TEAM BROWER

FOREIGN DIRECT INVESTMENT MOOT COMPETITION

Seoul, 28 October – 3 November 2021

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 9 OF THE BONOORU-MEKAR COMPREHENSIVE ECONOMIC PARTNERSHIP AND TRADE AGREEMENT AND THE INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES ("ICSID") ARBITRATION (ADDITIONAL FACILITY) RULES

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

-BETWEEN-

Vemma Holdings Inc.

Claimant

- AND –

The Federal Republic of Mekar

Respondent

MEMORIAL FOR RESPONDENT

Registry

International Center for Settlement of Investment Disputes

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INDEX OF ABBREVIATIONS

¶/¶¶	Paragraph(s)
Act (2009)	Monopoly and Restrictive Trade Practice Act, as Amended in 2009
CBFI	Consortium of Bonoori Foreign Investors
CBFI's *Amicus* Application	*Amicus* Submission by the Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	Comprehensive Economic Partnership and Trade Agreement
CRUP	Committee on Reform of Public Utilities
CRUP's *Amicus* Application	*Amicus* Submission by External Advisors to the Committee on Reform of Public Utilities
Facts	Uncontested Facts
FET	Fair and Equitable Treatment
FMV	Fair Market Value
ICSID (AF)	International Center for Settlement of Investment Disputes (Additional Facility)
ILC Articles	Draft Articles on responsibility of States for Internationally Wrongful Acts
L	Line
MFN	Most Favoured Nation
MV	Market Value

Notice	Notice of Arbitration
P	Page
PO	Procedural Order
Response	Response to the Notice of Arbitration
SOE(s)	State-Owned Enterprise(s)
VCLT	Vienna Convention on Law of the Treaties

LIST OF AUTHORTIES

AAPL (Award)	*Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka* — Award, ICSID Case No. ARB/87/3 (27 June 1990)
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Aguas del Tunari (Jurisdiction)	*Aguas del Tunari S.A. v. Bolivia* — Decision on Respondent's Objections to Jurisdiction, ICSID Case No. ARB/02/3 (21 Oct. 2005)
Apotex (III) (PO on Mr. Appleton)	*Apotex Holdings Inc. and Apotex Inc. v. U.S.* — Procedural Order on the Participation of the Applicant, Mr. Barry Appelton, as a Non-Disputing Party, ICSID Case No. ARB(AF)/12/1 (4 Mar. 2013)
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Bayindir (Award)	*Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan* — Award, ICSID Case No. ARB/03/29 (27 Aug. 2009)
Bear Creek (Award)	*Bear Creek Mining Corporation v. Peru* — Award, ICSID Case No. ARB/14/21 (30 Nov. 2017)
Berschader (Award)	*Vladimir Berschader and Moïse Berschader v. Russia* — Award, SCC Case No. 080/2004 (21 Apr. 2006)

BUCG (Jurisdiction)	*Beijing Urban Construction Group Co. Ltd. v. Yemen* — Decision on Jurisdiction, ICSID Case No. ARB/14/30 (31 May 2017)
B3 (Award)	*B3 Croatian Courier Coöperatief U.A. v. Croatia* — Award (Excerpts) ICSID Case No. ARB/15/5 (5 Apr. 2019)
CME (Final Award, Brownlie's Opinion)	*CME Czech Republic B.V. v. Czech Republic* — Separate Opinion by Ian Brownlie (14 Mar. 2003)
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EBO (Award)	*EBO Invest AS, Rox Holding AS and Staur Eiendom AS v. Latvia* — Award, ICSID Case No. ARB/16/38 (28 Feb. 2020)
Eco Oro (PO No.6)	*Eco Oro Minerals Corp. v. Colombia*, ICSID Case No. ARB/16/41 — Procedural Order No. 6 (18 Feb. 2019)

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Shill (2017)	S. Shill, "MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath", *American Journal of International Law*, Vol. 111, Issue 4 (2017)
Wolff (2019)	R. Wolff, New York Convention: Article-by-Article Commentary (2nd. ed.) (2019)

TREATIES

CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)
EU-Mercosur Trade Agreement	European Union-Mercosur Free Trade Agreement
Turkey-Turkmenistan BIT (1992)	Agreement Between Turkey and Turkmenistan Concerning the Reciprocal Protection and Protection of Investments

OTHERS

ICSID History (Vol.II-1)	The History of the ICSID Convention (Vol. II-1)

UNCITRAL Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

STATEMENT OF FACTS

Claimant and Respondent

[1] Vemma Holdings Inc. ("**Vemma**" or "**Claimant**") is an airline holding company incorporated under the law of the Commonwealth of Bonooru ("**Bonooru**"). Prior to its privatization on 17 June 1980, Claimant (then called as **Bonooru Air**) had been wholly owned and managed by Bonooru. As of now, Bonooru's control over Vemma is no more than the limited one, corresponding to its shareholdings.

[2] The Federal Republic of Mekar ("**Mekar**" or "**Respondent**") is a developing country where the Mekari Mon ("**MON**") circulates as a domestic currency. Until 2009, Respondent had attempted to develop its economic affairs with State-owned enterprises ("**SOEs**").

Pre-Investment

[3] In 2009, Respondent decided to privatize some State-controlled industrial sectors such as civil aviation (**Caeli Airways**). In order to achieve the privatization, Mekar appointed a State-owned and controlled company (**Mekar Airservices Ltd.**) "to which Caeli Airways' assets and part of its debt liability were transferred".

Sale Caeli's Stake for Vemma

[4] On 5 January 2011, Respondent selected Claimant as an appropriate partner in the civil aviation and on 29 March 2011, Respondent purchased an 85% stake of Caeli Airways to Claimant.

The CEPTA

[5] In April 2014, Bonooru and Mekar signed the Comprehensive Economic Partnership and Trade Agreement ("**CEPTA**"), and the CEPTA entered into force on 15 October 2014. Accordingly, on the same day, the pre-existing BIT was terminated on a basis of the parties' agreement.

The Launch of the CCM's First Investigation and Its Interim Measure

[6] On 9 September 2016, the CCM launched the first investigation to Caeli based on its discretion under *Monopoly and Restrictive Trade Practice Act, as Amended in 2009* because the Caeli's market share was 54% in conjunction with the Moon Alliance partner (**Royal Narnian**).

[7] As an interim measure, the CCM also imposed caps upon Caeli Airways' airfare.

The Launch of the CCM's Second Investigation

[8] In December 2016, the CCM lunched the second investigation against Caeli Airways, focusing upon the price undercutting on certain routes and from the Airport.

Serious Mekari Financial Crisis

[9] On March 2017, Mekari financial crisis ensued, which led to drastic inflation in Mekar.

[10] On 30 January 2018, the new cabinet passed a decree, according to which all companies operating in Mekar were required to offer goods and services denominated exclusively in MON.

The First Litigation against the CCM by Claimant

[11] Caeli Airways sought the CCM to remove the airfare caps tied to the official inflation rate calculated by the Central Bank. However, the CCM rejected Claimant's plea because the interim measures could not be removed until its investigations were complete, and that interference with inflation rates was beyond its competence.

[12] On 27 March 2018, Caeli Airways initiated a litigation against the CCM, requiring a removal of the caps. However, the Court Registrar scheduled the hearing in April 2019 and rejected the separate hearing citing lack of resource in Mekar Court.

The Conclusion of the CCM's First Investigation

[13] In August 2018, the CCM concluded its first investigation and reported that Caeli Airways violated Mekar's antitrust legislation. Also, the CCM found that the subsidies provided by Vemma helped Caeli Airways with reducing drastically its

airfare. Accordingly, the CCM imposed a total penalty of MON 150 Million upon Caeli Airways and also kept the caps during its second investigation.

Mekar's Subsidies for the Airline Industry

[14] On September 2018, Makar passed Executive Order 9-2018 for the purpose of alleviating some of the airline industry's concern. Under the Order, the Secretary of Civil Aviation ("**Secretary**") was vested with the discretion to decide who was granted subsidies.

[15] Secretary offer subsidies for some foreign airlines, but it rejected the application of subsidies under Executive Order 9-2018 by Caeli Airways and Larry Air.

The Conclusion of the CCM's Second Investigation and the Second Litigation

[16] On 1 January 2019, the CCM completed its second investigation and reported that Caeli Airways "had engaged in anti-competitive behavior in conducting its business activities in Phenac International Airport". As the result, MON 200 million fine was imposed upon Caeli Airways. Also, the CCM decided to keep the caps upon airfare until Caeli Airways' market share was to fall below 40%.

[17] On 20 January 2019, Caeli Airways requested the courts to join the application with the April 2019 hearing upon the airfare caps. However, the Court Registrar denied this plea and scheduled an initial hearing in May 2020.

Decision upon the Caps Matter

[18] On 15 June 2019, the court made a decision upon the caps imposed by the CCM. The court denied the plea by Caeli because the plea did not foresee the possibility of arriving at a different final decision and in order to save the resource of itself.

International Commercial Arbitration (in SCC) and Enforcement the Award

[19] On 11 February 2020, Mekar Airservices filed a request for arbitration with the Sinnoh Chamber of Commerce's (**"SCC"**)

[20] Mr. Cavanaugh made an award in favour of Mekar Airservices on 9 May 2020.

However, some evidence showed Mr. Cavanaugh had received bribes by Mekar Airservices.

[21] On 1 August 2020, the Supreme Arbitrazh Court of Sinnograd set aside the award because failure to set aside the award would be contrary to the public policy of Sinnoh.

[22] On 23 August 2020, the Court issued a ruling recognizing and enforcing the 9 May 2020 award in Mekar.

The initiation of the current proceedings

[23] Vemma sold its stake in Caeli to Mekar Airservices on 8 October 2020 for 400 million USD. Claimant filed a notice of arbitration against Mekar on 15 November 2020 to seek compensation for its losses under the CEPTA.

[24] On 2 March 2021, Bonooru increased its shareholding in Vemma to 55% under the Airways Infrastructure Rescue Act.

STATEMENT OF ARGUMENTS

Jurisdiction

[25] The Tribunal does not have jurisdiction *ratione personae* over the current State-to-State dispute. This is because the Claimant does not retain the requisite status: "*an investor*" under the CEPTA; and "*a national of another State*" under the ICSID AF Rules [**I.**].

Amicus Curiae

[26] The Tribunal should grant *amicus* status upon the CRUP since its application satisfies all minimum conditions: its perspective on corruption will assist the Tribunal in assessing jurisdiction; such a matter is relevant to this case; it has a significant interest here; it is independent from the parties; and its application pursues a public interest. On the other hand, the Tribunal should reject the application by the CBFI because it does not satisfy the conditions [**II.**].

Merits

[27] The Claimant complains of a series of aberrant conducts: the CCM's arbitrary acts; the denial of justice; and the unjustifiable discrimination. Yet, these acts and omissions, separately or in combination, do not constitute the violation of the FET standard under Article 9.9 of the CEPTA [**III.**].

Compensation

[28] The Tribunal shall assess the damages on the basis of the MV standard under Article 9.21.1 of the CEPTA. Also, there exists grounds to reduce the amount of compensation here [**IV.**].

PART ONE: JURISDICTION

I. THE TRIBUNAL LACKS THE JURISDICTION *RATIONE PERSONAE* TO HEAR THE DISPUTE

[29] As a preliminary issue, the Tribunal lacks the jurisdiction *ratione personae* to hear the State-to-State claim submitted by the Claimant.

[30] The jurisdiction of the Tribunal within the remit of the ICSID AF Rules does not stretch to such disputes as illustrated below:

(a). ***The CEPTA —*** Article 9.16.1 requires a dispute to arise between a Party and an investor;[1] and

(b). ***The ICSID AF Rules —*** Article 2 has the condition that a said dispute shall be between a Contracting State and a national of another Contracting State.[2]

[31] Concomitantly, in the current case, the Claimant is neither [**A.**] "*an investor*" under the CEPTA nor [**B.**] "*a national of another Contracting State*" under the ICSID AF Rules. Both grounds shall individually suffice to conclude that the present dispute is between two States: Bonooru and Mekar.

A. The Claimant Is Not "*an Investor*" Under the CEPTA

[32] Article 9.16.1 of the CEPTA stipulates that only claims lodged by "*an investor*" may be submitted under the dispute resolution mechanism under the CEPTA.[3] In this vein, the first objection stands in sequence: [**1.**] the CEPTA excludes the SOEs from the scope of "*an investor*"; and [**2.**] the Claimant is classified as the defined SOEs who are denied the status as "*an investor*".

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[1] CEPTA, art.9.16.1.

[2] ICSID AF Rules, art.2.

[3] CEPTA, art.9.16.1.

1. The SOEs fall outside the CEPTA's protection

[33] The CEPTA's drafters intended to exclude SOEs from the scope of "*an investor*". Without the explicit reference to that effect, their intention surfaces through the following comparison between Bonooru-Mekar BIT (1994) and the CEPTA.

(a). ***Bonooru-Mekar BIT (1994) —*** Article 1(a) defines an enterprise investor as "*any entity constituted or organized under applicable law, […] whether privately-owned or government-owned […]*";[4] and

(b). ***The CEPTA (2014) —*** Article 9.1 regards an enterprise as "*an investors*" when it "*is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party*".[5]

[34] Remarkably, the term "*government-owned*" disappears from the CEPTA's definition of "*an investor*". In other words, the CEPTA's drafters detached the SOEs' protection when they replaced Bonooru-Mekar BIT (1994) of the CEPTA.[6]

[35] This interpretation is a corollary of the interpretative rules under the VCLT. In the circumstances where one treaty refers in its text to another treaty, the latter treaty is a part of the "*context*" in which the former treaty shall be interpreted.[7] Given the CEPTA's reference to Bonooru-Mekar BIT (1994),[8] the above disappearance from the BIT constitutes the CEPTA's "*context*" under the VCLT.

[36] Moreover, the intentional exclusion of the SOEs is confirmed by "*the circumstances of its conclusion*" under Article 32 of the VCLT.[9] The parties to the BIT entered into the CEPTA's drafting process just after the Respondent launched the large-scale

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[4] Bonooru-Mekar BIT (1994), art.I(a).

[5] CEPTA, art.9.1.

[6] Facts, P33:¶32.

[7] *Rawat (Jurisdiction)*, ¶177; *Romak (Award)*, ¶¶192-195; VCLT, art.31.1.

[8] CEPTA, art.1.6.1.

[9] VCLT, art.32.

privatization of the SOEs.[10] Put it simply, in negotiating the CEPTA, the need to cover sovereign investors had been getting deflated.

[37] As per the treaty interpretation, the SOEs is perforce denied the privy status to as "*an investor*" under the CEPTA.

2. The Claimant is the defined SOE to be exclude from the CEPTA's protection

[38] As explained above, the CEPTA put "*government-owned*" entities outside its scope of "*an investor*". Here, [**a.**] the Claimant has been SOEs since its inception. In any event, [**b.**] if the Claimant was not true of a "*government-owned*" enterprise at the time when it made its investment, it acquired the status after the notice of arbitration by virtue of its corporate restructuring.

(a). The Claimant has been the defined SOE under Bonooru-Mekar BIT (1994)

[39] Article I(a) of Bonooru-Mekar BIT (1994) does not define the term "*government-owned*". In such an ambiguous situation, the investment tribunals have resorted to other treaties, accompanied by the exposition that "*the ordinary meaning of a word or phrase also includes the legal meanings given to such words or phrases*".[11]

[40] By way of illustration, the Claimant refers to the CPTPP for the purpose of clarifying the ordinary meaning of term "*government-owned*" under Article 31.1 of the VCLT. The treaty defined the SOEs as legal entities satisfying the three conditions below:

(a). "*directly owns more than 50 per cent of the share capital;*

(b). *controls, through ownership interests, the exercise of more than 50 per cent of the voting rights; or*

(c). *holds the power to appoint a majority of members of the board of directors or any other equivalent management body*".[12]

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[10] Facts, P30-31:¶¶18&20.

[11] *Aguas del Tunari (Jurisdiction)*, ¶230; *AAPL (Award)*, ¶40(F).

[12] CPTPP, art.17.1.

The same definition is employed in EU-Mercosur Trade Agreement.[13]

[41] In *casu*, surely, Bonoori shareholding rate had ranged between 31% and 38%, the proportion of which is seemingly insufficient to meet the above criteria.[14] Yet, in many meetings, including ones for selection of directors, Bonoori representatives form a majority members present and exercises a majority voting right.[15] The real is more critical to grasp with whether the Claimant is true of the above definition.

[42] Hence, the Claimant has been a "*government-owned*" enterprise who does not have a status as "*an investor*".

(b). In any event, the Claimant acquired the SOE status by its corporate restructuring after the notice of arbitration

[43] Assuming *arguendo* that the Tribunal did not regard the Claimant as the SOE at the time when it made its investment in Mekar, the Claimant would gain such a status by the corporate restructuring. As of 2 March 2021 (after the notice of arbitration), Bonoori government increased its shares in the Claimant to 55% and replaced the directors with governmental officials.[16] This fact manifestly leads to a satisfaction of the above SOE definition.

[44] In relation to this regard, the CEPTA requires any claimants to retain a status as "*an investor*" even after a notice of arbitration. For instance, Article 9.18.4 provides that "*a claimant referred in Article 9.16 [= 'an investor'] may […] continue a claim, under ICSID Convention or the ICSID Additional Facility Rules*".[17] That is, *lex specialis* exists under the CEPTA, according to which a claimant's status as "*an investor*" shall go on even in an arbitral proceeding.

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[13] EU-Mercosur Trade Agreement, art.1.f.

[14] Facts, P29:¶10.

[15] PO No.3: P86:¶3.

[16] Facts, P40:¶65.

[17] CEPTA, art.9.18.4(b); see, *also*, CEPTA, art.9.16.

[45] To sum up, the corporate restructuring after the notice of arbitration deprives the Claimant of a status as "*an investor*".

B. In Any Event, the Claimant Is Not "*a National of Another State*" Under the ICSID AF Rules

[46] Article 2 of the ICSID AF Rules implicitly shares the same jurisdictional approach as the ICSID Convention:[18] a said dispute shall be "*between a State […] and a national of another State*".[19]

[47] [**1.**] As per Broches test, [**2.**] the Claimant is not "*a national of another State*": it, rather, acted as a tool of Bonoori government.

1. The Broches test is the applicable standard to assess whether the SOEs are "a national of another State" or not

[48] Even though its text does not touch upon State-ownership, the *travaux préparatoires* of the ICSID Convention confirms the drafters' consensus that the SOEs are disqualified as "*a national of another State*" if they are "*entrusted with governmental functions*".[20]

[49] In arbitral circles, the consensus has been crystallized into the Broches test, according to which in oft-quoted words of *CSOB*:

> "*[F]or purposes of the Convention […] government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function*".[21]

[18] *MNSS (Award)*, ¶¶184-186; *Lao Holdings (I) (Jurisdiction)*, ¶64.

[19] ICSID AF Rules, art.2; ICSID Convention, art.25.1.

[20] ICSID History (Vol.II-1), P11:¶30.

[21] *CSOB (Jurisdiction)*, ¶17.

This passage was affirmed in *Flughafen Zürich*,[22] *BUCG*[23] and *Masdar.*[24]

[50] Admittedly, the two-pronged test is, to a great degree, analogical to Articles 5 and 8 of the ILC Articles.[25] Yet, as the tribunal in *Masdar* noted,[26] an attention needs to be casted upon whether a shadow of a State is in investment activities, not specific acts.

[51] In sum, the SOEs are disqualified as "*a national of another State*" under Article 2 of the ICSID AF Rules when they acted as a governmental agent or exercised a governmental function over their investment activities.

2. Broches test is satisfied for the denial of the Claimant's status as "a national of another Contracting State"

[52] In its investment activity, the Claimant [**a.**] discharged Bonoori governmental functions and [**b.**] acted as an agent of Bonooru.

(a). The Claimant exercised the empowered governmental authority over the current investment activity

[53] Here, [**i.**] the Claimant is *de jure* mandated with the governmental functions, and [**ii.**] its investment activity in Caeli Airways was the one *de jure imperii*.[27]

i. The Claimant is entrusted by the law with Bonoori governmental function

[54] First of all, the Tribunal needs to consider in sequence: whether the Claimant is empowered by a law to exercise a certain function; and whether the function is of a public character.

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[22] *Flughafen Zürich (Laudo)*, ¶274.

[23] *BUCG (Jurisdiction)*, ¶33.

[24] *Masdar (Award)*, ¶170.

[25] *BUCG (Jurisdiction)*, ¶34; *Masdar (Award)*, ¶167.

[26] *Masdar (Award)*, ¶169.

[27] *Cf*, *EBO (Award)*, ¶338; *Hamester (Award)*, ¶193.

[55] ***Empowerment***: Firstly, in privatizing it, the Claimant was mandated with a function through the Privatisation of Enterprises Act 1972.[28] Notably, the function is well described in "*Memorandum of Association of Vemma Holdings Inc.*", Article 3.a of which provides as follows:

> "*To establish and continue business as a national airline and air transport undertaking, to provide air transport services for passengers and cargo, […]*".[29]

In short, Bonoori government entrusted the Claimant with the aviation services for its citizens.

[56] ***Governmentality***: Secondly, such a function is encapsulated in Bonoori governmental authorities. Albeit the reality that an aviation business is discharged in the hands of private enterprises, this is not critical for a public character assessment. In *UAB*, the tribunal sided with a case-by-case analysis as follows:

> "*[W]hat is regarded as "governmental" depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise*".[30]

[57] Here, as Constitutional Court of Bonooru has recognized, Bonoori government shall provide its citizens an access to mobility, *inter alia*, aerial travel under Article 70 of its Constitution.[31] Without it, "*most of our citizens could not move between our islands or even leave the islands for another nation*".[32]

[58] Further to it, for the purpose of achieving the duty, Bonooru had retained some

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[28] Facts, P29:¶7.

[29] Annex IV, P44:L1506-1510.

[30] *UAB (Award)*, ¶¶808-809.

[31] Annex II, P42:L1455-1458; Annex III, P43:L1485-1486.

[32] Annex III, P43:L1487-1488.

controls over the Claimant through its shareholdings (31-38%)[33] and its right to appoint a member of directors.[34] In this sense, the aviation service for citizens are of a public character *at least* in Bonooru.

[59] Cumulatively considering, Bonoori government entrusts the Claimant by the law with a governmental aerial service which is essential to its compliance with Article 70 of its Constitution.

ii. The Claimant's investment activity in Caeli Airways is the use of prérogatives de puissance publique

[60] Next, the Tribunal's attention should be directed to whether the Claimant exercised the governmental function in the current investment activity. According to the tribunal in *CSOB*, the review rests upon the nature of an activity, not a purpose.[35] In detail, the fact that an activity has differential nature from one by private enterprises, is *ipso facto* sufficient to conclude that the activity is of a public character.[36]

[61] In this case, the Claimant's investment was the shareholding in Caeli Airways.[37] In order to purchase it, the Claimant had engaged in a series of acts (*e.g.*, the participation in the bid), thereby the conclusion of Share Purchase Agreement with Mekar Airservices.[38]

[62] Notably, in the bidding process, the Claimant availed itself of its ties with Bonoori government for the purpose of winning the bid. As one influential person noted, the suggested proposal in the bid materially includes Bonoori government's future supports.[39] Without such supports, the Claimant would not be selected as a partner

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[33] Facts, P29:¶10.

[34] Annex IV, P46:L1574-1576.

[35] *CSOB (Jurisdiction)*, ¶20.

[36] *Id.*, ¶25; *Flughafen Zürich (Laudo)*, ¶286.

[37] Facts, P31-32:¶24.

[38] Facts, P31-32:¶24.

[39] Facts, P31-32:¶24.

with Caeli Airways. This investment activity cannot be followed by a purely private aerial enterprise: it is connected with Bonoori government.

[63] Indeed, Bonoori Ministry recognized the public character in the following words:

> "*Vemma's contribution to the enhancement of Bonooru's tourism infrastructure, which has, in turn, enhanced the mobility rights of our population within the Greater Narnian region. Vemma has certainly lived up to the standards set by its predecessor in Bonooru*".[40]

[64] Hence, the investment activity here was the exercise of the entrusted governmental function. Such use of *prérogatives de puissance publique* disqualifies the Claimant as "*a national of another State*".

(b). The Claimant acted as an agent of Bonoori government over the investment activity

[65] The second limb of the Broches test is whether the SOEs acted as a governmental agent in their investment activities. The tribunal in *Masdar* made it clear that the SOEs are agents in the situations where they are "*under effective control of the State*",[41] *i.e.*, where "*the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result*".[42]

[66] Here, the following circumstantial evidences demonstrate that Bonoori government (who is the shareholder in the Claimant) compelled the Claimant to purchase the shares in Caeli Airways in order to achieve its policy, "*Caspian Project*".

[67] Firstly, immediately after the Claimant made the transaction, Bonooru unveiled that it would actively attract Mekari tourists under "*Caspian Project*".[43] It is noteworthy

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[40] PO No.4, P89:¶6.

[41] *Id*, ¶169.

[42] *EDF (Award)*, ¶200; *Tulip (Award)*, ¶306.

[43] Facts, P32-33:¶28.

that the Claimant put significant resources into flights between Mekar and Bonooru,[44] even though the routes are less beneficial to itself.[45]

[68] Secondly, Bonooru had expended USD 30 billion in order to develop the Phenac international Airport, which is Caeli Airways' base airport.[46] Indeed, against this background, the Claimant had taken bold investments into Caeli Airways (which would lead to the expansion of the airport).[47]

[69] Overall, the Bonooru put the Claimant under its "*effective control*" for the purpose of achieving its "*Caspian Project*". In this sense, the Claimant acted as the agent of Bonoori government over its investment activity.

[44] Annex VII, P55:L1862-1863.

[45] Annex VII, P55:L1869-1871.

[46] PO No.4, P89:¶1.

[47] Annex IX, P57:L1948-1951.

PART TWO: *AMICUS CURIAE*

II. THE TRIBUNAL SHOULD GRANT THE LEAVE SOUGHT FOR FILING ONLY *AMICUS* SUBMISSION BY THE CRUP

[70] Two named Petitioners described below submitted each request for leave to participate in this arbitration as *amicus curiae*.

(a). ***The CBFI*** **—** A non-profit industry association who represents Bonoori investors applied for the status of *amicus curiae* on the critical issue of SOEs' standing under the CEPTA (on 19 April 2021).[48]

(b). ***The CRUP*** **—** An advising group in Mekar who involved in Caeli's privatization sought *amicus* standing in order to inform the Tribunal regarding the Claimant's alleged corruption (on 28 May 2021).[49]

[71] Pursuant to [**A.**] Article 41(3) of the ICSID Arbitration (AF) Rules and Article 9.19 of the CEPTA, the Respondent exhorts the Tribunal [**B.**] to admit, on one side, the CRUP's petition; [**C.**] to reject, on the other side, the CBFI's participation.

A. Article 41(3) of the ICSID Arbitration (AF) Rules and Article 9.19 of the CEPTA Specifies the Test to Apply in This Case

[72] The starting point is Article 41(3) of the ICSID Arbitration (AF) Rules, according to which tribunals "*may allow*" *amicus* petition by considering the following points:

(a). ***Assistance*** **—** whether *amicus* submission "*would assist the Tribunal in the determination of a factual or legal issues*";

(b). ***Relevance*** **—** whether *amicus* submission "*would address a matter within the scope of the dispute*";

(c). ***Significant Interest*** **—** whether potential *amicus* "*has a significant interest in*

[48] CBFI's *Amicus* Application, P16:¶2.

[49] CRUP's *Amicus* Application, P19:L616-631.

the proceeding"; and

(d). ***Procedural Fairness —*** whether *amicus* submission "*does not disrupt the proceeding or unduly burden or unfairly prejudice either party*".[50]

As the term "*may allow*" indicates, tribunals have discretion to grant *amicus* status in a particular case.[51] Yet, the discretion is not unlimited: the above-cited points, as "*certain minimum criteria*", directs tribunals' discretion.[52]

[73] Remarkably, Article 9.19 of the CEPTA provides, on one hand, the same standard as the ICSID Arbitration (AF) Rules.[53] On the other hand, the CEPTA adds a unique element in Article 9.20.6 as follows:

> "*Mekar shall duly consider the application of the UNCITRAL rules on transparency in treaty-based investor-State arbitration to any international arbitration proceedings initiated against […] Mekar pursuant to this Agreement*".

Here, the Respondent "*asks that the Tribunal apply the UNCITRALL Rules on Transparency in Investor-State Arbitration to these proceedings*".[54] Thereby, pursuant to Article 1.3,[55] the UNCITRAL Rules on Transparency applies to this arbitration.

[74] Hence, the Tribunal shall take an additional factor below into account in accordance with Article 1.4(a) of the Rules:

(e). ***Public Interest —*** whether *amicus* submission has a public interest in transparency in a proceeding.[56]

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[50] ICSID Arbitration (AF) Rules, art.41(3).

[51] Born and Forrest (2019), P644.

[52] *Eco Oro (PO No.6)*, ¶23.

[53] CEPTA, art.9.19.3.

[54] Respondent's Comment on *Amici* Submissions, P24:L771-772.

[55] UNCITRAL Rules on Transparency, art.1.3.

[56] UNCITRAL Rules on Transparency, art.1.4(a).

[75] To sum up, the abovementioned factors (a)-(e) are the criteria for the Tribunal to confer *amicus* status upon two petitioners (the CBFI and the CRUP).

B. The CRUP Should Be Accorded *Amicus* Standing in This Arbitration

[76] As regards the CRUP, its application comports with the above factors: [**1.**] assistance; [**2.**] relevance; [**3.**] significant interest; [**4.**] procedural fairness; and [**5.**] public interest. As such, the Tribunal should invite the CBFI to make a submission in this case.

1. The CRUP would assist the Tribunal in the determination of the jurisdictional matter

[77] The first condition is to assess whether *amicus* application would assist a tribunal in an analysis of a dispute. This requirement is met "*by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties*".[57]

[78] Here, the CRUP submits the information about the Claimant's corruption (bribes paid to Mr. Dorian Umbridge) in the Caeli Airways' privatization process.[58] Neither party puts this matter before the Tribunal, and the knowledge is different from the Claimant since the CRUP would submit impartial information.

[79] Additionally, the corruption issue concerns the Tribunal's jurisdiction *ratione materiae* and hence, the first condition is met in this case.

2. The CRUP's submission would address the issue in this case

[80] Secondly, the CRUP limits its participation to "*a matter within the scope of the dispute*".[59] This criterion is satisfied in the eyes of the tribunal in *Aricia Grace* when *amicus* submission "*facilitate[s] [tribunals'] process of inquiry into, understanding*

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[57] ICSID Arbitration (AF) Rules, art.41.3(a): CEPTA, art.9.19.3.

[58] CRUP's *Amicus* Application, P19:L635-640.

[59] ICSID Arbitration (AF) Rules, art.41.3(b); CEPTA, art.9.19.3.

of, and resolving that very dispute which has been submitted to them".[60]

[81] In this regard, the Claimant alleges that the corruption issue has not raised by both parties and thus, the CRUP's application does not address a relevant matter in this case.[61]

[82] Yet, it is a trite law that arbitral tribunals have a duty to consider corruption as international public policy in order to ascertain its jurisdiction even in a situation where parties do not deal with it.[62] According to *Lao Holdings (I)*, "*no agreement between parties can prevent the arbitral tribunal from reviewing*" corruption evidence.[63]

[83] Hence, the corruption issue raised by the CRUP is relevant for the Tribunal's jurisdictional assessment.

3. The CRUP has a significant interest in this proceeding

[84] Thirdly, the CRUP has a significant interest in this arbitration. The tribunal in *Apotex (III)* commented on what comprises "*significant interest*" as follows:

> "[*T]he applicant needs to show that he has more than a general interest in the proceeding. For example, the applicant must demonstrate that the outcome of the arbitration may have a direct or indirect impact on the rights or principles the applicant represents and defends*".[64]

[85] In *casu*, the CRUP makes an attempt to defend its anti-corruption principle.[65] Should the Tribunal applaud the Claimant's shares as a protected investment, the CRUP's anti-corruption policy would stagnate.

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[60] *Aricia Grace (PO No.4)*, ¶51; *UPS (Amici Curiae)*, ¶60.

[61] Claimant's Comment on *Amici* Submissions, P22:L713-716.

[62] *Infinito Gold (Jurisdiction)*, ¶137; *Lao Holdings (I) (Annulment)*, ¶153.

[63] *Id.*, ¶153.

[64] *Apotex (III) (PO on Mr. Appleton)*, ¶38; *Eco Oro (PO No.6)*, ¶34.

[65] CRUP's *Amicus* Application, P19:L641.

[86] Additionally, the corruption-riddled society in Mekar must motivate potential investors to make a corrupt payment in order to gain a favourable position. In such a situation, the potential investors would not choose the CRUP as an advising partner, who tries to weed out corruption.[66] In this sense, the instant arbitration would affect the CRUP's financial operations.[67]

[87] Hence, the CRUP retains a significant interest in this proceeding.

4. The CRUP is independent from the disputing parties

[88] The fourth requirement is independence from disputing parties. This derives from the condition that *amicus* submission "*does not […] unfairly prejudice either party*".[68] In fact, this point has been affirmed in *Philip Morris*[69] and *von Pezold*.[70]

[89] Here, even though the CRUP engaged as external advisors in Caeli Airways' privatization, it was entrusted with the role as the result of a transparent and competitive process approved by Mekari government.[71] Indeed, the Claimant does not question the CRUP's independence.

[90] Thus, the CRUP is independent from the disputing parties.

5. The CRUP's submission pursues a public interest in this case

[91] With respect to the last condition, the CRUP's *amicus* brief pursues a public interest. In *RFP*, the tribunal found that the public interest factor exists when *amici curiae* "*show[s] any link between their [a]pplication and furtherance of the public*

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[66] CRUP's *Amicus* Application, P19:L644-646.

[67] CRUP's *Amicus* Application, P19:L621-623.

[68] Ishikawa (2018), ¶24; ICSID Arbitration (AF) Rules, art.41.3; CEPTA, art.9.19.3.

[69] *Philip Morris (Award)*, ¶55.

[70] *von Pezold (PO No.2)*, ¶49.

[71] CRUP's *Amicus* Application, P19:L617-621.

interest".[72]

[92] In this case, the public interest pursued by the CRUP is to eradicate corruption in Mekar.[73] This objective must be achieved by its *amicus* application where the Tribunal denies jurisdiction *ratione materiae* on the basis of the corruption evidence submitted by the CRUP. Such a judgement must deter potential investors from engaging in corruption.

[93] In sum, the CRUP's *amicus* application is in pursuit of a public interest.

C. <u>The CBFI Should Be, on the Other Hand, Denied *Amicus* Standing in This Case</u>

[94] With respect to the CBFI, the Tribunal should not grant leave for the CBFI to make an argument as *amicus curiae*. This is because the CBFI's application does not satisfy three conditions: [**1.**] assistance; [**2.**] procedural fairness; and [**3.**] a public interest.

1. The CBFI's submission would not assist the Tribunal's determination

[95] Firstly, the CBFI's application does not bring any different perspectives from the disputing parties and in this sense, the requirement of assistance is absent.

[96] In its brief, the CBFI introduces the information about the Bonoori SOEs: for instance, the SOEs' regulatory framework in Bonooru; the relationship between Bonooru and the SOEs; and the SOEs' economic position in Bonooru.[74]

[97] Yet, such general information can be submitted by the disputing parties and hence, it is unnecessary for the third-party (the CBFI) to participate in this arbitration.[75]

[98] Consequently, the CBFI's petition does not meet the assistance condition.

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[72] *RFP (PO No.6)*, ¶4.7.

[73] CRUP's *Amicus* Application, P19:L635-637.

[74] CBFI's *Amicus* Application, P16-17:¶10.

[75] *RFP (PO No.6)*, ¶4.4.

2. The CBFI is not independent from the Claimant

[99] As stated in the above, independence is crucial to the Tribunal's *amicus* assessment.[76] In this regard, the tribunal in *von Pezold* demonstrated to what extent potential *amicus curiae* apparently lacks independence. Therein, did the tribunal find that *amicus* was supported by Mr. Sacco, who strongly applauded Zimbabwe's action in dispute.[77] That is, a conflict of interest may occur in the circumstance where *amicus* shares an interest with a disputing party against an opposite one.

[100] Here, the CBFI has one member of Lapras Legal Capital, which advises the Claimant on funding strategies.[78] Moreover, the Claimant itself joins in the CBFI. These memberships show that the CBFI has a motivation to side with the Claimant through *amicus* participation.[79]

[101] Hence, the CBFI is not independent from the Claimant.

3. The CBFI does not pursue any public interest

[102] Thirdly, the CBFI does not demonstrate a link between its application and furtherance of a public interest.[80] In this regard, the CBFI alleges that its application promotes economy in Great Narnian region by protecting the Claimant as SOE under the CEPTA.[81]

[103] However, as stated in [**I.**], the CEPTA and ICSID AF assess whether SOEs have standings from diverse perspectives (shareholding ratio, board, governmental function and control). That is, such an investigation depends upon specific facts in each case. Thus, the result in this arbitration has any implications for other SOEs

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[76] *Philip Morris (Award)*, ¶55.

[77] *von Pezold (PO No.2)*, ¶¶54-55.

[78] CBFI's *Amicus* Application, P16-17:¶7.

[79] CBFI's *Amicus* Application, P16-17:¶7.

[80] *RFP (PO No.6)*, ¶4.7.

[81] CBFI's *Amicus* Application, P16:¶8.

about whether they are protected under the CEPTA.

[104] To sum up, the CBFI's application does not pursue any public interests.

PART THREE: MERITS

III. THE RESPONDENT HAS NOT VIOLATED ARTICLE 9.9 OF THE CEPTA

[105] In the Merits, the Claimant alleges the FET violation under Article 9.9 of the CEPTA in four ways: [**A.**] arbitrariness; [**B.**] a denial of justice; [**C.**] discrimination; and [**D.**] a creeping FET violation. Yet, any of them are not tenable in this case.

A. The CCM's Regulatory Acts Were Not Arbitrary

[106] Firstly, the Claimant complains of two administrative acts: [**1.**] the CCM's first and second investigations; and [**2.**] the CCM's continuous airfare caps in the economic crisis. These contentions are, however, untenable.

1. The CCM's first and second investigations were non-arbitrary

[107] The CCM launched the first and second investigation on the ground that Caeli Airways engaged in anti-competitive acts (*e.g.*, the 54% market share and low-cost services), resulting in the huge fines.[82] These investigations were made in accordance with Act (2009).[83]

[108] According to the Claimant, the investigations were contrary to the CCM's approval decision of March 2011 (under which the CCM applauded Caeli Airways' participation in Moon Alliance and the low-cost services due to it).[84] That is, the Claimant alleges that the decision created the legitimate expectation and it was frustrated.

[109] However, in approving the participation, the CCM cautioned that future high-level cooperation with Alliance (*e.g.*, prices) would trigger its investigation.[85] With this

[82] Facts, P34:¶36; Facts, P35:¶38.

[83] Annex V, P47:L1598-1603:L1611-1612.

[84] Facts, P32:¶25; Facts, P34-35:¶37.

[85] Facts, P32:¶25.

reservation, the Claimant could not *reasonably* expect that the CCM would not intervene with its business even in situation where Caeli Airways' engagement would be exceptionally anti-competitive.[86] Such a situation was present in this case.

[110] Hence, the Claimant had no legitimate expectations. The challenged CCM's investigations were in line with Act (2009) and thus, were not arbitrary.

2. The CCM's continuous airfare caps were not arbitrary

[111] In relation to the CCM's airfare caps, the Claimant alleges that the measure was "*unreasonable and unnecessary*" in the economic crisis.[87]

[112] Surely, Act (2009) leaves a room for modifying the airfare caps, corresponding to a situation as long as it is "*necessary and proportionate*".[88] Yet, what is necessary and proportionate is not subject to the Tribunal's review, *i.e.*, the CCM enjoyed a margin of discretion.[89] Hence, the Tribunal's solo inquiry is "*whether there was a manifest lack of reasons*" for the CCM's action.[90]

[113] In this case, even though Caeli Airways was faced with the currency crisis, the same was true of other airlines. This means that a withdrawal of the caps would not improve the non-competitive situation created by Caeli Airways.

[114] To sum up, there existed the reason for the CCM to impose continuously the caps on Caeli Airways in the crisis and thus, it was not arbitrary.

B. <u>The Claimant Was Not Denied Justice</u>

[115] The Claimant alleges that a denial of justice occurred by two points: [**1.**] the delays in the proceeding; and [**2.**] the recognition and enforcement of the award, which was

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[86] *Parkerings (Award)*, ¶331.

[87] Notice, P4:¶16.

[88] Annex V, P47:L1625-1626.

[89] *B3 (Award)*, ¶890.

[90] *Philip Morris (Award)*, ¶399.

set aside at the seat of arbitration.[91] Yet, both allegations are meritless.

1. The alleged delays in the proceeding were reasonable

[116] In the first place, the Claimant queries whether it was due delay that Mekar court fixed April 2019 as the date of an interim hearing to secure a stay upon the CCM's airfare caps. According to its complaint, "*Mekar's courts were underfunded, leading to significant delays in hearing urgent matters*" and this constituted a denial of justice.[92]

[117] Surely, a denial of justice encapsulates delay in a proceeding.[93] Yet, it stands only when delay is "*undue*" or "*unreasonable*".[94] This assessment depends upon a number of factors. In *White Industries*, the tribunal emphasized the general priority of a criminal proceeding for a resolution swiftness as follows:

> "*[T]he Tribunal considers it relevant to distinguish between criminal proceedings (and applications before human rights courts), where there is a particular need for the urgent resolution of cases, and purely commercial matters such as are involved here*".[95]

[118] Here, as the Court Registrar explained,[96] due to the rapid expansion of the population, Mekari judiciary *regrettably* has undergone the lack of enough judicial resources to accord swift deliberations both to criminal matters and commercial matters.[97]

[119] Further, the Claimant needs to pay a particular attention to the complexity of the case commenced by its subsidiary on 27 March 2018. Given the overwhelming market

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[91] Notice, P4-5:¶¶20&27.

[92] Notice, P4:¶20.

[93] *Azinian (Award)*, ¶102.

[94] *Id*, ¶102;

[95] *White Industries (Final Award)*, ¶10.4.14.

[96] Facts, P36:¶44.

[97] Facts, P29-30:¶13.

share by Caeli Airways alone (43%),[98] even a provisional removal of the airfare caps was likely to be influential to the competition in the aviation sector. This concern compelled Mekari court to require approximately one year for a hearing.

[120] Cumulatively considering, the alleged delay was regrettable, but not "*undue*" and "*unreasonable*". The Claimant's attempt fails.

2. The recognition and enforcement of the award, which was annulled at the seat of arbitration did not constitute a denial of justice

[121] As the second ground, the Claimant alleges that a denial of justice occurred due to the judiciary's recognition and enforcement of the award, which was set aside in its country of origin.[99]

[122] However, the Tribunal "*is not an appellate tier in respect of the decisions of the national judiciary*".[100] Thus, the Tribunal shall accord a certain margin of discretion to Mekari judicial decision.

[123] Indeed, in *Frontier* where the investor claimed that Czech court's interpretation on Ny Convention was wrong and constituted a denial of justice, the tribunal opined that the interpretation must be respected as long as it was a plausible one.[101]

[124] In this case, in relation to the recognition and enforcement, the court reasoned that:

> "*[T]he award […] was an international award which by definition was not integrated into the legal order of [a] country such that its existence continues despite its nullification and that its recognition in Mekar*".[102]

Notably, this reasoning is in line with French judicial practices, according to which an international award is independent from legal order at a seat of arbitration and thus,

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[98] Facts, P34:¶36.

[99] Notice, P5:¶27.

[100] *Eli Lilly (Final Award)*, ¶224.

[101] *Frontier (Final Award)*, ¶527.

[102] Annex XV, P68:¶11.

setting aside is not a ground to deny recognition and enforcement.[103] Moreover, this practice complies with NY Convention on the basis of its Article VII(1).[104]

[125] In sum, the challenged recognition and enforcement was made pursuant to the plausible interpretation of NY Convention and in this sense, a denial of justice did not arise.

C. The Alleviative Measures Under Executive Order 9-2018 Were Non-Discriminatory

[126] The FET standard under the CEPTA guarantees investors and investments against a host State's discriminatory conduct.[105] It is the Claimant's allegation that Mekar denied subsidies under Executive Order 9-2018 to Caeli Airways, whereas the other airlines enjoyed the relief. "*[T]his decision arbitrarily discriminated against Vemma*".[106]

[127] However, the Claimant has failed to meet its burden to prove two essential elements: [**a.**] a like circumstance; and [**b.**] without a reasonable justification.[107]

(a). The Claimant has failed to demonstrate that it was in "*a like circumstance*" with its alleged comparators in relation to Executive Order 9-2018

[128] The Claimant erroneously identifies Star Wings and JetGreen as comparators only on the basis that the three enterprises similarly operated in Mekar's aerial business. However, economic sector has not been applied as the sole test for likeness.

[129] Indeed, this was affirmed in *Levy (I)* where French banking investor claimed that Peru discriminately had furnished the domestic banks with a bailout loan. Yet, the fact that

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[103] Wolff (2019), P384-385:¶390.

[104] *Id.*, P384-385:¶390.

[105] CEPTA, art.9.9.2(c).

[106] Notice, P4:¶18.

[107] *Bayindir (Award)*, ¶399; *Saluka (Partial Award)*, ¶313.

the cited comparators were in the same sector was insufficient to prove likeness.[108] Rather, the tribunal emphasized a case-by-case analysis, *e.g.*, a market share and corporate structure.[109]

[130] Here, unlike the cited other airlines, Caeli Airways had been owned by Bonoori government, the characteristic of which enabled the State to intervene with its financial difficulty. [110] Further to this factor, Caeli Airways enjoyed the overwhelming market share (43%) in Mekar.[111]

[131] Such an inherent distinction shows that Caeli Airways was not in "*a like circumstance*" with Star Wings and JetGreen in relation to a bailout measure under Executive Order 9-2018.

(b). Alternatively, the challenged discrimination was reasonable

[132] Next, assuming *arguendo* that Caeli Airways in "*a like circumstance*" with Star Wings and JetGreen had been less favourably treated, the different treatment would be justified by valid policy reasons.[112]

[133] Such a policy is to modify Caeli Airways' anti-competitive behaiviour. As stated previously, Caeli Airways enjoyed the 43% market share in Mekari aviation industry.[113] This was the result of Bonoori government's continuous assistance under Horizon 2020.[114] In such a situation, double assistance by Bonooru and Mekar would accelerate Caeli Airways' anti-competitive position.

[134] In this regard, the Claimant may contend that other airlines (Star Wings and JetGreen)

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[108] *Levy (I) (Award)*, ¶396.

[109] *Id*, ¶397.

[110] Facts, P29:¶10.

[111] Facts, P34:¶36.

[112] *Saluka (Partial Award)*, ¶313.

[113] Facts, P34:¶36.

[114] PO No.4, P89:¶6.

also received subsidies from their home State.[115] Yet, the subsidies were made only one time in order to alleviate the economic damage in the crisis and thus, it cannot be comparable to the continuous reliefs by Bonooru.[116]

[135] To sum up, the discrimination was reasonable, which does not engage Mekari responsibility.

D. The Challenged Acts Does Not Amount to the Creeping Violation of the FET Standard

[136] Lastly, the Claimant alleged that the above-mentioned separate non-breaches, "*taken together*", amount to a cumulative FET violation.[117] Surely, tribunals have recognized the concept of creeping FET breach (which means that "*a succession or an accumulation of measures which, taken separately, would not breach [the FET] standard but, when taken together, do lead to such a result*").[118] Yet, this is not the case here.

[137] Notably, the tribunal in *Rompetrol* set the threshold for the creeping breach as follows:

> "*[The creeping FET breach] would only [occur] where the actions in question disclosed some link of underlying pattern or purpose between them; a mere scattered collection of disjointed harms would not be enough*".[119]

As such, the tribunal required the investor to show that its interest was affected by diverse regulatory measures in a persistent manner.[120]

[138] In *casu*, the Claimant attempted to collect the fragment acts into a box. While the CCM's measures aimed at the recovery of the domestic competition, Executive Order

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[115] Facts, P35-36:¶42.

[116] PO No.4, P89-90:¶7.

[117] Notice, P3:¶12.

[118] *El Paso (Award)*, ¶518; *Swisslion (Award)*, ¶275.

[119] *Rompetrol (Award)*, ¶271.

[120] *Id.*, ¶278.

9-2018 was a mere alleviative action in the middle of the economic crisis. Moreover, the judicial issue was related to the recognition and enforcement of arbitral award, which was annulled. These acts have no mutual relationships.

[139] To sum up, "zero plus zero" remains zero here. In this sense, the alleged creeping FET breach claim does not stand.

PART FOUR: COMPENSATION

IV. THE APPROPRIATE COMPENSATION IS THE MV STANDARD. ALSO, THERE EXISTS GROUNDS TO REDUCE THE AMOUNT OF COMPENSATION

[140] Assuming *arguendo* that it found the violation of the FET standard, [**A.**] the Tribunal shall assess the alleged damages on the basis of the MV standard. Also, [**B.**] the Tribunal needs to reduce the requested amount of compensation.

A. The Amount of Compensation Is USD 400 Million Corresponding to the MV of the Claimant's Investment

[141] The first disagreement with the Claimant concerns what is an appropriate standard to value the actual damages (the FMV or the MV). Both standards are respectively defined as follows:

(c). ***the FMV —*** "*the price […] at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms length in an open unrestricted market […]*":[121] and

(d). ***the MV —*** "*the most probable price […] which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably".*[122]

[142] As highlighted above, the FMV assumes a dealing between a hypothetical buyer and seller, whereas the MV reflects the most probable price that a specific buyer and seller would accept a transaction.

[143] Here, [**1.**] the MV is a standard to assess the alleged damages; and [**2.**] USD 400 million is the calculated price of the MV-based compensation.

1. The standard for compensation in valuing the damages is the MV one, not the

[121] *CMS (Award)*, ¶402; *El Paso (Award)*, ¶702.

[122] Maloney (2012), Part1.

FMV one

[144] Article 9.21.1(a) of the CEPTA empowers the Tribunal to "*award, separately or in combination, monetary damages at a market value*".[123] The Claimant, nonetheless, substitutes the MV standard for the FMV one, alleging "*according to both* [**a.**] *principles of international law and* [**b.**] *the most favoured nation obligation contained in CEPTA*".[124] Both allegations are without merit.

(a). The FMV standard is not applied on the basis of "*principles of international law*"

[145] The Claimant relies upon the full reparation principle as "*principles of international law*", according to which "*fair market value is […] commonly accepted standard of valuation and compensation*".[125] Also, the Claimant may cite some authorities and allege that the FMV has been synonymously construed with the MV.[126]

[146] However, such a general proposition does not apply to the CEPTA. Remarkably, as depicted below, the CEPTA's drafters intentionally distinguish the MV from the FMV.

Articles	Terms
Article 9.12.2	"*The compensation referred to in paragraph 1 shall amount to the fair market value of the investment […]*".[127]
Article 9.21.1(a)	"*[M]onetary damages at a market value, except as otherwise provided for in Article 9.12*".[128]

[123] CEPTA, Art.9.21.1(a).

[124] Notice, P5:¶30.

[125] *Sempra (Award)*, ¶404.

[126] *Devas (Quantum)*, ¶205; Marboe (2018), P23; Sabahi (2011), P103.

[127] CEPTA, art.9.12.2.

[128] CEPTA, art.9.21.1(a).

[147] As such, the difference as "*context*" under Article 31.1 of the VCLT[129] indicates that Article 9.21.1(a) provides *lex specialis*, *i.e.*, the MV standard shall prevail over the customary FMV one in valuing the damages (*lex specialis derogate generalis*).[130]

[148] Hence, the Claimant's "*principles of international law*" argument does not stand. Instead of the FMV standard, the Tribunal shall assess the alleged damages, corresponding to the MV of the investment.

(b). The FMV standard is not applied on the basis of "*the most favoured nation obligation contained in CEPTA*"

[149] Next, the Claimant's invocation of the FMV standard is closely tied to the MNF clause under Article 9.7.1 of the CEPTA, which provides as follows:

> "*Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords in like situations, to investors of a third country […] with respect to the establishment […] or disposal of their investments in its territory*".[131]

[150] According to the Claimant, it should enjoy the same treatment as Arrakis-investors against who the Respondent has made the FMV-compensation in accordance with Article 13 of Arrakis-Mekar BIT (2006).[132]

[151] In response, the Respondent

[152] clarifies five points (which are, in isolation, fatal to the Claimant's case): [**i.**] the term "*treatment […] in like situations*"; and [**ii.**] the term "*in territory*".

i. The term "treatment […] in like situations"

[153] The MFN clause under the CEPTA is designed to prevent investors from cherry-

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[129] VCLT, Art.31.1.

[130] *Palestinian Wall (ICJ, Advisory Opinion)*, ¶¶105-106.

[131] CEPTA, art.9.7.1.

[132] PO No.3, P87:¶15; Arrakis-Mekar BIT (2006), art.13.

picking better substantive treatment granted under different treaties. Indeed, Article 9.7.2 of the CEPTA strongly indicates drafters' intention to that effect as follows:

> "*Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute 'treatment' thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations*".[133]

[154] According to Professor Shill, this limitation "*result[s] in declining attempts by investors to rely on better standards of treatment granted under the host state's third-country [investment treaties]*".[134] Rather, as the term "*absent measures […] to those obligations*" indicates, the MFN clause covers only *de facto* discrimination, *i.e.*, different treatments received by third-country investors.[135]

[155] In this vein, the Claimant may refer to the cases where the Respondent awarded the FMV-compensation to Arrakis-investors under Arrakis-Mekar BIT (2006).[136] This view is, however, short-sighted. As the term "*treatment […] in like situations*" illustrates, the Claimant can challenge *de facto* discrimination only when the Respondent accords a more favourable treatment to Arrakis-investors "*in like situations*" with the Claimant.

[156] In *İçkale*, the tribunal tackled with the interpretation of the term "*in similar situations*" under the following Article II(2) of Turkey-Turkmenistan BIT (which is strikingly identical to the MFN clause under the CEPTA):

> "*Each Party shall accord to these investments […] treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country […]*".[137]

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133 CEPTA, art.9.7.2.

134 Schill (2017), P916.

135 Diagremont (2019), P. 88.

136 PO No.3, P87:¶15.

137 Turkey-Turkmenistan BIT (1992), art.II(2).

Remarkably, the tribunal did not interpret the term "*in similar situations*" as whether two investors have similarly made investments in Mekar.[138] Otherwise, the meaning of the term "*in similar situations*" and the term "*investors*" would overlap, which would be contrary to the fundamental rule of treaty interpretation, *effet utile*.[139] As a result, the tribunal concluded that the term "*in similar situations*" requires a fact-based analysis of two investors (*e.g.*, sector and industry).[140]

[157] Correspondingly, the term "*in like situations*" under the CEPTA makes it clear that the Claimant can enjoy FMV-compensation only in the event that it identifies Arrakis-investors "*in like situations*" with itself. Yet, this requisite identification is absent here.

[158] From the above, the Claimant is not entitled to FMV-compensation via the MFN clause under the CEPTA.

ii. The term "in the territory"

[159] Secondly, the MFN clause adds the expression "*in the territory*", thereby excluding the FMV-compensation from the scope of the term "*treatment*".

[160] In *ICS*, the tribunal construed the term "*in the territory*" as the MFN clause' territorial limitation.[141] According to the tribunal's view, any resolutions through international arbitration have an extra-territorial character and thus, fell outside a treatment "*in the territory*".[142] The same interpretation was affirmed in *Daimler*[143] and *Berschader*.[144]

[161] Applying the jurisprudence to the instant case, the Tribunal needs to consider that the FMV-compensation through investment arbitration is a non-territorial matter. In this

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[138] *İçkale (Award),* ¶329.

[139] *Id.*, ¶329.

[140] *Id.*, ¶329.

[141] *ICS (I) (Jurisdiction)*, ¶308.

[142] *Id.*, ¶¶308-309.

[143] *Daimler (Award)*, ¶¶228-230.

[144] *Berschader (Award)*, ¶185.

sense, the term "*in the territory*" prevents the Claimant's reliance upon the MFN clause for the purpose of enjoying the FMV-compensation.

2. USD 400 million is the amount of MV-based compensation

[162] The next issue is to what extent the Respondent shall make MV-compensation. According to *Vivendi (I)*:

> "*[T]he level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action*".[145]

Put it differently, this approach requires the Respondent to compensate but-for the alleged breach of Article 9.9.1 of the CEPTA.

[163] In this regard, the Claimant may allege that the Tribunal should assess the but-for damages to its investment in the circumstance where its investment would have been sold to Hawthorne Group.[146] This transaction would have allegedly succeeded in the amount of USD 600 million.[147]

[164] However, the prospect is too remote *vis-à-vis* the alleged breach. In other words, the Claimant fails to establish that the deal with Hawthorne Group would have been "*in all probability*" made.[148]

[165] This requirement of causation was demonstrated in *Lemire* where the radio-investor requested *lucrum cessans*, derived from Ukraine's denial of the participation in the bids.[149] The tribunal rejected this request since "*it is impossible to establish, with total certainty, how specific tenders would have been awarded*" but-for the FET

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[145] *Vivendi (I) (Award)*, ¶8.2.7.

[146] Facts, P38-39:¶56.

[147] Annex X, P58:L1990-1992.

[148] *Chorzów (PCIJ, Merits)*, P47.

[149] *Lemire (Award) (II)*, ¶161.

breach.[150]

[166] Here, Shareholder's Agreement between the Claimant and the Respondent reserves the latter's right of refusal for the former's plan to sell its investment.[151] In fact, on 17 December 2019, the Respondent exercised such right.[152] That is, in any event, the Claimant had no choice but to sell its investment to the Respondent but for the breach.

[167] Hence, the amount of MV-compensation is the most probable price that the Claimant and the Respondent will accept the transaction. Such amount is USD 400 million, which was already paid by the Respondent.[153]

B. Alternatively, the Tribunal Shall Reduce the Amount of Compensation (USD 700 Million) Requested by the Claimant

[168] Even if the Tribunal adopted the FMV standard in valuing the damages, the requested amount of compensation (USD 700 million) shall be reduced due to two grounds: [**1.**] the Claimant's contributory negligence; and [**2.**] the Respondent's economic situation.

1. The Claimant contributed to the occurrence of the damages

[169] Firstly, the Tribunal shall reduce the amount of compensation to be paid because of the Claimant's misconduct contributing to the emergence of the damages (the alleged distressed sale of the investment).

[170] The principle of contributory fault appears under Article 39 of the ILC Articles and its applicability in investment law has been recognized by tribunals.[154] According to the tribunal in *Bear Creek*, a State's responsibility is reduced in a situation where

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[150] *Id.*, ¶169.

[151] Annex VI, art.39.

[152] Facts, P39:¶57.

[153] Facts, P40:¶63.

[154] ILC Articles, art.39; *RosInvest (Final Award)*, ¶¶634-635; *Occidental (II) (Award)*, ¶¶665-669.

damages would not occur if an investor adopted a timely measure.[155]

[171] Here, the Claimant suffered from the rising fuel prices in the economic crisis, thereby being unable to pay the long-standing debts.[156] Yet, this scenario was *never* unforeseeable on the side of the Claimant. Indeed, the representatives of Mekar Airservices as a shareholder had cautioned that Caeli Airways' "*expansion should be controlled to avoid exorbitant costs*" and preferred "*profits into outstanding debt and improving financial health*", even though these voices had been ignored by the Claimant.[157]

[172] Additionally, aviation experts opined that "*the rapid expansion of Caeli Airways was ill-advised*" and they continued that "*if Caeli Airways had focused on its debts, this situation would not have occurred*".[158] That being said, the Claimant failed to deal with its debts in a timely manner, resulting in the damages.

[173] To sum up, the Claimant contributed to the occurrence of the damages and hence, the Tribunal shall reduce the amount of compensation to that extent.

2. The economic distress shall be taken into the compensation consideration

[174] Secondly, the Tribunal shall consider the Respondent's dire economic situation in calculating compensation. In other words, the Tribunal shall reduce compensation in a circumstance where the requested recovery put a financial strain upon the Respondent's budget.

[175] Notably, the CEPTA's teleological interpretation strongly indicates that it attaches such an element to the Tribunal's task for monetary compensation under Article 9.21(a).[159] In this regard, its object and purpose within the meaning under Article

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[155] *Bear Creek (Award)*, ¶410; *Abengoa (Laudo)*, ¶¶670-671; *Yucos (Final Award)*, ¶1596.

[156] Facts, P37-38:¶51.

[157] Facts, P33-34:¶¶31&35.

[158] Annex IX, P57:L1956-1959.

[159] CEPTA, art.9.21(a).

31.1 of the VCLT declares the necessity to "*bring economic growth and social benefits*" and recognizes "*the importance of […] human rights*".[160] As such, the CEPTA places a significance on Contracting Parties' responsibility for the well-being of their peoples, whereas an investor's protection is also provided (but, it is not absolute spirit).

[176] Indeed, in *CME*, Ian Brownlie considered the similar BIT's preamble and nodded in favour of an appropriate consideration of the Czechia's difficult financial situation.[161] According to the eminent jurist, the claimed USD 495.2 million was the burdensome, in that the demanded amount was about one-hundredth one of the governmental incomes (USD 53.9 billion).[162]

[177] Likewise, in *casu*, the IMF reported the deteriorating Respondent's economy (*e.g.*, a 8% fall in GDP, a 2600% inflation rate and a potential third debt default).[163] In the middle of the difficulty, in order to pay the claimed USD 700 million, the Respondent "*would have to transfer about twice its consolidated annual public spending to [the Claimant]*".[164] This would mean that the Claimant attempted to gain the very high compensation in exchange of the peoples' public welfare.

[178] In totality, the Tribunal shall reduce the very high compensation in accordance with the CEPTA.

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[160] CEPTA, preamble.

[161] *CME (Final Award, Brownlie's Opinion)*, ¶¶73-74.

[162] *Id*., ¶75.

[163] PO No.3, P86:¶4.

[164] PO No.3, P86:¶4.

PRAYER FOR RELIEF

[179] In light of the above submissions, the Respondent respectfully requests the Tribunal to find that:

(i) The jurisdictional objection stands;

(ii) The *amicus* application by the CRUP is admissible and the one by the CBFI, on the other hand, should be rejected;

(iii) The Respondent did not violate the FET obligation under Article 9.9 of the CEPTA; and

(iv) The appropriate standard for compensation is the MV one and there exists grounds to deduce the amount of compensation.

Submitted on 23 September 2021 by Team Brower

On behalf of the Respondent, The Federal Republic of Mekar