Team Gros G

International Centre for Settlement of Investment Disputes

Vemma Holdings Inc.

Claimant

AND

The Federal Republic of Mekar

Respondent

Memorial for Respondent

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

¶/¶¶	Paragraph/s
§	Section
&	and
art.	Article
Annex I	Constitution Act of Bonooru, 1947
Annex III	Constitutional Court of Bonooru on Privatisation of BA Holdings (excerpts)
Annex IV	Memorandum of Association of Vemma Holdings Inc. & Articles of Association of Vemma Holdings Inc.
Annex IX	Aviation Analytics June7,2019
Annex VI	Shareholders' Agreement relating to Caeli Airways
Annex VII	Phenac Business Today Podcast Transcript, 17November2014
Annex XII	14 June 2020 Centre for Integrity in Legal Services Report
Annex XIV	High Commercial Court of Mekar ruling — 23 August 2020
Annex XV	Superior Court of Mekar ruling- 25 September 2020
Arrakis-Mekar BIT	Treaty Between the Federal Republic of Mekar and the Kingdom of Arrakis for the Promotion and Protection of Investments
Caeli	Caeli Airways
Ch.	Chapter

Claimant	Vemma Holdings Inc.
BIT	Bilateral Investment Treaty
CBFI	Consortium of Bonoori Foreign Investors
CBFI Submission	Amicus Submission by the Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	Comprehensive Economic Partnership and Trade Agreement
CILS	Centre for Integrity in Legal Service
FDI	Foreign Direct Investment
External Advisors	External Advisors to the Committee on Reform of Public Utilities
EA Submission	Amicus Submission by External Advisors to the Committee on Reform of Public Utilities
FN	Footnote
ISDS	Investor-State Dispute Settlement Systems
l./ll.	Line/lines
MRTPA	Monopoly and Restrictive Trade Practice Act
Pbl.	Preamble
PO1	Procedural Order No.1
PO2	Procedural Order No.2
PO3	Procedural Order No.3
PO4	Procedural Order No.4
Respondent	Federal Republic of Mekar

SUF	Statement of Uncontested Facts

TABLE OF AUTHORITIES

Treaties, Conventions

NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards(June10,1958)
VCLT	United Nations, Vienna Convention on the Law of Treaties(1969)1155U.N.T.S.331.
China-Mexico BIT	Agreement between the Government of the United Mexican States and the Government of the People's Republic of China on the Promotion and Reciprocal Protection of Investments (June 6, 2009).
Korea-ASEAN BIT	Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea (entered into force September 1, 2009)
Japan-Korea-China Trilateral Investment Agreement	Agreement among the Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China for the Promotion, Facilitation, and Protection of Investment (entered into force May 17, 2014).

Arbitral Rules

Arbitration (AF) Rules	ICSID Arbitration (Additional Facility) Rules

ICSID Additional Facility Rules	ICSID Additional Facility Rules
UNCITRAL Transparency Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

Arbitral Awards

Aguas	Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decision on Respondent's Objection to Jurisdiction (October21, 2005).
Alicia Grace	Alicia Grace and others v. United Mexican States, ICSID Case No. UNCT/18/4, Procedural Order No. 4(June 24, 2019).
Apotex (PO3)	Apotex Holdings Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party (March 4, 2013).
Apotex (PO4)	Apotex Holdings Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of Applicant Mr. Barry Appleton as a Non-Disputing Party (March 4, 2013).
Apotex (UNCITRAL, PO2)	Apotex, Inc. v. The Government of the United States of America, UNCITRAL, ICSID Case No. UNCT/10/2, Procedural Order No. 2 (October 11, 2011).

Arif	Mr. Franck Charles Arif v. Republic of Maldova, ICSID Case No. ARB/11/23, Award, (April 8, 2013).
Austrian Airlines	Austrian Airlines v. The Slovak Republic, UNCITRAL, Final Award (October 9,2009).
Autopista	Autopista Concesionada de Venezuela, CA v. Republic of Venezuela, ICSID Case No. ARB/00/5, Decision on Jurisdiction (September 27, 2001).
Autopista	Autopista Concesionada de Venezuela, CA v. Republic of Venezuela, ICSID Case No. ARB/00/5, Decision on Jurisdiction (September 27, 2001).
Azinian	Robert Azinian, Kenneth Davitian, &Ellen Baca v. The United Mexican States, ICSID Case No. ARB(AF)/97/2, Award (November 1, 1999)
B.E. Chattin	Chattin Case (United States v. Mexico), 4 R.I.A.A. 28 (1927).
Bayindir	Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, Award, ICSID Case No. ARB/03/29 (August 27, 2009).
Bear Creek	Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Procedural Order No. 5 (July 21, 2016).
Belokon	Valeri Belokon v. Kyrgyz Republic, Decision of the Paris Court of Appeal Setting Aside the Award (February 21, 2017).

Berschader	Vladimir Berschader and Moïse Berschader v. The Russian Federation, SCC Case No. 080/2004, Award (April 21, 2006).
Biwater Gauff	Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22,Procedural Order No. 5(February2,2007).
Burlington	Burlington Resources v. Ecuador, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award(February7,2017).
Canepa	Beijing Urban Construction Group v. Republic of Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction(May31,2017).
Chemtura	Chemtura Corporation v. Government of Canada, UNCITRAL (formerly Crompton Corporation v. Government of Canada), Award (August 2, 2010).
Chevron	Chevron Corporation and Texaco Petroleum Corporation v. Ecuador (II), PCA Case No. 2009-23, Procedural Order No. 8 (April 18, 2011).
CME	CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Award (March 14, 2003).
CME (Brownlie Separate Opinion)	Czech Republic B.V. v. The Czech Republic, UNCITRAL, Separate Opinion on the issues at the quantum phases of CME v. Czech Republic by Ian Brownlie, C.B.E., Q.C. (Mar. 14, 2003),

CMS	CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award (May 12, 2005).
CSOB	Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction (May 24, 1999).
CSOB	Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Respondent's Further and Partial Objection to Jurisdiction (December1,2000).
Eco Oro	Eco Oro Minerals v. Republic of Colombia, ICSID Case No. AR/16/41, Procedural Order No. 6 (February 18, 2019).
El Paso	El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award (October 31, 2011).
Eli Lilly	Eli Lilly and Company v. Government of Canada, ICSID Case No. UNCT/14/2, Procedural Order No. 4, (April 6, 2015).
ELSI	Elettronica Sicula S.p.A. (United States of America v. Italy), Judgement of 20 July 1989, ICJ Rep. 1989
Frontier	Frontier Petroleum Services Ltd. v. The Czech Republic, Final Award (November 12, 2010).
Fynerdale	Fynerdale Holdings B.V. (Netherlands) v. Czech Republic, PCA Case No. 2018-18, Award (April 29, 2021).

GAMI	Gami Investments Inc. v. Mexico, UNCITRAL, Final Award (November 15, 2004).
Genin	Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award (June 25, 2001).
Glamis	Glamis Gold v. The United States of America,UNCITRAL,United States Submission Regarding Quechan Indian Nation Application(September15,2005).
Inceysa	Inceysa Vallisoletana, S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award(August 2, 2006).
Infinito Gold (Petition)	Infinito Gold Ltd. v. Costa Rica, ICSID Case No. ARB/14/5, Petition for Amicus Curiae Status (September 15, 2014).
Infinito Gold (PO2)	Infinito Gold Ltd. v. Costa Rica, ICSID Case No. ARB/14/5, Procedural Order No. 2(June 1, 2016).
Jan de Nul	Jan de Nul N.V. Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award (November 6, 2008).
Khan	Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia, UNCITRAL, Decision on Jurisdiction (July25,2012).
Krederi	Krederi Ltd. v. Ukraine, Award, ICSID Case No. ARB/14/17, Award (July 2, 2018).
Krederi	Krederi v. Ukraine, ICSID Case No. ARB/14/17, Award (July 2, 2018).

LG&E	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 (October 3, 2006).
Loewen	Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003)
Maffezini	Emilio Agustin Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (January 25, 2000).
Metal-Tech	Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, (October 4, 2013).
Methanex	Methanex Corporation v. United States of America, Decision of the Tribunal on Petitions from Third Persons to intervene as Amici Curiae (January 15, 2001).
Methanex (Award)	Methanex Corp. v. USA, 44 ILM 1343,Final Award(August3,2005).
Mobil	Venezuela Holdingmondevs, B.V., et al v. Bolivarian Republic of Venezuela, ICSID Case No.ARB/07/27, Decision on Jurisdiction, (June 10, 2010).
Mondev	Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award (October 11, 2002)
MTD	MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award (May 25, 2004).
Occidental	Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of

	Ecuador, ICSID Case No. ARB/06/11, Award (October 5, 2012).
Pac Rim	Pac Rim v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections (June 1, 2012).
Philip Morris	Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016).
Philip Morris (PO4)	Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Procedural Order No. 4 (March 24, 2015).
Phoenix	Phoenix Action Ltd v. The Czech Republic, ICSID Case No. ARB/06/5, Award, (April 15, 2009).
Plama	Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award (August 27, 2008).
Resolute Forest	Resolute Forest Products v. Government of Canada, PCA Case No. 2016-13, Procedural Order No. 6 (June27,2019).
Rumeli	Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/06, Award (July 29, 2008).
S.D. Myers	S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award, (November 13, 2000).
Salem	Salem Case (Egypt v. US), II R.I.A.A. 1165.

Saluka	Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award (March 17, 2006).
SD Meyers	S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award (November 13, 2000).
Suez	Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19,Award(April9,2015).
Suez (Amicus)	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 Petition for Participation as Amicus Curiae(May 19, 2005).
Suez (NGOs)	Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v.Argentine Republic,ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an amicus curiae Submission(February12, 2007).
Tecmed	Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003).
Thunderbird	International Thunderbird Gaming Corporation v. Mexico, UNCITRAL, Arbitral Award (January 26, 2006).
Tokios	Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction (April 29, 2004).

Toto	Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Award (June 7, 2012).
Tza Yap Shum	Señor Tza Yap Shum v. The Republic of Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (June 19, 2009).
Unión	Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4, Award, 31 August 2018.
Unión Fenosa	Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4, Award (August 31, 2018).
Unión Fenosa (Arbitrator Clodfelter Dissenting Opinion)	Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4, Dissenting Opinion of Arbitrator Mark Clodfelter (August 31, 2018).
Vivendi	Vivendi v.Argentina (II), ICSID Case No.ARB/03/19,Decision on the Proposal for the Disqualification of Gabrielle Kaufmann-Kohler(October22,2007).
von Pezold	Bernhard von Pezold and others v. Republic of Zimbabwe, ICSID Case No ARB/10/15, Procedural Order No. 2 (June26,2012).
World Duty Free	World Duty Free Company Limited v. The Republic of Kenya, ICSID Case No. Arb/00/7, Award (October 4, 2006).
Yukos	Yukos Universal Limited v. The Russian Federation, PCA Case No. AA 227, Final Award(July18,2014).

International Court of Justice Cases

Barcelona Traction (Judge Tanaka)	Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Separate Opinion of Judge Tanaka, Second Phase, Judgment of 5 February 1970.
Genocide	Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina/Serbia and Montenegro), Judgment, I.C.J. Reports 2007.

International Criminal Court

Tadić	Prosecutor v. Tadić, Appeals Chamber, IT-94-1-T(1999).

Domestic Court Cases

Chromalloy	In the Matter of the Arbitration of Certain Controversies between Chromalloy Aeroservices and Egypt 939 F Supp 907 (DDC 1996).
OTV	Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd, England and Wales High Court, Case No. 1998 Folio No 1003 (May 24, 1999).
Pabalk	Société Pabalk Ticaret Limited Sirketi v. Société Norsolor, French Court of Cassation, Case No. 83-11.355 (October 9, 1984).

Secondary Sources: Books

CRAWFORD	JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW(2019).
MARBOE	IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW(2017).
RAJPUT	ANIRUDDHA RAJPUT, REGULATORY FREEDOM AND INDIRECT EXPROPRIATION IN INVESTMENT ARBITRATION(2018).

Secondary Sources: Book Chapters

Jagusch & Sinclair	Stephen Jagusch & Anthony Sinclair, *Denial of Advantages under Article 17(1) in* INVESTMENT PROTECTION AND THE ENERGY CHARTER TREATY (Graham Coop & Clarisse Ribeiro, 2008).

Secondary Sources: Articles

Mistelis & Baltag	Loukas Mistelis & Crina Baltag, *Denial of Benefits and Article 17 of the Energy Charter Treaty* 113 PENN ST L.REV.1315(2009).
Hepburn	Jarrod Hepburn, *In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration,* 5 J. INT'L DISPUTE SETTLEMENT 3 (2014)
Born & Forrest	Gary Born & Stephanie Forrest, *Amicus Curiae Participation in Investment Arbitration*, ICSIDR.(2019).

Douglas	Zachary Douglas, *International responsibility for domestic adjudication: denial of justice deconstructed*, 63 INT'L&COMPARATIVE L.Q.4 (2014).
Borchard	Edwin Borchard, *The International Responsibility of States for Denial of Justice*, 33AM. POLITICAL SCIENCE R.5(1939).
Vesel	Scott Vesel, A "Creeping" Violation of the Fair and Equitable Treatment Standard?,30ARBITRATION INT'L558(2012).

Miscellaneous

Broches	Aron Broches,The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 136 Recueil des Cours 331(1972-II).
ARSIWA	Int'l Law Comm'n Articles on Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 53rd Sess., Supp. No. 10, U.N. Doc. A/56/10 (August 3, 2001).
ASIL Annual Meeting	Remarks by Simon Batifort, 112 Proceedings of the ASIL Annual Meeting (2018).
UNCITRAL Model Law	Model Law on International Commercial Arbitration 1985 (United Nations Commission on International Trade Law) UN Doc.A/40/17,AnnexI.
ILC Report	International Law Commission, Report of the International Law Commission on the work of its twenty-eighth session, II 1976 ILC Y.B. (94).

UNCITRAL Secretariat NY Convention Guide	UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)(2016).

STATEMENT OF FACTS

[1] The Federal Republic of Mekar (**"Respondent"**) is a State that has witnessed a period of prolonged political instability, characterized by mass migration from the country as well as exploitation of resource deposits by intermediate occupying powers.

[2] Vemma Holdings Inc. (**"Claimant"**) is an airline holding company incorporated in the Commonwealth of Bonooru (**"Bonooru"**) with 100% ownership in Royal Narnian, the flag carrier of Bonooru. From its date of incorporation until March 2020, Bonooru retained shareholding in Claimant, which ranged between 31% to 38%. Claimant has access to crude oil and natural gas because Bonooru is one of the largest petroleum-exporting states.

[3] A decree to privatize Respondent's state-owned airline, Caeli Airways (**"Caeli"**), was enacted in 2010. The first two attempts at restructuring failed due to investor concerns on debt liabilities attached to the airlines. A third attempt involving a transfer of assets and part of Caeli's debt liability to Mekar Airservices Ltd. was done. Respondent then marketed Caeli's core assets comprising of its brand and logo, valuable slots at two highly congested international airports, its profitable ground handling company CA Handling, and well-equipped technical base at Phenac, Mekar's capital.

[4] Claimant was the successful bidder in the sale of 85% of the shares of Caeli. The Competition Commission of Mekar (**"CCM"**) approved the acquisition as well

as the airline's participation in the Moon Alliance. However, the CCM also sought an undertaking from Caeli that it would not engage in high-level cooperation on competition parameters such as prices, schedules, capacity, facilities, and other sensitive information with Moon Alliance members, which was duly submitted.

[5] Claimant and Mekar Airservices Ltd. then entered into a Shareholders' Agreement. As part of its purchase, Claimant inherited existing discounts on airport services and landing and navigation fees enjoyed by Caeli at Phenac International Airport (**"Phenac International"**), along with twelve relatively young A340 airplanes. As soon as the acquisition was complete, Claimant announced tenders for purchase and lease of aircraft for Caeli.

[6] Claimant realized its modest early forecasts for Caeli. Despite rising fuel prices between 2011 and 2013, Caeli's operational costs did not overwhelm its revenues because of its use of Phenac International and its cooperation with other Moon Alliance members, especially the Royal Narnian, in respect of lounge access, terminals, IT platforms, check-in operations and code-sharing.

[7] Caeli's business model initially catered to customers travelling from Mekar to Bonooru. Bonooru attracted business travelers from Mekar and other neighboring countries. In 2011, Bonooru's Secretary of Transportation and Tourism unveiled the "Horizon 2020" Scheme to boost tourism in Bonooru. A key part of this Scheme was to offer recurring subsidies to companies investing in tourism-related infrastructure in Bonooru. Claimant received the first subsidy under this Scheme on 28 October 2011 and continued to receive subsidies until June 2016.

[8] After a volcanic eruption in Mekar that resulted in natural formations that piqued the interest of tourists, Caeli switched its business model to focus on customers traveling to Mekar. Caeli was able to offer low-fare, long-distance flights into Mekar because of the inexpensive MON and low oil prices. Claimant also expanded routes for cross-continental travel to Mekar using its A340 fleet, adding 20 new destinations in 2012. All these plans were deemed extravagant by the minority stockholder, Mekar Airservices Ltd., because of the volatility of demand in the region, especially in Mekar, during fall and winter months. Mekar Airservices Ltd. advised Claimant that profits garnered by Caeli should be allocated for repayment of debt. However, Claimant argued that to limit expansion would mean forfeiting unclaimed market share.

[9] In June 2014, oil prices around the globe crashed to a five-year low due to steadily rising supply from non-CEPO countries. Caeli turned a net profit over the whole year for the first time since its acquisition despite fall-winter losses concentrated in the high-traffic routes between Bonooru and Mekar. A podcast published by Phenac Business Today suggested that Caeli should cut back its operation on these routes.

[10] Data released by Caeli for 2014 indicated that while its low pricing did not allow it to turn as large a profit on each passenger as compared to its competitors, it received a much higher footfall. Its consistently high load factor allowed it to capture market share lost by its Mekari counterparts. These Mekari counterparts also had the benefits of cheap fuel, but Caeli was able to triumph over their competitors because

of their risky hedging strategies on expansion. The continuing decline in fuel prices in 2015 allowed Caeli to shore up even greater profits.

[11] Board representatives from Mekar Airservices preferred injecting these profits into outstanding debt and improving financial health, but Claimant's representatives insisted on fleet expansion consisting of 45 aircrafts and slashed airfares despite older aircraft having reduced operational expenses. By June 2016, Caeli became the only consistently profitable carrier on over half the routes to and from its base airport, Phenac International.

[12] The rapid expansion of Caeli naturally drew the attention of the CCM and Caeli's competitors. In line with this, there were two investigations conducted on Caeli. As an interim measure, and in the rightful and legitimate use of its faculties, the CCM placed caps on Caeli's airfare to prevent it from earning supra-competitive profits. Caeli never protested the airfare caps, nor was there evidence the caps hurt its profitability in 2016. The airfare caps were only kept in place until 2019 due to clear evidence of anti-competitive behavior by Caeli, including abuse of dominant position, predatory pricing, and unfair subsidization.

[13] The First Investigation was done *suo moto* on the part of the CCM. The CCM exercised its discretion under the Monopoly and Restrictive Trade Practice Act (**"MRTPA"**) and deemed it apt to investigate Caeli and compute its market share with Royal Narnian because there was evidence of preferential secondary slot-trading between the two entities. There were also concerns on unfair subsidization from the Horizon 2020 scheme that enabled Caeli's predatory pricing strategies. All

these indicators showed that there might be a violation of Caeli's undertaking not to engage in high-level cooperation with its fellow Moon Alliance members. The First Investigation was concluded and the CCM found that the subsidies received by Claimant under the Horizon 2020 scheme helped Caeli drastically reduce its airfare below its average avoidable costs.

[14] The Second Investigation was brought about by a complaint of Caeli's direct competitors, which CCM was mandated by law to conduct given the sufficient evidence brought about by the competitors. Bonooru deployed funds to renovate Phenac International over the next decade. Caeli used this to extract significant additional privileges in terms of airport service fees from Phenac International. This allowed Caeli to undercut ticket fares and eventually push other competitors off the market consisting of routes to and from Phenac International. Caeli even threatened to shift its traffic out of Phenac International to other airports in the region.

[15] The two investigations conducted by the CCM into Caeli resulted in the imposition of fines which was merely a proper application of the MRTPA. Respondent then lifted the airfare caps as soon as Caeli's market share was reduced to 40%.

[16] During the course of the First investigation, Respondent's currency started to nosedive. High foreign-currency debt resulted in Respondent running deficits in both its fiscal and current accounts. By March 2017, a currency crisis ensued in Respondent. Increasing inflation led to a surge in costs of everyday items and reduced consumer spending power. Respondent initially allowed Caeli to

denominate its airfare in USD but due to the need to stabilize the currency to avoid a debilitating economic situation, Respondent passed a decree requiring all companies operating in the country to offer goods and services denominated exclusively in MON.

[17] Claimant's investment was unable to secure a steady stream of revenue during the economic crisis which led to Claimant not agreeing to the use of Respondent's currency. Caeli, through Claimant's representatives, requested for the CCM to have the interim measures removed but the same was denied because it could not be removed until its investigations were complete, and that interference with inflation rates was beyond its competence.

[18] Caeli's board voted to seek judicial review of the CCM's airfare caps but due to a high volume of cases stemming from the economic crisis, the hearing was scheduled a year from filing. Caeli's lawyers urged for an immediate hearing to secure a stay on airfare caps, but the Court could not the request for a separate hearing on interim measures due to lack of resources aggravated by the economic crisis and the decision to prioritize criminal matters due to their far-reaching consequences.

[19] Despite this fact, Claimant was still afforded justice because the time it took for them to be heard was shorter than the initial time frame it took when it invested in Mekar. In 2015, it took an average of 27 months from commencement of an action to receiving a final decision in Mekari courts on commercial matters. In Caeli's case, it registered its claim on 27 March 2018 and the case was finally decided on 15 June

2019. The time it took only amounted to 14.5 months, less than the expected 27 months for commercial matters.

[20] Moreover, Respondent also recognized the need to aid airlines operating in their country and attempted to alleviate the industry's concerns. The President passed Executive Order 9-2018, granting subsidies to airlines for each Mekari citizen travelling on board. However, Caeli's and Larry Air's applications for subsidies were rejected by the Respondent due to these state-owned entities receiving continuous subsidies from their government. Respondent instead prioritized airlines that were privately-owned and had less market share so that there would be better competition and choices for its citizens.

[21] The losses subsequently incurred by Caeli in its operations were a result of (1) unpaid debts involving Caeli's inherited liabilities and expansion plans, (2) the withdrawal of funding by Bonooru under the Horizon 2020 scheme, (3) the steep rise in oil prices, and (4) the use of older aircraft because of an airplane crash involving the same model to that which Caeli acquired as part of its expansion.

[22] Since Caeli was hemorrhaging money because of its business decisions and the economic crisis, Claimant began looking for someone to purchase its stake in Caeli. In fact, two months before it secured an offer from Hawthorne Group LLP (**"Hawthorne"**) to buy Claimant's stake in Caeli, Fitch Ratings assigned a 'BB' Long-Term Issuer Default Rating to Claimant. Fitch cited a looming liquidity crunch, risky investments, and exposure to external risks and that Claimant is also

under pressure to conclude a sale of its airline operations in Mekar to shore up liquidity.

[23] Given these factors, Respondent observed that Hawthorne's offer to buy Claimant's stake in Caeli was not a bona fide offer as it was inflated. Respondent engaged in arbitration with Claimant and won on the merits. However, Claimant attributed corruption of the Arbitrator, Mr. Cavanaugh, on the part of Respondent. Claimant was successful in having the Supreme Arbitrazh Court of Sinnograd set aside the arbitral award despite having only presented hearsay evidence to prove corruption.

[24] Mekar Airservices sought to enforce the arbitral award before the High Commercial Court of Mekar and the same was recognized and enforced. Claimant appealed the judgment before the Superior Court of Mekar but the same was properly denied.

[25] Claimant tried to look for another buyer for its shares as its liquidity crisis continued and share prices dwindled because of their business decisions, but it failed. As a result, Claimant sold its stake in Caeli to Mekar Airservices on 8 October 2020 for 400 million USD. Simultaneously, Claimant filed a notice of arbitration against Respondent to seek compensation for losses under the CEPTA.

SUMMARY OF ARGUMENTS

[26] JURISDICTION. The Tribunal does not have standing under Chapter 9 of the CEPTA. State-Owned Enterprises do not have standing under the CEPTA. Moreover, Claimant has not met the jurisdictional requirement of *ratione legis*.

[27] AMICUS SUBMISSION BY CBFI. The application for leave to submit an *amicus* submission by CBFI should be denied because it does not meet the criteria under the CEPTA, the ICSID Additional Facility Rules, and the UNCITRAL Transparency Rules.

[28] AMICUS SUBMISSION BY EXTERNAL ADVISORS. The application for leave to submit an *amicus* submission by the External Advisors should be granted because it more than satisfies the criteria under the abovementioned rules.

[29] MERITS: FET. Respondent validly exercised its right to regulate recognized under Article 9.8 of the CEPTA. Even if the actions went beyond the scope of its right to regulate, Respondent's actions, evaluated individually or collectively, did not amount to a breach of its FET obligation under Article 9.9 of the CEPTA.

[30] MERITS: Appropriate Compensation Standard. Respondent has no obligation to compensate claimant. Respondent has complied with the market value standard and has no obligation to compensate based on the Most Favoured Nation provision under the CEPTA. Even if the fair market value method applies,

Respondent's obligation to compensate is mitigated by (1) Claimant's negligence in operating Caeli and (2) Respondent's economic crisis.

APPLICABLE LAW

[31] Pursuant to PO1, the Parties agree that these proceedings will be administered by the ICSID.[1] Accordingly, the administration of the proceedings is subject to and must be made in accordance with the ICSID Additional Facility Rules[2] as the ICSID Convention is not applicable[3] by reason of the fact that Respondent has not signed and ratified the ICSID Convention.[4] Pursuant to the specialized procedure agreed upon by the disputing parties in PO2, the Tribunal shall decide its own jurisdiction in accordance with Chapter 9 of the CEPTA[5] and settle the substantive aspect of the claim in accordance with Article 9.9 of the CEPTA.[6]

[32] Pursuant to PO1, the Tribunal shall consider the application for leave to file written submissions by non-disputing parties in accordance with Article 41 of the ICSID Arbitration (AF) Rules and Article 9.19 of the CEPTA.[7] Further, pursuant to Respondent's request and exercise[8] of its option under Article 9.20(6) of the CEPTA,[9] the Tribunal shall also apply the UNCITRAL Rules on Transparency[10] in assessing the submissions by non-disputing parties.

[1]PO1,¶5.
[2]ICSID Additional Facility Rules,art.2.
[3]*Id*.,art.3.
[4]SUF,¶20.
[5]PO2,¶8(a).
[6]PO3,¶8(c).
[7]PO1,¶¶19,20,21(g).
[8]Respondent's Comments on Applications for Leave to File *Amicus* Submissions,¶771-2.
[9]CEPTA,art.9.20(6).
[10]UNCITRAL Transparency Rules,arts.1(4)&4.

[33] Pursuant to Article 1.3(2) of the CEPTA, the Tribunal shall interpret and apply the provisions of the CEPTA (1) in the light of its objectives and (2) in accordance with applicable rules of international law.[11] Accordingly, the Tribunal may also refer to the Vienna Convention on the Law of Treaties (VCLT) to interpret the CEPTA "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[12]

[11] CEPTA,art.1.3(2).
[12] VCLT,arts.31,32.

ARGUMENTS

PROCEDURE

I. THE TRIBUNAL HAS NO JURISDICTION UNDER CHAPTER 9 OF THE CEPTA.

[34] Under Chapter 9 of the CEPTA and international investment law, the Tribunal has jurisdiction over a dispute when the following conditions are satisfied: *(A)* the disputing parties are composed of a protected investor of the treaty and a State-party to the treaty (jurisdiction *ratione personae*); *(B)* the subject matter of the dispute involves a covered investment (jurisdiction *ratione materiae*); and *(C)* the investment was made in accordance with general principles of law (jurisdiction *ratione legis*). These requirements are cumulative and the absence of one justifies disqualifying any entity from filing a claim before this Tribunal.

[35] As will be discussed below, Respondent submits that this Tribunal does not have jurisdiction to hear the present dispute as Claimant failed to meet all jurisdictional requirements, in the following ways: (*A*) Claimant is not a protected investor under Article 9.1 of the CEPTA; (*B*) Claimant has no covered investment; and (*C*) Claimant's investment was not made in accordance with general principles of law.

A. CLAIMANT IS NOT A PROTECTED INVESTOR UNDER ARTICLE 9.1 OF THE CEPTA.

[36] This Tribunal does not have jurisdiction over the present proceedings because Claimant is not a protected investor under Article 9.1 of the CEPTA. For an enterprise to be considered an investor, the enterprise must be: (*1*) a national of a State-Party; (*2*) constituted or organized under the laws of a State-Party;[13] and *(3)* have substantial business activities in the territory of a State-Party.[14] Here, Claimant failed to meet the first requirement.

[37] The CEPTA requires that an investor must be a national of a State-Party. Under Article 9.1 of the CEPTA and applicable rules of international law,[15] an investor is not a national of a State-Party when: (*i*) it is a State-owned Enterprise **("SOE"**); and (*ii*) it is disqualified as a national under the *Broches* test.[16]

[38] In this case, Claimant meets both these standards. Hence, despite Claimant's incorporation under the laws of a CEPTA State-Party, *i.e.,* Bonooru,[17] it does not qualify as a national for purposes of bringing a claim under the CEPTA.

1. Claimant is a State-owned Enterprise.

[39] Respondent submits that SOEs are not protected investors under the CEPTA. Article 9.1 of the CEPTA defines an investor as "an enterprise with the nationality of a Party."[18] An "enterprise" is defined as one that is "directly or indirectly owned

[13]CEPTA,art.9.1.
[14]CEPTA,art.9.1(a).
[15]CEPTA,art.1.3(2).
[16]*CSOB*,¶17.
[17]AnnexIV.
[18]CEPTA,art.9.1.

or controlled" by either a natural person or a private enterprise — not a State.[19] Thus, it is clear that since Claimant is majority (55%) owned by Bonooru[20] and controlled by it through its Ministry of Transport and Tourism Secretary and Board head, Ms. Sabrina Blue,[21] it cannot be considered an investor under the CEPTA.

[40] To further support its submission, Respondent relies on the Vienna Convention on the Law of Treaties (**"VCLT"**)[22] to determine that the CEPTA did not contemplate the inclusion of SOEs within the jurisdiction of the Tribunal.

[41] Pursuant to Article 31 of the VCLT, the CEPTA should be interpreted in good faith in accordance with the ordinary meaning of its terms, in their context, and in light of its object and purpose.[23] Thus, we must look into: (*a*) the text of other CEPTA provisions;[24] (*b*) related agreements between the same parties;[25] and (*c*) subsequent practice[26] and the circumstances of its conclusion.[27]

[42] *First*, nowhere in the CEPTA does it refer to SOEs except in Article 9.13, which explicitly refers to "State Enterprises." Notwithstanding this recognition however, the CEPTA States-Parties still omitted from expressly according investor-status to SOEs in Article 9.1 of the same.

[19]CEPTA,art.9.1.
[20]SUF,¶65.
[21]SUF,¶22.
[22]VCLT,arts.31-2.
[23]VCLT,art.31(1).
[24]VCLT,art.31(2).
[25]VCLT,art.31(2)(a).
[26]VCLT,art.31(3)(b).
[27]VCLT,art.32.

[43] *Second*, this was not the case in the CEPTA's predecessor-treaty, the 1994 Bonooru-Mekar BIT, which specifically defined an "enterprise" as an entity constituted or organized under applicable law "whether privately-owned or government-owned."[28] The omission of the word "government-owned" in the CEPTA should therefore be construed as a deliberate decision on the part of the Parties to exclude SOEs within the purview of the CEPTA.

[44] *Third,* State practice indicates that as early as 2013, there is "a general trend towards more sophisticated and detailed treaties" which "explicitly cover international investments by [government-controlled investors]" including SOEs. The CEPTA was concluded in 2014,[29] and at that time, other investment treaties already accounted for SOEs in express terms.[30]

[45] Thus, considering the CEPTA's treaty text, the 1994 Bonooru-Mekar BIT, and State practice and the circumstances of its conclusion, it is clear that the CEPTA does not protect Claimant as an investor.

2. Claimant is disqualified as a national under the *Broches* test.

[28]Bonooru-MekarBIT,art.I(a).
[29]SUF,¶32.
[30]*See* China-Mexico BIT,art.1;Korea-ASEAN BIT,arts.1(k),1(l);Japan-Korea-China Trilateral Investment Agreement,arts.1(2),(4).

[46] Even if the Tribunal finds that Claimant, as an SOE, may bring a claim under the CEPTA, it must still meet the requirements set out by the *Broches* test under customary international law.

[47] The Tribunal has applied the *Broches* test in determining whether a BIT allows SOEs to bring a claim against a State-party, the BIT being silent on the matter.[31] Borne out of Aron Broches, a leading authority on the ICSID Convention, the *Broches* test resembles Articles 5 and 8 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (**"ARSIWA"**), which are the customary rules on state attribution.[32] It provides that a mixed economy company or government-owned corporation is disqualified as an investor and barred from availing investor-State arbitration if: *(a)* it is acting as an agent for the government; or *(b)* it is discharging an essentially governmental function.[33] Both are applicable to Claimant.

a. Claimant is acting as an agent of Bonooru.

[48] Under Article 8 of the ARSIWA, an entity is considered a State agent when it is "acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[34] International law refers to such concept as either overall[35] or effective control.[36] As will be discussed below, Respondent submits that

[31] *Maffezini*,¶74.
[32] *Jan de Nul*,¶156.
[33] Broches,355&*CSOB*,¶17.
[34] ARSIWA,art.8.
[35] *Tadić*,¶157.
[36] *Genocide*,¶400.

Claimant is a State agent acting under both *(i)* overall and *(ii)* effective control of Bonooru.

i. Claimant acts under Bonooru's overall control.

[49] According to *Prosecutor v. Tadic*, overall control does not require complete dependence, or that each alleged act was carried out under the State's specific instructions. It is sufficient to prove that, beyond financing and equipping, the State participated in the "general direction, coordination, and supervision" of the entity's operations.[37]

[50] In this case, Bonooru financed Claimant through its 31-38% shareholding,[38] which increased to 55% in 2021,[39] and by backing Claimant's bid through the PJSC Bonoorian People's Bank (**"BPB"**),[40] in which the State holds a 58.96% stake.[41] It likewise equipped Claimant with recurring subsidies through its Horizon 2020 Scheme under the Caspian Project.[42] Beyond financing and equipping, Bonooru clearly participated in the general direction, coordination, and supervision of Claimant's operations through Ms. Sabrina Blue, who is both the head of Claimant's Board of Directors and Bonooru's Secretary of Transport and Tourism.[43] With a

[37] *Tadić*,¶¶131,156.
[38] SUF,¶10.
[39] SUF,¶65.
[40] SUF,¶23.
[41] SUF,FN1,¶¶23,30.
[42] SUF,¶28.
[43] SUF,¶22.

Bonoori official in Claimant's Board, Claimant is consistently aware of Bonooru's State priorities.[44] Eventually, Bonooru replaced Claimant's Board with government functionaries, expanded Claimant's functions to paramilitary activities, and equipped its legal team with lawyers from Bonooru's justice department.[45] Given all these circumstances, Bonooru exercises overall control over Claimant's activities.

ii. Claimant acts under Bonooru's effective control.

[51] According *Genocide* case, effective control is satisfied when the entity received from the State directions and/or instructions for every operation constituting the violation.[46] International investment cases have found that an entity is under the directions and/or instructions of the State when its acts are done with the blessing[47] or express clearance[48] of the State.

[52] In this case, there is a wealth of evidence to prove that Claimant's acquisition of the Caeli shares had the blessing and express clearance of the State. Since Claimant's inception, Bonooru has been controlling Claimant's operations, from planning to execution. In fact, Claimant's Articles of Association already required Bonooru's Ministry of Transport and Tourism to ensure the constant appointment of one of its State officials to the Board.[49] Bonooru appointed Ms. Blue, the head of

[44]SUF,¶28.
[45]SUF,¶65.
[46]*Genocide*,¶400.
[47]*Unión*,¶9.119.
[48]*Bayindir*,¶125.
[49]AnnexIV,art.152.4.

Claimant's Board as Ministry of Transport and Tourism Secretary on the same day.[50] In the same bid, Claimant proposed that it would refinance debt liability from Bonooru's[51] In 2011, Bonooru's Minister of Transportation and Tourism [52] in line with Bonooru's policy to boost "Bonooru's emerging tourism mark[53] In the end, Bonooru increased its controlling stake in Claimant to 55%, replaced Claimant's Board with government functionaries, expanded Claimant's functions to paramilitary activities, and equipped Claimant with lawyers from its justice department to assist in the present arbitration[54] Thus, given all these facts, Claimant cannot now deny that it is not a State agent acting under the effective control of Bonooru.

b. Claimant is discharging an essentially governmental function.

[53] Article 5 of the ARSIWA provides that an entity discharges an essentially governmental function when it is empowered by a State's internal law to exercise elements of governmental authority or public functions.[55] According to *CSOB*, an SOE is discharging essentially governmental functions when its activities are essentially governmental in nature.[56] Thus, "a private corporation operating for

[50]SUF,¶22.
[51]SUF,¶23.
[52]SUF,¶28.
[53]SUF,¶28.
[54]SUF,¶40.
[55]ARSIWA,art.5.
[56]*CSOB*,¶20&*Rumeli*,¶212.

profit while discharging essentially governmental functions delegated to it by the State" satisfies this test.[57]

[54] In *Maffezini v. Spain*, the Tribunal concluded that SODIGA was performing essentially governmental functions due to the following: (1) it was a private commercial corporation with significant ownership retained by the State; (2) it was created by the State to carry out governmental functions (*i.e.*, to promote regional industrial development); (3) many of its development activities, such as "investing in new enterprises, processing loan applications with official sources of financing, providing guarantees for such loans"[58] were "typically governmental tasks, not usually carried out by private entities."[59] All these circumstances are present here.

[55] *First*, Claimant is a private commercial corporation with significant ownership retained by Bonooru (currently 55% and previously 31-38% until March 2020).[60]

[56] *Second*, Claimant was incorporated pursuant to Bonooru's privatization policy, to succeed the State-owned parent company that owns Bonooru's former national carrier, Bonooru Air.[61] In this process, Claimant had to ensure that it would "continue to operate routes to remote communities"[62] to enable citizens' mobility rights under Bonooru's Constitution.[63] Claimant accomplishes this through its

[57]*Maffezini*,¶80.
[58]*Maffezini*,¶86
[59]*Maffezini*,¶86
[60]SUF,¶10&Respondent to the Notice of Arbitration,¶55.
[61]SUF,¶7.
[62]AnnexIII,¶59.
[63]AnnexI,art.70.

wholly-owned Royal Narnian, chosen by Bonooru to be its new flag carrier,[64] and utilized by Claimant "for public benefit."[65] Claimant's Memorandum of Association explicitly provides that its objective is "to assist in developing the aviation industry as well as the civil aviation infrastructure Bonooru for the benefit of its population in accordance with Article 70 of the Constitution Act, 1947 including servicing remote communities."[66] Through Royal Narnian, Claimant likewise receives "subsidies under Bonoori law for flights offered on routes of significance to mobility of disparate communities."[67]

[57] *Third*, many of Claimant's functions were development activities and have even been "expanded to include paramilitary activities[,]"[68] which are typically governmental in nature. These development activities include its maintenance of flights in non-profitable routes that are beneficial to Bonooru even when incurring losses,[69] its investment in new enterprises such as Caeli,[70] refinancing Caeli's debt liability from BPB at much favorable rates,[71] and receiving government assistance through bond issues and soft loans in favor of Caeli.[72]

[58] Given the following, it is clear that Claimant's functions were meant to serve an essentially governmental rather than commercial function. Thus, Claimant is

[64]SUF,¶29.
[65]AnnexIII,¶59.
[66]AnnexIV,(h).
[67]AnnexIII,¶59.
[68]SUF,¶65.
[69]AnnexVII,ll.1868,1870-1,1892.
[70]SUF,¶25-6.
[71]SUF,¶30.
[72]SUF,¶16.

disqualified as a national under the *Broches* test as it is a State entity acting on behalf of Bonooru.

3. Claimant does not have substantial business activities in Bonooru.

[59] The requirement of "substantial business activities"[73] is met when an investor is able to prove that it is not a "corporation of convenience"[74] created to gain access to ICSID jurisdiction as an "abuse of the Convention purposes."[75]

[60] Respondent submits that Claimant became a corporation of convenience used by Bonooru to gain access to this Tribunal's jurisdiction. By the time Claimant relinquished all its Caeli shares to Respondent on 8 October 2020,[76] Bonooru increased its shareholding in Claimant to 55%.[77] Immediately thereafter, Bonooru subjected Claimant to large-scale restructuring — its board of directors was replaced with government functionaries, its functions were expanded to include paramilitary activities, and its legal team was equipped with lawyers from Bonooru's justice department to assist in the present arbitration proceedings.[78] Given the series of events that unfolded before Claimant filed the present claim, this Tribunal cannot turn a blind eye from the corporate fiction that is Claimant.

---

[73]CEPTA,art.9.1(b).
[74]*See Autopista*,¶123-6.
[75]*Autopista*,¶123-6;*Tokios*,¶53-6;*Phoenix*,¶136-45;*Mobil*,¶184-5;*Aguas*,¶245;*Pac Rim*,2.5.
[76] SUF,¶63.
[77]SUF,¶65.
[78]SUF,¶65.

[61] The subsequent circumstances are telling signs that Claimant was merely a corporation of convenience exerting a purely fictional control for jurisdictional purposes for Bonooru to avail of the investment-state dispute settlement system.

B. CLAIMANT HAS NO COVERED INVESTMENT.

[62] Under Article 9.1 of the CEPTA, an investment is "every asset that an investor owns or controls, directly or indirectly," including shares in an enterprise.[79] Here, the shares in Caeli cannot be considered an investment because it is neither owned nor controlled by an investor but by the State of Mekar. As of 08 October 2020, Caeli became 100%-owned by Respondent when Claimant sold its Caeli shares back to Mekar Airservices.[80]

[63] Therefore, this dispute does not involve a covered investment under the CEPTA and is thereby not under the jurisdiction of this Tribunal.

C. CLAIMANT'S INVESTMENT WAS NOT MADE IN ACCORDANCE WITH GENERAL PRINCIPLES OF LAW.

[64] In addition to the aforementioned jurisdictional requirements under the CEPTA, international investment law requires that Claimant must satisfy the requirement of *ratione legis* jurisdiction.[81] *Ratione legis* jurisdiction requires that for a claim to be considered a protected investment, the investment must be made in

[79]CEPTA,art.9.1,¶2574.
[80]SUF,¶63.
[81]*Plama*,¶138&*Phoenix*,¶101.

accordance with (1) the principle of good faith and (2) international public policy. Otherwise, the claim is barred from this Tribunal's jurisdiction.[82]

1. Claimant's investment was not made in accordance with the principle of good faith.

[65] Good faith is a supreme principle, which governs legal relations in all their aspects and content and is embedded in all national legal systems.[83] Good faith requires the "absence of deceit and artifice during the negotiation and execution of instruments that gave rise to the investment."[84] In *World Duty Free v. Kenya*, the investor had obtained a contract by paying a bribe to the Kenyan President. There, the ICSID Tribunal ruled that it could not uphold claims based on "contracts obtained by corruption[.]"[85] In determining deceit or bad faith, various tribunals have considered circumstantial evidence, or red flags.[86]

[66] In this case, it is clear that Claimant obtained its Caeli investment through corruption and bribery, on account of the following circumstances: (*1*) throughout the bidding process, Mr. Dorian Umbridge, the Chairperson of Respondent's Committee on Reform on Public Utilities (**"Committee"**) was a strong proponent for Claimant's bid, despite other Committee members expressing their reluctance over it;[87] (*2*) the External Advisors of the Committee, who had actively participated

[82]*Inceysa*,¶230.
[83]*Inceysa*,¶230.
[84]*Inceysa*,¶231.
[85]*World Duty Free*,¶157.
[86]*Metal-Tech*,¶293;*Fynerdale*,¶573-4;*Unión Fenosa*,¶¶7.52,7.113,7.114;*Unión Fenosa(Arbitrator Clodfelter Dissenting Opinion)*,¶5;*Krederi*, ¶387-7.
[87]SUF,¶24.

in the deliberation and acquisition of Caeli, had presented evidence in their *amicus* submission that Claimant obtained Caeli "by means of bribes paid" to Mr. Umbridge;[88] (*3*) Bonooru's Court has taken *suo moto* cognizance of the allegations against Mr. Umbridge based on the aforementioned evidence;[89] and (*4*) Respondent's economy has lost MON 238 Million due to corruption.[90] Thus, the totality of the circumstances shows that Claimant's acquisition of its investment in Caeli was tainted with badges of corruption, bribery, and illegality. This Tribunal cannot thereby uphold Claimant's present claim.

2. Claimant's investment was not made in accordance with international public policy.

[67] International public policy consists of a series of fundamental principles that preserve the very essence of the State and the values of the international legal system against actions contrary to it.[91] In line with *Inceysa*,[92] the inclusion of the commitment to "eliminate bribery and corruption in trade and investment"[93] in the CEPTA's preamble is a clear manifestation of the signatory States, to exclude from the CEPTA's protection, investments made in conflict with such commitment.

[88]SUF,ll.636-7.
[89]PO3,¶13.
[90]PO3,¶13.
[91]*Inceysa*,¶245.
[92]*Inceysa*,¶245-6.
[93]CEPTA,l.2495-6.

[68] Given that the CEPTA follows international public policies designed to sanction illegal acts and their resulting effects, Claimant's tainted investment must not be a protected investment under the CEPTA.

3. Respondent is not estopped from raising the illegality of the investment.

[69] Estoppel does not apply in cases of corruption or fraud.[94] Given this, Respondent's acceptance of Claimant's investment in Caeli does not estop Respondent from raising the illegality of the investment. In *Thunderbird v. Mexico,* the Tribunal likewise considered the investor's knowledge of the investment's illegality and the potential risk of its closure due to the same. Thus, it should have exercised particular caution in pursuing its business venture in the host State.[95]

[70] In the same way, Claimant knew that its bribery and corruption were against the principle of good faith and international public policy.[96] Thus, despite its illegality, Respondent is not precluded from invoking the same before this Tribunal. All told, Claimant's claim is barred by *ratione legis* jurisdiction.

[94] *Arif*, ¶376 & Hepburn, 531.
[95] *Thunderbird*, ¶164.
[96] EA Submission, ll.636-7 & *World Duty Free*, ¶157.

II. THE TRIBUNAL SHOULD DENY THE LEAVE SOUGHT FOR FILING *AMICI* SUBMISSIONS BY THE CBFI AND GRANT THE LEAVE SOUGHT BY THE EXTERNAL ADVISORS PURSUANT TO ARTICLE 9.19 OF THE CEPTA AND THE ICSID ARBITRATION AF RULES.

[71] Article 9.19 of the CEPTA, the ICSID Arbitration Additional Facility Rules (**"ICSID Arbitration AF Rules"**), and the UNCITRAL Rules on Transparency[97] (**"UNCITRAL Rules"**) provide that in determining whether to allow third-party participation through the submission of *amicus* submissions, the Tribunal shall consider the following criteria, among others:

i. that the submission addresses a matter within the scope of the dispute;[98]
ii. that the submission brings a perspective, particular knowledge or insight that is different from that of the disputing parties;[99]
iii. the non-disputing party has significant interest in the proceeding;[100]
iv. that the applicant is independent from the disputing parties;[101]
v. the public interest in the particular arbitral proceedings;[102] and
vi. that the submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.[103]

[97]CEPTA,art.9.20(6).
[98]CEPTA,art.9.20(6)&ICSID Arbitration(AF)Rules,art.41(3)(b).
[99]CEPTA,art.9.20(6)&ICSID Arbitration(AF)Rules,art.41(3)(a).
[100]CEPTA,art.9.20(6)&ICSID Arbitration(AF)Rules,art.41(3)(c).
[101]*Suez(Amicus)*,¶24;*von Pezold*,¶49;*Elli Lily*,¶D;*Canepa*,¶30&*Vivendi*,¶28.
[102]UNCITRAL Transparency Rules,art.1(4)(a).
[103]CEPTA,art.9.19(3); ICSID Arbitration(AF)Rules,art.41(3)(b);UNCITRAL Transparency Rules,art.1(4)(b).

[72] In view of the foregoing, Respondent submits that: *(A)* the Consortium of Bonoori Foreign Investors' (**"CBFI"**) amicus submission fails to meet the aforementioned criteria and the Tribunal must thereby deny the same; and *(B)* the External Advisors to Respondent's Committee on Public Utilities Reform's (**"External Advisors"**) amicus submission satisfies the established criteria and the Tribunal must thereby grant the same.

A. CBFI'S *AMICUS* SUBMISSION FAILS TO MEET THE CRITERIA.

[73] The *amicus* application of CBFI should be denied because: *(i)* it does not address a matter of fact or law within the scope of the dispute; *(ii)* it does not bring a perspective and particular knowledge or insight that is different from that of the disputing parties; *(iii)* CBFI has no significant interest in the arbitral proceedings; *(iv)* CBFI is not independent of Claimant; *(v)* CBFI does not address a public interest; and *(vi)* CBFI will disrupt and unduly burden the arbitral proceedings.

1. CBFI does not address a matter of fact or law within the scope of the dispute.

[74] An *amicus* application addresses a matter of fact or law within the scope of the dispute when it addresses issues related to the interpretation of the BIT.[104] The *amicus* submission of CBFI does not satisfy the criteria because it does not address issues related to the interpretation of the CEPTA.

[104] A*potex(PO4)*,¶36.

[75] CBFI's submission regarding the regulatory framework in Bonooru, Bonooru's business landscape, and the impacts of the decision on future capital flows, does not address issues related to the interpretation of the CEPTA. If at all, the submissions by CBFI widens the scope of the dispute beyond that agreed upon by the disputing parties[105] as the facts and arguments advanced by CBFI relates to the standing of investors in general under the CEPTA. The submission by CBFI forces the Tribunal to decide on issues not explicitly raised by any of the disputing parties, such as whether other "impacting industries beyond the aviation sector that are crucial to the economic growth of Greater Narnian"[106] merit protection under the CEPTA. Evidently, the CBFI intends to widen the scope of the dispute beyond that agreed between the disputing parties.

[76] In any case, if the Tribunal finds that the submission of CBFI relates to issues within the scope of the dispute, the application should be still be denied as the other criteria are grossly not met.[107]

2. CBFI does not bring a perspective, particular knowledge, or insight that is different from that of the disputing parties.

[77] As it is presumed that the disputing parties themselves would provide all the necessary assistance and materials required by the Tribunal to decide their dispute,[108]

[105]PO1,¶17&PO2,¶8.
[106]CBFI Submission,562-3.
[107]*Resolute Forest*,¶4.5.
[108]*Methanex*,¶48&*Apotex(UNCITRAL,PO2)*,¶24.

this criteria is only met when a submission: *(i)* provides a specific knowledge and expertise of a qualified entity regarding the matters in dispute[109] and *(ii)* is unique in nature, *i.e.*, not duplicative of the submissions of the disputing parties.[110] None of these are present here.

[78] *First*, CBFI does not bring a specific and unique knowledge and expertise of a qualified entity. CBFI is a mere non-profit industry association composed of Bonoori investors who engage in public policy advocacy.[111] There is no showing that CBFI possesses the expertise to interpret Bonoori laws or the investor-State dispute settlement provisions of current investment treaties.

[79] *Second*, the submission of CBFI is not unique and is duplicative of the disputing parties' submissions. The Statement of Uncontested Facts, the Notice of Arbitration of Claimant and the Response to the Notice of Arbitration by Respondent already sufficiently apprises the Tribunal about the domestic laws,[112] the business landscape and economic conditions,[113] and international norms[114] which Bonooru and Mekar are subjected to. Accordingly, CBFI's submissions relating to the business landscape in Bonooru are not only duplicative but also unnecessary.

---

[109]*PhilipMorris(PO4)*,¶30;*PhilipMorris(PO3)*,¶28;*Electrabel*,¶24;*Glamis*,2;*Infinito(PO2)*,¶34;*Suez(NGOs)*,¶16;*Apotex(PO3)*,¶24;*Apotex(PO4)*,¶33.
[110]*Philip Morris*,¶26;*Apotex(PO4)*,¶34;*Chevron*,¶19.
[111]CBFI Submission,¶2.
[112]Notice of Arbitration,¶14;SUF,¶¶18,19,28,42,46,54,65.
[113]SUF,¶¶3,4,6-8,14,16-7,21,27-8,30,33-5,39,41,47-8,55.
[114]SUF,¶20,32,

3. CBFI has no significant interest in the arbitral proceedings.

[80] Significant interest connotes more than a general interest in the proceedings. According to *Apotex v. U.S.*, the outcome of the arbitration must have "a direct or indirect impact on the rights or principles the applicant represents and defends."[115] Thus, broad claims such as: *(a)* the public having a lasting interest in the decision,[116] and *(b)* the *amicus* seeking "to build a more ethical legal framework for the global pharmaceutical market,"[117] were considered mere general interests, not concrete enough to be considered significant.

[81] Similarly, CBFI's broad claim that the Tribunal's decision would have an impact on the *(a)* collective growth of the region and interpretation of current and future investment agreements; and that *(b)* it seeks to protect "access to an independent and impartial judicial system that guarantees the rights of foreign investors against arbitrary acts of another sovereign[,]" are merely general interests and do not rise to the level of significant interest.[118]

[82] The arbitration likewise does not have an impact on the rights or principles that CBFI defends. Article 9.21 of the CEPTA provides that an "award made by a [T]ribunal shall have no binding force except between the disputing parties and in respect of the particular case."[119] Thus, CBFI's statement that the decision impacts

[115] *Apotex(PO4)*,¶38.
[116] *Eco Oro*,¶34.
[117] *Apotex(UNCITRAL,PO2)*,¶28.
[118] CBFI Submission,¶8-9.
[119] CEPTA,art.9.21(3).

all Bonoori businesses is flawed, as arbitration proceedings pursuant to the CEPTA will not have any impact beyond the disputing parties. Therefore, CBFI has no significant interest in the present proceedings.

4. CBFI is not independent of Claimant.

[83] An *amicus* is independent[120] when it does not have a professional relationship with any of the disputing parties.[121] This requirement is implicit in a provision which requires that the *amicus* bring a perspective, particular knowledge or insight that is different from that of the Parties.[122] CBFI is not independent because it has a professional relationship with Claimant.

[84] CBFI has a professional relationship with Claimant due to Claimant's membership in CBFI.[123] CBFI-member Lapras Legal Capital is currently "advising Claimant on funding strategies with respect to its claim" against Respondent.[124] In fact, two other CBFI members "are currently pursuing claims against [Respondent] under Chapter 9 of CEPTA." Clearly, CBFI is only interested in advancing the interests of its members through its *amicus* submission before this Tribunal.

5. CBFI does not address a public interest.

[120] *Suez(NGOs)*,¶24;*von Pezold*,¶49;*Elli Lily*,¶D.
[121] Suez,¶12(c).
[122] *von Pezold*,¶49.
[123] CBFI Submission,¶7.
[124] CBFI Submission,¶7.

[85] The *amicus* submission must address a particular public interest at stake.[125] ICSID cases provide that a genuine "public interest" exists when the decision is likely to affect individuals or entities beyond the disputing parties.[126] However, *Apotex* clarifies that a "particular and professional interest" is *not* a public interest. In *Alicia Grace*, the Tribunal determined that the fact that its decision "could impact an entire community of bondholders" was not sufficient to constitute public interest.[127]

[86] In the same way, CBFI's submission does not address a public interest. It involves at most a particular and professional interest, as CBFI represents the private interests of Bonoori businessmen, some of which have similar pending claims against the Respondent. Given that the Tribunal's decision could only impact CBFI's community of "Bonoori investors investing in the Greater Narnian Region[,]"[128] such could not amount to public interest.

6. CBFI will disrupt and unduly burden the arbitral proceedings.

[87] An *amicus* submission would unduly burden the disputing parties if it will require further work, time, and expense for them.[129] In the same way, CBFI's submission will require further work, time, and expense for the disputing parties as it forces the Tribunal to consider entities beyond the disputing parties to truly

[125] *Apotex(UNCITRAL,PO2)*,¶29.
[126] *Alicia Grace*,¶53;*Apotex(PO4)*,¶43.
[127] *Alicia Grace*,¶53.
[128] CBFI Submission,¶2.
[129] *Resolute Forest*,¶4.8.

accommodate all the broad considerations raised by CBFI. This includes the business landscape in Bonooru,[130] the industries impacting Bonooru outside the aviation sector,[131] and even the impact of uncertainty on access to capital.[132] In order to be fully apprised of the interplay between Bonooru's regulatory framework and its business climate, the Tribunal would have to receive submissions from third parties beyond CBFI.

[88] Having established that CBFI's submission would only disrupt and unnecessarily burden the disputing parties by imposing further work, time, and expense on them, the Tribunal must deny the leave sought for the same.

B. THE EXTERNAL ADVISORS' *AMICUS* SUBMISSION SATISFIES THE CRITERIA.

[89] The *amicus* application of the External Advisors should be granted because: *(1)* it addresses a matter of fact or law within the scope of the dispute, *(2)* it brings a perspective and particular knowledge or insight that is different from that of the disputing parties, *(3)* the External Advisors have a significant interest in the arbitral proceedings, *(4)* External Advisors are independent; *(5)* the External Advisors address a public interest, and *(6)* the submission will not disrupt and unduly burden the present proceedings.

[130]CBFI Submission,¶10,§1.
[131]CBFI Submission,l.563.
[132]CBFI Submission,l.559.

1. The External Advisors address a matter of fact or law within the scope of the dispute.

[90] In *Apotex*, the ICSID Tribunal found that the *amicus* application was within the scope of the dispute because it would help address the arbitration's jurisdictional issues.[133]

[91] As previously established, the legality of an investment is an implied jurisdictional requirement under the CEPTA (*supra* I.C). The submission of the same would likewise raise the question of "the Tribunal's competence-competence[,]" or power to rule on its own jurisdiction.[134] Accordingly, the External Advisors' submission providing information that casts doubt on the legality of the investment is a matter of fact that is within the scope of the dispute.

2. The External Advisors bring a perspective and particular knowledge or insight that is different from that of the disputing parties.

[92] As stated above, the Tribunal will only accept *amicus* submissions if it was shown that the applicants (*1*) have the expertise to assist the Tribunal[135] and (2) their submission would bring a unique perspective, or a "perspective, particular knowledge or insight different from that of the disputing parties."[136]

---

[133] *Apotex(UNCITRAL,PO2)*,¶33.
[134] ICSID Convention,art.41(1).
[135] *Apotex(PO2)*,¶21;*Suez*,¶33;*von Pezold*,¶61.
[136] *Resolute Forest*,¶4.4&*Apotex(UNCITRAL,PO2)*,¶21.

[93] *First*, the External Advisors have the expertise to assist the Tribunal, as they are a group of professionals who are engaged in investment banking.[137] They likewise served as external advisors to the Committee during Caeli's privatization, liquidation, and restructuring.[138]

[94] *Second*, the External Advisors' submission provides knowledge and expertise that is different from that of the disputing parties. As succinctly put by the External Advisors, they "are in the unique position to adduce unbiased facts [...] that may not be obtained from either disputing party."[139] These particular facts disclose that Claimant secured its Caeli bid by bribing the Committee's Chairperson.[140] Their personal knowledge of these facts is likewise crucial in determining the Tribunal's competence-competence.[141]

[95] In *Infinito Gold v. Costa Rica*, the *amicus* posited that allegations of corruption and violation of local laws may directly affect the Tribunal's jurisdiction.[142] Since the *amicus* applicant could properly give information on this matter, the Tribunal granted the application.[143]

[96] Similarly, in this case, there are allegations of corruption and illegality pertaining to the subject investment of the proceedings. The External Advisors can

[137]EA Submission,l.616.
[138]EA Submission,l.619.
[139]EA Submission,l.368-40.
[140]EA Submission,l.636-7.
[141]EA Submission,l.651
[142]*Infinito Gold(Petition)*,7.
[143]*Infinito Gold(PO2)*,¶33.

properly assist the Tribunal by virtue of their personal knowledge of the facts involving the privatization of Caeli and the process leading up to Claimant's acquisition of Caeli shares.[144] Thus, they possess a unique position to assist the Tribunal in resolving jurisdictional issues.

3. The External Advisors have a significant interest in the arbitral proceedings.

[97] As previously discussed, significant interest requires that the *amicus* have "a direct or indirect impact on the rights or principles the applicant represents and defends."[145] In *Infinito Gold*, the *amicus* applicant had a significant interest in the dispute since it participated in the local court proceedings that found that the investment was illegally obtained by the investor through corruption.[146]

[98] In the same way, the External Advisors actively participated in the privatization of Caeli[147] and regularly acted as "interveners before federal courts in Mekar in relation to judicial proceedings concerning approval for privatization projects."[148] Truly, the External Advisors are committed to "promoting fair business practices in Mekar"[149] and possess a significant interest in ensuring that the privatization process in Mekar is not tainted by any irregularities.

---

[144]EA Submission,ll.622-3.
[145]*Apotex(PO4)*,¶38.
[146]*Infinito Gold(PO2)*,¶31.
[147]EA Submission,ll.621-3.
[148]EA Submission,ll.643-5.
[149]EA Submission,ll.641.

4. The External Advisors are independent.

[99] In determining the independence of an *amicus*, the Tribunal considers whether the circumstances of the application gives rise to legitimate doubts as to the applicant's independence or neutrality.[150] No doubts are present here.

[100] In spite of the External Advisors' participation during Caeli's privatization,[151] their independence and neutrality remain. Their advisory services were only contracted by Respondent for a limited period and were selected "through a transparent and competitive process approved by Respondent's Cabinet of Ministers," based on the criteria of competence under the law.[152] This professional relationship was terminated the moment the External Advisors received the renumeration for their services.[153]

[101] In truth, the External Advisors are independent members of Mekari civil society,[154] with the objective of "promoting fair business practices in Mekar[.]"[155] They ensure that privatization processes are protected from illegal conduct by regularly acting as interveners before Mekari court proceedings involving approvals for privatization projects,[156] performing corporation audits,[157] and regularly advising potential investors in Mekar.[158] Clearly, the External Advisors are independent.

---

[150] *von Pezold*,¶56.
[151] EA Submission,ll.625-30.
[152] EA Submission,ll.620-1.
[153] EA Submission,ll.630-1.
[154] EA Submission,l616.
[155] EA Submission,ll.641.
[156] EA Submission,ll.643-4.
[157] EA Submission,l.625.
[158] EA Submission,l.656.

5. The External Advisors address a public interest.

[102] As noted above, the *amicus* submission must address a public interest.[159] Public interest exists when the decision is likely to affect individuals or entities beyond the disputing parties[160] or when it considers the legality of various actions and measures taken by governments.[161] In this case, there is a public interest in light of the External Advisors' allegations of corruption and illegality involving Claimant's acquisition of Caeli shares.

[103] To grant the External Advisors' application would likewise serve the general public interest of promoting transparency in international investment arbitration. Such was determined by the Tribunal in *Methanex Corporation v. U.S.*[162] and *Biwater Gauff v. Tanzania*.[163]

6. The External Advisors will not disrupt and unduly burden the arbitral proceedings.

[104] As established, an *amicus* submission will only unduly burden the disputing parties if it will require further work, time, and expense for them.[164] In *Apotex*, a non-disputing party submission was found to be materially disruptive and unduly

[159] *Apotex(UNCITRAL,PO2)*,¶29.
[160] *Alicia Grace*,¶53;*Apotex(PO4)*,¶43.
[161] *Suez(NGOs)*,¶19&*Glamis*,2.
[162] *Methanex*,¶49.
[163] B*iwater Gauff*,¶*54.*
[164] *Resolute Forest*,¶4.8.

burdensome because it did not address the relevant facts and arguments in the arbitration.[165]

[105] In this case, the External Advisors' submission would not unduly burden the disputing parties it addresses the relevant issue of jurisdiction and provides key information relevant to the Tribunal's interpretation of the jurisdictional requirements of the CEPTA. The External Advisors offer new information on a matter crucial to the Tribunal's determination of its competence-competence.[166]

[106] Neither will the submission require more work, time, and expense than what the disputing parties would incur in the normal course of things. After all, the Tribunal ensures that all relevant matters must be threshed out in the course of the proceedings, including the allegations of corruption and illegality. The grant of the External Advisors' *amicus* application will therefore not be unfair or inefficient for the disputing parties. Rather, it would help the Tribunal properly resolve the issues involved in a timely and less cumbersome manner.

[165] *Apotex(PO3)*,¶37.
[166] EA Submission, I, 650-1.

MERITS

III. RESPONDENT DID NOT VIOLATE ARTICLE 9.9 OF THE CEPTA.

[107] In interpreting treaties, provisions must be read in relation to the other provisions in the instrument and understood as a whole.[167] Thus, Article 9.9 of the CEPTA must be read in relation to Article 9.8 which provides Respondent's right to regulate. The assailed acts of Respondent were exercised within its right to regulate and therefore, no violation of the CEPTA can be imputed upon it.

A. RESPONDENT'S SERIES OF ACTIONS WAS WITHIN ITS RIGHT TO REGULATE UNDER ARTICLE 9.8 OF THE CEPTA.

[108] Article 9.8 of the CEPTA recognizes the right of Respondent to regulate in its territories to achieve legitimate public policy objectives.[168] Under customary international law,[169] the right to regulate is the inherent right of the State to protect public interest.[170] When exercised in a *bona fide*, non-discriminatory, and proportionate manner, in accordance with due process, such right shall not amount to an internationally wrongful act.[171] It is exercised when a State adopts general regulations within the scope of its police power, pursuant to public policy

[167]VCLT,art.31(1).
[168]CEPTA, art. 9.8.
[169]RAJPUT,103.*See also Methanex(Award)*,¶410.
[170]CRAWFORD,297.
[171]*Saluka*,¶255.

objectives.[172] Under the CEPTA, these public policy objectives include (1) "social and consumer protection[,]"[173] (2) the rule of law,[174] and (3) in cases of economic crisis, "national security."[175]

[109] *First*, Respondent's measures such as investigating Caeli,[176] imposing airfare caps,[177] denying subsidies to Caeli,[178] and selling Caeli shares back to Respondent[179] were done for social and consumer protection.[180] As emphasized in the MRTPA,[181] Respondent sought "to protect the interests of consumers and to ensure freedom of trade" in Mekar.[182]

[110] *Second,* Respondent's enforcement of the annulled Award was done to uphold the rule of law, as its annulment was not based on reliable evidence[183] and relied solely on an unsubstantiated report.[184]

[111] *Third*, Respondent's economic measures were pursuant to national security. In *LG&E v. Argentina*, economic measures were imposed to maintain order and prevent civil unrest in the midst of "devastating, economic, political, and social" conditions.[185] Similarly, Respondent's decree requiring all companies in the State to

[172]*Saluka*,¶255.
[173] CEPTA,art.9.8(1).
[174]CEPTA,ll.2500-5.
[175]*Id.*
[176]SUF,¶36.
[177]SUF,¶37.
[178]SUF,¶46.
[179]SUF,¶63.
[180]CEPTA,art.9.8(1).
[181]MRTPA.
[182]MRTPA,Pbl.
[183]AnnexXIV,¶13.
[184]AnnexXV,¶18.
[185]*LG&E*,¶237.

offer goods and services exclusively in MON currency was in response to a devastating currency crisis that forced an increase inflation and a debilitating economic situation in Mekar.[186]

[112] In view of its public policy objectives, Respondent's measures were clearly a legitimate exercise of its right to regulate. From this alone, Claimant's allegations must be dismissed.

[113] However, even if Respondent's acts do not fall under its right to regulate, Respondent's series of actions, either taken individually or together, still cannot be considered a violation of Article 9.9 of the CEPTA. Below, these individual and collective violations shall be discussed in turn.

B. RESPONDENT'S SERIES OF ACTIONS, TAKEN INDIVIDUALLY, DOES NOT AMOUNT TO A BREACH OF THE FET STANDARD.

[114] Article 9.9 of the CEPTA requires Respondent to afford fair and equitable treatment (FET) to Claimant.[187] Contrary to Claimant's assertions, Respondent did not breach this FET obligation because it did not: (1) deny justice to Claimant; (2) commit any fundamental breach of due process; (3) engage in any arbitrary or discriminatory conduct; or (4) subject Claimant to any abusive treatment of investors, such as coercion, duress, and harassment.

[186] SUF,¶39.
[187] CEPTA,art.9.9(1).

1. Respondent's court proceedings do not constitute a denial of justice under Article 9.9(2)(a) of the CEPTA.

[115] The claim for denial of justice requires a high threshold[188] because only gross or manifest instances of injustice are considered denials of justice.[189] These involve exorbitant cases, like: absolute denial of justice, inexcusable delay of proceedings, and palpable and malicious iniquity of a judgment.[190]

[116] None of those instances are present here. Respondent's measures were legally in accordance with the principles of regularity and judicial independence because: *(a)* Respondent's courts did not subject Claimant to undue delay; and *(b)* Respondent's enforcement of the set-aside 09 May 2020 Award was justified.

a. Respondent's courts did not subject Claimant to undue delay.

[117] International investment tribunals have considered the following factors in determining whether delays in proceedings constitute a denial of justice: *(i)* the duration of the proceedings, *(ii)* the complexity of the matters, *(iii)* whether Claimant availed itself of possibilities of accelerating the proceedings, and *(iv)* whether Claimant suffered from the delay.[191]

[188] *Azinian*,¶99;*Loewen*,¶130;*Mondev*,¶126-7.
[189] Focarelli,¶12.
[190] *Salem*,¶7.
[191] *Frontier*,¶328(citing *Toto*,¶221).

[118] *First*, Claimant cannot claim that the 13 months between the filing of its claim and the scheduled interim hearing[192] constitute undue delay. In *Frontier Petroleum*, the Tribunal found that a delay of 18-39 months did not amount to a denial of justice.[193] The same ruling was found for delays of 10[194] and 6 years.[195]Thus, when Claimant's case was fully resolved by Respondent's courts only in 15 months' time, Respondent did so in a timely and ordered fashion. In fact, Claimant's case was resolved in almost half the time Mekari courts would usually to resolve commercial matters (~27 months).[196]

[119] *Second*, the matters before the Mekari courts were complex. The substance of the litigation was airfare caps, the determination of which requires more than judicial or legal knowledge. It requires industry knowledge and a careful review of industry practices. The MRPTA itself had to create an administrative body such as the CCM to have sole competence over investigating and penalizing anti-competitive behavior.[197] Thus, it is clearly a complex issue.

[120] *Third*, although Claimant urged for an immediate hearing on the airfare caps, they did not pursue any other alternative.[198] Two things are worthy of note in relation to this matter: *first*, Claimant did not protest the airfare caps, and there is no evidence that they hurt Caeli's profitability[199] and *second*, Claimants were aware that the

[192]SUF,¶54.
[193]*Frontier*,¶334.
[194]*Jan de Nul*,¶204.
[195]*Toto*,¶160.
[196]SUF,¶13.
[197]MRTPA,Ch.3(1).
[198]SUF,¶44.
[199]SUF,¶37.

average time taken from commencing an action to receiving a final decision in Mekari courts rose from 9 months in 1980 to 22 months in 2015.[200]

[121] *Fourth,* Claimant did not suffer from the alleged delay. No evidence suggests that earlier action on the part of Respondent's court would have made any difference to the purported effect of Respondent's decision. Any damage caused to Claimant was clearly due to other factors, like its very own MRPTA violations in the form of predatory pricing,[201] the oil crisis,[202] and the grounding of all Boeing 737 MAX aircrafts.[203]

[122] Thus, the proceedings before the Mekari courts were not subjected to unreasonable delays that would amount to denial of justice. In fact, Respondent's state organs administered justice to Claimant in a speedy manner.

b. Respondent's enforcement of the set-aside 09 May 2020 Award was justified.

[123] Respondent's enforcement of the annulled award was valid. Under Article III of the New York Convention (**"NY Convention"**), States-Parties are mandated to enforce arbitral awards and recognize them as binding.[204] Under Article V of the same and Article 36 of the UNCITRAL Model Law, States *may* enforce an arbitral

[200]SUF,¶13.
[201]SUF,¶45.
[202]SUF,¶48.
[203]*Id.*
[204]NY Convention,art.III.

award even if: (a) it is set aside;[205] or (b) such would be contrary to the public policy of the enforcing country.[206] In numerous international investment law cases, local courts have consistently enforced awards despite being set aside in their respective seats of arbitration because of the NY Convention's permissive language.[207]

[124] Similarly, Respondent's enforcement of the 09 May 2020 Arbitral Award set aside by the foreign Sinnograd Court[208] was clearly valid in light of the NY Convention's permissive language[209] and the similarly worded domestic Commercial Arbitration Act of Respondent.[210]

[125] Claimant cannot likewise invoke the public policy exception to invalidate Respondent's enforcement. Under international arbitration law, the public policy exception must be narrowly construed and determined by the domestic law of the enforcing country.[211]

[126] Here, Respondent's domestic law is expressly based on Article 36 of the UNCITRAL Model Law[212] and reflects the NY Convention.[213] Respondent's Courts have consistently enforced annulled awards,[214] recognizing that the public policy defense "must be construed narrowly."[215] Further, its Supreme Court even stated that

[205]NY Convention,art.V(1)(e).
[206]NY Convention,art.V(2)(b)&UNCITRAL Model Law,art.36(1)(a)(v).
[207]*See OTV;Chromalloy;Pabalk.*
[208]SUF,¶61-2.
[209]NY Convention,arts.V(1)(e)&V(2)(b).
[210]AnnexXIV,¶7.
[211]UNCITRAL Secretariat NY Convention Guide,240,¶4.
[212]AnnexXIV,¶7.
[213]NY Convention,art.V(1)(e)&V(2)(b).
[214]AnnexXIV,¶8.
[215]AnnexXIV,¶8.

enforcement of set-aside awards was not contrary to transnational public policy.[216] In fact, as the annulment was solely based on a flimsy, unsubstantiated report from a suspicious organization[217] under investigation, it would be "against Mekar's public policy to give credence" to it.[218] Thus, Respondent's enforcement of the annulled Award was justified.

2. Respondent's 15 June 2019 Decision does not constitute a fundamental breach of due process under Article 9.9(2)(b) of the CEPTA.

[127] Respondent did not commit a fundamental breach of due process when Justice VanDuzer summarily dismissed Claimant's claim, based on the following grounds: (a) Respondent's 15 June 2019 Decision is entitled to the presumption of regularity; and (*b*) Respondent's 19 June 2020 Decision is a reasonable regulatory decision.

a. Respondent's 15 June 2019 Decision is entitled to the presumption of regularity.

[128] Customary international law gives due regard to the principle of judicial independence.[219] Hence, the actions of domestic courts are accorded a greater

[216] AnnexXV,¶11.
[217] AnnexXIV,¶13.
[218] AnnexXIV,¶13.
[219] *Barcelona Traction(Judge Tanaka),*154.

presumption of regularity under international law.[220] This presumption is only overturned when there is a fundamental breach of due process.[221]

[129] According to *B.E Chattin v. United Mexican States*, fundamental breach of due process is present when the court proceedings are tainted with badges of irregularity, such as: (a) absence of proper investigations; (b) undue delay of the proceedings; (c) making the hearings in open court a mere formality; and (d) continued absence of seriousness on the part of the Court.[222]

[130] None of these are present here because: (a) there were proper investigations previously conducted by the CCM;[223] (b) the proceedings were conducted quicker than the average period for commercial matters;[224] (c) the hearings were not mere formalities as they were duly scheduled 13 months in advance and conducted for 3 intensive days;[225] and (d) Justice VanDuzer clearly took Claimant's case seriously, even reserving his judgment for a written decision weeks after the hearing and acting by virtue of a valid and binding Executive Order.[226] Thus, the Decision afforded Claimant due process.

b. Respondent's 15 June 2019 Decision is a reasonable regulatory decision.

[220]Borchard,900-2.
[221]*Genin*, ¶¶363-365.
[222]*B.E.Chattin*,¶30.
[223]SUF,¶¶36,38.
[224]SUF,¶¶52-4.
[225]SUF,¶52.
[226]SUF,¶52;PO3,¶8.

[131] Even if Respondent's Decision was tainted with irregularities, such was still valid as a reasonable regulatory decision. In *Genin v. Estonia*, the Tribunal ruled that despite certain procedural infirmities on the State's decision to revoke a license, such was a reasonable regulatory decision as it merely acted within its statutory discretion.[227] Further, in *GAMI v. Mexico*, the Tribunal noted that the State's good faith effort to achieve the objectives of its laws and regulations may counterbalance instances of disregard of legal or regulatory requirements.[228]

[132] In this case, Respondent's Decision was pursuant to Executive Order 5-2014, which expressly grants courts utmost discretion to dismiss without appeal a case by way of summary judgement where the judge finds there is very little chance of success on the merits.[229] As a reasonable regulatory measure, such was passed to expedite court proceedings and alleviate the backlog in Mekari courts.

[133] Consistently, Justice VanDuzer issued the Decision in good faith to de-clog its court dockets while affording litigants a more expeditious and inexpensive path to resolution. Thus, Respondent's courts afforded due process to Claimant, and it cannot be faulted for merely performing its duties.

3. Respondent did not engage in arbitrary or discriminatory conduct under Article 9.9(2)(c) of the CEPTA.

[227] *Genin*,¶¶363-4.
[228] *GAMI*,¶97.
[229] PO3,¶8.

[134] Article 9.9(2)(c) of the CEPTA provides that a party breaches its FET obligation if a measure constitutes arbitrary and discriminatory conduct.[230] As will be discussed below, Respondent's acts and omissions were neither (*a*) arbitrary nor (*b*) discriminatory in nature.

a. Respondent's investigation of Caeli does not constitute arbitrary conduct.

[135] Under international investment law, an "arbitrary" measure is one that is: (*i*) not based on a rational decision-making process;[231] and (*ii*) done in bad faith. None of these are present here.

i. Respondent engaged in a rational decision-making process.

[136] Respondent's investigation of Caeli based on its composite market share with Royal Narnian was not an arbitrary measure. According to *LG&E v. Argentina*, arbitrary measures are "measures that affect the investments of nationals of the other Party without engaging in a rational decision-making process."[232]

[137] In this case, Respondent engaged in a rational decision-making process when it investigated Caeli, as it was in accordance with its MRTPA. Chapter III(2)(a) of the MRPTA empowers the CCM to investigate *suo moto* into the anti-competitive behavior of a corporation when it: (a) obtains a market share greater than 50%; or

[230] CEPTA, art. 9.9(2)(c).
[231] *LG&E*, ¶158.
[232] *LG&E*, ¶158.

(b) owns a lower market share if the industry requires special attention.[233] Both apply to Claimant.

[138] *First*, Claimant has obtained a 54% market share when merging Caeli's market share with that of Royal Narnian.[234] It must be noted that at the time of investigation, Claimant owned 85% of Caeli and 100% of Royal Narnian,[235] both of which were Moon Alliance members. Thus, the first condition was clearly met.

[139] *Second*, it cannot be doubted that the aviation industry is an industry that requires special attention. The aviation industry is imbued with public interest as it affects the political, social, and economic aspects of Mekari citizens.[236] Further, Respondent is a part owner of Caeli, proving Respondent's interest in supervising and maintaining the integrity of the aviation industry.[237]

[140] Respondent's Second Investigation over Caeli was likewise proper under Chapter III(3) of the MRTPA[238] because the complaint was brought by regional airlines directly competing with Caeli and Claimant had at least 10% aggregate market share.[239] Thus, Respondent's investigations were not arbitrary as it involved a rational decision-making process.

[233]MRTPA,Chap.III(2)(a).
[234]SUF,¶36.
[235]SUF,¶¶10,26.
[236]PO3,¶10.
[237]SUF,¶26.
[238]MRTPA,Ch.III(3).
[239]PO4,¶7.

ii. Respondent's investigations were done in good faith.

[141] Respondent's investigation was likewise done in good faith. *Electronica Sicula* ruled that arbitrariness requires more than mere unlawfulness.[240] According to *Phillip Morris v. Uruguay*, arbitrary measures reflect "the absence of legitimate purpose, capriciousness, bad faith, or a serious lack of due process."[241] Consequently, measures undertaken in good faith cannot be considered arbitrary.

[142] Here, the Caeli investigation was Respondent's good faith enforcement of its MRPTA and a reasonable exercise of its police power. Anti-competitive behavior is punishable under the domestic laws of Respondent[242] and the CCM's imposition of airfare caps and fines was only pursuant to its "power to impose any interim and final remedy it deems just under Mekari law, including fines[.]"[243] Thus, Respondent's investigation over Caeli was done in good faith and does not constitute arbitrary conduct.

b. Respondent's denial of subsidies to Claimant does constitute discriminatory conduct.

[143] In *Saluka v. Czech Republic,* the Tribunal explained that conduct is not discriminatory when "a rational justification of any differential treatment of a

[240] *ELSI*,¶128.
[241] *Phillip Morris*, ¶353
[242] MRTPA,Ch.IV.
[243] MRTPA,Ch,III(4)(d).

foreign investor" exists.[244] Here, there exists reasonable justification for the differential treatment of Caeli when compared to other airlines that received subsidies from Respondent.

[144] Respondent had reasonable justification for its differential treatment because Claimant is naturally different compared to other companies that received subsidies. Unlike Caeli, subsidy recipients under Executive Order 9-2018 have less than 5% market share on domestic routes within Mekar[245] and are not significantly owned by a foreign government.[246] Caeli, on the other hand, is significantly owned by Bonooru.[247] In fact, Respondent treated Caeli the same way as Larry Air, another airline significantly owned by a foreign government,[248] as neither of them received subsidies from Respondent.[249] From this, it is clear Claimant is not in similar or like circumstances to the companies that received subsidies through Executive Order 9-2018.

[145] In fine, Claimant has dominated the aviation industry in the region and has been significantly subsidized by its home country. It cannot now decry the choice of Respondent to grant subsidies to companies which own significantly lower market shares and are not significantly State-owned. Thus, Claimant's argument on discriminatory conduct is misplaced and should be dismissed.

---

[244] *Saluka*,¶313.
[245] PO4,¶7.
[246] SUF,¶47.
[247] SUF,¶10.
[248] SUF,¶47.
[249] SUF,¶47.

4. Respondent's challenge to the Hawthorne offer did constitute abusive treatment under Article 9.9(2)(d) of the CEPTA.

[146] Respondent's challenge to the Hawthorne offer does not constitute abusive treatment against Claimant. For a measure to be considered as abusive, bad faith and coercion must be present.[250] However, Respondent's actions show nothing but good faith.

[147] Under the Caeli Shareholders' Agreement, Respondent is under no obligation to accept the Hawthorne offer as its acceptance is subject to negotiations with Claimant and its satisfaction of the arm's-length condition.[251] Pursuant to this, Respondent's challenge was validly based on the "artificially inflated and not an arm's length commercial price" which it deemed as unacceptable.[252] The eventual arbitration at the Sinnoh Chamber of Commerce was likewise pursuant to the arbitral clause in the Shareholders' Agreement. Further, Claimant's subsequent sale of Caeli shares to Respondent was legitimate and free from coercion or abuse, as it was pursuant to an agreement it entered with Respondent.[253]

[148] Thus, Claimant cannot impute bad faith on Respondent's actions as they were merely pursuant to their shared agreements.

---

[250] *Chemtura*,¶¶144-8. *See also Tecmed*,¶163&*Saluka*,¶308.
[251] AnnexVI,art.39(1)(a)
[252] SUF,¶57.
[253] Annex VI,art.39.

C. RESPONDENT'S ACTIONS, TAKEN TOGETHER, DOES NOT CONSTITUTE A VIOLATION OF ARTICLE 9.9 OF THE CEPTA.

[149] Respondent submits that Claimant cannot invoke a collective violation of the FET standard, as it finds no basis under (1) Article 9.9 of the CEPTA and (2) Article 15 of the ARSIWA.

[150] *First*, the CEPTA contemplates individual violations of the FET standard by clearly enumerating all its forms under Article 9.9(2) of the same.[254] Claimant cannot thereby claim a collective violation by accumulating all of Respondent's independent and isolated acts to constitute a resulting breach.

[151] Although Article 9.9(2) does include the plural term "measures," such only refers to complex violations, which are "the aggregate of a series of actions or omissions on the part of a single organ or, more frequently, of various organs, relating to a single matter and not, as in the case of a composite wrongful act, to a series of separate and independent situations."[255] Thus, for Claimant's collective claim to fall under the CEPTA, all of Respondent's measures referred to by Claimant must relate to chain of actions relating to a single matter, revealing an overarching intention. Such is clearly not the case here, given that all the actions imputed on Respondent are isolated incidents, not indicating a singular overarching intention.

[254] CEPTA,art.9.9(2).
[255]ILC Report, 94.

[152] *Second,* Claimant cannot likewise find basis under customary international law. In *El Paso v. Argentina,* the Tribunal characterized a series of a State's measures as constituting a "creeping FET violation."[256] This was anchored on Article 15 of the ARSIWA which provides that a breach may be committed through a composite act, or "an act made up of a series of separate actions or omissions which relate to separate situations but which, taken together, meet the conditions for a breach of a given international obligation."[257] In its *Commentaries*, the ILC itself recognized that only composite acts part of the ARSIWA.[258]

[153] Respondent submits that "creeping violations" under *El Paso* and "composite violations" under the Article 15 do not apply to the case at hand. This is because the FET violations under the CEPTA are complex in nature and require that all measures relate to a single matter, rather than a mere amalgamation of separate and independent situations.

[154] The ICSID Tribunal in *El Paso* anchored their decision on Article 15 of the ARSIWA but nevertheless recognized a complex act as a violation of the FET standard.[259] The same cannot be recognized in the case because the CEPTA recognizes that a violation of the FET standard may be committed only through a composite act and thus, it must be read in line with Article 15 of the ARSIWA.

[256]*El Paso,*¶518-519.
[257]ILC Report,93.
[258]ARSIWA,art.15.
[259]*El Paso,*¶ 515-519. *See also* Vesel,559.

[155] The facts show that the measures complained of (*i.e.*, Mekari court proceedings, CCM investigations, imposition of airfare caps, denial of subsidies, rejection of offers) were all separate actions executed by separate judicial, administrative, and legislative bodies of Respondent. Neither were they exercised with any unifying agenda or overarching purpose. Hence, no creeping FET violation can be adjudged in the case at bar.

IV. RESPONDENT MUST ONLY COMPENSATE CLAIMANT AT MARKET VALUE FOR ITS VIOLATION OF THE FET STANDARD UNDER ARTICLE 9.9 OF THE CEPTA.

[156] Even if Respondent has violated Article 9.9 of the CEPTA, Respondent nevertheless has no further obligation to compensate Claimant, due to the following reasons: *first*, Respondent has applied and complied with the compensation provisions contained in Article 9.21 of the CEPTA; *second*, Respondent has no obligation to compensate Claimant under Article 9.7 of the CEPTA; and *last*, in any case, Respondent's obligation to compensate is mitigated by (1) Claimant's negligence in operating Caeli and (2) Respondent's economic crisis.

A. RESPONDENT HAS APPLIED AND COMPLIED WITH THE COMPENSATION PROVISIONS CONTAINED IN ARTICLE 9.21 OF THE CEPTA.

[157] According to *SD Myers v. Canada*, if the subject BIT contains a specific compensation standard for non-expropriation cases, then the Tribunal has no discretion to determine otherwise.[260]

[158] Here, a specific standard for compensation in non-expropriation cases is expressly provided in Article 9.21 of the CEPTA. Particularly, it provides that "market value" shall be used in determining the final award against a respondent. The only exception to the market value standard is in Article 9.12 of the CEPTA, which provides "fair market value" (**"FMV"**) for expropriation.[261]

[159] As Claimants expressly waived their claim for any expropriation,[262] the present dispute is a non-expropriation case, and the market value standard must strictly be applied pursuant to Article 9.21 of the CEPTA.

[160] Market value refers to "actual prices paid or received in the market."[263] Given that the actual price paid by Respondent to Claimant for the shares amounted to US$ 400 million,[264] no additional compensation should be paid to Claimant.

B. RESPONDENT HAS NO OBLIGATION TO COMPENSATE CLAIMANT UNDER ARTICLE 9.7 OF THE CEPTA.

[260] *S.D. Myers*,¶309.
[261] CEPTA,art.9.21(1).
[262] PO3,¶2.
[263] MARBOE,214. Fair market value refers to "the price a 'hypothetical willing buyer' would pay a 'hypothetical willing seller', while the former reflects."
[264] SUF,¶63.

[161] Claimant cannot likewise invoke the MFN provision under Article 9.7(2) of the CEPTA to claim FMV. Article 9.7(2) provides that States-Parties shall accord to investors treatment no less favorable than it accords others in like situations.[265] However, it also provides that the MFN obligation does not apply to substantive obligations in other international investment treaties,[266] such as the compensation standard provided in Respondent's 2006 Arrakis-Mekar BIT.[267] Thus, Claimant cannot invoke Article 9.7 of the CEPTA to claim FMV as compensation.

[162] Even assuming that compensation standards are not substantive obligations, such can only be imported when the standard lacks specificity. In *CME v. Czech Republic,* the "just compensation" standard in the BIT lacked specificity, giving room for the disputing parties to argue whether it means "fair market value" or "less than fair market value.[268] To solve the predicament, the Tribunal imported the FMV compensation standard from a separate treaty to interpret the term "just compensation."[269]

[163] Such is not the case here. The CEPTA does not lack specificity as it clearly provides a the "market value" compensation standard in non-expropriation cases.[270] The FMV provision in Articles 9.12 of the CEPTA is considered *lex specialis* and express the specific intent of the parties to limit FMV compensation within the expropriation standards provided.[271] Moreover, importing an alternative formula for

[265]CEPTA, art.9.7(2).
[266]CEPTA,art.9.7(2).
[267]Arrakis-Mekar BIT, art.13.
[268] *CME*,¶500.
[269] *CME*,¶500.
[270]CEPTA,art.9.21(1).
[271]*See also Austrian Airlines*,¶*135;Berschader*,¶183*;Tza Yap Shum*,¶220.

compensation, would render nugatory the express provision in the treaty for compensation.[272] Therefore, the market value standard of compensation shall apply and no additional compensation shall be paid by Respondent to Claimant.

C. IN ANY CASE, RESPONDENT'S OBLIGATION TO COMPENSATE IS MITIGATED.

[164] Assuming but not conceding that Respondent is nevertheless obligated to compensate Claimant using the FMV standard, no additional payment shall be given by Respondent due to mitigating circumstances. These mitigating circumstances include: (*1*) Claimant's contributory negligence in operating Caeli; and (*2*) the economic crisis in Mekar.

1. Respondent's obligation to compensate is mitigated by Claimant's contributory negligence.

[165] According to *MTD v. Chile,* a BIT is not an insurance policy against risk.[273] Thus, it is imperative for investors to exercise a certain degree of caution or diligence when investing in another country.[274] If the investor is shown to be reckless in its investment, a Tribunal would take this contributory fault into account when awarding damages by proportionately reducing the amount of compensation.[275]

[272] *CME(Brownlie Separate Opinion),*¶11.
[273] *MTD,*¶178.
[274] *MTD,*¶178.
[275] *MTD,*¶178.

[166] In BIT violations, the ICSID Tribunal has allowed for the mitigation of compensation due to contributory injury caused by the willful or negligent act or omission of the injured party.[276] However, to hold an investor liable for contributory negligence:[277] (1) there must be a causal link between the investor's negligent acts and the resulting damages;[278] and (2) the negligence must be material and significant.[279]

[167] In this case, there is a causal link between the negligent acts of the investor and the damages resulting from the same, in light of the following circumstances: (1) Claimant engaged in overly aggressive investment conduct[280] against the constant warnings of Respondent to maintain healthy business practices;[281] (2) Claimant knowingly violated its undertaking with Respondent's CCM not to engage in high-level cooperation with Moon Alliance members,[282] through Royal Narnian;[283] and (3) Claimant likewise violated the MRPTA by engaging in predatory pricing[284] and unfair subsidization.[285] It is clear that Claimant's negligence caused Caeli's unfortunate demise which brought it before these present proceedings.

[168] Claimant's negligence was likewise material and significant as it triggered the chain of events that led to Claimant's alleged losses.[286] The violative acts imputed

[276]*Occidental*,¶670.
[277]ARSIWA,art.39.
[278]*Occidental*,¶669.
[279]*Occidental*,¶670&*Yukos*,¶1601.
[280]SUF,¶33 & 53.
[281]SUF,¶¶29,31,35.
[282]SUF,¶25.
[283]SUF,¶27.
[284]SUF,¶34.
[285]SUF,¶28-9;PO4,¶7;SUF,¶39.
[286]*Burlington*,¶580.

by Claimant (*supra* III) all began with the CCM's investigation which would not have happened were it not for the reckless and negligent way Claimant ran Caeli's business in violation of Respondent's MRPTA. All told, Respondent's obligation to compensate must thereby be mitigated by Claimant's contributory negligence.

2. Respondent's obligation to compensate is mitigated by the economic crisis in Mekar.

[169] The obligation to compensate an investor is mitigated when the Host State is experiencing an economic crisis.[287] In *CMS v. Argentina*, the ICSID Tribunal found that the economic crisis experienced in Argentina, although not amounting to a state of necessity under customary international law, warranted mitigation of compensation due to the investor.[288]

[170] Here, the economic crisis prompted Respondent to implement measures such as the use of the MON in all transactions in order to stabilize the country's currency.[289] The said measure was even backed by the IMF when it explained that there was a "need to establish credibility in the [local] currency to avoid a debilitating economic situation."[290] This economic crisis "led to a surge in costs of everyday items and reduced consumer spending power."[291]

[287] *CMS*,¶244.
[288] *CMS*,¶244.
[289] SUF,¶42.
[290] SUF,¶39.
[291] SUF,¶39.

[171] Thus, when coupled with the fact that Claimant's situation was also brought about by its own negligence involving business decisions, no additional compensation should be awarded to Claimant.

PRAYER FOR RELIEF

[172] Respondent hereby requests that the Arbitral Tribunal:

1. Find that it does not have jurisdiction under Chapter 9 of the CEPTA;
2. Deny the application for leave to file an *amicus* submission by CBFI;
3. Grant the application for leave to file an *amicus* submission by the External Advisors;
4. Find that Respondent treated Claimant's investment according to its obligations under Chapter 9 of the CEPTA;
5. In case the Tribunal finds Respondent did violate Article 9.9 of the CEPTA, then the Tribunal should conclude that Respondent has already purchased Claimant's investment at "market value" and award Claimant no further compensation; in any case, the Tribunal should reduce any compensation awarded considering Claimant's contributory negligence and the ongoing economic crisis in Mekar.