TEAM CURRIM

THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

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

VEMMA HOLDINGS INC.

(Claimant)

V.

THE FEDERAL REPUBLIC OF MEKAR

(Respondent)

MEMORIAL FOR RESPONDENT

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Arrakis-Mekar BIT	Arrakis-Mekar 2004 Bilateral Investment Treaty
BIT	Bilateral Investment Treaty
BoD	Board of Directors
Bonooru-Mekar BIT	Bonooru-Mekar 1994 Bilateral Investment Treaty
CAA	Civil Aviation Authority of Bonooru
CBFI	Consortium of Bonoori Foreign Investors
CCM	The Competition Commission of Mekar
CEPTA	Comprehensive Economic Partnership and

	Trade Agreement
CILS	Centre for Integrity in Legal Services
CRPU	Committee on Reform of Public Utilities
FET	Fair and Equitable Treatment
GDP	Gross Domestic Product
IMF	International Monetary Fund
ISDS	Investor-State Dispute Settlement
MoA	Memorandum of Association
MFN	Most Favoured Nation
MON	Currency used in Mekar
MRTP Act	Monopoly and Restrictive Trade Practice Act
NGO	Non-Governmental Organization
SOE	State-Owned Enterprise
SCC	Sinnoh Chamber of Commerce

STATEMENT OF FACTS

Dramatis Personae

1. Vemma Holdings Inc. (**"Claimant"**) is an airline holding company incorporated in the Commonwealth of Bonooru (**"Bonooru"**), with ownership of leading global airlines, and party to the Moon Alliance with five other major airlines around the world.

2. The Federal Republic of Mekar (**"Respondent"**) is a sovereign state which bore the brunt of prolonged political instability, affecting its economic growth and national stability.

The Establishment of Vemma Holdings

3. Bonooru and its airline industry has been regulated by the CAA of Bonooru, where BA Holdings and its subsidiary Bonooru Air act as Bonooru's national airline and hold a monopoly over the civil aviation market.

4. However, after suffering losses due to oil shocks in 1973 and 1979, Bonooru created a scheme to privatize BA Holdings, with the CAA planning to sell up to 70% of the nation's stake in it.

5. BA Holdings was then split into three airlines, one of them being Royal Narnian as the intended flag carrier of Bonooru to operate under Claimant as the successor of BA Holdings, which hitherto maintained 100% ownership of Royal Narnian. Subsequently, the Bonoori government holds a significant 31-38% stake within Claimant.

The Creation of the Investment

6. Until 2003, Mekar's civil aviation industry consisted only of two state-owned entities in the form of Aer Caeli and Caeli Airways until they merged into one Caeli Airways (**"Caeli"**). However, budgetary constraints of the Mekari government inhibited the growth and management of Caeli, which with the addition of the 2008 financial crisis pushed the Mekari government to create a privatisation scheme for Caeli.

7. Mekar Airservices Ltd., a state-owned and controlled entity in charge of Caeli's privatisation, marketed Caeli for investment. On 5 January 2011, Claimant won the tender as the highest bidder with a tender valued at 800 million USD and Claimant's acquisition of an 85% stake in Caeli, with the remaining 15% held by Mekar Airservices, as well as the airline participation as a member of Moon Alliance were approved by CCM.

8. Claimant also inherited existing discounts on airport services and landing and navigation fees enjoyed by Caeli at Phenac International Airport, along with twelve A340 aircrafts as part of its acquisition.

Events Leading up to the Dispute

9. During its investment, Claimant turned Caeli into a profitable airline by expanding its routes and offering airfare below its competitors. Numerous Mekari Airservices representatives had advised Claimant to inject those profits into outstanding debt and improve financial health, but instead, Claimant preferred to expand its fleet and maintain its ill-strategised business strategy.

10. In September 2016, CCM investigated Caeli for various anti-competitive practices (**"The First Investigation"**). The CCM then launched another investigation (**"The Second Investigation"**) into Caeli in December 2016, focusing specifically on price undercutting on certain routes to and from Phenac International by the complaint of a consortium of small regional airlines in Greater Narnia. Consequently, CCM imposed airfare caps as an interim measure to prevent Caeli from earning supra-competitive profits.

11. In late 2016, the value of Mekari MON began to fall. By March 2017, a currency crisis and inflation happened in Mekar, which reduced consumer spending and affected many sectors of the Mekari economy. Therefore, to help counter the damage of the crisis towards its economy, Mekar passed a decree requiring all companies operating in the country to operate exclusively in MON.

12. The CCM had adjusted Claimant's airfare cap according to Mekar's inflation rate to not burden Claimant's airfare in the current crisis. However, Claimant was unsatisfied and sought a more beneficial inflation rate from the central bank. When their request was denied by the central bank, Claimant brought the case to Mekar's High Court with the purpose of revoking the airfare cap.

13. Despite the on-going economic crisis, Respondent tried its best to accelerate Claimant's submission in the Mekari Court. Ever since 1980, Mekari Courts had always prioritized criminal cases, resulting in an average time of 27 months for the court to render a judgement over a commercial case. However, it only took Respondent 15 months to resolve Claimant's case, 12 months shorter than the average time that the Mekari Court usually took.

14. After CCM concluded the investigations, Caeli was found to have committed predatory pricing strategies and abused its dominant position. Due to the severity of Caeli's anti-competitive behaviour, CCM decided to impose proportional sanction in the form of fines amounting to USD 350 million and to keep the airline caps in place.

15. In September 2018, the President of Mekar passed Executive Order 9-2018 granting subsidies and offering loans to several airlines operating in Mekar. However, Caeli's application for this financial assistance was denied as it was already receiving unique advantages as an SOE.

16. Although Claimant could still survive and improve the condition of their investment, Claimant gave up and expressed the offer from Hawthorne Group LLP to buy the entirety of Claimant's stakes. Upon hearing the offer, Mekar Airservices was convinced that the offer made was invalid due to Hawthrone's affiliation with Claimant. As both parties failed to reach an agreement, Mekar Airservices filed a request for arbitration with the SCC Arbitration Institute.

17. The sole arbitrator of the dispute, Mr. Rett Eichel Cavanaugh, rendered an award in favour of Mekar Airservices on 9 May 2020. Following that, a report was released from CILS alleging that Mr. Cavanaugh had received bribes from representatives of Mekar Airservices to render a favourable decision, leaking an uncredible audio-recording of both parties' conversation. Consequently, the Supreme Arbitrazh Court of Sinnograd set-aside the award on the grounds that the award was tainted with corruption. However, due to insufficient evidence to prove corruption, the Mekari Court still enforced the award and Vemma's subsequent appeal was dismissed.

18. After Claimant failed to yield another buyer, Respondent offered to buy Claimant's stake in Caeli on 8 October 2020 for 400 million USD which Claimant willingly accepted. However, on 15 November 2020, Claimant, unsatisfied with the turn of events, filed a notice of arbitration against Mekar.

19. The aftermath of Claimant's investment resulted in Bonooru implementing a bail-in program in order to save Claimant. Through the program, Bonooru increased its shareholding to 55% and Claimant underwent large-scale structuring. Consequently, the Bonoori government holds an even bigger control in Claimant's company.

SUMMARY OF ARGUMENTS

PROCEDURAL ISSUE: JURISDICTION

The Tribunal presently does not have jurisdiction over the dispute as Claimant is not a qualified investor due to not being 'a national of a Contracting State' under Article 25(1) of ICSID Convention, rendering this arbitration a State-to-State arbitration. This is due to Claimant acting as an agent of the government and discharging essentially governmental functions in providing aviation services. However, in the event this Tribunal finds Claimant to be a qualified investor, Claimant has certainly lost its standing in the current proceeding since March 2021.

PROCEDURAL ISSUE: AMICUS SUBMISSION

The Tribunal should allow the *amicus* submission by the External Advisors to the CRPU as the submission will be of huge help to assist the Tribunal in deciding matters that are currently being disputed. The External Advisors to the CRPU had fulfilled all requirements set out under Article 41(3) of ICSID AFR. Firstly, the submission is within the scope of the dispute. Secondly, the has proven its significant interest in the proceeding. Thirdly, the submission will not disrupt the proceeding, unduly burden, or unfairly prejudice to any parties. On the contrary, the Tribunal should not allow the *amicus* submission by the CBFI as it does not fulfill the standards set out in Article 41(3) of ICSID AFR. Firstly, CBFI's submission fails to contribute to a new perspective. Secondly, CBFI does not have a significant interest in filing their submission. Thirdly, CBFI lacked independence as an *amici*. Fourthly, accepting CBFI's submission before this Tribunal would only disrupt the proceeding, unduly burden the parties, and unfairly prejudiced against Claimant.

MERITS: FET

The Tribunal should find that Respondent's measures cannot be assessed aggregately and must be seen individually, and when seen individually does not breach fair and equitable treatment. Firstly, Respondent's measures were not arbitrary since the investigation was rationally and proportionally connected to a public purpose and followed international practices, the sanctions were proportional even during the financial crisis, and the enforcement of the SCC award was done according to the relevant legal standard. Secondly, Respondent has not denied Claimant justice as Claimant was not subjected to undue delay. Thirdly, Respondent's decision to not bestow Claimant subsidies under Executive Order 9-2018 was not discriminatory as it was

treated similarly with its identical comparator and in the alternative, Respondent had reasonable justification.

MERITS: COMPENSATION

The Tribunal should find that Respondent owes Claimant no compensation as the 'market value' standard remains the applicable compensation standard according to Article 9.21 of CEPTA due to several reasons. Firstly, the MFN clause under Article 9.7 of CEPTA cannot be used to import compensation standards from another BIT. Secondly, the compensation standard under principles of international law is inapplicable as CEPTA is not silent regarding the applicable compensation standard for FET breaches. Thirdly, Respondent owes no compensation for Claimant as it had paid the 'market value' of Claimant's investment when it acquired Claimant's shares in Caeli. Alternatively, if the tribunal finds that the applicable standard is at 'fair market value', the compensation shall be reduced due to Respondent's current occurring economic crisis and Claimant's contributory fault.

ARGUMENTS

PROCEDURAL ISSUES

SUBMISSION I: THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THIS DISPUTE UNDER ARTICLE 9.17 OF CEPTA AND THE ICSID CONVENTION

[1] Article 9.17 of CEPTA stipulates the consent of Bonooru and Mekar to arbitrate under the ICSID Convention. For this Tribunal to have jurisdiction, the submission of a claim should fulfill the standards in Article 25 of ICSID Convention and the ICSID AFR.

[2] However, Respondent submits that the requirements of a claim under Article 9.17 of CEPTA has not been fulfilled, as (A) Claimant is not 'a national of a Contracting State' under Article 25 of ICSID Convention; and (B) in any event, Claimant had lost its standing since March 2021.

A. CLAIMANT IS NOT 'A NATIONAL OF A CONTRACTING STATE' UNDER ARTICLE 25 OF ICSID CONVENTION

[3] Article 25 of ICSID Convention stipulates that an ICSID tribunal has jurisdiction to resolve disputes arising directly from an investment that happened between a Contracting State and 'a national of a Contracting State', however it does not cover dispute resolution between states.

[4] Claimant is an enterprise that is closely tied with its home state, Bonooru. A lot of its actions also reflect the interests of the Bonoori government. Respondent consequently submits that Claimant would not qualify as 'a national of a Contracting State' rather their actions are attributed to the State. Thus, this constitutes a State to State arbitration.

[5] To determine whether an enterprise qualifies as 'a national of a Contracting State', past practices have used the Broches Test.[1] Under this test, Claimant would not qualify as 'a national of a Contracting State' since it (1) acted as an agent for the Bonoori government; or (2) was discharging an essentially governmental function.[2]

[1] Schreuer, p. 161; *CSOB*, ¶17; *BUCG*, ¶33.
[2] Schreuer, p. 161; Feldman, p. 5.

1. Claimant was acting as agent for the government

[6] Previous tribunals noted that for an entity to be an agent of the government, it must be functionally used to pursue the interests of the State.[3] This happens through the use of the State's corporate control over the entity.[4] As economic entities currently conduct both commercial and governmental roles to achieve the State's policy objectives, past practices found that the State may be responsible for its interference over the entity's action.[5]

[7] In the present case, Claimant's actions in investing and operating Caeli were in the interest of Bonooru. This was done through two means, namely Bonooru's significant shareholding within Claimant and Bonooru's Ministry of Transport and Tourism representative in Claimant's BoD.

[8] Claimant's conduct served the function of Bonooru's interest. This can be seen through the express statement given by the Prime Minister of Bonooru prior to Claimant's privatisation. He ensured that Bonooru would direct Claimant to operate for the public regardless of profitability, and that Claimant was created to improve aviation services for Bonooru citizens.[6]

[9] Sabrina Blue, Bonooru's Secretary of Transport and Tourism, had also stated that Claimant was given subsidies due to its investment in Mekar that benefits Bonooru's development and connectivity.[7] It was apparent that they were pursuing Bonooru's interest specifically in development, as they flew routes which cost them losses subsequent with the subsidies they received from Bonooru.[8]

[10] Moreover, Bonooru exercised corporate control by reserving specific strategic positions in Claimant and through its significant shareholding within Claimant. This is evident by Bonooru's right to directly nominate a Non-Executive Director in Vemma's decision-making body as the Ministry of Transport and Tourism representative.[9]

[11] A Non-Executive Director's role is supervisory in nature, where they can influence Claimant's action to synchronize with the interests of Bonooru, including in making sure it

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[3] *BUCG,* ¶¶39-40; *CSOB*, ¶19; *Flughafen*, ¶284.
[4] *CSOB,* ¶20.
[5] Jaemin, p. 15.
[6] Uncontested Facts, ¶8.
[7] Uncontested Facts, ¶28.
[8] Uncontested Facts, ¶30; Annex VII, p. 55.
[9] *RFCC,* ¶36.

abides by the directions pre-determined within Claimant's articles of association, to fulfill the Bonooru constitution's provision on mobility rights.[10]

[12] Moreover, the fact that Bonooru's representatives were always present in every meeting and at times held a majority vote,[11] shows that they are in prime position to align Claimant's actions with their interest, which includes investing and operating Caeli.

[13] As Claimant was acting on behalf of the Bonoori government, they are an agent of Bonooru. Consequently, it should not qualify as 'a national of a Contracting State' under ICSID Convention.

2. Claimant was discharging an essentially governmental function

[14] The second element of the Broches Test was noted to resemble Article 5 of ARSIWA.[12] Within the article, an entity is discharging an essentially governmental function if the entity in question is empowered by the law of that State to exercise elements of governmental authority in the particular instance.[13]

[15] In the present case, Claimant is a Bonoori airline holding company that provides aviation services through Royal Narnian, Bonooru's flag carrier.[14] Additionally, in 2011, Claimant also began its investment and operation in Caeli, a Mekari airline that was recently privatised.[15] In managing its business operations, both conducts are closely tied with each other.[16]

[16] Therefore, Respondent submits that Claimant was discharging an essentially governmental function, particularly in providing aviation services as well as investing and operating Caeli, because (a) Claimant's conduct was empowered by the law of Bonooru; and (b) Claimant was exercising elements of Bonooru's governmental authority.

a. Claimant's conduct was empowered by the law of Bonooru

[17] In *EDF,* an entity is considered as empowered when it is authorised by the government to exercise specified functions that are normally exercised by state organs.[17] Furthermore, in *AMF,* the tribunal established that Constitutional Court decisions can be used to prove

[10] Molano-León, p. 570; OECD (2018), pp. 67-69; Annex IV, l.1510, 1520.
[11] Procedural Order 3, ¶3.
[12] *BUCG,* ¶34; Feldman, p. 33; Blyschak, p. 35; Cortesi, p. 113.
[13] *Ibid.*
[14] Uncontested Facts, ¶¶9-10.
[15] Uncontested Facts, ¶26.
[16] Uncontested Facts, ¶¶27, 65.
[17] *EDF,* ¶193.

empowerment by the law of the State, as the entity was delegated to exercise public duties, thus rendering it the action of the State.[18]

[18] Presently, Claimant's conduct, particularly in providing aviation services, was empowered through Bonooru's Constitutional Court's decision.[19] Through the decision, the Bonoori government bestowed a public duty to Claimant to serve routes regardless of its profitability.[20] The public duty was particularly given to Claimant which continues even after its privatisation.[21] Therefore, Claimant's conduct was empowered by the law of Bonooru.

b. Claimant was exercising elements of Bonooru's governmental authority

[19] A conduct must be governmental in nature to be deemed as an act of the State.[22] In *EDF*, an entity is exercising governmental authority if it carries out functions of a public character which are normally exercised by state organs.[23] Accordingly, these functions have to be interpreted with regards to the history and traditions of a particular society.[24] Additionally, entities can still retain public functions under Article 5 of ARSIWA even in situations where former state entities have been privatised to serve commercially.[25]

[20] Presently, Claimant was exercising elements of Bonooru's governmental authority through its conducts in (i) providing aviation services; and (ii) investing and operating Caeli.

i. Claimant's conduct of providing aviation services was an exercise of governmental authority

[21] Claimant is created as a result of BA Holdings' privatisation to enhance profitability in providing aviation services.[26] As an archipelagic state, Bonooru bestowed a positive obligation to BA Holdings to ensure protection for its citizens' rights of mobility.[27] Following BA Holdings' privatisation, Claimant as its successor became the only private aviation company that retained the public duty, setting it apart from other private aviation companies in Bonooru.[28] Therefore, in regards to the history and tradition of Bonooru, Claimant was

[18] *AMF,* ¶547.
[19] Annex III.
[20] Annex III, l.1493-1495.
[21] Annex III, l.1490-1497; Uncontested Facts, ¶8.
[22] *Bayindir*, ¶122; *CSOB*, ¶20.
[23] *EDF*, ¶169.
[24] ARSIWA Commentary, p. 43, Article 5 ¶6.
[25] ARSIWA Commentary, p. 43, Article 5 ¶1; *Elliot,* ¶286.
[26] Uncontested Facts, ¶7.
[27] Annex I.
[28] Annex III; Uncontested Facts, ¶9.

exercising Bonooru's governmental authority as it continued to operate under State influence.

[22] For example, after Kenya Airways' privatisation, the Kenyan government retained a 23% minority stake and the airline is kept as the flag carrier that retains its public function.[29] Similarly, the Bonoori government also reserved influential stakes in Claimant's company after the privatisation.[30]

[23] Additionally, the Bonoori government provided recurring subsidies for its operation to remote communities regardless of its profitability.[31] This is in line with Claimant's MoA which disclosed its interest to serve routes for the public benefit in accordance with Bonooru's Constitution.[32]

[24] Moreover, a former Bonoori government official has revealed that corporations in Bonooru, especially Royal Narnian, are not independent from the government and receive a lot of State aid, which prompted the airline's major success.[33] Conclusively, Claimant was not exclusively commercial. Instead, it retained public functions to serve Bonooru's population.

ii. Claimant's investment and operation in Caeli was an exercise of governmental authority

[25] Claimant's investment and operation in Caeli was also governmental in nature, as shown by the Horizon 2020 subsidies and the Bonoori government's involvement.

[26] First, Claimant's investment has enhanced the mobility rights of Bonoori citizens within the Greater Narnian region and Bonooru's aviation and tourism industry. This is affirmed by the Secretary of Transport and Tourism's statement regarding the recurring subsidies that Claimant received under the Horizon 2020 scheme.[34] This demonstrates that Bonooru is exercising its authority for the nation's benefit through Claimant's conduct. Such benefits include an increase in GDP and bigger control in the Greater Narnian Region.[35]

[27] Bonooru heavily relies on its aviation industry. As of 2019, the industry has contributed nearly 13% to Bonooru's GDP and accounted for 11.6% of its total employment.[36] Presently,

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[29] IFC, pp. 1-2.
[30] Uncontested Facts, ¶10.
[31] Uncontested Facts, ¶8.
[32] Annex IV, l. 1591-1521.
[33] Annex VII, l. 1860-1863.
[34] Uncontested Facts, ¶28; Procedural Order No. 4, ¶6.
[35] Uncontested Facts, ¶¶4, 28; Annex VII; Abbas, pp. 35-39; Blomstrom, pp. 1-45; Dietzsch, p. 18.
[36] Uncontested Facts, ¶6.

Bonooru utilised Claimant's investment in Mekar to support its developmental scheme, the Caspian Project. In particular, the subsidies were expected to help Bonooru boost its tourism industry and connectivity, consequently achieving their national goals.[37]

[28] Second, the Bonoori government was heavily involved in Claimant's investment and operation in Caeli. In January 2019, when Caeli was found to be conducting anti-competitive behavior, Bonooru immediately withdrew the funds promised as a part of the Caspian Project to upgrade Mekar's infrastructure.[38] Consequently, Bonoori government officials had used the funds as a leverage to make sure that Claimant is treated favourably in Mekar.[39] If Claimant was indeed a private entity whose actions are not attributable to Bonooru, the Bonoori government officials would not have gone to such lengths to ensure favourable treatment for Claimant.

[29] Therefore, Claimant was exercising elements of governmental authority by performing their conducts in the aviation industry.

B. IN ANY EVENT, CLAIMANT HAD LOST ITS STANDING SINCE MARCH 2021

[30] In the event that the Tribunal found that Claimant is 'a national of a Contracting State' under Article 25 of ICSID Convention, they have certainly lost this status since March 2021.

[31] In March 2021, Claimant was put under the direct and effective control of Bonooru through Bonooru's bail-in program.[40] This effectively ends any legal standing that Claimant might have had before this Tribunal, as (1) Claimant failed to maintain its 'national of a Contracting State' status according to the continuous nationality rule; (2) Alternatively, Bonooru has abused ICSID's procedure to gain jurisdiction through Claimant.

1. Claimant failed to maintain its 'national of a Contracting State' status according to the continuous nationality rule

[32] In the present dispute, CEPTA is silent on the change of national status during arbitration. Instead, through Article 1.3(2) of CEPTA, the parties have left this issue up for the Tribunal's interpretation through the rules of international law.

[33] The tribunal in *Loewen* considered a case where the claimant's nationality was affected by its

[37] Uncontested Facts, ¶28.
[38] Procedural Order No. 4, ¶1.
[39] Annex IX, l. 1952; Response to the Notice of Arbitration, ¶18.
[40] Uncontested Facts, ¶65.

restructuring.[41] There, it was noted that the default rule in international law is that an investor should maintain their national status even during the process of arbitration.[42]

[34] Presently, Claimant was put under the direct and effective control of Bonooru, which can be seen by the increased percentage of shares owned by the Bonoori government, the positioning of government officials in their BoD, and expanded functions in military activities in March 2021.[43] It is also worth to note that Claimant is assisted by Bonooru's justice department in this arbitration.[44] Such facts show that the criteria in Broches Test were fulfilled, and the Claimant is not considered as a 'national of the Contracting State' anymore under Article 25 of ICSID Convention.

[35] As this change happened during the arbitration process, Claimant does not have a continuous nationality and it is therefore barred from standing in this Tribunal.

2. Alternatively, Claimant's restructuring is an abuse of process to gain ICSID jurisdiction

[36] Abuse of process is conduct that causes significant prejudice to the party against whom it is aimed and can undermine the fair and orderly resolution of disputes by international arbitration.[45] There is a broad range of conducts that would fall into this category, which includes opportunistic corporate restructuring to gain ICSID jurisdiction. When such conducts occur, tribunals have lifted the corporate veil and denied jurisdiction to the case.[46]

[37] Under normal circumstances, Bonooru would not have been given standing before this Tribunal. However, Bonooru is currently attempting to use Claimant as a front to deceitfully obtain jurisdiction. Such facts show that Claimant has been involved in abuse of process to allow an opportunistic pursuit of claims by Bonooru. Therefore, the Tribunal should deny its jurisdiction over this dispute.

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[41] *Loewen*, ¶225.
[42] *Loewen*, ¶226.
[43] Uncontested Facts, ¶65.
[44] *Ibid.*
[45] Gaillard, p. 2.
[46] *Tokios Tokeles,* ¶56; *Saluka*, ¶230.

SUBMISSION II: THE TRIBUNAL SHOULD GRANT THE LEAVE RESPONDENT SOUGHT FOR THE *AMICUS* SUBMISSIONS

[38] Article 41(3) of ICSID AFR and Article 9.19(3) of CEPTA set requirements for an *amicus* submission to be accepted. Claimant submits that, (A) the *amicus* submission by the External Advisors to the CRPU should be allowed; and (B) CBFI's *amicus* submission should be barred.

A. THE *AMICUS* SUBMISSION BY THE EXTERNAL ADVISORS TO THE CRPU SHOULD BE ALLOWED

1. The *amicus* submission is within the scope of the dispute

[39] Respondent submits that the *amicus* submission is within the scope of the dispute, contrary to Claimant's allegation that it does not. Presently, the *Amici* raised a jurisdictional question similar to Respondent's contention in the Response to the Notice of Arbitration, stating that the tribunal does not have jurisdiction over the current case.[47]

[40] In *UPS,* an *amicus* submission is used to assist the tribunal in understanding the issues in the dispute.[48] Additionally, in *Suez,* the submission has to encapsulate either law, facts, or the application of facts to the law.[49]

[41] Furthermore, in *Infinito Gold*, the *amicus* submission was within the scope of the dispute even with the differences of reasoning being used by the *amici* and the parties to the proceeding.[50] In this case, respondent submitted that the tribunal has no jurisdiction according to the BIT, as the dispute had been settled in domestic court. However, although the *amici* based their reasoning on the illegal nature of claimant's concession, the tribunal declared that the difference in reasoning was an extension of the respondent's jurisdictional contest. Thereby, a matter within the scope of the dispute.[51]

[42] Presently, the *Amici* is raising a question on the tribunal's jurisdiction, much like what Respondent has done. Whilst with a different reasoning than those of Respondent's, the submission still falls within the scope of the dispute as much like in *Infinito Gold*, the new reasoning brought by *Amici* is merely an expansion of Respondent's jurisdictional contest.

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[47] Response to Notice of Arbitration, ¶¶2-6.
[48] *UPS-Amici,* ¶60.
[49] *Suez,* ¶20.
[50] *Infinito Gold-Procedural Order,* ¶128.
[51] *Infinito Gold-Procedural Order,* ¶12.

2. The External Advisors to the CRPU has significant interest in the proceeding

[43] Under Article 41(3) of ICSID AFR and Article 9.19 of CEPTA, an *amicus* submission must only be made by those which have a significant interest in the proceeding. Moreover significant interest is fulfilled when the submission contains elements of public interest.[52]

[44] Although the public interest requirement is silent in both ICSID Convention and ICSID AFR, tribunals which have accepted *amicus* submissions never fail to mention the public nature of the disputes as arbitral awards in ISDS may have a significant impact on the welfare of the citizens within host States.[53] Tribunals have also noted the importance of public interest in an *amicus* submission, especially when it is made by members of civil society.[54]

[45] Accounting for this, the *Amici*'s interest in the dispute lies in the alleged existence of failure of fair business practice.[55] Fair business practice in this case would constitute how the Mekari government conducts and facilitates commercial activities of businesses, hence influencing *Amici* through their role as experts in investment banking.

[46] Furthermore, a failure of fair business practice can take its roots in other wider public issues, such as corruption.[56] Corruption itself is considered to be a violation of transnational public policy.[57]

[47] Hence, the *Amici* has submitted their submission in regards to public interest and thus fulfill the requirement of significant interest in the proceeding.

3. The submission of the External Advisors to the CRPU does not unfairly prejudice or burden either party

[48] Article 41(3) of ICSID AFR obliges for an *amicus* submission to not unduly burden, unfairly prejudice either party, or disrupt the proceeding. In *Apotex*, for a submission to not be unduly burdensome, prejudicial, or disruptive, it has to fulfill the set requirements for *amicus* submission acceptance.[58]

[49] Presently, the *amicus* submission has fulfilled all the required elements in Article 41(3) of

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[52] *Biwater Gauff,* ¶22.
[53] Ishikawa, pp. 373-394; De Brabandere, pp. 294-295.
[54] *Gabriel Resources*, ¶55; *Methanex-Amici,* ¶49; *Suez,* ¶18.
[55] CRPU *Amicus* Submission, l. 640-655.
[56] Jimenez; Murphy, pp. 385-390.
[57] *World Duty Free,* ¶157.
[58] *Apotex*, ¶42.

ICSID AFR as they discuss a matter within the scope, has a significant interest, and as *Amici* are independent members of society with no ties to either parties to the dispute, they also hold no bias or prejudice. Hence, they have fulfilled the terms to not be unduly burdensome, prejudicial, or disruptive.

B. CBFI'S *AMICUS* SUBMISSION SHOULD BE BARRED

[50] Contrary to the External Advisors to the CRPU's submission, Respondent submits that CBFI's *amicus* submission should be barred, as the *Amici* fails to abide by the requirements stated in both Article 41(3) of ICSID AFR and Article 9.19(3) of CEPTA, due to four alternative reasons: (1) the submission fails to contribute a new perspective, (2) CBFI does not have a significant interest, (3) CBFI lacks independence, and (4) the acceptance of the submission will only disrupt the proceeding, unduly burden, and unfairly prejudice Respondent.

1. CBFI's submission fails to contribute a new perspective

[51] Respondent submits that the *Amici* has failed to offer a new perspective that is different from the disputing parties. In *Philip Morris,* for a submission to be considered as a new perspective, it should (i) provide evidence of relevant factual and legal issues, and (ii) the knowledge, perspective and insight are distinct from the disputing parties.[59]

[52] *Firstly*, the *Amici* failed to provide evidence of relevant factual and legal issues. Previous tribunals have noted that the evidence and new perspective introduced should not otherwise be available if not for the *amici's* submission, in order to establish its ability to assist matters within the dispute.[60]

[53] In the present case, the *amicus* submission solely discusses Claimant's status as a private entity in Bonooru which is the current jurisdictional contest that the Tribunal had been aware of. Respondent is contesting Claimant's jurisdiction as it is claiming itself to be a qualified 'national of a Contracting State' under Article 25 of ICSID Convention.[61] Similarly, the *Amici* had also exhibited various facts to substantiate Claimant's standing as a private entity, affirming the notion that Claimant qualifies as a 'national of a Contracting State'. Therefore, the Tribunal has already been made aware of the *Amici*'s perspective regardless of the refusal

[59] *Philip Morris-Procedural Order,* ¶7.
[60] *UPS-Amici,* ¶46; *Philip Morris-Procedural Order*, ¶24; *Alicia Grace*, ¶50.
[61] Response to the Notice of Arbitration, ¶¶2-6.

of the *amicus* submission.

[54] Furthermore, in circumstances where the Tribunal is in need of further information, the Tribunal can turn to Claimant to provide the information needed instead of granting the *amicus* submission that has the same exact perspective as Claimant.

[55] *Secondly*, the *Amici* does not provide knowledge, perspective, and insight that are distinct from the disputing parties.[62] In *Eco Oro*, to fulfil this requirement, the *amici* must explain the distinct nature of their perspective.[63]

[56] Presently, Respondent submits that the *Amici* had failed to demonstrate before the Tribunal their ability in providing a particular perspective different from the disputing parties.[64] It is unlikely that the *Amici* would be able to explain the nature of their perspective seeing that the *Amici* and Claimant hold the same perspective, considering Claimant is a member of the *Amici* as an association.[65]

[57] Consequently, the *Amici* does not fulfil the standard set in Article 41(3)(a) of ICSID AFR due to its failure to demonstrate a new perspective that would be of assistance to the Tribunal.

2. CBFI does not have significant interest in the proceeding

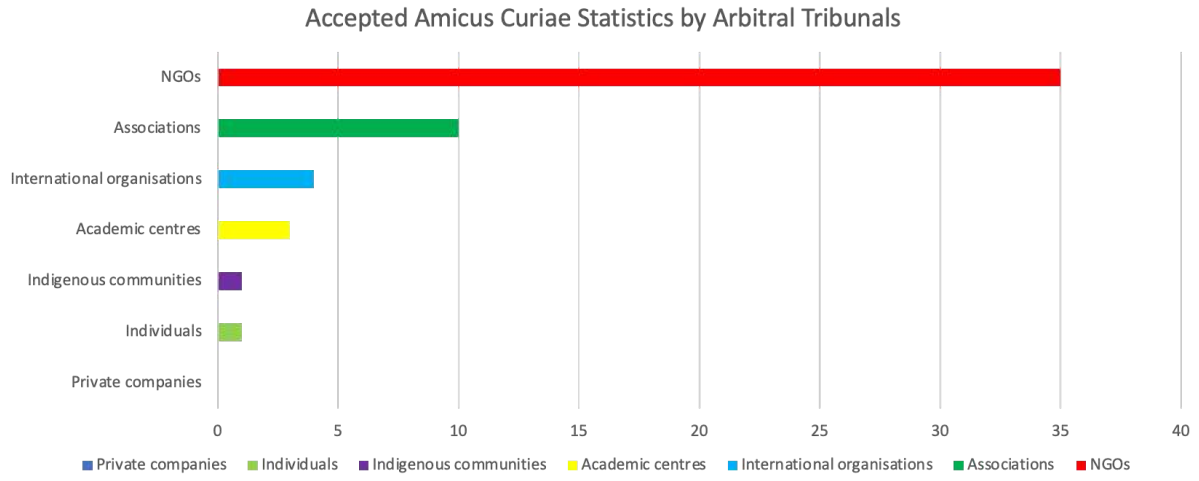
[58] As previously stated, the fulfilment of the public interest in its submission is necessary for the *Amici* to be deemed to have a significant interest in the proceeding.[66] Therefore, Respondent submits that the *Amici* does not have a significant interest in the proceeding because it does not file its submission in regards to public interest.

[59] In *Suez,* a matter qualifies as a public interest if (i) it is a collective interest of a society, or (ii) it implicates the common interest of mankind.[67] Presently, Respondent submits the *Amici* had failed to fulfill both requirements.

[60] The *Amici*'s interest solely lies in having the Tribunal adopt a favourable interpretation of CEPTA provisions for their current and future agreements in Mekar.[68] That interest alone is not the collective interest of a society, as not everyone is a Bonoori foreign investor.

[62] *Biwater Gauff,* ¶20; *Piero,* ¶5.17; *UPS-Amici*, ¶46.
[63] *Eco Oro,* ¶32.
[64] Mekar's Application to Bar the Amicus Submission by the CBFI, l. 780-781.
[65] Amicus Submission by the CBFI, ¶7.
[66] See Procedural, Issue II, ¶¶43-44.
[67] *Suez,* ¶18; Schliemann, p. 373.
[68] Amicus Submission by the CBFI, ¶9.

Therefore, *Amici*'s interest is insignificant and cannot be considered as a public interest.



[data collected as of 20th September 2021]

[61] *Secondly*, the common interest of mankind usually revolves around environmental or human rights interest.[69] Based on the chart shown above, out of 84 *amicus* submissions filed, 54 submissions had been accepted, one partially accepted, and 29 were rejected by the arbitral tribunals. Out of the 54 that were accepted, 35 from NGOs, 10 came from associations, 4 from international organisations, 3 from academic centres, 1 from indigenous communities, and 1 from individuals. Meanwhile, so far, no *amicus* submissions from private companies have been accepted. Therefore, arbitral tribunals tend to only admit application from *amici* whose interests encapsulates the betterment of human rights or the environment.

[62] Contrarily, the interest that the *Amici* holds is neither of these categories, as it is a particular and professional interest thus failing to fulfill the public interest standard.

3. CBFI lacks independence

[63] To fulfill the requirements under Article 41(3) of ICSID AFR, an *amici* is required to be independent from the disputing parties.[70] Presently, Respondent submits that various facts surrounding the *amicus* submission had shown that the *Amici* lacks independence from Claimant.

[64] To be deemed independent, an *amici* must not have a relationship with the parties which might give rise to a conflict of interest.[71] Moreover, it is also necessary for the *amici* to

[69] Schliemann, p. 373.
[70] *Border Timbers,* ¶49.
[71] *Piero,* ¶5.12.

disclose the nature of their professional relationships with the disputing parties.[72]

[65] CBFI, the *Amici*, is an association that represents Bonoori foreign investors.[73] One of its members, Lapras Legal Capital, is an advisor to Claimant on funding strategies while simultaneously submitting an *amicus* submission in the same proceeding.[74] These roles that Lapras held has shown its lack of independence from Claimant because it proves that the *Amici* has a relationship with the disputing party that gives rise to a conflict of interest.

[66] Furthermore, Respondent also found the *Amici* to be associated with the Bonoori government, because the e-mail address of the *Amici* is a governmental e-mail.[75] A governmental e-mail address would not be available to any private non-profit association, unless said association is a governmental body. This could further affect their independence as the main disputed issue of the proceeding revolves around Claimant's status and whether or not it qualifies as an SOE. If the *Amici* is indeed a governmental body, Respondent is in an even more certain position that Claimant is an SOE.

[67] Lastly, Claimant is also a member of the *Amici*.[76] That would mean as a member of the *Amici*, Claimant is submitting its own *amicus* brief in hopes to help determine an issue that will work favourably to its own standing as a disputing party.

[68] Therefore, the *Amici* had also failed to fulfill the criteria of independence. *Amici*'s lack of independence proved the possible circumstances may arise where the *amicus* submission is filed with influence from Claimant, consequently failing to bring a different point of view from the disputing party.

4. The acceptance of CBFI's submission will only disrupt the proceeding, unduly burden, and unfairly prejudice Respondent

[69] As the last standard to be fulfilled, Respondent submits that the *amicus* submission will only disrupt the proceeding, unduly burdensome, and unfairly prejudicial against Respondent.

[70] In *Apotex,* the *amici* had failed to fulfil the requirements of an *amicus* submission. Consequently, the admission of the submission will require unnecessary additional work,

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[72] *Suez,* ¶23; Gomez, p. 557.
[73] Amicus Submission by the CBFI, ¶2.
[74] Amicus Submission by the CBFI, ¶7.
[75] Amicus Submission by the CBFI, l. 574.
[76] Amicus Submission by the CBFI, ¶7.

time and expense which would be unduly burdensome and potentially prejudicial.[77]

[71] Presently, the *Amici* had failed to fulfill Article 41(3) of ICSID AFR as they had failed in bringing new perspective, proving their significant interest, and establishing their independence in the proceeding. Furthermore, as explained above, Lapras Legal Capital's roles as in the present proceeding is also prejudicial against Respondent.[78]

[72] Therefore, the *amicus* submission by CBFI should be barred as they have failed to fulfill the criteria set under Article 41(3) of ICSID AFR, meaning the submission will only bring unnecessary additional work, time, and expense for both the parties and Tribunal, resulting in a disruptive, unduly burdensome, and prejudicial arbitration proceeding.

[77] *Apotex,* ¶42.
[78] See Procedural, Issue II, ¶65; Mekar's Application to Bar the Amicus Submission by the CBFI, l. 778-780.

MERITS

SUBMISSION I: RESPONDENT'S MEASURES DO NOT VIOLATE THE FET STANDARD UNDER ARTICLE 9.9 OF CEPTA

[73] Article 9.9 of CEPTA obliges Respondent to ensure FET towards Claimant's investment. This obligation requires Respondent to take measures that do not constitute (a) denial of justice in criminal, civil, or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) arbitrary or discriminatory conduct; and (d) abusive treatment of investors, such as coercion, duress, and harassment.[79]

[74] Claimant alleged that Respondent's measures such as CCM's investigations and the subsequent sanctions, denial of subsidies, enforcing a set-aside award, and treatment of undue delay in the local court breached the FET standards when seen aggregately and individually. However, Respondent submits that (A) Respondent's measures cannot be assessed aggregately; and (B) Alternatively, Respondent's measures individually do not breach FET.

A. RESPONDENT'S MEASURES CANNOT BE ASSESSED AGGREGATELY

[75] FET breaches can be seen aggregately only in special situations.[80] The tribunal in *El Paso* first introduced the concept that measures can be seen aggregately as the conduct's amount to the same effect, which is a complete change of the investment's legal framework in Argentina.[81]

[76] In the present case, Claimant alleged that each of Respondent's aggregate measures are aimed towards disrupting Claimant's investment.[82] However, Respondent submits that all the alleged conducts have different effects. The implementation of the airfare cap was to prevent Claimant from earning supra-competitive profits, the denial of subsidies was to prevent Claimant from having more advantages than privately-owned companies, the enforcement of the set-aside SCC award was to prevent Claimant from selling Caeli at an inflated price, and the court was hardly delayed at all. As the alleged measures enacted by Respondent have different effects, the measures can therefore only be seen individually.

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[79] CEPTA, Article 9.9.
[80] Vesel, p. 553.
[81] *El Paso,* ¶518; Vesel, p. 556.
[82] Notice of Arbitration, ¶¶19, 21.

B. ALTERNATIVELY, RESPONDENT'S MEASURES DO NOT INDIVIDUALLY GIVE RISE TO FET BREACH

[77] Claimant had contested Respondent's measures on several independent grounds. In response to such allegations, Respondent submits that the individual alleged measures do not give rise to a violation of FET standards, as they (1) were not arbitrary, (2) did not constitute a denial of justice, and (3) were not discriminatory.

1. Respondent's measures were not arbitrary

[78] Past tribunals have noted that a measure cannot be considered arbitrary if the measures are (1) rationally and proportionally connected to a public policy goal,[83] and (2) consistent with international practices regarding that matter.[84] Moreover, Respondent is not required to take the best possible measure but only the reasonable measure considering the current situation.[85]

[79] Claimant alleged that two of Respondent's conducts were arbitrary, namely (a) CCM's investigation and sanctions, and (b) enforcement of SCC's award. Respondent denies such allegations, as both have fulfilled the aforementioned elements.

a. CCM's investigations and sanctions were not arbitrary

[80] Presently, Claimant contested CCM's investigation and sanctions towards Claimant due to its allegedly arbitrary nature. However, these measures were not arbitrary, as (i) CCM's investigations were rational and proportional to securing the Mekar aviation market, (ii) consistent with international competition law practices, and (iii) the sanctions given to Claimant were proportional.

i. CCM's investigations were rational and proportional to secure Mekar's aviation market

[81] Under Claimant's management, Caeli received substantial advantages unavailable to other airlines in the market, such as subsidies under the Horizon 2020 scheme. They also had access to even more benefits through cooperation with Royal Narnian and Moon Alliance membership.[86] Moreover, Caeli had inherited core assets and advantages in Mekar from before the purchase such as discounts on airport services, twelve A340 aircrafts, valuable slots at two

[83] *Saluka,* ¶460; *AES,* ¶10.3.7.
[84] *ADF,* ¶188; *Noble Ventures,* ¶¶178, 182.
[85] *Philip Morris-Concurring and Dissenting Opinion,* ¶141; *Lemire II,* ¶283.
[86] Uncontested Facts, ¶27.

highly congested international airports, and a well-equipped technical base at Phenac International Airport.[87]

[82] However, such advantages were used in ways that threatened the Mekar airline industry. Caeli threatened to push competitors off the market with their low airfares enabled by advantages and the subsidies from the Horizon 2020 scheme.[88] In order to protect other vulnerable airlines, CCM launched two investigations into Caeli and enacted airfare caps, which were rational considering the threat Caeli posed.[89]

[83] Whilst conducting the investigations, CCM had jointly assessed Caeli's market shares with Royal Narnian, which were reasonable given the level of cooperation they had. Not only were they both owned by Claimant, but the two airlines also preferentially shared exclusive privileges with each other, including preferential secondary slot trading.[90] These conducts qualify as 'Agreements or Arrangements that Prevent or Lessen Competition Substantially' under chapter IV of the MRTP Act.[91]

[84] As a result of the first investigation, CCM objectively found that Caeli had abused the subsidies from the Horizon 2020 scheme, allowing them to drastically lower their airfare.[92] Moreover, CCM found that Caeli had evidently used its privileges in Phenac to undercut ticket prices which led to competitors being pushed off the routes.[93] Therefore, CCM's investigations were rational and proportional to secure Mekar's aviation market.

ii. CCM's investigations are consistent with international competition law practices

[85] Additionally, consolidating market share of two affiliated airlines is a common practice when investigating competition concerns arising out of the effect of an alliance.[94] For example, the European Competition Authorities would usually combine the market share between the alleged airlines to assess their dominant position in the market, which is determined when both airlines have a high market power and deny competitors entry to the market.[95] This practice is used to determine whether the alliance could enable them to dominate the market and abuse their position.

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[87] Uncontested Facts, ¶¶21, 26.
[88] Uncontested Facts, ¶¶34-36.
[89] Uncontested Facts, ¶¶37-38.
[90] Uncontested Facts, ¶36.
[91] Annex V, l. 1685-1700.
[92] Uncontested Facts, ¶¶27, 45.
[93] Uncontested Facts, ¶49.
[94] ECA, ¶35.
[95] ECA, ¶36.

[86] High market power is determined when the airline's combined market share enables it to abuse its dominant position. Common practice ascertains that a market share higher than 40% of the market is considered a threat of dominant position.[96]

[87] Presently, Caeli's 43% market share on all domestic and international routes from Phenac International Airport would constitute high market power. Moreover, when considered in conjunction with Royal Narnian it would amount to an astounding 54% market share, which would enable them to dominate the market and abuse their position.[97]

[88] Therefore, combining Caeli's and Royal Narnian's market share is a legitimate practice in assessing competition concerns in the airline industry, as their alliance results in high market power that could deny competitors entry to the market.[98]

iii. The sanctions given to Claimant were proportional

[89] A measure that is disproportionate with the legitimate public purpose sought will be considered as an arbitrary measure.[99] For a measure to be proportional with the public purpose, a measure must: (1) be suitable and necessary to achieve a legitimate public purpose, and (2) not be excessive.[100]

[90] Firstly, the airfare cap was necessary and suitable to prevent Claimant from earning supra-competitive profits in the future. CCM's investigations resulted in Caeli being proven guilty of enacting anti-competitive practices such as predatory pricing.[101] Predatory pricing is a strategy where businesses temporarily provide low prices in order to improve long-run profitability by deterring entry.[102] This would harm the public as it leads to the business hiking up its prices in the future. Consequently, airfare caps were suitable and necessary to prevent Caeli from committing such actions and made its predatory pricing strategy obsolete.

[91] Secondly, the fines given to Claimant resulting from the investigations were not excessive as Claimant fell under the ambit of highly aggravating factors stipulated in Chapter IV of the MRTP Act such as the effect on competition in the relevant market and the financial position of the person against whom the order is made.[103]

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[96] German Act, Sec. 19 (3); DG Competition, ¶3; OECD (1999), p. 72.
[97] Procedural Order No. 3, ¶6.
[98] ECA, ¶41.
[99] *EDF*, ¶303.
[100] *Electrabel,* ¶179.
[101] Uncontested Facts, ¶45.
[102] Milgrom, ¶112.
[103] Annex V, l. 1660.

[92] Moreover, Claimant's profitability was not affected by the airfare cap and fines.[104] Caeli started incurring losses only after the economic crisis happened. This proves that Claimant's economic downfall was caused by the economic crisis, not the airfare cap. Thus, neither the fines or airfare cap were excessive.

b. Respondent's decision to enforce SCC's arbitral award was legitimate

[93] Claimant alleged that the Mekari Courts' decisions to enforce the set-aside SCC award was arbitrary, as it was not in accordance with the relevant legal standards. However, Respondent submits that the enforcement did not violate (i) international agreements and (ii) Mekari domestic law.

i. The Mekari Courts' decisions did not violate international agreements

[94] Claimant alleged that the Mekari Courts' decisions violated the New York Convention and CEPTA. Contrarily, Respondent submits that the Mekari Courts' decisions did not violate either agreement.

[95] Article VI of the New York Convention stipulates that if an award was set-aside, the court may refuse the enforcement of the award.[105] By looking at its ordinary meaning, it can be inferred that the enforcement of a set-aside award is not mandatory from the article's use of the term 'may'.[106] This implies that enforcing a set-aside award entirely depends on the court's discretion. If the New York Convention had intended to oblige a court to deny enforcement of a set-aside award, they would have used the word 'shall' to indicate its obligatory character.

[96] Moreover, enforcing a set-aside award is a common practice in various courts.[107] In *Chromalloy,* the French district court enforced an award that was set-aside in its seat of arbitration because it was an international award that was not integrated into the legal order of that country.[108] Therefore, its existence continues despite its nullification and the enforcement in France is not contrary to international public policy.

[97] Presently, Mekari judges were merely exercising their discretion under the New York Convention that does not prohibit a court from recognising a set-aside award. Similar to *Chromalloy,* Mekari jurisprudence in the *Alta Lumina Trading Case* applied the same reasoning

[104] Uncontested Facts, ¶¶33-37.
[105] Article VI of the New York Convention.
[106] Article 31(1) of the VCLT.
[107] *Chromalloy,* p. 4; *Hilmarton,* pp. 1-3.
[108] *Chromalloy,* p. 4.

to enforce a set-aside award because an international award continues to exist despite being set-aside in the seat of arbitration as the award is not integrated into the legal order of that country.[109]

[98] Additionally, Claimant may allege that Mekari Courts' decisions are not in accordance with the preamble of CEPTA.[110] However, a preamble is merely a symbolic statement with no legal force, and not a binding obligation to determine whether Respondent is violating international agreements, especially in the absence of any credible proof over the alleged corruption.[111]

[99] Therefore, Mekari Courts' decision to enforce a set-aside award does not violate the New York Convention and CEPTA.

ii. The Mekari Courts' decisions did not violate Mekari domestic law

[100] Contrary to Claimant's allegation, the Mekari Courts' decisions to enforce the set-aside award also did not violate Mekari domestic law. According to Section 36 of the Mekar Commercial Arbitration Act, the Court has the discretion to enforce an arbitral award unless it is contrary to the public policy of Mekar. However, Claimant did not submit sufficient evidence to prove the allegations of corruption. Consequently, the enforcement is not contrary to Mekar's public policy.

[101] Following Mekari jurisprudence that permits strong circumstantial evidence in proving corruption, Claimant must be able to provide evidence such as limited consideration of evidence on record.[112]

[102] Moreover, previous tribunals have noted that in proving corruption through circumstantial evidence,[113] claimant must be able to provide evidence that collectively explain a series of fraudulent actions[114] or 'red flags' such as a third party's unusual request of contract terms or payment arrangements.[115] Furthermore, evidence must be evaluated based on its solidness and persuasiveness with reasonable certainty.[116]

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[109] Annex XIV, ¶11.
[110] 2014 Bonooru - Mekar CEPTA, l. 2495.
[111] Gardiner, p. 33; Orgad, pp. 720-726.
[112] Annex XIV, ¶9.
[113] *Oostergetel,* ¶303; *Metal-Tech,* ¶243.
[114] *Methanex-Award*, Part III- Chapter B ¶2 ; Sourgens, ¶5.51.
[115] *Metal-Tech*, ¶291; ICC, pp. 5-6.
[116] *Tethyan Copper*, ¶¶300, 402.

[103] Presently, Claimant had based its allegation solely on a report published by CILS that supposedly contained audio recording of a conversation between Mr. Cavanaugh as the SCC arbitrator, and a Mekar Airservices' representative.[117] However, this is the only circumstantial evidence weighing in Claimant's favour as numerous evidence persuaded the High Commercial Court of Mekar that corruption did not occur.

[104] First, the award was a well-reasoned decision which shows that the arbitrator had examined both parties' submission equitably. Second, the award reflected the correct position of law which did not explain the arbitrator's alleged bias. Third, the CILS report lacks credibility as it is currently undergoing a criminal investigation for receiving foreign funding to interfere with Mekar's domestic affairs.[118]

[105] Additionally, Claimant's reliance only on the CILS report shows that Claimant had failed to substantiate enough solid and persuasive evidence which proves the existence of fraudulent actions or 'red flags' committed by both Respondent and Mr. Cavanaugh.

[106] As Claimant had failed to establish circumstantial evidence over the alleged corruption, the Mekari Courts' decision to enforce the award was not contrary to Mekar's domestic law. Consequently, the Mekari Courts' decisions were not arbitrary.

2. Respondent's measures did not constitute a denial of justice

[107] Denial of justice can be pleaded if the relevant courts subject a dispute to an undue delay.[119] The test for denial of justice sets a high threshold, and requires the demonstration of 'a particularly serious shortcoming and egregious conduct that shocks, or at least surprises, a sense of judicial propriety.'[120]

[108] Presently, Claimant alleged that the delayed proceedings had given rise to a denial of justice. However, Respondent submits that its conduct did not constitute a denial of justice because the court proceeding was not subject to undue delay.

[109] The tribunal in *White Industries* considered a case involving a similar situation to the dispute at hand. In that case, the tribunal did not find undue delay as India's courts had administered the case at a reasonable pace, considering India is a developing country with an outstretched legal

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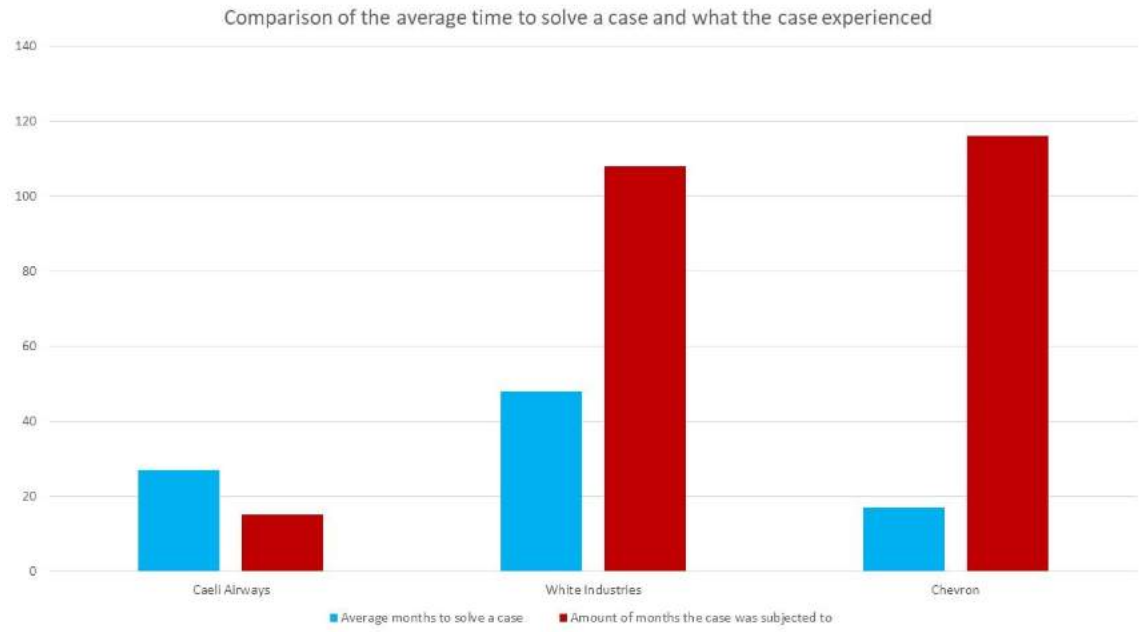
[117] Annex XIV, ¶13.
[118] Annex XIV, ¶10.
[119] *Azinian,* ¶102.
[120] *Mondev*, ¶127; *Chevron I*, ¶244; *White Industries*, ¶¶10.4.7, 10.4.22.

system.[121] Moreover, the tribunal also noticed the priority to resolve criminal and humanitarian cases over commercial matters. These two factors are prevalent in our case and proves that the delay Claimant suffered was not undue.

[110] Similar to the conditions in *White Industries,* Mekar is a developing country with backlog issues in its legal system.[122] The sudden increase in population between 1980 and 2015 results in Mekar's judicial system failing to expand at the same rate.[123] Additionally, Mekar's judiciaries prioritized criminal cases over commercial cases.[124] This is a common international practice, as it deals with the human rights of the criminals and therefore needs urgent decisions.[125]

[111] Despite these circumstances, Claimant's submission in Mekar's High Court was administered at a reasonable pace. Claimant's submission was submitted during Mekar's economic crisis which affected the amount of cases needed to be resolved in Mekar's High Court. While Mekar's High Court continued to prioritize criminal matters, it was still able to resolve the case within 15 months, 12 months shorter than the average time needed for a commercial case to be resolved in Mekari Courts. The improvement of the average time was due to Mekar's effort to relieve the court congestion by passing Executive Order 5-2014.[126]



[121] *White Industries,* ¶10.4.10.
[122] Uncontested Facts, ¶¶12-13.
[123] Uncontested Facts, ¶13.
[124] *Ibid*.
[125] *White Industries,* ¶10.4.14.
[126] Procedural Order No. 3, ¶8.

[112] The illustration above demonstrates that in comparison with *Chevron I* and *White Industries,* Claimant's case was resolved much faster compared to the average time needed to resolve a commercial case in those countries.

[113] Therefore, Claimant was not subjected to undue delay as Mekar's High Court had administered Claimant's case at a reasonable pace despite the stemming cases in Mekar's High Court.

3. Respondent's measures were not discriminatory

[114] State conduct is considered discriminatory if investors 'in like circumstances' are treated differently without reasonable justification.[127] However, it would be perverse to ignore an identical comparator if they are present.[128] Therefore, a measure is discriminatory if there is a differential treatment between cases with identical comparators in the absence of a reasonable justification.

[115] In this case, Respondent submits that (a) Caeli, Star Wings, and JetGreen are not identical comparators, or; (b) Alternatively, there is a reasonable justification for the different treatment.

a. Caeli, Star Wings, and JetGreen are not identical comparators

[116] In *UPS,* the tribunal ruled that UPS was not comparable to Canada Post although they both deliver packages and mail, as Canada Post undertook bigger obligations due to it being a Canadian SOE. Therefore, it is legitimate for Canada to give special benefits to Canada Post.[129] Essentially, the issue of ownership guides the tribunal in ruling that they were not 'in like circumstances'. Moreover, in *Methanex,* the tribunal prioritized Methanex's identical comparators rather than entities in the same market.[130]

[117] Presently, this Tribunal must look into other state-owned airlines operating in Mekar to determine its identical comparator. Therefore, Respondent submits that the identical comparator is Larry Air, an SOE identical to Claimant, who also did not receive subsidies under Executive Order 9-2018.[131]

[118] Star Wings and JetGreen are not Caeli's identical comparators as they did not share the same benefit as Caeli, due to them being privately-owned companies.[132] Therefore, Claimant's

[127] *Saluka,* ¶313; *Parkerings,* ¶369.
[128] *Methanex-Award,* Part IV - Chapter B, ¶17.
[129] *UPS-Award,* ¶¶173-175.
[130] *Methanex-Award,* Part IV - Chapter B, ¶38.
[131] Uncontested Facts, ¶47.
[132] Uncontested Facts, ¶46.

identical comparator is Larry Air, rather than its less similar comparators Star Wings and JetGreen.

[119] Additionally, Respondent providing Caeli state aid after buying Claimant's share in Caeli is not an eligible indicator that Respondent considers Star Wings and JetGreen as an identical comparator. The state aid was approved by CCM due to Caeli's expectancy to undertake activities of public importance as Mekar's only State-owned airline, meaning that its financial health is of paramount significance.[133]

b. Alternatively, there is a reasonable justification for the different treatment

[120] Alternatively, Respondent submits that there is a justifiable reason for the different treatment. In *SD Myers,* the tribunal ruled that the justification for a State's act was considered reasonable when it is in line with the implementation of the measure.[134]

[121] The justification for the different treatment provided by Mekar's Deputy Minister of Civil Aviation was reasonable, since SOEs have unique advantages over privately-owned companies and granting them subsidies under Executive Order 9-2018 would enable them to outcompete these privately-owned companies.[135] This justification also supports one of the intentions of Executive Order 9-2018 itself, which is to not skew market conditions in favour of one or more enterprises.[136]

[122] Presently, Caeli possessed unique advantages unavailable to other airlines in the market, especially privately-owned airlines.[137] Additionally, the dominant recipients of the subsidies under Executive Order 9-2018 were small domestic airlines which only possess market share less than 5% in important domestic routes within Mekar.[138] These domestic airlines did not have the advantages that Caeli possessed in combating the damages of the economic crisis in Mekar. Therefore, granting Caeli subsidies would have resulted in the aviation market to favor Caeli as it would add to their list of substantial advantages compared to these privately-owned companies.

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[133] Procedural Order No. 3, ¶10.
[134] *SD Myers*, ¶255.
[135] Uncontested Facts, ¶46.
[136] Annex VIII, l. 1922.
[137] See Merits, Submission I, ¶81.
[138] Procedural Order No.4, ¶7.

[123] Conclusively, Respondent did not discriminate against Claimant as it was treated equally to its identical comparator, Larry Air. Furthermore, any differential treatment with Star Wings and JetGreen is justifiable as Claimant is an SOE with unique advantages.

[124] Having proven that the individual acts that Respondent allegedly committed did not breach any FET obligations, Respondent requests the Tribunal to find that Claimant's allegations are dismissed entirely.

SUBMISSION II: THE TRIBUNAL SHOULD NOT GRANT CLAIMANT'S REQUEST FOR COMPENSATION

[125] CEPTA regulated several compensation standards applicable in different conditions. The compensation standard for a breach of FET is at 'market value' as stipulated under Article 9.21 of CEPTA.[139]

[126] Claimant submitted that the compensation standard for Respondent's alleged breach of FET is the 'fair market value' standard. However, as this is contrary to Article 9.21 CEPTA, Respondent submits that (A) The 'market value' standard is the applicable compensation standard, (B) Respondent has paid compensation at 'market value', and (C) Alternatively, the Tribunal shall reduce the amount of compensation if the applicable compensation standard is 'fair market value'.

A. THE APPLICABLE STANDARD FOR COMPENSATION IS THE 'MARKET VALUE' STANDARD

[127] Claimant had attempted to derogate the compensation standard stipulated under Article 9.21 of CEPTA by applying Article 9.7 of CEPTA to import a more favourable compensation standard under Arrakis-Mekar BIT, which accords the 'fair market value' standard. Moreover, Claimant further submitted that customary international law is applicable to determine the compensation standard.

[128] However, Respondent submits that the compensation standard in CEPTA cannot be derogated as (1) the MFN clause under Article 9.7 of CEPTA cannot import a more favourable compensation standard, and (2) the compensation standard under customary international law is inapplicable.

1. The MFN clause under Article 9.7 of CEPTA cannot import a more favourable compensation standard

[129] The MFN clause assigns an obligation for the signatory States to provide the most favourable treatment for investors or investment of the other party, that it would have granted to investors or investment from a third State. However, a State is only obliged to the extent of commitments stipulated under the MFN clause.[140]

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[139] Article 9.21, CEPTA.
[140] Nikiema, p. 2.

[130] Similarly, MFN clause regulated under Article 9.7 of CEPTA provide a limitation of commitment for the MFN clause. The clause stipulates that:

"1. Each Party shall accord investment of a party ***in like situations, treatment*** *no less favourable than it accords a third parties investment [...]*

2. The treatment ***does not include procedures for dispute settlement*** *[...]* ***Substantive obligation****s in other international investment treaties [...]* ***do not in themselves constitute "treatment"****, and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations."*

[131] Therefore, Respondent submits that the MFN clause cannot be used to import a more favourable compensation standard from a third-party BIT as it is (i) a procedure for dispute settlement, and (ii) not within the scope of the MFN clause application.

[132] *First*, substantive obligation is a host State's obligatory conduct to safeguard foreign investments from any discriminatory or unfair and inequitable practices within its territory.[141] Contrarily, procedures for dispute settlement refers to the BIT dispute settlement clauses, which in several treaties include the final remedies that the tribunal may award, such as compensation.[142]

[133] The compensation standard in CEPTA is a part of dispute settlement procedures as it is merely a form of remedy that the Tribunal may grant for the State as a result of breaching its substantive obligation.[143] This is also confirmed by the position of Article 9.21 of CEPTA that is situated under Section E entitled "Settlement of Disputes".[144]

[134] *Second,* tribunals have established that the term 'in like situation' in the MFN clause indicates the parties' intent to restrict the MFN clause scope to actual conduct that the host state accords to investments in factually similar situations, with the effect of treating one less favourably than the other.[145] Given the limitation, the MFN clause cannot import a more favourable investment protection standard under a third-party BIT, because a difference between applicable legal standards does not amount to 'treatment accorded in like situations'.[146]

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[141] *ICS I,* ¶294.
[142] Pohl, p. 32.
[143] *ICS I,* ¶294; Pohl, p. 32.
[144] CEPTA, p. 82.
[145] *Ickale,* ¶¶328-329.
[146] *Ibid.*

[135] This is aligned with the notion that the MFN clause cannot be used to import a more favourable treatment from a third-party BIT if the clause does not explicitly allow it.[147] Otherwise, misinterpreting the clause would create a preferential treatment for claimant as it can pick and choose the most favourable provision under various BITs.[148]

[136] Presently, Article 9.7 of CEPTA has limited the application only for treatment of investments 'in like situation'. Interpreting the clause through its ordinary meaning, the treatment does not refer to the standards of protection under another third party BIT, but only to actual less favourable conduct that Respondent accorded for investments, in a factually similar situation. The following paragraph of the clause confirms that different substantive obligations in a third-party BIT do not in itself constitute treatment, because there must be a concrete measure that investors of different nationalities receive.[149]

[137] Accordingly, this limitation demonstrates that the clause did not explicitly allow importing a more favourable standard from a third-party BIT. Thus, interpreting so would create preferential treatment for investors and contrary to the parties' purpose of concluding CEPTA in the first place, which is to balance the investors' and host states' rights. [150]

[138] Hence, Claimant cannot use Article 9.7 of CEPTA to derogate the compensation standard under Article 9.21 of CEPTA.

2. The compensation standard under customary international law is inapplicable

[139] Respondent submits that the compensation standard under customary international law is inapplicable as CEPTA is not silent regarding the compensation standards for FET breaches, because it is not included as the measures stipulated under Article 9.12 of CEPTA.

[140] Generally, treaties should enjoy procedural priority over other sources of international law, as concluding a treaty means 'opting out' customary international law to establish a special law.[151] Tribunals have used standards from customary international law exceptionally when the investment treaty is silent regarding the said issue.[152]

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[147] *Plama,* ¶¶198-200; *Wintershall,* ¶167.
[148] *Plama,* ¶219.
[149] Mbengue, p. 88.
[150] Procedural Order No. 2, ¶14.
[151] Lauterpacht, pp. 87-88.
[152] *SD Myers,* ¶¶306-307; *LG&E-Award*, ¶40.

[141] On the contrary, CEPTA as the applicable treaty in the present case, has specifically regulated 'market value' as the compensation standard for FET breaches under Article 9.21 of CEPTA. Hence, this standard must be applied as the treaty's provisions must be prioritized.

[142] Moreover, Claimant may allege that the compensation standard under customary international law is applicable as Respondent's measures resulted in a similar effect with indirect expropriation. However, this argument is unacceptable due to the different nature of these two measures since indirect expropriation requires the element of taking the investor's control in the investment,[153] which is not the case for FET breaches.

[143] In *LG&E,* the tribunal did not find that FET breach has similar effect with indirect expropriation as (i) claimant did not lose control over their shares and licenses, although its shares value fluctuated during the crisis, (ii) the state's measure was not permanent for claimant's shares value as it rebounded after the crisis, and (iii) claimant's investment has not ceased to exist.[154] Presently, Respondent's measures also do not have a similar effect with indirect expropriation.

[144] *Firstly*, a mere decrease of Caeli's shares' value does not constitute that Respondent's measures caused Claimant to lose control over Caeli.[155] Even after Respondent's alleged breach, it was ultimately Claimant's decision to sell Caeli to Respondent.[156] This demonstrates that Respondent did not interfere with its property rights and thus does not constitute as indirect expropriation.[157]

[145] *Secondly*, the fact that Caeli's shares' value continued to decrease cannot conclude that Respondent's measure was permanent.[158] This is because Claimant's shares' value could have rebound after the crisis had Claimant not given up on its investment in Caeli prematurely.

[146] *Thirdly,* Claimant's investment still exists as Caeli was still able to continue its operation after it was acquired by Respondent.[159]

[147] Additionally, the negotiation history of the treaty can be taken into account to interpret any ambiguous stipulations under the treaty.[160] Presently, prior to the establishment of CEPTA,

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[153] *LG&E-Decision on Liability,* ¶188.
[154] *LG&E-Decision on Liability,* ¶¶198-200; *LG&E-Award*, ¶39.
[155] Uncontested Facts, ¶¶29, 31, 35.
[156] Uncontested Facts, ¶56.
[157] *El Paso,* ¶278.
[158] Uncontested Facts, ¶64.
[159] *Ibid.*
[160] *Ickale,* ¶229; *Infinito Gold-Jurisdiction*, ¶288.

Mekar had received continued losses from Bonooru investors' claims under the Bonooru-Mekar BIT. Thus, Mekar initiated the CEPTA to balance the rights of investors and host States.[161]

[148] Pursuant to this goal, the drafters of CEPTA differentiated the compensation standard between FET violation and expropriation. This is to avoid investors seeking compensation based on the 'fair market value' standard in absence of an expropriatory measure.

[149] In conclusion, the compensation standard under customary international law cannot be applied, as Article 9.21 of CEPTA has explicitly regulated the applicable compensation standard for a breach of FET.

B. RESPONDENT HAS PAID COMPENSATION AT 'MARKET VALUE'

[150] Having proven that the compensation standard under Article 9.21 of CEPTA cannot be derogated, Respondent submits that it had paid compensation according to the applicable standard which is at 'market value' by acquiring Claimant's shares in October 2020 for USD 400 million.

[151] Previous tribunals have assessed the 'market value' of an investment by referring to the value of an entity's share in any available market,[162] or an arm's length offer to acquire the investment.[163] Moreover, the 'market value' standard also considers the effect of economic crisis on the business.[164]

[152] Presently, the price at which Respondent acquired Claimant's investment accords to the 'market value' standard of Claimant's investment. The purchase price was the only offer Claimant had received, making Respondent the only willing buyer for Claimant's investment despite the ongoing economic crisis.[165] Thus, there is no other comparable price that can be constituted as the 'market value' of Claimant's investment.

[153] Even if Claimant had received an offer from Hawthorne Group for USD 600 million, this offer cannot be assessed as the market value of Caeli since it was not an arm's length transaction. An offer from related parties will certainly be carried out under different terms and circumstances compared to an offer made by an independent company. Therefore, to assess whether the offer

[161] Procedural Order No.3, ¶14.
[162] *Gemplus*, ¶14.26; Wöss, ¶6.40.
[163] *CME,* ¶100.
[164] *Sempra,* ¶435; Mata Dona, ¶17.37.
[165] Uncontested Facts, ¶63.

was made at arm's length, the price must be compared with an offer made by independent companies in similar transactions.[166] Additionally, the price must also account for the responsibilities and risk, the circumstances at the time and place of the transaction, and the parties' business strategies.[167]

[154] Presently, Hawthorne Group, an equity firm with stakes in numerous low-cost airlines, is affiliated with Claimant through Moon Alliance.[168] Thus, it must be assessed whether the offer by Hawthorne Group was made at arm's length considering Hawthorne Group and Claimant are related parties.

[155] Accordingly, there is no fact which demonstrates that the price offered by Hawthorne is similar with those offered by an independent company as no other buyer was willing to purchase Caeli for USD 600 million.[169] This shows that the price was inflated as it did not account for (i) the responsibilities and risk that the potential buyer would incur after the purchase, (ii) the circumstances at the time of transaction, (iii) and Claimant's risky business strategy.[170]

[156] First, the purchaser would incur huge responsibilities and risk as it would inherit Caeli's burgeoning liability.[171] Second, the transaction was conducted during an economic crisis which affected Claimant's shares' value.[172] Third, throughout its investment, Claimant had committed several risky business strategies which prompted Caeli's losses.

[157] Moreover, Claimant alleged that the purchase does not amount to compensation as it does not cover Claimant's loss of profits and was granted before the award was rendered. However, in *LG&E,* accounting loss of profits will be uncertain and thus prohibited as investors did not lose title to their property.[173] Furthermore, in *Gemplus,* the tribunal deemed that respondent's payment to claimant before the arbitral proceeding was a part of the compensation.[174]

[158] Similarly, Claimant did not lose their title over Caeli, as they willingly sold their investment to Respondent. Moreover, Respondent's purchase despite being conducted before the arbitral proceeding could still amount to compensation. Ultimately, Respondent's decision to acquire

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[166] Ignat, pp. 3040-3042.
[167] OECD (2011), p. 8.
[168] Uncontested Facts, ¶58.
[169] Uncontested Facts, ¶¶58, 63.
[170] Ignat, pp. 3040-3042; OECD (2011), p. 8.
[171] Uncontested Facts, ¶56.
[172] *Ibid.*
[173] *LG&E-Award,* ¶¶89, 91.
[174] *Gemplus,* ¶¶14.21, 14.23.

Claimant's investment in the first place, despite being situated in a severe economic crisis, was to prevent Claimant from suffering even more losses.

[159] Having proven that Respondent has acquired Claimant's investment at a 'market value' standard, Respondent is thus no longer obliged to provide additional compensation.

C. ALTERNATIVELY, THE TRIBUNAL SHALL REDUCE THE COMPENSATION

[160] Alternatively, if the Tribunal finds that the applicable standard for compensation is at 'fair market value', Respondent submits that the compensation must be reduced as (1) Claimant must bear the risk of investing in Mekar and (2) Claimant contributed to the losses.

1. Claimant must bear the risk of investing in Mekar

[161] Previous tribunals have taken into account the State's economic crisis to determine whether the amount of compensation must be reduced.[175] According to the tribunal in *CMS,* the compensation must be reduced as claimant had to share some impacts of the crisis since it is a business risk that claimant took when investing in that particular State.[176]

[162] Moreover, the political and economic stability of the State must be taken into account during the calculation of compensation to prevent unjust enrichment for claimant.[177] The high risk of investing in a State with such instability would heightened the discount rate and thus reduce the amount of compensation.[178]

[163] Presently, Mekar is a developing country with a long history of being situated in a political instability which simultaneously led into late economic reforms that affected Mekar's growth after the independence.[179] Moreover, before the economic crisis in 2016, Mekar had also experienced a financial crisis in 2008, which affected Caeli's operation as the government could no longer provide a bailout.[180] Thus, it is evident from the very beginning of the investment that there is a high risk in investing in Mekar.

[164] Furthermore, the economic crisis in 2016 continued to worsen as shown by Mekar's financial condition in 2019. At that time, the IMF reported that Mekar will face a negative growth for four consecutive quarters, an 8% fall in GDP, a 2600% average inflation rate in 2020, as well as

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[175] *CMS,* ¶248; *Enron,* ¶232.
[176] *CMS,* ¶248.
[177] *AMT,* ¶7.14.
[178] *Gold Reserve,* ¶842.
[179] Uncontested Facts, ¶12.
[180] Uncontested Facts, ¶17.

potential third debt default in as many decades.[181] In November 2020, Mekar also received a CCC credit rating from Fitch and in the first three months of 2020, Mekar's bank loan defaults had increased by 23%.

[165] This whole precarious situation affected Mekar's ability to pay USD 700 million to Claimant, as to afford the amount claimed, Mekar would have to transfer twice the amount of Mekar's annual public spending and add another burden to its debt.[182]

[166] Based on the aforementioned facts, Claimant as an investor should have known the risk involved when it decided to invest and operate in a State with an unstable political and economical climate. Therefore, Claimant must share the impact of Mekar's economic crisis on its investment since it is the risk of investing in an economically unstable country.

2. Claimant contributed to the losses

[167] Several tribunals had also reduced the compensation as the direct cause for the investor's losses were due to its own fault.[183] In *MTD,* the tribunal reduced 50% of the compensation amount since the State cannot be held responsible for claimant's risky business judgement.[184] Furthermore, in *Waste Management,* a risky business judgement includes claimant's unsustainable assumption on customer uptake.[185]

[168] Similarly, the direct cause of Claimant's losses was from several measures that Claimant had taken during its investment in Mekar. First, Claimant violated the MRTP Act by committing predatory pricing and abusing its dominant position. Claimant then must receive airfare caps and pay fines as sanctions for its violation.[186]

[169] Second, similar to *Waste Management,* Claimant's business strategy was risky as it failed to assume future probabilities. Ever since the bidding process, Claimant's business strategy was found to be overly optimistic as it did not consider the volatility of fuel prices and potential takeover of long-distance routes by competitors.[187] This forecast manifested in 2018 where its finances suffered due to rising prices of oil and the newly purchased aircraft for expansion were grounded.[188]

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[181] Procedural Order, ¶4.
[182] *Ibid.*
[183] *Urbaser,* ¶¶845-846; *Lauder,* ¶235; *Rompetrol,* ¶279.
[184] *MTD,* ¶¶242-243.
[185] *Waste Management,* ¶177.
[186] Uncontested Facts, ¶¶45, 49.
[187] Uncontested Facts, ¶27.
[188] Uncontested Facts, ¶48.

[170] Third, Claimant had always prioritized expansion instead of improving its financial health despite being flooded in debt.[189] Respondent had advised Claimant to take a more cautious business strategy by channeling its profits towards settling its inherited debt.[190] However, Claimant did the opposite by using its profits to provide low-cost airfare and purchase new aircraft.[191] This expansive strategy was later acknowledged by observers as a reckless and ill-advised business decision that depreciated Caeli's value.

[171] Hence, the amount of compensation must be reduced since Claimant must also bear responsibility for its contribution to the losses it suffered.

[189] Uncontested Facts, ¶35.
[190] *Ibid.*
[191] *Ibid.*

PRAYERS FOR RELIEF

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

a. DECLINE to exercise jurisdiction due to the Claimant's status as a SOE;

b. GRANT the leave Respondent sought for *amici* submissions;

c. FIND that Mekar did not violate Article 9.9 of CEPTA; and

d. FIND that Mekar has already purchased Claimant's investment at 'market value' and award Claimant no compensation; in the alternative, the Tribunal should reduce the compensation awarded.