were a reasonable response to Caeli's unlawful strategies (**1**), while the airfare caps were justified (**2**). Furthermore, both investigations resulted in the well-grounded decisions (**3**).

### 1. Investigations and caps were reasonable

127. A measure is justified, if it serves, first, an apparent legitimate purpose,[141] such as securing a fair competition in host State,[142] and, second, as a response to an investor's conduct, *e.g.* fraud,[143] misrepresentation,[144] or anti–competitive conduct.[145]

128. First (**a**) and Second (**b**) Investigations into Caeli were a reasonable response to Caeli's anti–competitive practices.

#### (a) CCM opened First Investigation pursuant to MRTPA requirements

129. CCM has discretion to open an investigation into a corporation having a market share lower than 50%, if a relevant industry "*require[s] special attention*".[146] Carrier's market power is determined

[138] *ELSI case*, ¶128; see also *Siemens v. Argentina*, ¶318; *Azurix v. Argentina*, ¶392; *Loewen v. USA*, ¶131.
[139] *Heiskanen*, p.104.
[140] *Cervin Investissements v. Costa Rica*, ¶523.
[141] *EDF v. Romania*, ¶303.
[142] *Weiss*, pp.8-14.
[143] *Azinian v. Mexico*, ¶121.
[144] *Genin v. Estonia*, ¶362.
[145] *Gazprom v. Ukraine*.
[146] Annex V, p.47, lines 1602-1603.

as an aggregate market share of a corporation and its code-sharing alliance partners.[147] Mergers with competing carriers further increase carrier's market power.[148]

130. In the beginning of the First Investigation, Caeli had 43% market share.[149] However, since Caeli entered Moon Alliance, including its code-sharing agreement,[150] Caeli's market share should be aggregated with Royal Narnian's one. Furthermore, the acquisition of Caeli by Claimant,[151] that wholly owned Royal Narnian,[152] led to a significant corporate integration.[153]

131. Therefore, CCM justifiably aggregated Caeli's and Royal Narnian's market shares resulting in over 54% share.[154]

### (b) CCM opened Second Investigation pursuant to MRTPA requirements

132. CCM may open an investigation upon complaint by a direct competitor.[155]

133. The Second Investigation upon complaint by small regional airlines was lawful, as they operated on short-haul routes market and were concerned that Caeli's undercut prices threatened them.[156]

134. Therefore, both Investigations were opened according to the MRTPA.

## 2. Airfare caps were justified despite the crisis

135. As an interim measure, CCM imposed the caps limiting Caeli's ability to raise prices excessively. The decree requiring companies to denominate services in MON was justified in circumstances of the crisis (**a**), and maintenance of airfare caps was justified despite the decree (**b**).

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[147] *Dempsey*, p.695.
[148] *Aegean Airline/Olympic Air II*, ¶120; *Air France/KLM/Alitalia/Delta*, ¶¶50, 58*; Lufthansa/SAS*, ¶¶55-56; *British Airways/American Airlines/Iberia*, ¶¶37-42; *Continental/United/Lufthansa/Air Canada*, ¶43; *United Airlines/US Airways Merger Plan.*
[149] SUF, p.34, ¶36, lines 1150-1151.
[150] *Ibid.*, p.32, ¶27, lines 1071-1072.
[151] *Ibid.*, ¶26.
[152] *Ibid.*, p.29, ¶10.
[153] *Ibid.*, p.34, ¶36, lines 1154-1155.
[154] *Ibid.*, ¶36, line 1153.
[155] Annex V, p.47, line 1609.
[156] SUF, p.35, ¶38, lines 1171-1174.

### (a) Denomination of services in MON was necessary

136. As upheld by *Enron v. Argentina* and *LG&E v. Argentina* tribunals, at face of an unfolding crisis the host state is justified in adopting measures that are disadvantageous to investors, but acutely necessary to tackle the crisis.[157]

137. In 2016, when Mekari national currency began to nosedive, it was necessary to reinforce its credibility, as emphasized by the IMF[158] and the new Mekari government.[159] Therefore, denomination of services in MON was a reasonable response to unfolding crisis.

138. Thus, the requirement to offer services in MON was compatible with Article 9.9 CEPTA.

### (b) Maintenance of caps during crisis was justified

139. A measure is not arbitrary, when it relates to rational policy.[160] Caps are necessary to prevent predator from capitalizing on its abusive pricing.[161]

140. Given that Caeli benefitted from its Moon Alliance membership and Bonoori subsidies[162] and had the major market share,[163] it could easily recover from the crisis and, thus, had a potential of capitalizing on its unlawful strategies. Therefore, the legitimate aim of preventing Caeli from earning supra-competitive profits[164] stayed relevant. Furthermore, since caps were set reasonably above Caeli's rates,[165] it would still be able to operate profitably, if it abandoned its predatory practices.

141. Thus, the maintenance of caps was reasonable.

## 3. CCM's decisions were grounded in law and industry practice

142. CCM's decisions finding Caeli as engaging in predatory pricing[166] were lawful and well-reasoned.

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[157] *Enron v. Argentina*, ¶281; *LG&E v. Argentina*, ¶162; *Continental Casualty v. Argentina*, ¶214.
[158] SUF, p.35, ¶39
[159] *Ibid.*, pp.35-36, ¶42
[160] *LG&E v. Argentina*, ¶158; *National Grid v. Argentina*, ¶197; *Saluka v. Czechia*, ¶460; *AES v. Hungary*, ¶¶10.3.7-10.3.9; *Electrabel v. Hungary*, ¶179; *EDF v. Romania*, ¶303.
[161] *Vickers*, pp.15-26; *Air Canada v. Canada*, ¶17.
[162] SUF, p.38, ¶45, lines 1245-1246
[163] *Ibid.*, p.37, ¶49.
[164] SUF, p.34, ¶37
[165] *Ibid.*, lines 1161-1162.
[166] SUF, p.36, ¶45; p.37, ¶49.

143. Predatory pricing is present, when a dominant entity sells services at a price lower than production costs to discipline or eliminate competitors[167] entailing anti–competitive effects.[168]

144. Caeli dominated the routes connecting to Phenac International (**a**) and priced below costs to exclude its competitors (**b**). Consequently, this strategy adversely affected the competition (**c**).

**(a) Caeli had dominant position**

145. Dominant position exists where a person substantially controls a class of business.[169] Domination is determined by market power and structure[170] characterized by hub concentration[171] and capacity constraints on slots.[172]

146. Caeli with Royal Narnian had 54% market share on all Phenac International routes, while its closest competitor, JetGreen, had twice smaller share — 21%. Further, Caeli dominated a hub at Phenac International, where it controlled valuable slots[173] and had airport services discounts.[174]

147. Therefore, Caeli dominated Phenac International routes.

**(b) Caeli's below-costs pricing had anti–competitive purpose**

148. Claimant offered cheap tickets and FFP bonuses pricing below costs and aiming to constrain competition.

149. Lawful response to the LCCs' entry takes only moderate price reduction.[175] Pricing below costs implies that a corporation intentionally foregoes short-term revenues to exclude competitors.[176] Since full-service carriers offer higher quality service, they incur greater costs than LCCs, and thus should charge higher fares.[177] Therefore, predation is evident when a full-service carrier matches LCC's fares.[178] Since major airlines operate plenty of routes, while predatory pricing is

[167] Annex V, p.48, lines 1648-1649.
[168] *Ibid.*, p.48, lines 1656-1657.
[169] *Ibid.*, lines 1652-1654.
[170] *Joskow/Klevorick,* p.223
[171] *Ewald*, pp.163-164; *Ghemawat*, p.20; *USA v. AMR*, p.43.
[172] *Ewald*, p.163, *Grundmann*, pp.48-162.
[173] SUF, p.31, ¶21, lines 1013-1016.
[174] *Ibid.*, p.32, ¶26, lines 1054-1055.
[175] *Dempsey*, pp.716-717, 719-720; *Baumol*, pp.53-54.
[176] *Baumol*, pp.49-50, 59-61; *ICN Workbook*, ¶¶55-56; *Canada v. Air Canada*, ¶80.
[177] *Lufthansa case*, pp.2-3; *Gillen/Ashish*, p.93.
[178] *USA v. AMR (Appeal)*, pp.68-70; *Dempsey*, pp.721-735.

implemented only on those, where it faces low-cost entry,[179] an airline can easily price below costs on particular routes, while report high overall profits.[180]

150. First, since Caeli was a full-service carrier offering FFPs[181] and catering,[182] by undercutting competitors, it was apparently pricing bellow its own costs.[183] Therefore, Caeli's conduct can only be explained by predatory purposes. Second, while Caeli introduced predatory fares only on Bonooru-Mekar flights,[184] its overall profits reported in 2014-2015[185] do not exclude predation since it operated various routes.[186]

151. Therefore, CCM's findings are well substantiated.

**(c) Caeli's strategies prevented competition**

152. Practice is abusive if it had or "*is likely to have the effect of preventing or lessening the competition substantially*".[187] Caeli's conduct had both.

153. Predatory pricing excludes actual competitors and signals potential ones that any attempt to enter a market will meet predatory response.[188]

154. First, the regional airlines' complaint evidenced that Caeli's predatory practices made it impossible to enter and stay on Phenac International market.[189] Second, Caeli's reputation prevented potential competitors from even trying to enter its routes.

155. Thus, CCM's decisions were well-reasoned.

**4. Penalties were not arbitrary**

156. The penalties imposed on Caeli were proportionate.

157. The penalty imposed on an investor must be proportionate.[190] The *Occidental v. Ecuador* tribunal held that "*the potential for harm, and the need to deter others from [breaches], justifies the*

[179] *Dempsey*, pp.721-735.
[180] *Dempsey*, pp.712, 721; *Greig*, p.87.
[181] SUF, p.34, ¶35, lines 1142-1144.
[182] *Ibid.*, p.32, ¶28, lines 1073-1074.
[183] Annex VII, p.55, lines 1866-1871.
[184] *Ibid.*, p.35, ¶38, lines 1171-1174; p.33, ¶33, lines 1122-1124; Annex VII, p.55, lines 1869-1871.
[185] *Ibid.*, p.34, ¶¶34-35.
[186] SUF, p.32, ¶27; p.33, ¶29.
[187] Annex V, p.48, lines 1656-1657.
[188] *Gundlach*, pp.282-283; *Heil/Langvardt*, p.92; *Hüschelrath*, p.10; *Ashish*, p.38.
[189] SUF, p.35, ¶38.
[190] *Occidental v. Ecuador*, ¶¶402-409, 416.

*imposition of a penalty*".[191] Furthermore, absence of harm from anti–competitive behavior may be due to authorities' intervention, and thus does not mitigate predator's liability.[192] Hence, heavy penalties are often imposed for predatory pricing.[193]

158. First, Caeli squeezed out additional privileges from Phenac International[194] and damaged its competitors by hindering their normal operation.[195] Second, Caeli's abusive behavior had potential to exclude existing competitors and prevent future competition.[196] Finally, since predatory pricing is not a rare occurrence in airline industry,[197] significant penalties were justified for deterrence. Therefore, the penalties were proportionate.

159. Thus, CCM's measures were complaint with FET.

### B. PROCEEDINGS BEFORE MEKARI COURTS WERE CONSISTENT WITH FET

160. Claimant initiated the proceedings before Mekari courts requesting to lift the caps and challenging SCC Award's enforcement. Mekari courts treated Claimant fairly and equitably.

161. Denial of justice refers to flagrant procedural irregularities or gross substantial defects of the judgement.[198] Since international tribunals are not courts of appeal, denial of justice may be claimed only in case of "*manifest injustice (…) leading to an outcome which offends a sense of judicial propriety*".[199]

162. The judgement dismissing Caeli's appeal did not constitute denial of justice (**1**) and was delivered promptly (**2**). The enforcement of the set-aside award in Mekar was also consistent with FET (**3**).

#### 1. Dismissal of Caeli's appeal was not denial of justice

163. Summary dismissal of Caeli's appeal on the caps was consistent with FET.

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[191] *Ibid.*, ¶416.
[192] *AKZO v. EC (Report)*, p.I-3393.
[193] *Qualcomm*, ¶19; *AKZO v. EC*, p.I-3477; *OECD Predatory pricing*, pp.35, 38-39; *Air Canada/Air France-KLM et al.*
[194] PO3, p.86, ¶7.
[195] SUF, p.35, ¶38.
[196] Respondent's Memorial, ¶¶149-152.
[197] *Rival accuses Swoop*.
[198] *Infinito v. Costa Rica*, ¶445; *Iberdrola v. Guatemala*, ¶¶432, 492; *Krederi v. Ukraine*, ¶¶451, 468; *Philip Morris v. Uruguay*, ¶¶498, 500-501; *Flughafen Zürich v. Venezuela*, ¶636; *Harvard Draft Convention*, Art.8.
[199] *Loewen v. USA*, ¶¶57-58; *Mondev v. USA*, ¶127.

164. Denial of justice exists where a person is prevented from accessing courts resulting in court's failure to decide material aspects of a claim.[200] Outright rejection of an improper claim,[201] brevity of the decision,[202] or absence of further recourse,[203] do not constitute denial of justice.

165. Summary judgement does not deny access to justice, but allows avoiding pointless costs and delay,[204] where a court is satisfied that it has all necessary evidence to properly resolve a case and parties were able to address it.[205]

166. Mekari courts can summarily dismiss claims that have "*little chance of success on merits*".[206] Caeli had its day in court and presented its case.[207] The High Court in substance decided the case[208] being satisfied on the basis of evidence before it, that CCM's decision to keep airfare caps was reasonable given Caeli's advantageous position.[209]

167. Thus, Claimant was never denied access to justice.

### 2. Delay in delivering judgement on caps was not undue

168. Delays in judicial proceedings should be evaluated against the situation in the host state's judiciary.[210] Due to the seriousness of denial of justice allegation, the delay must be outrageous,[211] *e.g.* six to 10 years for the first instance decision.[212] In ECHR jurisprudence, even priority cases[213] were found unduly delayed after two years pending.

169. The proceedings on Caeli's appeal on the caps were carried out as speedy as possible given the courts congestion in Mekar.[214] Although normally commercial disputes take approximately 27

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[200] *Poirot v. France*, ¶46; *Maširević v. Serbia*, ¶¶49, 51; *Pantechniki v. Albania*, ¶100; *Philip Morris v. Uruguay*, ¶557.
[201] *Iberdrola v. Guatemala*, ¶453.
[202] *Philip Morris v. Uruguay*, ¶557; *Bridgestone v. Panama*, ¶517.
[203] *Philip Morris v. Uruguay*, ¶527.
[204] *ED&F Man v. Patel*, ¶10.
[205] *ICI Chemicals v. TTE Training*, ¶12; see also *Ralph Wilson v. ABC*, pp.699-700; *Childress*, pp.186-188; *Schwarzer*, p.481.
[206] PO3, p.86, ¶8.
[207] SUF, p.38, ¶52.
[208] *Ibid.*, ¶54.
[209] *Ibid.*, p.32, ¶¶27, 28, p.34, ¶¶34, 38.
[210] *Toto Costruzioni v. Lebanon*, ¶165; *Frontier Petroleum v. Czechia*, ¶336.
[211] *Ibid.*, ¶334.
[212] *Toto Costruzioni v. Lebanon*, ¶160; *Victor Pey Casado v. Chile*, ¶225; *Jan de Nul v. Egypt*, ¶204.
[213] *Cesarini v. Italy* (80 months); *Podbielski v. Poland* (66 months); *De Micheli v. Italy* (25 months).
[214] SUF, pp.29-30, ¶13.

months,[215] Caeli's request proceeded in 15 months.[216] Such a postponement does not meet the high threshold of undue delay.

170. Thus, the judicial proceedings before the High Court of Mekar followed Article 9.9(2)(a)(b) CEPTA.

### 3. Enforcement of the set-aside award was lawful

171. Enforcement of the SCC Award, despite its annulment, did not constitute denial of justice. Mekari courts have no obligation to deny enforcement (**a**), which was compatible with Mekari public policy (**b**).

#### (a) Mekari courts have no obligation to deny enforcement of annulled awards

172. The SCC Award's enforcement was in Mekari courts' discretion.

173. The NYC does not oblige to refuse enforcement of set-aside awards.[217] Article V(1)(e) NYC shall be interpreted as allowing but not obligating states to deny enforcement of annulled awards.[218]

174. Similarly, the Superior Court maintains that international award is not integrated into the seat's legal order.[219] Thus, subsequent decisions at the seat should not affect the SCC Award's enforcement in Mekar.[220]

175. Therefore, it was lawful to enforce the set-aside SCC Award.

#### (b) The SCC Award's enforcement was compatible with Mekari public policy

176. Mekari public policy allowed the SCC Award's enforcement.

177. Mekari court is free to resort or not to resort to public policy defense.[221]

178. Furthermore, the SCC Award's enforcement was compliant with Mekari public policy. Although prohibition of corruption forms part of it,[222] the SCC Award cannot be denied enforcement upon unfounded allegations. Under Mekari law, only award's substantive defects manifesting

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[215] *Ibid.*
[216] SUF, p.36, ¶44, p.38, ¶54.
[217] NYC, Art.V(1).
[218] *UNCITRAL Guide on NYC*, pp.221-222; *Putrabali v. Rena Holding*, p.5; *DAC v. Bechtel*, p.5; *Apis v. Kereskedelmi*, ¶348; *Soleh Boneh v. Uganda*, ¶748; *van den Berg*, p.265; *Born*, pp.3428-3433; *Cheng*, pp.679, 680.
[219] Annex XV, p.68, lines 2358-2360.
[220] Annex XIII, p.64, ¶14, lines 2209-2211.
[221] NYC, Art.V(2)(b); *UNCITRAL Guide on NYC*, pp.239-244; Annex XIV, p.65, ¶7.
[222] Annex XV, p.68, ¶11, lines 2358-2364.

arbitrator's bias serve sufficient evidence of corruption,[223] while the CILS report[224] has no credence under Mekari law[225] and, at any rate, fails to meet Mekari evidentiary standards.

179. Therefore, enforcement of the set-aside SCC Award did not constitute denial of justice.

### C. RESPONDENT DID NOT DISCRIMINATE AGAINST CLAIMANT

180. Subsidies under the Executive Order 9-2018 were granted to airlines[226] on a non-discriminatory basis. Although Caeli did not receive them, Claimant was not discriminated by Respondent.

181. Under FET standard, discrimination is a measure specifically targeting an investor[227] and amounting to a "*deliberate conspiracy (…) to destroy or frustrate the investment by improper means*".[228] Discrimination was found, for instance, where states subjected investors to additional fees[229] or penalized them for what domestic companies were rewarded.[230] Therefore, only exposure of an investor to specific hardships constitutes discrimination.

182. The subsidies were granted predominantly to small airlines operating important domestic routes within Mekar,[231] while Caeli was not the only airline who did not receive subsidies.[232] Therefore, Respondent did not target Claimant, while refusal to grant subsidies could not itself frustrate Claimant's investment.

183. Therefore, Respondent did not discriminate against Claimant.

184. **In conclusion on Issue III,** Respondent treated Claimant in non-arbitrary and non-discriminatory manner and did not deny justice.

## IV. RESPONDENT DOES NOT OWE CLAIMANT ANY COMPENSATION

185. Claimant has always relied on luck rather than on rational strategies, which predictably led to the decline of Caeli. Now Claimant puts the blame for its recklessness on Respondent. Although

[223] Annex XIV, p.66, ¶9.
[224] *Ibid.*, p.66, ¶10.
[225] *Ibid.*, p.66, ¶13.
[226] SUF, p.37, ¶46.
[227] *LG&E v. Argentina*, ¶146; *OAO Tatneft v. Ukraine*, ¶408; *Bogdanov v. Moldova*, ¶89; *Eastern Sugar v. Czechia*, ¶¶335-337.
[228] *Waste Management v. Mexico*, ¶138.
[229] *Bogdanov v. Moldova*, ¶¶86-88.
[230] *Eastern Sugar v. Czechia*, ¶¶334, 337.
[231] PO4, p.89, ¶7.
[232] SUF, p.37, ¶47.

Respondent has already paid MV as acquisition price, Claimant claims unreasonable sums, which it alleges to be "*fair*" market value.

186. Claimant is only entitled to compensation at MV (**A**). Alternatively, regardless of the applicable standard, compensation shall be reduced (**B**).

## A. CLAIMANT IS ONLY ENTITLED TO COMPENSATION AT MV

187. If the Tribunal finds the FET violation, it should first refer to the CEPTA provisions to determine compensation. Claimant might only be awarded compensation at MV explicitly prescribed in the CEPTA (**1**). Even if the Tribunal finds that the CEPTA standards of compensation do not apply, FMV is not applicable to determine compensation for the FET breach (**2**). Furthermore, Claimant has already received appropriate compensation (**3**). Moreover, FMV cannot be awarded under MFN (**4**).

### 1. The CEPTA explicitly prescribes application of MV

188. Articles 9.12(2) and 9.21(1) CEPTA set compensation standards covering all awards under the CEPTA.

189. The *CMS v. Argentina* tribunal found that it can only choose compensation standard if "*the Treaty offers no guidance*".[233] Similarly, in *Myers v. Canada*, the tribunal exercised such discretion only because the treaty was silent.[234]

190. If the treaties defined compensation standards, the tribunals relied on the respective provisions.[235] Particularly, the *Rumeli v. Kazakhstan* tribunal applied the "*real value*" standard provided in the BIT[236] to determine compensation for unlawful expropriation, finding that it does not contradict the full reparation principle.[237]

191. The CEPTA expressly provides for two comprehensive standards of compensation. Article 9.21 stipulates that "*where a tribunal makes a final award against a respondent, the tribunal may award (…) monetary damages at a market value, except as otherwise provided for in Article 9.12*" (emphasis added).[238] Article 9.12 governs compensation only for direct lawful expropriation, which

[233] *CMS v. Argentina*, ¶409; *Feldman v. Mexico*, ¶194; *Vivendi v. Argentina II*, ¶¶8.2.8-8.2.9.
[234] *Myers v. Canada*, ¶309; *MTD v. Chile*, ¶238; *National Grid v. Argentina*, ¶269.
[235] *Funnekotter v. Zimbabwe*, ¶110; *Metalclad v. Mexico*, ¶112; *Tecmed v. Mexico*, ¶151.
[236] Kazakhstan-Turkey BIT, Art.3.
[237] *Rumeli v. Kazakhstan*, ¶¶792-793.
[238] CEPTA, p.82, Art.9.21, ¶1, lines 3018-3024.

amounts to FMV.[239] Hence, the CEPTA does not allow to apply FMV except to compensate direct expropriation under Article 9.12.

192. Article 9.12 is not applicable because Caeli was not expropriated. Claimant alleges that Respondent violated FET, compensation for which is governed by Article 9.21.

193. Thus, the Tribunal shall apply MV under Article 9.21.

### 2. In any event, FMV is not applicable to FET violations

194. Contrary to Claimant's assertions, even if the Tribunal finds that CEPTA provisions do not apply, it cannot resort to FMV, which governs compensation for expropriation.

195. That is, FMV is not applicable to compensation for FET breaches (**a**). Alternatively, should the Tribunal find FMV applicable to FET violations, it is not applicable here, since FMV is only relevant where the breach had expropriatory effect (**b**), which is absent.

#### (a) FMV does not apply to compensation for FET breaches

196. FMV is applicable to compensation for expropriation and cannot govern compensation for FET breach.[240]

197. In *ADM v. Mexico*, the tribunal refused to apply FMV to national treatment violation finding that FMV "*is only applicable to cases of expropriation*".[241] Unlike expropriation, non-expropriatory breaches lead only to partial impairment, which explains the difference in compensation.[242]

198. Claimant does not argue expropriation[243] and limits its claims to FET breach leaving the compensation standard for expropriation irrelevant. Moreover, expropriation has never occurred.[244]

199. Hence, FMV is not applicable to FET breaches.

#### (b) The FET breach had no expropriatory effect

200. Claimant may argue that FMV as a customary standard applies to compensation because of the expropriatory effect of the breach. However, sustaining such a claim effectively grants protection

[239] *Ibid*., p.77, Art.9.12, ¶2, lines 2809-2810.
[240] *Marboe*, pp.757-758.
[241] *ADM v. Mexico*, ¶283; see also *PSEG v. Turkey*, ¶305; *Houben v. Burundi*, ¶225; *Feldman v. Mexico*, ¶194.
[242] *Marboe (Calculation)*, p.135.
[243] Notice, p.5, ¶29, limes 152-153; PO1, p.13, ¶17, lines 413-414.
[244] Respondent's Memorial, ¶202.

to indirect expropriation, not covered by the scope of the dispute[245] and expressly excluded by the CEPTA (***i***).[246] Further, FMV does not apply since expropriation-like consequences did not occur (***ii***).

***(i) CEPTA does not cover indirect expropriation***

201. The Tribunal should not find expropriatory effect of the FET breach in line with the CEPTA.

202. As put by the *Enron v. Argentina* tribunal, FMV may apply to FET breach, which is indistinctive from indirect expropriation.[247] However, the contracting states are free to exclude certain types of disputes.[248] The *Nations Energy v. Panama* tribunal found that the issue of taxation could not be heard since it was excluded by the BIT.[249]

203. Article 9.12 explicitly provides that "*investors are not protected against measures that may be considered to indirectly expropriate an investment*".[250] Finding of expropriation-like consequences equates FET breach with indirect expropriation. Applying FMV in such a case would essentially mean circumventing the CEPTA.

204. Thus, the Tribunal should not find expropriatory effect.

***(ii) Caeli did not suffer expropriation-like consequences***

205. Alternatively, there are no expropriatory consequences.

206. The *Azurix v. Argentina* tribunal found that expropriation-like consequences are present if the investment was taken over.[251]

207. Claimant's investment was not taken over since the decision to sell Caeli was Claimant's commercial choice. Respondent acquired Caeli, which Claimant intended to sell anyway,[252] through a fair deal, providing the price equal to MV.

208. Moreover, Respondent properly exercised the first refusal right in relation to the deal with Hawthorne Group. Under Article 39 Shareholders' Agreement, Claimant could not sell its shares

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[245] *Ibid*.
[246] CEPTA, p.78, Art.9.12, ¶2, lines 2807-2808.
[247] *Enron v. Argentina*, ¶363; *Gold Reserve v. Venezuela*, ¶680; *Sempra v. Argentina*, ¶403.
[248] *Dolzer/Schreuer*, p.255.
[249] *Nations Energy v. Panama*, ¶74; *Ahmonseto v. Egypt*, ¶208; *Philip Morris v. Uruguay*, ¶208.
[250] CEPTA, p.78, Art.9.12, ¶2, lines 2807-2808.
[251] *Azurix v. Argentina*, ¶424; see also *Murphy v. Ecuador*, ¶482; *Kardassopoulos v. Georgia*, ¶534.
[252] SUF, p.40, ¶63, line 1390.

because the offer was not "*a bona fide written offer for a Third-Party arm's length Transaction*".[253] Respondent had all grounds to suspect that the potential transaction was not an arm's length one because the price was artificially inflated. Absence of other buyers in seven months proves Claimant's failure to adequately assess its investment and appropriateness of the Respondent's price.

209. Therefore, FMV is not applicable to FET breaches.

### 3. Claimant has already received appropriate compensation

210. Respondent does not owe Claimant any compensation because appropriate compensation at MV (**a**) has already been paid in the arm's length transaction (**b**).

#### (a) Compensation at MV is appropriate

211. The Tribunal should determine compensation at MV.

212. The core of the full reparation principle is to wipe out all the harmful effects of the breach.[254] The PCIJ observed that such reparation involves "*the obligation to restore the undertaking and, if this [is] not possible, to pay <u>its value</u>*" (emphasis added).[255]

213. The tribunals applied MV to determine compensation consistent with the full reparation principle.[256] The *ADC v. Hungary* tribunal awarded compensation "*in accordance with the Chorzów Factory standard, i.e., the Claimants should be compensated the market value of the expropriated investments*".[257]

214. Should the Tribunal find Respondent's violation, compensation at MV would fully cover the losses suffered, because Claimant would be provided with its investment's value. Since Claimant sold Caeli, the appropriate compensation shall be the investment's value under market conditions.[258]

215. Therefore, MV is an appropriate standard.

#### (b) Respondent paid MV

216. The sum paid to Claimant corresponds to investment's MV.

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[253] Annex VI, Art.39, p.52, lines 1750-1757.
[254] *Chorzów Factory*, p.47, ¶2.
[255] *Ibid.*, p.48, ¶1.
[256] *Tenaris v Venezuela (II)*, ¶397; *Funnekotter v. Zimbabwe*, ¶130; *Talsud v. Mexico*, ¶12.4.
[257] *ADC v. Hungary*, ¶499; *Gemplus v. Mexico*, ¶13.40.
[258] SUF, p.40, ¶63, lines 1391-1392.

217. MV is "*the fair value of the transaction on an arms' length basis, where both parties to the transaction have knowledge of the applicable circumstances*".[259] Thus, the MV standard requires that the price reflects the parties' knowledge of the applicable circumstances and is determined in an arm's length transaction.[260] ISA define it as

> "*[a] transaction conducted (…) between a willing buyer and a willing seller who are unrelated and are acting independently of each other and pursuing their own best interests*".[261]

218. First, the price paid to Claimant indeed reflects the parties' knowledge of Caeli's financial situation and the surrounding circumstances. During the crisis, Caeli experienced economic distress and continuously declined in value. Caeli descended into a "*dire financial situation*".[262] In February 2019, Caeli even faced the risk of insolvency,[263] which indicates that at that time Caeli could not have been worth 1.1 billion USD (which Claimant alleges to be Caeli's "*fair value*"). Even if the Tribunal finds that Respondent committed FET breach, compensation cannot be more than what Claimant has already received because it amounts to MV.

219. Second, the arm's length transaction requirement is met because, as was previously mentioned, Claimant was not compelled to sell the investment, and thus parties acted independently from each other.[264] The price offered to Claimant reflected the notion of arm's length transaction because it adequately reflected Caeli's value at the time of acquisition. Furthermore, as it was demonstrated, Respondent did not obstruct the deal with Hawthorne Group.[265]

220. Therefore, since MV reflects the independently determined price in light of the applicable circumstances, it implies that such price is fair. Anything above 400 million USD is overcompensation.

### 4. MFN clause application does not grant FMV

221. The compensation standard it is not covered by the MFN clause.

222. Commentary to Article 33 ARS refers to restitution and compensation as a secondary obligation deriving from the breach of substantive rights.[266] Commentary to Article 34 in the similar fashion

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[259] *Tecmed v. Mexico*, ¶191.
[260] *OEG v. Ukraine*, ¶161; *Total v. Argentina*, ¶137; *Foresight and Greentech v. Spain*, ¶513.
[261] *ISA 550*, ¶10.
[262] *Ibid.*, p.36, ¶44, line 1236.
[263] *Ibid.*, p.37, ¶51, line 1300.
[264] Respondent's Memorial, ¶202.
[265] *Ibid*.
[266] *Commentary to ARS*, Art.33, ¶4.

contrasts the right to compensation with the primary right from which the former arises.[267] The compensation standard falls within the procedural mandate that is triggered by the breach of the primary obligation.[268]

223. Moreover, as put by the *İçkale v. Turkmenistan* tribunal, MFN clause covers only provisions that are expressly included in the scope of the clause.[269]

224. Article 9.7 CEPTA provides that MFN clause covers only substantive obligations of the States. The standard of compensation is not itself a substantive obligation. To the contrary, MV, found in Article 21 CEPTA, structurally belongs to the dispute resolution provisions. These are excluded from the scope of MFN.[270] Thus, the standard of compensation is distinguished from substantive rights and thus excluded from the scope of MFN.

225. Moreover, the compensation standard does not appear in the text of the clause. MFN then cannot apply to it.

226. Therefore, MFN does not govern compensation standard.

## B. THE TRIBUNAL SHALL REDUCE COMPENSATION DUE TO MITIGATING FACTORS

227. If the Tribunal awards Claimant any additional compensation, it should be reduced. Claimant's negligent and risky conduct undermined Caeli's financial health and left it helpless against any changes of the economic conditions. The following economic crisis became the final nail in the Caeli's coffin and brought it to the edge of insolvency.[271]

228. The genuine reason why Caeli depreciated was reckless and ill-advised management on Claimant's part (**1**). Moreover, Claimant's unlawful actions significantly and materially contributed to the losses (**2**). Furthermore, Claimant's losses occurred largely due to the economic crisis in Mekar (**3**).

### 1. Claimant's actions contributed to its losses

229. Acting imprudently, Claimant made ill-advised business decisions for which Respondent cannot be liable.

230. Under Article 39 ARS, compensation shall be reduced, if the injured party contributed to its losses. According to the ARS Commentary, unreasonable conduct compounds "*a lack of due care (…) for*

[267] *Ibid*., Art.34, ¶3.
[268] UNCITRAL, Report, ¶38.
[269] *İçkale v. Turkmenistan*, ¶330; see also *Muhammet Çap & Sehil v. Turkmenistan*, ¶790.
[270] CEPTA, p.76, Art.9.7, line 2715.
[271] SUF, p.37, ¶51, line 1300.

*his or her own rights*".[272] The *Azurix v. Argentina* tribunal reduced compensation due to the claimant's unreasonable business decisions, who purchased the assets priced 10 times above the market.[273] To establish the investor's reasonableness, the tribunal assessed its conduct from an average businessperson's viewpoint.[274]

231. Claimant's erratic management caused Caeli's depreciation. Particularly, it adopted risky fleet expansion strategies (**a**) and conducted aggressive leverage policy while excessively relying on volatile oil prices (**b**).

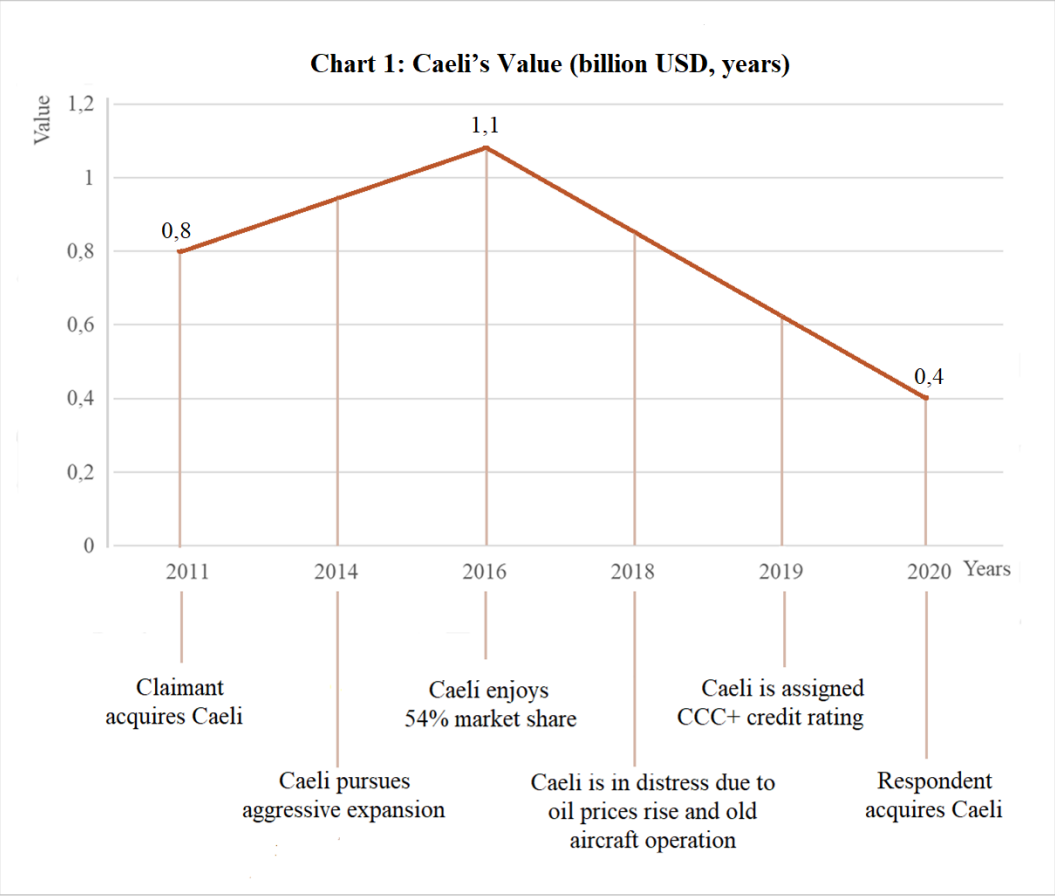
**(a) Claimant adopted risky expansion strategy**

232. Claimant's expansion strategy was negligently risky.

233. While any enterprise aims to expand, no prudent investor would pursue extensive growth completely neglecting the enterprise's financial health.[275] Fleet expansion is a well-known cause of airlines' bankruptcy. Once outstandingly successful carrier, PanAm failed because its overexpansion resulted in inability to survive oil prices rise.[276] PanAm's excessive expansion, as well as a large fleet of Boeing 747, caused overcapacity and inability to cut operation costs during the crisis.[277] This example shows that although fleet expansion might be effective in short run, it is inevitably dangerous in the long term.

234. Industry experts pointed that Caeli's expansion is an inappropriate long-term strategy.[278] However, Claimant preferred to ignore both professional advice and industry experience. Claimant opted for risky fleet expansion instead of concentrating on Caeli's financial health, as Mekar Airservices advised.[279] It introduced dozens of cross-continental flights which was risky given the high demand volatility during off-peak seasons.[280] The effect of Claimant's unwise decisions is evident from the Chart 1:

[272] ARS Commentary, Art.39, ¶5.
[273] *Azurix v. Argentina*, ¶426; *MTD v. Chile*; *Waste Management v. Mexico*, ¶177; *Oostergetel v. Slovakia*, ¶238.
[274] *Ibid.*; *Gemplus v. Mexico*, ¶12.58; *Starrett Housing v. Iran*, ¶338.
[275] *Sarkar*, p.72.
[276] *The Biggest Airlines to Ever Go Bankrupt.*
[277] *The rise and fall of Pan Am.*
[278] Annex VII, p.55, lines 1890-1891.
[279] SUF, p.34, ¶35, lines 1136-1138.
[280] *Ibid*., p.33, ¶29, lines 1096-1098.




235. Predictably, this led to Caeli being unable to stabilize its financial situation during the crisis.[281] Subsequently, alongside the crisis, overexpansion was said to be the main cause of Caeli's fall.[282]

**(b) Claimant opted for aggressive leverage policy**

236. Claimant managed to benefit from its unreasonable strategies for a short time only because of favorable exogenous factors. Claimant was known to take risky decisions, heavily relying on volatile oil prices to secure its expansion instead of financing its debt.[283] Claimant ignored lessons of many now-insolvent airlines. Particularly, massive debts, taken to finance aggressive expansion, led to insolvency of the largest American airlines: Barniff, Continental, and Eastern.[284]

[281] *Ibid*., p.38, ¶53, lines 1314-1317.
[282] *Ibid*., p.38, ¶53, lines 1318-1320.
[283] Annex IX, lines 1956-1957.
[284] *Mathiesen*, p.1024.

237. Claimant's strategy was so evidently flawed that business experts had predicted fail of Caeli in the long term in 2014, several years before Claimant started to experience financial distress.[285] Claimant's negligent conduct and lack of due care resulted in its greater vulnerability to exogenous economic factors.[286] As a prudent investor, Claimant should have secured Caeli's financial health and have not boldly assumed that external factors such as oil prices would always be beneficial.

238. Therefore, the Tribunal shall reduce compensation due to Claimant's negligence.

**2. Claimant's actions were unlawful**

239. Claimant only faced investigations and restrictive measures because of its unlawful actions.

240. The *Copper Mesa v. Ecuador* tribunal reduced compensation by 30% finding that the claimant contributed to damages in result of material and significant wrongful act.[287]

241. Claimant breached Mekari anti–monopoly law which could not have been ignored by CCM. This act was material and significant due to its detrimental effects on competition.[288]

242. Therefore, Claimant contributed to its losses.

**3. Compensation shall be reduced because of the crisis**

243. Claimant's losses were largely caused by the crisis. Thus, compensation shall be reduced accordingly.

244. The PCIJ in *Oscar Chinn* observed that "*no enterprise (…) can escape the chances and hazards resulting from general economic conditions*".[289] As put by the *Maffezini v. Spain* tribunal, BITs do not relieve investors of business risks inherent in any investment.[290] Such general business risks include economic crisis and country risks.[291]

245. Claimant suffered losses largely because of the consequences of the crisis. However, Claimant could not have expected protection from currency fluctuation since it is part and parcel of the business risk[292] that cannot be allocated to Respondent.

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[285] Annex VII, lines 1890-1891.
[286] Respondent's Memorial, ¶¶229-231.
[287] *Copper Mesa v. Ecuador*, ¶6.102; *Occidental v. Ecuador*, ¶687; *MTD v. Chile*, ¶243.
[288] Respondent's Memorial, ¶128
[289] *Oscar Chinn*, p.88, ¶1; *Starrett Housing v. Iran*, ¶73.
[290] *Maffezini v. Spain*, ¶64; *AMT v. Zaire*, ¶7.15; *MTD v. Chile*, ¶178; *Ebrahimi v. Iran*, ¶124(b); *Sola Tiles v. Iran*, ¶63.
[291] *Olguin v. Paraguay*, ¶65(b); *Genin v. Estonia*, ¶348; *CME v. Czechia*, ¶562.
[292] *Enron v. Argentina*, ¶116; *Biloune v. Ghana*, ¶101.

246. Hence, compensation shall be reduced to reflect the effect of the crisis.

247. **To conclude on Issue IV,** Claimant is not entitled to any compensation as it has already received it at MV. Alternatively, should the Tribunal award compensation, it shall be reduced due to mitigating factors.

## PRAYER FOR RELIEF

For the foregoing reasons, Respondent requests the Tribunal to find that:

**I.** The Tribunal lacks jurisdiction;

**II.** The External Advisors' submission should be allowed, while the CBFI's submission should be barred;

**III.** Respondent did not violate FET obligation;

**IV.** Respondent does not owe Claimant any compensation, or, alternatively, the compensation shall be reduced.

Respectfully submitted on September 23, 2021.

**TEAM AGO**

**COUNSEL FOR**

**THE FEDERAL REPUBLIC OF MEKAR**