TEAM FABELA

VEMMA HOLDINGS INC.

(*Claimant*)

v.

THE FEDERAL REPUBLIC OF MEKAR

(*Respondent*)

MEMORIAL FOR RESPONDENT

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Chorzow	*The Factory at Chorzow (Claim for Indemnity) (Germany v. Poland)* (1928) PCIJ Series A No. 17 Judgement 13.09.1928
ELSI	*Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* ICJ Rep. 1989 Judgement 20.07.1989
Nicaragua	*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*

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27.06.1986

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Archer	*Archer Daniels Midland Company and Tate & Lyle Ingredients America, Inc. v. The United Mexican States* ICSID Case No. ARB(AF)/04/5 Award 21.11.2007
Crystallex	*Crystallex International Corporation v. Bolivarian Republic of Venezuela* ICSID Case No. ARB(AF)/11/2 Award 04.04.2016

MNSS	*MNSS B.V. and Recupero Credito Acciaio N.V v. Montenegro* ICSID Case No. ARB(AF)/12/8 Award 04.05.2016
Mondev	*Mondev International Ltd. v. United States of America* ICSID Case No. ARB(AF)/99/2 Award 11.10.2002
Ryan	*Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland* ICSID Case No. ARB(AF)/11/3 Award 24.11.2015
Tecmed	*Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* ICSID Case No. ARB(AF)/00/2 Award 29.05.2003
Waste Management	*Waste Management v. United Mexican States (II)* ICSID Case No. ARB(AF)/00/3 Final Award 30.04.2004

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Aguas	*Aguas del Tunari, S.A. v. Republic of Bolivia* ICSID Case No. ARB/02/3 Decision on Respondent's Objections to Jurisdiction 21.10.2005
Apotex (Award)	*Apotex Inc. v. The Government of the United States of America* ICSID Case No. UNCT/10/2 Award on Jurisdiction and Admissibility 14.06.2013
Apotex (PO2)	*Apotex Inc. v. The Government of the United States of America* ICSID Case No. UNCT/10/2 Procedural Order No. 2, on the Participation of a Non-Disputing Party 11.10.2011

Arif	*Mr. Franck Charles Arif v. Republic of Moldova* ICSID Case No. ARB/11/23 Award 08.04.2013
Azurix	*Azurix Corp. v. The Argentine Republic (I)* ICSID Case No. ARB/01/12 Award 14.07.2006
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CMS	*CMS Gas Transmission Company v. The Republic Of Argentina* ICSID Case No. Arb/01/8 Award 12.05.2005

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Karpa	*Marvin Roy Feldman Karpa v. United Mexican States* ICSID Case No. ARB(AF)/99/1 Award 16.12.2002
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Occidental (II)	*Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)* ICSID Case No. ARB/06/11 Award 05.10.2012

Pantechniki	*Pantechniki S.A. Contractors and Engineers (Greece) v. The Republic of Albania* ICSID Case No. ARB/07/21 Award 30.07.2009
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Philip Morris (PO3)	*Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* ICSID Case No. ARB/10/7 Procedural Order 3 17.02.2015
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	Decision on Jurisdiction
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Siemens	*Siemens A.G. v. The Argentine Republic*
	ICSID Case No. ARB/02/8
	Award
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Stadtwerke	*Stadtwerke München GmbH, RWE Inogy GmbH, and others v. Kingdom of Spain*
	ICSID Case No. ARB/15/1
	Award
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Swisslion	*Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia* ICSID Case No. ARB/09/16 Award 06.07.2012
Tokios	*Tokios Tokelés v. Ukraine* ICSID Case No. ARB/02/18 Award 26.07.2007
Tokios (Dissent)	*Tokios Tokelés v. Ukraine* ICSID Case No. ARB/02/18 Dissenting Opinion by Mr. Daniel M. Price (Award) 26.07.2007
Vacuum Salt	*Vacuum Salt Products Ltd. v. Republic of Ghana* ICSID Case No. ARB/92/1 Award 16.02.1994
Vivendi (Amicus)	*Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic* ICSID Case No. ARB/03/19 Order in Response to a petition for Transparence and Participation as

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Vivendi (Award)	*Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* ICSID Case No. ARB/97/3 Award 20.08.2007
von Pezold	*Bernhard von Pezold and Others v. Republic of Zimbabwe* ICSID Case No. ARB/10/15 Procedural Order No. 2 26.06.2012
World Duty Free	*World Duty Free Company v. Republic of Kenya* ICSID Case No. ARB/00/7 Award 04.10.2006

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Abbreviation	**Citation**
AMR	*United States v. AMR Corp.* 140 F. Supp. 2d 1141 (D. Kan. 2001)

	Memorandum and Order 27.04.2001
Amto	*Limited Liability Company Amto v. Ukraine* SCC Case No. 080/2005 Final Award 26.03.2008
Antaris	*Antaris Solar GmbH and Dr. Michael Göde v. The Czech Republic* PCA Case No. 2014-1 Award 02.05.2018
Cotton	*United States — Restrictions on Imports of Cotton and Man-Made Fibre Underwear* WT/DS24 Report of the Panel 08.11.1996
ECE	*ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtungsechzigste Grundstücksgesellschaft mbH & Co v. The Czech Republic* PCA Case No. 2010-05 Award 19.09.2013

Glamis	*Glamis Gold, Ltd. v. The United States of America* Ad hoc Arbitration (UNCITRAL) Award 08.06.2009
Greentech	*Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. The Italian Republic* SCC Case No. V 2015/095 Award 23.12.2018
Himpurna	*Himpurna California Energy Ltd. v. PT (Persero) Perusahaan Listruik Negara* Ad hoc Arbitration (UNCITRAL) Final Award 04.05.1999
Hulley	*Hulley Enterprises Ltd. v. Russian Federation* PCA Case No. 2005-03/AA226 Final Award 18.07.2014
Isolux	*Isolux Netherlands, BV v. Kingdom of Spain* SCC Case V2013/153

	Final Award
	17.07.2016
Lauder	*Ronald S. Lauder v. The Czech Republic*
	Ad Hoc Arbitration (UNCITRAL)
	Final Award
	03.09.2001
Methanex (Amicus)	*Methanex Corporation v. United States of America*
	Ad hoc Arbitration (UNCITRAL)
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	15.01.2001
Methanex (Award)	*Methanex Corporation v. United States of America*
	Ad hoc Arbitration (UNCITRAL)
	Final Award of the Tribunal on Jurisdiction and Merits
	03.08.2005
Oostergetel	*Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*
	Ad Hoc Arbitration (UNCITRAL)
	Final Award (redacted version)
	23.04.2012

Resolute Forest	*Resolute Forest Products v. The Government of Canada* PCA Case No. 2016-13 Procedural Order No. 6, On the Participation of Prof. Robert Howse and Mr. Barry Appleton as *Amici Curiae* 29.06.2017
Saluka	*Saluka Investments BV v. The Czech Republic* PCA Case No. 2001-04 Partial Award 17.03.2006
Société Générale	*Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic* LCIA Case No. UN 7927 Award on Preliminary Objections to Jurisdiction 19.09.2008
Tatneft	*OAO Tatneft v. Ukraine* PCA Case No. 2008-8 Partial Award on Jurisdiction 28.09.2010
UPS	*United Parcel Service of America v. The Government of Canada* Ad hoc Arbitration (UNCITRAL)

	Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae* 17.10.2001
White Industries	*White Industries Australia Limited v. The Republic of India* Ad hoc Arbitration (UNCITRAL) Final Award 30.11.2011
Yukos	*Yukos Universal Limited (Isle of Man) v. The Russian Federation* PCA Case No. 2005-04/AA227 Final Award 18.07.2014

MISCELLANEOUS

Abbreviation	**Citation**
ARSIWA	ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001) 2 (pt 2) YBILC 26 2001
Badia	Dr. Albert Badia Dr. Kabir Duggal (eds.) State-Owned Enterprises Jus Mundi

Bolton/Brodley/Riordan	Patrick Bolton, Joseph F. Brodley and Michael H. Riordan Predatory Pricing: Strategic Theory and Legal Policy The United States Department of Justice
Cambridge	Marginal Cambridge English Dictionary
Enforcement Policy	Department of Transportation of the United States Government Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry 63 Fed. Reg. 17, 919, 17, 920-22 1998
FTC	FTC Hearing #8: Common Ownership Hearings on Competition and Consumer Protection in the 21st Century 2018
Gudofsky/Kriaris/Vital	Jason Gudofsky, Evangelia Litsa Kriaris and Lucian Vital Abuse of Joint Dominance: Is the Cure Worse than the Disease? CBA 2010
Gürkaynak/ Özgümüş	Gönenç Gürkaynak and Onur Özgümüş Predatory pricing Global Dictionary of Competition Law

ICAO	ICAO ICAO's approach to anticompetitive behaviours
ILC Report	ILC Report of the International Law Commission on the work of its twenty-eighth session (1976) 2 (pt 2) YBILC 1 1976
OECD	OECD "Indirect Expropriation" and the "Right to Regulate" in International Investment Law OECD Working Papers on International Investment 2004
Reuters	Interim Injenction Thomas Reuters Practical Law
Teo	Kirsten Teo To Enforce or Not to Enforce Annulled Arbitral Awards Kluwer Arbitration Blog 2019

Wills/Grün	Tom Wills and Gianna-Carina Grün Trains vs. planes: What's the real cost of travel? DW 2018
Wilson	Thomas Wilson Common Ownership – Where Do We Stand? Kluwer Competition Law Blog 2019

LEGAL INSTRUMENTS

Abbreviation	**Citation**
AF Rules	ICSID Additional Facility Rules 2006
Arrakis-Mekar BIT	Treaty Between the Federal Republic of Mekar and the Kingdom of Arrakis for the Promotion and Protection of Investments 16.01.2006
Bonooru-Mekar BIT	Treaty Between the Federal Republic of Mekar and the Commonwealth of Bonooru for the Promotion and Protection of Investments 1994

CEPTA	Comprehensive Economic Partnership and Trade Agreement Between the Commonwealth of Bonooru and the Federal Republic of Mekar 2014
Convention	ICSID Convention, Rules and Regulation 1966
CREFAA	Convention on the Recognition and Enforcement of Foreign Arbitral Awards The United Nations 1959
NAFTA	North American Free Trade Agreement 1994
VCLT	Vienna Convention on the Law of Treaties The United Nations 1969

TABLE OF ABBREVIATIONS

Abbreviation	Term
%	Percentage
¶/¶¶	Paragraph/Paragraphs
BIT	Bilateral Investment Treaty
Bonooru	The Commonwealth of Bonooru
Caeli Airways	Caeli Airways Joint Stock Company
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CIL	Customary International Law
CILS	Centre for Integrity in Legal Studies
EACRPU	External Advisors to the Committee on Reforms of Public Utilities
FET	Fair and Equitable Treatment
First Investigation	The First Investigation of the Competition Commission of Mekar
FMV	Fair Market Value
GDP	Gross Domestic Product
HCC	High Commercial Court of Mekar
i.e.	That is
ICSID	International Centre for the Settlement of Investment Disputes
IICRA	Investment Information and Credit Rating Agency
IMF	International Monetary Fund
Inc.	Incorporated

LLP	Limited Liability Partnership
LPM	Labourers' Party of Mekar
Mekar	The Federal Republic of Mekar
MFN	Most Favoured Nation
MRTP Act	Monopoly and Restrictive Trade Practices Act, 2009
MV	Market Value
Notice	Notice of Arbitration
p./pp.	Page/Pages
Party	A contracting party to the CEPTA
PO	Procedural Order
Response	Response to Notice of Arbitration
SCC	Sinnoh Chambers of Commerce
Second Investigation	The Second Investigation of the Competition Commission of Mekar
The CLAIMANT	Vemma Holdings Incorporated
The RESPONDENT	The Federal Republic of Mekar
UNCITRAL Rules	UNCITRAL Arbitration Rules (as revised in 2010)
Uncontested Facts	Statement of Uncontested Facts
USD	United States Dollar
v.	Versus
Viz.	Videlicet

STATEMENT OF FACTS

Background

1. The Commonwealth of Bonooru is an archipelagic state with a disparate geography. Consequently, Article 70 of the Constitution of Bonooru, bestows a positive obligation on Bonooru to provide travel to its citizens.

2. The CLAIMANT is an airline holding company incorporated in Bonooru. Since its inception, Bonooru retained a significant minority shareholding in the CLAIMANT owing to the importance of the airline industry to Bonooru. The Constitutional Court of Bonooru also confirms the significance of international air travel in Bonooru.

The CLAIMANT invests in Caeli Airways

3. In 2008, the Mekari government, authorised the large-scale privatization of State-owned enterprises and Caeli Airways was designated for this privatization. Consequently, Mekar revised its MRTP Act to inspire investor confidence. This amendment created the CCM, an autonomous body independent of government influence.

4. The CLAIMANT'S bid to acquire Caeli Airways was accepted on 5 January 2011. Subsequently, the CCM also approved the CLAIMANT'S acquisition of Caeli Airways with an undertaking that Caeli would not engage in anti-competitive behavior by abusing its new-found relationship with the Moon Alliance.

The CLAIMANT indulges in extravagant practices coupled with anti-competitive behavior

5. From 2011-2016, Caeli Airways underwent rapid expansion with no regard to the volatility of demand in Mekar. The Mekari representatives on Caeli Airways' board suggested that Caeli's expansion should have been controlled during seasons of low demand. The CLAIMANT paid no heed to these cautions.

6. However, the CLAIMANT's expansionary business strategies caught the attention of the CCM and its competitors. In 2016, the CCM initiated two investigations to ascertain whether the CLAIMANT had indulged in anti-competitive practices. In the interim, the CCM placed airfare caps on Caeli Airways to prevent it from earning supra competitive prices by abusing its dominant position.

Economic Crisis ensues in Mekar, and the CLAIMANT seeks judicial review of the Airfare Caps

7. In 2017, a currency crisis ensued Mekar which led to an increasing inflation. Consequently, the Mekari government passed a decree requiring all companies to offer their services in MON.

8. In 2018, the CCM concluded its first investigation and found a breach of the MRTP Act. Accordingly, it imposed a total penalty of 150 million MON. In January 2019, the CCM concluded its second investigation and found that Caeli Airways had engaged in anti-competitive behavior. The CCM decided to maintain the airfare caps until Caeli Airways' market share fell below 40%.

9. The CLAIMANT sought judicial review for the removal of the airfare caps. Caeli Airways' claim was heard in April 2019 despite the high volume of cases stemming from the economic crisis. Its request was denied by the Mekari Court.

The CLAIMANT decides to sell its stake in Caeli Airways

10. The CCM lifted the airfare caps once Caeli Airways' market share fell below 40%. Despite this removal, the CLAIMANT sought to sell its stake in Caeli Airways to Hawthorne Group LLP. However, Mekari officials noted that this offer was not *bona-fide* due to the CLAIMANT'S association with the Moon Alliance and initiated arbitration.

11. The award declared that Hawthorne Group's offer could not be considered as one received from a *bona-fide* third party due to its affiliation with the CLAIMANT through the Moon Alliance. In August 2020, the Supreme Arbitrazh Court of Sinnograd set aside the award owing to allegations of corruption on the part of the sole arbitrator. The Superior Court of Mekar enforced the award and dismissed the CLAIMANT'S appeal through its discretionary powers.

12. The CLAIMANT sold its stake in the investment to Mekar Airservices at its market value for 400 million USD.

Initiation of Arbitration

13. On 15 November 2020, the CLAIMANT filed a Notice of Arbitration against the RESPONDENT raising frivolous claims under the CEPTA and the AF Rules.

14. On 19 April 2021, the CBFI filed its application for leave to file *amicus curiae* submissions. On 28 May 2021, the EACRPU filed its application for leave to file *amicus curiae* submissions.

EXECUTIVE SUMMARY

15. **JURISDICTION:** This Tribunal does not have jurisdiction as the CLAIMANT is disqualified as an investor by the application of the *Broches* test. The CLAIMANT was discharging essentially governmental functions of Bonooru in operating Caeli Airways. *Alternatively*, the CLAIMANT was an agent of Bonooru in operating Caeli Airways.

16. ***AMICUS CURIAE*:** It is appropriate to grant leave to the EACRPU, and not the CBFI, to file *amicus curiae* submission. The EACRPU would be of assistance to the Tribunal, would address a matter within the dispute, has a significant interest, makes its submissions in furtherance of a public interest and would not prejudice the Parties. In contrast, the CBFI does not fulfil any of these requirements.

17. **FET:** The RESPONDENT did not deny justice to the CLAIMANT by means of manifestly unjust decisions or a delayed judgement. The CCM did not violate its due process obligations in the First, or the Second Investigations. The RESPONDENT'S decision to maintain the airfare caps and deny subsidies was not arbitrary as it was based on a rational policy and was proportionate. The RESPONDENT did not harass the CLAIMANT for political purposes, nor did it subject it to duress. Finally, the RESPONDENT'S measures cannot be considered cumulatively to breach FET.

18. The RESPONDENT'S measures are exempted under Article 9.8 CEPTA, as their objectives were legitimate. *Alternatively*, the RESPONDENT'S measures are were also legitimate as they were neither unreasonable nor discriminatory.

19. **COMPENSATION STANDARD:** Without prejudice to the above, if the Tribunal finds that the RESPONDENT breached its obligations under Article 9.9 CEPTA, the compensation awarded must be based on the MV standard. The MFN clause cannot be invoked to import the FMV standard of compensation. Further, no compensation is owed to the CLAIMANT based on the MV standard since the RESPONDENT had already paid the MV for the CLAIMANT'S investment. Lastly, any compensation awarded must be reduced owing to the CLAIMANT'S contributory fault and the economic crisis in Mekar.

ARGUMENTS

ISSUE 1: THE TRIBUNAL DOES NOT HAVE JURISDICTION UNDER CHAPTER 9 OF THE CEPTA

20. The Tribunal does not have jurisdiction because this dispute is a State-to-State arbitration. Neither the CEPTA nor the AF Rules envisage State-to-State arbitration. Under the CEPTA, claims may only be brought by an investor.[1] Further, the definition of 'investor' in the CEPTA does not include a State.[2] The AF Rules only contemplates disputes between a State (or its constituent subdivision or agency of a State) and a national of another State.[3]

21. A State-owned entity acting in the capacity of the State should be treated as such.[4] The *Broches* test determines whether a State-owned enterprise acted in the capacity of its constituent State.[5] It requires that:

> [A] mixed economy enterprise or a 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 essential function.[6]

22. Admittedly, the *Broches* test was envisaged to apply under the Convention. However, it must be applied in this dispute **[I]**. The CLAIMANT is a State-owned enterprise which acted under the color of Bonooru and is consequently disqualified by the *Broches* test **[II]**.

I. THE *BROCHES* TEST MUST BE APPLIED TO THIS DISPUTE

23. Article 4(2) AF Rules can be invoked to apply the *Broches* test in this dispute. In *MNSS*, the tribunal clarified that Article 4(2) AF Rules specifically provides that the jurisdictional requirements of the convention must be met to a limited extent by the Secretary-General of ICSID. Therefore, for the purpose of determining jurisdiction under Article 2(a) AF Rules, the tribunal applied the *Salini* criteria to determine whether a dispute arose out of an investment.[7]

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[1] *CEPTA,* Article 9.16.
[2] *CEPTA*, Article 9.1.
[3] *AF Rules*, Article 2.
[4] *Badia,* ¶8.
[5] *Badia*, ¶9.
[6] *Broches*, ¶355.
[7] *MNSS,* ¶¶184-186, 188; *Salini,* ¶¶50-57.

The *Salini* criteria are merely tools to determine the existence of an investment under ICSID arbitrations and not jurisdictional criteria.[8]

24. Analogously, the *Broches* test is also a tool developed under the Convention to determine whether a State-owned enterprise is a 'national of another contracting state'.[9] For the purposes of determining jurisdiction under Article 2(a) AF Rules, the CLAIMANT must be a 'national of another contracting state' as the RESPONDENT is not a contracting state.

25. Neither the CEPTA nor the AF rules expressly define the boundaries of sovereign conduct, despite excluding State-State arbitration from their ambit. The *Broches* test mirrors the international law principles of attribution,[10] and helps in determining whether an entity is acting in the capacity of the State. Further, the *Broches* test has been applied previously, although indirectly, in *Tatneft*, a tribunal constituted under the UNCITRAL Rules.[11] Therefore, the *Broches* test must be applied to determine whether the CLAIMANT has standing to bring a claim.

II. THE CLAIMANT IS DISQUALIFIED BY THE *BROCHES* TEST

26. A State-owned enterprise is one that is predominantly owned by or controlled by the State or its institutions, with or without separate legal personality.[12]

27. Since the CLAIMANT'S inception, Bonooru has held a sizeable stake of at least 31% in the company.[13] No other shareholder held more than 7% stake in the CLAIMANT.[14] Therefore, the CLAIMANT is a State-owned enterprise of Bonooru. Further, it is disqualified under the *Broches* test as it was discharging essentially governmental functions of Bonooru **[1]**; and *alternatively*, it was acting as an agent of Bonooru **[2]** in operating Caeli Airways.

1. The CLAIMANT was discharging essentially governmental functions of Bonooru in operating Caeli Airways

28. This requirement of the *Broches* test mirrors Article 5 ARSIWA,[15] which requires the entity to be empowered by the laws of a State to exercise elements of governmental authority (i.e.,

[8] *Ryan,* ¶197.
[9] *CSOB*, ¶17, *BUCG*, ¶33, *Masdar*, ¶170.
[10] *BUCG*, ¶34.
[11] *Tatneft*, ¶163.
[12] *Paulsson*, p. 197.
[13] Record, Uncontested Facts, p. 29, ¶10.
[14] Record, Uncontested Facts, p. 89, ¶2.
[15] *BUCG*, ¶34.

governmental functions) and to be acting in a governmental capacity in performing the conduct in question.[16]

29. The CLAIMANT was discharging essentially governmental function because providing international air travel to and from Bonooru is a governmental function of Bonooru **[1.1]**; the CLAIMANT is empowered by the law of Bonooru to perform this governmental function **[1.2]**; and the CLAIMANT was performing this governmental function in operating Caeli Airways **[1.3]**.[17]

1.1. Providing international air travel is a governmental function of Bonooru

30. The definition of what constitutes a governmental function, depends on the society in question, its history, and its traditions.[18]

31. Air travel is important for Bonooru as it is a small archipelagic state comprising of 109 islands.[19] Therefore, Article 70 of the Bonoori Constitution bestows an obligation on the Bonoori government to provide "*travel to and from its many islands"* to ensure the mobility rights of Bonoori citizens.[20] This obligation is international in character, as the phrase includes all travel either to the islands of Bonooru or from the islands of Bonooru. This interpretation is supported by the decision of the Constitutional Court of Bonooru which stated that the obligation under Article 70 extends to providing paid travel both "*within, and outside*" Bonooru.[21]

32. Further, the historical importance of Article 70 to Bonooru's society is highlighted by: *first,* the monopoly of the fully State-owned Bonooru Air over civil aviation for nearly 40 years;[22] *second,* the protests by Bonoori people on the privatisation of Bonooru Air, owing to a fear of loss of mobility rights;[23] and *third*, the Prime Minister of Bonooru assuring protestors that Bonooru Air's successor (CLAIMANT) would be directed to provide mobility rights to Bonoori citizens.[24]

33. Moreover, the CLAIMANT received subsidies for the operation of international air routes between Bonooru and Mekar, under the Horizon 2020 Scheme.[25] One of the main outcomes of this Scheme, as outlined by a government official of Bonooru (who, coincidentally, was the erstwhile

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[16] *ARSIWA*, Article 5.
[17] *ARSIWA*, Article 5.
[18] *ARSIWA Commentary*, p. 43, ¶6; *Crawford*, p. 130.
[19] Record, Uncontested Facts, p. 28, ¶5.
[20] Record, Annex I, p. 41, Article 70(2).
[21] Record, Annex II, p. 42, ¶25.
[22] Record, Uncontested Facts, p. 29, ¶7.
[23] Record, Uncontested Facts, p. 29, ¶8.
[24] Record, Uncontested Facts, p. 29, ¶8.
[25] Record, Uncontested Facts, p. 32, ¶28.

head of the CLAIMANT'S board of directors),[26] was that the CLAIMANT enhanced the mobility rights of Bonoori citizens by operating those international air routes.[27]

34. Therefore, providing international air travel to and from Bonooru is a governmental function of Bonooru.

35. The CLAIMANT may contend that providing international air travel is a commercial act and not a governmental function. This distinction is borrowed from the concept of state immunity, and is not supported by the ARSIWA.[28] Further, ICSID tribunals have confirmed that the distinction between commercial and governmental acts does not apply to ARSIWA.[29] Therefore, such a distinction is untenable.

1.2. The CLAIMANT is empowered by the law of Bonooru to perform this governmental function

36. The term 'empowered by law' implies that the State in question has specifically delegated governmental functions.[17] The inclusion of governmental functions in the objects and functions of a company is enough to prove that it has been entrusted with governmental functions.[30]

37. Clause 3(h) of the CLAIMANT'S Memorandum of Association provides that one of the objectives of the CLAIMANT is to benefit the Bonoori public in accordance with Article 70 of the Bonoori Constitution.[31] The Constitutional Court of Bonooru confirmed that it was the Bonoori state which mandated the fulfilment of this objective by the CLAIMANT.[32] Therefore, Bonooru has empowered the CLAIMANT to perform this governmental function by delegating its constitutional responsibility to the CLAIMANT.

1.3. The CLAIMANT was performing this governmental function in operating Caeli Airways

38. When ARSIWA is applied to determine State Responsibility, the acts of an entity, which are alleged to be internationally wrongful acts must be examined.[33] However, when the *Broches* test is applied, the CLAIMANT'S acts with respect to its investment must be analysed.[34] The

[26] Record, Uncontested Facts, p. 31, ¶22.
[27] Record, PO4, p. 89, ¶6.
[28] *Crawford*, p. 130.
[29] *Noble Ventures*, ¶82.
[30] *Hamester*, ¶190.
[31] Record, Uncontested Facts, Annex IV, p. 44.
[32] Record, Uncontested Facts, Annex III, p. 43.
[33] *ARSIWA,* Article 1.
[34] *Masdar*, ¶171.

governmental functions must constitute the *"core"* of the CLAIMANT'S business in its investment, i.e., they should not be "*marginal*".[35] The term *"marginal"* is defined as *"very small in amount or effect"*.[36]

39. Caeli Airways' flights between Bonooru and Mekar, the operation of which is a governmental function of Bonooru, constituted a *"core"* of its business. These *"high-traffic routes"*[37] were one of the "*pillars*" of its business.[38] Furthermore, a former Bonoori government employee pointed out that Caeli Airways puts *"significant resources"* into flights between Bonooru and Mekar.[39] Thus, governmental functions constituted the *"core"* of the CLAIMANT'S business in Caeli Airways as they were not "*marginal*".

40. Therefore, the CLAIMANT should be disqualified as an investor as it was discharging essentially governmental functions of Bonooru.

2. *Alternatively*, the CLAIMANT was an agent of Bonooru in operating Caeli Airways

41. This requirement of the Broches test mirrors Article 8 ARSIWA.[40] It applies to cases where an entity is acting on the instructions of, or under the direction and control of a State in carrying out the conduct in question.[41] Therefore, it must be examined whether the entity is under the 'effective control' of the State.[42] A State exercises 'effective control' if it directs or enforces the perpetration of the acts in question.[43] This requirement is fulfilled when a state exercises control over the investment decisions of the investor.[44]

42. As there is no definition of control, each case must be viewed in relation to its facts and context.[45] Control may also be exercised by minority shareholders, by virtue of their special rights.[46] Some of the drafters of the Convention expressed the view that control may be achieved by even 15% shareholding.[47]

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[35] *Tatneft*, ¶137.
[36] *Cambridge*.
[37] Record, Uncontested Facts, p. 33, ¶33.
[38] Record, Uncontested Facts, p. 32, ¶28.
[39] Record, Uncontested Facts, Annex VII, p. 55.
[40] *BUCG*, ¶34.
[41] *ARSIWA*, Article 8.
[42] *Bosnian Genocide*, ¶401.
[43] *Nicaragua*, ¶115.
[44] *Masdar*, ¶171.
[45] *Vacuum Salt*, ¶43.
[46] *Aguas del Tunari*, ¶264.
[47] *Schreuer/Malintoppi/Reinisch/Sinclair*, p. 324, ¶851.

43. Bonooru held a 31-38% share in the CLAIMANT when it was operating Caeli Airways.[48] No other shareholder had more than a 7% stake.[49] This made Bonooru the largest voting bloc in the CLAIMANT'S shareholder meetings, giving it a high level of control over the investment decisions of the CLAIMANT. Many times, its representatives even formed the majority of members present and voting in the shareholder meetings of the CLAIMANT, where major decisions like appointment of directors were taken.[50] Bonooru also had a special right to nominate one of its officials as a non-executive director of the CLAIMANT.[51]

44. Further, the Constitutional Court of Bonooru held that Bonooru's stake in the CLAIMANT was sufficient for it to ensure the protection of its citizen's rights under Article 70, indicating that the CLAIMANT is under its 'effective control'.[52] Moreover, a former high ranking official of the Bonoori government admitted that companies like the CLAIMANT tend to be controlled by the Bonoori government.[53]

45. Therefore, the CLAIMANT is an agent of Bonooru as it is under Bonooru's 'effective control'.

[48] Record, Uncontested Facts, p. 29, ¶10.
[49] Record, PO4, p. 89, ¶2.
[50] Record, PO3, p. 86, ¶3.
[51] Record, Annex IV, p. 46, ¶152.4.
[52] Record, Annex III, p. 43, ¶59.
[53] Record, Annex VII, p. 55.

ISSUE 2: THE TRIBUNAL SHOULD ONLY GRANT THE LEAVE SOUGHT BY THE EACRPU TO FILE *AMICUS CURIAE* SUBMISSIONS

46. The CBFI and EACRPU have sought leave to file *amicus curiae* submissions. Amici submissions may be accepted under the AF Rules only if their submissions would address a matter within the scope of the dispute **[I]**, that may assist the tribunal **[II]**, from a person or entity that has a significant interest in the arbitral proceeding **[III]**.[54] Pursuant to Article 9.20(6) of the CEPTA, the Tribunal must also examine whether the amici make their submissions in furtherance of a public interest **[IV]**. Further, the Tribunal has an independent obligation to ensure that the amici submissions do not unfairly prejudice the Parties **[V]**.[55] These are guiding factors that the Tribunal may consider in determining whether to accept amicus submissions and they must be considered cumulatively.[56]

47. The Tribunal should allow EACRPU and should not allow the CBFI to file *amicus curiae* submissions. The reasons for this are elaborated below as against each relevant factor.

I. THE EACRPU'S SUBMISSIONS WOULD ADDRESS MATTERS WITHIN THE SCOPE OF THE DISPUTE, WHILE THE CBFI'S SUBMISSIONS WOULD NOT

48. Amici submissions should not unnaturally broaden the scope of the dispute.[57] The amici must establish the relevance of their submissions with respect to the legal scope of the dispute.[58]

49. The EACRPU's submissions would address issues regarding the legality of the acquisition of the CLAIMANT'S investment. Investments obtained through fraud and corruption are outside the jurisdiction of the Tribunal.[59] Therefore, this is a matter within the dispute because it affects the jurisdiction of the Tribunal.

50. The CLAIMANT may contend that the EACRPU's submissions would unnaturally broaden the scope of the dispute by raising a new jurisdictional question which has not been raised by either Party. However, jurisdiction is always within the scope of the dispute as it is the prerogative of the Tribunal to address and resolve issues which affect its jurisdiction.[60] Even if such issues have

[54] *CEPTA*, Article 9.19(3); *AF Rules*, Article 41(3).
[55] *AF Rules*, Article 41(3).
[56] *Born/Forrest*, p. 645; *Schliemann*, p. 370.
[57] *Apotex (PO2)*, ¶32; *Apotex Holdings*, ¶35.
[58] *Eco Oro*, ¶29.
[59] *Inceysa,* ¶84.
[60] *Born/Forrest*, p. 650.

not been raised by the Parties, the Tribunal has the authority to determine its own jurisdiction.[61] Therefore, the EACRPU's submissions address matters within the scope of the dispute.

51. In contrast, the CBFI's submissions would not address a matter within the scope of the dispute. The crux of the dispute is the alleged unfair and inequitable treatment of the CLAIMANT's investment within Mekar. At face value, the CBFI's submissions regarding Bonooru's business landscape, and its regulatory framework are clearly not within the scope of a dispute that originated in Mekar. CBFI does not make any assertions on how its submissions address a legal issue germane to the dispute.

52. The CLAIMANT may argue that information on Bonooru's business landscape and its corporate governance framework would be relevant in the issue of jurisdiction to determine the level of control that Bonooru exercises over businesses in its territory. However, as stated above at ¶25, the issue of jurisdiction concerns the *Broches* test. This test involves a highly specific factual inquiry into the CLAIMANT's functions and control exercised over it. Information about the level of control Bonooru generally exercises over businesses in its territory is not relevant under the *Broches* test. Therefore, the CBFI fails to address a matter within the scope of the dispute.

II. THE EACRPU'S SUBMISSIONS WOULD BE OF ASSISTANCE TO THE TRIBUNAL, WHILE THE CBFI'S SUBMISSIONS WOULD NOT

53. In addition to addressing a matter within the dispute, the amici must establish both expertise and a unique perspective to be of assistance.[62] The amici submissions must not entail information that has or that can be provided by the disputing parties.[63] Having information and experience specific to the background of the investment would constitute a unique perspective.[64]

54. The EACRPU seeks to adduce information regarding corruption that took place during the acquisition of Caeli Airways by the CLAIMANT. Such information is specific to the background of the CLAIMANT'S investment. The EACRPU has a unique perspective because they can provide unbiased facts regarding corruption as they were external advisors involved in the entirety of the privatization process. *In any case*, the Tribunal cannot rule out on the possibility of amici

[61] *AF Rules*, Article 45(3).
[62] *Bear Creek (PO5)*, ¶38; *Eco Oro*, ¶31; *Vivendi (Amicus)*, ¶24; *Schliemann*, p. 371.
[63] *Bear Creek (PO5)*, ¶39; *Eco Oro*, ¶32; *Apotex (PO2)*, ¶21; *Resolute Forest*, ¶4.4.
[64] *Bear Creek (PO5)*, ¶54.

submissions alleging corruption to be of assistance, and they must be allowed.[65] Therefore, the EACRPU's submissions would be of assistance to the Tribunal.

55. In contrast, the CBFI's submissions would not provide information that is different from the Parties. The CLAIMANT is subject to Bonooru's business landscape and its corporate framework. Therefore, any information that the CBFI has would also be available with the CLAIMANT.

56. Further, the CLAIMANT is a member of the CBFI. Even if there was no involvement by the CLAIMANT in the CBFI's decision to file an amicus submission, which is unclear, they may nevertheless have influenced the applicants' position on the information it seeks to adduce through previous activities and deliberations within the CBFI. Therefore, the CBFI would not contribute to knowledge which is materially different from the Parties.

57. The CLAIMANT may argue that the CBFI, as the 'national leader in public policy advocacy in Bonooru and Greater Narnia', would address these issues from a broader perspective. However, expertise of amici is irrelevant if they do not provide information that is different from what the Parties may be able to provide.[66] As stated above at ¶56, the CBFI would not provide information or knowledge that is different from what the CLAIMANT may be able to provide. Therefore, the CBFI would not be of any assistance to the Tribunal.

III. THE EACRPU HAS A SIGNIFICANT INTEREST IN THE PROCEEDINGS, WHILE THE CBFI DOES NOT

58. Amici possess 'significant interest' if the outcome of the arbitration affects the rights and principles they seek to represent.[67] Therefore, they must demonstrate more than a general interest in the proceedings.[68]

59. The EACRPU submits that the CLAIMANT'S investment is tainted by allegations of corruption. Allowing an investor, which has obtained its investment through corruption and bribery, to claim relief through Investor-State Dispute Settlement would lead to stagnation of anti-corruption efforts in Mekar. The CLAIMANT may contend that this is a general interest and is not a significant interest. However, the EACRPU are members of Mekari civil society, whose professional focus is investment banking. Hence, the outcome of the arbitration affects their financial operations as they regularly advise potential investors who wish to invest in Mekar. Therefore, the EACRPU

[65] *Infinito Gold*, ¶33.
[66] *Bear Creek (PO5)*, ¶54.
[67] *Resolute Forest*, ¶*4.6*; *Eco Oro*, ¶34; *Apotex (PO2)*, ¶28*; Apotex Holdings*, ¶38; *Schliemann*, p. 371.
[68] *Resolute Forest*, ¶*4.6*; *Eco Oro*, ¶34; *Apotex (PO2)*, ¶28*; Apotex Holdings*, ¶38; *Schliemann*, p. 371.

has demonstrated how its own rights are affected by this dispute and by the issue they seek to make submissions on.

60. In contrast, the CBFI has not demonstrated anything beyond a general interest. An amicus' interest in the legal interpretation of treaty provisions cannot constitute a significant interest as it would be contrary to the objective of permitting *amicus curiae* briefs.[69] The interpretation of the legal provision of a treaty would merely be a general interest of all foreign investors. The CBFI is a collective of Bonoori foreign investors. Allowing such a collective to make *amicus curiae* submissions would lead to the absurd result where any foreign investor could make *amicus curiae* submissions in disputes that would favour them in ongoing or upcoming disputes under the same treaty. Therefore, the CBFI does not have a significant interest in the proceedings.

IV. THE EACRPU MAKES ITS SUBMISSIONS IN FURTHERANCE OF A PUBLIC INTEREST, WHILE THE CBFI DOES NOT

61. Amici must identify, through its submissions, a specific public interest which is affected by the outcome of the dispute and make their submissions in furtherance of this public interest.[70] To identify a specific public interest, amici must show that the dispute has potential to affect the operation of systems which provide basic public services to millions of people.[71] Traditionally, public interest is either the interest of the state and its constituents, for instance, the state's regulatory policy, or issues which are the common interest of mankind. The common interest of mankind may include public health or environment.[72]

62. Issues of corruption are contrary to transnational public policy.[73] Consequently, issues of corruption are of interest to the State and its constituents. Further, the maintenance of fair business practices within the host state would also qualify as a public interest in the arbitration.[74] The EACRPU claims that the public interest in this arbitration is inherent considering allegations of corruption against the CLAIMANT. Further, the EACRPU has an interest in the maintenance of fair business practices in Mekar. Therefore, it has identified the specific public interest which is affected by this dispute.

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[69] *Apotex Holdings*, ¶40.
[70] *Apotex (PO2)*, ¶29; *Methanex (Amicus)*, ¶49; *Bastin*, p. 227; *Schill/Djanic*, p. 48; *Zachariasiewicz*, p. 214.
[71] *Vivendi (Amicus)*, ¶19; *Methanex (Amicus)*, ¶49.
[72] *Vivendi (Amicus)*, ¶24; *Gabriel Resources*, ¶65; *Schliemann*, p. 373.
[73] *World Duty Free*, ¶172.
[74] *UPS*, ¶3; *Menaker/Helbeck*, p. 198, ¶9.61.

63. In contrast, the CBFI does not make its submissions in furtherance of a public interest. It has only identified the outcome of this arbitration on Bonoori foreign investors. The interest of foreign investors in obtaining favourable interpretation of the CEPTA neither affects the state's interest nor does it impact issues which are the common interest of mankind.

V. THE EACRPU'S SUBMISSIONS WOULD NOT UNFAIRLY PREJUDICE THE CLAIMANT, WHILE THE CBFI'S SUBMISSIONS WOULD UNFAIRLY PREJUDICE THE RESPONDENT

64. The Tribunal has an obligation to ensure that amici submissions do not unfairly prejudice the Parties.[75] Amici submissions would unfairly prejudice the Parties, if there is a lack of independence and neutrality of amici from the Parties.[76]

65. The EACRPU's submissions would not unfairly prejudice the CLAIMANT. They are independent from the Parties.[77] Further, they have complied with all the requirements mandated by the Tribunal. The CLAIMANT may contend that the EACRPU's submissions would raise a new procedural layer to the dispute and increase costs. However, the EACRPU's submissions affect the Tribunal's jurisdiction and must be examined.

66. In contrast, the CBFI's submissions would unfairly prejudice the RESPONDENT. Where the amicus' member is engaged in a dispute with a disputing party, it is an indication of 'apparent lack of independence or neutrality'.[78] Three members of the CBFI, viz. the CLAIMANT, SRB Infrastructure, and Wiig Wealth Management Group, are presently engaged in disputes with the RESPONDENT.[79] Therefore, CBFI's submissions would unfairly prejudice the RESPONDENT.

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[75] *AF Rules*, Article 41(3); *Vivendi*, ¶29; *Methanex (Amicus)*, ¶50; *UPS*, ¶69; *Philip Morris (PO3)*, ¶29; *Philip Morris (PO4)*, ¶29; *Bastin*, p. 132.
[76] *von Pezold*, ¶59.
[77] Record, Amicus Submission by the EACRPU, p. 19.
[78] *von Pezold*, ¶56; *Born/Forrest* p. 654.
[79] Record, Amicus Submission by the CBFI, p. 16, ¶6.

ISSUE 3: THE RESPONDENT DID NOT VIOLATE ARTICLE 9.9 CEPTA

67. The CLAIMANT contends that the RESPONDENT breached its obligations under Article 9.9 CEPTA and that its measures cannot be justified under its right to regulate. To the contrary, none of the RESPONDENT'S measures violate Article 9.9 CEPTA **[I]**. *In any case*, the RESPONDENT'S measures are covered under Article 9.8 CEPTA **[II]**.

I. THE RESPONDENT DID NOT BREACH THE FET STANDARD UNDER ARTICLE 9.9 CEPTA

68. Contrary to the CLAIMANT'S contentions, the RESPONDENT'S conduct did not amount to a denial of justice **[1]**; the RESPONDENT did not violate due process in either investigation **[2]**; the RESPONDENT'S conduct was not arbitrary **[3]**; the RESPONDENT'S conduct was not abusive **[4]**; and the RESPONDENT'S conduct cannot be considered cumulatively to breach FET **[5].**

1. The RESPONDENT'S conduct did not amount to a denial of justice

69. Article 9.9 CEPTA provides that the denial of justice in criminal, civil or administrative proceedings would be in violation of FET. A denial of justice refers to a gross failure of a national legal system as a whole.[80] Tribunals have previously considered breaches of municipal law, improper judicial procedure and even potentially corrupt motivations on the part of a judge to not constitute a denial of justice.[81] To prove a denial of justice, the CLAIMANT must demonstrate a misapplication that no honest, competent court could have ever arrived at.[82]

70. The CLAIMANT may contend denial of justice by claiming that there were manifestly unjust decisions and an undue delay. However, the CCM's order regarding the First Investigation was not manifestly unjust **[1.1]**; there was no undue delay in the hearing regarding interim relief for the CCM's airfare caps **[1.2]**; and that the decision of the Mekari Court to implement the set-aside award was not manifestly unjust **[1.3]**.

1.1. The CCM's order regarding the First Investigation was not manifestly unjust

71. Contrary to the contentions of the CLAIMANT, the CCM's order regarding the First Investigation did not constitute a denial of justice as it was not manifestly unjust. There was no denial of justice

[80] *Oostergetel*, ¶273; *Amto*, ¶80.
[81] *Oostergetel*, ¶273.
[82] *Arif*, ¶442.

as the CLAIMANT did not satisfy the 'finality rule' **[1.1.1]**; and the CCM's order did not shock judicial propriety **[1.1.2]**.

1.1.1. The CLAIMANT did not satisfy the 'finality rule'

72. A denial of justice cannot be established without the CLAIMANT having given the RESPONDENT'S judicial system the chance to correct an erroneous decision.[83] Consequently, a denial of justice cannot be established without exhausting local remedies, which is known as the 'finality rule.'

73. The CLAIMANT may contend that it must be exempted from this rule on the basis of apparent futility of the measures. However, this alleged futility must be assessed based on the reasonable availability of remedies and the investor's behavior in exhausting them. In order to claim futility, the investor must have attempted to exhaust local remedies, irrespective of their contingent or theoretical nature.[84] Further, a mere delay cannot form the basis of a futility exception.[85]

74. The First Investigation had concluded with a 150 million MON fine against the CLAIMANT and the maintenance of airfare caps until the Second Investigation had concluded.[86] Fines in Mekar can only be imposed after a court review.[87] However, the CLAIMANT did not wait until the initial review of this decision, much less the final review. Therefore, the CLAIMANT did not exhaust available local remedies. The only justification the CLAIMANT offers for the same is the delay, which cannot form the basis for such a claim.

1.1.2. The CCM's order did not shock judicial propriety

75. A manifestly unjust decision refers to a decision which shocks judicial propriety, i.e., one which could not have been arrived at by an honest and competent court.[88] The CCM had found Caeli Airways guilty of predatory pricing based on its low fares, loyalty programs and the subsidies it received from Bonooru.

76. The CLAIMANT may contend that this decision was manifestly unjust as the CLAIMANT could not have rendered its services below its costs as it was still profitable during that period. However, above-cost predatory pricing has been considered by various competition jurisdictions globally.[89] These jurisdictions also rely upon average avoidable costs to ascertain when such strategy

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[83] *Pantechniki*, ¶96.
[84] *Apotex (Award),* ¶288.
[85] *Kiliç*, ¶8.1.10.
[86] Record, Uncontested Facts, p. 36, ¶45.
[87] Record, Uncontested Facts, p. 37, ¶50.
[88] *Arif*, ¶442.
[89] *Pinto*, p. 74; *AMR*, ¶1196; *Enforcement Policy.*

becomes predatory.[90] Additionally, such strategy was financed by receipt of foreign subsidies which is generally considered to be anti-competitive.[91] Even if the Tribunal disagrees with the CCM's rationale, a mere misapplication of law does not indicate a failure of the system as a whole and would not constitute a denial of justice.[92] Therefore, the order was not manifestly unjust.

77. Further, absent any demonstration of procedural impropriety or interference regarding the order, a finding of breach would amount to the Tribunal sitting as a court of appeal.[93] This shall violate the general principle that international review cannot assess the correctness of judicial or administrative outcomes.[94] Therefore, the order did not shock judicial propriety.

1.2. The delay in the interim hearing on the airfare caps was not an undue delay

78. An undue delay refers to a circumstance where an investor is subjected to overly long Court proceedings.[95] Identifying such a delay requires a fact sensitive assessment of factors such as the complexity of the proceedings, need for swiftness, the behavior of the litigant, and the behavior of courts.[96]

79. *First*, matters involving technical determinations are generally regarded as complex.[97] The assessment of whether interim relief should be provided, in this case, would require the court to examine *prima facie* the allegations of predatory pricing.[98] This would involve demonstrating highly technical elements such as market structure, the scheme of predation and probable recoupment.[99] Therefore, the matter was clearly highly complex.

80. *Second*, the need for swiftness in a proceeding must be ascertained based on the other matters before the Court.[100] The Mekari Court Registrar had indicated the priority of criminal proceedings as a major cause of the delay.[101] Therefore, in light of the other matters before the Court, this matter did not require swiftness.

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[90] *Gürkaynak/Özgümüş*.
[91] *ICAO*.
[92] *Liman*, ¶274.
[93] *Amto*, ¶80.
[94] *Reinisch/Schreuer*, pp. 382-383, ¶646.
[95] *Reinisch/Schreuer*, p. 410, ¶783.
[96] *White Industries*, ¶¶10.4.11, 10.4.13, 10.4.14, 10.4.18.
[97] *Jan de Nul*, ¶204.
[98] *Reuters*.
[99] *Bolton/Brodley/Riordan,* p. 31.
[100] *White Industries,* ¶10.4.14.
[101] Record, Uncontested Facts, p. 36, ¶44.

81. *Finally*, the status of the host State as a developing nation and its growing population has been considered while assessing delays.[102] Mekar's population between 1980 to 2015 had almost doubled. However, its judicial system did not expand at the same rate.[103] This resulted in extreme court delays and inefficiency. The Court was also the victim of a surge in cases owing to the economic crisis. Therefore, while this delay was potentially unsatisfactory, it did not breach FET.

82. Without prejudice to the above, the CLAIMANT applied for interim relief in a matter which had been heard and resolved in only 15 months. Tribunals have previously considered even delays of 10 years to not be undue.[104] Therefore, the alleged delay did not constitute an undue delay.

1.3. The HCC's decision to enforce the set aside arbitral award does not constitute a manifestly unjust decision

83. As stated above at ¶75, a manifestly unjust decision is one which shocks judicial propriety. Article 5(1) New York Convention prescribes the grounds for refusal of enforcement by providing discretionary power to the enforcing Court.[105] This implies that the Mekari courts have discretion in enforcing awards which do not conflict with it local laws.[106]

84. Both the HCC and the Superior Court of Mekar, after assessing the allegations of corruption against Mr. Cavannaugh, had ruled in favour of enforcing the award. The Court had also confirmed CILS as an entity funded by foreign donations with the aim of interfering in Mekar's domestic affairs. Therefore, the evidence of corruption cannot be considered valid.

85. The CLAIMANT may also highlight alleged circumstantial evidence such as the length of the award or number of direct references to evidentiary documents. However, an award may only be set aside if 'strong circumstantial evidence' is presented. The lack of direct references to evidence presented does not indicate that it was not considered. Further, the application of mind is ascertained on the basis of the coverage of the important issues and not on the length of the award.[107] The Court had examined the rationale of the award and concluded that it represented the correct position of law even if it was only 5 pages long.[108] Consequently, the CLAIMANT'S allegations of corruption held no weight.

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[102] *White Industries,* ¶10.4.18.
[103] Record, Uncontested Facts, p. 29-30, ¶13.
[104] *Jan de Nul*, ¶204; *Rumeli*, ¶ 617.
[105] *CREFAA*, Article 5(1).
[106] *Teo.*
[107] *Rumeli*, ¶617.
[108] Record, Annex XIV, p. 66, ¶10.

86. As stated above at ¶77, an international review cannot assess the correctness of domestic judicial or administrative outcomes. Even if the Tribunal decides that this decision was a misapplication of the law, the same will not constitute a denial of justice.[109]

87. Therefore, the RESPONDENT'S conduct does not amount to a denial of justice.

2. The RESPONDENT did not violate the CLAIMANT'S right to procedural propriety

88. Article 9.9(2)(b) CEPTA prohibits breaches of due process in judicial and administrative proceedings.[110] A due process violation refers to a manifestly unjust procedural omission which shocks judicial propriety.[111] Such omission must have been so egregiously wrong that no honest competent court could have arrived at it.[112] Consequently, a mere procedural error does not constitute a breach of due process as due process is concerned with the operation of the State's administrative and legal system as a whole. Due Process was neither violated in the First Investigation **[2.1]**; nor in the Second Investigation **[2.2]**.

2.1. The CCM did not violate due process in initiating the First Investigation

89. The CLAIMANT contends that the initiation of the First Investigation violated due process as it was initiated on the consideration of Caeli Airways' market share jointly with the members of the moon alliance. However, various competition jurisdictions globally have considered market shares jointly in cases of joint ownership.[113] Further, regulators have even removed industry specific exemptions such as the exemption for slot trading.[114] The CCM only considered the Caeli Airways' share with that of the Royal Narnian. The CLAIMANT, during this period, owned 85% of Caeli Airways and 100% of the Royal Narnian. Additionally, the Caeli airways had co-operated with the Royal Narnian through preferential slot trading.

90. Therefore, the CCM did not violate due process in the First Investigation.

2.2. The CCM did not violate due process in initiating the Second Investigation

91. The CLAIMANT contends that the CCM violated due process under the MRTP Act by initiating the Second investigation without considering other modes of transports while assessing the

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[109] *Liman*, ¶274.
[110] *CEPTA*, Article 9.9(2)(b).
[111] *ELSI*, ¶128; *Genin*, ¶364.
[112] *Arif*, ¶445; *ECE*, ¶4.764.
[113] *Gudofsky/Kriaris/Vital*, p. 2; *FTC*; *Wilson*.
[114] *Pheasant/Giles*, p. 32.

relevant market.[115] Further, the CLAIMANT also contends that the complaint was not valid as the complainants were not in direct competition with Caeli Airways as most of its business was on long-haul flights which these enterprises did not operate.[116]

92. However, the fact that most of Caeli Airways' business is derived from long haul flights is irrelevant as it does not relate to Caeli Airways' participation in the identified regional routes. Further, as airlines and other modes of transportation are distinct in terms of prices and commuting time, they constitute a distinct relevant market.[117]

93. Therefore, the CCM did not violate due process in the Second Investigation.

3. The RESPONDENT'S measures were not arbitrary

94. Article 9.9(2)(c) CEPTA provides that measures exhibiting arbitrary conduct would breach the FET standard. The CLAIMANT may contend that by refusing to remove the airfare caps in light of inflation, and by denying it subsidies, the RESPONDENT acted arbitrarily. To test whether a measure is arbitrary or not, the Tribunal must examine whether there existed a rational policy for that measure and whether the act was reasonable in relation to the said policy.[118] A rational policy must address a public interest matter, and for the measure to be reasonable, the effect on the investor must be considered.[119] In light of this standard, the decision to maintain airfare caps was not arbitrary **[3.1];** and the decision to deny subsidies to the CLAIMANT was not arbitrary **[3.2].**

3.1. The decision to maintain airfare caps was not arbitrary

95. The decision to maintain airfare caps was not arbitrary as it was based on a rational policy **[3.1.1];** and was reasonably related to that policy **[3.1.2].**

3.1.1. The decision was based on a rational policy

96. A rational policy measure is taken by following a logical and good sense explanation, with the aim of addressing a public interest matter.[120] Such a policy takes into account social and economic interests, so that individual interests can be safely pursued.[121] A measure taken to ensure compliance with specific laws, in the absence of evidence regarding targeting of a foreign

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[115] Record, Uncontested Facts, p. 35, ¶38.
[116] Record, Uncontested Facts, p. 35, ¶38.
[117] *Wills/Grün*.
[118] *Electrabel*, ¶179; *AES*, ¶10.3.7; *Micula*, ¶525; *Kingsbury/Schill*, p. 96.
[119] *Electrabel*, ¶179; *AES*, ¶¶10.3.8-10.3.9; *Micula*, ¶525.
[120] *AES*, ¶10.3.8; *Electrabel*, ¶179; *EDF*, ¶303; *McLachlan/Shore/Weiniger*, ¶7.177.
[121] *Mamidoil*, ¶614.

investment, cannot be arbitrary.[122] Consumer protection measures have been held to be based on a rational policy.[123]

97. The CCM imposed airfare caps against the CLAIMANT as part of its investigations against anti-competitive behavior.[124] The airfare caps were in compliance with the MRTP Act, and ensured that the CLAIMANT does not earn supra-competitive profits.[125] This antitrust legislation had the objective of consumer protection, which is a matter of public interest.[126] Further, the cap itself was not fixed, but was pegged to the national inflation rate determined by the Central Bank for the entire nation.[127] The decision to maintain these caps took into account the prevalent inflation, and complied with the MRTP Act. There is no evidence that suggests the targeting of the CLAIMANT in making such a decision. Therefore, the decision to maintain airfare caps was based on a rational policy as it was in compliance with laws meant to ensure consumer protection.

3.1.2. The decision was reasonably related to the policy objective

98. A measure is reasonable when its impact on the investor is proportional to the State's rational public policy objective.[128] Proportionality requires that the claim must be evaluated on the basis of the effect the measure has on the investors' rights,[129] and balance it with the State's interests in a manner that is not excessive.[130] To find a governmental measure arbitrary, the host state's special circumstances must be considered.[131] Consequently, an economic crisis in a country justifies heightened scrutiny of various sectors.[132]

99. In *Antaris,* the Czech Republic imposed certain measures to regulate windfall profits and to reduce impact on consumers, which were held to be not disproportionate as it had the rational objective of consumer protection and these measures were reasonable to achieve that goal.[133] The tribunal clarified that its own opinion on whether the particular course of action was good, or if a different solution might have been better, does not matter for the purpose of the

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122 *Lauder*, ¶270.
123 *Isolux*, ¶823.
124 Record, Uncontested Facts, p. 34, ¶37.
125 Record, Uncontested Facts, p. 34, ¶37.
126 Record, Annex V, p. 47.
127 Record, Uncontested Facts, p. 36, ¶43.
128 *Electrabel*, ¶179; *AES*, ¶10.3.36; *Antaris,* ¶305; *Kläger*, p. 243.
129 *Kingsbury/Schill*, p. 102; *Bücheler*, p. 196.
130 *Azurix*, ¶331; *EDF*, ¶293; *Greentech*, ¶139; *Marfin*, ¶1213.
131 *Genin,* ¶371.
132 *Genin, ¶371.*
133 *Antaris,* ¶444.

reasonableness analysis.[134] Lastly, the fact that certain measures are unfavourable to the investor does not make them unreasonable, when the policy behind the measures is to ensure consumer protection and bears a reasonable relationship to achieving it.[135]

100. The CLAIMANT has contended that the maintenance of the airfare caps in the backdrop of inflation was unreasonable and disproportionate.[136] However, this decision was reasonable and proportionate. The economic crisis had left the CCM with only two options – either to remove the airfare caps as a whole, or peg it to the national inflation rate.

101. If the airfare caps were removed, it would have been contrary to the public interest as the CLAIMANT could have used the inflation as an excuse to increase its prices significantly by abusing its dominant market position. Due to the rising oil prices in 2018,[137] many airlines would not have been able to keep up their operations, thereby allowing the CLAIMANT to assert its dominance. Such anti-competitive acts would have only worsened the debilitating economic situation. The economic crisis justified such heightened scrutiny into all parts of the economy, including stricter measures against anti-competitive behavior.

102. On the other hand, pegging the airfare caps to the national inflation rate did take the inflation into account. The airfare caps were imposed to ensure that the CLAIMANT does not abuse its dominant market position and earn supra-competitive profits. The maintenance of the airfare caps was necessary to ensure consumer protection, and even if it may have been unfavourable to the CLAIMANT, it cannot be said to be unreasonable.

103. Therefore, the CCM's decision to maintain the airfare caps, and subsequently peg it to the national inflation rate, was a rational policy, and had a reasonable relation to that policy objective.

3.2. The decision to deny subsidies to the CLAIMANT was not arbitrary

104. The CLAIMANT has further contended that the RESPONDENT arbitrarily denied it the subsidies that were offered to some other airlines.[138] However, the decision to deny subsidies to the CLAIMANT was based on a rational policy **[3.2.1];** and was reasonably related to that policy objective **[3.2.2].**

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[134] *Antaris,* ¶443.
[135] *Isolux,* ¶823; *Stadtwerke,* ¶317.
[136] Record, Notice, p. 4, ¶16.
[137] Record, Uncontested Facts, p. 37, ¶48.
[138] Record, Notice, p. 4, ¶18.

3.2.1. The decision was based on a rational policy

105. As stated above at ¶96, a rational policy must take into account economic interests, so that individual interests can be safely pursued. *First,* State-owned and subsidized entities have several advantages over private owned entities, such as lower or no domestic taxes, preferences from government and have lesser requirements to produce profits or pay dividends.[139] Investments made by State-owned enterprises can also have potential national security or competitive neutrality concerns, which warrant mitigating measures from the host state.[140]

106. The CLAIMANT is a State-owned enterprise, and had near assurances that it would be bailed out by Bonooru if it suffered substantial losses.[141] It also received regular subsidies from Bonooru, unlike other privately owned airlines.[142] These subsidies also allowed the CLAIMANT to indulge in its anti-competitive practices.[143] The only other airline which was owned by another State, Larry Air, was also denied these subsidies.[144]

107. *Second,* due to the economic crisis, the RESPONDENT'S finances were severely affected, to the point where its entire consolidated annual public spending was only 350 million USD.[145] This is considerably lower than other comparable developing economies with similar population sizes. Consequently, due to limited funds, the RESPONDENT had to prioritize airlines that were more affected in order to allocate funds efficiently. The RESPONDENT provided subsidies to small airlines operating important domestic routes in Mekar, having a market share of less than 5%.[146] By providing subsidies only to airlines that were more vulnerable to the effects of the economic crisis, the RESPONDENT ensured the survival of the airline industry efficiently.

108. Therefore, the RESPONDENT denied subsidies to the CLAIMANT since it was a State-owned airline, and was a large, low-cost airline which would have recovered from the effects of the economic crisis. The RESPONDENT thereby ensured that the airline industry was protected in the most efficient manner.

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[139] *Nielsen*, p. 57.
[140] *Wang,* p. 51.
[141] Record, Annex IX, p. 55.
[142] Record, PO4, p. 89, ¶6.
[143] Record, Uncontested Facts, p. 36, ¶45.
[144] Record, Uncontested Facts, p. 37, ¶47.
[145] Record, PO3, p. 86, ¶4.
[146] Record, PO4, p. 89, ¶7.

3.2.2. The decision was reasonably related to the policy objective

109. As stated above at ¶98, reasonability is tested through proportionality. Based on statistical data, low-cost airlines can benefit from the effects of an economic crisis, since consumers would attempt to cut down expenses and opt for cheaper transportation options.[147]

110. Caeli Airways was a low-cost airline with the largest market share, and was also State-owned. Consequently, it was not as vulnerable to the effects of the economic crisis as some other airlines. The RESPONDENT had balanced its financial interests against the CLAIMANT'S, and decided not to grant any subsidies to the CLAIMANT. The CLAIMANT was not disproportionately affected because of this decision.

111. Therefore, the decision to deny subsidies was based on a rational policy and was reasonably related to the policy objective.

4. The RESPONDENT did not subject the CLAIMANT to abusive treatment

112. Article 9.9(2)(d) of the CEPTA provides that measures constituting abusive treatment, i.e., harassment and duress, of an investor would be in violation of the FET standard. The CLAIMANT may contend that the RESPONDENT violated the FET standard when it exercised its sovereign powers against the CLAIMANT. However, such a contention is untenable. The RESPONDENT did not harass the CLAIMANT **[4.1];** nor did it subject its investment to duress **[4.2]**.

4.1. The RESPONDENT did not harass the CLAIMANT

113. Tribunals should not consider a State's decision to 'play it by the book', as a campaign of harassment.[148] Consequently, foreign investors are not granted protection when economic injury results from *bona fide* regulation within the police powers of the state.[149] When a State fails to provide justification for its actions, it indicates that those actions were politically motivated.[150] In *Tokios,* the tribunal rejected the contentions of the investor regarding harassment when the host State showed the existence of an alternative explanation other than that of a politically inspired campaign. Due to the presence of an alternative explanation, the evidence regarding harassment was no longer considered to be plausible.[151]

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147 *Štimac/Vince/Vidović*, p. 9.
148 *McLachlan/Shore/Weiniger,* ¶7.127.
149 *OECD*, p. 5; *Philip Morris (Award),* ¶217; *Methanex (Award), Part IV, Ch. D,* ¶7.
150 *Tokios,* ¶33; *Tokios (Dissent),* ¶5; *Waste Management,* ¶138.
151 *Tokios,* ¶136.

114. The CLAIMANT may contend that five measures of the RESPONDENT constituted harassment. However, each of these measures had an alternative explanation. Consequently, these explanations invalidate any claim of political motivations behind the RESPONDENT'S measures.

115. *First,* the refusal to remove airfare caps in light of inflation was in line with the MRTP Act. The CCM acted in a *bona fide* manner with the objective of ensuring consumer protection, by preventing the CLAIMANT from abusing its dominant position in the fragile aviation industry. As stated above at ¶101, the CCM could not revise the inflation rate, and the CLAIMANT did have a judicial recourse against the imposition of airfare caps itself. Moreover, the CCM is an autonomous body without any government influence, which indicates that its actions are not in furtherance of political motives.[152]

116. *Second,* the delayed hearing of the CLAIMANT'S case against the airfare caps before the Mekari courts was also justified. As stated above at ¶¶79-81, Mekar is a developing economy, where the courts are already overburdened, which leads to delays in hearing of cases. The CLAIMANT'S matter was highly complex as it involved many technical issues. Moreover, there was a need to prioritise criminal matters over civil matters.[153] Consequently, it was listed for a later date. This implies that there existed an alternative explanation for the delay, which is more plausible than attributing political motivations on the part of the court.

117. *Third,* the denial of subsidies was in line with the actual objective of the subsidies, which was to protect the aviation industry from the effects of the economic crisis.[154] As stated above at ¶106, the CLAIMANT is a State-owned enterprise, and had near assurances that it would be bailed out by Bonooru if it suffered substantial losses.[155] Further, the CLAIMANT was also a low-cost airline and would therefore benefit from the effects of an economic crisis.[156] Consequently, it was denied the subsidies which were offered to smaller airlines severely affected by the economic crisis. Any objection raised by the CLAIMANT on the basis of political motivation behind this measure is untenable as all State-owned airlines were accorded similar treatment and the CLAIMANT was not specifically targeted.[157] Therefore, there existed an alternative explanation for the denial of subsidies to the CLAIMANT.

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[152] Record, Uncontested Facts, pp. 30-31, ¶19.
[153] Record, Uncontested Facts, pp. 29-30, ¶13.
[154] Record, Annex VIII, p. 56.
[155] Record, Annex IX, p. 57.
[156] *Štimac/Vince/Vidović*, p. 9.
[157] Record, Uncontested Facts, p. 37, ¶47.

118. *Fourth,* the loan offered by First National Phenac to the CLAIMANT, for a high interest rate, based on its CCC+ rating by the IICRA, was also justified. The CLAIMANT incurred significant losses by taking multiple risky business decisions against the advice of the RESPONDENT. It did not reduce its debt liabilities when it was profitable, further damaging its financial health. It also had to pay 350 million MON as fines to the CCM. Taking all these factors into consideration, the IICRA gave it a low credit rating, based on which the high interest rate for the loan was justified.[158] Therefore, there was an alternative explanation for offering a high interest rate on the loan which is more plausible than a claim of political motivations.

119. *Fifth,* the enforcement of the award invalidating Hawthorne Group LLP's offer was also justified. As stated above at ¶¶84-85, Mekari courts have discretion to enforce awards. The offer was not a *bona fide* third-party offer, and was declared as such in the SCC Award. The HCC and the Superior Court of Mekar assessed CILS' allegations of corruption against Mr. Cavannaugh.[159] The CILS report was rightly disregarded owing to its receipt of suspicious foreign funding and questionable intentions.[160] The CLAIMANT also did not present any strong circumstantial evidence. Therefore, the enforcement of this award could not have been based on political motivation as there existed a well-reasoned, alternative explanation for the enforcement of the award.

120. Therefore, the presence of alternative explanations for each of the measures of the RESPONDENT indicates that there was no political motivation behind these measures, leading to the conclusion that the RESPONDENT did not subject the CLAIMANT to harassment.

4.2. The RESPONDENT did not subject the CLAIMANT to duress

121. The RESPONDENT did not subject the CLAIMANT to any form of duress. A claim of duress requires the imposition of an agreement on an investor by a sovereign act of the host state.[161] Economic duress takes place when the host state exercises economic compulsion over an investor in an attempt to force it to settle, and where such settlement would not take place in the normal operation of economic forces.[162]

122. In *Waste Management,* the tribunal clarified that the burden cannot be put on the host state when the investor's own business plan failed under the circumstances of an economic crisis and

[158] Record, Uncontested Facts, pp. 37-38, ¶51.
[159] Record, Uncontested Facts, p. 39, ¶60.
[160] Record, Annex XIV, p. 66, ¶13.
[161] *Hamester*, ¶251.
[162] *Harvard*, p. 191; *Desert Line*, ¶151.

unsustainable assumptions about the market.[163] Consequently, an investor's own business problems and risky decisions does not make the host state liable for subsequent losses.[164]

123. The CLAIMANT undertook a lot of risky business strategies, especially expanding Caeli Airways at a time when it should have focused on maintaining its financial health and repaying its existing debts.[165] The low prices of its services were not sustainable as they were making significantly less profit per passenger, and were dependent on high footfall which varied across the year. The agreement to sell Caeli Airways to the RESPONDENT at an allegedly lower price was a result of such risky business strategies.

124. The effects of the economic crisis in conjunction with the CLAIMANT'S poor business plan, resulted in the valuation of Caeli Airways that was paid by the RESPONDENT. It was the CLAIMANT'S own choice to sell the investment at the time of a debilitating economic crisis to the RESPONDENT at the quoted the market value for the investment. Further, the CLAIMANT failed to yield any other buyer for its investment apart from a buyer offering an inflated price for the investment, due to its connection with the CLAIMANT. This offer was accordingly held to be invalid. Therefore, the RESPONDENT cannot be held liable for duress as no compulsion was exercised by it, nor can it be held responsible for the poor business choices of the CLAIMANT which deteriorated the value of the investment.

5. The RESPONDENT'S measures cannot be considered cumulatively to breach FET

125. An FET breach based on cumulative effect has been defined as:

> [A] process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result.[166]

126. A cumulative breach of FET can occur only when there is an alteration of the entire legal framework for foreign investments,[167] which implies that such a breach has a high threshold.[168]

127. Tribunals have previously considered measures cumulatively to constitute a breach of FET, by relying upon Article 15 ARSIWA, which provides that a series of measures can amount to a

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[163] *Waste Management*, ¶177.
[164] *Karpa,* ¶112.
[165] Record, Uncontested Facts, p. 34, ¶35.
[166] *El Paso*, ¶518.
[167] *El Paso,* ¶519; *Micula,* ¶682; *LG&E,* ¶139.
[168] *Blusun,* ¶363; *Oostergetel,* ¶304.

composite breach.[169] Such a breach requires establishment of motive, tying all the allegedly wrongful acts.[170] In *Glamis,* the tribunal held that when individual acts did not constitute a breach, all the acts together would also not constitute a breach, absent a finding of political intention.[171] Sets of measures by two different levels of governmental authorities, even though they happened one after the other, were held to be as separate factual clusters as the investor was unable to establish a causal link between them.[172]

128. The CLAIMANT has contended that the cumulative effect of all the measures of the RESPONDENT has resulted in a breach of FET standard. However, the measures implemented by the government were imposed by different organs of the government. The CCM is an autonomous body which is not influenced by the elected government.[173] The courts of Mekar are also independent from the elected government.

129. Even though the identified measures were taken one after the other, there exists no causal link between the acts of the CCM and that of the courts, as they were taken by independent bodies without any mutual influence. Further, any claim of political intention on the part of the government to cause losses to the CLAIMANT is also unfounded as the government holds no influence over these autonomous bodies. As stated above at ¶¶105-110, the decision to deny subsidies was also based on a rational policy and was proportional to the policy objective.

130. These measures are separate factual clusters, and absent any intention linking them, there exists no causal link between the imputed measures. Therefore, the measures of the RESPONDENT cannot be considered cumulatively to breach FET.

II. THE RESPONDENT'S ACTIONS ARE COVERED UNDER ARTICLE 9.8 CEPTA

131. Article 9.8 CEPTA recognizes the right of host States to regulate within its territory in pursuance of legitimate public policy objectives.[174] The RESPONDENT'S measures are exempted under the right to regulate as the RESPONDENT'S objectives were legitimate **[1]**; and *in any case*, the measures itself were legitimate **[2]**.

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[169] *ARSIWA,* Article 15; *El Paso*, ¶516; *Société Générale*, ¶91; *Swisslion*, ¶275.
[170] *Salmon,* pp. 383, 391; *ILC Report*, p. 93, ¶22.
[171] *Glamis,* ¶826.
[172] *Glamis,* ¶¶826-829.
[173] Record, Uncontested Facts, pp. 30-31, ¶19.
[174] *CEPTA*, Article 9.8.

1. The RESPONDENT'S objectives were legitimate

132. Article 9.8 CEPTA explicitly mentions 'consumer protection' as a legitimate policy.[175] Tribunals have previously recognised protection of critical industries[176] and management of an economic crisis as legitimate public policy objectives.[177] Both the maintenance of airfare caps and the denial of subsidies are exempted under Article 9.8 CEPTA as they were in pursuance of the above stated legitimate public policy objectives.

133. The CLAIMANT may contend that the RESPONDENT'S measures were illegitimate based on alleged presence of political motivations by highlighting the LPM's political campaign. However, democratic governments generally respond to political shifts by altering policies of the erstwhile government, and this shift does not *ipso facto* render a measure illegitimate.[178] *In any case*, measures taken for certain public interests are legitimate, irrespective of alleged political motivations.[179] Therefore, the legitimacy of the state's objective must be ascertained based on whether the measure was enacted with a logical and good sense explanation.[180]

134. *First*, the airfare caps had been maintained by the CCM, independent of any 'political motivation, based on the fact that the Second Investigation was still ongoing. As stated above at ¶101, Caeli Airways was under investigation for anticompetitive measures. Once the economic crisis began, lifting the airfare caps could have resulted in irreparable damage to the airline industry owing to the market's sensitive position. This would have been detrimental to consumers.

135. *Second*, the RESPONDENT had issued subsidies to ease the woes of the airline industry during the economic crisis. The CLAIMANT was subjected to differential treatment owing to these advantages that it possesses. As stated above at ¶105, state owned enterprises enjoy numerous benefits such as preferences from government and lesser need to produce profits. The CLAIMANT was distinguished owing to these advantages. Larry Air, another State-owned airline had also been denied subsidies. Therefore, the CLAIMANT was denied subsidies to better protect the aviation industry and not to further political motivation.

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[175] *CEPTA*, Article 9.8(1).
[176] *Cotton*, ¶5.193.
[177] *Marfin*, ¶830.
[178] *Yulia*, p. 200.
[179] *AES*, ¶10.3.31.
[180] *AES*, ¶10.3.8; *Electrabel*, ¶179.

136. Therefore, RESPONDENT'S objectives were legitimate, irrespective of alleged political motivation as both the maintenance of airfare caps and the denial of subsidies followed logical & good sense explanations in pursuance of public interest.

2. The RESPONDENT'S measures are legitimate

137. The CLAIMANT may contend that the RESPONDENT'S measures do not satisfy requirements under international law, i.e., proportionality and non-discrimination and consequently, would not be exempted under Article 9.8 CEPTA. However, the tests under international law do not apply as Article 9.8 CEPTA constitutes an autonomous treaty standard which confers an unfettered right to regulate on the RESPONDENT **[2.1]**. *In any case*, even if the right to regulate is restricted by considerations such as proportionality and non-discrimination, the RESPONDENT'S measures were neither unreasonable nor discriminatory **[2.2]**.

2.1. Article 9.8 CEPTA confers an unfettered right to regulate

138. A treaty must be interpreted according to the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose.[181] Provisions, absent any express reference to international law, constitute autonomous treaty standards.[182] Further in the absence of clear limitations, a provision must be interpreted broadly.[183]

139. Article 9.8(1) CEPTA provides that "*...the Parties recognise their right to regulate in their territories in order to achieve legitimate public policy objectives, such as national security...*" This provision constitutes an autonomous treaty standard as it does not refer to the CIL standards of a state's right to regulate. The term 'such as' widens the ambit of this provision as it implies a non-exhaustive list. It also prescribes legitimacy as a limitation only with respect to the objective in question, and not the measure itself. Further, Article 9.8(2) CEPTA confirms that a damaging measure alone shall not breach the Treaty.

140. The formulation of the right to regulate allows the RESPONDENT to prevent anti-competitive activities and protect critical industries, thereby furthering CEPTA's objectives, i.e., consumer protection, promote economic growth and bring opportunities for business.[184]

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[181] *VCLT*, Article 31.
[182] *Bear Creek*, ¶516; *Glamis*, ¶606.
[183] *Saluka*, ¶286.
[184] *CEPTA*, Preamble.

141. This interpretation is also confirmed by circumstances of the CEPTA's conclusion, and its object & purpose. The CEPTA had replaced the 1994 Bonooru-Mekar BIT to balance investor-State rights.[185] The Bonooru-Mekar BIT did not expressly provide for a right to regulate. If the drafters had envisioned the right to regulate to operate as under CIL, Article 9.8 CEPTA would be unnecessary as the State would still possess the right to regulate under CIL.[186] Therefore, Article 9.8 CEPTA constitutes an autonomous treaty standard conferring an unfettered right to regulate.

2.2. *In any case*, the RESPONDENT'S measures are legitimate as they were neither unreasonable nor discriminatory

142. Generally, the right to regulate under CIL is limited to proportionate and non-discriminatory measures. As stated above at ¶98, a measure is reasonable when its impact on the investors is proportional to the States' objective. A measure which treats similarly placed entities differently, without reasonable justification is said to be discriminatory.

143. *First*, as stated above at ¶99, a measure intending to regulate windfall profits and protect consumers from higher prices is proportionate, irrespective of any 'better' measures which could have been enacted. The airfare caps were maintained to prevent Caeli Airways from using the excuse of inflation to raise prices and earn supra-competitive profits. This measure was related to the objective of consumer protection, and was proportionate. Further, due to the absence of any other party in a similar position, the measure was not discriminatory.

144. *Second*, as stated above at ¶¶105-107, the CLAIMANT was subjected to differential treatment owing to its size as well as the advantages it had as a State-owned enterprise. The subsidies were granted to airlines having a market share of less than 5%. Further, it was not granted to the only other State-owned airline, i.e., Larry Air. The decision to deny subsidies to the CLAIMANT cannot be said to be unreasonable or discriminatory as it was in line with the objective of protecting the aviation industry in the most efficient manner.

145. Therefore, the RESPONDENT'S measures were legitimate as they were not unreasonable or discriminatory.

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[185] Record, PO3, p. 87, ¶14.
[186] *Rajput*, p. 103; *Lowe*, p. 447.

ISSUE 4: THE MV STANDARD IS THE APPROPRIATE STANDARD OF COMPENSATION, AND ALTERNATIVELY, THE TRIBUNAL SHOULD REDUCE ANY COMPENSATION AWARDED

146. The CLAIMANT has contended that any compensation awarded must be based on the FMV standard as it can be imported through the MFN clause under Article 9.7 CEPTA.[187] However, the FMV standard cannot be imported under the MFN clause **[I]**. Further, under the more appropriate MV standard, no compensation is due to the CLAIMANT **[II]**. *Alternatively*, any compensation awarded must be reduced, owing to the CLAIMANT'S contributory fault and the economic crisis in Mekar **[III].**

I. THE MFN CLAUSE UNDER ARTICLE 9.7 CEPTA CANNOT BE INVOKED TO IMPORT THE FMV STANDARD

147. Article 9.21 CEPTA requires that compensation for the breach of FET must be provided as per the MV standard. The CLAIMANT may contend that the FMV standard has to be applied instead of the MV standard, as it can be imported from Article 13 Arrakis-Mekar BIT. However, the MFN clause cannot be invoked to import the FMV standard of compensation is a procedure for resolution of disputes, and is consequently excluded by Article 9.7(2) CEPTA **[1]**. Further, the FMV standard of compensation is not necessarily more favourable **[2]**.

1. Compensation standard is excluded by Article 9.7(2) CEPTA

148. More favourable treatment can be imported from other international agreements only if it falls within the ambit of Article 9.7(1) CEPTA, and is not restricted by Article 9.7(2) CEPTA. Article 9.7(2) CEPTA does not consider *"procedures for the resolution of investment disputes"* as 'treatment' referred to in Article 9.7(1) CEPTA, and thereby restricts importing such provisions from other international treaties.

149. The CEPTA contains two separate set of obligations - Section D i.e., Investment Protection and Section E i.e., Settlement of Disputes. Likewise, the NAFTA also provides for a similar distinction for obligations under Chapter Eleven, wherein Section A contains the provisions for Investment protection, and Section B contains the provisions regarding Settlement of Disputes.[188] This chapter was interpreted to clarify that Section A imposed Substantive

[187] Record, Notice, p. 5, ¶30.
[188] *NAFTA*, Chapter Eleven.

Obligations on the contracting parties, whereas Section B provided procedural rights to an investor when such obligations were breached.[189] Substantive obligations are addressed to 'Contracting Parties', whereas procedural rights are addressed to disputing parties.[190]

150. Analogously, Section D – Investment Protection of the CEPTA also contains substantive obligations addressed to the 'Contracting Parties', whereas Section E – Settlement of Disputes contains procedural rights addressed to disputing parties. The MV standard of compensation is provided under Article 9.21 CEPTA, which is covered under the broad head of Section E. Consequently, compensation under the CEPTA is a procedure for the resolution of disputes.

151. This interpretation is reinforced by international investment law as well. Procedural rights are usually invoked when substantive rights are breached. In case of infringement of substantive rights, compensation is awarded to wipe out the consequences of the unlawful act and re-establish the situation which would have existed if the act not been committed.[191] Consequently, *Brownlie* considered compensation to be a process for the resolution of disputes and clarified that the express choice of a compensation standard would become nugatory if compensation was allowed to be imported through an MFN clause.[192]

152. Therefore, Article 9.7 CEPTA cannot be used to import FMV standard of compensation from the Arrakis-Mekar BIT since compensation is a procedure for the resolution of disputes.

2. *In any case*, FMV is not necessarily a more favourable standard of compensation

153. The MV standard is more favourable than the FMV standard in the present dispute. The MV standard represents the actual value of the investment which will be paid or received in the market.[193] On the other hand, FMV standard reflects the hypothetical price of an investment,[194] by taking into account the future profitability of the enterprise.[195]

154. Future profitability can be proven only if the investor can show that it has a profitable business plan i.e., the business is of 'going concern'.[196] It must be shown with 'sufficient certainty' that the profits could have been availed by the investor in the absence of a breach by the host state.[197]

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[189] *Archer,* ¶172.
[190] *Douglas,* p. 112.
[191] *Chorzow*, ¶270; *Crawford (AJIL)*, p. 876.
[192] *CME*, ¶11.
[193] *Marboe*, p. 214.
[194] *Marboe*, p. 214; *El Paso*, ¶702.
[195] *Siemens,* ¶355.
[196] *Vivendi (Award)*, ¶8.3.3.
[197] *Vivendi (Award),* ¶8.3.3.

Sufficient certainty of profits can be examined by considering the effect of supply-demand dynamics[198] or the business plan of the distressed enterprise.[199]

155. The CLAIMANT was not of going concern as its profitability during the economic crisis was uncertain. The CLAIMANT'S business model was an overly optimistic plan based on unrealistic market expectations.[200] It did not account for price volatility, leaving the business susceptible to shifts in operational costs and demand.[201] This susceptibility was displayed during the economic crisis once oil prices rose. This lack of future profitability would be reflected in Caeli Airways' FMV and consequently, lesser compensation would be awarded.

156. Therefore, considering Caeli Airways' failed business plan and the absence of any evidence establishing Caeli Airways' profitability, the FMV standard of compensation cannot be regarded to be necessarily more favourable.

II. NO COMPENSATION IS OWED TO THE CLAIMANT ON THE BASIS OF THE MV STANDARD

157. While awarding compensation, the Tribunal must apply the rule against the issuance of double damages, i.e., awarding of reparation twice for the same injury for equitable compensation.[202] As stated above at ¶153, the MV standard represents the real market value of the investment which will be paid or received in the market.

158. The CLAIMANT had received an inflated offer from Hawthorne Group LLP for its investment, valuing at 600 million USD. As stated above at ¶119, this was not a *bona fide* third-party offer, and was consequently rejected. The only other offer was the one made by the RESPONDENT for 400 million USD, which was the real market value of Caeli Airways at the time. Awarding any additional compensation to the CLAIMANT in these proceedings would amount to double damages. Therefore, no compensation is owed to the CLAIMANT based on the MV standard.

III. EVEN IF COMPENSATION IS AWARDED, IT MUST BE REDUCED

159. Without prejudice to the above, if the Tribunal decides to award any compensation to the CLAIMANT, it must be reduced considering the CLAIMANT'S contributory fault **[1]**; and the economic crisis in Mekar **[2].**

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198 *Crystallex*, ¶879.
199 *Crystallex*, ¶878.
200 Record, Uncontested Facts, p. 31, ¶24.
201 Record, Annex VII, p. 55.
202 *Chorzow,* ¶130.

1. The CLAIMANT'S risky decisions contributed to its injury

160. Contributory fault consists of willful or negligent action which was unrelated to the wrongdoing of the State.[203] To prove contributory fault, the conduct of the investor should have been material and significant to the injury.[204] Tribunals, while determining if the misconduct was material or significant, have relied on the grave mistake of the investor without which the host state wouldn't have taken a disproportionate action,[205] or found a justification for the same.[206]

161. In *MTD,* the damages awarded were significantly reduced based on the fact that the investor incurred losses due to its own business judgment which had increased the risks in the transaction.[207] Further, in *Occidental (II),* factors involving the investor's own misconduct were considered by the tribunal, based on which the host state had taken measures that were detrimental to the investor.[208] Consequently, the tribunal reduced the compensation awarded based on contributory fault of the investor.[209]

162. The CLAIMANT'S business strategies relied on overly optimistic estimates,[210] and were anti-competitive in nature.[211] In spite of several warnings by Mekari officials,[212] the CLAIMANT continued to make risky business decisions. For instance, Caeli Airways benefited from low oil prices and didn't focus on its debt.[213] It was reasonable to have foreseen that the oil prices would have risen profoundly when these prices were at an all-time low in 2013. Its continued operation of older aircrafts until 2018 exacerbated its financial distress as the oil prices skyrocketed.[214] Further, the CLAIMANT indulged in anti-competitive behavior, which led the RESPONDENT to take the allegedly disproportionate measures. Therefore, the losses incurred by the CLAIMANT could not have been avoided even if there was no breach of Article 9.9 CEPTA.

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[203] *ARSIWA Commentary*, Article 39, pp. 109-110, ¶1; *Yukos*, ¶1596.
[204] *Yukos*, ¶1600; *ARSIWA*, Article 39; *Occidental (II)*, ¶670; *MTD*, ¶101.
[205] *Occidental (II)*, ¶669.
[206] *Yukos*, ¶1605.
[207] *MTD,* ¶243.
[208] *Occidental (II)*, ¶687.
[209] *Occidental (II)*, ¶687.
[210] Record, Annex VII, p. 55.
[211] Record, Uncontested Facts, p. 37, ¶49.
[212] Record, Uncontested Facts, p. 33, ¶31.
[213] Record, Annex IX, p. 57.
[214] Record, Uncontested Facts, p. 37, ¶48.

2. The economic situation of the RESPONDENT should be taken into consideration

163. The drafters of the CEPTA recognized the importance of a proper balance between the rights of investors and that of the host state.[215] While balancing such rights, the financial circumstances of the host state should be considered to prevent "*catastrophic repercussions of the livelihood & economic wellbeing of the population.*"[216] Even though an economic crisis does not amount to a legal excuse, it is unreasonable for an investor to believe that the host state is not affected by the same.[217] Consequently, the effects of an economic crisis should be taken into account while awarding compensation.[218] Tribunals have reduced compensation in cases of an economic crisis, since awarding full compensation would have been ruinous to the host state which would amount to an abuse of rights.[219]

164. The economic crisis in Mekar was so severe, that in 2019, an IMF report predicted four consecutive quarters of negative growth for Mekar, an 8% fall in GDP, and a 2600 % average inflation rate in 2020.[220] In the backdrop of such a deteriorating economy, compensating the CLAIMANT with 700 million USD would require the RESPONDENT to transfer about twice its consolidated annual public spending.[221] Consequently, the Tribunal must reduce the compensation awarded, as awarding full compensation would be ruinous to the RESPONDENT.

165. Therefore, any compensation awarded to the CLAIMANT must be reduced owing to the CLAIMANT'S contributory fault, and the detrimental effects of the economic crisis in Mekar.

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[215] Record, PO3, ¶14.
[216] *CME,* ¶¶77-80.
[217] *Enron*, ¶232.
[218] *Enron*, ¶¶232, 415; *CMS,* ¶¶456-457.
[219] *Himpurna,* ¶¶330-343.
[220] Record, PO3, p. 86, ¶4.
[221] Record, PO3, p. 86, ¶3.

PRAYERS FOR RELIEF

166. In light of the foregoing, the RESPONDENT hereby respectfully requests the Tribunal to find that:

1. It does not have jurisdiction over the present dispute;

2. The leave sought by the EACRPU to file *amicus curiae* submissions must be granted;

3. The leave sought by the CBFI to file *amicus curiae* submissions must be denied;

4. If the Tribunal finds it has jurisdiction over the present dispute, that Article 9.9 CEPTA was not breached;

5. If a breach is found, no compensation is owed under the solely applicable MV standard. *Alternatively*, any compensation awarded must be reduced;

On Behalf of the RESPONDENT

TEAM FABELA