TEAM ALIAS: COLLIARD

IN THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

MEMORANDUM FOR RESPONDENT

Vemma Holdings Inc.

(CLAIMANT)

v.

The Federal Republic of Mekar

(RESPONDENT)

FOREIGN DIRECT INVESTMENT MOOT COURT COMPETITION, 2021

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AFR	The ICSID Additional Facility Rules, 2006.
Bonooru-Mekar BIT	Bomooru-Mekar Bilateral Investment Treaty, 1994.
CEPTA	Bonooru-Mekar Comprehensive Economic Partnership and Trade Agreement, 2014.
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration, 2014.
ICSID Centre	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention On The Settlement Of Investment Disputes Between States And Nationals Of Other States, 1966.
MRTP Act	Monopoly and Restrictive Trade Practices Act, as amended in 2009.
NORWAY BIT	Norway Model BIT (2007).
UNCITRAL	UNCITRAL Transparency Rules on Transparency in Investor-State Arbitration, 2014.

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INA	INA Corporation v. Government of the Islamic Republic of Iran, Iran-US Claims Tribunal, Award No. 184-161-1 (Aug. 13, 1985).
International Technical Products	Iran-US Claims Tribunal, Phillips Petroleum Co. Iran v. Iran et al., 21 IRAN-U.S. C.T.R., at 79 et seq.
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Saluka	Saluka Investments BV (The Netherlands) v. The Czech Republic, Partial Award on Marc. 17, 2006.
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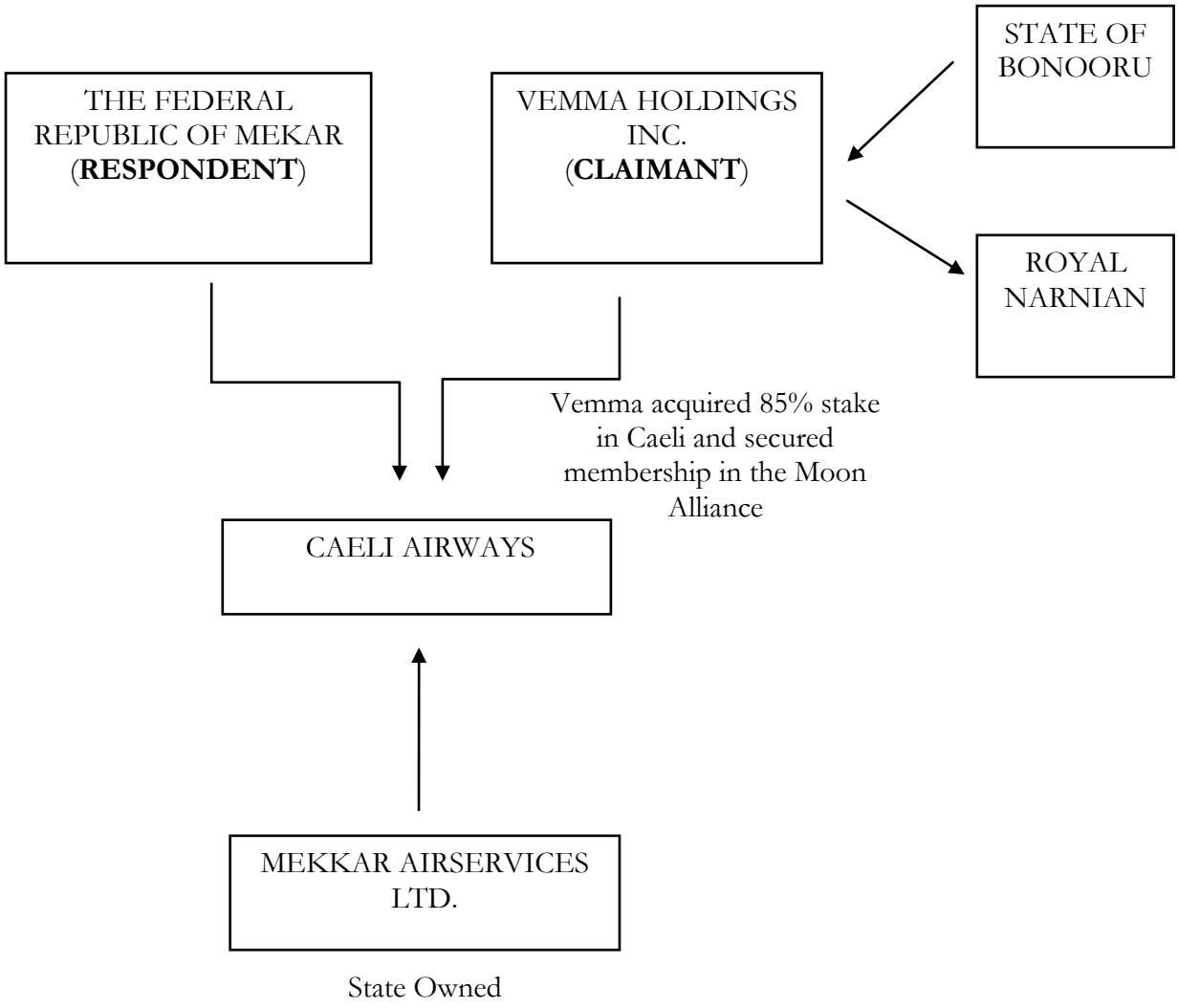
LIST OF ABBREVIATIONS

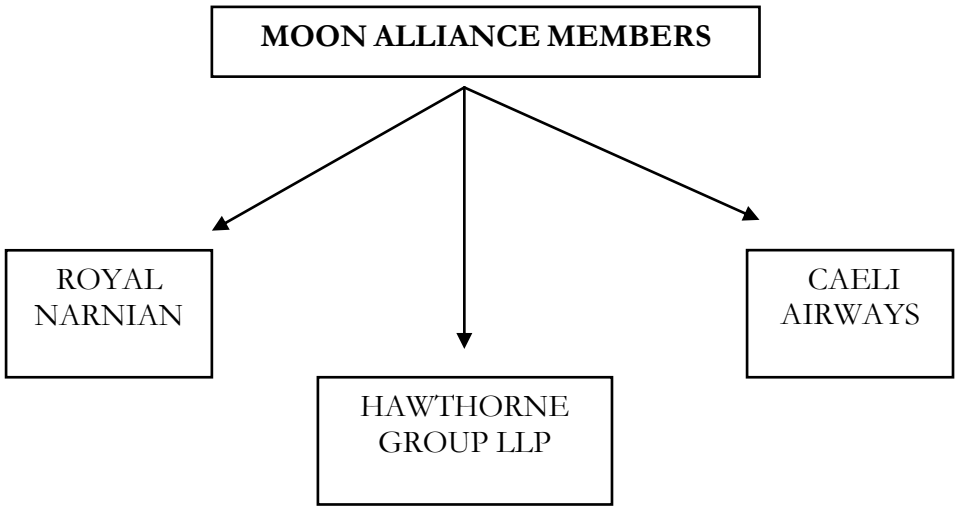
BIT	Bilateral Investment Treaty
Caeli/Caeli Airways	Caeli Airways Ltd.
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CRPU	Committee on Public Utilities Reform
FET	Fair and Equitable Treatment
Hawthorne	Hawthorne Group LLP
IBA	International Bar Association
IBA	International Bar Association
ICJ	International Court of Justice
ICJ	International Court of Justice
MAL	Mekar Airservices Ltd.
MFN	Most-Favoured-Nation
MON	Mekari Mon
NDP	Non Disputing Parties
PIA	Phenac International Airport
PO1	Procedural Order 1
PO2	Procedural Order 2
PO3	Procedural Order 3
SCE	State-controlled entity

SOE	State-owned entity
UN	United Nations
UNCITRAL	The United Nations Commission on International Trade Law
USD	United States Dollars
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

STATEMENT OF FACTS

RELATIONSHIP OF PARTIES:





TIMELINE OF EVENTS:

19 December 1984	Bonooru Air was split into three airlines. Vemma Holdings acquired 100% ownership in Royal Narnian.
2003	Merger of Caeli Airways with Air Caeli.
14 February 2004	Extension of government assistance to the Caeli Airways airline
2009	The Emergency Recovery Act 2009 was passed which authorised large-scale privatisation of SOEs.
3 November 2010	Vemma submitted its bid for the purchase of Caeli Airways
29 March 2011	Vemma Holdings entered into a Share Purchase Agreement with MAL to purchase an 85% stake in the company.
2014	In the **first quarter of 2014,** the Vemma board decided to increase the number of Caeli's international routes to offset the losses. In **April 2014**, Mekar and Bonooru signed the CEPTA.
2015-2017	The CCM ensued two investigations against Caeli Airways. In **late 2017** MON was denominated in US dollars and tourism sector were re-nationalized
August 2018	CCM concluded its First Investigation and a penalty of MON 150 Million on Caeli was imposed
25 September 2018	The President passed Executive Order 9-2018 granting subsidies to airlines
1 January 2019	The CCM completed its Second Investigation and a penalty of MON 200 million was imposed
First quarter of 2019	Mekar's High Court heard submissions from Caeli Airways and the CCM concerning a stay on the imposition of airfare caps which was declined Caeli Airways was forced to shut down several loss-making routes, ground majority of its fleet and cancel purchase order.
Third quarter of 2019	The market sharer of Caeli dropped below 40%, with its operations on most routes generating deep losses.

November to December 2019	Vemma announced their intention to sell their stake in Caeli Airways and in the process secured an offer from Hawthorne Group LLP & communicated it to MAL who rejected the offer
1 August 2020	The Supreme Arbitrazh Court of Sinnograd set aside the award
8 October 2020	Vemma Holdings sold its stake in Caeli to MAL for 400 million USD.
2 March 2021	Bonooru increased its shareholding to 55%
April to May 2021	CBFI and CRPU submitted their written submissions for the application of Non-Disputing parties

CLAIMANTS' CONCERNS:

Investor state investment dispute
The State of Bonooru has maintained a minority stake in the Claimant during the relevant time period. Further there is also no state control present. Therefore, the Claimant is not State Owned or State controlled and fulfils the definition of "investor" under the CEPTA as well as "national of another State" under the AFR. The Claimant also performs solely commercial functions. Therefore, the current proceedings are investor-State in nature and the Tribunal has jurisdiction to adjudicate on them.

Respondent's acts and omissions, amounting to "measures" Article 9.9 of the CEPTA, breached its FET obligations.
The individual measures frustrated Claimant's legitimate expectation, denied it justice and due process, were discriminatory and arbitrary and constitute abusive treatment. Additionally, the cumulative effect of all the measures taken together rendered Claimant's investment futile, unremunerative and unviable.

SUMMARY OF PLEADING

Issue 1

The Respondent submits that the present dispute falls outside the jurisdiction of the Tribunal as the Claimant is neither an "investor" under Article 9.1 of the CEPTA nor a "national of another State" under the AFR. The Claimant is a State owned and state controlled entity thereby making this a State-State dispute, which the Respondent has not consented for and which as per the Respondent falls outside the purview of the Tribunal's jurisdiction. Thus, this Tribunal must reject the Claimant's challenge.

Issue 2

The Tribunal should grant leave to the CRPU as they fulfil the criteria laid down in the CEPTA and under Article 41(3) of the AFR, regarding submissions made by non-disputing parties which *inter alia* include being in pursuit of public interest, providing a fresh perspective and being independent. In contrast, the submission of the CBFI does not fulfil these criteria as it is *inter alia* not in pursuit of public interest, lacks fresh perspective and independence. Additionally, it also unduly burdens the process.

Issue 3

The Respondent did not, individually or cumulatively, breach its FET obligations under Article 9.9 of the CEPTA. Its actions were legitimately taken in pursuance of its right to regulate and did not breach its FET obligations. Further, the losses suffered due to the poor business decisions of the Claimant cannot be attributed to the Respondent.

Issue 4

The Respondent argues that compensation owed to the Claimant, if at all, must correspond to "market value" standard expressly stipulated in Article 9.21 of the CEPTA instead of the "fair market value" standard proposed by the Claimant. The Claimant cannot be allowed to import "fair market value" standard under the Arrakis-Mekar BIT on the basis of the MFN clause under the CEPTA or the principles of international law. Therefore, the Claimant cannot derogate from Article 9.21. Lastly, any compensation owed must be reduced taking into account the contributory fault of the Claimant and the grave economic situation of Mekar.

PLEADING
PHASE I: JURISDICTION

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION TO ADJUDICATE THE DISPUTE UNDER CHAPTER 9 OF THE CEPTA.

[1] The Tribunal's jurisdiction does not arise in this case, as both the parties have agreed to apply the AFR pursuant to the provisions of Chapter 9 of the CEPTA.

[2] The Respondent submits that the tribunal does not have the jurisdiction to hear the present dispute which constitutes State-State arbitration. The Claimant is a State-Owned and State-Controlled entity.[1] State-State arbitrations fall outside the purview of the CEPTA and the AFR, and the Respondent has not consented to State-State arbitration with Bonooru.

[3] The Respondent has therefore, challenged the jurisdiction of the Tribunal as the Claimant does not qualify as a "national of another State" under the AFR **(A)** nor fall within the purview of "investor" under Article 9.1 the CEPTA **(B)**.

A. THE CLAIMANT IS NOT A "NATIONAL OF ANOTHER STATE" UNDER THE AFR.

[4] Article 2 of the AFR[2] only contemplates proceedings between a "*State (or a constituent subdivision or agency of a State) and a national of another State*".[3] A "national of another State" is defined under Article 1(6) of the AFR as "*a person who is not, or whom the parties to the proceeding in question have agreed not to treat as, a national of the State party to that proceeding*."[4] An SOE, when treated akin to a State, does not fall within the category of "national of another State."[5]

[5] The test that has been developed to determine if an entity is an SOE looks into to the ownership and control of the entity.[6]

[1] FDI Moot Proposition, at 6, ¶ 2.
[2] Article 2, AFR.
[3] *Id.*
[4] Article 1, AFR.
[5] Tatneft, ¶ 21.
[6] Maffezini, ¶ 76.

[6] In light of this, the Respondent submits that the Claimant, being a State owned and controlled entity, does not constitute a "national of another State." The Claimant is a State-owned entity as the State owns **[1]** and exercises control **[2]** over the same. It is also carrying out essentially governmental functions as an agent of the State **[3]**.

1. The Claimant is State owned.

[7] Claimant has alleged that it is not State owned as the State held a minority share in it. In response, Respondent submits that the State's ownership of 55% in the Claimant, during the relevant time period, makes it State owned.[7]

[8] The relevant time period for determination of jurisdiction extends beyond the time of initiation of proceedings. This principle was enunciated in this Tribunals decision in *Loewen v. United states of America*, wherein it stated that it did not have jurisdiction due to the changed nationality of the claimant and that there must be

> *[c]ontinuous national identity from the date of the events giving rise to the claim, which date is known as the dies a quo, through the date of the resolution of the claim.*

[9] *In casu*, the State acquired a majority 55% ownership in the Claimant in March 2021[8] which was before the date of resolution of the claim. Therefore, during the relevant time period, the Claimant was State Owned.

2. The Claimant is State controlled.

[10] The word 'control' is defined as the "power or authority to manage, direct, superintend, restrict, regulate, govern, administer or oversee".[9]

[11] The definition of control was given by the tribunal in *Aguas del Tunari v. Bolivia,* wherein it was stated that the capacity to control must be seen in terms of percentage of shares held and

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[7] *Id.*
[8] FDI Moot Proposition, at 40, ¶ 65.
[9] BLACK'S LAW DICTIONARY at 399.

> *"[I]n the case of a minority shareholder, the legal capacity to control an entity may exist by reason of the percentage of shares held, legal rights conveyed in instruments or agreements such as the articles of incorporation or shareholders' agreements, or a combination of these.*"[10]

[12] Further, Article 8 of[11] the ARSIWA defines "control" to cover those situations where a person or group of persons either "act[…] on the instructions" or "under the direction or control" of the State.[12]

[13] This was further elaborated upon in the *Nicaragua* case,[13] wherein it was stated that a general situation of dependence on and support from the State is insufficient and that the persons in question must have "*acted in accordance with that State's instructions or under its 'effective control'.*"[14]

[14] Therefore *"it requires both a general control of the State over the person or entity and a specific control of the State over the act the attribution of which is at stake.*[15]

[15] As can be seen from the above, State control is a wider term than State ownership and includes, *inter alia*, voting rights, the power to effectively decide[16] and implement key decisions of the business activities of the enterprise[17] and "*a capacity to block major changes*"[18] in the enterprise.

[16] *In casu*, the State has direct control over the Claimant's business activities and key decisions. According to the Claimant's Articles of Association, the Ministry of Transport and Tourism can elect one representative[19] to a director position. Further, when other representatives on the board are absent, a Bonoori majority occurs.[20] As a result, the State retains the power to decide any matters in relation to the Claimant and thus establish its control over it. Therefore, not only does the State have a majority stake but it also has the power to control or affect key decisions in other capacities as well.

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[10] Aguas del Tunari, ¶ 264.
[11] Article 8, ARSIWA.
[12] *Id.*
[13] Nicaragua, ¶ 51.
[14] Marfin, ¶ 674.
[15] White Industries Australia Limited, ¶ 5.1.27.
[16] International Thunderbird Gaming Corporation, ¶108.
[17] B-Mex, ¶ 214.
[18] Tallinn, ¶ 369.
[19] FDI Moot Proposition, at 46 ¶ 152.2.
[20] *Id.,* PO3, at 87 ¶ 3.

3. The Claimant is carrying out essentially governmental functions as an agent of the State.

[17] The purpose behind establishing both the ICSID convention and the ICSID AFR was to promote private international investment.[21] The comment to the Preliminary draft of the ICSID Convention stated that the term "national of another State' does not solely mean privately- owned companies "*thus permitting a wholly or partially government-owned company to be a party to proceedings brought by or against a foreign State*".[22] Further, Aron Broches, one of the architects of the Convention, stated that-

> *"[a] mixed economy company or 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*."[23]

[18] The Respondent submits that the Claimant cannot be a "national of another State" as it is acting as an agent for the government **(i)** and discharging an essentially governmental function **(ii)**.

i) ***The Claimant is acting as an agent for the government.***

[19] Agency includes "*every relation in which one person acts for or represents another by latter's authority*". According to Professor Schreuer:

> "*[t]he concept of 'agency' should be read not in structural terms but functionally . . . What matters is that [the agency] performs public functions on behalf of the Contracting State or one of its constituent subdivisions."*[24]

[20] In CSOB v. Slovakia, the concept of agency was explained stating that CSOB "*acted on behalf of the State in facilitating or executing the international banking transactions and foreign commercial operations the State wished to support"*[25] and that it was due to the State's control that CSOB was required to do the State's bidding.

[21] *In casu*, the Claimant acts as an agent and carries out the positive obligations of the State, to enable citizens' mobility by development of the aviation industry, under Article 70 of the

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[21] Preamble, ICSID.
[22] SCHREUER at 161.
[23] ARON BROCHES, SELECTED ESSAYS at 202.
[24] SCHREUER, at 160.
[25] CSOB, ¶ 20.

Constitution.[26] The routes flown by Caeli airways have a resultant benefit to Bonooru and its citizens which is the main intention behind flying such routes. Further, in the Claimant's Memorandum of Association it has been clearly stated that it must aid in

> *"[d]eveloping 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."*[27]

This clearly illustrates that Claimant was carrying out essential governmental functions on behalf of the State of Bonooru and is therefore acting as an agent of the government.

ii) ***The Claimant is discharging an essentially governmental function.***

[22] Essentially governmental functions are those-

> "*functions which are governmental in nature or which are otherwise normally reserved to the State, or which by their nature are not usually carried out by private businesses or individuals.*"[28]

[23] In the present case, the nature of all acts carried out by the Claimant were essentially governmental. Such acts were carried out to boost tourism in Bonooru and ensure travel of the Bonoori citizens from one island to another, which was in lieu of the State's obligations and their policies under Article 70 of the Constitution.

[24] Further, the facts that the Claimant continued to fly certain routes despite them becoming unprofitable to fly, strongly suggests that such actions were in furtherance of government objectives rather than being commercial in nature.

[25] Therefore, the Claimant can be said to be carrying out "an essentially governmental function" and is working in a governmental capacity.

B. THE CLAIMANT DOES NOT FALL UNDER THE DEFINITION OF "INVESTOR" UNDER ARTICLE 9.1 OF THE CEPTA.

[26] FDI Moot Proposition, at 41.
[27] *Id.*
[28] Maffezini, ¶ 77.

[26] Article 9.16(1) of the CEPTA provides for the submission of claims to arbitration by an investor of a party. Subsequently, Article 9.16 (2) provides that such a claim may be submitted under the AFR. Article 9.1[29] defines an investor as

> *[…] an enterprise with the nationality of a Party or seated in the territory of a Party that seeks to make, is making or has made an investment in the territory of the other Party.*

[27] The Respondent submits that the lack of an explicit mention of SOEs in this Article suggests that the same are not provided for under the definition of investor in the CEPTA. Further, investment as is envisaged by Article 9.1 of the CEPTA, is not taking place in the present case.

[28] The erstwhile 1994 Bonooru-Mekar BIT[30] provided an expansive definition of investor which *inter alia* included SOEs. Article 1 of the BIT mentions that an "enterprise" includes "privately-owned or government-owned" entities.[31] However, this BIT was terminated and subsequently replaced by the CEPTA in 2014.[32] The definition of investor in the CEPTA is silent on the State control and ownership of the investor. This proves the clear intention of the parties to exclude SOEs from the ambit of investor.

[29] Further, there is also no investment, as envisaged by the CEPTA, taking place in the current situation. An investment that is a product of corruption cannot seek protection of a treaty as such agreements are null and void.[33] In fact, many tribunals have reconsidered their jurisdiction in light of allegations of corruption[34] and have even relied on indirect and circumstantial evidence such as red flags to prove the corruption taking place at certain instances.

[30] *In casu*, the Claimant had bribed the Chairperson of the Public Utilities Committee, Mr. Dorian Umbridge, in order to receive certain rights.[35] Despite select members of the CRPU highlighting fears of over-valuation and "*an overly optimistic forecast*" which did not consider "*serious volatility of fuel crisis and potential takeover of the long distance routes by competitors*," Mr.

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[29] Article 9.1, CEPTA.
[30] Bonooru-Mekar BIT.
[31] *Id.*, Article 1.
[32] FDI Moot Proposition, at 33, ¶ 32.
[33] Siemens, ¶ 45.
[34] World Duty Free, ¶ 101.
[35] FDI Moot Proposition, at 19.

Umbridge was insistent on the investment.[36] His vehement support for the investment despite such fears should be seen as a clear "red flag".[37] Further, Bonooru's Constitutional Court taking up *suo moto* cognizance of the corruption allegations also indicates that corruption was inherent in the investment process.[38] Therefore, the Claimant being an SOE and there being corruption in the investment process, the Claimant is not an investor under the CEPTA.

[31] In conclusion, the Claimant is carrying out essentially governmental functions as an agent of the State. Further, it is also an SOE and an SCE, and, therefore, cannot be included under the definition of "investor" under Article 9.1 of the CEPTA or the category of "national of another State" under the AFR. Consequently, the Tribunal lacks jurisdiction to adjudicate the present case.

[36] *Id.*, at 31, ¶ 24.
[37] Glencore, ¶¶ 669-670.
[38] *Id.*, P.O. 3, at 87, ¶ 13.

PHASE II: ADMISSIBILITY

II. THE TRIBUNAL SHOULD GRANT LEAVE TO THE EXTERNAL ADVISORS TO THE COMMITTEE ON REFORM OF PUBLIC UTILITIES REFORM AND DENY LEAVE TO THE CONSORTIUM OF BONOORI FOREIGN INVESTORS.

[30] Pursuant to Article 41(3) of the ICSID Arbitration (Additional Facility) Rules[39] and Article 9.19 of the CEPTA.[40]

[31] The submissions of external advisors to the CRPU must be admitted [**A**] and the submissions of the CBFI must be rejected [**B**].

A. THE SUBMISSIONS OF THE CRPU ARE ADMISSIBLE.

[32] The submissions of the CRPU are admissible as they are made in pursuit of public interest[**1**]; the CRPU have significant interest in the proceedings [**2**]; the CRPU do not lack independence [**3**]; the submissions address matters within the scope of dispute [**4**]; and, *alternatively,* an *amicus curiae* such as the CRPU can raise issues of jurisdiction. [**5**]

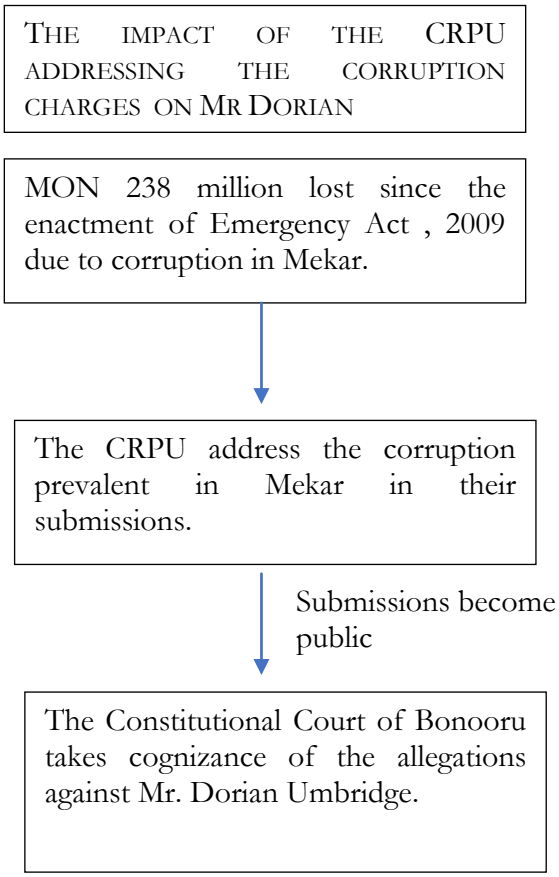
1. <u>The submission is in pursuit of public interest.</u>

[33] Public interest is established when the issues under dispute[41] address those systems which provide basic public services to millions of people[42] and as such, extend beyond the issues raised by commercial arbitration.[43] Therefore, they should be supported by well-recognized expertise on these issues.[44]

[34] In the present case, the claimant is surrounded by allegations of corruption in their rights received over the acquisition of Caeli.[45] Therefore, outcome of the dispute would have public policy implication and an impact on potential investors prospecting opportunities in the

[39] Article 41(3), AFR.
[40] Article 9.19 CEPTA.
[41] Biwater, ¶ 20.
[42] Aguas Argentinas, ¶ 19.
[43] Methanex, ¶ 49.
[44] Biwater, ¶ 20.
[45] FDI Moot Proposition, at 19, ¶ 5.

Respondent state.[46] Accordingly, the submissions of the CRPU raise this primary issue of corruption and provide unbiased evidence of the same. In doing so, the CRPU endeavours to promote fair business practices in Mekar.



[35] As the CRPU have an expertise in the subject matter and a broader interest in the public policy implications, their submission is in pursuit of public interest.

2. <u>The CRPU have significant interest in the proceedings.</u>

[36] If an *amicus curiae* is affected by the award of the Tribunal and has direct interest in the subject matter of the claim, then-

> *[I]t would be contrary to international principles of fairness, equality and fundamental justice to deny them the opportunity to defend their interests.*[47]

[37] However, when a proceeding has a significant influence on the population and goes beyond resolving private conflicts, the process should permit citizens' participation and be

[46] *Id*, ¶ 6.
[47] UPS, ¶ 3.

transparent.[48] In *Methanex*,[49] *Aguas Argentinas*[50] and *Biwater Gauff*[51] the tribunals have taken into consideration the significant interest of third parties, even when there was less direct involvement with the subject matter of those cases, in an effort to promote transparency.

[38] In the present case, the CRPU appear before this Tribunal not only as advisors on national and international business,[52] but also as an entity that aims to reduce corruption in the region. The impact of the decision in this case holds significant interest for all Mekari businesses in promoting fair business practice and for fair judicial proceedings in privatisation process.[53] Therefore, the CRPU have significant interest in the arbitration.

3. The CRPU do not lack independence

[39] The independence of an applicant is an implicit criterion of admissibility.[54] Undisclosed relationships give rise to conflict of interest, threatening the independence and impartiality of the arbitral tribunal and resulting in challenge of the arbitral award. [55]

[40] 'Independence' is characterized by the '*absence of external control*'.[56] There exists a duty to disclose potential conflict of interests[57] and to disclose whether the *amicus curiae* have received any financial assistance from a party in the dispute in the preparation of the petition.[58] This requirement has also been established in *Aguas*,[59] *Piero Foresti,*[60] and *Biwater.*[61]

[41] In the present case, the CRPU have disclosed that they have not received financial or any other assistance in relation to the making of their submissions.[62] The CRPU have also disclosed that the association's income is not payable for the personal benefit of any member or shareholder of the association.[63] Furthermore, the CPRU have fully disclosed their

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[48] Biwater, ¶ 14.
[49] Methanex, ¶ 49.
[50] Aguas Argentinas ¶¶ 19, 20, 21.
[51] Biwater, ¶ 14.
[52] FDI Moot Proposition, at 19, ¶ 4.
[53] *Id.*
[54] Philip Morris, ¶10; Article 5 UNCITRAL.
[55] ROGERS, p. 199.
[56] Conoco Phillips, ¶ 54.
[57] IBA Guidelines.
[58] Article 41(3), AFR.
[59] Aguas Argentinas ¶¶ 24, 25.
[60] Piero Foresti, ¶ 5.9.
[61] Biwater, ¶11.
[62] FDI Moot Proposition, at 20, ¶ 1.
[63] *Id.*

participation in the acquisition of Caeli Airways and the remuneration provided for the same.[64] The CRPU remain independent advisors and are in a position to provide unbiased facts before this Tribunal.[65]

[42] Hence, the CRPU have established their independence from the disputing parties.

4. The CRPU address issues within the scope of dispute.

[43] An *amicus curiae* should raise and discuss relevant issues and assist the Tribunal in legal obligations arising within the scope of the dispute.[66] An informed amicus curiae can play an important role in bringing the allegations of corruption to the tribunal.[67]The submission should be beneficial to the tribunal, keeping in mind the contribution of the particular knowledge and expertise of a qualified entity. [68] The insight provided by an *amicus curiae* should be directly relevant to the factual and legal issues under consideration.[69]

[44] In the present case, in Mekar, corruption in privatisation has resulted in a loss of MON 238 million[70] since the Emergency Recovery Act, 2009 and has become *"a part and parcel of doing business."* [71]The issue of corruption being highlighted by the CRPU offer a fresh perspective and addresses relevant public issues both of which are requirements for the admissibility of submissions of an *amicus curiae* and therefore falls within the scope of dispute. Addressing these allegations do not expand the dispute, rather emphasizes on certain public issues within the arbitration.

5. ***Alternatively*, *amicus curiae* such as the CRPU can raise issues of jurisdiction.**

[45] The *amicus curiae* have the power to consider issues of illegality of its own motion, if the issue has not been put before it by the parties.[72]An *amicus curiae* can raise issues on jurisdiction, notwithstanding already exiting jurisdictional issues.[73]

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[64] FDI Moot Proposition, at 19, ¶ 3.
[65] *Id,* ¶ 4.
[66] Piero Foresti ¶ 2.2, Norway BIT.
[67] World Duty Free, ¶¶ 157, 144.
[68] Philip Morris P.0 4.
[69] Norway BIT.
[70] Philip Morris P.O 3.
[71] *Id.*
[72] Himpurna, ¶¶ 219, 220.
[73] Pacific Rim, ¶ 3.

[46]Therefore, even if the Claimant is contesting that the CRPU raises a new jurisdictional issue. It is within the authority of the CRPU to raise the issue of corruption as the legality of the Claimant's investment is crucial to the determination of the Tribunal's competence-competence. [74]

B. THE SUBMISSIONS OF THE CBFI ARE INADMISSIBLE.

[47]The submissions of the CBFI are not admissible as they do not bring a fresh perspective, knowledge or insight relevant to the case [**1**]; their submission is not in pursuit of public interest [**2**]; the CBFI lack independence [**3;**] and, the submission unduly burdens and unfairly prejudice the proceedings [**4**].

1. <u>The CBFI do not bring a fresh perspective, knowledge or insight relevant to the case.</u>

[48]An *amicus curiae* should not "*consider themselves as simply in the same position as either party's lawyers.*"[75] They should provide a perspective that is "*[i]ntegrated, grounded in the relevant legal principles and sources of law, directly connected to the issues before the Tribunal*." They should have perspectives on the legal issues that arise in such contexts, and their implications [76] and their perspective should materially differ from those of the contending parties. [77]If the competing arguments can be sufficiently discussed by the parties, this could be grounds for the submissions not to be granted leave. [78]

[49]In the present case, the CBFI mentions issues regarding public policy, development of Greater Narnian region and regulatory regimes[79] that do not materially differ from those of the contending parties. The CBFI reiterates the Claimant's narrative of free-market conditions in Bonooru. The submission does not reflect valuable perspectives that differ from the submissions of the parties.

2. <u>The submission is not in pursuit of public interest</u>

[74] FDI Moot Proposition, at 19, ¶ 6.
[75] Biwater ¶ 64.
[76] *Id.*
[77] Piero Foresti, ¶ 5.17.
[78] UPS, ¶ 48.
[79] FDI Moot Proposition, at 16, ¶¶ 8, 9.

[50] The public interest in an arbitration arises from its subject-matter. [80] The *amicus curiae*'s sole apparent interest should not be in advancing their own private interests.[81] They lose any claim to being independent from the Parties if they are directly working with them.[82] Their submission should satisfy the relevant 'public interest' threshold and affect individuals or entities beyond the Disputing Parties. [83]

[51] In the present case, although the subject matter of the dispute involves public interest, the CBFI fails to make any submissions in pursuit of this. The CBFI also has 38 members[84] that hold investment rights in Mekar within which SRB Infrastructure and Wiig Wealth Management Group are currently pursuing claims against Mekar. Therefore, they have a private interest in the dispute rather than public interest.

3. The CBFI lack independence.

[52] Organisations lacking structural independence from parties should be barred from making amicus submissions.[85] An *amicus curiae* should provide technical, legal and financial support to Parties in the implementation of the Protocols and Guidelines for them to lack independence.[86] If the arguments of the *amicus curiae* can be seen to be clearly aligned to one of the parties, this would transform them from being amicus of the tribunal to amicus of the party.[87]

[53] In the present case, Lapras Legal Capital, a member of the CBFI, is directly working with the Claimant and advising them on funding strategies [88] with respect to its claim against the Federal Republic of Mekar. Additionally, 38 members of the CBFI hold investment rights in Mekar and two are also pursuing claims against Mekar.[89] Therefore, the CBFI have a vested interest in the proceedings leading to conflict of interest and lack of independence.

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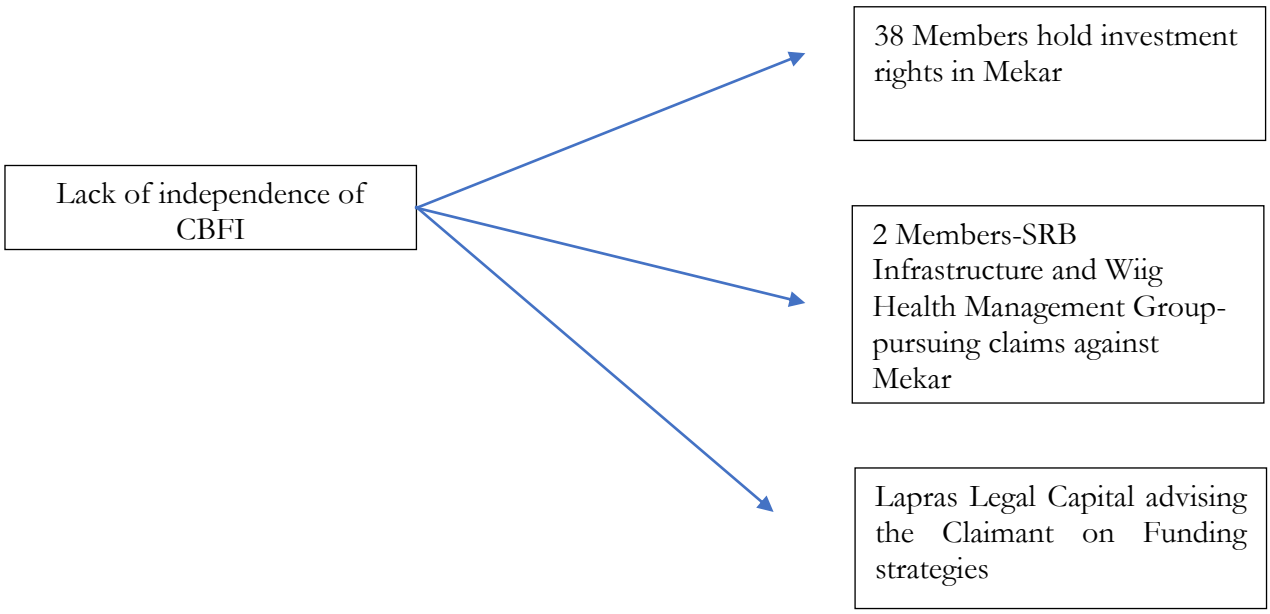
[80] Methanex, ¶ 49.
[81] Eli Lilly, ¶ 30.
[82] Bernhard Von Pezold, ¶ 60.
[83] Apotex, ¶ 36.
[84] FDI Moot Proposition, at 16, ¶ 6.
[85] Border Timbers, ¶49.
[86] FDI Moot Proposition, P.O 3.
[87] Bernhard Von Pezold, ¶ 60.
[88] FDI Moot Proposition, at 16, ¶ 7.
[89] *Id.*



4. <u>The submission by the CBFI unduly burden and unfairly prejudice the proceedings.</u>

[54]The non-disputing party submission should not "*disrupt the proceeding or unduly burden or unfairly prejudice either party.*"[90] The *amicus curiae* should address the relevant facts and arguments advanced in this arbitration[91] and they should have the required expertise, experience, and independence[92] to serve as *amici curiae.*

[55]In the present case, the CBFI fail to address the relevant facts and arguments related to the arbitration. They focus primarily on advancing their own interests. They do not provide a distinctive perspective in relation to the arbitration. Their submissions will only take away the tribunal's attention from the more direct and immediate issues of concern. Hence, they unduly burden and unfairly prejudice the proceedings.

[90] Article 41(3), AFR.
[91] Apotex, ¶ 37.
[92] Aguas Argentinas, ¶¶ 17, 24.

PHASE III: MERITS

III. THE RESPONDENT HAS TREATED CLAIMANT FAIRLY AND EQUITABLY UNDER ARTICLE 9.9 OF THE CEPTA.

[56]The Claimant has argued that the Respondent's actions individually and together constitute a breach of its obligation to treat the Claimant fairly and equitably.

[57]The FET provision stipulated under Article 9.9 of the CEPTA only obliges the Respondent to accord a *"minimum standard treatment"* to the Claimant in accordance with the customary international law.[93] The minimum standard imposes narrower limits on the host State's authority as compared to the autonomous FET provisions.[94]

[58]The Respondent submits that its measures did not breach the FET provision either individually **[A]** or cumulatively **[B]**.

A. THE RESPONDENT'S INDIVIDUAL MEASURES DID NOT BREACH THE FET PROVISION.

[60]The Respondent did not breach its FET obligations as its measures did not frustrate the Claimant's legitimate expectations **[1]**; did not deny justice to the Claimant or breach due process in civil and administrative proceedings **[2];** were not arbitrary or discriminatory **[3]**; and did not constitute abusive treatment of the Claimant in the form of coercion, duress or harassment **[4].**

1. <u>The Respondent did not frustrate the Claimant's legitimate expectations.</u>

[61]Article 9.9(3) of CEPTA stipulates:

> *"When applying the above fair and equitable treatment obligation, a Tribunal may consider whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated."*"[95]

[93] Article 9.9 CEPTA.
[94] Cargill ¶ 285; PSEG ¶ 239; Enron ¶ 258.
[95] Article 9.9 CEPTA.

[62] In order to prove legitimacy of its expectations, an investor must establish clear and specific representations made by the host State to that effect.[96] The investor is also required to conduct thorough due diligence of the host State's regulatory framework prior to building such expectations.[97]

[68] *In casu*, the Claimant's expectations were not "legitimate" or "reasonable" as the Respondent made no specific representation allowing its anti-competitive behaviour and lower the cost of services on particular routes to an extent that drives the competitors off the market.[98] The privileges it secured at PIA were *additional* to what it inherited vide the Share-Purchase Agreement with MAL and were never promised by the Respondent to induce investment.[99] Further, there was also no specific representation made by the CCM approving the Horizon 2020 scheme at the time of the investment as it was introduced *after* the investment was complete and accepted.[100]

[69] Additionally, the Claimant ought to have known the competition laws of Mekar and could not have legitimately expected the Respondent to disregard their violation by it.

[70] Caeli was a dominant player having substantial control over the airline market in Mekar, evinced though its 43% market share,[101] the fact that it carried about 35% of Mekar's population[102] and it becoming the "*only consistently profitable carrier on over half the routes to and from*" PIA by 2016.[103] Its closest competitor was JetGreen with a mere 21% market share.[104] Further, Caeli's "preferential secondary slot-trading" with Royal Narnian, also owned fully by the Claimant,[105] implies that the two were "jointly dominant" with more than 54% market share.[106]

[71] The Claimant exploited this dominant position of Caeli and engaged in anti-competitive behaviour through its predatory pricing strategies, keeping airfares very low in order to drive

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[96] Antaris, ¶ 360(3).
[97] Belenergia, ¶ 584.
[98] FDI Moot Proposition, at 34, ¶ 34.
[99] *Id.*, at 32, ¶ 26.
[100] *Id.,* at 32, ¶¶ 25, 26 and 28.
[101] *Id.*, at 34, ¶ 36.
[102] *Id.*, at 34, ¶ 34.
[103] *Id.*, at 34, ¶ 35.
[104] *Id.*, P.O. 3, at 86 ¶ 6.
[105] *Id.,* at 29, ¶ 10.
[106] *Id.*, at 34, ¶ 36.

out the regional competitors,[107] and to subsequently abuse the monopoly so attained in violation of the MRTP Act.[108] It received market-disruptive subsidies from Bonooru under the Horizon 2020 scheme[109] that "*directly supported*" its operation in Mekar in violation of the MRTP Act,[110] and also obtained *additional* privilege of lower airport service fees than Caeli's competitors at PIA, due to its dominant position.[111] These acts allowed the Claimant to launch flights on regional routes[112] *despite* having incurred losses on them previously,[113] in order to push competitors out of the market.

[72] In conclusion, the Respondent made no specific representations to arouse the Claimant's legitimate expectation of not adhering to the MRTP Act, and the Claimant must conducted sufficient due diligence to apprise itself of the MRTP Act.

2. <u>The Respondent did not deny justice to the Claimant.</u>

[71] The requirement of 'due process' is included under protection against 'denial of justice.'[114] The Claimant has contended a breach of both substantive and procedural fairness required under this standard.[115]

[72] In the present case, the Respondent did not deny justice to the Claimant as there was no undue delay in proceedings **[i]**, the conduct of the courts was not arbitrary beyond misapplication of law[116] **[ii]**.

iii) There ***was no undue delay in proceedings.***

[73] A host State is only required to enforce "*[investors'] legitimate rights within a reasonable amount of time."*[117] The appraisal of reasonable time can depend on the behaviour of the courts themselves."[118]

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[107] *Id.*, at 6.
[108] Ch III & IV MRTP Act.
[109] *Id.,* at 32, ¶ 28.
[110] FDI Moot Proposition, at 34, fn 3.
[111] *Id.,* at 37, ¶ 49.
[112] *Id.,* at 35, ¶ 38.
[113] *Id.,* at 33, ¶ 31.
[114] Siag, ¶.452; Rumeli, ¶.653.
[115] ALWYN 309; Siag, ¶.452.
[116] Chevron, at 250; Robert ¶¶ 102,103.
[117] *Id.*
[118] *Id.*

[74]*In casu*, the Respondent's courts usually take approximately 22 months to decide a case and more for commercial cases.[119] However, the Claimant's cases concerning the imposition of airfare caps and CCM investigations were resolved within 15 months (March, 2018 to June, 2019)[120] and 6 months (January 2019 to June 2019),[121] respectively. The Respondent's courts, while grappling with the exponential increase in litigations due to the economic crisis and having limited resources at its disposal, made sure that justice was imparted as quickly as possible.

[75]Thus, the Claimant's allegation of undue delay in the proceedings are false and baseless.

iv) ***The conduct of the Respondent's court was not arbitrary.***

[76]A domestic court's conduct is 'arbitrary' only if it is "*a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.*"[122] In the absence of such conduct, the *Tatneft* tribunal observed that a mere misapplication of law does not constitute breach of the denial of justice standard[123] and, in such instances, the tribunal cannot act as an "international appellate court."[124]

[77]*In casu*, the conduct of the Respondent's court was not arbitrary as it dismissed the Claimant's case against CCM's measures after hearing both the parties and after due consideration.[125] Further, the Sinnoh's arbitral award was enforced by the Mekari courts in line with Section 36(2) of the Commercial Arbitration Law and the Article V(1)(e) of the New York Conventions and the reasoning was further backed by precedents which enforced awards annulled at the seat of arbitration.[126] Thus, the courts' conduct was not arbitrary and can, at best, be assumed to be an error of law, the correction of which is beyond the scope of this tribunal.

3. <u>The Respondent's conduct was not arbitrary or discriminatory.</u>

[119] FDI Moot Proposition, at 29-30, ¶ 13.
[120] *Id.*, at 36, 38, ¶¶ 44, 54.
[121] *Id.*, at 37-38, ¶¶ 50, 54.
[122] ELSI, ¶ 391.
[123] Tatneft, ¶ 352.
[124] Moldova, ¶ 441.
[125] FDI Moot Proposition, at 38, ¶ 52.
[126] *Id.*, at 68, ¶¶ 10, 11, 12 and 18.

[78] A measure is not arbitrary or discriminatory measure unless the State manifestly disregards the rules and distorts fair competition among the investors.[127]

[79] Here, the Respondent's measures did not distort fair competition among the investors and are not arbitrary **[i]** or discriminatory **[ii]**.

i) ***The Respondent's measures were not arbitrary.***

[80] The term 'arbitrary' has been defined as "depending on individual discretion; ... founded on prejudice or preference rather than on reason or fact;"[128] a measure harming the investor for no legitimate purpose.[129] A measure is not arbitrary if it is "based on objective ground" with no intention to "target foreign investment."[130] As stated by the *Pope* tribunal, the threshold required is that "*every* reasonable and impartial person must be dissatisfied."[131]

[81] In relation to the Claimant's allegation of arbitrary conduct by the CCM, it is pertinent to note here that Chapters III of the MRTP Act authorises CCM to impose fines and behavioural remedies against "anti-competitive acts" of dominant entities.[132] Behavioural remedies, unlike irreversible structural remedies which have immediate market impact,[133] obligate the dominant entities to do/refrain from doing some act, such as imposition of price caps.[134] They are imposed to regulate the conduct of concerned entities and redeem the abuse.[135]

[82] *In* casu, the maintenance of airfare caps till 2019 despite the economic crisis and subsequent imposition of fines against Caeli by CCM were not arbitrary. The measures were rightly and legitimately taken to regulate Caeli's clearly evident anti-competitive behaviour under the MRTP Act. Moreover, the caps were removed as soon as Caeli's and Royal Narnian's conjunctive market share fell below 40%.[136] Thus, the measures were objective and did not

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[127] Lemire, ¶ 43.
[128] *Arbitrary*, Black's Law Dictionary, 7th ed., 1999; Lauder, ¶ 221.
[129] SCHREUER, at 188.
[130] Lauder, ¶ 270.
[131] Pope, ¶ 64.
[132] Ch III, MRTP Act.
[133] Remedies in Merger Cases, Organisation for Economic Cooperation & Development Policy Roundtables 11 (2011); *Merger Remedies Guide* 9 (Int'l coop. in Comp. Enf., 2016).
[134] Visa MIF, ¶ 36.
[135] Remedies in Merger Cases, Organisation for Economic Cooperation & Development Policy Roundtables 11 (2011); *Merger Remedies Guide* 9 (Int'l coop. in Comp. Enf., 2016).
[136] FDI Moot Proposition, at 38, ¶ 55.

target foreign investors for the investigation was only conducted for the Claimant and not any other investor.

[83] Additionally, the Respondent's decision requiring companies to price their services in MON was reasonable as it was to reduce its reliance on foreign currencies and help it deal with the economic crisis.

[84] Therefore, the Respondent's measures were not arbitrary.

ii) ***The Respondent's measures were not discriminatory.***

[85] Discrimination means dissimilar treatment.[137] It involves less favourable treatment accorded to investors[138] under like circumstances without any justification.[139]

[86] In the present case, the Respondent's decision to *not* grant subsidies to the Claimant under Executive Order 9-2018[140] is not discriminatory as: *first*, it is not under "like circumstances" with other investors **[a]**, and *second*, the differential treatment is justified **[b]**.

a. The Claimant is not under "like circumstances" with other investors.

[87] The investors in 'like circumstances' are in 'similarly situated' or 'comparable' positions[141] — comparators in a "competitive relationship," such as "operating in the same business and economic factors."[142] Investors bear the burden of establishing that their investments are "in like circumstances" with an identified comparator(s).[143] If the investor or investment is found not to be "in like circumstances" to the identified comparator(s), no treaty breach could be established.[144]

[88] *In casu*, the Claimant indeed had a competitive relationship with the other foreign airlines as they were all operating in the same business in Mekar. However, the shareholding of Bonooru in the Claimant put it under 'unlike circumstances' with other investors which had complete private ownership as such shareholding of Bonooru altered the Claimant's position

[137] Antoine, at 457.
[138] Lauder, ¶ 231.
[139] Bayindir, ¶ 399.
[140] FDI Moot Proposition, at 36, ¶ 46.
[141] Nykomb, at 34; SCB, ¶ 395.
[142] Muszynianka, ¶¶ 518, 519, and 520; Gosling ¶¶ 254, 255 and 256.
[143] Total, ¶ 212; UPS, ¶¶ 83 and 84.
[144] Vento, ¶.265; Griffin ¶¶.576, 577 and 578; UPS ¶ 181.

in Mekar's market. Conversely, it put the Claimant under "like circumstances" with Larry Air, another wholly government-owned airline which also did not receive subsidies under the said order.[145]

[89]To conclude, the Claimant was not under "like circumstances" with other foreign investors except Larry Air.

b. Refusal of the Respondent to grant subsidies to the Claimant is justified.

[90]A differential treatment is discriminatory if it is not justified.[146] Justification implies rationality and non-arbitrariness of the measures differentiating between the investors.[147] In *Parkerings-Compagniet*, the tribunal categorically upheld a State's right to exercise its sovereign power fairly and reasonably.[148]

[91]*In casu*, the decision of the Respondent to grant subsidies to a particular airline, extending help, is strictly up to its own discretion. This decision was reasonable and justified as per the reasons stated by the deputy Minister of Transportation.[149] The minister rightly pointed out that Bonooru's ownership in the Claimant altered its position in Mekar's market.[150] The Claimant and Larry Air, both having State-ownership,[151] enjoyed unique advantages allowing them to out-compete privately-owned firms. Consequently, the Respondent was not obliged to further provide a cushion to the Claimant by spending the taxpayers' money to their detriment.

[92]This accounts for a completely reasonable justification to exclude the two airlines from receiving subsidies and, thus, the said order was not discriminatory.

4. <u>The Respondent's measures do not constitute abusive treatment of the Claimant.</u>

[145] FDI Moot Proposition, at 37, ¶ 47..
[146] Lidercón, ¶ 169; Enron, ¶.282.
[147] Saluka, ¶ 460.
[148] *Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II,* United Nations Conference on Trade and Development (UNCTAD) 74.
[149] FDI Moot Proposition, at 37, ¶ 46.
[150] *Id.*
[151] *Id.,* at 29, ¶ 10.

[93]Article 9.9(2)(d) of CEPTA includes coercion and harassment as part of abusive treatment against the investors.[152] The assessment of this protection has no set criteria and depends on the facts of each case.[153] Thus, the meaning of the terms needs to be seen in their general context.[154]

[94]The Black's Law Dictionary defines 'coercion' as "*compulsion*;" and 'harassment' as-

> *"[w]ords, conduct or action…directed at a specific person, [that] annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose."*

[95]In the present case, the refusal of Hawthorne's offer to the Claimant by MAL for buying Caeli's shares does not constitute compulsion or harassment. The Claimant cannot claim forced sale of its shares in Caeli merely because MAL rejected *one* offer procured by it. Moreover, such rejection was made pursuant to MAL's 'Right of First Refusal Offer' under Article 39(1)(a) of the Shareholders' Agreement.[155] MAL further reserved the right to not buy shares for the same price contained in that offer as Hawthorne was not a *bonafide* third-party by virtue of its membership in Moon Alliance.[156] Due to the relationship of the parties, the Claimant secured an "artificially inflated offer" for its stake in Caeli which was not at arm's length.[157]

[96]Thus, MAL's refusal was within its contractual rights and does not constitute abusive treatment of the Claimant.

B. THE RESPONDENT'S MEASURES DID NOT BREACH THE FET PROVISION CUMULATIVELY.

[97]The Claimant has contended that even if the FET provision was not violated through the Respondent's individual acts, it was breached through the series of measures which, when considered together, became inconsistent due to their "cumulative effect."[158]

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[152] Article 9.9(2)(d) CEPTA.
[153] IMFA, ¶ 228; Lemire, ¶.284.
[154] Article 31(2), VCLT.
[155] Article 39(1), Shareholder's Agreement.
[156] *Id.*
[157] FDI Moot Proposition, at 39, ¶ 57.
[158] El Paso, ¶¶ 515, 519; Metalelad, ¶ 99.

[98] However, such "creeping violation" of the FET has been defined as a series of "systematic policy or practice" with the intent to cause damage.[159]

[99] *In casu*, a creeping violation of FET finds no basis in the CEPTA. Therefore, the tribunal does not have the power to introduce a new violation not envisaged by the CEPTA.

[100] Moreover, *assuming that such a violation exists*, the measures taken by the Respondent in the present case are neither systematic nor contain an intent to cause damage to the Claimant's investment and, thus, cannot amount to a creeping violation of the FET. Conversely, the Claimant suffered losses due to its own risky and unsound business decisions. The economic reforms in Mekar had started late in 1994[160] and the country had faced a financial crisis in 2008 prior to the Claimant's investment.[161] Despite being aware of the volatile economy of the country and the statement of CEPO Secretary-General clearly indicating a forthcoming rise in oil prices,[162] the Claimant continued to infuse its profits in expansion over routes were not profitable.[163]

[101] To conclude, the Respondent seeks to emphasise that no "creeping violation" of the FET obligations exists in the present case. *Arguendo*, the losses suffered by the Claimant during its investment cannot be attributed to the Respondent's measures and are strictly a consequence of the Claimant's own bad business decisions.

[102] Thus, Respondent's measures, individual or cumulative, have not violated its FET obligations under Article 9.9 of the CEPTA and it is not liable to pay any compensation to the Claimant.

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[159] ILC, Article 15, note 3.
[160] FDI Moot Proposition, at 29, ¶ 12.
[161] *Id.*, at 30, ¶ 17.
[162] *Id.*, at 33, fn 2.
[163] *Id.*, at 33, ¶ 33.

PHASE IV: QUANTUM

IV. IF THE RESPONDENT HAS VIOLATED ARTICLE 9.9, 'MARKET VALUE' IS THE APPROPRIATE COMPENSATION STANDARD.

[103] The Respondent submits that compensation, if any, must correspond to the "market value" standard contained in Article 9.21 of the CEPTA [**A**]. As the Respondent has already paid the market value of the Claimant's investment, no compensation is owed.[164] Further, any compensation awarded must be valued on the date of the last FET breach [**B**]. Lastly, the compensation amount must be reduced due to the presence of mitigating factors [**C**].

A. THE "MARKET VALUE" STANDARD AS CONTAINED IN ARTICLE 9.21 MUST BE APPLIED.

[104] The Claimant has argued that compensation should correspond to the "fair market value" standard as opposed to the "market value" standard explicitly provided for in the CEPTA.[165] *Per contra*, the Respondent argues that the tribunal must award compensation, if at all, in accordance with the "market value" standard expressly contemplated under the CEPTA [**1**]. The Claimant cannot rely on the MFN clause in the CEPTA [**2**] nor the principles of international law [**3**] permit deviation from express treaty provisions in favour of the fair market value standard.

1. FET violations must be compensated at "market value" as provided under Article 9.21.

[105] The maxim of *expression union est exclusion alterius* is a well-established principle of interpretation[166] pursuant to which the express mention of an item excludes others.[167] Specifically, arbitral tribunals have applied this maxim to interpret the exceptions to a treaty provision and have generally held that an item not specifically excluded is included in the

[164] PL Holdings, ¶ 446; Walter Bau, ¶ 14.28; National Grid, ¶ 290.
[165] Article 9.21 CEPTA.
[166] Tokios Tokelės, ¶ 30.
[167] National Grid, Decision on Jurisdiction, ¶ 82.

scope of a treaty provision.[168] Furthermore, Article 31 of the VCLT[169] and requires "ordinary meaning to be given to the terms of the treaty"[170].

[106] In the present case, Article 9.21 provides for "monetary damages at a *market value*, except as otherwise provided for in Article 9.12". Evidently, the latter provision provides for compensation at fair market value in cases of direct expropriation, which is beyond the jurisdiction of the tribunal pursuant to Procedural Order no. 3.[171] As a result, applying the maxim *expression union est exclusion alterius* as well as Article 31 of the VCLT, since FET breaches are not expressly included, compensation for FET breaches must correspond to the "market value" standard under the CEPTA.

2. The MFN clause cannot be invoked to derogate from the compensation standard provided under Article 9.21.

[107] The Claimant relies on the MFN clause to import "fair market value" standard from the Arrakis-Mekar BIT and substitute the "market value" standard stipulated in the CEPTA for compensation. However, an MFN clause can be invoked to treatment provided by subsequent treaties only.[172] Conversely, a treatment contained in an earlier treaty cannot be imported into a subsequently concluded treaty on the basis of the MFN clause. *In* casu, Article 9.7 under the CEPTA cannot be invoked to import the "fair market value" standard as the Arrakis-Mekar BIT predates the CEPTA by nearly eight years, having been concluded in 2006.[173]

[108] Even if the treatment from previously concluded treaties was allowed to be imported in such manner, the Claimant cannot claim equal treatment[174] for it does not satisfy the requirements stipulated under Article 9.7 of the CEPTA: the compensation standard in the CEPTA does not treat the Claimant less favourably [**i**]; the Claimant is not in "like situations" with other investors from Arrakis [**ii**]; and the Respondent has not maintained measures pursuant to the treatment sought to be substituted [**iii**].

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168 Philip Morris, Decision on Jurisdiction, ¶ 87; Daimler, ¶ 237.
169 Yukos, Interim Award on Jurisdiction, ¶¶ 184-85; Yukos, Dissenting Opinion of Professor Brigitte Stern, ¶ 14.
170 Article 31, VCLT.
171 FDI Moot Proposition, P.O. 3, at 86, ¶ 2.
172 Vladimir Berschader, ¶ 179.
173 FDI Moot Proposition, Arrakis-Mekar BIT, Article 14, at 84.
174 *Id.,* Article 13, at 84.

i) ***The compensation standard provided in the CEPTA does not treat the Claimant less favourably.***

[109] While the purpose of MFN clause is to ensure investors are treated at par with other investors,[175] MFN clause cannot be invoked to negate a treatment covered by the basic treaty in a different and specific way by importing a different standard of the treatment.[176] Therefore, the specific intent of the parties to a treaty with respect to a particular provision supersedes the general intent of the MFN provision.[177] For instance, *Austrian Airlines* tribunal rejected the application of MFN clause to override the clear and unambiguous treaty provisions which also indicated the specific intent of the parties to that treaty.[178]

[110] Moreover, arbitral tribunals have concluded that a treatment is less favourable if it does not offer any choice at all, in comparison to the provision which is sought to be imported.[179]

[111] Whereas "market value" and "fair market value" standards are merely different methods to calculate compensation,[180] in the present case, the CEPTA clearly envisions provision for monetary damages at the "market value" of the investment as does its Model BIT.[181] The Arrakis-Mekar BIT does not offer a treatment which is absent in the CEPTA. As such, it cannot be said that the "market value" standard treats the Claimant less favourably than the "fair market value" standard.

ii) ***The Respondent has not accorded treatment in "like situations" to other airline investors from Arrakis.***

[112] The second condition for invocation of the MFN clause under the CEPTA requires that the treatment accorded must be less favourable than "the treatment it accords in like situations, to investors of a third country".[182] Such comparison between an investor invoking MFN clause and another investor extends beyond territorial similarity of investment in the

[175] National Grid, Decision on Jurisdiction, ¶ 92.
[176] CME, Separate Opinion on the Issues at the Quantum phases, ¶ 11; ILC MFN Report, at 21, ¶ 115.
[177] Tza Yap, ¶ 220.
[178] Austrian Airlines, ¶ 137.
[179] Garanti Koza, ¶¶ 94-97.
[180] CC/Devas, ¶ 205.
[181] FDI Moot Proposition, P.O. 3, at 87, ¶ 15.
[182] Güriş, Partial Dissenting Opinion of Nassib G. Ziadé, ¶ 23.

host State.[183] In *İçkale* v. *Turkmenistan*, the tribunal held that for the purposes of MFN treatment, standards of protection included in other investment treaties are said to be more favourable when they "*create legal rights for the investors concerned*."[184]

[113] *In casu*, the Claimant and the airline investors from Arrakis are not in "like situations" as the Arrakis-Mekar BIT has not created any additional rights in terms of the compensation standard for the Arrakis investors over the investors from Bonooru. Although different compensation standards have been contemplated for the investors from both States, the provisions provide the same right to claim compensation in cases of violation of the treaty provisions. Further, the Arrakis investors awarded compensation at fair market value by the tribunal under the Arrakis-Mekar BIT do not necessarily belong to the same economic sector — airline industry. Therefore, the Claimant has not proved the existence of an airline investor who has been accorded treatment more favourably than the Claimant in "like situations."

iii) ***The Respondent has not maintained actual, more-favourable measures pursuant to substantive obligations.***

[114] Article 9.7(2) of the CEPTA limits the scope of application of MFN clause to import substantive obligations following which an investor has actually been treated more favourably by way of measures.[185] Measure, unless defined in the treaty, refers to "*any sort of act, step or proceeding taken by a State*."[186] It includes the conduct of *"domestic courts, domestic administrative bodies, and the national legislator."*[187] On the other hand, arbitral awards arise out of international arbitral tribunals constituted under international investment treaties and not under domestic laws of a State.[188] Consequently, arbitral awards do not constitute "measures" within the purview of Article 9.7.

[115] Therefore, arbitral awards rendered by the arbitral tribunals established under the Arrakis-Mekar BIT[189] do not constitute measures maintained or adopted by the Respondent.

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[183] Içkale, ¶ 329.
[184] *Id.*, ¶ 329.
[185] Dumberry (2017), at 16; Discrimination, Sabahi (2019), ¶¶ 17.64, 17.67.
[186] Fisheries Jurisdiction, at 460, ¶ 66.
[187] SCHILL (2009), at 79; Stepanov (2018), at 50, 51; *See* Chevron, at 17, ¶ 8.60; *See also* CME, ¶ 613.
[188] Jarvin (1987), at 140; Casey, (2017), ¶ 5.1.1.
[189] FDI Moot Proposition, P.O. 3, at 87, ¶ 15.

[116] *Ergo*, the claim for deviation from the "market value" standard provided in the CEPTA on the basis of the MFN clause must be held as invalid.

3. The principles of international law cannot be invoked to derogate from the compensation standard envisioned in Article 9.21.

[117] Under international jurisprudence, a special law prevails over a general law.[190] Accordingly, the treaty established and accepted by two States to govern their relations is a *lex specialis*[191] and must prevail over the general rules in regards to same subject matter.[192] Furthermore, when a specific compensation standard under a treaty provides "sufficient guidance for the valuation of claimant's investment", customary international law is not applicable.[193] This has been acknowledged in *ADC* v. *Hungary*, wherein the tribunal found that expressly mentioned compensation standards supersede the general rules of customary international law.[194]

[118] In the present case, Article 9.21 explicitly mentions standard of compensation as "market value" for all treaty breaches except expropriation. Hence, it provides sufficient guidance for the valuation of the Claimant's investment in cases of FET breaches. Therefore, "market value" must be the basis of compensation.

B. THE APPROPRIATE VALUATION DATE IS THE DATE CORRESPONDING TO THE CULMINATION OF BREACHES.

[119] "Market value" reflects the actual price paid by a seller to a buyer in the market[195] at a particular date which is the valuation date.[196] The valuation date in cases of breaches resulting from a series of actions is generally accepted as the date of the last action amounting to a breach.[197] Following this, the tribunal in *Crystallex* v. *Venezuela* chose the date corresponding to culmination of FET breaches as valuation date.[198]

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[190] ILC Fragmentation, at 4; Bluefin Tuna, ¶ 123.
[191] INA, ¶ 24.
[192] Right of Passage, at 44, ¶ 6.
[193] Sunlodges, ¶ 417.
[194] ADC, ¶ 481.
[195] *See* Marboe (2017), ¶ 1.
[196] Glossary, ¶ 30.1.
[197] Cystallex, ¶ 855; Watkins Holdings, ¶¶ 679-80; International Technical Products, at 240, 241; *see also* Valuation, Marboe (2017), ¶ 3.307.
[198] Crystallex, ¶ 855.

[120] In the present case, the series of the alleged FET violations culminated on October 8, 2020, i.e., the date on which the Claimant sold its shares in Caeli Airways Ltd. to MAL. Thus, the Claimant's investment must be valued as on this last date of alleged violation.

[121] Furthermore, the proceeds from sale of the Claimant's shares in Caeli Airways Ltd. to MAL must be deducted from the compensation amount to ensure that the Claimant does benefit from double recovery.[199] Therefore, the Respondent does not owe any compensation to the Claimant.

C. ANY COMPENSATION AWARDED MUST BE REDUCED IN LIGHT OF MITIGATING CIRCUMSTANCES.

[121] If the Tribunal finds that compensation is owed, the Respondent submits that the amount of compensation should be reduced due to the contributory fault of the Claimant towards the losses it suffered [**1**] and the extant economic crisis in Mekar [**2**].

1. <u>The amount of compensation owed must be reduced due to Claimant's contributory fault.</u>

[122] It is an accepted principle of international law[200] that treaty protections do not nullify all business risks associated with an investment.[201] As a result, the conduct of the investor is relevant for determination of compensation. In light of this, the Respondent asserts that not only did Claimant contribute to the losses incurred [**i**] but it also failed to take steps to mitigate them [**ii**].

*i) **The Claimant's actions resulted in the losses incurred.***

[123] Under international law, the contribution of the injured person or entity in relation to whom reparation is sought must be taken into account.[202] In fact, wherever such contribution has been material or significant,[203] tribunals have reduced the amount of

[199] Hamester, ¶ 95; National Grid, Award on Nov. 3, 2008, ¶290.
[200] Waste Management, ¶ 177.
[201] AMT, ¶ 7.15; Sabahi (2018), at 326-327.
[202] Article 39, ARSIWA; Yukos, ¶1633; Stati, ¶ 1331.
[203] Yukos, ¶ 1600.

compensation awarded to the injured party.[204] Illustratively, in *MTD* v. *Chile*, the tribunal applied the material or significant contribution test[205] and reduced compensation by 50 per cent[206] taking into account the losses arising from MTD's risky business decision.[207]

[124] In the present case, despite the advice given by the MAL, the Claimant continued to expand its operation by adding new routes and destinations despite the losses suffered.[208] The Claimant also took advantage of the plummeting oil prices in 2014 to push for lower cost of flights and operative costs[209] ignoring the observation of the CEPO Secretary-General that the oil prices would rise in the future.[210] Thus, the Claimant's poor business decisions in light of the increased business risks have materially and significantly contributed to the losses incurred by it.

ii) ***Claimant failed to mitigate its losses.***

[125] The duty of the injured investors to mitigate its losses is well established under general principles of arbitral case law,[211] and applicable even if not expressly mentioned in the treaty.[212] This duty requires the aggrieved party to either take steps to minimise the loss or abstain from taking actions which increase the loss.[213] As a result, this principle acts as a compensation-reducing factor once liability is established.[214] The *CME* v. *Czech Republic* tribunal took note of this principle and reduced the compensation owed to Claimants as they had breached their duty by increasing their exposure to risk after being aware of a treaty breach by the Czech Republic.[215]

[126] In the present case, the Claimant's prioritisation of the ill-advised expansion of operations,[216] engagement in anti-competitive practices,[217] and failure to take steps such as

[204] UAB, ¶¶ 1142-3; UAB, Decision on Annulment on Apr. 8, 2020, ¶ 167; Occidental, ¶ 687;
[205] MTD, Decision on Annulment, ¶ 101.
[206] MTD, Award on May 25, 2004, ¶ 178.
[207] MTD, ¶¶ 242-43.
[208] FDI Moot Proposition, at 32-34, ¶¶ 26, 29, 31, 33, 35.
[209] *Id.* at 34, ¶ 35; *Id.*, Aviation Analytics June 7, 2019 at 57.
[210] *Id.* at 34, ¶ 33, n.2.
[211] Goldman (1999), at 832, ¶ 1491.
[212] Middle East, ¶ 167.
[213] Komarov (2006).
[214] Ripinsky (2009), at 19; See also ARSIWA, art. 31, ¶ 11; Gabčíkovo-Nagymaros Project, at 55, ¶ 80.
[215] CME, ¶¶ 303, 376.
[216] FDI Moot Proposition, at 34, ¶ 35.
[217] FDI Moot Proposition, Aviation Analytics June 7, 2019 at 57.

appealing the air fare caps or to reduce losses resulted in breach of its duty to mitigate its losses.

2. <u>In light of the ongoing economic crisis in Mekar, the compensation must be reduced.</u>

[128] Various arbitral tribunals have held that compensation does not extend to punitive damages.[218] Accordingly, compensation must be assessed taking into account the actual economic condition[219] of the host State. For instance, the *AMT* tribunal took into account the ongoing economic crisis in Zaire and stated that while estimating damages, it must "*have regard to the realities of the situation*".[220]

[129] In the present case, any compensation should be reduced in light of the grave and ongoing economic crisis faced by the Respondent.

[130] *Ergo*, in light of the above-mentioned mitigating circumstances, the compensation, if at all, owed by the Respondent, must be appropriately reduced.

[218] Kardassopoulos, ¶ 513; HEP, ¶ 238.
[219] Paparinskis (2020), at 1250; Ethiopia's Damages Claims, ¶ 26; CMS, ¶¶ 353–356.
[220] AMT, ¶¶ 17.13, 17.15; Cube Infrastructure, ¶ 464.

PRAYER FOR RELIEF

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

(a) Find that the tribunal does not have the jurisdiction to hear the present dispute;

(b) Find that the *amicus* submissions of the CRPU are admissible in the present dispute;

(c) Reject the *amicus* submissions of the CBFI;

(d) Declare that the Respondent has not violated Article 9.9 of the CEPTA;

(e) Find that Respondent's liability is precluded by way of Article 9.8 of the CEPTA;

(f) Declare that compensation, if awarded, must be valued at the "market value" standard contained in Article 9.21 of the CEPTA, which amounts to 400 million USD;

(g) Find that the Respondent has already compensated the Claimant; and

(h) Reduce any compensation awarded in light of the Claimant's contributory fault and the dire economic situation in Mekar.

ON BEHALF OF THE RESPONDENT

TEAM COLLIARD