TEAM ALIAS: Fortier

INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

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

Vemma
Holdings Inc.
(Claimant)

v.

Federal Republic of Mekar
(Respondent)

MEMORIAL FOR THE RESPONDENT

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LIST OF ABBREVIATIONS

¶	Paragraph
Art.	Article
BIT	Bilateral Investment Treaty
Bonooru	Commonwealth of Bonooru
BPB	Bonoorian People's Bank
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	Comprehensive Economic Partnership and Trade Agreement Between the Commonwealth of Bonooru and the Federal Republic of Mekar, 2014
CILS	Centre for Integrity in Legal Services
CRPU	Committee on Reform of Public Utilities
FMV	Fair Market Value
FET	Fair and Equitable Treatment
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID AF Rules	ICSID Additional Facility Rule
ILC	International Law Commission
ISDS	Investor-State Dispute Settlement
MFN	Most-Favored Nation
MON	Mekari Mon
MV	Market Value
MRTP Act	Monopoly and Restrictive Trade Practice Act
OECD	Organisation for Economic Cooperation and Development
SCC	Sinnoh Chambers of Commerce
SOE	State-Owned Enterprise
Transparency Rules	UNCITRAL rules on transparency in treaty-based investor-State arbitration
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nation Commission on International Trade Law
US	United States of America
VCLT	Vienna Convention on the Law of Treaties

INDEX OF AUTHORITIES

ICSID CASES

1.	Aguas	Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae (2006).
2.	Apotex	Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1, Procedural Order No. 2 (2013).
3.	Apotex (Award)	Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1, Award (2014).
4.	Azurix	Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award (2006).
5.	Bayindir	Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction (2005).
6.	Bear Creek	Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Procedural Order No. 6 (2016)
7.	Biwater	Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No.5 (2007).
8.	BUCG	Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction (2017).
9.	Cargill	Cargill, Incorporated v. Republic of Poland, ICSID Case No. ARB(AF)/04/2, Final Award (2008).
10.	CMS	CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award (2005).
11.	Corn	Corn Products International, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility (2008).
12.	CSOB	Ceskoslvenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction (1999).
13.	Dan Cake	Dan Cake S.A. v. Hungary, ICSID Case No. ARB/12/9, Award (2018).
14.	El Paso	El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award (2011).
15.	Enron	Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award (2007).
16.	Flughafen Zürich	Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/19, Award (2014).
17.	Inceysa	Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award (2006).

18.	Infinito	Infinito Gold Ltd. v. Republic of Costa Rica, ICSID Case No. ARB/14/5, Procedural Order No. 2 (2016).
19.	Jan de Nul	Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award (2008).
20.	LETCO	Liberian Eastern Timber Corporation (LETCO) v. Liberia, ICSID Case No. ARB/83/2, Award (1986).
21.	LG&E	LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Award (2007).
22.	LG&E Liability	LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (2006).
23.	Loewen	Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Award (2003).
24.	Maffezini (Award)	Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Award (2000).
25.	Maffezini (Juris)	Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (2000).
26.	Marvin Feldman	Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award (2002).
27.	Metal-Tech	Metal-Tech Ltd. v. The Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award (2013).
28.	Metalclad	Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (2000).
29.	Mondev	Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award (2002).
30.	MTD	MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award (2004).
31.	Muhammet Çap	Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan, ICSID Case No. ARB/12/6, Award (2021)
32.	Noble Ventures	Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award (2005).
33.	Occidental	Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award (2012).
34.	Pantechniki	Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania, ICSID Case No. ARB/07/21, Award (2009).
35.	Philip Morris (Order 3)	Philip Morris v. Uruguay, ICSID Case No. ARB/10/7, Procedural Order No.3 (2015).
36.	Philip Morris (Order 4)	Philip Morris v. Uruguay, ICSID Case No. ARB/10/7, Procedural Order No.4 (2015).

37.	Plama	Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award (2008).
38.	Teinver	Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic, ICSID Case No. ARB/09/1, Award (2017).
39.	Total	Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability (2010).
40.	UPS	UPS v. Canada, ICSID Case No. UNCT/02/1, Decision of The Tribunal on Petitions for Intervention and Participation as Amicus Curiae (2001).
41.	UPS (Award)	UPS v. Canada, ICSID Case No. UNCT/02/1, Award on the Merits (2007).
42.	Vacuum Salt	Vacuum Salt Products Ltd. v. Republic of Ghana, ICSID Case No. ARB/92/1, Award (1994).
43.	Vento	Vento Motorcycles, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/17/3, Award (2020).
44.	Vivendi	Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Jurisdiction (2005).
45.	Vivendi (Award)	Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award (2015).
46.	Vivendi (Order in Response)	Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organisations for Permission to Make an Amicus Curiae Submission (2007).
47.	Waste Management II	Waste Management, Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB(AF)/00/3, Award (2004).
48.	World Duty Free	World Duty Free Company Limited v. Republic of Kenya, ICSID Case No. ARB/00/7, Award (2006).

OTHER COURTS & TRIBUNALS

1.	Chemtura	Chemtura Corporation (formerly Crompton Corporation) v. Canada, UNCITRAL, Final Award (2010).
2.	Chevron	Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, UNCITRAL, Final Award (2011).
3.	CME	CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Separate Opinion on the issues at the quantum phases (Ian Brownlie, Q.C.) (2003).
4.	ELSI	Case Concerning Elettronica Sicula S.p.A (ELSI) (United States of America v. Italy), Judgment, [1989] ICJ Rep 15.
5.	Glamis Gold	Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Award (2009).

6.	Hilmarton (France)	Societe Hilmarton v. Societe OTV, 20 Y.C.A. 19. (1995).
7.	Himpurna	Himpurna California Energy Ltd. v. Perusahaan Listruik Negara, UNCITRAl, Award (1999).
8.	Methanex	Methanex Corporation v. Unites States of America, UNCITRAL, Decision of Tribunal on Amicus (2001).
9.	National Grid	National Grid plc v. The Argentine Republic, UNCITRAL, Award (2008).
10.	Saluka	Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award (2006).
11.	Thunderbird	International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award (2006).
12.	White	White Industries Australia Limited v. Republic of India, UNCITRAL, Final Award (2011).
13.	Yukos (UK)	Yukos Capital SARL v. OJSC Rosneft Oil Company, 2014 EWHC 2188 (2014).

JOURNAL ARTICLES

1.	Annacker	C. Annacker, *Protection and Admission of Sovereign Investment under Investment Treaties*, 10 CHINESE JOURNAL OF INTERNATIONAL LAW 531 (2011).
2.	Blyschak	P. Blyschak, *State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and their Investments Protected*, 6(2) JOURNAL OF INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 1 (2011).
3.	Born	G. Born & S. Forrest, *Amicus Curiae Participation in Investment Arbitration*, 34 ICSID REVIEW 3 (2019).
4.	Douglas	Z. Douglas, *The Plea of Illegality in Investment-Treaty Arbitration*, 29(1) ICSID REVIEW 155 (2014).
5.	Feldman	M. Feldman, *State-Owned Enterprises as Claimants in International Investment Arbitration,* 31(1) ICSID REVIEW 24 (2016).
6.	McLaughlin	M. McLaughlin, *Defining a State-Owned Enterprise in International Investment Agreements*, 34(3) ICSID REVIEW 595 (2020).
7.	Milhaupt & Zheng	C. Milhaupt & W. Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEORGETOWN LAW JOURNAL 665 (2015).

BOOKS & TREATISES

1.	BROCHES	A. BROCHES, SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW (1995)
2.	BROWNLIE	I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (5th ed., 1998).

3.	Dorr	O. Dorr, *Article 31: General Rule of Interpretation* in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (O. Dorr & K. Schmalenbach, ed., 2012).
4.	OPPENHEIM	L. OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW (R. Jennings & A. Watts ed., 1992)
5.	SCHREUER	C. SCHREUER, THE ICSID CONVENTION: A COMMENTARY (2nd ed., 2009).
6.	SCHREUER (PROTECTION)	R. DOLZER & C. SCHREUER, *Standards of Protection* in PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2012).
7.	SINCLAIR	I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES (1984).
8.	WEERAMANTRY	J. WEERAMANTRY, TREATY INTERPRETATION IN INVESTMENT ARBITRATION (2012).
9.	YEN	T. YEN, THE INTERPRETATION OF INVESTMENT TREATIES (2014).

INTERNATIONAL MATERIAL

1.	History of ICSID, Vol. II-1	International Centre for Settlement of Investment Disputes, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of another States*, Vol. II-1 (1968).
2.	ILC Draft Articles	International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10) (2001).
3.	ILC Draft Articles Commentary	International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, Supplement No. 10 (A/56/10) (2001).
4.	IRBD Report	International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States*, 1 ICSID Reports 28 (1965)
5.	UNCITRAL Report	UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-seventh session*, UN Doc. A/CN.9/760 (2012).

RULES & CONVENTIONS

1.	AUCPCC	African Union Convention on Preventing and Combating Corruption, 2003.
2.	ICSID	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965.
3.	ICSID AF Rules	Rules Governing the Additional Facility For the Administration of Proceedings By the Secretariat of the International Centre for Settlement of Investment Disputes, 1978.

4.	OECD Anti-Bribery Convention	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997.
5.	The New York Convention	UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.
6.	Transparency Rules	UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration, 2014.
7.	UNCAC	United Nations Convention against Corruption, 2003.
8.	VCLT	Vienna Convention on the Law of Treaties, 1969.
9.	UNCITRAL Model law	UNCITRAL Model Law on International Commercial Arbitration, 1985.

ONLINE MATERIAL

1.	OECD Report	OECD Report, *State Owned Enterprises and the Principle of Competitive Neutrality*, September 20, 2010, available at https://www.oecd.org/daf/competition/46734249.pdf (Last visited on September 18, 2021).

MISCELLANEOUS MATERIAL

1.	OECD GUIDELINES	ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES (2015)
2.	World Bank	WORLD BANK, BUREAUCRATS IN BUSINESS: THE ECONOMICS AND POLITICS OF STATE OWNERSHIP (1995)

STATEMENT OF FACTS

I. PARTIES TO THE DISPUTE.

The Claimant 'Vemma Holdings Inc.' is an airline holding company incorporated in Bonooru State. It is owned and operated by Royal Narnian, which is a leading global airline. The State of Bonooru has considerable shareholding in the Claimant company and exercises dominant influence in its working. The Respondent is the Federal Republic of Mekar, situated approximately 1,600 km to the south of the State of Bonooru.

II. PRIVATIZATION OF CAELI AIRWAYS.

The Respondent decided to sell a majority interest in the state-owned Caeli Airways as part of its privatization initiative. The Competition Commission of Mekar (CCM) was formed, and Caeli Airways' main assets were offered to potential bidders by Mekar Airservices Ltd. The Claimant competed with other firms in an open tendering procedure for the acquisition of a controlling interest in Caeli Airways. The Claimant's bid was successful, and on January 5, 2011, it acquired an 85% stake in Caeli Airways. Mekar maintained 15% ownership in Caeli Airways through Mekar Airservices Ltd. Claimant's bid for the acquisition of a majority stake in Caeli Airways specifically stated that it would refinance for the remainder of Caeli Airways' large debt liability from the BPB, a government bank of Bonooru. It must be noted that, in the initial stages, potential investors had predominantly cited the debt liabilities of Caeli Airways as being a major barrier for the purpose of investing in the airlines. Subsequently, the large debt liability of Caeli Airways was refinanced from BPB at more favorable rates than available on the market. Vemma's association with Bonooru State was also one of the primary reasons why its bid was selected for investing in Caeli Airways. In the initial years following privatization, the Claimant took an extravagant approach to its investment activities, funneling funds towards rapid expansion instead of tending to long-term financial health. It did so against the clear warnings of the Respondent on Caeli Airways' board.

III. ORIGIN OF THE DISPUTE

The rapid expansion of Caeli Airways naturally drew the attention of the CCM and Caeli's competitors. In September 2016, Caeli Airways was investigated by CCM for violating Mekari legislation, and the CEPTA and the report found a breach of Mekar's antitrust legislation in the form of predatory pricing resulting from low airfares and loyalty programmes. The report also noted that the subsidies received by Vemma under the Horizon 2020 scheme helped Caeli

drastically reduce its airfare below its average avoidable costs. In December 2016, CCM launched a second investigation on Caeli Airways, at the request of Caeli Airways competitors. The report concluded that Caeli had engaged in anti-competitive behavior in conducting its business activities in Phenac International Airport. Caeli Airways was subjected to airfare limitations as a result of the CCM's investigations.

The grant of subsidies and state aid by Bonooru as a part of the Horizon 2020 State policy was directly linked with the beneficiary, i.e., the Claimant making investments in tourism-related infrastructure in Bonooru and promoting the public policies of the State. This State policy, or the grant of subsidies, was, in effect, a mode of ensuring that the Claimant pursues ventures for promotion of tourism, irrespective of any profit incentives, and thus, the Respondent believes that it resulted in Bonooru exercising significant State influence in the operations of the Claimant company.

One of the express objectives of incorporation of the Claimant Company, as provided in its Memorandum of Association, is to cater to the remote communities of Bonooru in accordance with Article 70 of the Constitution, regardless of profitability considerations.

As the currency crisis worsened, Mekar's economic strategy altered significantly. Despite the currency's continuous fluctuation in value, Mekar compelled Caeli Airways to price its services in MON. In light of the economic crisis, Mekar's President signed Executive Order 9-2018 on September 25, 2018, granting subsidies to airlines operating in the city. These subsidies were denied to Caeli Airways as Bonooru had a significant stake in the Claimant company. Essentially that subsidy was also denied to Larry- air which was also a fully government-owned airline.

In Mekari courts, Caeli Airways contested these actions. Despite being swamped with cases, Mekari courts allowed the Claimant to raise its complaints before the proper legal authorities. When the case was heard, it was dismissed prematurely. As a cumulative result of these acts, the Claimant decided to sell its stake in Caeli Airways.

The Claimant received a genuine offer from Hawthorne Group LLP to purchase its interest in Caeli. As per the Shareholder’s Agreement, the Claimant was obligated to give Mekar Airservices Ltd. the chance to acquire the shares at a price proposed by the Hawthorne Group. Mekar Airservices contested the legality of the Hawthorne Group's offer due to the Hawthorne Group's Moon Alliance membership.

The dispute of legality of the Hawthorne offer was submitted to arbitration in Sinnoh under the rules of the Sinnoh Chamber of Commerce. The award was released in favor of Mekar Airservices. When the Mekari Courts went ahead and enforced the award, the Claimants decided to sell their stake in the Caeli Airways to Mekar Airservices. The sale was concluded at a price below the fair market value of the stake.

The Claimant submitted their claim for arbitration under the ICSID Additional Facility Rules against the Respondent on the ground the Respondent State has violated the fair and equitable treatment guaranteed under CEPTA. Subsequently, the Claimant underwent a radical restructuring on March 2, 2021, whereby large-scale changes took place, which included, amongst others, an increase in Bonooru State's shareholding in the company to 55% and the replacement of the company's Board of Directors with government functionaries of Bonooru.

IV. ARBITRATION

As a response to the notice of arbitration, the Respondent requests the Tribunal not to exercise jurisdiction due to the Claimant's status as a State-owned enterprise. It also requests the Tribunal to find that it did not violate Article 9.9 of CETPA as per the claim bought by the Claimant and are not liable to pay any compensation. In addition to Notice of Arbitration and Response to the Notice of Arbitration, the Tribunal has received two applications for written amicus curiae submissions. These applications are from CBFI, a non-profit consortium of Bonooru investors and external advisors to Mekar's Committee of Public Reforms.

PLEADINGS

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

1. The Respondent submits that the Tribunal does not have the requisite jurisdiction to adjudicate the dispute, on the grounds that the Claimant qualifies as an SOE **[A]**, and additionally, it does not satisfy the Broches Test **[B]**. Further, the claimant does not fall within the scope of the term "investor" as defined in the CEPTA, read in light of the principles enshrined in the VCLT **[C]**. Moreover, the Respondent submits that the claims should be declared inadmissible considering that the Claimant indulged in corrupt practice for procuring the investment **[D]**.

A. THE CLAIMANT QUALIFIES AS AN SOE.

2. From the outset of the negotiations of the ICSID Convention, there was a general consensus that private v private and State-State disputes should be excluded from the scope of jurisdiction of the Centre since disputes between States could be submitted to the ICJ, and disputes between private entities could be resolved by commercial arbitration.[1] The primary objective of the drafters was to establish a forum for the purpose of resolution of Investor-State claims and de-politicization of such disputes.[2]
3. The Report of the Executive Directors to the Convention, 1965 expressly provided that the ICSID Convention could serve as a crucial step towards the promotion of private international capital flow as well as an enhancement in the mutual confidence of private investors and host States.[3] Similarly, the Preamble to the Convention, reflecting that goal, specifically underlines the imperative need of international cooperation in the course of accomplishing economic development, and the vital role of *"private international investment therein"*.[4] Thus, the ISDS Regime was essentially a means of establishing a satisfactory legal infrastructure aimed at the promotion and protection of private international investment.[5]
4. The Respondent submits that the Continuous Nationality rule should apply in the present case for determining the ownership status of the claimant **[a]**. Applying the Continuous

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[1] Feldman, 33; BROCHES, 167; Annacker, 554.
[2] *Id.*
[3] IBRD, ¶9; SCHREUER, 4; Feldman, 33; Annacker, 554.
[4] ICSID, Preamble, ¶1.
[5] IBRD, ¶9; ICSID, Preamble, ¶1; SCHREUER, 4; Feldman, 31.

Nationality rule, it is submitted that the claimant qualifies as an SOE **[b]**. In arguendo, even if the critical date rule were to apply as on the date of institution of arbitral proceedings, the claimant would still qualify as an SOE **[c]**.

a. The Continuous Nationality rule should apply to determine the ownership status of the Claimant.

5. According to the Continuous Nationality rule under international law,

> *"A party commencing proceedings must maintain its identity from the date of events giving rise to the claim, which is known as the dies a quo, through the date of the resolution of the claim, which is known as the dies ad quem".*[6]

6. It is imperative that we take note of the fundamental principle and philosophy behind the application of the Continuous Nationality rule. A party submitting a claim must maintain its identity and character from the date of events giving rise to the claim till the date of the award.[7] Any drastic restructuring resulting in a change in its status from that as existing on the date of submission of claims, amounting to a violation of the ISDS regime, will impair or defeat its rights to pursue claims before the tribunal. The application of the Continuous Nationality principle enables a tribunal to take into account the status of the Claimant company upon restructuring, subsequent to the filing of the notice of arbitration, so as to determine whether the Claimant falls within its jurisdiction.[8]

7. Illustratively, in the *Loewen* case, after the arbitral proceedings had commenced, the Claimant, a Canadian company which was pursuing its claims against the US, underwent a reorganisation, whereby it transformed into an American company.[9] Applying the continuous nationality rule, the *Loewen* Tribunal took into consideration the ownership status of the Claimant company post-restructuring, that took place after the institution of arbitral proceedings. Subsequently, the Tribunal dismissed the claims considering that the claimant by virtue of its restructuring, had transformed into an American investor, which contravened the very essence of the ISDS regime that provides for the resolution of only those disputes arising between a State and National of another State.[10]

8. There is another principle namely, the Critical Date, which has also been applied by certain Investor-State tribunals for determining the standing of the Claimant by reference

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[6] BROWNLIE, 482; OPPENHEIM, 512; Loewen, ¶225.
[7] *Id*.
[8] Loewen, ¶220, 225, 238.
[9] Loewen, ¶220.
[10] Loewen, ¶223.

to the status of the party prevailing on the date on which such proceedings are deemed to have been instituted.[11] A grave limitation of the critical date rule, however, is that it does not take into consideration any subsequent development relating to the claimant's status post the institution of proceedings.[12] Thus, the critical date rule provides a Claimant with absolute leverage to undergo a large-scale restructuring post the commencement of the arbitral proceedings, and transform itself into a character and acquire a status, which is otherwise disentitled to make claims before Investor-State tribunals. Despite the transformation post the institution of proceedings, the application of this principle would enable the Tribunal to exercise jurisdiction over such entities that were otherwise barred from pursuing claims and thereby confer benefits and privileges upon such entities, frustrating the very essence of the ISDS Regime.

9. In the present case, after the notice of arbitration was filed, the Claimant underwent a radical restructuring on March 2, 2021, whereby large-scale changes took place, which included amongst others, an increase in Bonooru State's shareholding in the company to 55% and the replacement of the company's Board of Directors with government functionaries of Bonooru.[13]

10. Having regard to the fact that the Continuous Nationality rule upholds the essence of the ISDS regime, it is submitted that the same should be applied in preference to the Critical Date rule to determine the ownership status of the Claimant, and take into consideration the claimant's restructuring, that has taken place post the filing of notice of arbitration.

b. Applying the Continuous Nationality Rule, the Claimant qualifies as an SOE.

11. Various international organisations like the OECD and World Bank have produced comprehensive reports with respect to SOEs.[14] They fundamentally characterize SOEs as entities, in which the State exercises effective control.[15] The concept of SOEs as articulated in the reports envisages dominant influence and authority exercised by the State so as to appoint a large number of individuals to the board with a view to considerably influence the working of the entity.[16] Further, several Investor-State

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[11] CSOB, ¶31; Vivendi, ¶63; Bayindir, ¶178.
[12] CSOB, ¶31.
[13] Record, 40, Statement of Uncontested Facts, ¶65.
[14] OECD GUIDELINES, 14; World Bank, 26; McLaughlin, 604.
[15] *Id*.
[16] *Id*.

tribunals have analysed the requirement of effective control and have recognised various crucial factors for determining the same such as voting rights, shareholding pattern, decision-making structures, as well as ability to appoint directors.[17]

12. The Respondent submits that the replacement of the Claimant company's Board of Directors with government functionaries of the State, along with the State's majority shareholding in the company post-restructuring,[18] enables Bonooru State to exercise a dominant influence over the affairs of the claimant company in the regular meetings. Accordingly, there is every possibility of directors being appointed in the regular meetings to espouse the cause of the Bonooru government and in particular to manage the company in accordance with the desires of the government functionaries.
13. Thus, applying the Continuous Nationality rule and taking into account the claimant company's status post-restructuring, it is submitted that Bonooru State exercises effective control over the Board of Directors as well as the working of the company in general. Therefore, the Claimant company can be said to qualify as an SOE.

c. In arguendo, even if the critical date rule were to apply, the Claimant would still qualify as an SOE.

14. Applying the critical date rule and considering the status of the Claimant company as on the date of filing of the notice of arbitration when the Bonooru State prior to its large-scale restructuring held minority shareholding in the Claimant company, the Respondent submits that the Claimant would still qualify as an SOE.
15. It is quite common in the contemporary international corporate world to significantly influence the business activities of an entity without holding the majority voting rights in shareholders' meetings. Control over an entity can be achieved in light of the power and favourable circumstances to effectively decide and implement the key decisions relating to the working of the entity.[19]
16. Illustratively, in the *Thunderbird* case, despite the fact that the Claimant company had less than 50% shareholding in the entities on whose behalf it was pursuing the claims, the Tribunal found sufficient material establishing a pattern of effective control exercised by Thunderbird over the said entities on the basis of its significant influence on the decision-making and working of the entity through its actions, resources, expertise and officers.[20]

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[17] Vacuum Salt, ¶43, 44; LETCO, ¶16.5; SCHREUER, 327.
[18] Record, 40, Statement of Uncontested Facts, ¶65.
[19] Thunderbird, ¶108.
[20] Thunderbird, ¶107; Blyschak, 46.

17. Further, the Tribunal in *Vacuum Salt* held that there was no rigid formula for determining control. Each case should be necessarily viewed in its own particular context, taking into consideration the totality of the facts and circumstances.[21]
18. Additionally, the concept of *"State control"* over the working of a company has evolved considerably with the passage of time. Curtis Milhaupt, who has worked considerably in the fields of comparative corporate governance and economic development, as well as Wentong Zheng, have comprehensively discussed the concept of 'State control' and factors for determining it by providing the contemporary example of the Chinese institutional environment, wherein the Chinese State along with its institutions wields considerable influence upon companies outside the rigid structures of corporate governance.[22] A focus on ownership and shareholding alone would be futile in the current contemporary context, and a holistic analysis pertaining to the context and circumstances is necessary for coming to a well-reasoned conclusion regarding State control.[23] One important interpretative tool in this regard is that of 'State capture', which suggests that such enterprises should be evaluated based on the political connections of the company's management, the extent of State aid, as well as influence of the State and government policies in the company's operations.[24]
19. The Respondent submits that the significant State influence exercised upon the working of the Claimant company would inter alia appear from the following materials on record.
20. One of the express objectives of incorporation of the Claimant Company as provided in its Memorandum of Association is to cater to the remote communities of Bonooru in accordance with Article 70 of the Constitution, regardless of profitability considerations,[25] which is clearly indicative of effective and dominant State influence as normally, a private company would pursue such objects as would subserve its commercial and profitable interests, and adherence to constitutional obligations would generally not form part of its object clause.
21. Bonooru's own highest court, namely, the Constitutional Court of Bonooru on the issue concerning privatisation of BA Holdings, specifically held that Bonooru's continued, although minority, participation in the Claimant Company would ensure that the airline is utilised for public benefit under the direction and entrustment of the Bonooru

[21] Vacuum Salt, ¶43; Blyschak, 46.
[22] Milhaupt & Zheng, 668; McLaughlin, 622.
[23] Milhaupt & Zheng, 669.
[24] *Id.*
[25] Record, 44, Annex IV, Memorandum of Association of Vemma Holdings, ¶3. (h).

government.[26] Additionally, the Prime Minister of Bonooru in a speech on November 10, 1980 had expressly clarified that the Bonooru government would continue to maintain significant interest throughout the company's lifetime, and direct the company to operate flights to the most remote islands, regardless of profitability considerations.[27] Such statements made by the Head of Bonooru State as well as the Constitutional Court of Bonooru clearly reveal that Bonooru indeed exercised a dominant influence upon the affairs of Claimant company since the privatisation of Bonooru Air.

22. Moreover, the grant of subsidies and State aid by Bonooru as a part of the Horizon 2020 State policy was directly linked with the beneficiary, i.e., the Claimant making investments in tourism related infrastructure in Bonooru and promoting the public policies of the State.[28] This State policy, or the grant of subsidies, was, in effect, a mode of ensuring that the Claimant pursues ventures for promotion of tourism, irrespective of any profit incentives and thus, it resulted in Bonooru exercising significant State influence in the operations of the Claimant company.

23. Additionally, Caeli Airways was able to refinance its significantly large debt liability at more favourable rates than available in the market from BPB, a government bank of Bonooru.[29] This act becomes particularly quite relevant considering that the large debt liability of Caeli Airways was one of the primary reasons for the failure of its privatisation initially.[30] It is also important to understand that States generally provide for low-cost credit facilities to firms having political connections with the State.[31] For instance, in the present case, Sabrina Blue, the former head of the Board of Directors of the Claimant company, was appointed as the Secretary of Bonooru's Ministry of Transport and Tourism.[32] Thus, the Respondent submits that the significant amount of State patronage for the Claimant company, in effect, made Vemma Holdings obligated to pursue State interests, and thereby, served as a method of exercising State control over the company's affairs.

24. Hence, in light of the aforesaid, it is submitted that the Claimant qualifies as an SOE even if we take into consideration the Company's status as on the critical date on which the notice of arbitration was filed.

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[26] Record, 59, Annex III, Constitutional Court of Bonooru on Privatisation of BA Holdings, ¶59.
[27] Record, 29, Statement of Uncontested Facts, ¶8.
[28] Record, 32, Statement of Uncontested Facts, ¶28.
[29] Record, 33, Statement of Uncontested Facts, ¶30.
[30] Record, 31, Statement of Uncontested Facts, ¶21.
[31] Milhaupt & Zheng, 689-690.
[32] Record, 31, Statement of Uncontested Facts, ¶22.

B. ADDITIONALLY, THE CLAIMANT DOES NOT SATISFY THE BROCHES TEST.

25. In 1972, Aron Broches, who is considered to be the principal architect of the ICSID Convention, had stated that the claims of an SOE may be admitted by Investor-State Tribunals *"unless it is acting as an agent of the government or is discharging an essentially governmental function"*.[33] This statement has been termed as the "Broches Test" and has been applied by various tribunals for determining whether an SOE may fall within the jurisdiction of the tribunal.[34] In order to be amenable to the tribunal's jurisdiction, the Claimant, being an SOE, would necessarily need to satisfy the separate, distinct prongs of the Broches Test. However, in the present case, the Respondent submits that the Claimant operated as an agent of the Bonooru government in the course of managing the affairs of Caeli Airways, and thereby, fails to satisfy the Broches Test.
26. In the contemporary context, the main concerns surrounding SOEs are that they may engage in behaviour motivated by political and public policy considerations rather than strictly commercial concerns and adopt the appearance of a private entity for furthering their otherwise State objectives.[35]
27. The *BUCG* Tribunal expressly held that the Broches prong is a mirror image of the attribution rule enshrined in Article 8 of the ILC Articles on State Responsibility.[36] Similarly, according to Paul Blyschak, an Investment Law practitioner, one source for understanding what is meant by the term *"government agent"* is the said Article 8 of ILC's Draft Articles on State Responsibility, which provides that:

> *"The conduct of a person or group of persons shall be considered as an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct"*.[37]

28. In a scenario, where there is any evidence, which indicates that the State is utilising its ownership interest in the entity to pursue State policies, the conduct of the entity can be attributed to the State, and therefore, the agency between the State and the entity is established.[38] Further, the totality of an SOE's operations and the context of the investment made by the said SOE should be evaluated holistically to determine whether

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[33] BROCHES, 202; SCHREUER, 161; History of ICSID, Vol. II-1 230; Byschak, 34.
[34] BUCG, ¶33; CSOB, ¶17; Maffezini (Juris), ¶79.
[35] Byschak, 31.
[36] BUCG, ¶34; ILC Draft Articles, Art. 8.
[37] ILC Draft Articles, Art. 8; Byschak, 35.
[38] ILC Draft Articles Commentary, 48, ¶6.

the entity was acting under the control of the home State in managing the affairs of the investment.[39]

29. In the *BUCG* case, the Tribunal pointed out that, in the particular context of the investment in Yemen, there was no evidence that BUCG, the Chinese SOE, was acting as an agent for the Chinese State in performing an international construction contract,[40] and therefore, BUCG was amenable to the jurisdiction of the Tribunal.

30. However, in the present case, the Respondent submits that, in the specific context of the Claimant's investment in Caeli Airways, the Bonooru government exercised a dominant influence over the operations of the Company, which were diverted predominantly in the pursuance of its State interests.

31. The provision of subsidies under the Horizon 2020 policy of the Bonooru government was essentially, a means of ensuring that the Claimant company, irrespective of profitability considerations, engages in ventures for promoting tourism in Bonooru and drawing more travellers from Mekar and the Greater Narnian region to Bonooru's emerging tourism market by way of its investment in Caeli Airways.[41] In fact, Caeli Airways' losses in 2014 were particular concentrated in the routes between Bonooru and Mekar.[42] Despite incurring severe losses, the Claimant did not cut down its operations in any of those routes connecting Bonooru and Mekar, considering that the Claimant company, having availed of subsidies and State aid under the Horizon 2020 Scheme, was under a direct obligation to draw travellers from Mekar to Bonooru's tourism markets, as well as maintain investments in promotion of tourism, thereby pursuing public policies under the control of the State.

32. Moreover, the Claimant's bid for the acquisition of a majority stake in Caeli Airways specifically stated that it would refinance for the remainder of Caeli Airways' large debt liability from the BPB, a government bank of Bonooru.[43] In this context, it must be noted that, in the initial stages, potential investors had predominantly cited the debt liabilities of Caeli Airways as being a major barrier for the purpose of investing in the airlines.[44] Subsequently, the large debt liability of Caeli Airways was refinanced from BPB at more favourable rates than available on the market.[45] This is clearly indicative of the

[39] Byschak, 40-41.
[40] BUCG, ¶39.
[41] Record, 32, Statement of Uncontested Facts, ¶28.
[42] Record, 33, Statement of Uncontested Facts, ¶33.
[43] Record, 31, Statement of Uncontested Facts, ¶23.
[44] Record, 31, Statement of Uncontested Facts, ¶21.
[45] Record, 33, Statement of Uncontested Facts, ¶30.

considerable State assistance rendered in the course of the Claimant company acquiring a controlling stake in Caeli Airways despite the debt liabilities attached to the airlines.

33. The Respondent State submits that the enormous extent of State backing for the claimant, in effect, enabled Bonooru to utilise its considerably significant bargaining power in respect of the Claimant company to ensure that it pursues State interests.

34. Further, it is imperative that we take into consideration the opinion of Ms. Kasumi, a former-high ranking government employee within Bonooru's Ministry of Transport and Tourism. She had expressly stated that companies in Bonooru were in no way independent from the government. In fact, with special emphasis on Caeli Airways, she had highlighted that the State invested significant resources into the flights between Mekar and Bonooru despite the routes not being profitable for the Airlines. Thus, according to Ms. Kasumi, the Claimant's investment in Caeli Airways should be necessarily viewed in the specific context of the Bonoori State policies, namely, the Caspian Project, and the Horizon 2020 Scheme, that specifically aimed at promoting tourism in Bonooru.[46] Hence, in light of the aforesaid, the Respondent submits that such important statements by a former high-ranking government employee within Bonooru's Ministry of Tourism clearly underline the enormous power and authority exercised by Bonooru State over the Claimant's operations in the context of its investment in Caeli Airways.

35. Therefore, it is submitted that the Claimant does not satisfy the Broches Test, and does not fall within the jurisdiction of the Tribunal.

C. THE CLAIMANT DOES NOT FALL WITHIN THE SCOPE OF THE TERM "INVESTOR" AS DEFINED IN THE CEPTA, IN LIGHT OF ARTICLE 31 OF THE VCLT.

36. Generally, a treaty provision is interpreted in terms of its natural ordinary meaning.[47] Article 31(1) of the VCLT provides for the interpretation of a treaty provision in accordance with the ordinary meaning to be given to the terms of the treaty.[48] It is a crucial interpretative tool for ascertaining the intention of the parties.[49]

37. Further, Article 31(1) of the VCLT also requires a contextual interpretation to be given to the concerned treaty provision. In this regard, the terms of a treaty should not be interpreted in a vacuum. Rather, the specific context in which the term has been used in

[46] Record, 55, Annex VII, Phenac Business Today Podcast Transcript.
[47] YEN, 46; Dorr 522; WEERAMANTRY, 41.
[48] VCLT, Art. 31(1).
[49] YEN, 46; Dorr 522.

the treaty is to considered and the same accordingly interpreted to be in-tune with the treaty provisions.[50]

38. In the present case, Article 9.1 of the CEPTA defines an *"investor"* as a:

> "*natural person with the nationality of a Party or an enterprise with the nationality of a Party or seated in the territory of a Party that seeks to make, is making or has made an investment in the territory of the other Party.*"[51]

39. Additionally, under the CEPTA, an *"enterprise of a Party"* is defined as an enterprise which is constituted under the laws of a Party and *"is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under paragraph (a)"*.[52]

40. The Respondent submits that an ordinary literal reading of the term *"enterprise"* in the context of the definition provision under the CEPTA implies that the enterprise must be necessarily owned or controlled by a natural person or by an enterprise provided under paragraph (a). The term *"enterprise"* as provided under paragraph (a) does not include *"States"* within its scope and accordingly, the term *"enterprise"* as defined in the CEPTA does not include SOEs considering that SOEs are entities which are controlled by States.

41. In the present case, the Respondent has submitted that the Claimant company qualifies as an SOE. Therefore, it is submitted that the Claimant being an SOE, does not fall within the scope of the term *"enterprise"* as defined in the CEPTA.

42. Moreover, the definition of the term "enterprise" under the 1994 BIT between Bonooru and Mekar specifically included SOEs within its scope.[53] On the other hand, in the subsequent agreement, i.e., the CEPTA, the applicable treaty in the present case, the State parties have not included SOEs within the scope of the term "enterprise".[54] The term *"enterprise"* as defined in the CEPTA, therefore, should be interpreted keeping in mind the intent of the contracting State parties in this regard to exclude SOEs from the scope of the CEPTA.

43. Hence, the Respondent submits that the Claimant Company, being an SOE, would also not fall within the scope of the term "investor" as defined in the CEPTA, read in light of Article 31 of the VCLT.

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[50] WEERAMANTRY, 58; SINCLAIR, 121.
[51] Record, 73, CEPTA.
[52] *Id.*
[53] Record, 69, BIT, Art. I. a).
[54] Record, 73, CEPTA.

D. THE CLAIMS SHOULD BE DECLARED INADMISSIBLE SINCE THE CLAIMANT INDULGED IN CORRUPT PRACTICE FOR PROCURING THE INVESTMENT.

44. The concept of international public policy confers upon a Tribunal the responsibility to condemn any abhorrent violation irrespective of whether it has been raised specifically by either of the disputing parties.[55] According to the *World Duty Free* Tribunal, the term *"international public policy"* was interpreted to represent an *"an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora"*.[56] The existence of a particular transnational public policy rule is to be ascertained by reference to international conventions, arbitral awards and comparative law.[57]

45. With respect to the grave issue of corruption, the international community has adopted a wide range of measures, including the conclusion of a large number of international conventions over the past few decades.[58]

46. In view of the adoption of a considerably large number of international conventions as well as national laws in relation to corruption, various Investor-State Tribunals have held bribery to be in contravention of transnational public policy, and therefore, tribunals have leaned against admitting claims based on agreements concluded by corrupt or unfair practice.[59] In this regard, the *Metal-Tech* Tribunal specifically stated that:

> *"The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in corrupt practice"*.[60]

47. Further, the Preamble to the CEPTA is also indicative of the intent of the Contracting States to promote the rule of law, and eliminate bribery and corruption in trade and investment.[61]

48. In the present case, the amicus submission by external advisors to the CRPU, who were involved as independent advisors in the entirety of the privatisation process of Caeli Airways, provides that there is clear evidence revealing that the Claimant acquired the investment by paying bribes to Mr. Dorian Umbridge, the Chairperson of the CRPU.[62]

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[55] Douglas, 180.
[56] World Duty Free, ¶139; Plama, ¶142.
[57] World Duty Free, ¶141.
[58] World Duty Free, ¶143-146; Metal-Tech, ¶291; UNCAC; AUCPCC; OECD Anti-Bribery Convention.
[59] World Duty Free, ¶157; Metal-Tech, ¶292; Plama, ¶143; Inceysa, ¶249.
[60] Metal-Tech, ¶389.
[61] Record, 71, CEPTA.
[62] Record, 19, Amicus Submission by External Advisors to the Committee on Reform of Public Utilities.

49. Considering that bribery was a means used by the claimant to acquire the investment, the Respondent submits that the Tribunal should condemn this abhorrent act of corruption and not admit the claims pursued by the Claimant company, which indulged in a highly unethical act in contravention of transnational public policy.

50. Hence, it is submitted that the claims should be declared inadmissible since the Claimant indulged in corrupt practice for procuring the investment.

II. THE TRIBUNAL SHOULD GRANT LEAVE TO FILE *AMICUS CURIAE* SUBMISSIONS TO THE EXTERNAL ADVISORS TO CRPU AND NOT TO CBFI.

51. Article 9.19(3) of the CEPTA lays down the conditions which the Tribunal must consider to accept a written *amicus curiae* submission by a non-disputing party.[63] A written submission will only be accepted if the non-disputing party necessarily fulfils all the conditions that are laid down in the CEPTA.

52. These conditions include the non-exhaustive factors given under Article 41(3) of ICSID AF Rules[64] and Article 4 and 5 of the Transparency Rules[65].

53. In this regard, the Respondent submits that the Tribunal should grant leave to accept written submissions from the external advisors to the CRPU **[A]** and not to CBFI **[B]**.

A. THE TRIBUNAL SHOULD GRANT LEAVE TO THE EXTERNAL ADVISORS TO THE CRPU FOR FILING WRITTEN *AMICUS CURIAE* SUBMISSION.

54. The Respondent submits that the external advisors to the CRPU's written submission is regarding a matter of fact or law within the scope of this dispute **[a]**. Further, the written submission will assist the Tribunal by bringing a perspective that is different from that of the disputing parties **[b]** and will not unduly burden the arbitral proceedings **[c].** Additionally, the external advisors to the CRPU are an independent non-disputing party **[d]** which have a significant interest in the present dispute **[e].** Finally, the Tribunal must grant leave to the external advisors in light of public interest in cases of corruption **[f].**

a. Amicus curiae submission by the external advisors to CRPU is regarding a matter of fact or law within the scope of this dispute.

55. Article 9.19(3) of CEPTA, Article 41(3)(b) of ICSID AF Rules and Article 4(1) of Transparency Rules state that *amicus curiae* submission by a third party must be

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63 Record, 80, CEPTA, Art. 9.19(3).
64 ICSID AF Rules, Art. 41(3).
65 Transparency Rules, Art. 4, 5.

regarding a matter of fact within the scope of the dispute.[66] Further, it is one of the objectives of CEPTA to eliminate bribery and corruption in trade and investment.[67]

56. In the *Philip Morris* case, the Tribunal allowed written *amicus curiae* submissions from the WHO and PAHO as they provided the Tribunal with official technical information and evidence regarding distinct trends in tobacco marketing and consumption. The dispute in this case was regarding the breach of domestic tobacco control legislation and tobacco marketing and packaging restrictions by the company Philip Morris in the state of Uruguay. The data submitted by the organisations were considered to be within the scope of the dispute as they were directly related to tobacco marketing.[68]

57. In the *Infinito Gold* case*,* the Tribunal accepted written *amicus curiae* submissions from a Costa-Rican NGO which raised issues of corruption against the Claimant investor. Despite the fact that neither of the disputing parties had raised the issue of corruption before the arbitral tribunal, the NGO was granted leave to file written submissions considering that the corruption issue may play a pivotal role in the assessment of the dispute.[69]

58. Further, in the *Apotex* case, the Tribunal held that issues on jurisdiction might raise matters of public interest on which a non-disputing party can provide assistance.[70] Tribunals like *Aguas* had only refused *amicus curiae* from raising jurisdictional issues as such issues were already analysed by the tribunal.[71]

59. In the present case, the external advisors to the CRPU claim to have specific evidence which suggests that the Claimant acquired its rights over the Caeli Airways by means of bribery and corruption.[72] Hence, the assessment of the legality of the Claimant's investment is crucial to the determination of the Tribunal's competence-competence and is directly related to the jurisdictional issues raised by the disputing parties.

60. Additionally, as per the report of Transparency International, the Respondent has consistently scored low on the corruption perception index.[73] The external advisors who were involved in the privatisation process of Caeli Airways are uniquely positioned to adduce evidence of the alleged corruption.[74] The Tribunal is yet to decide the issues on

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[66] Record, 80, CEPTA, Art. 9.19(3); ICSID AF Rules, Art. 41(3)(b); Transparency Rules, Art. 4(1).
[67] Record, 71, CEPTA, Preamble.
[68] Philip Morris (Order3), ¶23; Philip Morris (Order 4), ¶25.
[69] Infinito, ¶33.
[70] Apotex, ¶33.
[71] Aguas, ¶27.
[72] Record, 19, Amicus Submission by External Advisors to the Committee on Reform of Public Utilities.
[73] Record, 29, Statement of Uncontested Facts, ¶12.
[74] Record, 19, Amicus Submission by External Advisors to the Committee on Reform of Public Utilities.

jurisdiction and thus, following the principle of *Apotex* and *Aguas*, the external advisors can raise jurisdictional issues. Therefore, it is submitted that the external advisors to CRPU satisfy the condition under CEPTA by bringing a matter of fact or law within the scope of the dispute.

b. Amicus curiae submission by the external advisors will assist the Tribunal by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

61. Article 9.19(3) of CEPTA states that the *amicus curiae* must assist the Tribunal in evaluating the submissions of the disputing parties.[75] Article 41(3)(a) of ICSID AF Rules and Article 4(3)(b) of Transparency Rules state that *amicus* submission by a third party must assist the tribunal by giving a perspective that is different from that of the disputing parties.[76]
62. This condition focuses on *amicus curiae's* potential 'contribution of particular knowledge and expertise' and 'likely utility' to the Tribunal.[77] Owing to their procedural limitation, ICSID tribunals do not investigate the issues on their own and thus, they solely rely on information given by the parties.[78] In such cases, additional factual information given by non-disputing parties becomes essential for Tribunal's evaluation of facts.[79]
63. In the *Vivendi* case, the suitability of non-disputing parties was determined by their expertise, experience and perspective.[80] In the *Apotex* case, the Tribunal said that the requirements of expertise, experience or perspective were to be construed broadly so as to allow the Tribunal, an access to the widest possible range of views.[81]
64. Examples of such broad interpretations can be seen in cases of *Philip Morris*, where the health organisations assisted the Tribunal by providing data on global tobacco trends[82] and in *UPS*, where the postal union assisted the Tribunal by giving its perspective on the effect of Canada's new postal legislation.[83]
65. In the present case, the external advisors to the CRPU were the independent advisors engaged in the privatisation, liquidation, and/or restructuring of Caeli Airways. They are

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[75] Record, 80, CEPTA, Art. 9.19(3).
[76] ICSID AF Rules, Art. 41(3)(a); Transparency Rules, Art. 4(3)(b).
[77] Born, 646.
[78] UNCITRAL Report, ¶52
[79] *Id.*
[80] Vivendi (Order in Response), ¶24.
[81] Apotex, ¶22.
[82] Philip Morris (Order3), ¶24; Philip Morris (Order4), ¶25.
[83] UPS, ¶70.

members of the Mekari civil society whose professional focus is investment banking. They have previously acted as interveners before federal courts in Mekar in relation to judicial proceedings concerning approval for privatisation projects. Further, the external advisors regularly advise potential investors about the prospecting investment opportunities in the Respondent state.[84]

66. Hence, it is submitted that the external advisors to the CRPU have the requisite expertise to be a suitable *amicus curia.* As advisors engaged with privatisation of Caeli Airways, they have the necessary experience to adduce evidence regarding the corruption allegations raised by them.[85] Their perspective will assist the Tribunal by providing factual information that may not be obtained from either disputing party.

c. The external advisors to the CRPU will not unduly burden the arbitral proceedings or unfairly prejudice any disputing party.

67. Article 9.19(3) of CEPTA, Article 41(3) of ICSID AF Rules and Article 4(5) of Transparency Rules state that *amicus curiae* must not unduly burden the arbitral proceedings or unfairly prejudice any disputing parties.[86]

68. The Tribunals satisfy this criterion by enforcing procedural safeguards on the submissions of *amicus curiae*.[87] With respect to unfair prejudice, Tribunals accept amicus curiae submissions even if their arguments are one sided.[88]

69. In the present case, CEPTA and Procedural Order No.1 lays down the procedural safeguards for *amicus curiae* submissions.[89] The external advisors to the CRPU have complied with these safeguards and disclosed its identity, affiliation to the disputing parties and nature of interest in the present arbitration. Further, the submission will not unfairly prejudice the Claimant as the purpose of this submission is to assist the Tribunal by providing additional factual information on the process of privatisation of Caeli Airways.[90] This information is relevant to the particular case as the scope of the present dispute involves the question of jurisdiction of the Claimant before the Tribunal. Hence, it is submitted that the external advisors to the CRPU satisfy this condition under the CEPTA.

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[84] Record, 19, Amicus Submission by External Advisors to the Committee on Reform of Public Utilities.
[85] *Id.*
[86] Record, 80, CEPTA, Art. 9.19(3); ICSID AF Rules, Art. 41(3); Transparency Rules, Art. 4(5).
[87] Vivendi (Order in Response), ¶26; Aguas, ¶15.
[88] Glamis Gold, ¶8.
[89] Record, 13, Procedural Order No. 1, ¶20.
[90] Record, 19, Amicus Submission by External Advisors to the Committee on Reform of Public Utilities.

d. CBFI is an independent non-disputing party.

70. Article 9.19(3) of CEPTA states that a non-disputing party must disclose any affiliation, direct or indirect, with any disputing party and any assistance it will receive from a person, government or organisation.[91]

71. To judge the independence of a party, it is necessary to know the nature of their financial and professional relationships with the disputing parties, if any.[92] A non-material relationship between the *amicus curiae* and disputing party does not affects the independence of the *amicus*.[93] This principle was upheld by the *Biwater* case, when the Tribunal allowed LEAT to submit written amicus submissions, although LEAT had previously worked with the government of Respondent state on environmental issues.[94]

72. In the present case, the external advisors to the CRPU advised Caeli Airways on their privatisation, liquidation, and/or restructuring. They were selected for this role by way of a transparent and competitive process approved by the Cabinet of Ministers of Mekar and based on criteria of competence as identified in the Law on Privatisation. Their tasks included performing an audit, an analysis of the economic, technical and financial performance of Caeli Airways etc. For their work, the external advisors were remunerated with both a set fee and a success fee as a percentage of the sales price.[95]

73. Thus, the external advisors are a professionally independent party who were previously involved with the one of the governmental organs of the Respondent State. Like *Biwater*, the involvement was merely advisory and on a non-material level as the advisors were not under a direct control of the Respondent's government. Further, they have not received a financial assistance from any of the disputing parties.[96] Hence, it is submitted that external advisors to the CRPU satisfy the condition under CEPTA by being an independent party.

e. The external advisors to the CRPU have a significant interest in the present arbitral proceedings.

[91] Record, 80, CEPTA, Art. 9.19(3).
[92] Aguas, ¶32.
[93] Biwater, ¶11(a).
[94] *Id.*
[95] Record, 19, Amicus Submission by External Advisors to the Committee on Reform of Public Utilities.
[96] Record, 20, Amicus Submission by External Advisors to the Committee on Reform of Public Utilities.

74. Article 9.19(3) of CEPTA, Article 41(3)(c) of ICSID AF Rules and Article 4(3)(a) of Transparency Rules state that a third party filing *amicus* submission must have a significant interest in the dispute.[97]

75. A party is said to have significant interest when the dispute affects the rights of the third party, directly or indirectly.[98] In the *Philip Morris* case, WHO and PAHO were said to have significant interest in the dispute as they dealt with public health matters and the dispute was regarding the breach of tobacco legislation in Uruguay.[99] In *UPS*, postal union had a significant interest in the dispute as the award of the dispute could change Canada's postal regulations, which would directly affect the Union.[100]

76. In the present case, the external advisors to the CRPU have a significant interest in promoting fair business practices in Mekar. As members who are professionally focused on investment banking, the external advisors regularly act as interveners before federal courts in Mekar in relation to judicial proceedings concerning approval for privatisation projects.[101] Similar to *UPS*, the award of this dispute will directly affect the external advisors as the stagnation in anti-corruption efforts will impact its financial operations which involve advising potential investors.[102] Hence, it is submitted that the external advisors to the CRPU satisfy the condition under CEPTA by having a significant interest in the dispute.

f. Leave for filing amicus submission must be granted to the external advisors to CRPU in light of public interest.

77. The object of UNCITRAL Rules of Transparency is to take into account the public interest involved in such investor-State arbitrations.[103] The *Methanex* Tribunal had laid down the importance of *amicus curiae* in light of increasing public interest in investor-state arbitrations.[104] Tribunals under the ICSID and UNCITRAL rules have cited the *Methanex* judgement to allow *amicus curiae* submissions.[105]

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[97] Record, 80, CEPTA, Art. 9.19(3); ICSID AF Rules, Art. 41(3)(c); Transparency Rules, Art. 4(3)(a).
[98] Glamis Gold, ¶8.
[99] Philip Morris (Order3), ¶25(c); Philip Morris (Order4), ¶27(c).
[100] UPS, ¶70.
[101] Record, 19, Amicus Submission by External Advisors to the Committee on Reform of Public Utilities.
[102] *Id.*
[103] Transparency Rules, Object.
[104] Methanex, ¶49.
[105] UPS, ¶70; Philip Morris (Order4), ¶26.

78. In the *Aguas* case, the Tribunal held that public interest is present in cases whose decisions can have an impact on others.[106] Decisions on public policy[107] and international responsibility of state under International law[108] has been considered as matters of public interest. Tribunals have accepted *amicus curiae* submissions on such matters.

79. In the present case, the written submissions by the external advisors to the CRPU will assist the Tribunal by providing evidence and factual information on the bribes offered by the Claimant to claim their rights over Caeli Airways.[109] Corruption is an abhorrent act and a grave matter of public interest. The Claimant's country and the Respondent are vehemently against corruption and their investment agreement aims to eliminate bribery from investment and trade.[110] Hence, it is submitted that the Tribunal must grant leave to file written submissions to external advisors to CRPU in light of public interest.

B. THE TRIBUNAL SHOULD NOT GRANT LEAVE TO THE CBFI FOR FILING WRITTEN *AMICUS CURIAE* SUBMISSION.

80. The Respondent submits that the Tribunal must not grant leave to the CBFI as they do not fulfil the conditions listed under Article 9.19(3) of the CEPTA as the CBFI is not an independent non-disputing party **[a]** and the written submission by CBFI will not bring a new perspective, particular knowledge or insight to the Tribunal **[b]**.

a. CBFI is not an independent non-disputing party.

81. Article 9.19(3) of CEPTA states that a non-disputing party must disclose any affiliation, direct or indirect, with any disputing party and any assistance it will receive from a person, government or organisation.[111]

82. A non-disputing party's independence is ascertained by determining its financial and professional relationship with the disputing party.[112] An apparent lack of independence or neutrality is a sufficient ground to reject a non-disputing party's petition.[113]

83. In the *Von Pezold* case, the *amicus curiae* application by the European Centre for Constitutional and Human Rights was rejected as the Centre was associated with an

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[106] Aguas, ¶18.
[107] UPS, ¶70.
[108] Vivendi, ¶18.
[109] Record, 19, Amicus Submission by External Advisors to the Committee on Reform of Public Utilities.
[110] Record, 71, CEPTA, Preamble.
[111] Record, 80, CEPTA, Article 9.19(3).
[112] Aguas, ¶32.
[113] Von Pezold, ¶56.

organisation which was involved in an ongoing dispute with the Claimants of the dispute, Border Times ltd. [114]

84. In the present case, CBFI is a consortium of Bonoori investors.[115] The Claimant of the present dispute is a part of it.[116] LLC, who is advising the Claimant on funding strategies with respect to this particular claim is also a part of CBFI.[117] Further, two members of the CBFI, SRB Infrastructure and Wiig Wealth Management Group, are currently pursuing claims against the Respondent under Chapter 9 of CEPTA.[118] Even though CBFI claims that the Claimant has not provided any financial assistance to the CBFI[119], there seems to be an inherent lack of professional independence. Hence, it is submitted that CBFI is not an independent non-disputing party.

b. Amicus submission by CBFI will not bring a new perspective, particular knowledge or insight to the Tribunal.

85. Article 9.19(3) of CEPTA states that the *amicus curiae* must assist the Tribunal in evaluating the submissions of the disputing parties.[120] Article 41(3)(a) of ICSID AF Rules and Article 4(3)(b) of Transparency Rules state that *amicus* submission by a third party must assist the tribunal by giving a perspective that is different from that of the disputing parties.[121]

86. An *amicus* written submission must not be duplicative of other submissions, either by the disputing parties or other *amici curiae*.[122] According to the *Apotex* tribunal, the assessment as to the likely utility of a non-disputing party's submission should be made on the assumption that the Disputing Parties will competently and comprehensively argue all the issues in dispute before the Tribunal.[123]

87. In the *Bear Creek* case, the Tribunal rejected the *amicus curiae* application as even though the *amicus* was able to show wide experience in the area of sustainable investment, its application lacked information on how it would contribute any further information or arguments not provided by the disputing parties.[124]

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[114] *Id.*
[115] Record, 16, Amicus Submission by the Consortium of Bonoori Foreign Investors, ¶2.
[116] Record, 16, Amicus Submission by the Consortium of Bonoori Foreign Investors, ¶7.
[117] *Id.*
[118] Record, 16, Amicus Submission by the Consortium of Bonoori Foreign Investors, ¶6.
[119] Record, 16, Amicus Submission by the Consortium of Bonoori Foreign Investors, ¶3.
[120] Record, 80, CEPTA, Art. 9.19(3).
[121] ICSID AF Rules, Art. 41(3)(a); Transparency Rules, Art. 4(3)(b).
[122] Born, 647.
[123] Apotex, ¶25.
[124] Bear Creek, ¶38.

88. Similarly, in the present case, CBFI's submission are duplicative of the Claimant's submission. The Claimant, its funding strategy advisors and two other investors who are pursuing claims against the Respondent are members of CBFI.[125] The submissions pertaining to access to an impartial judicial system as well as admissibility of State-owned enterprises discharging commercial functions are similar to those submitted by the Claimant in its notice of arbitration.[126] Thus, all the issues raised by CBFI will be dealt by the Claimant in its issue. Further, as a member to CBFI, the perspective of the Claimant will be similar to that of CBFI. Hence, it is submitted that CBFI fails to satisfy this condition under CEPTA.

III. <u>THE RESPONDENT HAS NOT VIOLATED ARTICLE 9.9 OF THE CEPTA</u>

89. The FET standard is a common investment protection under International Investment Agreements. However, the precise extent of the standard has never been unequivocally determined, and the breach of the standard has to be assessed on a case-to-case basis.[127]

90. The broad wording of the FET standard often carries a risk of overarching application. Tribunals are criticised for interpreting the terms of the treaty exclusively in favour of the investors.[128] Therefore, the Respondent invites the Tribunal to carefully interpret the FET clause in the present case to avoid an overreaching.

91. The Respondents submits that the Acts undertaken were legitimate and proportionate exercise of the States Right to Regulate as provided under Article 9.8 and the Preamble of the CEPTA.[129]

92. Hence, it is submitted that the Respondent's acts were neither arbitrary **[A]** nor discriminatory **[B]**. Furthermore, they do not constitute a fundamental breach of due process **[C]** and denial of justice **[D]**.

A. RESPONDENT DID NOT ACT IN AN ARBITRARY MANNER.

93. Article 9.9(2)(c) of the CEPTA states that an arbitrary measure may constitute a violation of the FET standard.[130] However, the CEPTA does not define the term arbitrary.

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[125] Record, 16, Amicus Submission by the Consortium of Bonoori Foreign Investors, ¶6,7.
[126] Record, 17, Amicus Submission by the Consortium of Bonoori Foreign Investors, ¶10; Record, 4, Notice of Arbitration, ¶20.
[127] Waste Management, ¶99; Mondev, ¶318; Noble Ventures, ¶181.
[128] Noble Ventures, ¶52.
[129] Record, 76, CEPTA, Art. 9.8; Record, 71, CEPTA, Preamble.
[130] Record, 76, CEPTA, Art. 9.9(2)(c).

94. Several Investment Tribunals have followed the definition laid down in the *ELSI* case, which defines the term arbitrary as "…a *willful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety*."[131] Therefore, the aforesaid test should be considered to analyse acts of the Respondents.

95. In light of the aforesaid, the Respondent submits that CCM investigations, the consequent fines imposed **(a),** and the maintenance of airfare caps were not arbitrary **(b)**.

a. The CCM investigations and the consequent fines imposed were not arbitrary.

96. Arbitrariness requires some form of manifest impropriety.[132] In the *Chemtura* case, the Claimants argued that a special review of their product was conducted in bad faith. However, after examining the circumstances, the Tribunal concluded that the special review had been launched out of legitimate regulatory concerns and in accordance with Canada's international commitments.[133]

97. In the present case, the Respondent submits that both the investigations were initiated out of legitimate concerns and were in accordance with the MRTP Act. Hence, they were within the purview of Respondent's right to regulate

98. Caeli Airways had adopted a low pricing model to expand its consumer base with the help of the Claimant's subsidies received from the home-state.[134] By the end of 2015, Caeli Airways had become the only profitable airline on more than half of the routes to and from Phenac International Airport.[135] The rapid expansion of Caeli Airways drew the attention of the CCM, who launched the first investigation to inquire whether or not the Claimant had adopted predatory pricing strategies to hinder competition in the domestic market.[136]

99. The Respondent submits that the MRTP Act provides the CCM with the discretion to launch an investigation in cases where the market share is lower than fifty percent.[137] In the present case, the CCM stated that the composite share of Caeli Airways and its Moon Alliance Partner Royal Narnian exceeded 54%.[138]

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[131] ELSI, ¶128.
[132] Enron, ¶281.
[133] Chemtura, ¶147.
[134] Record, 34, Statement of Uncontested Facts, ¶34.
[135] *Id.*, ¶35.
[136] *Id.*, ¶36.
[137] Record, 47, Annex V, Monopoly and Restrictive Trade Practice Act.
[138] Record, 34, Statement of Uncontested Facts, ¶36.

100. The CCM was justified in considering the composite share in light of the evidence of preferential secondary slot-trading between the airlines.[139] Hence, it is submitted that the CCM appropriately exercised its discretion to initiate the first investigation.

101. Subsequently, the second investigation was launched by CCM on receiving a complaint against the Claimant from the Consortium of Small and Regional Airlines of the Greater Narnian Region alleging that the Claimant had launched low airfare flights on specific regional routes with the sole purpose of pushing out its competitors.[140] The Consortium alleged that with the help of the privileges enjoyed by Caeli Airways at the Phenac International Airport, the Claimant had converted it into an impenetrable fortress hub.[141]

102. The Respondent submits that at the time of privatisation of Caeli Airways, the CCM had sufficiently cautioned the Claimant against indulging in anti-competitive behaviour and had taken an undertaking from the Claimant in this regard.[142] Nonetheless, the Claimant indulged in anti-competitive acts, which violated the antitrust legislation.[143] It is submitted that the investigation did not seek to penalise Caeli Airways for the privileges promised under the contract, instead it aimed at prohibiting the Claimant from abusing those privileges for adopting undercutting strategies to drive out competitors. Therefore, Respondent submits that the investigations were launched out of legitimate regulatory concerns.

103. Lastly, it is submitted that the CCM appropriately exercised its powers under the MRTP Act to impose fines as both the investigations concluded the breach of the domestic legislation by the Claimant.[144] Hence, the Respondent submits that the CCM investigations and the consequent imposition of fines were not arbitrary.

b. The maintenance of airfare caps was not arbitrary.

104. Tribunals have stated that an arbitrary measure is one that affects the investments of the other Party without engaging in a rational decision-making process.[145]

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[139] *Id.*
[140] Record, 35, Statement of Uncontested Facts, ¶38.
[141] *Id.*
[142] Record, 32, Statement of Uncontested Facts, ¶25.
[143] Record, 36, Statement of Uncontested Facts, ¶45; Record, 37, Statement of Uncontested Facts, ¶49.
[144] *Id.*
[145] LG&E Liability, ¶158; Teinver, ¶923.

105. The object and purpose of the MRTP Act aims to prevent practices having adverse effect on competition, to protect the interests of consumers and to ensure freedom of trade.[146] The MRTP Act grants the power to the CCM to impose interim measures.[147]

106. In the present case, during the first investigation, the CCM had placed airfare caps on Caeli Airways to prevent it from earning supra profits.[148] The CCM had decided to keep the airfare caps in place till the end of the investigation. The Claimant admits that at the time of imposition, the caps were reasonable.[149] Thereafter, a second investigation was launched against the Claimant by the CCM on receiving a complaint from its competitors.[150]

107. The first investigation concluded in August 2018, and the CCM issued a voluminous report on the results.[151] The CCM Report stated that the Claimant had breached the MRTP Act by adopting predatory pricing strategies resulting from low airfares and loyalty programs.[152] Accordingly, the CCM decided to impose fines and continue the imposition of airfare caps till the end of the second investigation.[153]

108. Likewise, the second investigation concluded that the Claimant had breached the domestic legislation by abuse of dominant position.[154] Hence, the CCM continued the maintenance of the airfare caps to prevent the Claimant, having a market share of more than forty percent, from abusing its market share to adversely affect the consumers and its competitors during the economic crises.

109. The Respondents submits that the maintenance of caps was a legitimate exercise of the states' right to regulate, which aimed at consumer protection and freedom of trade. Therefore, it is submitted that the maintenance of airfare caps was not arbitrary.

B. THE RESPONDENT DID NOT ACT IN A DISCRIMINATORY MANNER.

110. To decide whether the State of Mekar has acted in a discriminatory manner, the Tribunal may rely on the test laid down in the *Saluka* Case, which states that "*discrimination by a*

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[146] Record, 47, Annex V, Monopoly and Restrictive Trade Practice Act.
[147] *Id.*
[148] Record, 34, Statement of Uncontested Facts, ¶36.
[149] Record, 3, Notice to Arbitration, ¶15.
[150] Record, 34, Statement of Uncontested Facts, ¶36.
[151] Record, 36, Statement of Uncontested Facts, ¶45.
[152] *Id.*
[153] *Id.*
[154] Record, 37, Statement of Uncontested Facts, ¶49.

host State is found when similar cases are treated differently without reasonable justification."[155]

111. In the present case, during the economic crises, the President of Mekar had passed the Executive Order 9-2018, which granted subsidies to airlines for each Mekar citizen on board.[156] The Executive Order directed the Secretary of Civil Aviation to use discretion while granting subsidies and considering whether or not these subsidies will skew market conditions in favour of one or more enterprises.[157]

112. The Respondent submits that the denial of subsidies to the Claimant was not discriminatory. The Secretary granted the subsidy only to airlines with less than five percent market share.[158] The market share of Caeli Airways was more than forty percent, and, hence, it was not granted the subsidy.[159]

113. Moreover, the denial of subsidies was not discriminatory as the Secretary had denied subsidies to both the Claimant and Larry Air as they were SOE's.[160] It is well established under International law that SOE's have a unique advantage over private entities due to the continuous influx of funds, subsidies, and other concessions from home states.[161] Furthermore, the internationally recognised Principle of Competitive Neutrality requires the states to take positive steps to diminish the advantage SOEs have over private airlines.[162]

114. Therefore, the Respondent submits that differential treatment, if any, was reasonably justified.

C. THE ACTS OF THE RESPONDENT DO NOT CONSTITUTE A FUNDAMENTAL BREACH OF DUE PROCESS.

115. Article 9.9(2)(b) of the CEPTA states that a fundamental breach of due process may amount to a violation of the FET standard. The CEPTA mentions the term "fundamental," which indicates that minor procedural violations of due process will not amount to a violation of the FET standard.[163] Similarly, in the *Waste Management II* case, the Tribunal

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[155] Saluka, ¶313.
[156] Record, 36, Statement of Uncontested Facts, ¶46.
[157] *Id*.
[158] Record, 89, 90, Procedural Order 4, ¶7.
[159] Record, 37, Statement of Uncontested Facts, ¶49.
[160] Record, 37, Statement of Uncontested Facts, ¶47.
[161] OECD Report.
[162] *Id*.
[163] Record, 76, CEPTA, Art. 9.9(2)(b).

stated that the lack of due process should lead to an outcome that shocks judicial propriety.[164]

116. In the present case, the Respondent submits that the Mekari Courts accorded justice within a reasonable amount of time **[a]** and did not deprive the Claimant of the right to be heard. **[b]**

a. The Mekari Courts accorded justice within a reasonable time.

117. To decide whether an undue delay has occurred, a Tribunal may consider whether justice was accorded within a reasonable time.[165] Tribunals have observed that the understanding of 'undue delay' is to be evaluated on a case-to-case basis.[166] For determining what is reasonable, the Tribunal should take into consideration - (1) the complexity of the case, (2) the conduct of the parties and the judiciary, and (3) the significance of the interests at stake in the case.[167]

118. In the *White* case, the Tribunal held that the delay of seven years, although unsatisfactory, did not amount to a breach of due process in light of India's rapidly growing population and the developing judicial system.[168] Similarly, several tribunals have recognised that while adjudicating on the claims of undue delay, developing states must be held at a relatively lower standard than an industrialised country.[169]

119. In the present case, the population of Mekar rapidly grew from six million to ten million eight hundred thousand between 1980 and 2015.[170] However, the judicial system failed to expand at the same rate, due to which the average time taken to reach a decision rose to twenty-seven months for commercial cases.[171]

120. Furthermore, several parties had approached the Court during the economic crises seeking immediate redressal.[172] Therefore, making it impossible for the Court to immediately address all claims. Notwithstanding the aforementioned circumstances, the Mekari Courts during the economic crises managed to accord justice within thirteen months.[173]

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[164] Waste Management II, ¶98.
[165] Chevron, ¶250; White, ¶10.4.11; Jan Van Nul, ¶204
[166] *Id.*
[167] White, ¶10.4.10.
[168] White, ¶10.4.22.
[169] White, ¶5.2.18; Jan de Nul, ¶204.
[170] Record, 29, Statement of Uncontested Facts, ¶13.
[171] *Id.*
[172] Record, 36, Statement of Uncontested Facts, ¶44.
[173] Record, 38, Statement of Uncontested Facts, ¶54.

121. Moreover, at the time of making the investment, the investor was aware of the developing conditions of the host state, and therefore, the Tribunal should reject the claim pertaining to undue delay.[174] Hence, the Respondent submits that Mekari Courts accorded justice within a reasonable time.

b. The Respondent has not violated the Claimants Right to be heard.

122. Tribunals have stated that the absence of notice of hearing or right to be heard constitutes a violation of due process.[175] In the *Thunderbird* case, the Tribunal stated that the Claimant's right to be heard has not been violated since he was given a chance to appear and present its case before the Court.[176]

123. In the present case, to alleviate the backlog on Mekari Courts and expedite the Court proceedings, the Mekari President in 2014 had passed an Executive Order authorising courts to dismiss cases via summary judgements.[177]

124. The Respondent submits that the Claimant was given a fair chance to appear before the Court and present its case during the hearing on airfare caps.[178] Moreover, after hearing the contentions of the parties, Justice VanDuzer opined that the case had little chance of success on merits and, therefore, rightfully dismissed the case by issuing a summary judgement.[179]

125. Hence, the Respondent has not violated the Claimant's right to be heard.

D. THE ACTS OF THE RESPONDENT DO NOT CONSTITUTE A DENIAL OF JUSTICE.

126. Article 9.9(2)(a) of the CEPTA states that denial of justice may constitute a violation of the FET standard.[180]

127. Tribunals have stated that the threshold for establishing denial of justice is extremely high.[181] Correspondingly, only gross miscarriage of justice, manifestly or clearly egregious conduct by the judiciary, amount to an internationally wrongful act.[182] In the

[174] Record, 29, Statement of Uncontested Facts, ¶13.
[175] Metalclad, ¶91-93; Dan Cake, ¶150
[176] Thunderbird, ¶198.
[177] Record, 86, Procedural Order 3, ¶8.
[178] Record, 38, Statement of Uncontested Facts, ¶54.
[179] *Id.*
[180] Record, 76, CEPTA, Art.9.9(2)(a).
[181] Loewen, ¶132; ELSI, ¶128.
[182] Flughafen Zurich ¶636-41.

Pantechniki case, the Tribunal stated that the error must be of a kind which no "competent judge could reasonably have made."[183]

128. Furthermore, Tribunals are not courts of appeal on domestic decisions.[184] In the *Dan Cake* case, the Tribunal stated it is not the Tribunal's task to determine whether it agrees or disagrees with the Court; and a mere disagreement cannot amount to a violation of FET standard.[185]

129. Article V(1)(e) of the New York Convention and the UNCITRAL Model Law states that courts "may" refuse to enforce an award that is set aside at its seat.[186] Several jurisdictions have interpreted "may" to be merely directory and stated that courts have the discretion to enforce the award.[187] Moreover, Article VII of the New York Convention provides that the convention shall not deprive any party to benefit from an arbitral award as permitted by the law of the enforcing State.[188]

130. In the present case, after running Caeli Airways into the ground, the Claimant decided to abandon the investment. The Claimant notified the Respondent as per the Right to First Refusal clause and quoted the offer made by Moon Alliance partner, Hawthorne Group LLP.[189] The Respondent rightfully rejected the prices offered as they were artificially inflated and were not an arm's length commercial price.[190] Therefore, a dispute arose between both parties regarding the offer, and consequently, they opted for arbitration.[191]

131. The SCC appointed Mr. Rett Eichel Cavanaugh to adjudicate the dispute, who rendered an award favouring the Respondent.[192] Subsequently, on the basis of the unreliable CILS Report, the Claimant filed an appeal in the Supreme Arbitrazh Court of Sinnograd.[193] The Court set aside the award on the basis of circumstantial evidence even after mentioning that "*the Court does not find itself in a position to conclusively rule on whether the act of bribery had in fact taken place*." [194]

132. On the contrary, the High Commercial Court of Mekar, after carefully considering the evidence on record, the precedents and the public policy of Mekar rightfully used its

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[183] Pantechniki, ¶94.
[184] SCHREUER (PROTECTION), 36.
[185] Dan Cake, ¶117.
[186] The New York Convention, Art. V(1)(e); UNCITRAL Model Law, Art. 36(1)(a)(v).
[187] Yukos (UK); Hilmarton (France).
[188] The New York Convention, Art. VII.
[189] Record, 39, Statement of Uncontested Facts, ¶57.
[190] *Id.*
[191] *Id.*, ¶58.
[192] *Id.*
[193] *Id.*, ¶60.
[194] Record, 64, Annex XIII, Supreme Arbitrazh Court of Sinnograd Ruling, ¶11.

discretion to enforce the award.[195] The Court agreed with the legal reasoning and rationale provided by the arbitrator and blamed the Claimant for the shoddy state of its application.[196] The Court refused to rely excessively on the CILS Report due to lack of partiality and the ongoing investigation against the organisation.[197] Accordingly, the Court decided to enforce the award.

133. Thereafter, the Claimant appealed in the Superior Court of Mekar, which reaffirmed the judgment of the High Commercial Court of Mekar by relying on the precedents where the Mekari Courts had enforced awards which were set aside at the seat.[198]

134. Hence, the Respondent submits that the enforcement of the award by the Mekari Courts was reasoned and not egregious. Therefore, the acts of the Respondent do not constitute a denial of justice.

IV. THE RESPONDENT DOES NOT OWE ANY COMPENSATION AS MV IS THE APPLICABLE STANDARD. HOWEVER, IF THE TRIBUNAL AWARDS COMPENSATION, THE MITIGATING CIRCUMSTANCES SHOULD BE TAKEN INTO ACCOUNT.

135. The Claimant, in the present case, has no basis for demanding FMV as the standard of compensation as the CEPTA prescribes for MV standard. **[A]** The MFN clause in CEPTA cannot be used to import the FMV standard. **[B]** Moreover, even if the tribunal concludes that the FMV should be the applicable standard, the compensation should be reduced on account of contributory negligence and the economic conditions in Mekar. **[C]**

A. CEPTA EXPRESSLY PRESCRIBES MARKET VALUE AS THE STANDARD OF COMPENSATION.

136. Article 26 of the VCLT encapsulates the essence of the principle '*Pacta Sunt Servanda*', according to which, a treaty is binding on the contracting parties, and should be applied in good faith.[199]

137. In the present case, the applicable treaty, i.e., the CEPTA prescribes MV as the standard of compensation for the breach of FET.[200] It is imperative to understand that the primary intention of the drafters of the CEPTA was to provide compensation on the basis of the

[195] Record, 65-66, Annex XIV, High Commercial Court of Mekar ruling- 23 August 2020.
[196] Record, 66, Annex XIV, High Commercial Court of Mekar ruling- 23 August 2020, ¶12.
[197] Record, 66, Annex XIV, High Commercial Court of Mekar ruling- 23 August 2020, ¶13.
[198] Record, 68, Annex XV, High Commercial Court of Mekar ruling- 23 August 2020, ¶11.
[199] VCLT, Art. 26.
[200] Record, 82, CEPTA, Art. 9.21.

FMV standard exclusively in expropriation cases.[201] On the other hand, compensation arising out of all other form of breaches should be based on the MV standard.[202]

138. The Respondent submits that the State parties to the CEPTA have expressly incorporated MV as the appropriate standard of compensation and no other standard has been agreed upon by the parties with respect to FET breaches. Hence, since the parties have expressly agreed upon the issue in hand, and codified it in the treaty, subsequently, they cannot derogate from the express provisions of the same.

139. Moreover, it should be noted that the applicable treaty is not silent with respect to the appropriate standard of compensation. In case, it was silent, the Tribunal was well within its authority to apply any standard.[203]

140. However, in the present case, owing to the express incorporation of the MV Standard in Article 9.21(1)(a) of the CEPTA, it is submitted that the Tribunal should uphold the intention of the State parties to the treaty, and thereby, apply the MV Standard of compensation.

B. FMV STANDARD CANNOT BE IMPORTED VIA THE MFN CLAUSE.

141. Art. 9.7 of the CEPTA states that each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords in like situations.[204] Art. 13 of the Arrakis-Mekar BIT states FMV value as the standard of compensation.[205]

142. According to Separate Opinion of Ian Brownlie in the *CME* case, a MFN clause cannot be used to derogate a provision or standard expressly given in the investment treaty.[206] In the present case, the standard of compensation given for all monetary damages except expropriation is MV.[207] Therefore, the Respondents submit that the MFN clause cannot be used to import FMV value for compensation.

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[201] Record, 77, CEPTA, Art. 9.12.
[202] Record, 82, CEPTA, Art. 9.21.
[203] Azurix ¶424; Marvin Feldman.
[204] Record, 76, CEPTA, Art. 9.7(1).
[205] Record, 84, 2006 Arrakis-Mekar BIT, Art. 13.
[206] CME, ¶11.
[207] Record, 82, CEPTA, Art. 9.21(1)(a).

143. Alternatively, the MFN clause is only applicable in cases of 'like situations'.[208] A lack of like situations or circumstances does not lead to discrimination or application of the MFN clause.[209] Further, the burden of proof of establishing like situations is on the investor.[210]

144. Like situations are determined on the basis of facts and context.[211] Tribunals determine like circumstances based on same business or economic sector[212], competitive relationship between the claimant and the identified domestic or foreign comparator[213] (including the possible substitutability of the investors' products)[214] , the legal and factual circumstances of the investor or investment[215] and considerations of public policy/interest[216].

145. In the present case, the Claimant argues that they should receive compensation for the alleged violation of FET in FMV standard. While Arrakis investors have received compensation in FMV standard[217], it cannot be proved that the Arrakis investors were in 'like situations' as the Claimants. Therefore, the Respondent submits that the Claimant and the Arrakis investors are not in 'like situations' and hence, MFN clause cannot be used to import FMV standard from Arrakis-Mekar BIT.

C. THE COMPENSATION MUST BE REDUCED IF FMV STANDARD IS APPLIED.

146. The compensation to be awarded should be reduced or adjusted owing to the contributory fault of the Claimant, **[a]** and the prevailing economic crisis in Mekar. **[b]**

a. Compensation must be reduced in light of contributory negligence.

147. Tribunals have stated that BIT's are not insurance against business risks.[218] Under international law, reparation for an injury must be determined by taking into account the contribution of the injured state.[219] In the case of MTD v. Chile, the tribunal stated that

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[208] Record, 76, CEPTA, Art. 9.7(1).
[209] Vento, ¶265; Corn, ¶116, 117; UPS, ¶181.
[210] Total, ¶212; UPS (Award), ¶83, 84.
[211] UPS (Award), ¶87-102.
[212] Vento, ¶242.
[213] Vento, ¶265.
[214] Corn, ¶126.
[215] Apotex (Award), ¶8.42, ¶8.54.
[216] Cargill, ¶312.
[217] Record, 87, Procedural Order No.3, ¶15.
[218] Maffezini (Award), ¶69; MTD, ¶179.
[219] ILC Draft Articles, Art. 39.

the Claimant incurred losses due to risky business choices independent of the FET breach.[220] Accordingly the damages awarded were reduced by fifty percent.[221]

148. In the present case, during the initial years of the investment, the Claimant had adopted an exorbitant approach despite repeated warnings from the Respondent.[222]

149. During fall and winter, there was a sharp decline in the revenues. However, Caeli Airways continued expansion on the regional routes.[223] In 2014, when the fuel prices dropped to an all-time low, Caeli Airways accrued net profit for the first time.[224] Mekar Air services advised the Claimants to use the profits to refinance its debts but instead, the Claimant continued the reckless, ill-advised expansion into the unstable markets of Mekar.[225] The Claimant opted to expand Caeli Airway's fleet and purchased forty-five Boeing 737 MAX aircrafts which were subsequently banned by various international jurisdictions and the State of Mekar due to safety concerns.[226] The Claimant should not be ensured against the business risks associated with the investment.

150. Hence, the Respondent submits that the risky business choices of the Claimant significantly contributed to losses and therefore, the compensation shall be reduced accordingly.

b. Compensation must be reduced due to Mekar's economic situation.

151. Tribunals have taken into account the economic conditions of the host state while awarding compensation.[227] Tribunals have opined that the actions undertaken by the host state to mitigate the economic crises need not be the best response to the unfolding crises but what the state at the time termed suitable.[228]

152. In the present case, Mekar is a volatile state and has faced economic and political crises in the past.[229] Moreover, the Claimant at the time of making the investment was aware of the volatility in the State.

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[220] MTD, ¶242.
[221] MTD, ¶246.
[222] Record, 33, Statement of Uncontested Facts, ¶31; Record, 34, Statement of Uncontested Facts, ¶35.
[223] Record, 33, Statement of Uncontested Facts, ¶31.
[224] Record, 34, Statement of Uncontested Facts, ¶35.
[225] Record, 34, Statement of Uncontested Facts, ¶35.
[226] Record, 37, Statement of Uncontested Facts, ¶48.
[227] Himpurna, ¶364-366; AMT, ¶7.14, ¶7.15.
[228] National Grid, ¶274; Vivendi (Award), ¶794, 795.
[229] Record, 30, Statement of Uncontested Facts, ¶17.

153. Currently, the situation in the State of Mekar is continuously deteriorating and the bank loan defaults increased by twenty-three percent.[230] In 2019, the IMF predicted negative growth four consecutive quarters.[231] The IMF report also noted that the State of Mekar was facing a potential third debt default in as many decades and to pay the Claimant seven hundred million as compensation, the state would have to transfer twice its consolidated annual public spending.[232] Such a burdensome compensation would substantially impact the Mekari economy and make it impossible for the state to recover from economic crises.

154. In light of the aforesaid, the State of Mekar submits that the Tribunal must take into account the economic situation of the state while awarding the damages.

[230] Record, 86, Procedural Order 3, ¶4.
[231] *Id.*
[232] *Id.*

PRAYER

The Respondent respectfully requests this Tribunal to find that:

1. The Tribunal does not have jurisdiction under Chapter 9 of the CEPTA to adjudicate this matter.
2. The Tribunal should grant leave to the external advisors to the CRPU for filing *amicus curiae* submissions.
3. The Tribunal should not grant leave to the CBFI for filing *amicus curiae* submissions.
4. The Respondent is not liable for the violation of Article 9.9 of the CEPTA.
5. The Tribunal should not grant compensation to the Claimant in FMV standard.
6. The Tribunal should take into account the mitigating circumstances.

And pass any other order that it may deem fit.

And for this act of Kindness, the Respondent shall be forever grateful.

Sd/-

Counsel for Respondent