TEAM KOO

INTERNATIONAL CENTRE

FOR SETTLEMENT OF INVESTMENT DISPUTES

VEMMA HOLDINGS INC.

(CLAIMANT)

v.

FEDERAL REPUBLIC OF MEKAR

(RESPONDENT)

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

MEMORIAL FOR RESPONDENT

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LIST OF ABBREVIATIONS

§/§§	paragraph/paragraphs
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Award	Arbitral award of 9 May 2020 ruled by Mr. Cavannaugh in favor of Mekar Airservices
BIT	Bilateral investment treaty
Caeli	Caeli Airways
CAA	Mekari Commercial Arbitration Act
CCM	Competition Commission of Mekar
CILS	Centre for Integrity in Legal Services
CLAIMANT	Vemma Holdings Inc.
CBFI	Consortium of Bonoori Foreign Investors
EACRPU	External advisors to the Committee on Reform on Public Utilities
ECCHR	European Center for Constitutional and Human Rights
FET	Fair and equitable treatment
FMV	Fair market value
ICJ	International Court of Justice
MFN	Most favored nation
MON	Mekari currency

Monopoly Act	Monopoly and Restrictive Trade Practice Act
MoA	Memorandum of Association of Vemma Holdings Inc.
MV	Market value
Order	Mekari Executive Order 9-2018
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
Record	Problem of Foreign Direct Investment International Arbitration Moot 2021
RESPONDENT	The Federal Republic of Mekar
Shareholders' Agreement	Shareholders' Agreement of Caeli Airways
SOE	State-owned enterprise
UN	United Nations
USD	United States dollar

LIST OF AUTHORITIES

Abbreviation	Citation
INVESTMENT ARBITRAL AWARDS and DECISIONS	
Abengoa	Abengoa S.A. y COFIDES S.A. *v.* Mexico, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013
AES	AES Summit Generation Limited and AES-Tisza Erömü Kft *v.* Hungary, ICSID Case No. ARB/07/22, Award, 23 September 2010
Apotex	Apotex Inc. *v.* USA, UNCITRAL, Procedural Order No.2 on the Participation of a Non-disputing Party, 11 October 2011
Azinian	Robert Azinian, Kenneth Davitian, & Ellen Baca *v.* Mexico, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999
Azurix	Azurix Corp. *v.* Argentina, ICSID Case No. ARB/01/12, Award, 14 July 2006
Bear	Bear Creek Mining Corporation *v.* Peru, ICSID Case No. ARB/14/21, Procedural Order No. 5, 21 July 2016

Bernhard	Bernhard von Pezold and others *v.* Republic of Zimbabwe and Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited *v.* Zimbabwe, ICSID Case No. ARB/10/15 and ICSID Case No. ARB/10/25, Procedural Order NO. 2, 26 June 2012
BG Group	BG Group Plc. *v.* Argentina, UNCITRAL, Final Award, 24 December 2007
Biloune	Antoine Biloune and Marine Drive Complex Ltd. *v.* Ghana, UNCITRAL, Award on Damages and Costs, 30 July 1990
BUCG	Beijing Urban Construction Group Co. Ltd. *v.* Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017
CME (Partial Award)	CME Czech Republic B.V. *v.* The Czech Republic UNCITRAL, Partial award, 13 September 2001
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ConocoPhillips	ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. *v.* Venezuela, ICSID Case No. ARB/07/30, Award of the Tribunal, 8 March 2019
Consortium RFCC	Consortium RFCC *v.* Maroc, ICSID Case No. ARB/00/6, Decision on Jurisdiction, 16 July 2001
Copper Mesa	Copper Mesa Mining Corporation *v.* Ecuador, UNCITRAL, Award, 15 March 2016
CSOB	Ceskoslovenska Obchodni Banka, A.S. *v.* Slovakia, ICSID Case No. ARB/97/4, Decision of the Tribunal on Respondent's Further and Partial Objection to Jurisdiction, 1 December 2000
Eco	Eco Oro Minerals Corp. *v.* Colombia, ICSID Case No. ARB/16/41, Procedural Order No. 6, 18 February 2019
EDF	EDF (Services) Limited *v.* Romania, ICSID Case No. ARB/05/13, Award, 8 October 2009

El Paso	El Paso Energy International Company *v.* Argentina, ICSID Case No. ARB/03/15, Award, 31 October 2011
Enron (Award)	Enron Corporation and Ponderosa Assets, L.P. *v.* Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007
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Eskosol	Eskosol S.p.A. in liquidazione *v.* Italy, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019
Feldman	Marvin Roy Feldman Karpa *v.* Mexico, ICSID Case No. ARB(AF)/99/1), Award, 16 December 2002
Flughafen	Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. *v.* Venezuela, ICSID Case No. ARB/10/19, Award, 18 November 2014
Frontier Petroleum	Frontier Petroleum Services Ltd. *v.* The Czech Republic, UNCITRAL, Final Award,

	12 November 2010
Gabriel	Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd. *v.* Romania, ICSID Case No. ARB/15/31, Procedural Order No.19, 7 December 2018
Gami	Gami Investments Inc. *v.* Mexico, UNCITRAL, Final Award, 15 November 2004
Gavrilović	Georg Gavrilović and Gavrilović d.o.o. *v.* Croatia, ICSID Case No. ARB/12/39, Award, 25 July 2018
Genin	Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil *v.* Estonia, ICSID Case No. ARB/99/2, Award, 25 June 2001
Heemsen	Enrique Heemsen and Jorge Heemsen *v.* Venezuela, PCA Case No. 2017-18, Decision on Jurisdiction, 29 October 2019
HICEE	HICEE B.V. *v.* Slovakia, UNCITRAL, Partial Award, 2 May 2011
Iberdrola	Iberdrola Energía S.A. *v.* Guatemala (I), ICSID Case No. ARB/09/5, Award,

	17 August 2012
ICS	ICS Inspection and Control Services Limited v. The Argentine Republic (I) PCA Case No. 2010-09, Award on Jurisdiction 10 February 2012
Inceysa	Inceysa Vallisoletana S.L. *v.* El Salvador, ICSID Case No. ARB/03/26, Award, 2 August 2006
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Jan de Nul	Jan de Nul N.V. and Dredging International N.V. *v.* Egypt, ICSID Case No. ARB/04/13, Award,

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LG&E	LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. *v.* Argentina, ICSID Case No. ARB/02/1, Award, 25 July 2005
Maffezini	Emilio Agustín Maffezini *v.* Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000
Mamidoil	Mamidoil Jetoil Greek Petroleum Products *v.* Albania, ICSID Case No ARB/11/24, Award, 30 March 2015

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Masdar	Masdar Solar & Wind Cooperatief U.A. *v.* Spain, ICSID Case No. ARB/14/1, Award, 16 May 2018
MTD (Award)	MTD Equity Sdn. Bhd. and MTD Chile S.A. *v.* Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004
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Nelson	Joshua Dean Nelson and Jorge Blanco *v.* Mexico, ICSID Case No. UNCT/17/1, Award of the Tribunal, 5 June 2020
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TECO	TECO Guatemala Holdings, LLC *v.* Guatemala, ICSID Case No. ARB/10/23, Award, 19 December 2013

Thunderbird	International Thunderbird Gaming Corporation *v.* Mexico, UNCITRAL, Arbitral Award, 26 January 2006
Total	Total S.A. *v.* Argentina, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010
UPS (Award)	United Parcel Service of America Inc *v.* Canada, ICSID Case No. UNCT/02/1, Award on the Merits, 24 May 2007
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Yukos	Yukos Universal limited (Isle of Man) *v.* Russia, UNCITRAL, Award, 18 July 2014
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Commentary to ARSIWA	Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001
Draft Articles on MFN	Draft Articles on most-favoured-nation clauses with commentaries 1978
OECD	Organisation for Economic Co-operation and Development Fair and Equitable Treatment Standard in International Investment Law OECD, 2004
OECD I	Organisation for Economic Co-operation and Development State Support to the Air Transport Sector: Monitoring developments related to the Covid-19 crisis OECD, 2021

UCIHL	University Centre for International Humanitarian Law Expert meeting on private military contractors: status and state responsibility for their actions 2005
UNCTAD (FET)	United Nations Conference on Trade and Development Fair and equitable treatment UNCTAD Series on Issues in International Investment Agreements II, 2012
UNCTAD (National Security)	United Nations Conference on Trade and Development The Protection of National Security in IIA UNCTAD Series on International Investment Policies for Development, 2009
UNCITRAL (Recommendation)	UNCITRAL Recommendation regarding the interpretation of Article II, paragraph 2, and Article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 7 July 2006

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Abbreviation	Citation
AIRA	Airways Infrastructure Rescue Act
Argentina-Qatar BIT	The Reciprocal Promotion and Protection of Investments between the Argentine Republic and the State of Qatar (6 November 2016)
Arrakis-Mekar BIT	Treaty between the Federal Republic of Mekar and the Kingdom of Arrakis for the Promotion and Protection of Investments (16 January 2006)
Australia-China FTA	Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China (17 June 2015)
Benin-Canada BIT	Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments (9 January 2013)
Bonooru-Mekar BIT	Treaty between the Federal Republic of Mekar and the Commonwealth of Bonooru for the Promotion and Protection of Investments (24 August 1994)
CEPTA	Comprehensive Economic Partnership and Trade Agreement between the Commonwealth of Bonooru and the Federal Republic of Mekar (15 October 2014)
Constitution	Constitution Act of Bonooru (1947)
ICSID AFR	ICSID Additional Facility Rules (as revised on 10 April 2006)
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States (14 October 1966)

Japan-Kenya BIT	Agreement between the Government of Japan and the Government of the Republic of Kenya for the promotion and protection of investment (28 August 2016)
NAFTA	North American Free Trade Agreement (17 December 1992)
Panama-United Kingdom BIT	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Panama for the Promotion and Protection of Investments (7 October 1983)
TPP	Trans-Pacific Partnership Agreement (4 February 2016)
UNCITRAL Rules 1976	Arbitration Rules of the United Nations Commission on International Trade Law (1976)
US Model BIT	Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment (2012)
VCLT	Vienna Convention on the Law of Treaties (23 May 1969)

STATEMENT OF FACTS

PARTIES TO THE DISPUTE

1. CLAIMANT is Vemma Holdings Inc., an airline holding company incorporated in the Commonwealth of Bonooru.

2. RESPONDENT is the Federal Republic of Mekar.

CLAIMANT

3. From 1984, date of CLAIMANT's incorporation, till March 2021, Bonooru enjoyed minority shareholding in CLAIMANT which ranged between 31% to 38%.

4. On 2 March 2021, Bonooru increased its shareholding in CLAIMANT to 55%, replaced CLAIMANT's board of directors with government functionaries, and included paramilitary activities in its functions.

CLAIMANT'S INVESTMENT

5. On 5 January 2011, CLAIMANT's bid to buy an 85% stake in Caeli at USD 800 million was accepted.

6. On 5 March 2011, the CCM approved CLAIMANT's acquisition of the stake and Caeli's participation in the Moon Alliance conditioning it with Caeli's undertaking not to engage in high-level cooperation with other members of the Moon Alliance. Remaining 15% stake in Caeli belonged to Mekar Airservices.

7. Under the Shareholders' Agreement, Mekar Airservices enjoyed the right of first refusal in case of sale of CLAIMANT's stocks.

THE CEPTA

8. On 15 October 2014, Mekar and Bonooru entered the CEPTA, and the pre-existing BIT between the states was terminated.

THE CCM'S INVESTIGATIONS AGAINST CAELI

9. In September 2016, CLAIMANT's predatory pricing strategy forced the CCM to start the first investigation on its own motion. The CCM placed caps on Caeli's airfare as an interim measure to prevent it from earning supra-competitive profits to which Caeli did not object.

10. By the end of August 2018, the first investigation was concluded and the CCM imposed a MON 150 million fine on Caeli which Caeli never challenged.

11. In December 2016, consortium of small regional airlines brought a complaint to the CCM claiming that they were being pushed from the market by Caeli. The CCM commenced the second investigation against Caeli and prolonged the caps.

12. The second investigation resulted in imposition of a MON 200 million fine which Caeli never challenged.

THE CURRENCY CRISIS IN MEKAR

13. In October 2017, due to the currency crisis, Mekar approved denomination of airfare in USD for all airlines in Mekar.

14. In 2018, due to increased instability of MON, Mekari government required companies to denominate their airfares exclusively in MON.

15. To alleviate concerns in airline industry, Mekar passed the Order granting subsidies to airlines that suffered from economic crisis. Considering CLAIMANT's benefits from Bonoori "Horizon 2020" program, Caeli was denied subsidies. The subsidies were granted to smaller private airlines operating at important domestic routes.

16. In March 2018, Caeli filed a claim against the CCM seeking to remove the airfare caps. On 15 June 2019, the Mekari court declined Caeli's request.

ARBITRATION PROCEEDINGS BETWEEN CLAIMANT AND MEKAR AIRSERVICES

17. In 2019, CLAIMANT tried to sell its stake to Hawthorne Group for USD 600 million. Mekar Airservices rejected CLAIMANT's offer to buy its stake under the right of first refusal as it was not at an arm's length commercial price.

18. On 11 February 2020, Mekar Airservices filed a request for arbitration with the SCC claiming that Hawthorne Group's offer was invalid.

19. The SCC appointed a sole arbitrator Mr. Cavanaugh who issued an award in favor of Mekar Airservices on 9 May 2020.

20. On 14 June 2020, the CILS issued a report alleging that Mekar Airservices bribed Mr. Cavannaugh to render the Award in its favor. The CILS is recognized in Mekar as a foreign agent and its activities are illicit under the Mekari Law.

21. On 1 August 2020, the Supreme Arbitrazh Court of Sinnograd set aside the Award based on the CILS report.

22. On 23 August 2020, the High Commercial Court of Mekar enforced the Award upon the request of Mekar Airservices as it found no sufficient evidence of corruption. CLAIMANT's appeal to this decision at the Superior Court of Mekar was dismissed.

23. CLAIMANT did not receive other offers and thus sold the stake in Caeli to Mekar Airservices on 8 October 2020 for USD 400 million.

ARBITRATION

24. On 15 November 2020, CLAIMANT filed the Notice of Arbitration against RESPONDENT.

25. CLAIMANT requested compensation in the amount of USD 1.1 billion at a FMV.

AMICI CURIAE

26. After the Tribunal welcomed *amici curiae* submissions, it received two applications.

27. The EACRPU, members of Mekari civil society with a professional focus on investment banking, prepared an *amici curiae* submission with information on bribery involved in the process of acquisition of the stake in Caeli by CLAIMANT.

28. The CBFI, an entity representing Bonoori investors, prepared an *amicus curiae* submission with some general information on business climate, the existing corporate framework, and aviation industry in Bonooru. The CBFI includes CLAIMANT, CLAIMANT's advisor on funding strategies, and two other entities currently pursuing claims against RESPONDENT among its members.

SUMMARY OF ARGUMENTS

JURISDICTION. The Tribunal shall decline jurisdiction over the present dispute. First, CLAIMANT is not an "*Investor*" within the meaning of Article 9.1 of the CEPTA, as the context of the CEPTA excludes SOEs from the scope of the investor's protection and the antecedent Bonooru-Mekar BIT confirms such interpretation. Second, CLAIMANT is not a "*national of another State*" withing the meaning of Article 2 of the ICSID AFR under the *Broches* test due to it being Bonoori agent and exercising governmental functions of Bonooru.

AMICUS CURIAE SUBMISSIONS. The Tribunal shall grant a leave for filing only to the *amici* submission by the EACRPU. First, the CBFI is not independent while its *amicus* submission does not assist the Tribunal and unfairly prejudices RESPONDENT. Second, *amici* submission by the EACRPU exceeds the scope of the dispute but should be granted an exceptional leave, and the EACRPU have a significant interest in the present arbitral proceedings.

VIOLATION OF THE FET STANDARD. The Tribunal shall find that RESPONDENT accorded FET to CLAIMANT's investment under Article 9.9 of the CEPTA. First, RESPONDENT initiated anti-competitive investigations in due process to protect Mekari consumers. Second, RESPONDENT did not frustrate CLAIMANT's legitimate expectations as it did not make any specific representations to CLAIMANT. Third, RESPONDENT's actions were non-arbitrary and pursued a legitimate public policy objective. Fourth, RESPONDENT did not discriminate CLAIMANT. Fifth, RESPONDENT did not deny CLAIMANT justice as the duration of proceedings in Mekari courts was reasonable and the Award was properly enforced. Lastly, RESPONDENT did not coerce CLAIMANT to sell its investment. Additionally, the Tribunal shall not assess actions of RESPONDENT cumulatively as they did not have a connecting objective.

COMPENSATION STANDARD. The Tribunal shall not award the compensation in the amount claimed by CLAIMANT. As Article 9.21 of the CEPTA includes the MV standard for compensation, RESPONDENT has already paid the MV of the investment. Moreover, Article 9.7 of the CEPTA does not allow to apply the FMV standard from the Arrakis-Mekar BIT. Alternatively, the compensation should be reduced because CLAIMANT's actions contributed to its losses, and dire financial situation of RESPONDENT will result in crippling compensation.

ARGUMENTS

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

1. To determine whether CLAIMANT as a SOE has standing in the investment arbitration, the Tribunal shall analyze whether CLAIMANT meets the requirements of the appropriate investment treaty and the applicable arbitration rules.[1]

2. RESPONDENT respectfully requests this Tribunal to decline jurisdiction over the present dispute since CLAIMANT does not satisfy *ratione personae* requirements of both the CEPTA and the ICSID AFR. First, (**A**) CLAIMANT is not an "*Investor*" within the meaning of Article 9.1 of the CEPTA. Second, (**B**) CLAIMANT is not a "*national of another State*" within the meaning of Article 2 of the ICSID AFR.

A. CLAIMANT IS NOT AN "*INVESTOR*" WITHIN THE MEANING OF ARTICLE 9.1 OF THE CEPTA

3. CLAIMANT as a SOE is not covered by the definition of "*Investor*" in Article 9.1 of the CEPTA.

4. According to Article 9.1 of the CEPTA, an "*Investor*" means "*an **enterprise** with the nationality of a Party or seated in the territory of a Party…*" [emphasis added] that made an investment "*in the territory of the other Party*". In turn, an "*enterprise*" means "*an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party*".

5. CLAIMANT may allege that since the CEPTA defines the "*Investor*" through the term "*enterprise*" which is broadly understood in the CEPTA, it covers SOEs. However, it is true only unless the investment treaty "*states something to the contrary*".[2]

6. RESPONDENT submits that (**1**) the term "*Investor*" in Article 9.1 of the CEPTA does not include SOEs based on the context of the CEPTA and (**2**) the antecedent Bonooru-Mekar BIT confirms such implicit exclusion.

[1] Blyschak, pp. 3, 18, 26; Nalbandian, pp. 12-13.
[2] UNCTAD (National Security), p. 43.

1. The term "*Investor*" in Article 9.1 of the CEPTA does not include SOEs

7. CLAIMANT may file treaty claims only if it acts as a subrogee under Article 9.15 of the CEPTA and not as an "*Investor*" under Article 9.1 of the CEPTA.

8. Unlike other investment treaties, the CEPTA neither explicitly covers SOEs[3] nor excludes them[4] in the definition of investor. The lack of such references shall not be considered as a presumption in favor of jurisdiction *ratione personae* in the present dispute since "*any analysis of jurisdiction must be made with meticulous care*"[5], "*even-handedly and objectively*".[6] Accordingly, RESPONDENT invites the Tribunal to apply the VCLT rules to interpret Article 9.1 of the CEPTA.

9. According to Article 31(1) of the VCLT, to which both Bonooru and Mekar are parties,[7]

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their **context** and in the light of its object and purpose. [emphasis added]

10. The meaning of the treaty terms cannot be determined without considering the entire treaty text including other articles.[8]

11. Presence of a subrogation clause in the treaty is considered as one of the factors implying exclusion of sovereign actors including SOEs from the definition of investor if the latter is silent on their inclusion.[9] If the investment treaty extends subrogation rights to such actors, it suggests that where the state parties intended to provide standing to sovereign actors, they did so expressly.[10]

12. According to Article 9.15(1) of the CEPTA,

> Where a Party or an **agency authorised by a Party** has granted an indemnity, a guarantee or a contract of insurance against non-commercial risks with regard to an investment by one of its investors in the territory of the other Party and when payment has been made under this indemnity, guarantee or contract of insurance by the former Party or the agency authorised by it, **the latter Party shall recognise the rights of** the former Party or **the agency authorised by the**

[3] Australia-China FTA, Articles 9.1(b) and 9.1(e); Argentina-Qatar BIT, Article 1(1)(b); Benin-Canada BIT, Article 1; Japan-Kenya BIT, Articles 1(b)(ii), 1(d); TPP, Articles 1.3 and 9.1; US Model BIT, Article 1.
[4] Panama-United Kingdom BIT, Article 1(d)(i).
[5] *Inceysa*, §176.
[6] *RosInvest*, §44.
[7] Record, p. 40, l. 1415.
[8] Dörr/Schmalenbach, p. 543, §45; Villiger, p. 427, §10.
[9] Blyschak, p. 23; McLaughlin, p. 610.
[10] *Ibid.*

> **former Party** by virtue of the principle of subrogation to the rights of the investor. [emphasis added]

13. It means that the CEPTA allows indemnifying parties, namely the state party and its designated "*agency*", to pursue arbitration against the other state in limited cases which are specifically named.

14. Although Article 9.15(1) of the CEPTA does not provide definition of a term "*agency*", it shall be interpreted "*not in structural terms but functionally*".[11] The entity qualifies as "*agency*" when "*it performs public functions*"[12] on behalf of the state while its corporate status, whether a company or a state organ, is irrelevant.[13]

15. As CLAIMANT has been exercising public functions on behalf of Bonooru in the aviation sector from the date of its creation and has been recently empowered for execution of paramilitary activity,[14] it shall be considered as the "*agency*" for the purposes of Article 9.15(1) of the CEPTA.

16. Hence, CLAIMANT can file claims under the CEPTA only as a subrogee under Article 9.15 of the CEPTA and not as an "*Investor*" under Article 9.1 of the CEPTA.

2. Antecedent Bonooru-Mekar BIT confirms implicit exclusion of SOEs from the definition of "*Investor*" in Article 9.1 of the CEPTA

17. The prior Bonooru-Mekar BIT which expressly covered SOEs as investors shall be interpreted in favor of their subsequent exclusion from the CEPTA.

18. Article 32 of the VCLT recognizes the use of supplementary means of interpretation *"in order to confirm the meaning resulting from the application of article 31*".

19. A list of supplementary means of interpretation is non-exhaustive.[15] Therefore, the Tribunal may refer to any means of interpretation which can "*reasonably*" assist in establishing the meaning of the treaty.[16]

20. Antecedent treaty can be used as the supplementary means of interpretation of the superseding treaty.[17] In *Pope&Talbot*, the tribunal referred to prior BITs to interpret

[11] Schreuer I, p. 153, §243.
[12] *Ibid.*
[13] *Ibid.*
[14] Memorial for RESPONDENT, §§43-48.
[15] *Enron (Decision on Jurisdiction)*, §32; *HICEE*, §117; Dörr/Schmalenbach, p. 580, §24; Villiger, p. 445, §2.
[16] Dörr/Schmalenbach, p. 581, §26.
[17] Weeramantry, p. 128, §5.35.

Article 1105 of NAFTA.[18] Similarly, in the *Legality of the Use of Force* and the *La Grand* cases, the ICJ examined the PCIJ Statute and its drafting history in order to interpret Articles 35(2) and 41 of the ICJ Statute.[19]

21. In light of the foregoing, RESPONDENT invites the Tribunal to examine Article I of the Bonooru-Mekar BIT in order to confirm the meaning of "*Investor*" in Article 9.1 of the CEPTA resulting from above application of Article 31 of the VCLT.

22. Article I(d) of the Bonooru-Mekar BIT defined "*investor*" through a term "*enterprise*", as well as Article 9.1 of the CEPTA. However, it directly mentioned "*any entity…whether privately-owned or* ***government-owned***" [emphasis added] within the definition of "*investor*".[20]

23. Prior treaty practice demonstrates that earlier Bonooru and Mekar intended to provide investor's protection to SOEs. When entering the Bonooru-Mekar BIT in 1994,[21] Mekar operated as a planned economy with domination of SOEs in aviation sector[22] which required investor's protection. However, almost immediately after the start of the privatization of Mekari SOEs in 2009,[23] Mekar and Bonooru started negotiations towards the CEPTA.[24] Importantly, Bonooru has commenced privatization of SOEs in 1980-s[25] and now operates as a market-based mixed economy.[26] Such coincidence in time of privatization of Mekari SOEs and entering into the new BIT silent about SOEs as investors evidence that both Bonooru and Mekar did not intend to provide investor's protection to SOEs in the CEPTA.

24. Thus, the lack of direct reference to SOEs in the definition of investor in the subsequent treaty, the CEPTA, shall be interpreted as their implied exclusion from the treaty protection.

25. Therefore, CLAIMANT does not satisfy *ratione personae* requirements of the CEPTA.

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[18] *Pope&Talbot,* §§110-111, 115.
[19] *Legality of the Use,* §§103-113; *La Grand,* §§105-107.
[20] Bonooru-Mekar BIT, Article I(a).
[21] Record, p. 70, l. 2464.
[22] Record, p. 30, ll. 954-960.
[23] Record, p. 30, ll. 985-992.
[24] Record, p. 30, ll. 999-1000.
[25] Record, p. 29, ll. 911-915.
[26] Record, p. 28, ll. 885-886.

B. CLAIMANT IS NOT A "*NATIONAL OF ANOTHER STATE*" WITHIN THE MEANING OF ARTICLE 2 OF THE ICSID AFR

26. (**1**) The *Broches* test is applicable in the proceedings under the ICSID AFR. (**2**) CLAIMANT does not qualify as a "*national of another State*" under this test.

1. The *Broches* test is applicable in the proceedings under the ICSID AFR

27. Since Mekar has not signed and ratified the ICSID Convention,[27] this dispute is considered under the ICSID AFR in accordance with Articles 9.16(2)(b) and 9.17 of the CEPTA.

28. Article 2 of the ICSID AFR provides that only proceedings "*between State (or a constituent subdivision or agency of a State) and* ***a national of another State***" [emphasis added] can be administered by the Secretariat of the ICSID.

29. To determine whether CLAIMANT as a SOE qualifies as a "*national of another State*" under the ICSID AFR, the Tribunal shall apply the *Broches* test used for the jurisdictional purposes under the ICSID Convention.[28]

30. The investment tribunals tend to apply jurisdictional requirements of the ICSID Convention in the proceedings administered under the ICSID AFR or UNCITRAL Rules 1976 due to the hierarchy of forums specified in a particular treaty where an arbitration under the ICSID Convention is primary.

31. In *Rawat,*[29] *Heemsen*[30] and *Manuel Garcia Armas*[31], the PCA tribunals administering proceedings under the UNCITRAL Rules 1976 interpreted the choice of the ICSID as one of the possible forums as excluding dual nationals from the definition of investor under the applicable BIT.

32. In *Romak*[32] *and Nova Scotia*[33], the PCA and ICSID tribunals administering disputes under the UNCITRAL Rules 1976 and the ICSID AFR held that definition of

[27] Record, p. 2, l. 28, p. 31, ll. 1002-1005.
[28] *BUCG*, §33; *CSOB*, §16-17; *Flughafen*, §§273-275; *Masdar*, §§168-172.
[29] *Rawat*, §§174-184.
[30] *Heemsen*, §442.
[31] *Manuel Garcia Armas*, §§718, 719, 721-723.
[32] *Romak*, §§193-194.
[33] *Nova Scotia*, §80.

investment cannot be interpreted narrower than under the ICSID jurisprudence, even though the disputing parties chose the arbitral forum other than the ICSID.

33. By analogy, the *Broches* test shall be applied in the present proceedings under the ICSID AFR since Article 9.16(2)(a) of the CEPTA provides arbitration under the ICSID Convention as primary. Otherwise would contradict the *effet utile* rule of interpretation and lead to unreasonable result whereby the determination of SOEs' standing would depend on the choice of forum and applicable arbitrations rules.

34. In light of the foregoing, RESPONDENT invites the Tribunal to apply the *Broches* test.

2. CLAIMANT is not a "*national of another State*" under the *Broches* test

35. According to the *Broches* test which is the "*mirror image*"[34] of the attribution rules under Articles 5 and 8 of ARSIWA[35]:

> A mixed economy company or **government-owned corporation** should not be disqualified as a "national of another Contracting State" unless it is **acting as an agent for the government** or is **discharging an essentially governmental function**. [36] [emphasis added]

36. Use of a preposition "*or*" means that the *Broches* test imposes two separate and distinct criteria.[37] Therefore, if either of these criteria is present, the Tribunal shall decline jurisdiction *ratione personae.*

37. Both of the elements of the *Broches* test shall be determined "*in the light of situation as it existed on the date when the proceedings were instituted*",[38] *e.g.* on 25 March 2021, when the Procedural Order No. 1 was issued by the Tribunal.[39] Furthermore, the tribunals tend to analyze whether the SOE as claimant satisfies *Broches* test or similar tests not tying it to the moment when the investment was made.[40]

38. *In casu,* CLAIMANT does not qualify as the "*national of another State*" under Article 2 of the ICSID AFR as it (*i*) acts as a Bonoori agent and (*ii*) discharges essentially governmental functions.

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[34] *BUCG*, §34.
[35] *BUCG*, §34; *Masdar*, §§167-169; Kovács, p. 270.
[36] Broches, pp. 354-355.
[37] *BUCG*, §33; *Maffezini*, §81; Blyschak, p. 34.
[38] *CSOB*, §31; *Eskosol*, §§201-202; *Vivendi*, §§60-61.
[39] Record, p. 11, ll. 350-352.
[40] *CSOB*, §18-20; *Flughafen*, §§280-286; *Masdar*, §171.

i. CLAIMANT acts as an agent of Bonooru

39. CLAIMANT qualifies as a Bonoori agent since Bonooru exercises total control over the CLAIMANT'S activity.

40. To determine whether a SOE is acting as an agent for the government, the degree to which the state directs or instructs SOE's activity should be assessed.[41] Among the factors indicating agency, the tribunals name majority governmental shareholding[42] and government officials sitting as members of the board of directors.[43]

41. First, from March 2021, Bonooru has been holding a 55% stake in CLAIMANT.[44] Moreover, Bonooru is the only governmental shareholder in CLAIMANT and no other shareholder holds more than a 7% stake.[45] Second, the board of directors, CLAIMANT's decision-making authority,[46] consists only of the government functionaries.[47] Third, CLAIMANT's legal department is equipped with lawyers from Bonooru's justice department to assist in the present arbitration proceedings.[48] As such, Bonooru exercises total control over the actions of CLAIMANT.

42. On this background, in the present arbitration, CLAIMANT acts as an emanation of Bonooru and, therefore, shall be treated as its agent.

ii. CLAIMANT discharges essentially governmental functions

43. CLAIMANT's air service activity directed on the accomplishment of the public objectives and paramilitary activity evidence that CLAIMANT exercises essentially governmental functions of Bonooru.

44. There is no precise definition of the concept of "*essentially governmental function*" under the *Broches* test and the similar "*governmental authority*" under Article 5 of ARSIWA.[49] The meaning of these terms depends "*on the particular society, its history*

[41] ARSIWA, Article 8; Kovács, p. 271.
[42] *Consortium RFCC*, §36.
[43] *Ibid*.
[44] Record, p. 40, ll. 1410-1411.
[45] Record, p. 89, ll. 3273-3274.
[46] Record, p. 45-46, ll. 1566-1567, 1569-1571, 1574-1576.
[47] Record, p. 40, l. 1412.
[48] Record, p. 40, ll. 1413-1414.
[49] Commentary to ARSIWA, p. 43, §6.

and traditions".[50] Thus, the Tribunal shall assess historic and economic conditions in Bonooru, as well as public objectives of CLAIMANT's activity.[51]

45. Historically, air service activity qualifies as an "*essentially governmental function*" in Bonooru, archipelagic state comprising of 109 islands.[52] Due to the unique Bonoori geography, Article 70(2) of the Constitution provides a positive obligation[53] of Bonooru to "*ensure that every citizen is guaranteed travel to and from its many islands*".[54] Bonooru has been performing its positive obligations with the help of CLAIMANT's predecessor and CLAIMANT itself, as has been repeatedly stressed by the Bonoori officials[55] and has been reflected in the CLAIMANT'S founding documents.

46. Under Article 3(h) of the MoA, one of the objectives for which CLAIMANT was established was to assist in developing the aviation industry as well as the civil aviation infrastructure in Bonooru for the benefit of its population in accordance with Article 70 of the Constitution.[56] As such, CLAIMANT aims to ensure execution of the Bonoori obligations to its citizens under Article 70(2) of the Constitution. Therefore, its commercial activity is inseparable from the execution of public functions considering that none of the objectives for which CLAIMANT was established "*shall be deemed to be merely subsidiary*"[57] to the other objectives.[58]

47. In addition, the paramilitary activity to which CLAIMANT was empowered by virtue of the AIRA[59] constitutes the "*essentially governmental function*" since it "*normally exercised by State organs*"[60] as a corollary of the state monopoly on the legitimate use of force.[61]

[50] *Ibid.*
[51] *Maffezini*, §76; Blyschak, pp. 31, 33; Feldman, pp. 24, 34-35.
[52] Record, p. 28, l. 895.
[53] Record, p. 42, ll. 1454-1459, p. 43, ll. 1480-1487.
[54] Record, p. 44, ll. 1519-1521.
[55] Record, p. 29, ll. 920-926, p. 33, ll. 1086-1087, p. 43, ll. 1489-1497.
[56] Record, p. 41, l. 1429.
[57] Record, p. 44, l. 1537.
[58] Record, pp. 44-45, ll. 1536-1539.
[59] Record, p. 40, ll. 1408-1414.
[60] Commentary to ARSIWA, p. 43, §2.
[61] Crawford, pp. 127-128; Tonkin, pp. 100-101, UCIHL, p. 18.

48. Hence, CLAIMANT has been executing essentially governmental functions of Bonooru from the date of its creation. Therefore, CLAIMANT cannot qualify as a "*national of another State*" under Article 2 of the ICSID AFR.

49. To conclude, the Tribunal shall decline jurisdiction *ratione personae* over the present dispute.

II. ONLY *AMICUS* SUBMISSION BY THE EACRPU SHOULD BE GRANTED A LEAVE

50. After setting out requirements for application for leave to file a non-disputing party submission, the Tribunal received two such applications.[62] The first submission was filed by a non-profit industry association, the CBFI, that represents Bonoori investors.[63] The second submission was filed by the EACRPU, members of Mekari civil society with a professional focus on investment banking.[64]

51. While the Tribunal has discretion in deciding whether to grant a leave for filing *amicus* submission or not, it shall consider the conformity of such a submission with the applicable law.[65] Article 9.19 of the CEPTA and Article 41 of the ICSID AFR cumulatively set out several requirements for non-disputing party submissions.

52. Regarding the substance of *amicus* submission, it shall

    (1) address a matter of fact or law within the scope of the dispute; an

    (2) assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

53. Regarding the personality of *amicus*, the submission shall be prepared

    (1) by a person or entity other than a disputing party,

    (2) that has a significant interest in the arbitral proceedings.

[62] Record, pp. 15-20.
[63] Record, pp. 15-17.
[64] Record, pp. 18-20.
[65] Born&Forrest, p. 23; Obadia, p. 367.

54. Additionally, Article 9.19 of the CEPTA and Article 41 of the ICSID AFR provide that the Tribunal shall ensure that *amicus* submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice either disputing party.

55. As (**A**) *amicus* submission by the CBFI does not comply with Article 9.19 of the CEPTA and Article 41 of the ICSID AFR, (**B**) the Tribunal shall grant a leave for filing only to the *amici* submission by the EACRPU which is in line with named requirements.

A. *AMICUS* SUBMISSION BY THE CBFI SHOULD NOT BE GRANTED A LEAVE

56. The Tribunal shall not grant a leave for filing *amicus* submission to the CBFI. First, (**1**) the CBFI is not independent. Second, (**2**) *amicus* submission by the CBFI does not assist the Tribunal. Third, (**3**) *amicus* submission by the CBFI unfairly prejudices RESPONDENT.

1. The CBFI is not independent

57. Membership of Lapras Legal Capital which advised CLAIMANT on funding strategies and CLAIMANT itself in the CBFI makes it dependent from CLAIMANT.

58. In addition to the requirements set out in Article 9.19 of the CEPTA and Article 41 of the ICSID AFR, *amicus* should be independent from the disputing parties.[66] *Amicus* is not independent if there is a relationship of control or the determinative influence of the disputing party on the writing of *amicus* submission.[67]

59. In this vein, the *Philip Morris* tribunal denied the petition filed by a non-disputing party because claimants' lawyers participated on its management board and on specific thematic committees.[68]

60. Similarly, Lapras Legal Capital, CLAIMANT's adviser on funding strategies with respect to the present dispute,[69] is also the CBFI's member[70] which voted in respect of the submission by the CBFI[71] and therefore influenced on its writing. Moreover,

[66] *Bernhard*, §49; *Philip Morris (Award)*, §55.
[67] Schliemann, p. 380.
[68] *Philip Morris (Award)*, §55.
[69] Record, p. 16, ll. 521-522.
[70] Record, p. 16, l. 520.
[71] Record, p. 87, ll. 3207-3211.

CLAIMANT itself is also a member of the CBFI.[72] Taken together, these facts prove the existence of a relationship of determinative influence of CLAIMANT on the writing of *amicus* submission by the CBFI as both CLAIMANT and its advisor are interested in the outcome of the present dispute in favor of CLAIMANT.

61. Therefore, the CBFI is not independent.

2. *Amicus* submission by the CBFI does not assist the Tribunal

62. *Amicus* submission by the CBFI does not assist the Tribunal since the CBFI does not have knowledge of factual issues relevant to the dispute.

63. *Amicus* submission shall assist the Tribunal in evaluating the submissions and arguments of the disputing parties.[73] To satisfy this test, *amicus* shall show that it has knowledge of factual issues relevant to the dispute.[74]

64. The CBFI does not have possess such knowledge. Unlike the EACRPU which were engaged in the process of CLAIMANT's making an investment in 2010,[75] the CBFI is not familiar with the nuances of the present dispute and provides the Tribunal only with some general information about CLAIMANT's home state, Bonooru.[76]

65. It is not evident how context regarding the business climate of Bonooru, the existing corporate framework in which Bonoori enterprises operate, the nature of the aviation industry in Bonooru, and the impact of uncertainty on access to capital in Greater Narnia[77] will help the Tribunal to decide whether it has jurisdiction over the present claims, whether RESPONDENT has breached the FET standard and what is the appropriate basis for the grant of compensation.[78]

66. This information does not regard CLAIMANT's business or corporate framework, Bonoorian aviation industry's influence on CLAIMANT's investment decisions or any correlation between capital in Greater Narnia and CLAIMANT's investment, therefore, it is too general to assist the Tribunal.

[72] Record, p. 16, l. 520.
[73] Record, p. 80, ll. 2930-2934; ICSID AFR, Article 41.
[74] *Gabriel*, §60; *Suez*, §24; Born&Forrest, p. 21.
[75] Record, p. 19, ll. 616-624.
[76] Record, p. 17, ll. 557-559.
[77] *Ibid*.
[78] Record, p. 14, ll. 455, 459.

67. As the CBFI does not possess any information related to the substance of the present dispute and is thus "*ill-equipped to comment on the jurisdictional matters being decided*",[79] it cannot assist the Tribunal.

3. *Amicus* submission by the CBFI unfairly prejudices RESPONDENT

68. *Amicus* submission by the CBFI unfairly prejudices RESPONDENT because of the ongoing proceedings between several members of the CBFI and RESPONDENT.

69. The Tribunal is under an obligation to ensure that *amici* submissions do not unfairly prejudice any disputing party.[80] An unfair prejudice may result from a non-disputing party's acting in an unconstructive manner.[81]

70. The *Bernhard* tribunal found that since the *amicus* received support from an entity which was engaged in an ongoing dispute with claimants, such a submission did unfairly prejudice claimants, hence the tribunal refused to accept the *amicus* brief.[82]

71. In the present case, several members of the CBFI are currently pursuing claims against RESPONDENT under Chapter 9 of the CEPTA.[83] Therefore, as the CBFI's members are engaged in ongoing disputes with one of the disputing parties, namely RESPONDENT, the submission by the CBFI will unfairly prejudice RESPONDENT.

72. To conclude, if filing *amicus* submission by the CBFI is granted a leave in these proceedings, RESPONDENT will be unfairly prejudiced.

73. RESPONDENT respectfully requests the Tribunal not to grant a leave to *amicus* submission by the CBFI because it was prepared by an entity dependent on CLAIMANT, does not assist the Tribunal, and will unfairly prejudice RESPONDENT.

B. *AMICI* SUBMISSION BY THE EACRPU SHOULD BE GRANTED A LEAVE

74. Contrary to CLAIMANT's allegations, *amici* submission by the EACRPU satisfies all the criteria set out in Article 9.19 of the CEPTA and Article 41 of the ICSID AFR. First, (**1**) although *amici* submission by the EACRPU exceeds the scope of the dispute,

[79] Bastin, p. 131.
[80] Record, p. 80, ll. 2938-2940; ICSID AFR, Article 41.
[81] Born&Forrest, p. 32.
[82] *Bernhard*, §§55, 56, 62.
[83] Record, p. 16, ll. 517-519.

it should be granted an exceptional leave. Second, (**2**) the EACRPU have a significant interest in the arbitral proceedings.

1. Although *amici* submission by the EACRPU exceeds the scope of the dispute, it should be granted an exceptional leave

75. The Tribunal shall exceptionally grant a leave for filing *amici* submission by the EACRPU which concerns the matter outside the scope of the dispute.

76. *Amici* submissions should regard a matter of fact or law within the scope of the dispute.[84] That means that in order not to exceed its mandate, a tribunal shall allow submissions only on matters raised by the disputing parties.[85] Thus, the generality of the assertion and the total lack of any specificity as to the relevance to the legal scope of the dispute[86] can lead the tribunal to the conclusion that the subject matter of the proposed submission is beyond the scope of the dispute.[87]

77. RESPONDENT admits that *amici* submission by the EACRPU raises a new jurisdictional objection which has not been raised by the disputing parties.[88] Nevertheless, the Tribunal shall review it.

78. A tribunal must always ascertain its jurisdiction, and should, if necessary, go into that matter on its own motion.[89] Although *amici* submissions generally should not regard the matter of law or fact outside the scope of the dispute, a court or a tribunal shall address a new jurisdictional objection contained in *amicus* submission *ex officio.*[90]

79. In *Infinito Gold*, *amicus* submission provided information regarding corruption involved in claimant's making an investment while neither disputing party has made any allegations of corruption and was granted a leave because the matter of legality of claimant's investment "*may play some role in its assessment of this dispute*".[91]

80. In the present case, RESPONDENT objects the Tribunal's jurisdiction because the present dispute constitutes state-to-state arbitration[92] while the EACRPU in their *amici*

[84] Record, p. 80, ll. 2930-2931; ICSID AFR, Article 41.
[85] Baltag, p. 22.
[86] *Eco*, §29.
[87] *Ibid.*
[88] Record, p. 22, ll. 713-716.
[89] ICSID AFR, Article 45(1); *ICAO Counsil*, §13; *Spence*, §225; *Strabag*, §8.98.
[90] *JSW Solar*, §250.
[91] *Infinito Gold (PO2)*, §§33, 37.
[92] Record, p. 6, ll. 183-184.

submission object the Tribunal's jurisdiction because CLAIMANT's investment was made through bribery and is therefore illegal.[93] Although *amici* submission by the EACRPU concern the matter outside the scope of the dispute, it shall be addressed by the Tribunal *ex officio* as it raises a new jurisdictional objection.

81. Additionally, Article 9.19 of the CEPTA and Article 41 of the ICSID AFR provide the Tribunal criteria in accordance with which it may assess *amici* submissions but do not bind the Tribunal to dismiss *amici* submissions which do not comply.[94]

82. The Tribunal has substantial grounds to grant an exceptional leave to *amici* submission by the EACRPU. The EACRPU can provide the Tribunal with the unique perspective given that they have been closely connected to the process of making the investment by CLAIMANT.[95] Moreover, *amici* submission by the EACRPU cannot be ignored by the Tribunal since it regards bribery and corruption in investment which the parties to the CEPTA intended to eliminate.[96]

83. The parties to the CEPTA also intended to promote transparency.[97] Allowing *amicus* participation, especially on issues of public importance, such as bribery and corruption, will enhance the transparency of the present proceedings.[98]

84. Furthermore, *amicus* submissions from individuals or entities based in the respondent state deserve special consideration from tribunals[99] as in case the award is rendered against the host state, citizens and entities of that state will indirectly bear the obligation to pay compensation to the investor through taxes they pay to their state.[100] Thus, transparency requires special attention to the submissions of non-disputing parties from respondent states.

85. For the reasons described above, the Tribunal may exercise its discretion and accept *amici* submission by the EACRPU even if it does not comply with all applicable requirements.

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[93] Record, p. 19, ll. 650-656.
[94] *Bear*, §45; Lamb&Harrison&Hew, p. 85.
[95] Record, p. 19, ll. 616-630.
[96] Record, p. 71, ll. 2495-2496.
[97] *Ibid.*
[98] *Infinito Gold (Petition)*, pp. 8-9; *Infinito Gold (PO2)*, §§13, 37; Born&Forrest, p. 27; Butler, p. 173.
[99] Alexandrov&Childress, p. 695.
[100] *Ibid*.

2. The EACRPU have a significant interest in the present arbitral proceedings

86. The EACRPU have a significant interest in the present arbitral proceedings because these proceedings may negatively affect the purpose of the EACRPU.

87. The Tribunal may accept and consider written *amicus curiae* submission from a person or entity that has a significant interest in the arbitral proceedings.[101]

88. To satisfy this test, a non-disputing party should show the Tribunal that the purpose for which it was created is negatively affected by the matter in dispute[102] or that the outcome of the proceedings may have a direct or indirect impact on the rights or principles it represents or defends.[103]

89. Moreover, a non-disputing party should show these circumstances very explicitly and not in the "*limited and open-textured wording*".[104] In *UPS*, non-disputing parties showed that if claimant's position was supported, many Canada Post employees would be fired and their pensions would not be guaranteed by Canada anymore[105] while the availability and quality of postal services for Canadian people would be reduced.[106] By doing so, non-disputing parties proved that they had significant interest in the proceedings because they defended interests of Canada Post employees and Canadian people and thus were allowed to file *amicus* submission.[107]

90. In the present case, the purpose of the EACRPU is investment banking.[108] If the Tribunal supports claims of the present dispute which remain tainted by allegations of corruption,[109] it will contribute to stagnation in anti-corruption efforts in Mekar. Such a stagnation impacts the financial operations of the EACRPU[110] which obstructs their activities in investment banking and therefore negatively affects the activities of the EACRPU.

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[101] Record, p. 80, ll. 2930-2933; ICSID AFR, Article 41.
[102] *InterAguas*, §33; Gomez, p. 558.
[103] *Apotex*, §28; Obadia, p. 370.
[104] *Eco*, §34.
[105] *UPS (Petition)*, §§27-29.
[106] *UPS (Petition)*, §§30-35.
[107] *UPS (Award)*, §3.
[108] Record, p. 19, l. 616.
[109] Record, p. 19, ll. 654-656.
[110] Record, p. 19, ll. 644-646.

91. The EACRPU have a significant interest in the present proceedings because if the Tribunal ignores the fact that the investment was made through bribery and supports CLAIMANT's position, it will negatively affect the activities of the EACRPU in investment banking.

92. To conclude, there are no obstacles for the Tribunal to grant a leave for filing *amici* submission by the EACRPU. Moreover, granting a leave "*would support the transparency of the proceeding and its acceptability by users at large*".[111]

III. RESPONDENT'S ACTIONS CONFORMED WITH ARTICLE 9.9 OF THE CEPTA

93. Under Article 9.9 of the CEPTA, state's actions towards an investor should conform with the FET standard, while Article 9.8 of the CEPTA secures RESPONDENT's right to regulate its internal affairs to achieve legitimate public policy objectives.

94. Appealing to the breach of the FET standard, CLAIMANT tries to hide its short-sighted business planning that has resulted in the sale of CLAIMANT's stake in Caeli. However, CLAIMANT fails to prove RESPONDENT's breach of Article 9.9 of the CEPTA as (**A**) all actions of RESPONDENT conformed with the FET standard assessed. (**B**) Additionally, the Tribunal shall not assess RESPONDENT's actions cumulatively.

A. EACH OF RESPONDENT'S ACTIONS CONFORMED WITH THE FET STANDARD

95. (**1**) RESPONDENT acted in due process, (**2**) did not frustrate CLAIMANT's legitimate expectations, (**3**) did not discriminate CLAIMANT, (**4**) did not subject CLAIMANT to arbitrary treatment, (**5**) did not deny CLAIMANT justice, and, lastly, (**6**) did not coerce it to sell its investment.

1. RESPONDENT acted in due process

96. CLAIMANT may allege that the CCM violated the Monopoly Act when initiating its investigations into Caeli's anticompetitive behavior thus committing a fundamental breach of due process prohibited under Article 9.9(2) of the CEPTA. However, (*i*) the CCM properly applied the Monopoly Act when deciding to investigate Caeli. (*ii*) In any event, minor discrepancies cannot amount to the breach of the FET standard.

[111] *Philip Morris (PO3),* §28.

i. The CCM started both investigations in line with the Monopoly Act

97. First, the CCM was authorized to start the first investigation against Caeli regardless of its market share.

98. Under Chapter III(2) of the Monopoly Act, the CCM may commence a *suo moto* investigation into anti-competitive behavior if the corporation obtains a market share greater than 50%.[112] CLAIMANT suggests that the CCM had no right to investigate Caeli since at the time the first investigation was initiated Caeli's market share was 43%.[113]

99. However, the Monopoly Act enables the CCM to exercise discretion and start investigation even when the market share of a corporation is lower than 50%, provided that the company operates in an industry requiring "*special attention*".[114] Since Caeli operates in aviation sector which is considered of "*strategic interest*"[115] for many states around the globe, nothing precluded the CCM from launching the investigation into Caeli regardless of the slightly lower market share when Caeli's business model started posing a threat to competition in Mekar.[116]

100. Second, the CCM properly started the second investigation against Caeli.

101. According to Chapter III(3) of the Monopoly Act, the CCM shall open an investigation where a complaint is brought by a direct competitor, while the corporation's market share is above 10% and the competitor provides sufficient evidence of the corporation's potential threat.[117]

102. The second investigation was commenced upon the complaint from the small regional airlines in Greater Narnia which suffered from Caeli's price undercutting.[118] Since Caeli competed with these airlines,[119] the CCM had a good reason to launch the second investigation pursuant to Chapter III(3) of the Monopoly Act.

103. Thus, the CCM properly started both investigations into Caeli's activities.

[112] Record, p. 47, ll. 1598-1606.
[113] Record, p. 34, ll. 1150-1151.
[114] Record, p. 47, ll. 1600-1602.
[115] OECD I, p. 8.
[116] Record, p. 34, ll. 1147-1150.
[117] Record, p. 47, ll. 1607-1612.
[118] Record, p. 35, ll. 1170-1178.
[119] Record, p. 35, ll. 1170-1174.

ii. Even if the CCM misapplied the Monopoly Act, it does not amount to fundamental breach of due process

104. To violate the FET standard under the CEPTA, a breach of due process must be "*fundamental*" pursuant to Article 9.9(2) of the CEPTA.

105. The mere misapplication of the law may amount to the breach of due process if it is "*clear and malicious*"[120] and gross enough to determine the entire failure of administration.[121]

106. In the present case, both investigations resulted in findings that Caeli acted in violation of the Monopoly Act[122] and CLAIMANT never challenged these findings. Hence, even if the CCM misapplied the Monopoly Act when starting the investigations, such discrepancies cannot amount to the breach of due process.

107. Furthermore, procedural deficiencies of non-fundamental nature are not sufficient for establishing a breach of due process if the measures are legitimate and pursue public interest.[123]

108. Under Article 9.8 of the CEPTA, RESPONDENT enjoys the right to regulate in its territory in pursuance of public policy objectives even if the exercise of this right negatively affects the investor. Among such objectives, Article 9.8(1) of the CEPTA lists consumer protection which is one of the overall aims of the Monopoly Act.[124] Consequently, RESPONDENT and the CCM as its organ are entitled to a "*high measure of deference*"[125] when they act to protect consumers and competition in the market.

109. As Caeli adopted predatory pricing strategies utilizing the benefits it received from Bonooru as a SOE[126] and privileges it enjoyed at Phenac International Airport[127] and thus could have pushed smaller competitors out of market,[128] the CCM had all the reasons to commence both investigations against Caeli even if the Monopoly Act was not followed strictly.

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[120] *Azinian*, §103.
[121] *TECO*, §457; *Nelson*, §361.
[122] Record, p. 36, ll. 1242-1247; p. 37, ll. 1277-1285.
[123] *Genin*, §§363–365; *Gami*, §97.
[124] Record, p. 47, ll. 1589-1593.
[125] *Saluka*, §305; *Total*, §115.
[126] Record, p. 34, ll. 1155-1158.
[127] Record, p. 31, ll. 1026-1031.
[128] Record, p. 35, ll. 1170-1176; p. 37, ll. 1277-1285; p. 86, ll. 3175-3177.

110. Consequently, RESPONDENT did not commit a "*fundamental*" breach of due process when the CCM initiated two anti-competitive investigations against Caeli.

2. RESPONDENT did not frustrate CLAIMANT's legitimate expectations

111. Pursuant to Article 9.9(3) of the CEPTA, the Tribunal "*may consider*" legitimate expectations of an investor when assessing the FET breach if the host state made a "*specific representation to an investor to induce the investment*".

112. CLAIMANT may allege that RESPONDENT frustrated its legitimate expectations that Caeli will not be penalized for cooperation with other members of the Moon Alliance. However, RESPONDENT never made such specific representation to CLAIMANT.

113. Legitimate expectations are created at the time of the investment.[129] "*Specific representation*" is a promise or a guarantee that an investor may rely upon when making investment decision.[130] Notably, in *Thunderbird*, even a direct written assurance from the state representative was not found constitutive of legitimate expectations.[131]

114. At the time of CLAIMANT's investment in 2011,[132] RESPONDENT did not make any specific representation towards CLAIMANT that it would not act if Caeli involved in high-level cooperation. Conversely, the CCM conditioned CLAIMANT's investment with the undertaking that CLAIMANT would not engage in such a cooperation.[133] Consequently, when CLAIMANT's preferential secondary slot-trading with another member of the Moon Alliance owned by CLAIMANT, Royal Narnian,[134] started to threaten competition in Mekar, the CCM commenced investigations to protect Mekari consumers.[135]

115. Thus, RESPONDENT did not give CLAIMANT a specific representation that it will not investigate CLAIMANT's anticompetitive behavior connected with a high-level cooperation with another member of the Moon Alliance.

[129] *Frontier Petroleum*, §287.
[130] *Parkerings*, §331.
[131] *Thunderbird*, §§147-149.
[132] Record, p. 32, ll. 1050-1051.
[133] Record, p. 32, ll. 1046-1049.
[134] Record, p. 29, ll. 932-933.
[135] Memorial for RESPONDENT, §§108-109.

3. RESPONDENT acted in a non-arbitrary manner

116. CLAIMANT may allege the maintenance of the caps placed after the first investigation along with denomination of airfare in MON was arbitrary. Contrary to these allegations, RESPONDENT did not treat CLAIMANT arbitrarily, as RESPONDENT's actions were attributed to protection of consumers and alleviation of harsh economic situation.

117. The state's measure is arbitrary if it inflicts purposeless damage, is based on prejudice, and is non-compliant with the state's legitimate purposes and due process.[136] *A contrario*, when state's conduct is directed at legitimate objective, it is non-arbitrary.[137]

118. In 2016, CLAIMANT started posing a threat to competition in Mekar,[138] forcing the CCM to start the first investigation and impose airfare caps.[139] The caps were interim, and the measure was intended to prevent Caeli from earning supra-competitive profits in case it pushes smaller competitors out of the market.[140] Caeli itself did not oppose the imposition of the caps[141] and started objecting them only when CLAIMANT's risky business strategy stopped generating profits.[142] Notably, RESPONDENT lifted the caps as soon as Caeli's market share fell below 40% and Caeli stopped impeding fair competition in the airline market in Mekar.[143]

119. Thus, as imposition of the caps was justified with Caeli's potential to raise the airfare after becoming a monopoly and pursued the public policy objective of protecting Mekari consumers secured under Article 9.8 of the CEPTA, it was not arbitrary.

120. Furthermore, the requirement to denominate airfares in MON was justified with the economic conditions in Mekar. As confirmed by *El Paso* and *Genin*, measures of a state pressured by economic downfall are non-arbitrary.[144] Accordingly, as the currency crisis hit Mekar, RESPONDENT should not be punished for regulating in its territory to take control of the devaluating MON, even if this decision hurt Caeli.

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[136] *EDF*, §303.
[137] *AES*, §10.3.9; *Mamidoil*, §657.
[138] Record, p. 34, ll. 1148-1150; p. 35, ll. 1170-1178, 1244-1247.
[139] Record, p. 34, ll. 1147-1150, 1160-1163.
[140] Record, p. 34, ll. 1160-1161.
[141] Record, p. 35, ll. 1168-1169.
[142] Record, p. 36, ll. 1221-1222; ll. 1233-1237.
[143] Record, p. 38, ll. 1336-1338.
[144] *El Paso*, §322; *Genin*, §370.

121. Thus, RESPONDENT's urgent actions taken in order to protect Mekari consumers and economy during the crisis were non-arbitrary.

4. RESPONDENT did not discriminate CLAIMANT

122. CLAIMANT may allege that being rejected in subsidies under the Order it was discriminated by RESPONDENT. However, RESPONDENT's measures were not discriminatory, as CLAIMANT as a SOE had more privileges than average actors in the airline market and was therefore in a different factual and legal situation.

123. Non-discrimination principle requires justification for all differential treatment of foreign investors.[145] However, it should be observed whether state actions were taken under similar circumstances.[146] In this vein, the *El Paso* and *Enron* tribunals held that differential treatment of actors being in different factual and legal situations does not amount to discrimination.[147]

124. As the Order was aimed at alleviating the effects of the economic downturn in Mekari region,[148] it was only reasonable for RESPONDENT to grant subsidies to those companies in the market which were in need. CLAIMANT, however, was a SOE[149] which benefited from Bonoori "Horizon 2020" Scheme[150] and was not in a position which required additional state financial help from Mekar. Thus, it was denied subsidies.

125. CLAIMANT might allege that Star Wings and JetGreen, which received subsidies from their home state, Arrakis[151] were in a comparable situation to CLAIMANT. However, these airlines had less than 5% market share,[152] were private[153] and operated on important domestic routes.[154] In contrast, CLAIMANT held 43% market share,[155] was a SOE,[156] and operated mainly on international routes.[157] Thus, conditions of Star Wings and JetGreen were different from CLAIMANT's, and in situation of economic crisis

[145] *Saluka*, §307.
[146] *ELSI*, §122; *BG Group*, §§357-359; *Feldman*, §170.
[147] *El Paso*, §315; *Enron (Award)*, §282.
[148] Record, p. 36, ll. 1251-1253.
[149] Record, p. 37, ll. 1259-1268.
[150] Record, p. 32, ll. 1076-1081; p. 34, ll. 1155-1157; p. 36, ll. 1245-1247.
[151] Record, pp. 36-37, ll. 1256-1260.
[152] Record, p. 89, ll. 299-3301.
[153] Record, pp. 36-37, ll. 1256-1260.
[154] Record, p. 89, ll. 3299-3301.
[155] Record, p. 34, ll. 1150-1151.
[156] Record, p. 37, ll. 1259-1268.
[157] Record, p. 33, ll. 1112-1113.

RESPONDENT reasonably prioritized domestic routes over international which CLAIMANT was focusing on.[158]

126. At the same time, CLAIMANT was treated equally with another SOE in the aviation sector, Larry Air, which also did not receive subsidies under the Order.[159]

127. Thus, RESPONDENT's denial of subsidies to CLAIMANT was not discriminatory as CLAIMANT had advantages over other actors in the airline market and thus was in a different position compared to Star Wings and JetGreen.

5. RESPONDENT did not deny CLAIMANT justice

128. CLAIMANT may allege that duration of its proceedings was excessive as the hearing of CLAIMANT's case was scheduled the year after submission, while the enforcement of the Award amounts to denial of justice. However, (*i*) duration of CLAIMANT's proceedings in RESPONDENT's courts was decent and justified and (*ii*) the Mekari courts properly enforced the Award.

i. Duration of CLAIMANT's proceedings in RESPONDENT's courts was decent and justified

129. Undue delays in proceedings may amount to denial of justice,[160] meaning that duration of proceedings should be necessary and justified.[161] In *ELSI*, although the duration of proceedings was excessive in comparison to average, and there were no such precedents in the past, the tribunal found it insufficient to amount to denial of justice.[162] Even delays in 9 years in *White Industries* and in 10 years in *Jan de Nul* were not considered excessive by the tribunals.[163]

130. In the present case, only 12 months passed from CLAIMANT's submission of a claim until the date of the hearing,[164] and in just two months, on 15 June 2019, Justice VanDuzer released his interim decision.[165] Consequently, it took approximately 15

[158] Record, p. 33, ll. 1112-1113.
[159] Record, p. 37, ll. 1266-1268.
[160] *Krederi*, §458; *Iberdrola*, §432; UNCTAD (FET), p. 81.
[161] Alvarez, p. 306.
[162] *ELSI*, §§110-112.
[163] *White Industries*, §§10.4.21-10.4.24; *Jan de Nul*, §§202-204.
[164] Record, p. 36, ll. 1229-1235.
[165] Record, p. 38, ll. 1321-1322.

months for the Mekari court to hear CLAIMANT's case on the airfare caps which does not reach the level of denial of justice under the FET standard.

131. Furthermore, there was no prejudice towards CLAIMANT in the conduct of Mekari court. In 2015, average duration of proceedings in Mekar was 22-27 months. Such duration was justified as, while Mekari judicial system was gradually expanding,[166] RESPONDENT prioritized criminal cases over commercial,[167] because the rapid solution in such cases is needed in order not to prolong the arrest of a suspect.[168] According to *White Industries* and *Roussalis*, the criminal proceedings require higher level of urgency than commercial matters.[169] Thus, RESPONDENT's preference towards criminal cases was reasonable and CLAIMANT's case was in no way extraordinary to be prioritized over criminal cases and other commercial cases initiated earlier.

132. As the Mekari court did not extend average duration of the proceedings[170] in CLAIMANT's case, CLAIMANT cannot accuse RESPONDENT of unreasonable delays in hearings of CLAIMANT's case. Thus, the proceedings in RESPONDENT's courts were not excessive in duration.

ii. Enforcement of the Award did not infringe upon CLAIMANT's rights

133. The prohibition of denial of justice arises from the state's obligation to provide due process in judicial system consisting of access to court, just decisions, transparent and impartial judicial proceedings.[171]

134. In the present case, the Tribunal should disregard CLAIMANT's speculations on the enforcement of the Award as (*a*) alleged prejudice of an arbitrator does not blemish the Award and (*b*) RESPONDENT had the right to enforce it.

(a) Alleged prejudice of an arbitrator does not blemish the Award

135. CLAIMANT may allege that prejudice of an arbitrator blemishes the enforcement of the Award. However, CLAIMANT failed to provide sufficient evidence of the bribery.

[166] Record, p. 29, ll. 949-950; p. 86, ll. 3183-3185.
[167] Record, p. 30, ll. 952-953; p. 36, ll. 1239-1241.
[168] Record, p. 30, ll. 952-953.
[169] *White Industries*, §10.4.14, *Roussalis*, §§602-603.
[170] Record, pp. 29-30, ll. 950-953.
[171] OECD, p. 29.

136. The Tribunal may refer to credible evidence of fraud and corruption when considering the legality of the award itself and its enforcement.[172] The evidence should be clear, convincing, and pointing clearly to corruption.[173] In *Lao*, even the repeated evidence of bribes being paid to public officials supplemented by an eye-witness did not convince the tribunal, as an act of corruption shall be proved under the standard higher than the mere balance of probabilities.[174]

137. In the present case, alleging prejudice of Mr. Cavannaugh, CLAIMANT appeals to the only evidence of corruption, which is the report of the CILS, an organization considered illicit under the Mekari law.[175] Such a report is clearly not enough to accuse Mekar Airservices of bribing the arbitrator and tarnish the Award.

(b) RESPONDENT had the right to enforce the Award

138. CLAIMANT may allege that the enforcement of the Award amounts to denial of justice as the Award was previously set aside at the court in Sinnoh.[176] Contrary to CLAIMANT's allegations, as RESPONDENT had the right to enforce the Award under Article VII of the NYC, the RESPONDENT's actions do not qualify as denial of justice.

139. According to Article V(1) of the NYC, enforcement of the award "*may*" be refused if it was set aside by the competent authority at the seat of arbitration. Following the ordinary meaning of the terms,[177] the wording of Article V(1) of the NYC implies no obligation for domestic courts to refuse enforcement of such an award. Consequently, the set aside award may be enforced by the courts if *lex fori* so permits.[178]

140. Under Section 36(1) of the CAA, the court "*may*" refuse enforcement of the award if it is against public policy of Mekar.[179] In the present case, CLAIMANT appealed to the only argument based on the report of the CILS.[180] As the CILS is an illicit organization under RESPONDENT's law,[181] the Mekari court declined the argument[182] and found

[172] *Biloune*, §§67-68.
[173] *Lao*, §110.
[174] *Lao*, §§169-170.
[175] Record, p. 66, ll. 2286-2290.
[176] Record, p. 4, l. 100.
[177] Memorial for RESPONDENT, §9.
[178] *Norsolor*, pp. 4-5; *Hilmarton*, pp. 2-3; *CM*, §52; Koch, p. 269; UNCITRAL (Recommendation), p. 2.
[179] Record, p. 65, ll. 2251-2252.
[180] Record, p. 66, ll. 2271-2279.
[181] Record, p. 66, ll. 2286-2290.
[182] Record, p. 64, ll. 2181-2186.

refusal of enforcement of the Award being against public policy of Mekar.[183] Thus, under the NYC and the CAA, the Award was legitimately enforced in Mekar.[184]

141. Consequently, RESPONDENT's enforcement of the Award does not deny CLAIMANT justice, as it was in line with RESPONDENT's international obligations under the NYC and in compliance with the domestic law, while the presented evidence of bribery was reasonably dismissed by the Mekari court.

6. RESPONDENT did not coerce CLAIMANT to sell its investment

142. CLAIMANT may allege that RESPONDENT's treatment was aimed to force CLAIMANT to sell its investment to Mekar Airservices. However, RESPONDENT treated CLAIMANT and its investments in a non-abusive manner.

143. Prohibition of abusive treatment of a foreign investor requires the host state to provide an investor with a non-hostile environment free from coercion and harassment.[185] Coercion is present when a state puts a strong direct pressure on an investor to force it to sell or abandon its property for a miserable price.[186] However, consistent with *Pope&Talbot*, if investor's own behavior causes its distress, the state is not responsible.[187]

144. RESPONDENT did not pressure CLAIMANT to sell its shares as it was CLAIMANT's own decision due to the lack of economic foresight and inability to attract a *bona fide* buyer. When Hawthorne Group, a member of the Moon Alliance,[188] offered CLAIMANT to buy its investment, Mekar Airservices rejected the offer, as it was not at arm's length commercial price and the purchaser was not a *bona fide* third party due to its Moon Alliance affiliation with CLAIMANT.[189] At the same time, nothing precluded CLAIMANT to continue its operation of Caeli or wait for another buyer to make a proper offer.

145. Thus, as the CLAIMANT's decision to sell its investment was purely commercial and was not forced by RESPONDENT, RESPONDENT's actions did not constitute abusive treatment of CLAIMANT.

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[183] Record, p. 66, ll. 2286-2292.
[184] Record, pp. 65-66, ll. 2253-2260.
[185] Schreuer II, p. 381.
[186] Vagts, pp. 24-25.
[187] *Pope&Talbot I,* §68.
[188] Record, p. 39, ll. 1346-1349.
[189] Record, p. 39, ll. 1345-1349.

B. THE TRIBUNAL SHALL NOT ASSESS RESPONDENT'S ACTIONS CUMULATIVELY

146. Following *El Paso* stance,[190] CLAIMANT might allege that the Tribunal may assess RESPONDENT's actions together and find violation of Article 9.9 of the CEPTA. RESPONDENT submits that the Tribunal shall not assess its measures cumulatively as they did not have a connecting objective.

147. In *Rompetrol*, the tribunal held that state's measures should be taken cumulatively only if there is a unifying pattern or purpose between them.[191] The *Gavrilović* tribunal agreed with respondent's contention on impossibility of cumulative assessment, as there was no common intent in them.[192]

148. In the present case, actions of RESPONDENT disputed by CLAIMANT were not part of the joint campaign against CLAIMANT.

149. First, CCM's investigations were aimed at combatting Caeli's anticompetitive behavior to protect Mekari consumers and competition in the airline market.[193]

150. Second, RESPONDENT's decisions during the economic crisis to denominate airfare in MON and deny CLAIMANT subsidies were taken in attempt to alleviate harsh economic situation in Mekar and help those companies which were more important for citizens and had less opportunities to sustain profitability.[194]

151. Third, the duration of proceedings in the Mekari court was average considering the state of Mekari judicial system and was not intended to harm Caeli.[195]

152. Lastly, all actions of Mekar Airservices were commercially reasonable as it exercised the right of first refusal under the Shareholders' Agreement, challenged the offer in the SCC[196] and enforced the Award in its favor in accordance with the NYC.[197]

153. Consequently, as all RESPONDENT's actions directed upon Caeli were not connected with the one objective to deprive CLAIMANT of its investment, the Tribunal shall not follow the approach of *El Paso* and assess the present case as a consolidate violation.

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[190] *El Paso*, §518.
[191] *Rompetrol*, §271.
[192] *Gavrilović*, §1135.
[193] Memorial for RESPONDENT, §§106-109.
[194] Memorial for RESPONDENT, §§118-120.
[195] Memorial for RESPONDENT, §§129-132.
[196] Record, p. 39, ll. 1345-1354.
[197] Memorial for RESPONDENT, §§139-141.

154. To conclude, RESPONDENT did not violate Article 9.9 of the CEPTA as all its actions conformed with the FET standard and shall not be assessed cumulatively.

IV. COMPENSATION SHALL BE CALCULATED UNDER MV STANDARD OR REDUCED

155. In case the Tribunal finds that RESPONDENT breached the FET standard under Article 9.9 of the CEPTA, (**A**) RESPONDENT should not pay any compensation to CLAIMANT as it has already paid it in accordance with MV standard. (**B**) Even if the Tribunal holds that FMV standard is applicable, the compensation shall be reduced.

A. RESPONDENT OWES NO COMPENSATION TO CLAIMANT

156. (**1**) The amount of compensation shall be determined in accordance with MV standard as the CEPTA unambiguously provides. (**2**) Although the CEPTA enshrines MFN provision, it does not apply to the compensation standard.

1. The Tribunal shall apply MV standard under Article 9.21 of the CEPTA

157. Pursuant to Article 9.21(1)(a) of the CEPTA, the Tribunal may award monetary damages at MV standard.

158. CLAIMANT argues that compensation should correspond to FMV of the investment according to both principles of international law and obligations envisaged by the CEPTA.[198]

159. The only mention of FMV standard is contained in Article 9.12 of the CEPTA titled "*Expropriation and compensation*". Under Article 9.12 of the CEPTA, compensation for expropriation shall amount to FMV of the investment. As such, the CEPTA prescribes FMV standard only for the cases of lawful expropriation.

160. While Article 9.12 of the CEPTA relates to cases of lawful expropriation, Article 9.21 of the CEPTA provides the MV standard of compensation for breaches of the CEPTA, including the breach of FET standard. Consequently, the Tribunal should apply MV standard to determine the amount of compensation *in casu*.

[198] Record, p. 5, ll. 154-156.

161. Moreover, the express reference to MV made by the parties to the CEPTA in Article 9.21 cannot be interpreted as a reference to FMV standard of compensation as the standards differ substantially.

162. MV is the reflection of the perception of value of a willing buyer and a seller whereby the actual economic circumstances are taken into consideration even if they represent duress or threat.[199]

163. The parties to the CEPTA have chosen MV standard which, as opposed to FMV, considers threat or special economic circumstances.[200] Even if RESPONDENT had breached the FET standard, such a breach has objectively reduced the investment value. Since Bonooru and Mekar opted for MV standard, the devaluation of the investment resulting from the breach of the FET standard shall be considered.

164. CLAIMANT may allege that tribunals tend to apply FMV standard to the FET breaches as well. However, cases in which tribunals used FMV in case of the FET breach involved total loss of investment.[201] If a breach does not lead to the total loss of investment, tribunals follow a case-by-case approach.[202]

165. Total loss of investment implies that an investor has lost the title to investment or when interference with property rights has led to a loss equivalent to the total loss of investment.[203] *A contrario*, CLAIMANT was not subject to a total loss of investment. Even though the investment had considerably devaluated, CLAIMANT still had an opportunity to dispose of the investment on its own.

166. CLAIMANT failed to attract a buyer and has sold its stake in Caeli to Mekar Airservices for USD 400 million.[204] Although Hawthorne Group offered CLAIMANT to buy its stake in Caeli for USD 600 million[205], it cannot be considered as a valid one, as the price was artificially inflated and offered by an affiliated party.[206]

[199] Cox, §13.16; GAR p. 8, §22.
[200] GAR p. 8, §22.
[201] *Azurix*, §424, *LG&E*, §35.
[202] *Feldman*, §197, *Azurix*, §421.
[203] *LG&E*, §35.
[204] Record, p. 9, ll. 294-295; p. 40, ll. 1391-1393.
[205] Record, p. 58, l. 1992.
[206] Record, p. 39, ll. 1345-1349.

167. As RESPONDENT's offer was the only valid offer received by CLAIMANT, it reflects MV of CLAIMANT's investment.

168. Thus, the Tribunal shall not follow FMV standard as RESPONDENT did not deprive CLAIMANT of its investment and has already paid the compensation under MV standard.

2. CLAIMANT may not refer to the MFN clause in the CEPTA to apply the FMV standard of compensation

169. CLAIMANT might refer to the MFN clause contained in Article 9.7 of the CEPTA to apply FMV standard provided in Arrakis-Mekar BIT. Yet, the argument cannot be considered by the Tribunal as requirements of tArticle 9.7 of the CEPTA are not met.

170. Article 9.7 of the CEPTA provides:

> (1) Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favorable 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.
>
> (2) For greater certainty, the treatment referred to in paragraph 1 **does not include procedures for the resolution of investment disputes between investors and states** provided for in other international investment treaties and other trade agreements. **Substantive obligations** in other international investment treaties and other trade agreements **do not in themselves constitute "treatment"**, and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations. [emphasis added]

171. Although MV standard might be less favorable than FMV, CLAIMANT shall still prove other elements of the test. There are several factors to be proven to grant CLAIMANT a compensation for the FET violation no less favorable than for investors from Arrakis: (*i*) the treatment shall relate to the specific scope provided in Article 9.7(1) of the CEPTA*;* (*ii*) the treatment shall not relate to the procedures for the resolution of investment disputes; (*iii*) there shall be measures adopted or maintained by the host state for the substantive obligations to be considered treatment.

i. Compensation standard is not included in the scope of Article 9.7(1) of the CEPTA

172. Under Article 9 of the Draft Articles on MFN, the MFN clauses apply only to "*those rights that fall within the subject matter of the clause*".[207]

173. In accordance with the ordinary meaning of the terms,[208] Article 9.7 of the CEPTA applies only to a limited number of cases of treatment, namely "*establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal*" of the investments. The similar wording was considered as limiting the scope of the MFN clause by the *ICS* tribunal.[209]

174. In comparison, the *CME* decision, which CLAIMANT might rely upon to benefit from the FMV standard, dealt with a much broader MFN clause which applied to:

> **rules, whether general or specific**, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement. [210] [emphasis added]

175. As the scope of Article 9.7 of the CEPTA is limited only to certain instances of treatment and has no mention of the compensation standard, CLAIMANT cannot benefit from the FMV provision of the Arrakis-Mekar BIT.

ii. The standard of compensation relates to the procedures for the resolution of investment disputes

176. Furthermore, MFN treatment refers only to treatment of an investment and not to the process of dispute settlement. In the case at hand, under Article 9.21(1)(a) of the CEPTA, the standard of compensation is considered a procedural matter.

177. Under Article 31(1) of the VCLT the treaty shall be interpreted in its context, therefore, the title of an article shall be considered. Article 9.21 of the CEPTA is entitled "*Final Award*" meaning that awarding the compensation at a certain standard relates to the Tribunal's competence and, therefore, qualifies as a procedural matter.

[207] Draft Articles on MFN, p. 27.
[208] Memorial for RESPONDENT, §9.
[209] *ICS*, §298.
[210] *CME (Partial Award)*, §397.

178. Such interpretation is confirmed by professor Brownlie who in regards to the compensation standard stated that

> the presumption must be that the clause promises MFN treatment only in matters of treatment of an investment, and not to the process of dispute settlement.[211]

179. Consequently, choice of applicable compensation standard by the Tribunal qualifies as a procedural matter and thus cannot be applied by virtue of Article 9.7 of the CEPTA.

iii. RESPONDENT has not taken any measures in relation to the compensation standard

180. Article 9.7(2) of the CEPTA prescribes that substantive obligations shall be followed by measures maintained by the host state to be considered "*treatment*" for the purposes of application of the MFN clause.

181. Moreover, Article 9.7(2) contains a qualifier "*for greater certainty*" which is taken as limiting the scope of the MFN clauses only to the instances of actual treatment, but not mere substantive rules.[212] Even without such qualifiers, the mere substantive rules shall be followed by a treatment by the host state.[213]

182. RESPONDENT did not take any measures pursuant to this obligation. The compensations under FMV standard were awarded by arbitral tribunals whose actions are not attributable to RESPONDENT.[214]

183. Consequently, compensation standard enshrined in Arrakis-Mekar BIT should not be considered as treatment according to Article 9.7(2) of the CEPTA. Thus, the FMV standard for compensation in Arrakis-Mekar BIT is not applicable by virtue of Article 9.7 of the CEPTA.

B. IN CASE CLAIMANT IS ENTITLED TO COMPENSATION, IT SHOULD BE CONSIDERABLY REDUCED

184. If the Tribunal deems FMV standard applicable, the amount of compensation shall be considerably reduced. (**1**) First, CLAIMANT contributed to the damage caused to its

[211] *CME (Separate Opinion)*, §11.
[212] Schill on MFN, p. 916.
[213] Draft Articles on MFN, p. 32.
[214] Record, p. 87, ll. 3227-3228.

investment. (**2**) Second, the amount of compensation requested by the CLAIMANT constitutes crippling compensation.

1. CLAIMANT contributed to the damage to the investment

185. Article 39 of the ARSIWA prescribes that in the determination of reparation the contribution to the injury shall be considered. Contribution to the injury may be made by "*willful or negligent action or omission of the injured party in relation to whom reparation is sought*". A wrongdoer may not be held liable for the injury caused by the victim of the breach.[215]

186. The principle of contributory fault is widely recognized both in the doctrine[216] and state practice. Tribunals reduce compensation due to contributory fault on a case-by-case basis. Thr *Copper Mesa* tribunal reduced compensation by 30%[217], the *MTD* tribunal by 50%[218], the *Occidental*[219] and *Yukos*[220] tribunals by 25%.

187. In order to qualify investor's actions as a case of contributory fault, they should meet three-tiered test. The test implies the presence of the responsibility of the host state for the violation of an investment treaty, blamable conduct of an investor, and the presence of a causal link between the actions of an investor and the damage to its investment.[221]

188. RESPONDENT invites the Tribunal to find that (*i*) CLAIMANT's conduct is blamable and (*ii*) there is a causal link between its conduct and losses incurred.

i. CLAIMANT's conduct is blamable

189. Investor's blamable conduct indicates contributory fault.[222] There are two forms of blamable conduct: behaviour provoking state action and unwise business decisions.[223] Lawful but commercially imprudent behaviour lacking diligence and reasonableness[224] may also be regarded as blamable.[225]

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[215] Commentary to ARSIWA, p. 110.
[216] *Ibid*.
[217] *Copper Mesa,* §11.4.
[218] *MTD (Award),* §243.
[219] *Occidental,* §825.
[220] *Yukos,* §1827.
[221] Kozyakova, p. 150.
[222] Commentary to ARSIWA, p. 109-110.
[223] Marboe, p. 8.
[224] Commentary to ARSIWA, p. 110.
[225] *MTD (Award),* §§242-243.

190. CLAIMANT's behaviour contains both forms of blamable conduct. (*a*) CLAIMANT took a range of risky business decisions resulting in its losses and (*b*) violated RESPONDENT's antitrust laws which is proven by the results of the CCM's investigations into Caeli.

(a) CLAIMANT took a range of risky business decisions resulting in its losses

191. CLAIMANT based its business model on providing low-price services relying on low oil prices. In such case, the rapid expansion was not a reasonable business model considering Caeli's debt and fluctuating fuel prices.[226]

192. Once Caeli started to generate profit, board representatives from Mekar Airservices insisted on injecting profits into huge debt and improving financial health, while "*Vemma's representatives preferred fleet expansion and slashed airfares*".[227]

193. Furthermore, CLAIMANT could have foreseen the economic crisis that also influenced the investment's value.[228] The economic situation in Mekar has been always fluctuating and inflation has been present at a considerable rate.[229] CLAIMANT could have predicted that in such economic setting its actions could lead to dire economic consequences for the company. Nevertheless, it proceeded with taking risky business decisions having increased the overall amount of damages.[230]

194. In light of this, CLAIMANT invites the Tribunal to follow the *MTD* tribunal's stance that "*the BITs are not an insurance against business risk*" and that investors "*should bear the consequences of their own actions as experienced businessmen*".[231]

195. Moreover, CLAIMANT still had an opportunity to improve Caeli's financial health.[232] Nevertheless, CLAIMANT did not take any action to keep the enterprise.[233]

196. Thus, CLAIMANT's risky business decisions amount to the blamable conduct and qualify as contributory fault.

[226] Record, p. 57, ll. 1956-1957.
[227] Record, p. 34, ll. 1136-1138.
[228] Spange, p. 45; Greenwood, p. 32; *Naftogaz*, §1979.
[229] Record, p. 4, ll. 85-87 p. 35, ll. 1187-1190; p. 36, ll. 1224-1225.
[230] Record, p. 37, ll. 1280-1285.
[231] *MTD (Award)*, §178.
[232] Record, p. 8, ll. 274-276.
[233] Record, p. 8, ll. 276-277.

(b) CLAIMANT violated RESPONDENT's antitrust laws

197. The *Yukos* tribunal held that claimant's unlawful tax strategies triggered respondent to take measures which were considered as the FET violation.[234] The compensation in that case was reduced due to claimant's contributory fault.

198. Similarly, CLAIMANT committed violations of antitrust laws involved abuse of dominant position, predatory pricing, and unfair subsidization.[235]

199. RESPONDENT warned CLAIMANT that such anti-competitive strategy might result in the review by the CCM.[236] However, CLAIMANT proceeded with it leading to the imposition of airfare caps and fines.[237]

200. Consequently, it was CLAIMANT's actions which triggered the investigations by the CCM and imposition of airfare caps and fines.

201. Given that two forms of blamable conduct are present in the CLAIMANT's actions, the Tribunal shall find contributory fault on behalf of CLAIMANT.

ii. There is a causal link between CLAIMANT's conduct and damages

202. The causal link between investor's blamable conduct and the damage it suffered is present when the blamable conduct contributes to the damage materially and significantly.[238]

203. The tribunals have a broad margin of estimation in determining the significance and materiality of the aggrieved party's contribution to the damage.[239] RESPONDENT invites the Tribunal to use such a margin in the present case and find the causal link between CLAIMANT's conduct and damages.

204. When determining the causal link between investor's actions and the damages, the question is whether the damage would have been inflicted had it not been for the investor's actions.[240]

[234] *Yukos*, §§1614-1615.
[235] Record, p. 7, ll. 240-241.
[236] Record, p. 7, ll. 232-234.
[237] Record, p. 7, ll. 236-238.
[238] Kozyakova, p. 15; Commentary to ARSIWA, p. 110, §5.
[239] *MTD (Decision on Annulment)*, §101.
[240] *Abengoa*, §671.

205. Had it not been for CLAIMANT's risky business strategy, involving *inter alia* expansion of its fleet and entering into burdensome leasing contracts and loans, it would not have the need to "*maintain a regular cash flow*" in regards to these liabilities and would remain profitable even with denomination of the airfares in MON.[241] Instead of improving its financial health and paying the outstanding debt when it had the chance to do so, CLAIMANT continued its ill-advised expansion.[242]

206. Had it not been for CLAIMANT's secondary slot-trading strategies[243] and predatory pricing[244], the CCM would not have investigated CLAIMANT's operations and would have not placed the airfare caps and fines which prevented it from being profitable in the conditions of the crisis.

207. Consequently, there is a causal link between CLAIMANT's actions and the damages it incurred, and such actions materially and significantly contributed to the damage.

2. The Tribunal should reduce the required compensation as crippling

208. The compensation claimed by CLAIMANT shall be considered as crippling for RESPONDENT, and therefore shall be reduced.

209. The compensation shall be considered crippling when it substantially affects the economy and the population of the state obliged to pay the compensation.[245]

210. CLAIMANT may state that principle of full reparation enshrined in the ARSIWA precludes reduction of compensation due to crippling compensation.

211. However, drafting history of the ARSIWA shows that crippling compensation was considered as a factor reducing the compensation.[246] The reason not to address crippling compensation in the 2001 reading of the ARSIWA was the consideration that the issue was exaggerated.[247] Cases of very large compensation were exceptional, and states allocated such sums to the sovereign debt.[248]

[241] Record, p. 35, ll. 1196-1197.
[242] Record, p. 34, ll. 1136-1138.
[243] Record, p. 34, ll. 1152-1155.
[244] Record, p. 34, ll. 1156-1157.
[245] *Eritrea,* §21.
[246] Paparinskis, p. 1253.
[247] *Ibid.*
[248] Paparinskis, p. 1255.

212. Nowadays, however, the global investment market has changed, raising the amounts of compensation owed to investors. For example, in the recent *ConocoPhillips*, the compensation due to claimants equalled to USD 8,7 billion.[249] In the case at hand, CLAIMANT requires USD 1.1 billion which is likely to affect RESPONDENT's economy and lead to violation of human rights of Mekari citizens.

213. RESPONDENT's limited economic capacity is relevant in determining the amount of compensation. The *Eritrea* tribunal stated that

> the size of claims raised potentially serious questions involving the intersection of the law of State responsibility with fundamental human rights norms.[250]

The tribunal held that huge amount of compensation would deprive citizens of adequate social care. [251] Thus, the Tribunal shall assess how drastic may the payment of compensation be for RESPONDENT.

214. According to IMF report in 2020, RESPONDENT was to face 8% fall in GDP, and a 2600% average inflation rate. The report noted that RESPONDENT was facing a potential third debt default in as many decades. [252]

215. At the end of 2020, RESPONDENT had CCC credit rating. RESPONDENT has also acknowledged that bank loan defaults had increased by one quarter as opposed to 2019.[253]

216. Furthermore, the RESPONDENT's economic situation is that deplorable that

> to pay the USD 700 million, RESPONDENT would have to transfer about twice its consolidated annual public spending.[254]

217. Therefore, RESPONDENT's economy is now facing hyperinflation, significant fall in GDP and bank loan defaults. RESPONDENT will have to sacrifice its citizens well-being for the sake of CLAIMANT's undertaking whose main beneficiary is Bonooru.[255]

218. Besides, under the preamble of the CEPTA, the CEPTA

[249] *ConocoPhillips,* §1010
[250] *Eritrea,* §19.
[251] *Eritrea,* §21.
[252] Record, p. 86, ll. 3161-3163.
[253] Record, p. 86, ll. 3165-3168.
[254] Record, p. 86, ll. 3163-3165.
[255] Memorial for RESPONDENT, §41.

> promotes economic integration to liberalise trade and investment, **bring economic growth** and **social benefits**, create new opportunities for workers and businesses, **contribute to raising living standards**, benefit consumers, **reduce poverty** and promote sustainable growth. [emphasis added]

219. The amount of compensation required by CLAIMANT undermines RESPONDENT's economy depriving it of any economic growth. Consequently, Mekari citizens may lose social benefits due to deplorable economic situation in the country. Since the required amount of compensation results in consequences which contradict the preamble of the CEPTA, it shall be reduced to comply with it.

220. To conclude, RESPONDENT has already paid the compensation under MV standard which amounts to USD 400 million. Even if CLAIMANT is entitled to compensation under FMV standard, it shall be considerably reduced.

PRAYER FOR RELIEF

221. RESPONDENT respectfully requests the Tribunal:

(1) to declare that that the Tribunal lacks jurisdiction over the present dispute;

(2) to grant a leave only to *amici* submission by the EACRPU;

(3) to declare that RESPONDENT has not violated its obligations to CLAIMANT under the CEPTA;

(4) to declare that the applicable standard for compensation is MV of the investment and that RESPONDENT has already paid it in the amount of USD 400 million, or to reduce the amount of compensation claimed if the Tribunal finds otherwise.

Respectfully submitted on 23 September 2021

By

Team Koo

On behalf of Federal Republic of Mekar