INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID Case No. ARB(AF)/19/78

Vemma Holdings Inc.

Claimant

v.

The Federal Republic of Mekar

Respondent

MEMORIAL FOR RESPONDENT

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TABLE OF ABBREVIATIONS

¶	Paragraph
¶¶	Paragraphs
1994 BIT	1994 Bonooru-Mekar BIT
Art	Article
BIT	Bilateral Investment Treaty
Bonooru	Commonwealth of Bonooru
Caeli	Caeli Airways
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
Centre	International Centre for Settlement of Investment Disputes
CEPTA	Comprehensive Economic Partnership and Trade Agreement, 2014
CIL	Customary International Law
CRPU	Committee on Reform of Public Utilities
FET	Fair and Equitable Treatment
FMV	Fair Market Value
ICSID	International Centre for Settlement of Investment Disputes
IL	International Law
ISDS	Investor State Dispute Settlement
LLC	Lapras Legal Capital
Mekar	Federal Republic of Mekar
MFN	Most Favoured Nation

MoA	Memorandum of Association
MRTP	Monopoly and Restrictive Trade Practice Act, 2009
MV	Market Value
Pg	Page
Phenac International	Phenac International Airport
PO	Procedural Order
SCC	Sinnoh Chamber of Commerce
State-owned enterprise	SOE
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US$	US Dollars

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ICSID AF Rules	International Centre for Settlement of Investment Disputes, ICSID Additional Facility Rules, April 2006.
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38, June 1958.
UNCITRAL Rules on Transparency	United Nations Commission on International Trade Law, Rules on Transparency in Treaty-based Investor-State Arbitration, April 2014.

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AES	AES Summit Generation Limited and AES-Tisza Erömü Kft v. Hungary, ICSID Case No. ARB/07/22, Award, 23 September 2010.
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STATEMENT OF FACTS

PARTIES TO THE DISPUTE

[1] Vemma Holdings Inc. [‘**Claimant**’] is an airline holding company incorporated in the Commonwealth of Bonooru.

[2] Federal Republic of Mekar [‘**Mekar**’] is a country in the Greater Narnian Region, with a population of 10.8 million. Until 2003, Mekar’s aviation industry consisted of two state owned carriers, which were merged into one national carrier– Caeli Airways.

[3] Commonwealth of Bonooru [‘**Bonooru**’] is an archipelagic nation in the Greater Narnian Region.

[4] Mekar signed CEPTA with the Commonwealth of Bonooru which came into forced on 15 October, 2014.

VEMMA IS ESTABLISHED

[5] Claimant was established as a successor to the State-owned BA Holdings, to continue business as a national airline. It was entrusted with assisting Bonooru to expand the civil aviation sector and infrastructure and uphold the mobility rights of Bonoori citizens. Bonooru was the single largest shareholder with 31-38% shares in Claimant.

VEMMA INVESTS IN MEKAR

[6] Claimant acquired an 85% stake in Caeli Airways on 29 March, 2011. In the same year, Bonooru introduced the Horizon 2020 scheme, aimed at enhancing the State’s tourism sector, under which Claimant received recurring subsidies.

THE BEGINNING OF CAELI’S ILL-ADVISED EXPANSIONIST STRATEGIES

[7] Claimant inherited Caeli Airways’ debt liabilities, which were refinanced by the Bonoorian People’s Bank at prices lower than market values. In 2012, Claimant, against the advice of Respondent, concentrated on offering low-fare, long-distance flights despite the volatility of demand in the region. Claimant persisted, arguing that claiming market share was more important than offsetting losses. Following fall-winter losses in 2013, Respondent again advised Claimant to limit expansion and avoid excess costs.

Yet again, Claimant continued to project an optimistic forecast and decided to further increase the number of flights on international routes.

[8] In June 2014, as oil prices crashed, Caeli turned over a profit for the first time while regional competitors fell out. Respondent pushed for the allocation of these profits into outstanding debt to improve financial health, but Claimant preferred fleet expansion and slashed airfares.

CCM INVESTIGATES CAELI

[9] In 2016, CCM was concerned that Caeli was using its foreign subsidies to engage in predatory pricing strategies. Upon finding evidence of preferential secondary slot trading, CCM deemed Caeli's effective market share to be over 50%. Consequently, it launched *suo moto* investigations into Caeli, in accordance with the MRTP Act. As an interim measure, CCM placed airfare caps to prevent Caeli from earning supra-competitive profits, which did not hurt its profitability.

[10] In 2016, a consortium of small regional airlines filed a complaint alleging Caeli was pushing out competitors, undercutting prices, misusing privileges from Phenac International. Such practices made it impossible for smaller airlines to penetrate the market. In December 2016, CCM launched the Second Investigation pursuant to this complaint.

[11] By 2018, CCM concluded its First Investigation and found that Airways breached the MRTP Act through predatory pricing. After the conclusion of the Second Investigation in 2019, CCM found that Caeli had engaged in anti-competitive behaviour through exclusionary strategies aimed solely at wiping out competitors.

MEKAR PASSES EXECUTIVE ORDER 9-2018

[12] In 2017, a financial crisis ensued in Mekar due to the depreciation of the Mekari currency, MON. Mekar passed Executive Order 9-2018 to alleviate the concerns of airline industry. Caeli's application, along with that of Larry Air, was dismissed due to the unique advantages such SOEs enjoyed. Instead, smaller and privately owned enterprises were assisted.

CAELI APPROACHES MEKARI COURTS

[13] In March 2018, Caeli approached the High Court of Mekar, seeking a judicial review of CCM's airfare caps. Claimant's case was concluded within 14 months, nearly half the average time taken for a commercial proceeding. The court rejected Claimant's interim request and further dismissed its appeal on merits under Executive Order 5-2014.

CAELI'S LIABILITIES COMPEL CLAIMANT TO SELL ITS STAKE

[14] Unable to pay Caeli's burgeoning debts, Claimant decided to jump ship and sell its stake in the airline. Claimant received an offer from Hawthorne Group LLP for US$ 600 million, which Respondent rejected under the Right of First Refusal, stating that it was not an arm's length price. After failed negotiations, Respondent filed a request at the SCC Arbitration Institute to seek redressal, where the arbitrator ruled in favour of Respondent. However, Claimant filed to set aside the SCC Award in the Supreme Arbitrazh Court of Sinnohgrad, alleging corruption. The Court found the evidence to be inconclusive, but set aside the award owing to Sinnohgrad's stringent public policy.

[15] Respondent filed for enforcement in Mekari courts, which also found the evidence to be insufficient and thus enforced the set aside SCC Award in accordance with its public policy and the discretion provided by international and domestic law. Following the enforcement of the SCC Award, Claimant failed to secure any another buyer for its share in Caeli. Consequently, Respondent stepped in and bought Caeli for US$ 400 million in 2020.

[16] On 15 November 2020, Claimant submitted its request for arbitration alleging compensation for losses under the CEPTA.

AMICUS SUBMISSIONS

[17] Two applications for non-disputing party submissions were filed.

[18] First, CBFI, a non-profit industry association representing Bonoori investors in the Greater Narnian Region and internationally. LLC is a member of CBFI and is simultaneously advising Claimant on funding strategies against Respondent for the present dispute.

[19] Second, the external advisors to Mekar's CRPU who had participated in the deliberations of the CRPU in the process leading up to the investment in Caeli Airways by Claimant. The submissions by the external advisors concern allegations of corruption in the procurement of Claimant's investment.

SUMMARY OF ARGUMENTS

JURISDICTION. This tribunal lacks jurisdiction *ratione personae*, as the present dispute constitutes State to State arbitration. Claimant fails to qualify as an investor under CEPTA and ICSID AF Rules, as the real party in interest is the Commonwealth of Bonooru. Claimant was controlled by Bonooru as is evident from the majority exercised at shareholder meetings, overlap of key personnel and subsidies received from the State. Further, Claimant performed essentially governmental functions by expanding the aviation infrastructure and tourism sector and upholding the mobility rights of Bonoori citizens.

AMICUS. First, the Tribunal should allow the *amicus* submission by CRPU as it meets all the requirements laid down in the CEPTA, ICSID AF Rules and the UNCITRAL Rules on Transparency. Specifically, CRPU raises a matter within the scope of the dispute as a matter of corruption is crucial to determine the Tribunal's competence-competence. Second, the Tribunal should bar the amicus submission by CBFI as it is not an independent and impartial applicant. Further CBFI's application neither provides new perspective, knowledge or insight nor pursues public interest.

MERITS. Respondent did not violate Article 9.9 of the CEPTA as Claimant's investment was treated fairly and equitably. The *suo moto* investigation was launched into Claimant's enterprise with a rational and legal basis and hence, was neither arbitrary nor abusive. Respondent's rejected Claimant's application for subsidies with a reasonable justification, owing to Caeli's unique advantages and thus, such rejection was neither arbitrary nor discriminatory. Mekari courts gave Claimant every opportunity to voice its grievances and dispensed justice speedily even in the face of an economic crisis. The Mekari courts further, exercised their rightful discretion in enforcing the SCC award and hence, such conduct was not a denial of justice.

REMEDY. Any compensation to Claimant for the FET breach, must be as per MV standard as prescribed in Article 9.21 of the CEPTA. This amounts to US$ 400 million and has already been paid to Claimant when Respondent purchased Claimant's stake in Caeli. Alternatively, any additional compensation awarded must take into account Claimant's contributory fault in damaging its investment and Respondent's economically distressing situation.

ARGUMENTS

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION RATIONE PERSONAE OVER THE PRESENT DISPUTE

[20] The Tribunal does not have jurisdiction *ratione personae* over this dispute. This is because Claimant is neither an 'investor' under Article 9.1 of CEPTA[1] nor a 'national' under Article 2 of ICSID AF Rules.[2] The requirements for jurisdiction *ratione personae* must be met according to both, the treaty and applicable rules.[3]

[21] The actual party behind this dispute is Bonooru and not Claimant. The applicable legal frameworks to this arbitration, CEPTA and ICSID AF Rules both bar a State from bringing a claim. Thus, for avoiding the misuse of the ISDS mechanism provided in Article 9.16 of CEPTA,[4] this Tribunal should deny standing to Claimant under (A) CEPTA and (B) ICSID AF Rules.

A. THE TRIBUNAL DOES NOT HAVE JURISDICTION UNDER CEPTA

[22] Claimant does not meet the requirements of an 'investor' as defined by Article 9.1 of the CEPTA:

> a natural person with the nationality of a Party or an enterprise with the nationality of a Party or seated in the territory of a Party that seeks to make, is making or has made an investment in the territory of the other Party(...)[5]

[23] Said Article only contemplates a natural person or an enterprise as an investor. Therefore, CEPTA has no provision to allow a State to bring a claim.

[24] Alternatively, even if the Tribunal were to consider Claimant as a SOE, it lacks jurisdiction under CEPTA. The intention of the Parties to CEPTA was to exclude SOEs.[6] In 1994, Bonooru and Mekar signed a BIT expressly including government

[1] CEPTA, Art 9.1.

[2] ICSID AF Rules, Art 2.

[3] *TSA Spectrum*, ¶156.

[4] CEPTA, Art 9.16.

[5] CEPTA, Art 9.1.

[6] *Austrian Airlines*, ¶115.

owned enterprises as investors.[7] On 15 October 1994, Bonooru and Mekar terminated the 1994 BIT[8] and agreed to a new treaty, CEPTA, without contemplating state owned enterprises as investors. The preclusion of the phrase 'government-owned' from CEPTA indicates a clear intention of the Parties to exclude SOEs.

[25] Thus, the Tribunal does not have jurisdiction under CEPTA.

B. THE TRIBUNAL DOES NOT HAVE JURISDICTION UNDER ICSID AF RULES

[26] Article 2 of ICSID AF Rules states that:

> The Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rule proceedings between a State or a constituent subdivision or agency of a State and a national of another State.[9]

[27] In order to bring a claim against a State, the claimant must be a 'national' under ICSID AF Rules. The national must be a private individual or corporation. States acting as investors have no access to the Centre in that capacity.[10] The inclusion of Claimant within the ambit of ICSID AF Rules would defeat the Convention's goal of depoliticization of investment disputes and the encouragement of private, as distinguished from public, international investment.[11]

[28] The Broches test,[12] read in conjunction with Articles 5 and 8 of ARSIWA,[13] is applied to assess whether an investor is separate from a State. Aron Broches formulated the Broches Test, setting the criteria to disqualify a national from a proceeding.

[29] The Broches test excludes a mixed economy company or government owned corporation from the jurisdiction of the Centre if it acts as an "agent for the government" or "discharges an essentially governmental function".[14] Various factors, such as

[7] 1994 Bonooru-Mekar BIT, Art 1(a).

[8] CEPTA, Art 1.6; Statement of Uncontested Facts, Pg 33, ¶32.

[9] ICSID AF Rules, Art 2.

[10] Christoph Schreuer (2009), Pg 161, ¶270.

[11] Christoph Schreuer (2009), Pg 187, ¶365; Mark Feldman (2016), Pg 13.

[12] Aron Broches (1972), Pg 332, ¶¶354-5.

[13] Mark Feldman (2016), Pg 5.

[14] C.F. Amerasinghe (1976), Pg 43.

ownership, control, nature, purposes and objectives of the entity, and the character of the actions are taken into consideration.[15]

[30] However, establishing an entity's standing under the Broches test is different from attributing an entity's conduct to a State's under ARSIWA.[16] Finding a State as the true investor requires consideration of broader set of investment activities, potentially spanning over time and different stages of the investment.[17]

[31] Respondent submits that the Tribunal does not have jurisdiction under ICSID AF Rules as (i) Claimant was acting as an agent of Bonooru; and (ii) Claimant was discharging essentially governmental functions.

i. Claimant was acting as an agent of Bonooru

[32] The first criterion under the Broches test is whether the investor acts as an agent of the government.[18] A reference to Article 8 of ARSIWA provides a basic framework to determine if an entity is acting as an agent of the government.[19] The 'agency' criterion focuses on the degree to which the State has directed or controlled an entity's investment actions or investment activities.[20]

[33] A tribunal may rely on management, voting rights, shareholding or other reasonable considerations to assess control.[21] The capacity block major changes in the company amounts to a "controlling interest".[22]

[34] In the present dispute, Bonooru was the single largest shareholder owning 31-38% shares in Claimant.[23] No other single shareholder owned more than 7% shares.[24] Moreover, due to a minimum requirement of 50% shareholders to form quorum in

[15] *Maffezini*, ¶76.

[16] Paul Byschak (2011), Pg 40.

[17] Ibid, Pg 39.

[18] Aron Broches (1972), Pg 332, ¶¶354-355.

[19] Csaba Kovács (2018), Pg 173; *BUCG*, ¶34.

[20] Paul Byschak (2011), Pg 40.

[21] *Vacuum*, ¶44.

[22] Ibid.

[23] PO4, Pg 89, ¶2.

[24] Ibid.

shareholder meetings, Bonooru formed a majority when not all shareholders attended.[25] These included meetings for electing more directors.[26] Therefore, Bonooru had the capacity to block major changes when the rest of shareholders were dispersed.[27]

[35] Another key factor to establish control is the overlapping of key personnel between the State representatives and the company under scrutiny.[28] The Chairperson of Claimant's Board of Directors was the Secretary of the Ministry of Transport and Tourism of Bonooru.[29] She was also the company's legal representative.[30] The Secretary was appointed the very day Claimant submitted its bid for Caeli.[31] Moreover, an official of Ministry of Transport and Tourism of Bonooru also held the director position in Claimant's Board of Directors.[32]

[36] Additionally, Bonooru exercised financial control over Claimant. Bonoorian People's Bank refinanced the debts of Claimant's enterprise at more favourable rates than available in the market.[33] Further, the Ministry of Transport and Tourism of Bonooru provided recurring subsidies to Claimant under the Horizon 2020 scheme to boost the tourism infrastructure in the State.[34]

[37] Enabled by these funds, Claimant utilised its investment in Caeli to further State objectives. It poured in resources on loss making routes[35] between Mekar and Bonooru to draw more travellers from Mekar and the Greater Narnian region[36] in order to expand Bonooru's tourism sector. Claimant's push for risky expansionist policies[37] was only

[25] PO3, Pg 86, ¶3.

[26] Ibid.

[27] Sang Yop Kang (2014), 854.

[28] *Thunderbird*, ¶109.

[29] Statement of Uncontested Facts, Pg 31, ¶22.

[30] Annex IV, Articles of Association of Vemma Holding Inc., Clause 152.8.

[31] Statement of Uncontested Facts, Pg 31, ¶22.

[32] Annex IV, Articles of Association of Vemma Holding Inc., Clause 152.4.

[33] Statement of Uncontested Facts, Pg 33, ¶30.

[34] PO4, Pg 89, ¶6.

[35] Statement of Uncontested Facts, Pg 33, ¶33; Annex VII, Phenac Business Today Podcast Transcript 17 November 2014, Line 1864.

[36] Statement of Uncontested Facts, Pg 32-33, ¶28.

[37] Statement of Uncontested Facts, Pg 33, ¶31.

sustained due to financial backing from Bonooru. This allowed Bonooru to ultimately achieve its objective of enhancing the aviation network and tourism infrastructure.[38]

[38] Thus, Claimant acted as an agent of the State.

ii. Claimant was discharging essentially governmental functions

[39] The second criterion to be fulfilled under the Broches test is the performance of essentially governmental functions by the investor. This criterion focuses on the degree to which an entity may perform investment activities with elements of governmental or regulatory authority.[39]

[40] Functions are governmental if the State ordinarily reserves such conduct for itself[40] or which by their nature are not usually carried out by private businesses or individuals.[41] Further, what is 'governmental' is defined by the history and traditions of the particular society.[42]

[41] Moreover, while assessing the performance of governmental authority, the purposes for which powers are to be exercised are of particular importance.[43] Tribunals have considered whether the powers have been bestowed in order to advance classically sovereign objectives.[44]

[42] Historically, Bonooru has regulated all civil aviation and mobility rights of its citizens. Bonooru is an archipelagic state and assigns special importance to mobility rights of its population under Article 70 of its Constitution.[45] Article 70 *inter alia* states that "every citizen of Bonooru has the right to enter, remain in, and leave its territory".[46] The

[38] PO4, Pg 89, ¶6.

[39] Paul Byschak (2011), Pg 40.

[40] James Crawford (2013), Pg 129, ¶4.3.2.

[41] *Maffezini*, ¶77.

[42] ARSIWA Commentaries (2001), ¶6.

[43] Ibid.

[44] *Hyatt*, ¶66; *Hamester*, ¶190; *EDF*, ¶97; *Salini*, ¶33.

[45] Statement of Uncontested Facts, ¶5.

[46] Annex I, Constitution Act of Bonooru 1947, Art 70(1).

Constitutional Court of Bonooru recognised positive obligations upon the State, under Article 70, which were to be carried out via Claimant.[47]

[43] Claimant was established as a successor to BA Holdings– a government entity entirely controlled by Bonooru's Ministry of Transport and Tourism.[48] Its purpose in undertaking the investment was to further Bonooru's policies.[49] Claimant's objective as per its MoA is to assist in the development of the aviation industry and infrastructure for Bonooru, and to uphold the mobility rights of its citizens under Article 70.[50] The entrustment of such crucial activities via Claimant's founding documents reflects the intent of the government to create an entity to carry out governmental functions in the field of regional development.[51]

[44] Finally, Claimant undertook strategic governmental functions for the State emphasised by a close supervision by the Ministry of Transport and Tourism.[52] Claimant via its investment in Caeli, furthered Bonoori governmental schemes aimed at regional development, enhanced Bonooru's tourism sector and furthered the mobility rights of Bonoori citizens under the control of the government.

[45] Claimant utilised its investment in Caeli to expand the Caspian Project, a Bonoori scheme aimed at facilitating movement and building infrastructure in the Greater Narnian region.[53] This intention is evidenced by allocation of US$ 30 billion to develop Mekar's Port and Phenac International Airport as part of the Caspian Project.[54]

[46] Moreover, Claimant had no qualms about advancing ill-advised, aggressive expansionist policies risking its financial stability.[55] Claimant poured significant

[47] Annex III, Constitutional Court of Bonooru on Privatisation of BA Holdings (Excerpts), ¶¶56-59.

[48] *Helnen*, ¶¶87, 94; Statement of Uncontested Facts, Pg 29, ¶7.

[49] *Vigotop*, ¶332.

[50] Annex IV, Memorandum of Association of Vemma Holdings Inc., Section 3(h).

[51] *Maffezini*, ¶85.

[52] *Flemingo*, ¶436.

[53] Statement of Uncontested Facts, Pg 28, ¶6.

[54] PO4, Pg 89, ¶1.

[55] Statement of Uncontested Facts, Pg 33, ¶31.

resources on Mekar-Bonooru routes driven by the recurring subsidies it received from Bonooru,[56] even when its losses were concentrated on them.[57]

[47] Claimant also expanded Bonooru's tourism sector under the Horizon 2020 scheme, which was a part of the Caspian Project aimed at boosting the tourism infrastructure in Bonooru.[58] Claimant was the first entity to receive state subsidies from Bonooru under this scheme, which was justified by Sabrina Blue as being beneficial to the aviation and tourism industry.[59] As a result of this enhanced infrastructure, Bonoori citizens' right to leave and enter the territory of Mekar under Article 70 of the Constitution, was furthered.[60]

[48] Therefore, Bonooru used public funds in the form of subsidies to exercise financial control over Claimant to ultimately use Caeli to further governmental functions.

[49] In conclusion, Respondent submits that the real party to this dispute is the State of Bonooru and as a result, Claimant fails to qualify as an investor under CEPTA and ICSID AF Rules. In turn, this leaves Claimant without standing to bring arbitral proceedings before this Tribunal.

[56] PO4, Pg 89, ¶6.

[57] Statement of Uncontested Facts, Pg 33, ¶33; Annex VII, Phenac Business Today Podcast Transcript 17 November 2014, Line 1864.

[58] Statement of Uncontested Facts, Pg 32, ¶28.

[59] Statement of Uncontested Facts, Pg 32, ¶28.

[60] PO4, Pg 89, ¶6.

II. APPLICATION FOR LEAVE TO FILE *AMICUS* SUBMISSIONS

[50] Two *amicus curiae* applications have been filed before the Tribunal, pursuant to PO1.[61] The application for leave to file an *amicus curiae* submission by CBFI was filed on 19 April, 2021, and the application by the external advisors to Mekar's CRPU was filed on 28 May, 2021.

[51] In order to be accepted, the *amici*'s applications must meet the cumulative requirements laid down in Article 9.19(3) of CEPTA,[62] Article 41(3) of ICSID AF Rules[63] and Articles 1 & 4 of UNCITRAL Rules on Transparency.[64] The UNCITRAL Rules on Transparency are applicable as they have been invoked by Respondent pursuant to Article 9.20(6) of CEPTA.[65]

[52] The cumulative requirements under the above-mentioned provisions are that the non-disputing party must (i) offer a particular perspective or knowledge, different from that of the disputing parties;[66] (ii) address matters within the scope of the dispute;[67] (iii) demonstrate a significant interest in the proceedings;[68] (iv) be independent and impartial;[69] and (v) make submission pursuant to public interest.[70]

[53] Respondent submits that the Tribunal (A) should allow the *amicus* submission by the external advisors to Mekar's CRPU as it meets all the requirements and (B) should bar the *amicus* submission by CBFI as it fails to meet the relevant thresholds.

[61] PO1, Pg 13, ¶20.

[62] CEPTA, Art 9.19(3).

[63] ICSID AF Rules, Art 41(3).

[64] UNCITRAL Rules on Transparency, Art 1.4.

[65] CEPTA, Art 9.20(6).

[66] CEPTA, Art 9.19(3); ICSID AF Rules, Art 41(3)(a); UNCITRAL Rules on Transparency, Art 4(3)(b).

[67] CEPTA, Art 9.19(3); ICSID AF Rules, Art 41(3)(b); UNCITRAL Rules on Transparency, Art 4(4)(d).

[68] CEPTA, Art 9.19(3); ICSID AF Rules, Art 41(3)(c); UNCITRAL Rules on Transparency, Art 4(3)(a).

[69] CEPTA, Art 9.19(3); UNCITRAL Rules on Transparency, Art 4(2)(b).

[70] UNCITRAL Rules on Transparency, Art 1(4)(a).

A. THE TRIBUNAL SHOULD ALLOW THE AMICUS SUBMISSION BY EXTERNAL ADVISORS TO MEKAR'S CRPU

[54] External advisors to Mekar's CRPU are members of Mekari civil society whose professional focus is investment banking.[71] The external advisors actively participated in the deliberations of CRPU to advise on privatization of Caeli leading up to the acquisition of an 85% stake in Caeli by Claimant.[72]

[55] The *amicus* submission by the external advisors will provide the Tribunal with crucial information regarding the corruption issue involved in the procurement of the investment in question.[73]

[56] The submission by external advisors should be accepted as it fulfils all the criteria under CEPTA, ICSID AF Rules and UNCITRAL Rules on Transparency.

i. External advisors bring knowledge that would assist the Tribunal

[57] The external advisors to CRPU offer unique and valuable knowledge[74] concerning the corruption allegation during the procurement of the underlying investment agreement.[75]

[58] The external advisors in their submission stated that Claimant procured its rights in Caeli by means of bribes paid to Mr. Dorian Umbridge, the Chairperson of the CRPU.[76] The non-disputing parties, were engaged as external advisors to the CRPU and had actively participated in CRPU's deliberations which led to Claimant's investment in Caeli,[77] and hence are well equipped to provide this Tribunal with the necessary information.

[71] *Amicus* Submission by External Advisors to CRPU, Pg 19.

[72] Ibid.

[73] Ibid.

[74] CEPTA, Art 9.19(3); ICSID AF Rules, Art 41(3)(a); UNCITRAL Rules on Transparency, Art 4(3)(b).

[75] *Amicus* Submission by External Advisors to CRPU, Pg 19.

[76] Ibid.

[77] Ibid.

[77] Ibid.

ii. External advisors address a matter within the scope of the dispute

[59] Claimant alleged that the external advisors' submission is not within the scope of the dispute as it raises an issue of corruption not raised by either disputing party.[78]

[60] However, non-disputing parties may raise issues of jurisdiction, even if respondent has not raised the same.[79] The requirement of 'within the scope' should not be interpreted narrowly and it is sufficient if the submissions are relevant to the dispute.[80] Moreover, the Tribunal under Article 45(3) of ICSID AF Rules may on its own initiative consider, at any stage of the proceeding, whether the dispute before it is within its competence.[81]

[61] In *Infinito Gold*, the tribunal allowed an *amicus* submission about an ongoing corruption proceeding over the claimant's concession agreement[82] and considered it to be within the scope of the dispute– despite the issue not being raised by either party.[83]

[62] Moreover, the issue of corruption is relevant to the present dispute as the assessment of the legality of Claimant's investment is crucial to the determination of the Tribunal's jurisdiction.[84] In the past, tribunals have declined to exercise jurisdiction due to the procurement of investments being tainted by corruption and bribery.[85]

[63] Further, elimination of corruption and bribery in trade and investment is one of the objectives under CEPTA.[86] Hence, the issue of corruption is within the scope of this dispute.

[78] Vemma's Application to bar the *Amicus* Submission by the External Advisors to the CRPU, Pg 22.

[79] *Electrabel*, ¶4.92.

[80] *Biwater*, ¶¶32-34, 50.

[81] ICSID AF Rules, Art 45(3).

[82] *Infinito Gold*, ¶¶11-12.

[83] Ibid, ¶¶33, 37.

[84] *Inceysa*, ¶155; *World Duty*, ¶157; *Metaltech*, ¶374; Kathrin Betz (2018), Pg 128-136.

[85] Ibid.

[86] CEPTA, Preamble, Pg 71.

iii. External advisors have significant interest in the present proceedings

[64] Tribunals have considered the criterion of 'significant interest' to be met if the decision has a direct implication for its professional activities.[87] The tribunal in *Apotex III* explained that the interest must be more than a general interest in the proceedings.[88]

[65] The external advisors possess both– a general interest in promoting fair business practices in Mekar,[89] and a specific interest in promoting anti-corruption efforts in it.[90] Stagnation in anti-corruption effort impacts their financial operations as they regularly advise potential investors prospecting opportunities in Respondent.[91] Moreover, the external advisors act as interveners before federal courts in judicial proceedings concerning approval for privatisation projects.[92] Therefore, external advisors have significant interest in the proceedings.[93]

iv. External advisors' submission is pursuant to public interest

[66] Under UNCITRAL Rules on Transparency, the Tribunal shall take into account the public interest in the particular arbitral proceeding.[94] Non-disputing parties are well-placed to provide assistance in issues of jurisdiction that might raise matters of public interest.[95]

[67] Here, the public interest revolves around the broader public policy implications of this dispute.[96] Corruption is against transnational public policy,[97] and is part of the "global consensus on fundamental economic, legal, moral, political, and social values".[98] Moreover, tribunals have a duty to render an enforceable award, meaning one that does

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[87] *Electrabel PO4*, ¶29.

[88] *Apotex III*, ¶38.

[89] *Amicus* Submission by External Advisors to CRPU, Pg 19.

[90] Ibid.

[91] Ibid.

[92] Ibid.

[93] CEPTA, Art 9.19(3); ICSID AF Rules, Art 41(3)(c); UNCITRAL Rules on Transparency, Art 4(3)(a).

[94] UNCITRAL Transparency Rules, Art 1(4)(a).

[95] *Apotex II*, ¶33; *Pac Rim*, ¶(ii); *Electrabel*, ¶5.32.

[96] *UPS Amici Curiae*, ¶3(ii).

[97] *World Duty Free*, ¶157; Pierre Lalive (1987), Pg 276-277, ¶62.

[98] Carolyn Lamm (2010), Pg 699, ¶707.

not violate public policy.[99] Further, the interests of the international arbitration community itself are served by actively assisting in anti-corruption efforts.[100]

[68] Therefore, external advisors' submission is pursuant to public interest.

v. External advisors are independent and impartial

[69] CEPTA and UNCITRAL Rules on Transparency require the non-disputing party to "disclose any affiliation, direct or indirect, with any disputing party".[101] Hence, the applicant must be independent from the disputing parties.[102] Moreover, the requirement of independence is implicit[103] under ICSID AF Rules Article 41(3)(a).[104]

[70] The external advisors acted as independent advisors throughout the privatisation process carries out by CRPU,[105] and were selected through a competitive and transparent process.[106] Further, external advisors have not received any financial or other support from the disputing parties for preparation of its *amicus* submission.[107] Thus, external advisors are independent from the disputing parties.[108]

[71] Hence, Respondent requests the Tribunal to grant leave to external advisors to file *amicus* submission as it fulfils all the requirements stated above.

B. THE TRIBUNAL SHOULD BAR THE AMICUS SUBMISSION BY CBFI

[72] As stated above, the *amicus* submissions should comply with the requirements established by CEPTA, ICSID AF Rules, and UNCITRAL Rules on Transparency. However, the *amicus* submission by CBFI fails to meet the required thresholds as (i) CBFI fails to bring a perspective different from the disputing parties;[109] (ii) CBFI is not

[99] NYC, Art V(2)(b).

[100] Bernardo Cremades (2003), Pg 80.

[101] CEPTA, Art 9.19(3); UNCITRAL Rules on Transparency, Art 4(2)(b).

[102] *Eli Lilly PO4*, ¶D; *Von Pezold*, ¶49.

[103] *Border Timbers*, ¶49.

[104] ICSID AF Rules, Art 41(3)(a).

[105] *Amicus* Submission by External Advisors to CRPU, Pg 19.

[106] Ibid.

[107] Ibid.

[108] CEPTA, Art 9.19(3); UNCITRAL Rules on Transparency, Art 4(2)(b).

[109] CEPTA, Art 9.19(3); ICSID AF Rules, Art 41(3)(a); UNCITRAL Rules on Transparency, Art 4(3)(b).

independent and impartial;[110] and (iii) CBFI's submission is not in pursuit of public interest.[111]

i. CBFI fails to bring a perspective, knowledge, or insight different from Claimant

[73] The enquiry into a new perspective, knowledge, or insight is generally made on the assumption that the disputing parties will provide a satisfactory basis for the tribunal to decide their dispute.[112] Moreover, submissions which are repetitive of the disputing parties' arguments,[113] and merely provide broader context in absence of additional information[114] fails to meet this criterion.

[74] In *Apotex III BMN*, the tribunal rejected the *amicus* submission on the definition of investment and scope of Article 1139(g) of the NAFTA due to lack of a different perspective– as the disputing parties had already fully addressed those issues. [115]

[75] CBFI's submission merely reiterates Claimant's stance that State-linked enterprises should have standing under CEPTA's ISDS mechanism,[116] hence fails to provide a different perspective.[117] Moreover, CBFI's submission just seeks to provide context regarding the business climate in Bonooru, without giving any relevant knowledge or information that may assist the Tribunal in determining factual or legal issues related to jurisdictional objection.

ii. CBFI's submission is not in pursuit of public interest

[76] Under UNCITRAL Rules on Transparency, the Tribunal shall take into account the public interest in the particular arbitral proceeding.[118] Every arbitral investment award

[110] CEPTA, Art 9.19(3); UNCITRAL Rules on Transparency, Art 4(2)(b).

[111] UNCITRAL Rules on Transparency, Art 1(4)(a).

[112] *Methanex Amici Curiae*, ¶48.

[113] *Apotex III BNM*, ¶26.

[114] *Bear Creek Mining*, ¶38.

[115] *Apotex III BNM*, ¶26.

[116] *Amicus* Submission by CBFI, Pg 16, ¶8.

[117] *Apotex III BNM*, ¶26.

[118] UNCITRAL Transparency Rules, Art 1(4)(a).

involving a State is likely to impact other investors[119] and hence the non-disputing party must show why the subject matter of the arbitration was of public interest.[120] Moreover, an *amicus* submission based on a specific private interest fails to meet the criterion of public interest.[121]

[77] The tribunal in *Resolute Forest* rejected the *amicus* submission as it was not in furtherance of public interest.[122] The tribunal held that the fact that interpretation of NAFTA's jurisdictional provision might impact persons other than disputing parties is not sufficient to meet the criterion of public interest.[123]

[78] Here, CBFI merely represents the interests of the investors of Bonooru,[124] who might be impacted by the interpretation of ISDS mechanism under CEPTA.[125] Moreover, CBFI's sole apparent interest in this arbitration lies in advancing its own private interest in retaining the membership fees from the members.[126] Therefore, CBFI has a personal interest in ensuring that its members have access to investment opportunities in Greater Narnian region[127] as opposed to furthering any public interest.

iii. CBFI is not independent and impartial

[79] As stated in [69] above, the non-disputing party must be independent from the disputing parties.[128]

[80] The apparent lack of independence or neutrality is a sufficient ground to deny the *amicus* submission.[129] A potential conflict of interest casts justifiable doubt on the independence of the non-disputing party.[130] Moreover, lack of connection with the

[119] *Methanex Amici Curiae*, ¶49.

[120] Ibid, ¶49; *Apotex III*, ¶42.

[121] *Apotex III*, ¶43.

[122] *Resolute Forest*, ¶4.7.

[123] Ibid.

[124] *Amicus* submission by CBFI, Pg 16, ¶2.

[125] Ibid, ¶9.

[126] PO3, Pg 87, ¶11.

[127] *Amicus* submission by CBFI, Pg 16, ¶8.

[128] *Eli Lilly PO4*, ¶D; *Von Pezold*, ¶49.

[129] *Von Pezold*, ¶56; *InterAguas*, ¶32.

[130] *Von Pezold*, ¶¶34-35, 56.

disputing parties is important to fulfil the requirement of independence.[131] Mere assertion of independence by the parties in this regard is not sufficient. In *InterAguas* despite the non-disputing party asserting that it was independent, the tribunal rejected that application as it held there could be a potential professional and financial conflict of interest.[132]

[81] The participation of LLC in these proceedings through CBFI raises conflict of interest due to their professional and financial relationship.[133] LLC is a member of CBFI and is simultaneously advising Claimant on funding strategies against Respondent for the present dispute.[134] This shows that there exists a close connection between LLC and Claimant. Such indirect affiliation of CBFI with Claimant establishes apparent lack of independence and mere assertion of independence by CBFI is not sufficient.

[82] Therefore, the Tribunal should reject the *amicus* application made by CBFI.

[131] *Philip Morris*, ¶55.

[132] *InterAguas*, ¶32.

[133] *Amicus* Submission by CBFI, Pg 16, ¶7.

[134] Ibid.

III. RESPONDENT ACCORDED FAIR AND EQUITABLE TREATMENT TO CLAIMANT UNDER ARTICLE 9.9 OF CEPTA.

[83] In *arguendo*, Respondent submits that it upheld the standard of Fair and Equitable Treatment under Article 9.9 of CEPTA. CEPTA enlists the FET standard under the header of 'Minimum Standard of Treatment'. In that context, the minimum standard of FET provides no more than 'minimal' protection.[135] Consequently, Claimant has the burden[136] to show a higher degree of inappropriateness in Respondent's conduct to show a violation of FET.[137]

[84] Article 9.9(2) qualifies the elements that amount to a breach of FET, namely– denial of justice; violation of due process; arbitrary or discriminatory conduct; abusive treatment of investors.

[85] Article 9.9(3) of CEPTA states that while addressing the FET obligation, the Tribunal must consider whether Respondent made a specific representation which the investor relied on when making the investment.[138] To establish a specific representation, State conduct must be specific, definitive and unambiguous.[139] The representation must be targeted specifically at the claimant and repeated assurances regarding the same must be made.[140] Further, encouraging remarks from government officials cannot create legitimate expectations.[141] Thus, Respondent's conduct did not give rise to any legitimate expectation that Claimant consequently relied upon while making its investment.

[86] Contrary to Claimant's allegations:[142] (A) CCM's *suo moto* investigation was neither arbitrary, nor abusive; and (B) Respondent's imposition of airfare caps were neither arbitrary, nor abusive. Alternatively, (C) Respondent's regulatory measures fall within its right to regulate.

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[135] *Saluka*, ¶292.

[136] Ioana Tudor (2008), Pg 138.

[137] *Saluka*, ¶292.

[138] CEPTA, Art 9.9(3).

[139] *White Industries*, ¶10.3.7; Andrew Newcombe (2009), Pg 281-82.

[140] Ibid.

[141] Ibid.

[142] Notice of Arbitration, Pg 2.

[87] Moreover, (D) Respondent's dismissal of Claimant's application for subsidy was not arbitrary, discriminatory or violative of due process; and (E) Respondent's courts did not deny justice to Claimant. Last, (F) Respondent's measures do not breach the FET standard cumulatively.

A. CCM'S SUO MOTO INVESTIGATION WAS NEITHER ARBITRARY NOR ABUSIVE

[88] In 2016, CCM found evidence of preferential secondary slot trading between Claimant's enterprises, Caeli and Royal Narnian. Concerned about predatory pricing, CCM launched a *suo moto* investigation ['**First Investigation**'] into Caeli, while considering the conjunctive market share of the enterprises.

[89] Such (i) clubbing was not arbitrary, and (ii) the First Investigation was not abusive.

i. The clubbing of market shares was not arbitrary

[90] Claimant contends that CCM should not have factored the conjunctive market shares. However, the clubbing was based on the evidence of preferential secondary slot trading which increased Caeli's market share to 54%, and hence, was not arbitrary.

[91] 'Arbitrary' refers to a move beyond a merely inconsistent or questionable application of legal policy, to the point where the action constitutes an unexpected and shocking repudiation of a policy's very purpose and goals.[143] The respondent merely has to show that such action had a rational link to a reasonable policy.[144]

[92] Airport slots refers to the take-off and landing facilities and permissions,[145] and are generally allocated by operators on the basis of historically flown routes by airlines.[146] Preferential secondary slot trading refers to a practice of exchanging airport slots on a preferential basis between two entities.[147] This practice has been known to pave the way for exclusion of other competitors.[148]

[143] *Cargill*, ¶¶292–293.

[144] *AES*, ¶10.3.7.

[145] OECD Airline Competition, Pg 16, ¶51.

[146] Jaap de Wit (2008), 50, ¶2.2.

[147] OECD Airline Competition, Pg 16, ¶50.

[148] *Sea Containers*, ¶79.

[93] Due to the preferential secondary slot trading, Caeli had access to both its own and Royal Narnian's facilities. Thus, Caeli was effectively operating with a conjunctive market share. Hence, the decision to club Claimant's enterprises was not arbitrary.

ii. The First Investigation was not abusive

[94] Claimant alleges that CCM violated the MRTP Act. However, CCM had the requisite authority to launch the First Investigation and hence, such measure was not abusive.

[95] State conduct will be abusive when there are manifestly no lawful grounds for the relevant actions.[149] States generally enjoy a margin of appreciation when determining the need to take regulatory actions.[150] The claimant must establish more than simple illegality or lack of authority under domestic law.[151]

[96] The MRTP Act empowers CCM to launch a *suo moto* investigation into an enterprise with a market share higher than 50%, which poses a unique threat to its competitors.[152]

[97] First, CCM was empowered to consider the effective market share instead of the technical market share. In July 2016, CCM broadened the scope of the MRTP Act to envisage market-disruptive agreements between an SOE and another enterprise.[153] Moreover, CCM's action was consistent with the undertaking signed by Claimant, in 2011. Claimant assured that it would not engage in high level collaboration with Moon Alliance members, such as Royal Narnian, on competition parameters such as schedules, capacity and facilities.[154] Caeli's contravention of this undertaking, led CCM to club the market shares.

[98] Second, CCM acted proactively as it was concerned that the subsidies received by Claimant, under the Horizon 2020 Scheme from Bonooru, were potentially enabling it to engage in predatory pricing and drive out smaller competitors.[155]

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[149] UNCTAD FET, Pg 83.

[150] *SD Myers*, ¶263.

[151] *ADF*, ¶190.

[152] Annex V, MRTP Act, Chapter III Section 2.

[153] Statement of Uncontested Facts, Pg 34, ¶36, Footnote 3.

[154] Statement of Uncontested Facts, Pg 32, ¶25.

[155] Statement of Uncontested Facts, Pg 35, ¶36.

[99] In any case, a "mere questionable" or "inconsistent" application of laws does not amount to a breach of the FET standard– and hence, the First Investigation was not abusive.[156] Hence, the First Investigation was based on lawful grounds and not abusive.

B. THE AIRFARE CAPS IMPOSED WERE NOT ARBITRARY OR ABUSIVE

[100] Pursuant to the initiation of the First Investigation, CCM imposed interim airfare caps on Caeli, to prevent it from earning supra-competitive profits in the future. These caps were set reasonably above the rates Caeli charged on set routes.

[101] Respondent submits that these airfare caps were (i) neither arbitrary, (ii) nor abusive.

i. The airfare caps were not arbitrary

[102] Claimant alleges that the maintenance of the airfare caps in the midst of the 2017 economic crisis was arbitrary.[157] However, CCM's decision to impose airfare caps upon Caeli was aimed solely at curbing Claimant from engaging in anti-competitive behaviour, and hence, was not arbitrary.

[103] The assessment of 'arbitrariness' requires that the challenged State measures manifestly lack reasons or seek an "ulterior motive".[158] Such an assessment must not be based on the determination that a domestic agency incorrectly weighed various factors or reasons in a manner that the tribunal criticizes.[159]

[104] The airfare caps imposed on Caeli were implemented in three phases: (a) on an interim basis after launching the First Investigation; (b) on an interim basis pending the investigation launched after a complaint from smaller airlines ['**Second Investigation'**]; (c) on a permanent basis until Claimant's effective market share fell below 40%.

a. The interim airfare caps pursuant to the First Investigation were not arbitrary

[156] *Cargill*, ¶293.

[157] Notice of Arbitration, ¶16.

[158] *ELSI*, ¶128; *Glencore*, ¶1448; *Siemens*, ¶¶318-319; *Lauder*, ¶219.

[159] *Cargill*, ¶¶292-293.

[105] The airfare caps imposed upon the initiation of the First Investigation were an interim measure to prevent Caeli from earning supra-competitive profits in the future, owing to concerns of predatory pricing.

[106] Predatory pricing is the practice of a dominant firm setting its prices much below the market rate, forcing competitors to leave the market and deterring new entrants.[160] Following which, the dominant firm would gain exploitable market power, to earn supra-competitive profits.[161] Administrative actions, such as price caps, to combat 'luxury profits' have been held to be rational and legitimate, not amounting to an FET breach.[162]

[107] The airfare caps prevented Caeli from setting prices below the market rate, ensuring conducive market conditions. Further, they ensured Caeli's compliance with the law, while simultaneously not hurting its profitability.[163] CCM's decision was taken to ensure that Claimant did not profit excessively to the detriment of smaller airlines. Hence, the airfare caps did not have an ulterior motive and were not arbitrary.

b. The interim airfare caps imposed pending the Second Investigation were not arbitrary

[108] In December 2016, a consortium of small regional airlines in Greater Narnia, brought a complaint before CCM, regarding Caeli's price undercutting strategies and misuse of privileges it enjoyed at Phenac International.[164] Pursuant to this complaint, CCM registered the Second Investigation.

[109] In 2018, at the end of the First Investigation, CCM found evidence that Caeli was engaging in predatory pricing. CCM decided to keep the interim airfare caps in place pending the Second Investigation.[165] In light of the evidence of anti-competitive behaviour, as well as allegations of misuse of privileges by Caeli, this was a rational

[160] OECD Predatory Pricing, Pg 5.

[161] Ibid.

[162] *AES*, ¶10.3.31.

[163] Statement of Uncontested Facts, Pg 35, ¶37.

[164] Statement of Uncontested Facts, Pg 35, ¶38.

[165] Statement of Uncontested Facts, Pg 37, ¶49.

decision. The misuse of these privileges raised concerns that Caeli would make Phenac International a 'fortress hub'.[166] Hence, this decision was not arbitrary.

c. The imposition of airfare caps on a permanent basis was not arbitrary

[110] In 2019, CCM concluded the Second Investigation, and found that Caeli had indeed abused its dominant position at Phenac International, to arm-twist airport officials into awarding it more concessions.[167] This allowed Caeli to undercut prices and would eventually lead to cutting off competitors. In light of this, CCM decided to continue the caps until Caeli's market share fell below 40%.

[111] Therefore, CCM's decision aimed to remedy the abusive use of the dominant market share by Caeli. Even if the Tribunal finds that CCM incorrectly evaluated factors in the imposition of airfare caps, the presence of a clear motive would mean that the measure was not arbitrary even during the economic crisis.

ii. The airfare caps were not abusive

[112] The imposition and maintenance of airfare caps, even during the economic crisis had lawful grounds in the MRTP Act and a reasonable basis, hence was not abusive.

[113] State measures are abusive when "harm is inflicted upon the investment for improper reasons".[168] Only the absence of a reasonable foundation of the State's decision makes it abusive.[169] There can be no abuse in a regulatory body taking the necessary actions to enforce the law, absent any specific undertaking that it will refrain from doing so.[170]

[114] CCM is empowered under Chapter III Section 4(d) of the MRTP Act to "impose any interim and final remedy it deems just under Mekari law, including fines, the forced sale or assets, or other measures to bring a corporation in line with this Act".[171] Thus, CCM imposed interim and permanent airfare caps on Caeli based on its findings on lawful grounds, hence the airfare caps were not abusive.

[166] Statement of Uncontested Facts, Pg 33, ¶30.

[167] PO3, Pg 86, ¶7.

[168] UNCTAD FET, Pg 83.

[169] *Iurii*, ¶81.

[170] *Lauder*, ¶297.

[171] Annex V, MRTP Act, Chapter III Section 4(d).

C. ALTERNATIVELY, RESPONDENT'S MEASURES ARE JUSTIFIED UNDER THE PROVISION OF RIGHT TO REGULATE UNDER ARTICLE 9.8

[115] Respondent's measures were pursuing legitimate public policy objectives under the Right to Regulate.[172] Hence, these measures do not constitute an actionable breach even if they negatively impacted Claimant's investment.

[116] Right to regulate has been defined as the legal right that allows a State to regulate in derogation of its international commitments, without incurring a duty to compensate.[173] While evaluating a State's measure, a 'margin of appreciation'[174] and a high degree of deference is given to its rationale.[175]

[117] State measures must be legitimate[176] and reasonable.[177] While evaluating legitimacy, tribunals observe that the State measure must address a public interest.[178] Respondent took regulatory measures to curb Claimant's anti-competitive practices and protect consumer interests. This has been enshrined under CEPTA,[179] and hence, was legitimate.

[118] While evaluating reasonableness, tribunals consider if a State measure contributed to fulfilling the purported objective,[180] if it was necessary[181] and proportional.[182]

[119] First, CCM's measures curbed Claimant's predatory pricing strategies which were attempting to push competitors out of the market. Second, the regulatory measures were necessary as Caeli was circumventing the law, to fulfil its anti-competitive goals, and harming consumer interests. Third, the impact on Claimant's enterprise was proportional to the aim sought. When the airfare caps were initially imposed, they did

[172] CEPTA, Art 9.8; CEPTA, Preamble.

[173] Aikaterini Titi (2016), Pg 33.

[174] *Philip Morris*, ¶410.

[175] Caroline Henckels (2014), Pg 311; *SD Myers*, ¶263.

[176] Jonathan Bonnitcha (2014), Pg 163.

[177] *Total SA*, ¶162; Caroline Henckles (2012), Pg 13; Federico Ortino (2017), 87.

[178] *Saluka*, ¶307.

[179] CEPTA, Art 9.8.

[180] Benedict Kingsbury, Stephan Schill (2010), Pg 86.

[181] Federico Ortino (2017), 87.

[182] Ibid, 88.

not hurt Caeli's profitability.[183] Claimant's subsequent financial condition was a result of its own ill-advised business decisions that left them without any financial flexibility[184] during the economic crisis.

[120] Similarly, the government mandate to revert to MON denomination[185], was a legitimate and reasonable measure, to establish credibility in the currency.[186] Therefore, Respondent's regulatory measures fall within its Right to Regulate.

D. RESPONDENT'S DISMISSAL OF CLAIMANT'S APPLICATION FOR SUBSIDY WAS NOT ARBITRARY, DISCRIMINATORY OR VIOLATIVE OF DUE PROCESS

[121] In 2017, Respondent faced a currency crisis causing financial distress to various industries.[187] In September 2018, to alleviate the impact of the economic crisis, Respondent issued Executive Order 9-2018 providing subsidies to the airline industry.[188]

[122] Respondent submits that the dismissal of Claimant's application for subsidy was (i) neither arbitrary, nor discriminatory. Moreover, (ii) the non-communication of the reasons of such dismissal does not violate due process.

i. Respondent's dismissal of Claimant's application was neither arbitrary, nor discriminatory

[123] A decision is not arbitrary as long as the State shows a reasonable policy consideration behind its measures.[189] State conduct is discriminatory when similar cases are treated differently, without reasonable justification.[190] Discrimination arises when entities who are similar in all material respects are treated differently.[191]

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[183] Statement of Uncontested Facts, Pg 35, ¶37.

[184] PO4, Pg 89, ¶5.

[185] Statement of Uncontested Facts, Pg 35, ¶42.

[186] Statement of Uncontested Facts, Pg 35, ¶39.

[187] Ibid.

[188] Statement of Uncontested Facts, Pg 36, ¶46.

[189] *Invesmart*, ¶¶454, 459–60, 462.

[190] *Saluka*, ¶313.

[191] *Total SA*, ¶210; Oppenheim (1992), Pg 378.

[124] Caeli was not 'in a like situation' with the two foreign airlines– StarWings and JetGreen, that received subsidies under Executive Order 9-2018. These airlines were privately owned by holding groups from Arrakis,[192] while Caeli was a State-linked enterprise.

[125] Respondent's justification for this differential was the unique advantages SOEs enjoy.[193] These include favourable legislative or administrative frameworks in their home State,[194] preferential treatment by the Government in the form of lending rates,[195] assurances of protection, and subsidies.[196]

[126] Having limited funds under Executive Order 9-2018,[197] Respondent prioritized private airlines which did not have access to these unique advantages, as well as airlines operating on important domestic routes with less than 5% market share.[198] Respondent's reasonable policy of maximising the utility of these funds factored in the rational link of such advantages and created a rational differentiation.

[127] Moreover, Claimant indeed had access to such advantages, such as recurring subsidies under the Horizon 2020 scheme,[199] a legislative framework– the Airways Infrastructure Rescue Act, which allowed Bonooru to bail out Claimant,[200] as well as alleged assurances from its home State.[201] Thus, Respondent's decision to not assist SOEs such as Claimant with additional subsidies was a reasonable policy and had a justification. Hence, the same was not arbitrary or discriminatory.

[192] Statement of Uncontested Facts, Pg 37, ¶46.

[193] Richard Nielsen (1981), 55; Yingying Wu (2019), 275.

[194] OECD Airline Competition, Pg 11.

[195] Ibid, Pg 35.

[196] Ibid, Pg 37.

[197] Annex VIII, Executive Order 9-2018, Section 3101(a).

[198] PO4, Pg 89, ¶7.

[199] PO4, Pg 89, ¶6.

[200] Statement of Uncontested Facts, Pg 40, ¶65.

[201] Annex VII, Phenac Business Today Podcast Transcript, Line 1875.

ii. Non-conveyance of reasons for dismissal was not a breach of due process

[128] Article 9.9(2)(b)[202] provides protection against a fundamental breach of due process, which includes the obligation of transparency. The use of the qualifier 'fundamental' implies that only serious violations by the State constitute a breach of the FET standard.[203]

[129] Whether a State has been unfair and inequitable by failing to be transparent with respect to its laws and regulations must be assessed in light of all of the factual circumstances surrounding such conduct.[204] A breach of transparency must create ambiguity, by contradicting a previous stance which is prejudicial to the investor in terms of planning its business activity.[205]

[130] In the present dispute, Respondent made no assurances that Claimant would receive financial aid in the form of subsidies. Claimant was informed that its application had been dismissed.[206] Thus, there was no ambiguity that affected Claimant's ability to plan future business activities due to Respondent's decisions. Hence, the non-conveyance of the reasons of the dismissal of Claimant's application was not a fundamental breach of due process.

E. THE CONDUCT OF MEKARI COURTS DOES NOT AMOUNT TO DENIAL OF JUSTICE

[131] In March 2018, Claimant sought a judicial review of the interim airfare caps in the High Court of Mekar. In April 2019, the hearings were conducted for the same. The case was concluded within 14 months of its filing as compared to the 27 months, on average taken by Mekari courts.[207] In his interim decision, Justice VanDuzer dismissed Claimant's appeal on merits, in accordance with Executive Order 5-2014.

[202] CEPTA, Art 9.9(2)(b).

[203] *Cargill*, ¶616; *Glamis*, ¶616; *Eli Lilly*, ¶222–223.

[204] *Micula*, ¶533.

[205] *Tecmed*, ¶172.

[206] Statement of Uncontested Facts, Pg 36, ¶46.

[207] Statement of Uncontested Facts, Pg 30, ¶13.

[132] Further, in February 2020, Respondent submitted a request for arbitration against Claimant at the SCC, to resolve a dispute concerning the sale of Caeli.[208] The arbitrator ruled in favour of Respondent,[209] pursuant to which Claimant appealed to the Supreme Arbitrazh Court of Sinnohgrad and the SCC award was set aside.[210] This was done due to Sinnohgrad's strict public policy on the issue of corruption.[211] However, Mekari courts enforced the SCC award[212] in accordance with Respondent's public policy and the questionable nature of the evidence presented.[213]

[133] Respondent submits that (i) the time taken by Mekari courts to hear Claimant's case; (ii) the dismissal of Claimant's case; and (iii) the enforcement of the set aside SCC award does not amount to denial of justice.

i. The time taken by Mekari courts does not amount to denial of justice

[134] Although undue delay may indicate denial of justice,[214] only conduct that shocks or surprises a sense of judicial propriety has been held to be denial of justice.[215] Proceedings do not become undue just because they exceed a certain period of time.[216]

[135] An assessment of whether a delay constituted denial of justice is highly fact sensitive.[217] Tribunals have laid down several criteria to establish the same including, the need for swiftness,[218] relevance of court congestion,[219] and the behaviour of the courts.[220] This list of requirements must be exhausted to prove undue delay.[221]

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[208] Statement of Uncontested Facts, Pg 39, ¶57.

[209] Statement of Uncontested Facts, Pg 39, ¶58.

[210] Statement of Uncontested Facts, Pg 39, ¶60.

[211] Annex XIII, Supreme Arbitrazh Court of Sinnograd Ruling, ¶12; PO4, Pg 90, ¶8.

[212] Statement of Uncontested Facts, Pg 39, ¶62.

[213] Annex XIV, High Commercial Court of Mekar ruling- 23 August 2020, ¶¶8, 13.

[214] *Azinian*, ¶102.

[215] *ELSI*, ¶128; *Mondev*, ¶127; *Eli Lily*, ¶224.

[216] Alwyn Freeman (1938), Pg 254.

[217] *White Industries*, ¶10.4.10.

[218] *Toto*, ¶¶160-162.

[219] *Chevron I*, ¶250.

[220] Ibid.

[221] *White Industries*, ¶11.3.2.

[136] First, cases which involve the question of human rights violations or criminal charges are considered to be urgent, while commercial matters are less urgent.[222] With an overload of cases owing to the national crisis, the Mekari courts prioritized criminal matters.[223] Claimant's case regarding the removal of the interim airfare caps was a commercial matter, and hence, less urgent.

[137] Second, in cases of an overburdened judiciary, tribunals have found that delays between five to ten years are not undue.[224] Additionally, special circumstances of the court must be considered.[225] Although Respondent is a country with an overburdened judiciary,[226] the Mekari High Court delivered a judgment for Claimant's appeal merely within 14 months. Further, starting late 2016, Respondent found itself amidst an economic crisis,[227] a special circumstance which must be considered.

[138] Third, courts must not act in a way that is prejudiced without a justification.[228] For any delay caused, Claimant was informed about the prioritization of criminal matters over commercial matters.[229] Thus, all the proceedings, even in the context of an economic crisis that was overburdening the judiciary, were well within the typical time frame taken by Mekari courts.

ii. The dismissal of Claimant's appeal was not denial of justice

[139] A swift decision does not suggest that the court failed to conduct it analytically.[230] A mere disagreement with the reasoning or persuasiveness of a judgement does not amount to denial of justice.[231] As long as the courts have sufficient information to deliver a decision swiftly, a 'lack of debate' is not serious enough to amount to denial of justice.[232] The dismissal of an appeal may amount to denial of justice only if such a

[222] *White Industries*, ¶10.4.14.

[223] Statement of Uncontested Facts, Pg 36, ¶44.

[224] *Jan de Nul*, ¶204; *Toto*, ¶160; *White Industries*, ¶¶11.4.9, 11.4.14.

[225] *Toto*, ¶165.

[226] Statement of Uncontested Facts, Pg 30, ¶13.

[227] Statement of Uncontested Facts, Pg 35, ¶39.

[228] Dolzer and Schreuer (2012), Pg 485.

[229] Statement of Uncontested Facts, Pg 36, ¶44.

[230] *Vöcklinghaus*, ¶180.

[231] *Iberdrola (I)*, ¶¶491, 502, 507.

[232] *Krederi*, ¶¶537, 541.

dismissal is unjustified.[233] Such decisions should be given considerable deference.[234] As long as the court acts per a requirement of law, it does not amount to denial of justice.[235]

[140] In this case, Justice VanDuzer, while rendering a decision on a temporary injunction on the airfare caps, considered Claimant's *prima facie* case on merits too.[236] Justice VanDuzer was presented with sufficient relevant information to conclude that Claimant's case would not be successful on merits. Mindful of the scarcity of resources in Respondent State at the time, Justice VanDuzer dismissed Claimant's appeal.[237] The Mekari High Court acted as per the requirements in Executive Order 5-2014, which allows the court to dismiss a case when it finds very little chance of success on merits. Thus, such a dismissal was justified under Mekari law and does not amount to denial of justice.

iii. Enforcement of the set aside SCC Award was not a denial of justice

[141] The objective of the NYC is to facilitate the recognition and enforcement of arbitral awards to the greatest extent possible and to provide a maximum level of control which Contracting States may exert over arbitral awards.[238] Enforcing States have the discretion to recognize and enforce an award and are not obligated to refuse enforcement, even if it has been set aside at the seat of arbitration.[239] For denial of justice to have occurred, Claimant must prove that Respondent's courts failed to take into account their arguments[240] or committed inexcusable mistakes of substantive law prejudicing the investor.[241]

[142] In the present dispute, Respondent's courts enforced SCC Award, in consonance with Respondent's public policy, which requires a high degree of proof for enforcement to

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[233] *Iberdrola (I)*, ¶432.

[234] *Eli Lilly*, ¶224.

[235] *Vöcklinghaus*, ¶180.

[236] Statement of Uncontested Facts, Pg 38, ¶52.

[237] Statement of Uncontested Facts, Pg 38, ¶54.

[238] UNCITRAL Secretariat (2016), Pg 125.

[239] Ibid; Nadia Darwazeh (2010), Pg 301, 307-09; Christoph Liebscher (2012), ¶¶353-356.

[240] *GEA*, ¶319.

[241] *Loewen*, ¶130.

be refused.[242] Both– the NYC[243] and Mekar's Commercial Arbitration Act,[244] provide a discretion to courts for enforcement of an award. Moreover, the evidence presented by Claimant "circumstantial at best"[245] and "inconclusive".[246] Thus, Claimant's evidence failed to meet the high threshold required for a breach of public policy, following which Respondent's courts exercised their discretion to enforce the award. Hence, the enforcement does not violate Respondent's international obligations or domestic law, and does not amount to a denial of justice.

F. RESPONDENT'S MEASURES DO NOT BREACH THE FET STANDARD CUMULATIVELY

[143] Claimant contends that Respondent's measures cumulatively violate the FET standard.[247] The *El Paso* tribunal laid down the concept of a 'creeping' violation of the FET standard– when considered individually, such measures do not violate the FET standard, but when taken together lead to such a result.[248]

[144] However, the reasoning behind such a decision was the "total alteration of the entire legal setup for foreign investments"[249] and the specific guarantees made by Argentina to the claimant that such an alteration would not take place.[250] Similarly, in the case of *LG&E*, the tribunal opined that "completely dismantling the very legal framework constructed to attract investors" was a breach of the FET standard.[251] Thus, the emphasis is on the subversion of the entire legal regime.[252]

[145] Respondent's measures such as the investigation into Claimant's enterprise, the imposition of airfare caps, and the 'MON-ification' of goods and services do not alter the legal framework of Respondent. While the investigation and the airfare caps were specific to Claimant due to its anti-competitive activities, the denomination of services

[242] Annex XIV, High Commercial Court of Mekar ruling- 23 August 2020, ¶9.

[243] NYC, Art 5(1)(e).

[244] Annex XIV, High Commercial Court of Mekar ruling- 23 August 2020, ¶7.

[245] Ibid, ¶10.

[246] Annex XIII, Supreme Arbitrazh Court of Sinnograd Ruling, ¶11.

[247] Notice of Arbitration, ¶12.

[248] *El Paso*, ¶515.

[249] *El Paso*, ¶517.

[250] Ibid.

[251] *LG&E Decision on Liability*, ¶139.

[252] *Blusun*, ¶363.

in MON was the standard practice in Respondent State, and only a temporary variation from the same was provided during the economic crisis.[253] Moreover, Respondent made no guarantees with regard the currency of services or inflation rates while Claimant made its investment in Caeli.

[146] Additionally, in order for a combination of acts of malfeasance to be considered as a composite act, there must be "some link of underlying pattern or purpose between them" in contrast to a "scattered collection of disjointed harms."[254] It is not enough for all actors to be State agencies– the different actions pursued on different paths by different actors must be linked together by a common and coordinated purpose.[255]

[147] Claimant cannot establish a common thread between the different actions of different agencies of Respondent. The investigations undertaken and airfare caps imposed by CCM were a response to the anti-competitive activities of Claimant.[256] The MON-ification of goods and services,[257] and the dismissal of Claimant's application for subsidies were merely regulatory actions by Respondent in the face of the economic crisis.[258] Last, the conduct of Mekari courts was the exercise of judicial discretion vested in them to cope with the backlog,[259] and uphold public policy.[260] There is no common link between these measures, that leads to a common outcome. Respondent's measures did not cause Claimant to sell its investment– that was entirely of its own volition, despite the considerable market share it still enjoyed.[261]

[253] Statement of Uncontested Facts, Pg 35, ¶40.

[254] *Rompetrol*, ¶271.

[255] Ibid, ¶273.

[256] Statement of Uncontested Facts, Pg 34, ¶36.

[257] Statement of Uncontested Facts, Pg 35, ¶40.

[258] Statement of Uncontested Facts, Pg 36-37, ¶46.

[259] Statement of Uncontested Facts, Pg 38, ¶54.

[260] Annex XIV, High Commercial Court of Mekar ruling- 23 August 2020, ¶8.

[261] Statement of Uncontested Facts, Pg 38, ¶56.

IV. IF RESPONDENT HAS VIOLATED ARTICLE 9.9 OF CEPTA, CLAIMANT IS ENTITLED TO ONLY MARKET VALUE COMPENSATION IN ACCORDANCE WITH ARTICLE 9.21, WHICH HAS ALREADY BEEN PAID

[148] In the remote possibility that this Tribunal finds that Respondent has breached Article 9.9 of CEPTA, Claimant seeks a compensation for an additional US$ 700 million. To arrive to this amount, Claimant alleges that it is entitled to FMV standard borrowed from Article 13 of the Arrakis-Mekar BIT. Yet, compensation must be evaluated only in accordance with Article 9.21 of CEPTA.

[149] Respondent acknowledges that various tribunals have accorded FMV standard of compensation in cases of FET violations.[262] However, in those cases, tribunals turned to the principles of IL to accord FMV, only due to the silence of the governing treaty on the standard of compensation.[263] Provisions of IL do not apply in the presence of a *lex specialis* provision in the treaty.[264]

[150] Here, CEPTA lays down an express provision to award compensation in cases of breaches of FET. Therefore, principles of IL would not apply to the present case, and the Tribunal must award compensation in accordance with MV standard of compensation, as provided in Article 9.21 of CEPTA.

[151] This Tribunal should not grant Claimants' request for compensation because (A) the MFN clause contained in Article 9.7 of CEPTA does not allow Claimant to depart from Article 9.21 of CEPTA. Additionally, (B) Respondent has already paid compensation in accordance with MV standard to Claimant.

[152] Alternatively, (C) in case the Tribunal deems any further compensation necessary, mitigatory factors such as Claimant's contributory fault, and Respondent's economic condition must be taken into account.

[262] *CMS*, ¶410; *Enron*, ¶363; *Vivendi (I)*, ¶8.2.11; *Azurix*, ¶424; *MTD*, ¶238; *Rumeli*, ¶792; *Duke Energy*, ¶¶467-468; *LG&E*, ¶31.

[263] *CMS*, ¶409; *Enron*, ¶359; *Vivendi (I)*, ¶8.2.3; *Azurix*, ¶419; *MTD*, ¶238; *Rumeli*, ¶789; *Duke Energy*, ¶469; *LG&E*, ¶30.

[264] ARSIWA, Art 55; *ADM*, ¶116.

A. THE MOST FAVOURED NATION CLAUSE DOES NOT ALLOW CLAIMANT TO DEPART FROM ARTICLE 9.21 OF CEPTA

[153] Article 9.7 of CEPTA provides that Respondent accord "treatment no less favourable than the treatment it accords in like situations, to investors of a third country and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory".[265]

[154] In order to import a provision from another treaty using the MFN clause, the claimant must demonstrate that more favourable treatment was accorded to investments that were 'in a like situation' to the claimant, on a subject matter that falls within the scope of the MFN clause.[266]

[155] Respondent submits that (i) Claimant has failed to draw a comparison between investors 'in like situations', and (ii) compensation is outside the scope of Article 9.7 of CEPTA.

i. Claimant has failed to draw a comparison between investors 'in like situations'

[156] Investors bear the burden of establishing that their investments are 'in like situation' with an identified comparator(s).[267] A *de facto* examination of the contextual situation of investors of the home State and of the third State is necessary to determine whether the treatment can be said to be less favourable.[268] Merely territorial similarities, i.e., investment in the same State by two investors of separate nationalities does not fulfil the requirement of 'in like situations'.[269] The tribunal in *Bayinder* noted that in the absence of any "sufficiently specific data" about the comparator, it was in no position to make any meaningful comparison, and thus, the test of 'likeness' is not met.[270]

[157] Claimant fails to establish that it is 'in like situations' with Arrakis investors. The mere fact that Arrakis investors have invested in the same State does not place those investors

[265] CEPTA, Art 9.7.

[266] Campbell McLachlan (2017), ¶7.305.

[267] *Total SA Decision On Liability*, ¶217; *UPS*, ¶84; *Thunderbird*, ¶¶175-176; *Methanex*, ¶12.

[268] *İçkale*, ¶329.

[269] Ibid.

[270] *Bayindir*, ¶417.

'in like situations' as Claimant. The scope of 'in like situations', as provided in Article 9.7 cannot be limited to just territorial similarities between Claimant and investors from Arrakis.

ii. Compensation is outside the scope of Article 9.7

[158] The interpretation and use of an MFN clause must be in accordance with the limited scope given to the clause, as well as the intention of the contracting parties.[271] Respondent submits that the subject of the 'standard of compensation' falls outside the scope of Article 9.7 since the clause has a limited scope. Moreover, the intention of the parties was to keep compensation out of the scope of Article 9.7.

[159] First, an MFN clause can only attract matters belonging to the same category of subject as that to which the clause itself relates.[272] This principle, known as the *ejusdem generis* principle, is also reiterated by the ILC Articles on MFN which state that an MFN clause only applies if the granting State extends benefits within the subject matter of the clause to a third State.[273] The purpose of this rule is to prevent an investor from extending the obligations of the State, to matters the State did not contemplate.[274]

[160] The subject matter of Article 9.7 of CEPTA is limited to "establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of investments". The matter of 'compensation' is not included in the exhaustive list of subject matters included in Article 9.7, and thus, falls outside the scope of the MFN treatment.

[161] Second, it is necessary to adjudge the intention of the parties while determining the scope of the MFN clause.[275] The express choice of the standard of compensation cannot be made a subject to the MFN clause.[276]

[162] The intention of Respondent State while negotiating CEPTA as a replacement to the 1994 Bonooru-Mekar BIT was to balance the rights of the investors and the State,

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[271] *Wintershall*, ¶162.

[272] *Ambatielos*, Pg 107.

[273] ILC MFN, Art 10.

[274] *Christian*, ¶217.

[275] *Wintershall*, ¶162.

[276] *CME*, ¶¶11-12.

especially with regards to compensation.[277] Thus, while the MFN clause encompassed in the 1994 Bonooru-Mekar BIT was applicable to all subject matters,[278] CEPTA narrowed the scope of the MFN clause to limited subject matters– compensation is not a part of those.

[163] Moreover, the contracting States to CEPTA expressly chose MV standard of compensation instead of FMV, for damages other than expropriation, to ensure that Respondent did not pay exorbitant sums of compensation to investors, in cases of breaches of CEPTA.[279] Such an express choice of standard of compensation cannot be derogated from, using the MFN clause.

[164] Thus, Claimant cannot rely on Article 9.7 to import FMV standard of compensation, since the subject of compensation does not fall within its scope, in accordance with the principle of *ejusdem generis*, as well as the intention of the parties.

B. RESPONDENT HAS ALREADY PAID SUCH COMPENSATION TO CLAIMANT

[165] Claimant is entitled to MV compensation as per Article 9.21 of CEPTA, amounting to US$ 400 million. During the purchase of Claimant's stake in Caeli, Respondent has already paid the same.

[166] Market value is the price at which an asset will trade in a competitive setting.[280] Factors in economic circumstances affecting the business including situations of distress and economic crisis are considered to calculate MV.[281]

[167] Due to Claimant's inability to procure a *bona fide*, arms-length buyer for its investment, Respondent purchased the same at the MV rate.[282] The MV of Claimant's stake in Caeli factored in the currency crisis in Respondent State, and quantified the same to be equivalent to US$ 400 million. Thus, MV of Claimant's investment has already been paid, and no further payment is owed.

[277] PO3, Pg 87, ¶15.

[278] 1994 Bonooru Mekar BIT, Art 3.

[279] PO3, Pg 87, ¶15.

[280] Herfried Wöss (2014), Pg 260, ¶6.40.

[281] Herfried Wöss, Adriana San Román Rivera (2021), ¶17.38.

[282] Statement of Uncontested Facts, Pg 40, ¶63.

C. COMPENSATION MUST BE REDUCED DUE TO THE MITIGATORY FACTORS

[168] Any compensation awarded by the Tribunal must consider that: (i) Claimant contributed to its own losses, and (ii) Respondent is in an economically distressing situation.

i. Claimant contributed to its own losses

[169] As per principles of IL,[283] case law[284] and commentaries[285], a claimant's wilful or negligent conduct that has materially contributed to the injury caused by an internationally wrongful act should be taken into account, and damages must be appropriately reduced.

[170] Respondent submits that BITs are not "insurance policies against bad business judgements"[286] and "claimants should bear the consequences of their own actions as experienced businessmen".[287] Damages must be proportionately reduced when the claimant made decisions that increased their risks of losses, and such a claimant must bear the responsibility of such decisions.[288] Additionally, in *Occidental*, the tribunal opined that "the claimants should pay a price for having committed an unlawful act which contributed in a material way to the prejudice which they subsequently suffered (…)".[289]

[171] Respondent submits that Claimant bears responsibility for the losses it incurred. Claimant undertook risky business strategies of rapid expansion, even after repeated warnings.[290] In 2014, when Caeli earned profits due to the crashing oil prices, representatives of Respondent advised Claimant to inject these profits into financial

[283] ARSIWA, Art 39.

[284] *MTD*, ¶¶242-243; *Gemplus*, ¶11.12; *RosInvest*, ¶635; *Maffezini*, ¶64; *Occidental*, ¶662.

[285] AK Bjorklund (2009), 446–447; JF Merizalde Urdaneta (2015), Pg 306; Borzu Sabahi (2011), Pg 175-176; James Crawford (2003), Pg 240.

[286] *Maffezini*, ¶64.

[287] *MTD*, ¶243.

[288] Ibid, ¶242.

[289] *Occidental*, ¶873.

[290] Statement of Uncontested Facts, Pg 33, 34, ¶¶29, 31, 35.

stability.[291] However, Claimant continued their rapid expansion, despite knowledge of the possibility of oil prices rising.[292]

[172] Moreover, Claimant's business model was based on anti-competitive actions like predatory pricing, pushing competition out of the market, and coercing Phenac International to grant them more concessions.[293] These unlawful measures must be factored in, in the calculation of compensation. Similarly, the consequences of Claimant's ill-advised decisions to expand, given the volatility of the airline industry, and oil prices, must be their own to bear.

ii. Respondent is an economically distressing situation

[173] Tribunals have considered the economic crises in States while awarding compensation.[294] Huge awards of compensation would require large diversions of national resources from the paying country– and its citizens needing healthcare, education and other public services.[295]

[174] In 2016, Respondent faced a currency collapse.[296] Still recovering from the financial instability caused, Respondent does not have the resources to pay the enormous sum of compensation demanded by Claimant. Payment of US$ 700 million would require Respondent to transfer twice the country's consolidated annual public spending.[297] Therefore, any compensation awarded must be reduced on account of Claimant's contribution, and Respondent's economic condition.

[291] Statement of Uncontested Facts, Pg 34, ¶35.

[292] Statement of Uncontested Facts, Pg 33, ¶33, Footnote 2.

[293] Statement of Uncontested Facts, Pg 36, 37, ¶¶45, 49.

[294] *Sempra*, ¶417; *LG&E Decision on Liability*, ¶139.

[295] *Eritrea Ethiopia*, ¶21.

[296] Statement of Uncontested Facts, Pg 37, ¶39.

[297] PO3, Pg 86, ¶4.

PRAYERS FOR RELIEF

[175] For the foregoing reasons, Respondent respectfully requests this Tribunal to:

A. FIND that the Tribunal does not have jurisdiction over this dispute;

B. ALLOW the *amicus* submission by the external advisors to CRPU, and bar the *amicus* submission of CBFI;

C. FIND that Respondent treated Claimant fairly and equitably, and thereby fulfilled its obligations under Article 9.9 of CEPTA;

D. AWARD Claimant no further compensation since Respondent has already purchased Claimant's investment at market value.

Submitted by,

Ms. Meagan Vestby

Ms. Aglaya Melnik,

Team Herczegh,

On behalf of the Federal Republic of Mekar.

(23 September, 2021).