IN THE MATTER OF AN ARBITRATION BEFORE THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ADDITIONAL FACILITY)

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

Between:

Vemma Holdings Inc.

Claimant

and

The Federal Republic of Mekar

Respondent

MEMORIAL FOR RESPONDENT

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September 23, 2021

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LIST OF ABBREVIATIONS

Abbreviation	Meaning
§	section(s)
¶	paragraph(s)
Award	Arbitral Award Rendered by Mr Rett Eichel Cavannaugh on May 9, 2020
BIT	Bilateral Investment Treaty
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
cf.	confer
CILS	Center for International Legal Services
cl.	clarification(s)
Claimant	Vemma Holdings Inc.
CRPU	External Advisors to The Committee on Reform of Public Utilities
EO 9-2018	Executive Order 9-2018
et seq.	and the following page(s)
Facts	Statement of Uncontested Facts
FET	Fair and Equitable Treatment
Hawthorne Group	Hawthorne Group LLP
i.e.	*id est* (that is)
ISDS	Investor-State Dispute Settlement
Lapras	Lapras Legal Capital
MON	Mekari's currency
NAFTA	North American Free Trade Agreement
NDP	Non-Disputing Party
NGO	Non-Governmental Organization
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10, 1958)
p.	page(s)
PIA	Phenac International Airport
PO1	Procedural Order No. 1, dated March 25, 2021
PO2	Procedural Order No. 2, dated June 18, 2021
PO3	Procedural Order No. 3, dated July 16, 2021
PO4	Procedural Order No. 4, dated September 1, 2021
Respondent	Federal Republic of Mekar
Trade Act	Mekar's Monopoly and Restrictive Trade Practice Act
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
USD	US dollars
WHO	World Health Organization
WTO	World Trade Organization

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LEGAL INSTRUMENTS

Short Reference	Reference
AF Rules	International Centre For Settlement Of Investment Disputes Arbitration, ICSID Arbitration (Additional Facility) Rules, 2006.
Arrakis – Mekar BIT	Treaty Between The Federal Republic of Mekar and The Kingdom of Arrakis for The Promotion And Protection Of Investments, January 16, 2006.
ARSIWA	International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), 2001.
Bonooru – Mekar BIT	Treaty Between The Federal Republic of Mekar and The Commonwealth of Bonooru for The Promotion and Protection of Investments, August 24, 1994.
CEPTA	Comprehensive Economic Partnership and Trade Agreement Between The Commonwealth of Bonooru and The Federal Republic of Mekar, October 15, 2014.
Draft Articles on MFN	Internal Law Commission, Draft Articles On Most-Favoured-Nation Clauses With Commentaries, 1978.
ICSID Rules	International Centre For Settlement Of Investment Disputes Arbitration, ICSID Arbitration Rules, 2006.
ILC Draft	International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Supplement No. 10 (A/56/10), 2001.
UR Transparency	United Nations, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2013.
VCLT	United Nations, Vienna Convention on the Law of Treaties, 1969.

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Addiko	*Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, ICSID Case No. ARB/17/37, June 12, 2020.
AES	*AES Summit v. Hungary, Award, ICSID Case No. ARB/02/17, September 23, 2010.*
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Azurix	*Azurix Corp. v. The Argentine Republic*, Award, ICSID Case No. ARB/01/12, July 14, 2006.
Bayindir	*Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Award, ICSID Case No. ARB/03/29, August 27, 2009.
Biwater Gauff	*Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Procedural Order No. 5, ICSID Case No. ARB/05/22, February 2, 2007.
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Charanne	*Charanne and Construction Investments v. Spain*, Award, SCC Case No. V 062/2012, January 21, 2016.
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CMS	*CMS Gas Transmission Company v. The Republic of Argentina*, Award, ICSID Case No. ARB/01/8, May 12, 2005.
Continental	*Continental Casualty Company v. The Argentine Republic*, Award, ICSID Case No. ARB/03/9, September 5, 2008.
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Eli Lilly	*Eli Lilly and Company v. The Government of Canada*, Procedural Order No. 4, ICSID Case No. UNCT/14/2, February 23, 2016.
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STATEMENT OF FACTS

Parties to the Dispute

[01] Vemma Holdings Inc. ("**Claimant**") is an airline holding company incorporated pursuant to the laws of the Commonwealth of Bonooru ("**Bonooru**"). Claimant is controlled by Bonooru and performs Bonooru's constitutional obligation to ensure its citizens' mobility.

[02] The Federal Republic of Mekar ("**Respondent**") is a country to the south of Bonooru which witnessed political instability post-independence, characterized by mass migration and exploitation of resources. Since then, the country has been careful to ensure its right to regulate while opening up its market to foreign investment.

[03] Respondent and Bonooru had entered into a BIT in 1994 ("**Bonooru-Mekar BIT**"), which was replaced by the Comprehensive Economic Partnership and Trade Agreement ("**CEPTA**") on October 15, 2014.

Caeli Airways Privatization Process

[04] After the 2008 financial crisis, Mekar's newly elected cabinet enacted the Emergency Recovery Act 2009 and authorized Caeli Airways' ("**Caeli**") privatization.

[05] Mekar's Monopoly and Restrictive Trade Practice Act ("**Trade Act**") was promulgated in 2009 to create and regulate the Competition Commission of Mekar ("**CCM**"), which aimed at inspiring investor confidence.

Claimant's bid was accepted with reservations

[06] Claimant participated in Caeli's tendering process. Although it presented an attractive business model, its proposal was overly optimistic and did not account for serious volatility of fuel prices and potential takeover of the long-distance routes by competitors. Claimant nevertheless won the tender.

[07] CCM approved Claimant's acquisition of an 85% stake in Caeli, but requested Caeli to undertake that it would not engage in high-level cooperation with Moon Alliance members, to which Caeli agreed.

Claimant took extravagant approaches to its investment activities that drew CCM's attention

[08] Following Caeli's acquisition, Claimant decided to offer low-fare, long-distance flights into Mekar. When Caeli started making profits, Claimant funneled funds towards rapid expansion. Claimant's risky strategies were taken against Mekar's representatives' advice.

[09] CCM then launched a *suo moto* investigation ("**First Investigation**") into Caeli to find if it was applying predatory pricing strategies. Caeli enjoyed a 43% market share individually, and 54% when considered in conjunction with its Moon Alliance partner, Royal Narnian. The market shares were considered jointly because the companies were engaging in high level cooperation. Besides, CCM was concerned that the subsidies received by Claimant under Horizon 2020 Scheme ("**Horizon 2020**") were enabling Caeli's predatory pricing.

[10] As an interim measure, CCM placed airfare caps on Caeli to prevent it from earning supra-competitive profits. Caeli did not protest the airfare caps.

[11] In December 2016, a consortium of regional airlines brought a complaint before the CCM alleging Caeli was capitalizing on its price undercutting policies and privileges enjoyed at Phenac International Airport ("**PIA**"), pushing competitors off specific regional routes. CCM thus launched another investigation into Caeli ("**Second Investigation**").

Claimant tried to evade from its responsibility when its risky strategies began to fail

[12] By March 2017, a currency crisis ensued in Mekar and Caeli was unable to secure a steady stream of revenue. Claimant questioned Mekar's government decision to require companies to offer goods and services denominated exclusively in MON. The decision

was however within State's right to reduce reliance on foreign currencies, in order to mitigate capital outflows and secure its macroeconomic situation.

[13] Caeli then requested the CCM to remove the interim airfare caps imposed in the First Investigation. This was not possible as the interim measures could not be removed until the investigation was complete.

[14] Claimant complained that Caeli was not granted subsidies through Executive Order 9-2018 ("**EO 9-2018**"). The EO 9-2018 was however an attempt to provide emergency subsidies to eligible businesses, mostly airlines operating important domestic routes within Mekar with less than 5% market share, which was not Caeli's situation.

The investigations concluded that Caeli engaged in anti-competitive behavior

[15] In August 2018, CMM concluded the First Investigation, and found that Caeli had breached Mekar's antitrust legislation by engaging in predatory pricing. Caeli was imposed a penalty of MON 150 million.

[16] In January 2019, CCM concluded the Second Investigation, and found that Caeli had engaged in anti-competitive behavior in conducting its business activities at PIA. CCM imposed a MON 200 million fine on Caeli and decided to maintain the airfare caps until Caeli's market share in conjunction with Royal Narnian fell below 40%.

Claimant decided to sell its stake in Caeli

[17] By the third quarter of 2019, Caeli's market share dropped below 40% and the CCM lifted the airfare caps. Despite this, Claimant announced its intention to sell its stake in Caeli and presented an offer it received from Hawthorne Group LLP ("**Hawthorne Group**").

[18] Respondent had a right of first refusal and rejected Hawthorne Group's offer because the company was associated to Claimant in the Moon Alliance and was not a *bona fide* third-purchaser. After failed negotiations between the parties, Respondent filed a request for arbitration before the Sinnoh Chamber of Commerce's ("**SCC**"), asking the

tribunal to find that the offer was indeed not made in *bona fide*. The sole arbitrator rendered an award in Respondent's favor.

[19] Claimant failed to find another buyer for its shares and decided to sell its stake in Caeli to Respondent for 400 million USD.

Claimant launches a claim against Respondent

[20] Claimant filed this arbitration on November 15, 2020, seeking compensation corresponding to the fair market value of Caeli, although the CEPTA provides for market value as the standard for compensation. Respondent then submitted its Response to the Notice of Arbitration denying all claims and demonstrating this Tribunal's lack of *ratione personae* jurisdiction.

The tribunal receives requests for leave for *amicus curiae* submissions

[21] The Consortium of Bonoori Foreign Investors ("**CBFI**") applied for leave to file an *amicus curiae* submission on April 19, 2021 to advocate for the protection of SOE like Claimant under the CEPTA. Subsequently, the External Advisors to the Committee on Reform of Public Utilities ("**CRPU**") applied for leave to file an *amicus curiae* submission on May 28, 2021. CRPU wants to assist this Tribunal's decision making by providing evidence of corruption in the tendering process that awarded Claimant its investment.

[22] Both Claimant and Respondent commented on the *amicus* applications on June 2021. In its submission, Respondent also asked the Tribunal to apply the UNCITRAL Rules on Transparency in Investor-State Arbitration ("**UR Transparency**") to these proceedings.

SUMMARY OF ARGUMENTS

[23] JURISDICTION: The Tribunal lacks jurisdiction over this case as it would constitute State-to-State arbitration because of Claimant's standing as a SOE part of the State of Bonooru. Additionally, as it is part of Bonooru, Claimant is not entitled to bring claims under the CEPTA or the AF Rules. Claimant is also not entitled to rely on Bonooru-Mekar BIT's definition of investor.

[24] LEAVE FOR *AMICUS CURIAE* PARTICIPATION: The Tribunal should only admit CRPU's submission and deny CBFI's, as the latter fails to meet the requirements for admission set forth in the applicable legal framework.

[25] NO VIOLATION OF FET: Respondent did not violate Art. 9.9 CEPTA as its actions were within the regulatory powers granted by Art. 9.8 CEPTA and in accordance with the FET obligations. CCM's investigations were lawful, expected and not arbitrary; there was no discrimination or denial of justice towards Claimant, and there was no frustration of Claimant's legitimate expectation.

[26] COMPENSATION: Should this Tribunal find that Claimant is entitled to compensation, it shall find that the applicable standard is the market value prescribed by Art. 9.21 CEPTA, which Claimant was already compensated for. Additionally, any compensation shall be reduced due to Claimant's responsibility for its own losses. Finally, this Tribunal should take Respondent's economic crisis into consideration while estimating the amount owed.

PART ONE: PRELIMINARY ISSUES

I. THE TRIBUNAL HAS JURISDICTION OVER THIS DISPUTE

[27] An arbitral tribunal's jurisdiction lies on parties' consent to arbitrate, which in ISDS is usually included in an investment treaty's dispute resolution clause.[1] In order to assess its jurisdiction, a tribunal shall analyze if the requirements *ratione materiae*, *ratione personae* and *ratione temporis* set forth in the applicable treaty, here the CEPTA, are met.[2]

[28] Besides, the Tribunal shall consider that consent alone is not sufficient to bring a dispute before the ICSID Centre. Regard shall also be had to the ICSID requirements for jurisdiction, like the parties and nature of the dispute.[3]

[29] Respondent submits that this Tribunal lacks jurisdiction *ratione personae* because these proceedings would constitute State-to-Sate arbitration, as Claimant is a SOE part of the State of Bonooru **(I.A)**. As such, Claimant neither qualifies as an investor under the CEPTA nor is entitled to bring claims under the AF Rules **(I.B)**. Moreover, Claimant cannot rely on Bonooru-Mekar BIT's definition of investor–and even if it could do so, this Tribunal would still lack jurisdiction *ratione personae* **(I.C)**.

I.A. Claimant is a SOE part of Bonooru

[30] The definition of State provided by the AF Rules includes constituent subdivisions and agencies of a State.[4] As these concepts are neither defined under the AF Rules nor the CEPTA, regard shall be had to international customary law, as provided for in Art. 31(3)(c) VCLT.[5]

[1] Hóber, p. 126, McIlwrath/Savage, p. 369. Steingruber, p. 681; Wehland, p. 233.
[2] Gaffney, p. 1; Dolzer/Schreuer, p. 245, 249, 254.
[3] ICSID Report, ¶25; Koch, ¶6.1, ¶6.51; National Gas, ¶120.
[4] Art. 2 AF Rules.
[5] Art. 31(3)(c) VCLT; AAPL, ¶20-21.

[31] Tribunals have often relied on Art. 5 and 8 ARSIWA to assess if a company's conduct is attributable to the State.[6] According to these, a company shall be considered part of the State if discharges an essentially governmental function or acts under the direction and control of the State.

[32] Claimant is empowered by Bonooru to exercise an essentially governmental function (**I.A.i**), and acts under the direction and control of Bonooru (**I.A.ii**). Even if Claimant was not a SOE part of Bonooru's government, it became one by March 2021 **(I.A.iii)**.

I.A.i. Claimant is empowered by Bonooru to exercise an essentially governmental function

[33] An essentially governmental function shall be determined through a context-specific analysis.[7] In *Maffezini*, the tribunal developed the Functional Test which aims at defining if an enterprise may be considered a part of the State on the grounds of performing an essentially governmental function.[8] The test comprises two steps.

[34] The *first step* consists in examining what were the tasks transferred to the entity and whether they are governmental in nature. Tribunals have held that a State obligation under municipal law would be governmental in nature.[9] The *second step* consists of assessing whether the acts in question in the proceedings were performed by the enterprise when exercising the delegated governmental function.[10] Both steps are met.

[35] Bonooru is an archipelago comprised of 109 islands.[11] Four of these islands concentrate its main facilities for services such as healthcare and education.[12] In light of this unique geography and the disproportion it entails, Art. 70 of Bonooru's Constitution

[6] Dolzer/Schreuer, p. 221; Hóber, p. 551; Petrochilos, p. 262; Flemingo; ¶439; Garanti LLP, ¶335; Bosh International, ¶173.
[7] Crawford, p. 101.
[8] Maffezini, ¶79.
[9] Maffezini, ¶86; Hamester, ¶190.
[10] Hamester, ¶197; Luigiterzo, ¶127.
[11] Facts, ¶5.
[12] Facts, ¶5.

ensures every citizen of Bonooru mobility rights, namely "*the right to enter, and leave its territory*" as well as the right "*to travel to and from its many islands*."[13]

[36] While such rights do not include a free of charge transportation, they include a positive obligation of Bonooru's government, as decided by the Constitutional Court of Bonooru on Mobility Rights.[14] Ensuring those rights is thus governmental in nature. Although these rights may be performed by travel through waterway, the Constitutional Court ruled that air travel is of foremost importance for Bonooru.[15] Ensuring air travel for Bonoori citizens is therefore an essentially governmental function in Bonooru.

[37] Since the privatization of BA Holdings in the 80s, Claimant is responsible for ensuring Bonooru's citizen mobility rights.[16] Its objectives as a company include:

> *h) To assist in* ***developing the aviation industry as well as the civil aviation infrastructure in Bonooru*** *for the* ***benefit of its population*** *in accordance with Article 70 of the Constitution Act, 1947* ***including servicing remote communities****;*[17]

[38] Additionally, in order to ensure Claimant would properly perform Bonooru's essentially governmental functions, Bonooru's government has always maintained a significant interest in Claimant and its investments.[18] Among others, it holds 31%-38% of Claimant's shares,[19] and has heavily invested in Claimant's companies through governmental subsides.[20]

[39] Claimant is directed to promote the governmental task of ensuring Bonooru's citizens' mobility rights since it was established. The first step of the Functional Test is thus fulfilled.

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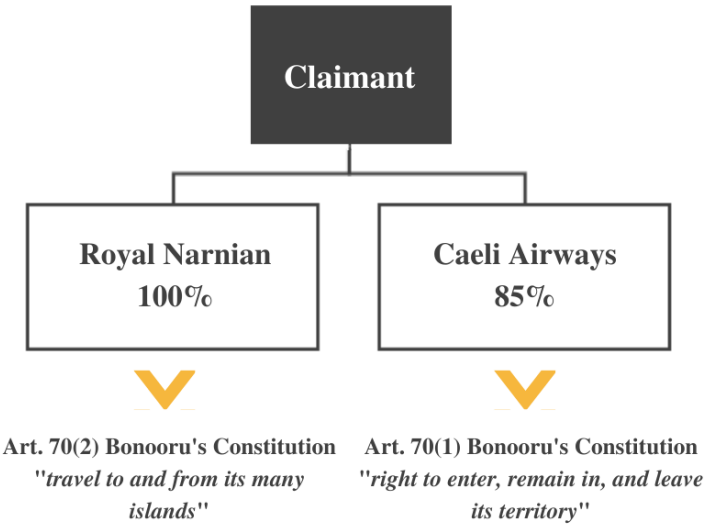
[13] Annex I, Art. 70(1), (2).
[14] Annex II, ¶24-5.
[15] Annex III, ¶56.
[16] Facts, ¶7-10.
[17] Annex IV, ¶3(h). Emphasis added.
[18] Facts, ¶8.
[19] Facts, ¶10.
[20] Facts, ¶28; Annex III, ¶59.

[40] To fulfill the objective set out in its Memorandum of Association, Claimant has two companies, Royal Narnian and Caeli, each focusing on different mobility rights:



[41] Whereas an independent company would aim at profitability,[21] Claimant aims at flying remote routes to ensure Bonnoru's citizens mobility rights, regardless of profitability.[22] In this regard, during the privatization process, Bonooru assured its population that Royal Narnian would still operate in Bonooru's most remote islands, although unprofitable.[23]

[42] Likewise, Caeli flight routes indicate that significant resources are directed to unprofitable flights between Mekar and Bonooru, which serves Bonooru's interests better than Claimant's or Caeli's ones.[24] As Claimant exercised the governmental function delegated to it in the *particular instance* of its investment in Caeli, the second step of the Functional Test is met.

[43] Claimant therefore exercises an essentially governmental function and should thus be considered part of the State of Bonooru.

[21] Intertrade, ¶185; EDF, ¶197.
[22] Facts, ¶8.
[23] Facts, ¶8; Annex III, ¶56.
[24] Annex VII, at 1866 *et seq*.

I.A.ii. Claimant acts under the direction and control of Bonooru

[44] An enterprise may also be considered part of a State if it acts under the direction and control of that State.[25]

[45] In *Deutsche Bank*, the tribunal stressed that proving either "*instructions*", "*direction*" or "*control*" of the State over the enterprise's activities would suffice for it to be considered a part of the State.[26] The Tribunal then held that the enterprise acted under Sri Lanka's direction and control as its statutory purpose was to conduct Sri Lanka's oil policy in the national interest.[27] It considered the identity of its shareholders and the composition and behavior of its board of directors to assess State control.[28]

[46] First, Claimant's statutory purpose includes promoting the governmental objective of ensuring mobility rights of Bonooru's citizens.[29]

[47] Second, the government of Bonooru, more specifically the Ministry of Transport and Tourism, has great influence over Claimant. It is entitled to nominate a non-executive director to Claimant's board.[30] Additionally, the Ministry's Secretary, Ms. Sabrina Blue, is the former head of Claimant's board of director. She was appointed as Bonoonu's Secretary of Transport and Tourism on the same day that Claimant submitted its bid for the purchase of Caeli.[31] In 2011, Claimant received its first subsidy under Horizon 2020, as part of the Caspian Project, a governmental project that aimed at boosting tourism in Bonooru. In that occasion, Ms. Sabrina Blue declared that Claimant's expansion in Mekar would be beneficial to Bonooru by boosting tourism and infrastructure at the country's disposal.[32] Claimant also receives an extensive amount of State aid through Royal Narnian.[33]

[25] Art. 8 ARSIWA; Waste Management, ¶75; EnCana, ¶154; EDF, ¶19.
[26] Deutsche Bank, ¶362.
[27] Deutsche Bank, ¶364.
[28] Deutsche Bank, ¶405.
[29] Annex IV, ¶3(h).
[30] Annex IV, Art. 152.4.
[31] Facts, ¶22.
[32] Facts, ¶28.
[33] Annex VII, at 1860.

[48] Furthermore, a former high-ranking employee of Bonooru's Ministry of Tourism publicly acknowledged that corporations from Bonooru are not fully independent–or, even worse, not independent at all.[34] In fact, Bonooru's representatives alone constitute the required quorum in most of Claimant's meetings, including those for election of directors.[35] Furthermore, Bonooru's governmental officials tried several times to negotiate with Respondent on behalf of Claimant.[36]

[49] The government of Bonooru thus has structural benefits that indicate its control over Claimant.

I.A.iii. Even if Claimant was not a SOE, it became one after Bonooru increased its shareholding participation in Claimant to a 55% stake

[50] Even if Claimant used to be a private enterprise–which would have qualified it as an investor–, it no longer is. Yet a claimant's standing as an investor must be continuously maintained throughout the proceedings until the resolution of the claim.[37]

[51] On March 5, 2021, Bonooru acquired a majority shareholding in Claimant, namely a 55% stake.[38] In that same date, other changes were made in Claimant's structure. It filled its board of directors with government functionaries, it included paramilitary activities among its functions, and its legal team is now assisted by lawyers from Bonooru's justice department. [39] Claimant is thus a SOE part of Bonooru.

I.B. Claimant is not entitled to bring claims to arbitration under the CEPTA and the AF Rules

[52] Since Claimant is a SOE part of Bonooru, it is neither entitled to bring claims under the CEPTA **(I.B.i)** nor under the AF Rules **(I.B.ii)**.

[34] Annex VII, at 1860.
[35] PO3, ¶3.
[36] Response to the Notice, ¶18.
[37] Loewen, ¶229.
[38] Response to the Notice, ¶4.
[39] Facts, ¶65.

I.B.i. Respondent did not consent to State-to-State arbitration under the CEPTA

[53] Jurisdiction requirements should be narrowly constructed, based on an "*unequivocal indication of a voluntary and indisputable acceptance*" of consent.[40] Non consent is the default rule.[41] In this sense, a claimant may not benefit of doubt regarding the scope of the offer to arbitrate.[42]

[54] Respondent's offer to arbitrate included in Art. 9.17 CEPTA is limited by Art. 9.16 CEPTA, which sets the requirements for submission of a claim to arbitration. A claim may only be submitted by an "*investor of a party*," which Art. 9.1 CEPTA defines as:

> "***a natural person with the nationality of a Party*** *or* ***an enterprise with the nationality of a Party*** *or stated in the territory of the other Party that seeks to make, is making or has made an investment in the territory of the other party*"[43]

[55] Since being an *investor* is a jurisdictional requirement, this concept should be narrowly constructed. It shall also be interpreted in good faith, considering the ordinary meaning of the wording and their context in light of the treaty's objective and purpose.[44]

[56] CEPTA's wording indicates that investor shall be either a natural person with the nationality of a Party or an *enterprise* with the nationality of a party. An enterprise may be directly or indirectly owned or controlled by a natural person of a Party.[45]

[57] Although Respondent does not contest Claimant's nationally, it submits that the concept of investor does not include States or SOEs directly or indirectly owned or controlled by the State. Respondent does acknowledge that the Parties did not include an

[40] Bosnia, ¶325; cf. also National Gas, ¶117.
[41] Daimler, ¶ 175.
[42] Fireman, ¶64.
[43] Art. 9.1 CEPTA.
[44] Art. 31(1) VCLT.
[45] Art. 9.1 CEPTA.

expressly exclusion of States and SOEs. However, only few treaties have a provision in this regard.[46]

[58] Moreover, when parties wanted to refer to SOEs, they did so expressly by means of Art. 9.13 CEPTA in order to attribute to the Contracting States conducts of SOEs which exercise governmental authority. When dealing with a similar provision, the tribunal in *Genin* found that the parties intended to attribute the conduct of SOEs to the contracting States, instead of treating them as investors.[47] This is precisely the case in the CEPTA.

[59] Besides, regarding the treaty's purpose, CEPTA's was signed to reduce the excessive benefits conferred to Bonoori investors by the Bonooru-Mekar BIT, which harmed investment relations between the Contracting States.[48] While the Bonooru-Mekar BIT considered as investor an enterprise of a party "*whether privately-owned or government-owned,*"[49] the CEPTA no longer included such specification.[50] Considering the treaty's text and its context, the Tribunal shall find that the parties' intended to exclude SOEs from the CEPTA's definition of investor.

[60] Claimant thus does not qualify as an investor under the CEPTA.

I.B.ii. The AF Rules do not provide for State-to-State arbitration

[61] The AF Rules allow arbitration under the jurisdiction of the ICSID Centre for non-signatories of the ICSID Convention.[51] Despite dismissing the ICSID Rules' requirement that a dispute should be between a contracting state and a national of a contracting state, all other *ratione personae* requirements for jurisdiction set forth in Art. 25 ICSID Rules are applicable to proceedings under the AF Rules.[52] Art. 25 ICSID Rules does not provide

[46] Mohtashami/El-Hosseny, p. 380; Shima, p. 11.
[47] Genin, ¶327.
[48] PO3, ¶14.
[49] Art. 1(a) 1994 Bonooru-Mekar BIT.
[50] Art. 9.13 CEPTA.
[51] Reed *et al.*, p. 129.
[52] Art. 4(2) AF Rules.

for State-to-State arbitration.[53] SOEs are only allowed to bring claims under Art. 25 ICSID Rules as long as they are not acting as an agent of the government.

[62] As Claimant qualifies as a SOE part of the State of Bonooru,[54] these proceedings would constitute State-to-State arbitration. Therefore, Claimant is not entitled to submit claims under the AF Rules.

I.C. Claimant may not rely on the Bonooru-Mekar BIT's investor definition

[63] Claimant may try to resort to the Bonooru-Mekar BIT to allege that SOEs could bring claims under the CEPTA. Differently from the CEPTA, the Bonooru-Mekar BIT includes SOEs in its definition of an enterprise of a party.[55] That provision is however no longer in effect.

[64] Bonooru and Mekar agreed in the CEPTA that all rights and obligations contained in the Bonooru-Mekar BIT would cease to have effect on the date of CEPTA's entry into force. In fact, Art. 1.6.2 CEPTA specifically prevents investors from submitting claims to arbitration under the Bonooru-Mekar BIT.[56]

[65] Claimant is therefore not entitled to resort to the Bonooru-Mekar BIT for a wider definition of investor. Even if it could, the Tribunal would still lack jurisdiction as the AF Rules do not allow proceedings between two States or, similarly, between a State and an agent of a State–which Claimant qualifies as.[57]

[53] Maffezini, ¶74; Broches, 1966, p. 265.
[54] *Cf. supra* I.A.
[55] Art. 1 Bonooru-Mekar BIT
[56] Art. 1.6.2 CEPTA.
[57] *Cf. supra* I.A.

II. *AMICUS CURIAE* OBJECTIONS: THE TRIBUNAL SHOULD GRANT CRPU LEAVE TO FILE AN *AMICUS* SUBMISSION AND DENY CBFI'S REQUEST FOR LEAVE

[66] Art. 9.19(3) CEPTA and 41(3) AF Rules explicitly confer this Tribunal powers to admit the participation of non-disputing parties ("**NDP**") such as *amicus curiae* in arbitral proceedings. Under the Terms of Reference, the Parties recognized this Tribunal's powers to accept *amicus curiae* submissions. [58]

[67] Respondent submits that this Tribunal should refuse CBFI's application as it fails to meet one of the *formal* requirements for NDP participation outlined in the Terms of Reference (**II.A**). Additionally, this Tribunal should analyze the *material* requirements set forth in the CEPTA and in the AF Rules for *amicus* participation (**II.B.**). Respondent also requests this Tribunal to apply the UR Transparency pursuant to Art. 9.20(6) CEPTA and consider their extra requirements for the admission of the *amicus curiae* applicants (**II.C.**). Lastly, Respondent asks this Tribunal to weight time and costs incurred by the applicants against their likely contribution to this Tribunal's decision making (**II.D.**).

II.A. CBFI did not comply with all formal requirements established in the Terms of Reference

[68] The Parties and the Tribunal established rules for NDP participation in their terms of reference such as length, signature, and duty of disclosure of any government, person or organization that has provided any assistance in preparing the submission.[59] In its application, CBFI denied any assistance from organizations associated with Claimant.[60] That was untrue.

[69] On March 29, 2021, CBFI's Executive Committee unanimously allowed Lapras Legal Capital ("**Lapras**") to vote on the matter of CBFI's submission in this arbitration.[61] Lapras is advising Claimant on funding strategies regarding this arbitration.[62] Since CBFI

[58] PO1, ¶19.
[59] PO1, ¶21.
[60] CBFI's Application, ¶3.
[61] PO3, ¶12.
[62] CBFI's Application, ¶7.

failed to address Lapras' assistance in its submission, it did not fulfill the disclosure requirement in the Terms of Reference and thus should be denied participation in this arbitration.

II.B. The Tribunal should only admit *amicus* who complies with the requirements set forth in the CEPTA and in the AF Rules

[70] While exercising its powers to admit or not the *amicus* applicants, this Tribunal should consider the material requirements established in Art. 9.19(3) CEPTA and Art. 41(3) AF Rules,[63] namely: *first*, the submission should assist the Tribunal in its decision making by bringing a perspective different from that of the Parties (**II.B.i**); *second*, the potential *amicus* should have a significant interest in these proceedings (**II.B.ii**); *third*, the submission should address a matter within the scope of the dispute (**II.B.iii**).

II.B.i. The potential *amicus* shall bring a perspective, particular knowledge, or insight that may assist the Tribunal in the decision making

[71] Art. 9.19(3) CEPTA and Art. 41(3)(a) AF Rules demand *amicus curiae* applicants to demonstrate their ability to provide a new perspective, knowledge, or insight to the tribunal.[64] Tribunals should thus only accept a*mici* whose assistance in the tribunal's decision making would not otherwise be available.[65]

[72] In *Phillip Morris*, the tribunal demanded *amicus* applicants to possess a particular knowledge or insight that was different from that of the disputing parties.[66] In *Eli Lilly*, the tribunal refused five *amicus* applications from pharmaceutical associations to which the claimant was a member because they would not bring any knowledge that would be

[63] Born/Forrest, p. 18-19; Sabater, p. 51.
[64] Born/Forrest, p. 22; Apotex #1, ¶21; Philip Morris, Procedural Order No. 4, ¶27; Biwater Gauff, ¶50; Eli Lilly, ¶6-9;
[65] Born/Forrest, p. 23; Apotex #1, ¶23; Apotex #2, Procedural Order on BNM, ¶23; Philip Morris, Procedural Order No. 4, ¶26; Vivendi, Order in Response to a Petition for Participation, ¶8; InterAguas, ¶23; Biwater Gauff, ¶50; Born/Forrest, p. 21-23; Gómez, p. 559; Schliemann, p. 371.
[66] Phillip Morris, ¶8.

different from that of the claimant.[67] The *InterAguas* and *Vivendi* tribunals decided likewise.[68]

[73] CRPU would bring a perspective different from that of the Parties. Arbitral tribunals should examine allegations of corruption when related evidence comes to light[69] because investments procured by corruption are outside tribunals' jurisdiction as they are contrary to transnational public policy.[70] That is exactly the present case, where CRPU would provide this Tribunal unbiased facts on Claimant's bribery to Mr. Dorian Umbridge, the Chairperson of the privatization committee that granted Claimant its investment ("**Committee**").[71] CRPU's expertise goes beyond that of the Parties as it was an independent advisor involved in the privatization committee.[72] CRPU will therefore assist this Tribunal in assessing its jurisdiction in light of the corruption evidence, thus contributing to its decision making.

[74] The CBFI's submission would on the other hand not assist this Tribunal decision making since it is unlikely to provide any insight different from that of the Claimant. Claimant is a member of CBFI, which intends to advocate for the protection of SOEs like Claimant under the CEPTA.[73] That however is part of the issues already at stake in this arbitration,[74] and will be addressed by Claimant during its submissions. CBFI's submission will thus likely be duplicative of Claimant's arguments, and therefore is unlikely to bring any fresh knowledge able to assist this Tribunal in its decisions.

[75] In short, CRPU's submission will assist this Tribunal by bringing a particular knowledge no Party will provide, whereas CBFI's submission will not.

[67] Eli Lilly, ¶6-9.
[68] Philip Morris, Procedural Order No. 3, ¶24; InterAguas, ¶23; Vivendi, Order in Response to a Petition for Participation, ¶24.
[69] Baizeau/Hayes, p. 234; Cremades/Cairn, p. 14.
[70] See e.g., ICC Case No. 1110; Inceysa, ¶252; SEGT, p. 359.
[71] CRPU's Application, p. 19.
[72] CRPU's Application, p. 19.
[73] CBFI's Application, ¶10.
[74] PO2, ¶8.

II.B.ii. The *amicus* shall have a *significant* interest in the outcome of the dispute

[76] Art. 9.19(3) CEPTA and Art. 41(3)(b) AF Rules requires *amicus* applicants to demonstrate a "*significant* interest*"* in the arbitration, as opposed to a "*general* interest" in the proceedings.[75]

[77] In *Apotex #1*, the tribunal assessed the significant interest criterion by requiring applicants to explain how the rights they represented could be directly or indirectly affected by the outcome of the proceedings.[76] An applicant's interest that lies only in convincing the tribunal to adopt a legal interpretation that could be advantageous to its members' pending and future cases would be merely a general interest.[77] The tribunals in *Resolute Forest, Philip Morris* and *InterAguas* reached similar conclusions.[78]

[78] CRPU has a *significant* interest in the outcome of these proceedings. This arbitration raises important issues regarding illegal investments procured by means of bribery and may set a precedent that other tribunals will take into account, although not binding.[79] CRPU's interest thus lies exactly in assisting this Tribunal's assessment of the legality of Claimant's investment and ultimately promoting fair business practices in Respondent's country.[80] Moreover, CRPU represents foreign investors prospecting opportunities in Respondent's country, which were impacted by the stagnation in anti-corruption efforts.[81] CRPU thus fulfills the significant interest criterion.

[79] Unlike CRPU, CBFI lacks significant interest in the case. CBFI seeks to convince this Tribunal of its jurisdiction *ratione personae* under the CEPTA in favor of Claimant as a SOE.[82] CBFI's interest thus lies only in convincing this Tribunal of a legal interpretation of the CEPTA that could be advantageous to its members. Yet a legal interpretation interest constitutes merely a *general* interest in the dispute, instead of a

[75] Born/Forrest, p. 25; Apotex #2, Procedural Order on Mr. Barry Appleton, ¶38; Resolute Forest, ¶4.6.
[76] Apotex #1, ¶27-28.
[77] Apotex #2, Procedural Order on Mr. Barry Appleton, ¶40.
[78] Resolute Forest, ¶4.6; Philip Morris, Procedural Order No. 4, ¶27-30; InterAguas, ¶31.
[79] SGS, ¶97.
[80] CRPU's Application, p. 19.
[81] CRPU's Application, p. 19.
[82] CBFI's Application, ¶10.

significant one.[83] CBFI therefore failed to demonstrate their *significant* interest in this dispute.

[80] CRPU thus has a significant interest in these proceedings, whereas CBFI has merely a general one.

II.B.iii. The potential *amicus* submission shall address a matter within the scope of the dispute

[81] Art. 9.19(3) CEPTA and Art. 41(3)(b) AF Rules request tribunals to examine if the *amicus curiae* submissions would address a matter within the scope of the dispute.

[82] Parties are sometimes not able to raise all relevant aspects of the controversy.[84] An informed *amicus curiae* can thus play key role in bringing relevant legal issues such as corruption to the tribunal's attention, especially because an *amicus* may possess expertise that the parties lack.[85] In *Apotex #1*, the tribunal reasoned that it is "*perfectly conceivable*" for *amicus curiae* to raise issues of jurisdiction.[86]

[83] Even though CRPU's submission raises a jurisdictional issue, it would still be within the scope of the dispute. Corruption evidence such as the present one has led other arbitral tribunals to deny their jurisdiction,[87] since investments procured by corruption are contrary to the purpose of ISDS of protecting only legitimate investments made in good faith.[88] Should the Tribunal fail to address the legality of Claimant's investment, the enforcement of the award could be endangered under Art. V(2)(b) NYC. Considering that CRPU's submission is thus relevant to this tribunal's decision on its jurisdiction, it would be within the scope of this dispute.

[83] Resolute Forest, ¶4.6.
[84] Gómez, p. 545.
[85] Levine, p. 217; Born/Forrest, p. 24.
[86] Apotex #1, ¶33.
[87] See e.g., ICC Case No. 1110; Inceysa, ¶252; SEGT, p. 359.
[88] Hamester, ¶123; Phoenix, ¶106.

[84] Respondent does not contest that CBFI's submission would be within the scope of the dispute. This requirement is however the sole requirement met by CBFI to be admitted as an *amicus* by this Tribunal.

II.C. The *amicus* petitioners shall also comply with the UNCITRAL Rules on Transparency's requirements

[85] Art. 9.20(6) CEPTA allows Respondent to request the application of the UR Transparency to any arbitration initiated against it, which Respondent has done.[89] Similar to the AF Rules, the UR Transparency also allow the participation of *amicus curiae* in investment arbitration.[90] Yet Art. 1(4)(a) and Art. 4.2 UR Transparency impose two extra requirements to be met by *amici*: public interest (**II.C.i**) and independency from the disputing parties (**II.C.ii**).

II.C.i. Public Interest

[86] Art. 1(4)(a) UR Transparency requires tribunals to consider public interest while analyzing an application for *amicus curiae.* Public interest requires applicants to show that the arbitration is likely to have implications beyond the interests of the parties.[91] In *Vivendi*, the tribunal construed public interest as the influence of the tribunal's award on how governments and foreign investors would approach similar investments when faced with difficulties.[92] Likewise, the tribunal in *Resolute Forest* required *amicus* applicants to show a link between their application and furtherance of the public interest.[93]

[87] CRPU's submission would meet the public interest requirement. Corruption entails interests beyond those of the parties.[94] This Tribunal's decision will influence on how tribunals and governments will approach cases involving other illegal investments like Claimant's, as well as those of investors relying on BITs with similar wording.[95] To deny the CRPU's submission would thus mean to turn a blind eye to corruption, which

[89] Respondent's Comments on Amicus, p. 24.
[90] Yu, p. 4.
[91] Apotex #2, ¶35-36; InterAguas, ¶18; Born/Forrest, p. 26; Ishikawa, p. 400.
[92] Vivendi, Order in Response to a Petition by Five NGOs, ¶17.
[93] Resolute Forest, ¶4.7.
[94] Baizeau/Hayes, p. 235.
[95] CRPU's Application, p. 19.

would go against the transparency and legitimacy goals of the UR Transparency.[96] The CRPU thus acts in the furtherance of the public interest.

[88] Contrary to CRPU, CBFI fails to meet the public interest requirement. CBFI seeks to convince this Tribunal to recognize its jurisdiction over Claimant's claim, and to advocate in favor of its members.[97] CBFI therefore does not act in the furtherance of the public interest.

II.C.ii. Independency from the disputing parties

[89] Art. 4.2 UR Transparency requires *amicus curiae* to disclose any connection with the parties to the dispute. Accordingly, *amicus* should demonstrate their independence from the disputing parties.[98] Tribunals may reject *amicus* applicants if there are doubts about their transparency and their source of funding, for example.[99] In *Von Pezold*, the tribunal refused *amicus* applications on the ground that the apparent lack of independence or neutrality would be sufficient to deny leave.[100] In other words, the *friend of the court* should not be the *friend* of one of the parties.[101]

[90] CRPU is independent from the Parties. First, it has no ties to the Parties, as it is composed of members of Respondent's civil society who worked as external independent advisors to the Committee, which were selected for the Committee through a transparent and competitive process based on criteria of competence established in the law.[102] None of the CRPU's members has received any financial or other support from any of the parties.[103] CRPU is thus neutral and independent from the Parties.

[91] CBFI conversely lacks independence from Claimant. CBFI has disclosed that other two of its members are currently pursuing claims against Respondent under Chapter 9 of the CEPTA, the same one Claimant relies on.[104] Moreover, Claimant's funding

[96] Yu, p. 4; *cf.* also: Bastin, p. 137; Vanduzer, p. 684.
[97] *Cf. supra* ¶74.
[98] Born/Forrest, p. 30; Yu, p. 4.
[99] Ishikawa, p. 400.
[100] Von Pezold, ¶56.
[101] Mourre, p. 269.
[102] CRPU's Application, p. 19.
[103] CRPU's Application, p. 20.
[104] CBFI's Application, ¶6.

advisor, Lapras, is also a member of CBFI.[105] CBFI allowed Lapras to participate in the preparation of the *amicus* submission despite its funding assistance to Claimant,[106] thus contradicting is own statement and raising a conflict of interest. Considering that, CBFI's submission lacks independence from Claimant.

[92] In this sense, Respondent submits that only CRPU is independent from the Parties.

II.D. The Tribunal shall balance the benefits of the *amicus* submission against the cost and duration of the proceedings

[93] Tribunals shall consider potential costs and time involved in *amici* applications.[107] Tribunals should reject *amicus* applicants that fail to meet any of the criteria laid down in the applicable rules, as they are likely to unfairly prejudice the disputing parties by increasing time and costs of the dispute.[108]

[94] CRPU's submission is unlikely to burden the disputing parties, as it meets all the criteria laid down in the applicable rules. Even if this Tribunal does not find corruption, it would still protect the legitimacy of its award and avoid potential discussions during the enforcement phase.

[95] CBFI fails nevertheless to meet *almost all* criteria for *amicus* applicants.[109] Respondent and this Tribunal would have to spend time with a duplicate submission in favor of Claimant, causing undue burden and delay in a scenario where costs and lack of speed are considered by users among the worst features of international arbitration.[110]

[96] All things considered, this Tribunal should grant CRPU leave to file an *amicus curiae* submission, whereas it should deny the CBFI's request for leave.

[105] Respondent's Comments on Amicus, p. 24.
[106] PO3, ¶12.
[107] Born/Forrest, p. 31.
[108] Resolute Forest, ¶4.8; Born/Forrest, p. 23; Ishikawa, p. 400; *cf.* also: Apotex #2, Procedural Order on Mr. Barry Appleton, ¶44.
[109] *Cf. supra* ¶74, 79, 84, 88, 91.
[110] White & Case/Queen Mary, p. 8, 10.

PART TWO: MERITS

III. RESPONDENT DID NOT VIOLATE ART. 9.9 OF THE CEPTA

[97] Claimant contends that Respondent violated Art. 9.9 CEPTA. Claimant's position is flawed.

[98] Art. 9.9 CEPTA contains the Contracting State's obligation to ensure investors and investments Fair and Equitable Treatment ("**FET**"), and is within Section D – Investment Protection, which encompasses Art. 9.8 to Art. 9.15.[111] While Art. 9.9 CEPTA sets the Minimum Standard of Treatment, Art. 9.8 CEPTA sets the Contracting States' Right to Regulate.

[99] Respondent did not violate Art. 9.9 CEPTA as, *first*, its actions were within its regulatory powers granted by Art. 9.8 CEPTA (**III.A**), *second*, it granted Claimant and its investment FET (**III.B**) and, *third*, it did not frustrate Claimant's legitimate expectations (**III.C**).

III.A. Respondent acted within its regulatory powers safeguarded by Art. 9.8 CEPTA

[100] Under Art. 9.8.1 CEPTA, the Contracting States acknowledge their right to regulate within their territories in order to achieve legitimate public policy objectives. Art. 9.8.2 CEPTA prescribes that the exercise of the right to regulate does not amount to a breach of any obligation under Section D, such as those within Art. 9.9 CEPTA, even if it negatively affects an investment:

> "*2. For greater certainty, **the mere fact that a Party regulates, including through a modification to its laws**, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, **does not amount to a breach of an obligation under this Section.***"[112]

[111] CEPTA, Section D – Investment Protection.
[112] Art. 9.8.2 CEPTA. Emphasis Added.

[101] The wording of this provision is the same as Art. 8.9(2) CETA, and aims at protecting a State's right to regulate.[113]

[102] Respondent is entitled to adopt or maintain measures with respect to market access to ensure fair competition,[114] such as "*restricting the concentration of ownership to ensure fair competition.*"[115]

[103] All the measures taken by Respondent, such as investigating into Claimant's investment and imposing airfare caps, were aimed at ensuring fair competition. Respondent therefore acted within its regulatory powers, and did not violate of Art. 9.9 CEPTA.

III.B. Respondent granted Claimant and its investment Fair and Equitable Treatment

[104] In exercising its regulatory authority, Respondent acted in accordance with its FET obligations.

[105] Pursuant to Art. 9.9.2 CEPTA a party breaches FET obligation by taking measures that constitute

> "*(a) a denial of justice in criminal, civil or administrative proceedings; or*
> *(b) a fundamental breach of due process; or*
> *(c) an arbitrary or discriminatory conduct; or*
> *(d) an abusive treatment of investor.*"

[106] Claimant contends that Respondent breached its FET obligations by acting arbitrarily and discriminating against Claimant and its investment as well as by denying it justice.[116] Claimant's allegation is flawed as *first*, CCM Investigations were lawful, expected, and not arbitrary (**III.B.i**); *second*, Respondent did not act discriminatorily

[113] Levashova, p. 32; Council of the European Union commentaries on CETA, p. 2-3.
[114] Art. 9.4 CEPTA.
[115] Art. 9.4.2 CEPTA.
[116] Notice of Arbitration, ¶18-20.

towards Claimant and its investment (**III.B.ii**); *third,* Respondent did not deny Claimant justice (**III.B.iii**).

III.B.i. CCM Investigations were lawful, expected, and not arbitrary

[107] An arbitrary conduct is described as "*founded on prejudice rather than a reason or fact*,"[117] in a way that inflicts damages on a party without a rational explanation or a legitimate purpose.[118] States' regulation regarding public interest does not amount to any arbitrary conduct.[119]

[108] Respondent's measures were necessary to prevent anti-competitive acts and to protect consumers. CCM investigations into Caeli were merely an application of the Trade Act in response to Caeli's large market share and predatory pricing (**III.B.i.a**) and its undercutting pricing policies and abuse of dominant position (**III.B.i.b**). Besides, The measures taken by CCM to prevent supra-competitive profits were legitimate (**III.B.i.c**).

III.B.i.a. Caeli's predatory pricing in conjunction with its large market share led to the First Investigation

[109] The Trade Act provides that CCM may open a *suo moto* investigation where a corporation, first, obtains a market share greater than 50%; second, poses a threat to the competition; and, third, if there is evidence that the actions taken have pushed or are likely to push competitors out of a market.[120]

[110] Claimant contends that the first requirement was not met.[121] This position is flawed, as Caeli enjoyed a 54% market share in Mekar in conjunction with Royal Narnian in January 2016.[122] The airlines' market share should be considered in conjunction not only because Claimant owned 100% of Royal Narnian[123] and 85% of Caeli,[124] but mainly

[117] Lauder, ¶221; *cf. also* Plama, Award, ¶184; UNCTAD, p. 78.
[118] Lemire, ¶385.
[119] UNCTAD, p. 80, LG&E, ¶162; AES, ¶10.3.31,10.3.34.
[120] Annex V, Ch. III, (2).
[121] Notice of Arbitration, ¶14.
[122] Facts, ¶36.
[123] Facts, ¶9,10.
[124] Facts, ¶26.

because they engaged in high-level cooperation.[125] Before the CCM approved Caeli's partnership with Moon Alliance, Caeli undertook not to engage in high-level cooperation in matters such as prices, schedules, capacities, facilities and other sensitive information with alliance members.[126] Yet Caeli engaged in high-level cooperation with Moon Alliance members, especially with Royal Narnian in respect of lounge access, terminals, IT platforms, check-in operations and code-sharing.[127] As Caeli and Royal Narnian worked in cooperation and both are owned by Claimant, their market share should be considered together. The first requirement for a *suo moto* investigation is therefore met.

[111] Besides, CCM was concerned that the subsidies Caeli received from Bonooru under Horizon 2020 allowed it to implement its predatory pricing strategies,[128] which threatened competition. Therefore, the second and third requirements for a *suo moto* investigation were also met.

III.B.i.b. Caeli's price undercutting policies and the abuse of its privilege enjoyed at Phenac International Airport led to the Second Investigation

[112] The definition of anti-competitive acts under the Trade Act includes, among others, practices that discipline or eliminate competitors from a market. Abuse of dominant position which is likely to prevent or lessen competition in a market is forbidden.[129]

[113] Pursuant to Chapter III (3), CCM shall open an investigation regarding potentially anti-competitive behavior of a corporation where:

> "*(a) a complaint is brought to the CCM by a direct competitor in the market; and*
>
> *(b) the corporation has at least a 10% market share.*

[125] Facts, ¶27.
[126] Facts, ¶25.
[127] Facts, ¶27.
[128] Facts, ¶36.
[129] Trade Act, Ch. IV.

(c) The CCM must consider whether sufficient evidence is brought by the direct competitor before exposing a corporation to a potentially costly investigation."[130]

[114] CCM's Second Investigation met all three requirements. First, a consortium of small regional airlines in Great Narnian brought a complaint before CCM regarding Caeli's undercutting policies and abuse of privilege at PIA.[131] Second, Caeli had a 43% market share.[132] Third, the consortium of small airlines brought evidence, which had been supported by experts in the media at the time.[133]

[115] Hence, CCM Second Investigation was lawful, and not arbitrary.

III.B.i.c. The measures taken by CCM to prevent supra-competitive profits were legitimate

[116] A State's right to regulate can lead to measures that will have an adverse effect on foreign investors,[134] yet these measures are legitimate as long as they aim at regulating a public interest.[135] The Trade Act granted CCM the power to impose any interim and final remedies necessary to bring a corporation into complying with the public interest of fair competition.[136]

[117] During the First Investigation, CCM applied airfare caps to Claimant as an interim measure against Claimant's predatory pricing strategies,[137] which stayed in force until Caeli's market share in conjunction with Royal Narnian's dropped below 40%.[138] The fact that Claimant only contested the airfare caps after its risky strategies started to take their toll, namely 16 months after CCM imposition of the caps,[139] shows that they were reasonable and legitimate.

[130] Trade Act, Ch. III, (3).
[131] Facts, ¶38.
[132] Facts, ¶36.
[133] Annex VII, ¶1890.
[134] Ejms, p. 79
[135] Levashova, p. 174; Bonnitcha, p. 163; EDF, ¶292; AES, ¶10.3.34.
[136] Annex V, Ch. III, (4), (d).
[137] Facts, ¶37.
[138] Facts, ¶49.
[139] Facts, ¶36,46

[118] CCM's fines on Caeli were also legitimate. The CCM concluded on the First Investigation that Caeli had indeed engaged in predatory pricing by means of low airfares and loyalty programs, subsidized by Horizon 2020.[140] CCM then fined Caeli for breach of Mekar's antitrust legislation.[141]

[119] As a result of the Second Investigation, CCM fined Caeli for abusing its dominant position at PIA and applying undercut ticket fares and strategies to push competitors out of the market.[142]

[120] The measures taken by CCM towards Caeli after the investigations were therefore foreseen and proportionate.

III.B.ii. Respondent did not discriminate against Claimant

[121] The non-discrimination requirement included in FET clauses aims at protecting investors from specific targeting, like deliberate conspiracy to frustrate the investment.[143] FET obligation is thus violated when the investor is manifestly discriminated without legitimate justification.[144]

[122] In *Invesmart*, the claimant alleged that Union Banka was discriminated as it did not receive state aid while other banks did.[145] The tribunal held that there was no discrimination as the comparators were not similarly placed in the market.[146]

[123] Respondent enacted EO 9-2018 to provide emergency subsidies to eligible businesses that suffered losses as a direct result of the 2017 economic crisis in Mekar.[147]

[124] EO 9-2018 conferred the Secretary of Civil Aviation authority to grant subsidies to eligible air services businesses based on their need and their unlikelihood to distort

[140] Facts, ¶45.
[141] Facts, ¶45.
[142] Facts, ¶49.
[143] Glamis, ¶542; Waste Management, ¶138; UNCTAD, p. 81.
[144] UNCTAD, p. 81.
[145] Invesmart, ¶407.
[146] Invesmart, ¶415.
[147] Annex VIII.

market conditions in favor of one or more enterprises.[148] Under these requirements, the predominant recipients of subsidies under EO 9-2018 were airlines with less than 5% market share on important domestic routes within Mekar.[149]

[125] Caeli failed to meet these requirements. First, Caeli did not need the subsidies under EO 9-2018 as it received continuous influx of funds from its home State under Horizon 2020.[150] Although other airlines that received subsidies from their home States were granted subsidies under the EO 9-2018,[151] none of them would distort market conditions as they did not have a market share close to Caeli's. JetGreen was Caeli's closest competitor and enjoyed 21% of the market share in Mekar,[152] while Caeli alone enjoyed 43%, and 54% in conjunction with Royal Narnian.[153]

[126] Second, granting Caeli subsidies would distort market conditions in favor of Caeli, as Caeli already secured its home State advantages compared to private companies.[154] Caeli and Larry Air were the only airlines operating in Mekar significantly owned by a foreign government. None of them received subsides under EO 9-2018.[155]

[127] Respondent therefore did discriminate against Claimant.

III.B.iii. Respondent did not deny Claimant justice

[128] Denial of justice takes place when a decision from a State court is improper and discreditable,[156] to the extent that there is a failure of the judicial system.[157] Claimant alleges that Respondent denied it justice by delaying hearings in urgent matters and dismissing Caeli's claims on the merits prematurely,[158] and by enforcing an award that was annulled at the seat of arbitration.[159] Claimant position is flawed as Respondent did

[148] Annex VIII, Ch. 31, Sec. 3101 (a); Annex VIII, Ch. 31, Sec. 3101 (c) (1).
[149] PO4, ¶7.
[150] Facts, ¶45.
[151] Facts, ¶46.
[152] PO3, ¶6.
[153] Facts, ¶36.
[154] Facts, ¶46.
[155] Facts, ¶47.
[156] Loewen, p. 137; ELSI, ¶128; Mondev, ¶127; Chevron, ¶8.32.
[157] Philip Morris, ¶500.
[158] Notice of Arbitration, ¶20.
[159] Notice of Arbitration, ¶28.

not deny Claimant justice in court proceedings (**III.B.iii.a**) and enforced the Award according with the NYC provisions (**III.B.iii.b**).

III.B.iii.a. Respondent did not deny Claimant justice in court proceedings

[129] When Claimant's strategies began to fail, it requested Respondent's High Court to review the airfare caps imposed in the First Investigation. Claimant alleges Respondent denied it justice by delaying the hearing on interim measures and dismissing the merits prematurely.[160] Claimant position is wrong.

[130] A denial of justice may occur when a breach of due process is not corrected by the judicial system.[161] However, Respondent did not breach Claimant's due process rights.

[131] A breach of due process occurs when a party is not afforded a reasonable opportunity to present its case.[162] It requires a shock to a sense of judicial propriety–mere administrative irregularities do not automatically lead to a violation of due process.[163]

[132] In *Bosh*, the tribunal held that there was no violation of due process as the investor had been informed of the government's actions and had been given opportunity to present its position.[164]

[133] In March 2018, Claimant sought judicial review of the airfare caps imposed by CCM in 2016. The hearing on interim measures was schedule to April 2019 due to the high volume of cases the Court had to deal with regarding the economic crisis.[165] The delay in Mekar's court was foreseen and justified because its population grew significantly since 1980 and the judicial system failed to expand at the same rate. Non-criminal matters are usually judged within take 22 months.[166] Caeli's case was nevertheless judged within 15 months.

[160] Notice of Arbitration, ¶20.
[161] Dumberry, p. 230.
[162] Dumberry, p. 258, Thunderbird, ¶198.
[163] Dumberry, p. 258; ELSI, ¶76; Asylum, ¶284;
[164] Bosh International, ¶214.
[165] Facts, ¶44.
[166] Facts, ¶13.

[134] In April 2019, Mekar's High Court heard Caeli's submissions concerning the airfare caps.[167] Pursuant to Executive Order 5-2014 ("**EO 5-2014**"), passed by Mekar's President in 2014 in order to alleviate the backlog in Mekari courts,[168] Respondent's courts may dismiss a case summarily if they find there is feel likelihood of success in the merits.[169] In light of that, in June 2019, Mekar's High Court released its interim decision declining to remove air caps due to Caeli's large market share and its predatory conducts. The court held it did not foresee the possibility of arriving at any different final decision in the merits, and dismissed Claimant's case as allowed by EO 5-2014.[170]

[135] Respondent therefore neither violated Claimant's procedural rights nor failed to correct a violation of those.

III.B.iii.b. Respondent enforced the Award in conformity with the NYC provisions

[136] Art. V NYC provides that States *may*, but not *must*, refuse enforcement of awards that fit into one the listed enforcement exceptions.[171] In other words, the NYC has pro-enforcement purposes which "*strongly inclines the courts to give effect to foreign arbitration awards*".[172] Even where one of the NYC enforcement exceptions is applicable, national courts remain free to recognize awards.[173] That has been supported by courts in the United States,[174] England and Wales,[175] Germany,[176] France,[177] and Hong Kong.[178]

[137] After Claimant's risky strategies turned sour, Claimant decided to sell its investment. It received an artificially inflated offer from the Hawthorne Group, another

[167] Facts, ¶52.
[168] PO3, ¶8.
[169] PO3, ¶8.
[170] Facts, ¶54.
[171] Art. V(1) NYC.
[172] Aloe Vera, ¶78; IMAX, p. 6; Hispasat, p. 3; Four Seasons, p. 613; Swiss Federal Tribunal, Judgement of October 4, 2010, p. 340.
[173] IPCO, ¶11.
[174] Chromalloy, p. 907; Rhone, p. 50; Cont'l Transfert Technique, p. 46.
[175] Svenska, ¶24-27; Dardana, p. 225.
[176] BGH, Judgement of September 25, 2003; OLG Hamburg, Judgement of January 24, 2003.
[177] French Cour de Cassation, Judgement of June 10, 1997; French Cour de Cassation, Judgement of June 29, 2007.
[178] Hebei, p. 652.

member of the Moon Alliance.[179] On February 11, 2020, Respondent filed a request for arbitration regarding that offer as it was made in bad faith and violated Caeli's Shareholders' Agreement.[180] Following a fast-track procedure, the Award was released on May 9, 2020 ("**Award**").[181] On that same day, Claimant filed for the set aside of the award at the court in Sinnoh, the seat of arbitration.[182] A month later, on June 14, 2020, the Centre for Integrity in Legal Services ("**CILS**") leaked a report to the press affirming that the arbitrator, Mr. Cavannaugh, received bribery from Respondent's representatives.[183]

[138] Although the veracity of the leaked information was questionable,[184] the court at the seat of arbitration set the award aside based solely on the alleged indicia of corruption.[185] Claimant presented this same corruption argument before Respondent's courts, which nonetheless dismissed the allegations given the inconclusive evidence, and enforced the award.[186]

[139] Respondent submits that its courts' decision to enforce the Award is aligned with the NYC pro-enforcement purpose, so that only a "*very strong case*" could lead to the refusal of enforcement of a foreign award.[187] That threshold was not met in Claimant's case.

[140] First, Claimant relied on evidence leaked by CILS, which is investigated as an entity funded by foreign donations to interfere in Respondent's domestic affairs.[188] Second, Respondent's High Commercial Court thoroughly examined the Award and found that the arbitrator considered both parties' submissions equitably, applied his mind, and arrived at a well-reasoned decision.[189] Third, even if CILS were to be deemed trustworthy, the leaked report was "*hearsay evidence*" and thus "*circumstantial at*

[179] Annex X; Facts, ¶57.
[180] Facts, ¶57; Annex VI, p. 52.
[181] Facts, ¶58.
[182] Facts, ¶60.
[183] Annex XII, ¶1.
[184] Annex XV, ¶18.
[185] Facts, ¶60.
[186] Annex XIV, ¶10-14.
[187] Annex XIV, ¶5.
[188] Annex XIV, ¶13.
[189] Annex XIV, ¶10.

best,"[190] which was insufficient for Respondent's courts to contradict the NYC pro-enforcement purposes and interfere with the Award.[191]

[141] Considering that, Respondent's enforcement of the Award was in line with the NYC and Respondent thus did not deny Claimant justice.

III.C. Respondent did not frustrate Claimant's legitimate expectations

[142] Pursuant to Art. 9.9.3 CEPTA, when applying the FET obligation, the Tribunal may consider whether a specific representation was made to induce an investment, creating a legitimate expectation.

[143] Legitimate expectations can be created by the investor based on commitments or promises made by the State to attract the investment.[192] Tribunals usually require a direct and specific representation by the State to a concrete investor to recognize the legitimate expectation created.[193]

[144] Claimant cannot allege Respondent frustrated its legitimate expectations concerning, *first,* Caeli's membership in Moon Alliance, (**III.C.i**), *second,* the benefits regarding the PIA, as Claimant abused of its dominant position (**III.C.ii**) and *third,* the denomination of services and goods in MON (**III.C.iii**).

III.C.i. Caeli's membership in Moon Alliance could be subject of analysis

[145] Regulatory powers are essential for a State and the renounce of their exercise cannot be assumed by any implicit declaration.[194] Caeli's participation in Moon Alliance had to be approved by CCM and was subject to limitations, such as not engaging in high-level cooperation with other alliance members.[195] Any waiver of CCM's power to control anti-competitive acts should be made through a direct and specific representation to an investor in order to create a legitimate expectation. This never happened. CCM's approval

[190] Annex XIV, ¶14.
[191] Annex XV, ¶6.
[192] Cervin, ¶509; Venezuela Holdings, ¶256; El Paso, ¶375.
[193] Levashova, p. 132; Charanne, ¶478; Continental, ¶261; Venezuela Holdings, ¶256.
[194] Prager/Jenkin, ¶31.
[195] Facts, ¶25

of Caeli's participation in Moon Alliance therefore did not create expectations on Claimant that the membership would not be subject to applicable rules.

III.C.ii. Claimant abused of its beneficial position at PIA

[146] Claimant inheritance of Caeli's benefits at PIA did not amount to any legitimate expectations that Claimant could abuse of these benefits. Respondent did not make any commitment to Claimant that it would be exempted from the Trade Act prohibition of abuse of dominant position.[196] Claimant therefore cannot allege Respondent violated its legitimate expectations regarding PIA.

III.C.iii. Respondent was within its right to regulate the denomination of services and goods in MON

[147] After many requests received from airlines, Respondent approved the denomination of airfares in USD in October 2017. Yet in order to fight inflation, Respondent later required all companies to denominate goods and services back in MON. Claimant cannot allege that the initial approval created a legitimate expectation.

[148] First, the approval was not a measure to induce Claimant's investment, as it was approved in 2017,[197] namely six years after Claimant's invested in Mekar.[198]

[149] Second, a mere change of regulatory framework does not amount to a breach of investors' legitimate expectations.[199] State's monetary sovereignty is recognized under customary international law and it encompasses the control of its own currency or any other currency within its territory.[200]

[150] Respondent therefore did not create any legitimate expectation on Claimant that its goods and services could be forever denominated in a foreign currency.

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[196] Annex V, Ch. IV, Prohibition where abuse of dominant position.
[197] Facts, ¶40.
[198] Facts, ¶26.
[199] Levashova, p. 141.
[200] Gianviti, p. 2; Proctor, p. 526-7; Kolo, p. 348; Dolzer/Schreuer, p. 213; Sacerdoti, p. 358-9; AES, ¶9.3.29; Cervin, ¶509.

IV. THE APPROPRIATE STANDARD FOR COMPENSATION IS MARKET VALUE

[151] As Respondent has not violated Art. 9.9. of the CEPTA, it owes Claimant no compensation. If the Tribunal concludes otherwise, the Tribunal should determine compensation using the "*market value*" standard of Art. 9.21(1) CEPTA (**IV.A**). Neither international law nor CEPTA's Most Favored Nation ("**MFN**") protection allow Claimant to derogate from the CEPTA standard for compensation (**IV.B**). The Tribunal should also find that Respondent has already compensated Claimant for the market value of its investment (**IV.C**). Alternatively, any compensation owed to Claimant should be reduced due to Claimant's responsibility for the losses it has incurred (**IV.D**). Lastly, any compensation awarded by this Tribunal should take into account Respondent's economic situation (**IV.E**).

IV.A. The CEPTA prescribes market value as the standard of compensation for non-expropriatory breaches

[152] Art. 9.21(1) CEPTA prescribes market value as the applicable standard of compensation for non-expropriatory breaches by stating that

> "*1. **Where a tribunal makes a final award against a respondent, the tribunal may award**, separately or in combination:*
> *(a) **monetary damages at a market value, except as otherwise provided for in Article 9.12**;*[…]."[201]

[153] This means that a final award against a respondent for breaches under the CEPTA may result in monetary damages i.e. compensation[202] at market value, if Art. 9.12 CEPTA does not prescribe otherwise.

[154] Art. 9.12 CEPTA is headed "*Expropriation and Compensation*," and addresses the applicable compensation standard for cases of lawful expropriation.[203] *In casu*,

[201] Art. 9.21(1) CEPTA. Emphasis Added.
[202] ARSIWA, Art. 36, ¶4; Nikièma, p. 3; CMS, ¶401; Vivendi, ¶8.2.8.
[203] Art. 9.12(2) CEPTA.

Claimant does not allege that Respondent has expropriated its investment.[204] Claimant instead has agreed to restrict its substantive claim to the alleged violation of Art. 9.9 CEPTA.[205] Art. 9.9 CEPTA pertains to "*Minimum Standard of Treatment*" and addresses FET,[206] not expropriation.

[155] As Claimant's allegations do not refer to expropriation, they are not under the scope of Art. 9.12 CEPTA. Art. 9.21(1)(a) CEPTA's exception to the market value standard is thus not met. Therefore, the market value standard under Art. 9.21(1)(a) CEPTA shall apply.

IV.B. Neither international law nor most favored nation protection allow Claimant to derogate from the market value standard in the CEPTA

[156] Claimant alleges that it would be owed the "*Fair Market Value*" ("**FMV**") of its investment by both principles of international law and CEPTA's MFN obligation.[207] Yet neither international law nor CEPTA's MFN clauses allow Claimant to derogate from the market value standard prescribed by Art. 9.21(1)(a) CEPTA. *First*, CEPTA's specific provisions concerning its parties supersede any general provisions of customary international law (**IV.B.i**). *Second*, the requirements for MFN protection under Art. 9.7 CEPTA are not met (**IV.B.ii**). *Third*, the requirements for MFN protection under Art. 9.11 CEPTA are not met. (**IV.B.iii**).

IV.B.i. CEPTA's specific provisions concerning its parties supersede any general provisions of international law

[157] Claimant alleges that it would be entitled to FMV based on principles of international law,[208] whereas Respondent submits market value prescribed in the CEPTA is the applicable standard. Compensation based on FMV is the value a hypothetical buyer would pay a hypothetical seller for an investment, both being under no obligation to buy

[204] Notice of Arbitration, ¶31.
[205] PO1, ¶17.
[206] Art. 9.9 CEPTA.
[207] Notice of Arbitration, ¶30.
[208] Notice of Arbitration, ¶30.

or sell and both having reasonable knowledge of relevant facts.[209] On the other hand, Compensation based on market value, comprehends the value of a party's investment[210] e.g., the value of a party's stake in a company,[211] or its direct capital loss.[212]

[158] Claimant alleges that general provisions of international law shall apply despite CEPTA's specific provisions on compensation standards.[213] Claimant's position is flawed.

[159] In case of inconsistency between different applicable provisions, specific provisions shall derogate from general provisions on the same subject.[214] In *UPS*, the tribunal dealt with conflicting provisions between the NAFTA and the ARSIWA. The tribunal found that the mere inconsistency between a specific provision and a general provision led to the application of the specific provision, without need to consider to what degree the provisions conflicted with each other.[215] The tribunals in *Phillips* and *INA* also considered whether to apply the specific rules set by the US–Iran Treaty or general customary rules of international law. Both tribunals decided that the specific provisions of the US-Iran Treaty superseded conflicting provisions of customary international law.[216]

[160] Inconsistency between applicable provisions exists when two requirements are met: first, the provisions at stake are mutually exclusive and, second, they apply to the same parties.[217]

[161] FMV and market value are mutually exclusive. This Tribunal cannot simultaneously award Claimant USD 700 million under FMV for (*sic*) Respondent's violations of the CEPTA,[218] and USD 400 million, which is the value of Claimant' under

[209] Marboe, p. 731; Kantor, p. 32; Starrett Housing, ¶277; Azurix, ¶424.
[210] Senn/Hewett/Fine, p. 433; Wena, ¶125; Continental, ¶305; Quasar, ¶215; Phelps, ¶31.
[211] Quasar, ¶215; Phelps, ¶31.
[212] Continental, ¶305.
[213] Notice of Arbitration, ¶30.
[214] ARSIWA, Art.55, ¶2; ILC Study Group, ¶56; Pulkowski, p. 163; Archer, ¶116.
[215] UPS, ¶176.
[216] Phillips, ¶107; INA, ¶24.
[217] ARSIWA, Art.55, ¶4; ILC Study Group, ¶75; Addiko, ¶292; Phillips, ¶107.
[218] Notice of Arbitration, ¶31.

market value, already paid by Respondent.[219] Moreover, both international principles and the CEPTA apply to the interactions between Claimant and Respondent.

[162] As the requirements for an inconsistency are met, the Tribunal shall apply the specific provision, here the CEPTA market value standard for compensation.

IV.B.ii. The requirements for MFN protection under Art. 9.7 CEPTA are not met

[163] Claimant cannot invoke the MFN protection provided by Art. 9.7(1) CEPTA to derogate from the market value standard set by Art. 9.21(1) CEPTA. That follows because *first*, Claimant's situation is not within the scope of Art. 9.7(1) CEPTA (**IV.B.ii.a**). *Second*, MFN protection does not apply to matters of procedure pursuant to Art. 9.7(2) CEPTA (**IV.B.ii.b**). *Third*, MFN protection requires objectively similar situations (**IV.B.ii.c**). *Fourth*, MFN protection shall not apply to extend the rights provided by Art. 9.9 CEPTA (**IV.B.ii.d**).

IV.B.ii.a. Claimant's request for Most Favored Nation protection is outside the scope of Art. 9.7(1) CEPTA

[164] Art. 9.7(1) CEPTA provides that investments and investors in like situations to that of third country investors or investments will receive MFN protection regarding "*the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory*".[220] These scenarios comprehend activities associated with the establishment and subsequent business practices of an investment.[221]

[165] Claimant intends to invoke MFN protection to benefit from a different standard of compensation.[222] Standards of compensation, however, are not mentioned under the

[219] Facts, ¶63.
[220] Art. 9.7(1) CEPTA.
[221] See *e.g.* Molinuevo, p. 94.
[222] Notice of Arbitration, ¶30.

protected scenarios of Art. 9.7(1) CEPTA as they do not concern either establishment of businesses, or business practices.

[166] Therefore, as Claimant's request for MFN protection is outside the scope of Art. 9.7(1) CEPTA, it should not be granted by this Tribunal.

IV.B.ii.b. Respondent is exempted from granting an investor Most Favored Nation protection to procedural matters

[167] Art. 9.7(2) CEPTA determines that the MFN obligation does not include issues concerning "***procedures for the resolution of investment*** *disputes between investors and states provided for in other international investment treaties and other trade agreements.*"[223]

[168] As the CEPTA does not define "*procedures for the resolution of investment disputes,*" this concept shall be interpreted in accordance with applicable rules of international customary law.[224] As both Parties are signatories of the VCLT,[225] this Tribunal shall refer to its provisions. As established by Art. 31 VCLT, one shall consider the ordinary meaning of terms used in the treaty in good faith, without disregard to the context, object, and purpose of the treaty.[226]

[169] Addressing the ordinary meaning of the terms used by Art. 9.7(2) CEPTA, Black's Law Dictionary defines procedure as a concept that "*denotes the body of rules, whether of practice or of pleading, whereby rights are effectuated through the successful application of the proper remedies*".[227] The expression "*procedures for the resolution of investment disputes*" may thus be understood as the body of rules on the proper methods on the resolution of a dispute concerning investments. This refers to rules on the conduct

[223] Art. 9.7(2) CEPTA. Emphasis added.
[224] Art. 1.3(2) CEPTA.
[225] Facts, ¶66.
[226] Art. 31 VCLT; Art. 27, VCLT Draft, ¶11-12.
[227] Black's Law, p. 1323.

of dispute settlement proceedings, like the hearing of witnesses, rules of evidence or pleading, and restrictions to the power of the tribunal.[228]

[170] Art. 9.21 CEPTA addresses issues of procedure associated with a Final Award, such as monetary damages, procedure costs and attorney fees, review procedures, and enforcement of awards.[229] In this sense, since Art. 9.21(1) CEPTA imposes procedural restrictions on a tribunal's power over an aspect of the proceedings i.e. the final award, it shall be considered a matter of procedure.

[171] Considering that Art. 9.7(2) CEPTA exempts Respondent from granting MFN protection to matters of procedure, Claimant is not entitled to invoke MFN protection in relation to Art. 9.21(1) CEPTA standard for compensation.

IV.B.ii.c. Claimant's situation is objectively different from that of Arrakis' investors

[172] Claimant may ask this Tribunal to apply MFN protection based on the treatment Respondent has accorded to investors under the Arrakis-Mekar BIT.[230] Nevertheless, even if this Tribunal understands that MFN protection may apply to the standard of compensation, it should not grant Claimant MFN protection as its situation is different from that of investors from Arrakis.

[173] Art. 9.7(1) CEPTA requires that investors or investments that intend to benefit from MFN protection are in like situations to that of investors or investments of a third country.[231]

[174] This follows because MFN protection exists only to safeguard investors from receiving different treatment because of their nationality.[232] MFN protection does not prohibit States from granting different treatment to investors which are subjected to

[228] Sabahi/Rubins/Wallace Jr., ¶17.47; Schill, p. 252; Pauker, p. 4; Lew/Mistelis/Kroll, ¶21-3; Panagopoulos, p. 71; Plama, Decision on Jurisdiction, ¶209.
[229] Art. 9.21 CEPTA.
[230] Arrakis-Mekar BIT.
[231] Art. 9.7(1) CEPTA.
[232] UNCTAD, p. 26; Dolzer/Stevens, p. 754; Bayindir, ¶387.

objectively different situations.[233] Objectively different situations are those subjected to distinct circumstances e.g. companies in different economic sectors.[234]

[175] Claimant is a SOE that acts an agent of Bonooru, and receives several benefits based on that, such as subsidies.[235] Claimant's competitor airlines from Arrakis, however, are not SOEs, let alone an agent of the State.[236] This constitutes an objectively different situation, which entitles Respondent to treat Claimant and Arrakis' investors differently.

[176] Therefore, even if this Tribunal understands that MFN protection is applicable, it should not grant Claimant MFN protection.

IV.B.ii.d. Claimant may not invoke Most Favored Nation protection to extend the rights conferred by Art. 9.9 CEPTA

[177] Art. 9.9 CEPTA addresses FET and full protection and security.[237] Art. 9.9(7) CEPTA determines that:

> *"7. The provisions of this Article shall not apply to invoke a more favourable treatment accorded by either Party under bilateral investment treaties or other agreements containing provisions relating to investments* ***signed prior to the entry into force of this Agreement****."*[238]

[178] This means that investors under the CEPTA may not invoke MFN protection to benefit from treatment granted by treaties signed prior to the entry into force of the CEPTA.

[179] Claimant may allege that it should be granted MFN protection to benefit from the treatment provided to Arrakis investors under the Arrakis-Mekar BIT. The Arrakis-Mekar

[233] UNCTAD, p. 26; Sabahi/Rubins/Wallace Jr., ¶17.06.
[234] UNCTAD, p. 27.
[235] *Cf. supra* I.A.
[236] Facts, ¶47.
[237] Art. 9.9 CEPTA.
[238] Art. 9.9(7) CEPTA, Emphasis Added.

BIT was signed on January 16, 2006.[239] CEPTA, on the other hand, was signed on October 15, 2014.[240]

[180] As the Arrakis-Mekar BIT was signed prior to the CEPTA, Claimant may not invoke MFN protection to extend the rights conferred by Art. 9.9 CEPTA.

IV.B.iii. The requirement for MFN protection under Art. 9.11 CEPTA is not met

[181] Claimant may also attempt to invoke MFN protection under Art. 9.11 CEPTA. This Tribunal shall nevertheless find that Art. 9.11 CEPTA's requirement for MFN protection has not been met.

[182] Art. 9.11 CEPTA prescribes that parties to CEPTA shall accord MFN protection with regards to compensation to investors of the other party whose covered investments suffer losses "*owing to armed conflict, civil strife, a state of emergency or natural disaster in its territory*". [241]

[183] Claimant however has agreed to limit its substantive claim to the alleged violations of FET under Art. 9.9 CEPTA.[242] Therefore, as Claimant does not allege that its losses stem from armed conflict, civil strife, a state of emergency or natural disaster, Claimant does not meet the criterion for invoking MFN protection under Art. 9.11 CEPTA.

IV.C. Respondent has already compensated Claimant for the market value of its investment

[184] Market value refers to the actual value of a party's investment[243] i.e. the value of a party's stake in a company,[244] or its direct capital loss.[245]

[239] Arrakis-Mekar BIT, p. 84.
[240] Facts, ¶32.
[241] CEPTA, p. 77, Art. 9.11.
[242] PO1, ¶17.
[243] Senn/Hewett/Fine, p. 433; Wena, ¶125; Continental, ¶305; Quasar, ¶215; Phelps, ¶31.
[244] Quasar, ¶215; Phelps, ¶31.
[245] Continental, ¶305.

[185] Respondent purchased Claimant's 85% stake in Caeli for USD 400 million. This was an amount paid for an 85% stake at Caeli at a time in which Caeli Airways shut down several routes, returned aircraft to their lessors, laid off 30% of its staff, canceled purchase orders, and grounded large parts of its fleet.[246] The fact that Claimant was unable to find other buyers for its investment even at USD 400 million indicates that Respondent has paid Claimant a more than fair price for Caeli.[247]

[186] Should this Tribunal understand that Respondent owes Claimant any compensation, then it should also consider that Respondent has already compensated Claimant for the market value of its investment by paying it USD 400 million.

IV.D. Any compensation awarded to Claimant should be reduced due to Claimant's responsibility for the losses it has incurred

[187] Art. 39 ARSIWA provides one shall consider whether the party seeking reparation has contributed to the injury by willful or negligent action or omission,[248] i.e. by lack of due care towards its own property or rights.[249]

[188] The *Cargill* tribunal found that the treaty protection invoked by the claimant could not provide it with a blanket against risks it knowingly assumed and which contributed to its own losses.[250] Likewise, the *MTD* tribunal reduced damages owed by Chile in 50% as the claimant had made decisions which increased the risks for its investment, regardless of the treatment given by Chile.[251]

[189] *In casu*, Claimant's actions and omissions contributed to the losses it incurred. First, Claimant ignored Respondent's warnings about the volatility of the Mekari market in Fall and Winter months,[252] and the warnings against Claimant's extravagant approach in 2012, and 2013.[253] Second, when Claimant turned a large profit due to dropping fuel

[246] Facts, ¶53.
[247] Facts, ¶63.
[248] ARSIWA, Art. 39, ¶1; Occidental, ¶678; Cargill, ¶670.
[249] ARSIWA, Art. 39, ¶5.
[250] Cargill, ¶669.
[251] MTD, ¶242.
[252] Facts, ¶29.
[253] Facts, ¶31.

prices in 2015, Respondent advised Claimant to inject its profits into outstanding debt and improving the financial health of Caeli. Claimant preferred placing orders to purchase 45 Boeing 737 MAX aircrafts and slashing airfare prices.[254] Third, the Secretary-General of the union of the largest petroleum-exporting states declared in June 2014 that a "*strong uptick*" of prices of oil was expected.[255] Regardless, Claimant continued to use older aircrafts, which are more vulnerable to a rise in oil prices, as they are less fuel efficient.[256] Claimant then suffered the consequences of the economic crisis in 2017 and the surge in oil prices in 2018,[257] and struggled to maintain a steady stream of revenue.[258]

[190] Despite being warned by multiple sources, Claimant acted negligently and put its investment in Caeli at risk. Any compensation should thus be reduced.

IV.E. Any compensation awarded should take into account the economic situation in Mekar

[191] Tribunals have considered the risk of negative repercussions to the well-being of the population when determining the amount of compensation payable by a State.[259] In *CMS*, the Tribunal considered the lasting effects the economic crisis would have on Argentina to lower the amount of compensation due.[260]

[192] Even if Claimant was owed the requested amount of USD 700 million, demanding this of Respondent would lead it to economic ruin as Respondent would have to transfer about twice its annual public spending to Claimant to pay that sum.[261] Moreover, Respondent is still in an economic crisis as Respondent's GDP dropped 8% in 2019 and bank defaults rose 23% in the first trimester of 2020.[262] As a State, Respondent is responsible for the well-being of its population. Any compensation paid by Respondent

[254] Facts, ¶34-5.
[255] Facts, ¶33.
[256] Facts, ¶35; Hoyland/Medland, p. 3.
[257] Facts, ¶48.
[258] Facts, ¶40.
[259] CMS, ¶356; CME, ¶78; Gulf of Maine, ¶237.
[260] CMS, ¶356.
[261] PO3, ¶4.
[262] PO3, ¶4.

to Claimant means less state funding available to public expenses and consequently less investment in the well-being of its people.

[193] Therefore, if this Tribunal finds that Claimant is owed any compensation, it should lower the amount of due so as to not impose on Respondent and its people an economic catastrophe.

REQUEST FOR RELIEF

[194] In light of the above, Respondent requests this Tribunal to issue an award against Claimant:

a) Declaring that this Tribunal lacks jurisdiction over this case;

b) Denying CBFI leave to file an *amicus curiae* submission;

c) Granting CRPU leave to file an *amicus curiae* submission;

d) Declaring that Respondent did not violate Art. 9.9 CEPTA;

e) Declaring that no compensation is due to the Claimant. Alternatively, declaring that:

   a. the applicable standard of compensation is the Market Value;

   b. Respondent has already paid Claimant the Market Value of its investments;

   c. the amount due shall be reduced because Claimant contributed to its losses and because of Respondent's economic situation;

f) Ordering Claimant to bear all costs and fees related to these proceedings.

Respectfully submitted,

[signed]
Counsel for Respondent
Mekari Ministry of Justice
1 Parliament Blvd
Phenac, Mekar
C3C 4D4

Dated September 23, 2021