In the Matter of Arbitration under the ICSID Additional Facility Rules
Between:

Vemma Holdings Inc. (Claimant)

v.

The Federal Republic of Mekar (Respondent)

KCAB INTERNATIONAL CASE 4364/IDR

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Legal Instrument

Abbreviation	Citation
CETA	Comprehensive Economic and Trade Agreement, EU-Canada. (2016)
Czech Republic - Netherlands BIT	Czech Republic - Netherlands BIT (1991)
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1959) 330 UNTS 38
VCLT	Vienna Convention on the Law of Treaties (1980) 1155 UNTS 331

Arbitral Decision

Abbreviation	Citation
Apotex II, BNM	Apotex II, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party Details ICSID Case No. ARB(AF)/12/1, (4.3.2013)
Apotex II, Mr. Barry	Apotex II, Procedural Order on the Participation of the Applicant, Mr. Barry Appleton, as a Non-Disputing Party, ICSID Case No. ARB(AF)/12/1, (4.3.2013)
Arif	Arif v. Republic of Mold., ICSID Case No. ARB/11/23, Award, (8.4.2013)
Azinian	Robert Azinian, Kenneth Davitian, & Ellen Baca v. Mexico, Award, ICSID No. ARB(AF)/97/2, (1.11.1999)
Azurix	Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award, (14.06.2006)
Bear Creek, PO 5	Bear Creek Mining Corporation v Republic of Peru, ICSID Case No. ARB/14/21, Procedural Order No. 5, (21.7.2016)
BG Group	BG Group plc v Argentina, Final Award, Ad hoc—UNCITRAL Arbitration Rules; IIC 321 (24.12.2007)
Biwater, PO 5	Biwater Gauff (Tanzania) Ltd., v United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 5, (24.7.2008)
Bosh BP	Bosh International, Inc and B&P Ltd Foreign Investment Enterprise v Ukraine, Award, ICSID Case No. ARB/08/11, (25.10. 2012)

BUCG, Decision on Jurisdiction	Beijing Urban Construction Co. Ltd. v Republic of Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction, (31.05.2017)
Burlington	Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5 (14.12.12)
Chevron	Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, PCA Case No. 2009-23, Second Partial Award on Track II, (30.8.2018)
CME	CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Partial Award, (13.09.2001)
CMS	CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, (12.5.2005)
CMS	CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, (12.5.2005)
Crystallex	Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No ARB(AF)/11/2, Award, (4.4.2016)
CSOB, Decision on Jurisdiction	Cekoslovakia Obchodni Banka, A.S. v The Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, (24.5.1999)
CSOB, Decision on Objection to Jurisdiction	Cekoslovakia Obchodni Banka, A.S. v The Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, (24.5.1999)
Eco Oro, PO 6	Eco Oro Minerals Corp. v. Republic of Colombia, Procedural Order No.6, ICSID Case No. ARB/16/41 (18.02.2019)
EDF	EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Procedural Order No. 3, (29.8.2008)
El Paso	El Paso v Argentina, ICSID Case No. ARB/03/15, Award. (31.10.2011)
Electrabel PO 4	Electrabel v. Hungary (ICSID Case No. ARB/07/19) Procedural Order No. 4 (28.04.2009)
Elsi	Elettronica Sicula SpA (U.S. v. Italy), ICJ Judgment, 1989 I.C.J. Reports (15.20.1989)
Enron	Enron Corporation and Ponderosa Assets, LP v Argentina, Award, ICSID Case No. ARB/01/3; IIC 292 (15.5.2007)
Flemingo	Flemingo Duty Free Shop Private Limited v The Republic of Poland, UNCITRAL, Award, (12.8.2016)
Glamis Gold	Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Award, (8.5.2009)

Gold Reserve	Gold Reserve v Venezuela, ICSID Case No. ARB(AF)/09/1, Award, (22.9.2014)
Gustav	Gustav F W Hamester GmbH & Co KG v Republic of Ghana, ICSID Case No. ARB/07/24, Award, (18.6.2010)
İçkale	İçkale İnsaat Limited ¸Şirketi v. Turkmenistan, ICSID Case No. ARB/10/24, Award (8.3.2016)
Jan de Nul, Award	Jan de Nul N.V. v Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, (6.11.2008
Laurent Piau	Laurent Piau, Applicant, v. Commission of the European Communities, Judgment of The Court of First Instance (Fourth Chamber), (26.1.2005)
Lemire	Joseph Charles Lemire v. Ukraine, Decision on jurisdiction and liability, ICSID Case No. ARB/06/18, (14.1.2010)
LG&E	LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc.v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (3.10.2006)
Loewen	Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB (AF)/98/3, Award (26.6.2003)
Maffezini, Decision on Jurisdiction	(Maffezini) Emilio Agustín Maffezini v The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objection to Jurisdiction, (25.1.2000)
Methanex	Methanex Corporation v. United States of America, UNCITRAL, Final Award on Jurisdiction and Merits (3.8.2005)
Micula	Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania [I], ICSID Case No. ARB/05/20, Final Award (11.12.2013)
Mondev	Mondev International Ltd v United States, ICSID Case No. ARB (AF)/99/2, Award, (11.10.2002)
MTD	MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, (25.5.2004)
National Grid	National Grid PLC v. The Argentine Republic, Award, (3.11.2008)
Niko, Decision on Corruption Claim	Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"), ICSID Case No. ARB/10/18, Decision on Corruption Claim (25.02.2019)
Parkerings	Parkerings-Compagniet AS V. Republic of Lithuania, in ICSID Arbitration Case No. ARB, Award (5.8.2007)

Paushok	Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability (30.4.2011)
Philip Morris, Award	Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, Award ICSID Case No. ARB/10/7 (08.07.2016)
Philip Morris, PO 3	Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, Procedural Order No.3, ICSID Case No. ARB/10/7 (17.02.2015)
Philip Morris, WHO Amicus Curiae	Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, Request to File a Written Submission (Amicus Curiae Brief) by the WHO and the Secretariat of the Tobacco Control Convention, ICSID Case No. ARB/10/7 (28.01.2015)
Piero Foresti, Letter by Secretary	Piero Foresti, Laura de Carli and Others v. The Republic of South Africa, Letter by the Secretary of the Tribunal, ICSID Case No. ARB(AF)/07/1, (05.10.2009)
Pope and Talbot	Pope and Talbot Inc. v. Government of Canada, NAFTA Case, Award on the merits of phase 2 (10.4.2001)
Salini, Jurisdiction	Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, Decision on Jurisdiction (31.07.2001)
Saluka	Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award (17.3.2006)
SD Myers	SD Myers, Inc v Government of Canada, UNCITRAL, Second Partial Award on Damages, (21.10.2002)
Sempra	Sempra Energy International v Argentina, Award, ICSID Case No. ARB/02/16; IIC 304. (18.9.2007)
Suez, Petition by NGO	Suez/Vivendi v. Argentina, Order In Response to a Petition by Five Non-Governmental Organizations for Permission to Make and Amicus Curiae Submission,ICSID Case No. ARB/03/19 (12.02.2007)
Suez, Petition for Amicus Curiae	Suez/Vivendi v. Argentina, Petition for Participation as Amicus Curiae, ICSID Case No. ARB/03/19 (19.05.2005)
Swisslion	Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia, ICSID Case No. ARB/09/16, Award (6.7.2012)
Tecmed	Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, (29.5.2003)
Total	Total S.A. v. Argentine Republic, Decision on Liability (ICSID Case No. ARB/04/1) (27.122010)

Toto	Toto Costntzioni Generali SpA v Lebanon (ICSID Case No. ARB/07112, Decision on Jurisdiction of (11 .9.2009)
Tulip	Tulip Real Estate Investment and Development Netherlands B.V. v Republic of Turkey, ICSID Case No. ARB/11/28, (10.3.2014)
White Industry, Award	White Industry v The Republic of India, ICSID Case No. ARB/xx/xx, Final Award (30.11.2011)
Yukos	Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award, (18.6.2004)

Textbooks

Abbreviation	Citation
C. Schreur	Dolzer, Rudolph and Christoph Schreuer. Principles of International Investment Law, (2nd ed OUP, 2012)
Competition Law	Richard Whish and David Bailey, Competition Law, 93 (9th ed. 2015)
Frank Hoffmeister & Gabriela Alexandru	Frank Hoffmeister & Gabriela Alexandru, A First Glimpse of Light on the Emerging Invisible EU Model BIT, 15 J. WORLD INV.&TRADE (2014)
ICSID Commentary	C. Schreuer, L. Malintppi, A. Reinisch and A. Sinclair, The ICSID Convention: A Commentary (2nd Edition, 2009)
Jacob M, Schill S	Jacob M, Schill S (2015) Fair and Equitable Treatment: Content, Practice, Method. In: Bungenber M et al. (eds) International Investment Law. Nomos/Hart, Baden-Baden.
Jan Paulsson	Jan Paulsson, Denial of Justice in International Law, Cambridge University Press, (2010)
Katia, Anastasios. and Catharine	Katia Fach Gómez, Anastasios Gourgourinis. and Catharine Titi, International Investment Law and Competition Law. [S.l.]: Springer Nature. (2021)
Liping He	Liping He, Hyperinflation: A World History. 1st ed. New York, NY: Routledge (2018)
P.-Y. Tschanz and J. E.Viñuales	P.-Y. Tschanz and J. E.Viñuales, Compensation for Non-expropriatory Breaches of International Investment Law, Journal of International Arbitration, Volume 26 (2009)

Patrick Dumberry	Patrick Dumberry, The Importation of 'Better' Fair and Equitable Treatment Standard Protection Through MFN Clauses: An Analysis of NAFTA Article 1103, 14(1) TRANSNAT'L DISP. MGMT. (2017)
Richard Whish	Richard Whish and David Bailey, Competition Law, 93 (9th ed. 2015)
S. Schacherer, and M. Mbengue	S. Schacherer, and M. Mbengue, Foreign investment under the comprehensive economic and trade Agreement (CETA). Cham: Springer. (2019)
Zachary Douglas	Zachary Douglas, The International Law of Investment Claims, New York, Cambridge University Press, (2009)

Cases

American International	American International Corp. v. Iran, 4 Iran-U.S. C.T.R. 96,, Award No. 93-2-3, (19.12.1983)
Copper Mesa	Copper Mesa Mining Corporation v. Republic of Ecuador, PCA No. 2012-2 (15.3.2016)
ELSI	RLA-0112, Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), I.C.J. Reports, 1989 ICJ 15, Award, CLA-0069 (20.7.1989)
Nicaragua	Nicaragua v United States of America, Judgement of 27 June 1986, International Court of Justice, Case Concerning Military and Paramilitary Activities in and Against Nicaragua
Nuclear Test	Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports (2.12.1974)
Occidental	Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467 (1.6.2004)

Articles

Abbreviation	Citation
Jaap de Wit & Guillaume Burghouwt	Jaap de Wit & Guillaume Burghouwt. Slot allocation and use at hub airports, perspectives for secondary trading. European Journal of Transport and Infrastructure Research (2008)
Posner	Richard A. Posner, Oligopoly and the Antitrust Laws: A Suggested Approach, 21 Stanford Law Review 1562 (1968)
Soreide, T	Soreide, T., Corruption in Public Procurement, Chr. Michelsen Institute Development Studies and Human Rights

UN/EU Documents

Abbreviation	Citation
ARSIWA	Draft Articles on State Responsibility (2001)
ARSIWA Commentary	Commentary of Draft Articles on State Responsibility (2001)
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 2006.

Miscellaneous

Abbreviation	Citation
Guidelines on the Treatment of Foreign Direct Investment	Guidelines on the Treatment of Foreign Direct Investment, World Bank, Legal Framework for the Treatment of Foreign Investment (Washington, D.C., 1992), vol. II,
OECD Airline Competition Background Paper	Airline Competition Background Paper by the Secretariat, OECD, (18-19 June 2014)
OECD: Margin Squeeze	Competition Law & Policy OECD, Margin Squeeze, policy roundtables, 2009,
Abuse of Dominance: Enforcement Guidelines	Abuse of Dominance: Enforcement Guidelines, Canadian Competition Bureau

Table of Abbreviation

¶ (¶¶)	Paragraph (Paragraphs)
Additional Facility Rules	ICSID Additional Facility Rules
BIT	Bilateral Investment Treaties
Caeli	Caeli Airways
CBFI	Consortium of Bonoori Foreign Investors
CILS	Centre for Integrity in Legal Services
CRPU	Committee on Reform on Public Utilities

EC	European Commission
EU	European Union
FET	Fair and Equitable Treatment
High Commercial Court	High Commercial Court of Mekar
MRTP	Monopoly and Restrictive Trade Practice Act
OECD	Organization for Cooperation and Development
p. (pp.)	Page (Pages)
Supreme Arbitrazh Court	Supreme Arbitrazh Court of Sinnograd
TFEU	Treaty on the Functioning of the European Union

STATEMENT OF FACTS

Pre-Investment

[1] ***1990s:*** In the year 1994, Mekar opened up to foreign investment, and in doing so the 1994 Bonooru - Mekar BIT was signed on the 24th August 1994.

[2] ***1994*****:** Mekar's civil aviation industry, consisting of Aer Caeli and Caeli Airways, witnessed staggered growth under the LPM, in which the former controlled national routes, and the latter enjoyed international routes.

[3] ***2008*****:** Mekar transitioned to a new cabinet, Mekari Common Man's Party (**"CMP"**). Under the cabinet, Mekar began a large-scale privatization of SOEs, including Caeli Airways.

[4] ***2009:*** Mekar's new legislature revised the Monopoly and Restrictive Trade Practice Act (**"MRTP"**) which envisaged the creation of CCM.

[5] ***2010s:*** Mekar Airservices Ltd. marketed Caeli airway's core assets to potential bidders. Four companies, including Vemma, participated in the tendering process and submitted its bid purchasing Caeli.

[6] ***2010:*** Bonooru and Mekar began negotiations towards a comprehensive trade agreement and included a chapter of investment protection to replace 1994 BIT. The proposal was defeated because Mekar's senate concern of acceding ICSID Convention due to the perception from the convention's rules favored developed countries.

Investment

[7] ***2011:*** Vemma provided the most financially attractive offer, valued at 800 million USD, and Caeli's tender was accepted for Vemma on 5 January. In addition, CCM approved Vemma's acquisition of an 85% stake in Caeli and its participation in the Moon Alliance. The remaining 15% were owned by Mekar through Mekar Airservice Ltd., through the Share Purchase Agreement".

Post-Investment

[8] ***2014s:*** In April, Mekar and Bonooru signed the CEPTA. The agreement entered into force on 15 October and both parties had agreed to terminate the pre-existing 1994 BIT on the same date.

[9] ***2014:*** In June, oil prices around the globe crashed to a five-year low due to steadily rising supply from non-CEPO countries. Caeli airways turned a net profit over the whole year for the first time after its acquisition and were particularly concentrated in high-traffic routes between Boonoru and Mekar.

[10] ***2014:*** In June, oil prices around the globe crashed to a five-year low due to steadily rising supply from non-CEPO countries. Caeli airways turned a net profit over the whole year for the first time after its acquisition and were particularly concentrated in high-traffic routes between Boonoru and Mekar.

[11] ***2016:*** A currency crisis ensued in Mekar, which resulted in the continuing decline of value in Mekari MON.

Challenged Measure

[12] ***2018s:*** The Mekar government passed a decree in January requiring all companies in every sector to change pricing currency to MON to reduce reliance on foreign currencies, in mitigating capital outflows and secure its macroeconomic situation.

[13] ***2018:*** In September the Mekari President passed Executive Order 9-2018 with the aim of providing financial aid in the form of subsidies towards eligible businesses that had been impacted by the currency crisis.

[14] ***2018:*** On 8 March, Caeli's board voted to seek judicial review of the interim airfare caps imposed on it in September 2016. However, on 15 June, Justice VanDuzer released his interim decision on the airfare caps, declining to remove them.

[15] ***2020s:*** In August, High Commercial Court of Mekar issued a ruling recognizing and enforcing an award in Mekar that has been set aside in the Supreme Arbitrazh Court of

Sinnograd based on the allegation of corruption by the sole arbitrator in the Sinnoh Chamber of Commerce.

[16] ***2020:*** Caeli's market share in Mekar dropped below 30%. Vemma's efforts between February and September 2020 failed to yield another buyer for its shares. As a result, Vemma sold its stake in Caeli to Mekar Airservices on 8 October 2020 for 400 million USD.

Arbitration

[17] Claimant filed a notice of arbitration against Mekar on 15 November 2020 to seek compensation for its losses under the CEPTA.

EXECUTIVE SUMMARY

[1] **Jurisdiction:** Claimant was exercising governmental function, therefore its conducts are attributed Bonooru according to Article 5 and 8 ARSIWA. Consequently, does not fall under the jurisdiction of the ICSID as it constituted as state-to-state arbitration.

[2] **Amicus Brief:** The tribunal should accept CRPU amicus brief as it is within the scope of the dispute while bringing new perspective and urgent public interest. Meanwhile rejecting CBFI's.

[3] **FET Standard:** The measures taken by Respondent to deny Claimant's subsidies, were permitted by domestic and international policy. Additionally, Respondent had not denied Claimant of justice, as measures taken were within the due process of law.

[4] **Compensation:** In any event, if the Tribunal finds that Claimant is entitled to compensation, the method shall use Article 9.21 CEPTA in accordance with *Lex Specialis* principle with no possibility of importing clause under MFN and international law.

[5] Conclusively, this proceeding is improper as Claimant is not eligible to arbitrate under the Tribunal (i.e. Mekar and Bonooru). In any event, no violation has been conducted, thus no compensation is entitled for Claimant.

Part I: Jurisdiction

[1] Under Article 9.17 CEPTA, Respondent and Claimant had given their consent to arbitrate under Additional Facility Rules. Article 2 Additional Facility Rules stated that it only entertains an arbitration proceeding between a State and a national of another State.

[2] *In casu*, Claimant's acts have manifested the conduct of the Government of Bonooru, turning the nature of the dispute to a state-to-state arbitration. Hence, the Tribunal would lack jurisdiction *ratione personae*.

[3] Presently, both the Additional Facility Rules and CEPTA are silent regarding the provision of attribution. Thus, to determine Claimant's *ratione personae* the Tribunal should apply the Broches Test rooting from Article 5 and 8 ARSIWA,[1] which has been relied upon by the ICSID tribunal to determine attribution of a private entity's conduct towards the state, in the absence of provisions in the BIT and the convention.[2]

[4] For an investor's conduct to be attributed to the state, the Broches Test asserts that it should exercise governmental authority or is conducted under the existence of the States' control (government's agent).[3]

[5] Accordingly, Respondent submits that Claimant possesses characters of a state as Claimant is exercising Bonooru governmental authority **[I];** and is conducted under direction or control of Bonooru **[II]**.

[1] BUCG, Decision on Jurisdiction ¶34.
[2] Maffezini, Decision on Jurisdiction ¶74.
[3] ICSID Commentary, p.161.

[I] Claimant is exercising Bonooru governmental authority

[6] The Broches test, rooting from Article 5 ARSIWA asserts that a private entity's action can be attributed to the state, if the entity is empowered by the law of the State and the conduct inherently exercises governmental authority.[4]

[7] Accordingly, Respondent submits that Claimant's activities throughout its acquisition of Caeli Airways (**"Caeli"**) should be seen as an exercise of governmental authority to further be attributed to Bonooru. As Claimant is empowered by the law of the state to exercise governmental authority **[A]**; and Claimant's conduct during its investment manifests the exercise of governmental authority **[B]**.

[A] Claimant is empowered by the law of the state to exercise governmental authority

[8] An entity can be determined to be empowered by the law of the state, if there is an instrument that authorizes it to exercise certain governmental authority as well as the governmental power to conduct such authority.[5]

[9] In the situation at hand, Claimant has manifested both prerequisites mentioned. *First,* Claimant obtained Bonooru empowerment through law authorization to conduct governmental authority and *second,* is vested with governmental power to exercise such authority.

[10] *First,* Bonooru's empowerment towards Claimant can be seen in its Memorandum of Association of Association **("MoA")** asserting that Claimant's operation has the purpose to serve Bonooru citizens' mobility rights.[6]

[11] In *Flemingo,* the tribunal established that PPL was empowered to exercise governmental authority by "PPL Act". The Act, delegated the PPL with the task to conduct modernization

[4] *Ibid*, p.43, ¶2.
[5] Flemingo, Award ¶436; Bosh BP, Award ¶173.
[6] Record, p.44.

of airport terminals, which is under the scope of the Ministry of Transport's obligation, therefore considered as a governmental matter.[7]

[12] Similarly, 'Serving Bonooru citizens' mobility rights' happens to be a part of the state's obligation, thus constituting Bonooru governmental authority.[8] Moreover in 1980, the Prime Minister further reaffirmed that the purpose of establishment of Claimant further proves this contention.[9]

[13] Second, Claimant was provided sufficient governmental power by the state to realize its governmental authority delegated to it under Article (h) of its MoA after the acceptance of the Horizon 2020 scheme.

[14] Taking a reference from *Bosh BP*, in determining whether an entity was empowered by the law of the state requires to prove that an entity possesses governmental power in the form of organizing a state-owned property to serve its governmental purpose of opening higher education service.[10]

[15] *In casu*, the acceptance of the Horizon 2020 scheme of recurring subsidies between Bonooru Ministry of Transport and Ms. Sabrina Blue, Claimant's representative has made available Claimant to exercise in its function Article (h) of its MoA.[11] Therefore provided Claimant with governmental power to Claimant in conducting its governmental function.

[16] Conclusively, as governmental authorization and power has been obtained, it is evident that Claimant is empowered by the law of Bonooru to exercise governmental function.

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[7] Flemingo, Award ¶436.
[8] Record, p.43.
[9] *Ibid,* p.29.
[10] Bosh BP, ¶173.
[11] Record, p.89.

[B] Claimant's conduct during its investment manifests the exercise of governmental authority

[17] Claimant's conduct throughout its investment shall be seen as the conduct of Bonooru. *Firstly,* Claimant's conduct is inherently a governmental authority. *Secondly*, its action shall be attributed to Bonooru.

[18] Firstly, the history of a certain society is a detrimental factor as to whether a function is essentially governmental,[12] for example the intent of an entity's establishment. In *Maffezini*, the fact that SODIGA's establishment was intended to exercise Spain's governmental functions, was considered as a detrimental factor.[13]

[19] Presently, Claimant's was established to carry out governmental functions of its predecessor regardless of profitability, namely serving Bonooru citizens mobility that was established as a state's obligation by the Constitutional Court of Bonooru. This thus raises a rebuttable presumption that Claimant is a state entity which exercises governmental function.[14]

[20] While Claimant might argue its current actions are commercial activity like in CSOB, the only similarity between CSOB and Claimant was their history of having exclusive dependence with the state. However, CSOB did not carry out governmental function in its conduct, since by 1993 it had thrown its exclusive economic dependence towards the state, being able to function as an independent commercial bank.[15]

[21] *In casu*, Claimant still carries out its governmental function throughout its investment. This was manifested by maintaining to serve unprofitable routes. Additionally, Ms. Sabina Blue stated that Claimant was "living up the expectation of its predecessor". Thus, in contrast with CSOB, Claimant never conducts its action for a commercial matter as an independent private airline.

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[12] ARSIWA Commentaries, p.101, ¶6.
[13] Maffezini, ¶85.
[14] *Ibid*, ¶77.
[15] CSOB, Decision on Objection to Jurisdiction, ¶21.

[22] *Secondly,* in regards to attribution, Respondent recognizes that the empowerment of an entity with governmental authority does not resolve the matter, as established in the tribunal of *Gustav.*[16]

[23] An entity's conduct is attributable to the state, only if the conduct happens because the entity exercised its governmental authority or is obliged by the state to do so.

[24] Illustratively, in *Gustav,* the fact that Cocobod – *a public entity, empowered with puissance publique to make and to enforce regulations regarding cocoa bean prices*[17] – insisted the Government's policy concerning the FOB prices for cocoa beans to claimant in concluding the Price Agreement 2001 does not make this act attributed to the state.[18]

[25] Cocobod 's conduct in the process of concluding the Price Agreement did not constitute an exercise of governmental authority, as it was not obliged to apply the Government policy and only used it as a guide which was still negotiable.

[26] Additionally, in *Flemingo,* PPL was not only delegated by the state but was also obliged to report intensively to the Ministry of Transport, meaning that PPL is clearly operating its governmental authority due to the fact that there was surveillance by the state, in the form of accountability of its obligation,[19] thus assuring the outcome of the PPL acts was in line with its governmental authority.

[27] *In casu,* Claimant's conduct of providing these loss-making routes occurred because Claimant has a governmental authority to serve Bonooru citizens mobility rights in accordance with Article 70 Bonooru Constitution. This then was further supported by obligation from Bonooru through the recurring subsidy under the Horizon 2020.

[28] Considering the Horizon 2020 subsidies were provided to "*optimally tap the potential of Bonooru's emerald beaches, it's fascinating national parks, and its human, cultural and historical treasures*" which

[16] Gustav, Award, ¶190.
[17] *Ibid.*
[18] Gustav, ¶222.
[19] Flemingo, ¶430.

was in line with Claimant's governmental authority in its MoA. Therefore, by accepting it, this is evident that Claimant also had an obligation from Bonooru to serve these routes or its governmental authority.

[29] Consequently, Claimant's conduct of serving those loss-making routes indeed happened due to its governmental authority that was further confirmed by acceptance of the Horizon 2020 subsidy.

[30] Therefore, it can be concluded that the conduct happened due to Claimant exercising its governmental authority to serve Bonooru citizens mobility rights and therefore its act shall be attributed to Bonooru.

[II] Claimant's conduct is under control of Bonooru

[31] In any event, should Claimant's actions do not reflect governmental authority, Article 8 ARSIWA shall be used to prove that they were undeniably under the control of Bonooru, rendering their actions to be attributable to Bonooru.

[32] Under Article 8 ARSIWA, it does not matter whether the conduct of the private entities involves "governmental activity", and the most common pattern is a state organ recruiting private entities who act as "auxiliaries" while remaining outside the official structure of the State.[20] This auxiliary or control mirrors the *Broches Test* requirement that an entity cannot act as a state agent.

[33] However, to determine that an entity is under the control or acting as auxiliary of a State, the state must have effective control.[21] The tribunal in *Jan de Nul* established the threshold of effective control to be:[22]

> *"International jurisprudence is very demanding in order to attribute the act of a person or entity to a State, as it requires both a* ***general control of the State*** *over the person or entity and a* ***specific control of the State*** *over the act the attribution of which is at stake; this is known as the "effective control" test."*

[20] *Ibid*, ¶2.
[21] White Industry, Award ¶81.16.
[22] Jan De Nul, Award, ¶173.

[34] Conclusively, Respondent submits that Claimant has fulfilled both parameter of effective control since Claimant was under the general **[A];** and specific control **[B]** of Bonooru.

[A] Claimant was under the general control of Bonooru

[35] General control of the state over an entity is explained when the state has the basic means to even control the said entity to achieve a certain outcome.

[36] The tribunal in *Tulip* established that TOKI, which is a Turkish governmental entity, controls the majority of Emlak's voting shares at all relevant times.[23] This majority ownership provides TOKI the ability to direct Emlak's decision to their desired outcome.[24]

[37] Thus, Emlak was subject to the control of TOKI, furthermore, the Turkish State Since TOKI had control over the voting shares through its representation on the Board, TOKI was "certainly capable" of also exerting sovereign control over Emlak.[25]

[38] In this present case, Respondent acknowledged that Vemma is a private entity, in which Bonooru is a share consisting around 31-38% which would not suffice to be considered as a 'majority shareholder'.[26] Although it does not expel Vemma from the possibility of being generally controlled by Bonooru, as there is no 'one size fits all' organizational structure being required to assess general control. [27]

[39] The percentage of shares of Bonooru indeed holds the biggest amount of ownership in the inventory.[28] Moreover, Bonooru is the only government entity that possesses ownership in Vemma, therefore having the most voting power compared to any other individual private companies.

[40] Furthermore, decisions being made pursuant to Bonooru's voting in the shareholder position is adopted by Vemma's Board of Directors for the company's operation.[29]

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[23] Tulip, ¶307.
[24] *Ibid.*
[25] *Ibid*, ¶308.
[26] Record, p.29.
[27] White Industry, ¶¶8.1.5, 8.1.8.
[28] Record, p.89.
[29] *Ibid,* p.86.

[41] Applying the same token that TOKI had control over the majority vote through the possession of majority shares, it must be seen that Bonooru did possess these powers albeit not all the time. The point still stands that Bonooru had the power to directly influence the outcome of Claimant's decision.

[42] The fact that Bonooru did not have any majority of shares is not determinative for this matter. What matters is, in the aspect of general control, Bonooru had the means to do so, even if it was not all the time.

[43] Conclusively, Claimant was under the general control of Bonooro based on the reasons.

[B] Claimant was under the specific control of Bonooru

[44] The tribunal in *Tulip* addressed that it is important to examine whether there has been any direction from the State towards the entity in question to conduct a specific activity, thus exercising specific control.[30]

[45] Presently, Respondent submits that this direction to conduct a specific activity is manifested through Claimant's acceptance of Bonooru's Horizon 2020 subsidies.

[46] Respondent is fully aware that States' participation in form of monetary aid may not be sufficient to establish control over an entity to conduct a specific activity.[31] For instance, in Nicaragua where the International Court of Justice denied attribution of conduct to the United States, as its direction to Contras only manifested in a form of aid.[32]

[47] Unlike the United States' aid to Contras, Bonooru's Horizon 2020 subsidies engage Claimant in an obligatory relationship with the Bonooru government.

[48] The reason being is that Claimant's commercial activity needs to align with the goal of the Caspian Project to "optimally tap the potential of Bonooru's emerald beaches, it's fascinating national parks, and its human, cultural and historical treasures". To fulfil such objectives, Claimants have the obligation to provide services of flight routes covering Mekar-Bonooru.

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[30] Tulip, ¶309.
[31] Nicaragua, ¶¶110 - 115.
[32] *Ibid.*

[49] Conclusively, Claimant's acceptance of the subsidy vested claimant with an obligation to conduct a certain action pursuant to the Caspian Project exhibiting the specific control of Bonooru over Claimant.

Part II: Amicus Brief

[50] Both disputing parties have agreed on the usage of amicus briefs under the ICSID Additional Facility Rules **("Additional Facility Rules")** as well as Article 9.19 CEPTA. Moreover, the UNCITRAL Rules on Transparency shall also be used for determining the applicable amicus elements.

[51] Presently, the information regarding the nature of Bonooru enterprise provided by the amicus brief submitted by the Consortium of Bonoori Foreign Investors **("CBFI")** is not assistive to the Tribunal as it cannot provide new perspective on Claimant's *ratione personae*.[33]

[52] On the other hand, the Amicus Brief submitted by external advisors of Committee on Reform on Public Utilities **("CRPU")** provides assistance to the Tribunal that will be detrimental towards the outcome of the proceeding.

[53] Respondent submits that the Tribunal should accept the amicus submitted by CRPU **[I].** Meanwhile, deny CBFI Amicus Brief application **[II]**.

[I] CRPU's Amicus Brief provides assistance to the Tribunal's assessment

[54] The main purpose of an Amicus Brief is providing assistance to the Tribunal, with the information that may not be provided by the disputing parties with respect to legal or factual issues of the dispute.[34]

[55] Thus, Respondent submits that CRPU's submission complies with the requirements as it falls within the scope of the dispute **[A]**, providing a new perspective **[B]**. Additionally, CRPU addresses public interest in its submission **[C]**.

[A] Information Provided by CRPU Amicus Brief falls within the Scope of the dispute

[56] Article 9.19 (3) CEPTA stated:

> "***After consultation with the disputing parties**, the tribunal may accept and consider written amicus curiae submissions regarding a matter of fact or law within **the scope of the dispute...**"*

[33] Record, p.17.
[34] Article 41 (3), Additional Facility Rules.

[57] To be accepted, amicus brief should contain information that falls under the scope of the dispute.[35] For this matter, an amicus submission should correlate to the claims being pursued by the disputing parties.[36]

[58] CRPU's submission relates to the conclusion of whether the investment is being protected by the CEPTA, which holds a crucial position with respect to all claims being brought to this Tribunal.[37]

[59] Claimant argues that CRPU's amicus submission raised a jurisdictional question that neither disputing parties requested in their procedural order.[38] However, Respondent contends that this does not make its submission to be outside the scope of the dispute, if it has the parties and the Tribunal's consent on whether such a question must be raised.

[60] For instance, in *Electrabel*, the second contention raised in European Commission **("EC")**'s amicus brief regarding applicable laws was deemed necessary by only one of the disputing parties as it raised a new form of interpretation.[39] However, the tribunal accepted the amicus considering that even a disputing party's opinion may be determinant on the tribunal's decision to accept an amicus brief.

[61] Presently, Respondent deems that the submission made by CRPU directly correlates with the claims made by disputing parties, despite raising a new jurisdictional question. This is due to its urgency towards the determination of *ratione materiae* of Claimant's jurisdiction. **[1]**.

[62] As *ratione materiae* depends on the existence of an investment, the definition of investment must be determined clearly. In which, an investment made by Claimant should possess legal basis to uphold it **[2]**. These matters can only be settled with the acceptance of CRPU's submission.

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[35] Apotex II, BNM, ¶¶28-30.
[36] *Ibid.*
[37] Record, p.19.
[38] *Ibid,* p.22.
[39] Electrabel PO 4, ¶¶16, 24.

1. The urgency of CRPU's jurisdictional question to the *ratione materiae* of Claimant's jurisdiction

[63] First and foremost, it shall be remembered that both parties have agreed to proceed to an arbitration within the ICSID tribunal, where its jurisdiction only spans out to legal disputes arising directly out of an investment which is protected by the BIT.[40]

[64] In support of this, the tribunal in *Salini* stated:

> *"The Arbitral Tribunal, therefore, is of the opinion that its* ***jurisdiction depends upon the existence of an investment within the meaning of the Bilateral Treaty*** *as well as that of the Convention, in accordance with the case law."*

[65] Therefore, CRPU's amicus must be accepted as the data displayed may enlighten the legitimacy upon Claimant's rights in Caeli and thus affect its investment to be considered as protected pursuant to the Article 9.1 (g) CEPTA.

[66] Article 9.1 (g) CEPTA asserts that an Investor's investment, to be protected should obtain:

"licenses, authorizations, permits, and similar rights ***conferred pursuant to the Party's law****".*

[67] Accordingly, Claimant's activities shall confer to this article, in which the purchasing of Claimant's right have to confer to the host state's law. The failure to determine the existence of an investment would cause the tribunal to lack jurisdiction.

2. Claimant has no legal basis to uphold its investment

[68] The Tribunal has an obligation to accept this amicus and see it as in the scope of dispute basing of Article 41 (2) ICSID Convention:

> *"****Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre****, or for other reasons is not within the competence of the Tribunal,* ***shall be considered by the Tribunal*** **[...]***"*

[69] Accordingly, the Tribunal will violate their obligation within Article 41 (2) ICSID Convention and has an existing risk of exceedingly exercising its power through Article 52 (1)(b) ICSID

[40] Salini, Decision on Jurisdiction, ¶44.

Convention which means that the award could be annulled if it does not accept CRPU amicus.

[70] *In casu*, CRPU's amicus could question the jurisdiction of this Tribunal, basing of Article 25 ICSID convention of a direct causal link between the substance of the amicus and the disputed claims.

[71] The *locus standi* of CRPU's amicus to question the jurisdiction of the Tribunal lies within interplay between Article 25 of ICSID Convention and Article 9.1 (g) of CEPTA which is determinant for the jurisdiction as it contains requirement for protected investment.

[72] Pursuant to Article 9.1 (g), Claimant's investment should be established in line with Mekari's domestic law to be covered by the CEPTA.[41]

[73] The information provided by the CRPU's amicus opens the possibility that Claimant's ownership of Caeli resulted from a bribe that could be contrary to Mekari's domestic law. As a result, this violation of domestic law may prevent Claimant's investment from obtaining protection under Article 9.1 (g) CEPTA, causing the Tribunal to lack jurisdiction over the case at hand.

[74] In *Niko,* the tribunal's jurisdiction was challenged due to the involvement of corruption in the initiation of claimant's investment. However, the tribunal still finds its jurisdiction available as no causal link was found between the corruption and claimant's conduct during the creation of investment.[42]

[75] Accordingly, it is suitable for the Respondent in this present case to submit the possibility of Claimant's investment to be illegitimate should there be a causal link between the possible evidence submitted by the CRPU regarding the corruption and the occurrence of Claimant's investment.

[41] Zachary Douglas (2009), p.203.
[42] Niko, Decision on the Corruption Claim, ¶27.

[76] The Constitutional Court of Bonooru has done a *suo moto* investigation in regard to the allegation of bribery between Claimant and Mr. Dorian Umbridge.[43] If proven, the subject of annulment will be pursued by the disputing parties, the Constitutional Court of Bonooru approved that there was a bribery increase the possibility of a causal link that the investment made by Claimant was illegal rendering the Tribunal jurisdiction is unavailable over the case.

[77] Additionally, according to Article 7 ARSIWA Mr. Dorian involvement in the allegation of bribery could not be attributed to Respondent since there was no certainty that he was acting under governmental capacity. This uncertainty regarding the extent of his authority raises the urgency for the Tribunal to entertain CRPU's amicus minding the effect imposed towards the jurisdiction - should the conduct be attributable to Respondent, then the Tribunal's competence may be rendered as void.

[78] In conclusion, the information displayed within CRPU's amicus may open the possibility that Claimant's investment was initiated in contrary existing domestic law, questioning the jurisdiction of the Tribunal. Therefore, the Tribunal may violate its obligation pursuant to the ICSID convention if it refuses to accept CRPU'S amicus.

[B] CRPU submission provides new perspective to the tribunal

[79] In order for an amicus brief to assist the Tribunal in assessing the factual or legal issue in the dispute, it is important for them to provide a new perspective, particular knowledge or an insight that is different from that of the disputing parties.[44] This requirement had been taken into account by most tribunals, such as *Eco Oro*, *Apotex II,* and *Bear Creek*, in accepting an amicus brief.[45]

[80] Accordingly, Respondent submits that CRPU's amicus brief possesses the said characteristic as it contains information that serves as possible evidence of Claimant's involvement in Mr. Dorian Umbridge's bribery. Such matters have not yet been brought by any of the disputing

[43] Record, p.87.
[44] Article 41 (3) (a), ICSID Additional Facility Rules.
[45] Eco Oro PO.6, ¶31; Bear Creek PO.5, ¶39; Apotex II, BNM, ¶29-30.

parties. Hence, CRPU's amicus will assist the Tribunal in assessing the legality of Claimant's investment pursuant to the CEPTA stated in the paragraphs above.[46]

[81] Furthermore, the Tribunal should as well consider CRPU's expertise and credential as relevant in submitting the amicus as possible evidence. *In casu,* CRPU engaged closely with Claimant as an external advisor on the privatization, liquidation, and/or restructuring of Caeli.[47]

[82] In conclusion, assessing from the nature of information as well as relevant expertise of CRPU, the Tribunal should see CRPU's amicus as eligible to assist the tribunal with a new perspective further accepting it.

[C] CRPU is in pursuit of public interest

[83] Public interest is an element that past precedents of investment tribunals have considered paramount in assessing amicus brief submission.[48] Indeed, amicus submissions at the first place serves the purpose of emphasizing the public interest that arose from the subject matter of the dispute.[49]

[84] The nature of the dispute that shall be assisted by the amicus should also consist of a subject matter in pursuant to public interest. Disputes with the subject matter in pursuant to public interest should be defined as those which may promulgate outcome that will affect individuals or entities beyond the disputing parties,[50] in which it may raise a variety of complex legal questions.[51]

[85] Presently, CRPU's submission indeed is in pursuit of a public interest, as it addresses an issue that might cause an impairment to fair business practices which then will have a magnitude effect such as consumer welfare.

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[46] Supra Note, ¶75-99.
[47] Record, p.19.
[48] Suez, Petition by NGO, ¶18.
[49] *Ibid.*
[50] Apotex II, Mr. Barry, ¶¶41-42.
[51] Suez, Petition for Amicus Curiae, ¶18.

[86] The information in CRPU's amicus can confirm the legality of Claimant's investment, where allegation of bribery in the procurement has occurred - as it submitted possible evidence towards Claimant's conduct.[52]

[87] It is to be noted that practices of corruption impair fair business practices, as it makes state officials choose the best briber, instead of best price-quality competitors that have competed fairly in the procurement.

[88] Moreover, corruption increases the cost of an enterprise, as they must put out more expenses if they choose to conduct bribery, thus leaving added financial burden. This additional cost may result in their product or services price to increase or for them to lower the quality as it will be costly to run operational expenses.[53]

[89] High prices and/or low quality of end products and/or services, will either way affect consumer welfare as quality purchases will not be adequate to its quality. The quality of the product or service will then - at the very best - only be decent compared to the cost that needs to be borne.

[90] As a result, competitiveness of the market will be barred as bribery will erase the competing stage and proceed to the selection of the best briber instead. This will further decrease, or even erase, the pressure on enterprises to provide the best quality at the best price for their products or service, preventing consumers to acquire decent products and services.[54]

[91] From this deliberation, the Tribunal shall see that corruption is not a mere event that might only affect the legality of the investment rendering jurisdictional defects. Corruption will negatively affect public interest, causing a magnitude of effect as comparable to such established in in *Suez/Vivendi* where the dispute centers around public service where millions of people aside from the disputing parties are affected.[55]

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[52] Supra, ¶25.
[53] *Ibid*, p.8.
[54] *Ibid.*
[55] Suez, Petition for Participation of Amicus Curiae, ¶18.

[92] Thus, should the Tribunal entertain cases involving corruption by not being refusing to be aware of this information, it will not only affect its obligation according to the ICSID Convention,[56] but will also contribute in impairing fair business practices by creating a reference for future precedents.[57]

[93] Conclusively, the Tribunal should accept CRPU's amicus as they contain public interest with respect to fairness of the market.

[II] The Tribunal should deny CBFI's amicus brief application

[94] The main purpose of an amicus curiae participation, under the Additional Facility Rules, is to give useful information along with accompanying submissions to the Tribunal.[58] However, CBFI in its submission fails to reach that main purpose since its submission neither provides any new perspective to the Tribunal **[A]**; nor is in pursuit of public interest **[B]**. Moreover, its participation in this proceeding can manifest a conflict of interest **[C]**.

[A] CBFI amicus brief is unable to provide new perspective to the Tribunal

[95] Claimant may contend that CBFI, as a consortium of foreign investors, are able to provide substantial knowledge regarding several applicable laws to define Claimant's *ratione personae*.

[96] However, in the Respondent's view, CBFI amicus brief is unable to provide a new perspective as they do not have substantial knowledge **[1]**; as they are not relevant expertise in the matter **[2]**.

1. CBFI cannot provide substantial knowledge

[97] To be accepted, an amicus should provide a new perspective to the tribunal which possesses a direct causal link that might affect the Tribunal's decision upon the conduct of the disputing parties.

[98] For instance, *Phillip Morris*, WHO FCTC amicus provided relevant provisions they issued as well as relevant Guidelines for its implementation with respect to tobacco warnings. WHO

[56] Supra, ¶19-29.
[57] Soreide, T, p.8.
[58] Piero Foresti, Letter by Secretary, ¶2.1.

FCTC's substantial knowledge regarding the implementation of its Guidelines indeed go beyond that of the disputing parties', as this is its main function as an organization itself.[59]

[99] Furthermore, WHO FCTC as an NDP, with its substantial knowledge was able to provide a direct causal link to what the decision that the tribunal may issue, since it is able to demonstrate that the measure of tobacco packaging and labelling measures implemented by Uruguay was related to the protection of public health it committed under the WHO FCTC Guidelines.[60]

[100] Presently, the legal analysis that CBFI provided in the amicus does not go beyond or differ from that of the disputing parties. Unlike WHO FCTC who provided the implementation of **its own Guidelines**, CBFI only attempted to provide its members' - Bonoori enterprises - regulatory framework, in which Claimant is one of them. Therefore, it would be unreasonable to say that Claimant would not be able to provide how it works as a Bonoori enterprise more than CBFI did.

[101] In our case, the substantial knowledge of Bonoori enterprises regulatory framework provided by CBFI would not assist the Tribunal, failing to demonstrate a direct causal link that might affect the Tribunal's decision upon the conduct of the disputing parties in the current proceeding.

[102] CBFI is unable to explain how information on business climate of Bonooru, existing corporate framework in which enterprises operate, and the nature of aviation industry in Bonooru might influence Claimant's conduct in its investment, and therefore have no causal link that can affect the Tribunal's decision upon the conduct of the disputing parties in the current proceeding.

[59] Phillip Morris, WHO Amicus Curiae, ¶15.
[60] *Ibid*, ¶¶11-12.

2. CBFI does not have relevant expertise

[103] NDP as amicis should possess relevant expertise towards the subject matter being contested in the dispute.

[104] In *Micula*, the European Commission (EC) acts as a NDP that submits an amicus brief on their analysis of EU Law. EC is the enforcer of EU Law as they are the creators of the law and understands it beyond the knowledge of the tribunal.[61]

[105] Presently, CBFI is not a governmental entity, rather they are just a consortium of foreign investors that are only able to provide perspective from the point of view of investors. Hence, they do not have a clear standing nor authority such as EC in *Micula* that would make them have an expertise that goes beyond the knowledge of the disputing parties in assisting the Tribunal in determining the legal or factual issue related to the proceeding

[106] The Tribunal shall also notice that EC in *Micula* is not only able to present the effect of the outcome of the decision, but it also provides assistance for the interpretation of Romania-Sweden BIT.

[107] Contrary to CBFI, who have no capacity to give such assistance as we have established in the previous point. Therefore, CBFI's amicus brief shall not be accepted since it would not be of any help for the Tribunal and only cause unnecessary extra time and cost burden for the disputing parties.

[B] The participation of CBFI can manifest into a conflict of interest

[108] The participation of CBFI's member, Lapras Legal Capital ("Lapras"),[62] in the current proceeding would risk the rise of a conflict of interest since it might possibly affect the independence of the amicus in submitting its amicus brief.

[61] Micula, ¶316.
[62] Record, p.16.

[109] Compared to *Phillip Morris,* the tribunal established that ASIPI lacked independence, because claimant's lawyer was holding a position in ASIPI's managerial board.[63] It must be seen that a participation of an "influential party in the CRPU" in the proceeding might affect the CRPU's independence, thus determining the acceptance of its submission.

[110] *In casu,* the participation of Lapras as Claimant's financial advisor would also question its independence, possibly raising conflict of interest. CBFI's nature as a consortium might add questions for this matter since it makes decisions in favor of its members.

[111] Indeed, a mere participation of a member will not conclusively determine that the CRPU lacks independence. In *Phillip Morris*, the tribunal proceeded to establish that WHO FCTC was in a unique position as the coordinating authority on international health work, which assists parties in implementation of the WHO FCTC obligations, despite respondent being one of its members.[64]

[112] However, the nature of WHO FCTC and CBFI are different. WHO as an organization stands to enforce its provision to its members regardless of the voice of its members, unlike CBFI as a consortium whose standing was influenced by the voice and opinion of its members.

[113] In conclusion, the participation of Lapras in the proceedings, questions CBFI's independence, possibly raising conflict of interest. This will further cause conflict of interest

[C] CBFI amicus brief shows no pursuit of public interest

[114] In order for an amici to be said to have provided a public interest in this proceeding, amici must submit that the disputed matter has a public element in it and it could assist the tribunal in adjudicating the said matter that has the public element.

[115] In *Biwater*, the amicus was successfully admitted by the tribunal as it provided assistance in the disputed matter that contained a public element regarding the host state's population to enjoy a basic human right in a form of clean water access.[65] The tribunal considered that this

[63] Phillip Morris, ¶55.
[64] Phillip Morris PO 3, ¶11.
[65] Biwater, PO 5, ¶14.

information provided sufficient information to display both public elements and the ability to assist the tribunal in assessing the specific public element in the disputed claim.

[116] Respondent submits that CBFI amicus brief is doubtful to have fulfilled the recurring thresholds. The reason being is that it does not conclusively show that its submission could assist the Tribunal in assessing the public element present in the disputed claim.

[117] CBFI's amicus only falls under the assumption that this Tribunal would make an error in the determination of Claimant's *ratione personae* - specifically in choosing the relevant domestic laws - and therefore would interrupt the public interest of Bonoori foreign investors, since it would introduce uncertain business framework regarding the status of State Linked Enterprises.

[118] As established, there are none or minor precedents of an amicus providing the relevant domestic laws to adjudicate the investor's *ratione personae*. Since, the burden of proof shall lie within the disputing parties and the tribunal to decide. Thus, there is no need for an amicus to step in to present the same arguments - any attempts in doing this would only be an unduly burden of process.

[119] Therefore, CBFI has failed to prove that it could, or need to, assist the tribunal in assessing the public interest present in the dispute, since the disputing parties and the tribunal will provide it either way.

MERITS III

[120] Article 9.9 (1) CEPTA requires a Contracting Party to treat investments in accordance with Fair and Equitable Treatment ("**FET**") and Full Protection and Security ("**FPS**") standards.[66] The inclusion of the word "and" between the two standards provide distinct guarantees of protection and thereby, separate grounds for violation of the Article.[67]

[121] Accordingly, Respondent submits that no violation of Article 9.9 (1) CEPTA has been conducted, as Respondent treated Claimant fairly and equitably **[I]**; Respondent provided full protection and security **[II]**. In any event Respondent violates Article 9.9 (1) CEPTA, Claimant is not entitled to the compensation award it seeks **[III].**

I. Respondent treated Claimant fairly and equitably

[122] FET provision in CEPTA adopted the autonomous view, as the clause does not refer to neither international minimum standard nor customary international law.[68] Consequently, a breach to either element leads to an entire breach of the entire FET standard.[69]

[123] Article 9.9 (1) and (2) CEPTA stipulates that FET standard includes the prohibition of Contracting Parties to conduct measures which constitute 'denial of justice in criminal, civil, or administrative proceedings' and those which possess 'arbitrary or discriminatory' nature.[70]

[124] *In casu*, Claimant's risky operation of Caeli within the State of Bonooru had been regarded as a threat to fair competition. In response, Respondent directed an investigation towards Claimant to pursue its public policy.

[125] The report of the investigations established that Claimant's conducts of exclusionary behavior were illegal. As a result, Respondent declined Claimant's application of subsidies lawfully in fear that it may help Caeli skew market conditions once more. Despite Caeli's

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[66] Jacob & Schill, p.162.
[67] *Ibid.*
[68] M Mbengue & S Schacherer, p.98.
[69] Lemire, ¶284; National Grid, ¶¶170-172; Total, ¶107; Saluka, ¶294.
[70] Record, p.76.

illegal behavior, Respondent still provided fair opportunity for Claimant to proceed with proper remedy within the Mekari judicial system.

[126] These measures reflected Respondent's best effort to provide legal protection for Claimant's investment, while protecting its public interest. In particular, Respondent did not commit: Discriminatory measures**[A]**; and denial of justice**[B]** towards claimant.

[A] The Respondent did not commit discriminatory conduct

[127] Claimant argues that the Respondents' decision to deny the application of subsidies for Caeli under Executive Order 9-2018, was discriminatory.[71] Specifically, since according to Claimant that the conduct was discriminatory as other airlines from Arrakis who also obtained subsidies from its home country were granted such subsidies.

[128] However, the denial of subsidies was based on a legitimate domestic policy. Thus, Respondent asserts that no discriminatory treatment was committed.

[129] Therefore, discrimination occurs when investors who are in like circumstances are being treated differently, without reasonable justification.[72] Respondent submits that the denial of subsidies towards Claimant is not discriminatory because: **[1]** Caeli is not in like circumstances with other Arrakis airlines; and **[2]**; the measures were justifiable.

1. Caeli is not in like circumstances with other Arrakis airlines

[130] Firstly, in determining whether Respondent had committed discriminatory treatment, the Tribunal should determine whether the two investors that were alleged to be treated differently are in like circumstances.[73]

[131] In *Parkerings,* the tribunal concluded that in determining in like circumstances with *Pinus Proprius*, the following conditions should cumulatively met: *"(i) Both companies must be foreignly*

[71] *Ibid.*
[72] SD Myers, ¶¶ 252-254; Saluka ¶313.
[73] Paushok, ¶315.

owned and operate in the same business sector; (ii) The two investors must be treated differently due to a measure taken by the State.[74]

[132] Presently, Respondent recognizes that Caeli had multiple similarities with the other airlines from Arrakis, such as JetGreen. However, those similarities are not sufficient to establish that the two entities were in like circumstances.

[133] The tribunal of *Parkerings* discovered similarities between the investor and *Pinus Propinus*, in which the aforementioned conditions have been met.[75] However, the tribunal noticed that the difference in size of *Pinus Proprius* and the environmental threat they could have imposed into the *Old Town*, is significant to determine that the two investors were not in like circumstances.[76]

[134] *In casu*, despite Caeli having similar characteristics with Arrakis' airlines such as Jet Green, Caeli maintained a much larger size in operations position and may impose significant threat towards the fairness of the airline market.

[135] Presently, Caeli's size is much bigger, as it possesses the largest market share of 43%, in comparison to any other foreign owned airlines from Arrakis, with JetGreen being its closest competitor at 21%.[77]

[136] Furthermore, Caeli also imposes a significant threat than that of its competitors towards the airline market, as the first investigation revealed its predatory behavior, by abusing its dominant position[78]

[137] Conclusively, Caeli was not in like circumstances with other airlines from Arrakis, fulfilling the threshold set within the tribunal of *Parkerings*.

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[74] Parkerings, ¶¶369-371.
[75] *Ibid.*
[76] *Ibid,* ¶396.
[77] Record, p.86.
[78] *Ibid,* pp.34-37.

2. Respondent asserts that the measures were justifiable

[138] In any event, if a host state had conducted differential treatment, it would be justified should there be rational policies which are not motivated by preference.[79] A rational policy may be those that carries out the purpose of national or international obligations.[80]

[139] Respondent is aware that it had conducted differential treatment regarding the distribution of the subsidies under Executive Order 9-2018. However, Respondent asserts that such differential treatment is justifiable as it is conducted with a rational policy to uphold Mekari competition law for the sake of the fairness within the airline market.

[140] Furthermore, Executive Order 9-2018 prescribes that the Secretary of Civil Aviation has the discretion to review and decide the eligibility of subsidies acceptance. Therefore, in deciding the distribution of subsidies, market fairness should be upheld to ensure that the subsidies would not be in favor of one enterprise over the other.[81]

[141] Presently, it is rational for Caeli's application for subsidies to be declined as they had received sufficient support from their home state of Bonooru under the Horizon 2020 Program and misused it to strengthen its dominant position and outcompete other airline companies operating in Mekar.[82]

[142] Evidently, CCM's investigation had found Claimant guilty of conducting predatory pricing and therefore breaking the Mekari competition law.[83] This indeed was considered when Respondent decided to reject Claimant's application of subsidy.

[143] Additionally, Respondent have both national and international obligation to fulfil, pertaining to the decline of subsidy. Internationally, Respondent is obligated to promote fair

[79] Pope and Talbot, ¶78.
[80] Philip Morris, ¶306.
[81] Record, p.56.
[82] *Ibid.*
[83] *Ibid*, p.36.

competition, as mentioned within the object and purpose of CEPTA contained in the preamble.[84]

[144] Domestically, Respondent is obligated to enforce their existing laws (Executive Order-9-2018), which has a clause that explicitly instructs the state not to grant subsidies to enterprises that will skew market conditions in favor of any enterprise.

[145] Conclusively, the differential treatment is justifiable and therefore, was not discriminatory towards Claimant.

[B] The Respondent did not commit denial of justice

[146] Several factors are indicative of Denial of Justice, which may breach the FET under 9.9 2(a) CEPTA. Some of which are unwarranted delays, willful disregard of due process, a palpable violation exposing bad faith and crucially, not a mere judicial error at its core.

[147] However, Respondent submits that they did not commit: an undue delay of court proceedings **[1]**; willful disregard of due process **[2]**; and Respondent has discretion to enforce an arbitral award that had been set aside **[3]**.

1. The Respondent did not commit an undue delay of court proceedings

[148] The tribunal in *Mondev* defined denial of justice as 'particularly serious shortcoming' and 'egregious conduct by the host state and its judicial organs' that 'shocks, or at least surprises, a sense of judicial propriety' would constitute a breach of this standard.[85]

[149] The tribunal further illustrates this point by defining denial of justice to be manifested through subjection to undue delay by a court.[86]

[150] Such shortcomings and undue delays should be assessed considering existing circumstances, including the investor's reasonable expectations given the knowledge of the Domestic Court system they have to adapt towards the limitations of such regime.[87]

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[84] *Ibid*, p.72.
[85] Mondev, ¶127.
[86] *Ibid*, ¶126.
[87] Chevron, ¶263.

[151] In this regard, Claimant might argue that Respondent's judicial system is in shortcoming, as it delayed hearings on urgent matters pertaining to the CCM's interim measure.[88]

[152] However, Claimant should have been aware their waiting period happened under the average time taken for a court proceeding to receive a final decision in Mekari courts - which ranges from 9 months to 22 months and even higher in commercial matters (~27 months).[89] In any event it took longer, this was due to the rapid increase of population in Mekar at that time.

[153] Furthermore, this Tribunal must ponder upon the existing circumstances for Claimant's contention of the delay, as Mekar underwent a severe financial crisis, with hyperinflation surging at a 2600% rate, thus the number of commercial cases increased.[90] Therefore this would not be in shock or even surprise a sense of judicial propriety.

[154] When deciding on Denial of Justice, the total period must be considered. Presently, Caeli requested a hearing on airfare caps being imposed due to its anti-competitive behavior on 27 March 2018. Due to the high volume of cases that resulted from the economic crisis, the hearing was scheduled for April 2019. Caeli insisted on an immediate redressal, however, the Court lacked resources to make this possible.[91]

[155] Further, all commercial cases underwent the same delay in the Domestic System of Mekar due to unavoidable constraints.[92]

[156] Even in such conditions, Respondent still administered Claimant's case in a quick manner, as the decision was made at only 15 months, contrasting with the average of 27 months for the commercial cases to reach a decision in Mekar.[93]

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[88] Record, p.4.
[89] *Ibid,* p.37.
[90] *Ibid,* p.36.
[91] *Ibid.*
[92] *Ibid.*
[93] *Ibid*, p.29.

[157] Accordingly, such delay had not reached a stage where it could be counted as egregious or unfair and inequitable, as it was within the reasonable expectation on how Mekar's Domestic Court worked.

[158] Furthermore, public international law does not provide fixed time limits within which certain classes of cases must be resolved,[94] therefore it should adhere to domestic procedural frameworks. Past precedents have encountered longer delays such as delay of nine years in *White Industries* or a delay of 14 years in *Chevron*, yet is not counted as denial of justice.[95]

[159] Therefore, there has been no breach of the international standard and consequently no denial of Justice was committed by the Mekar Courts for the amount of time taken to proceed a case.

2. Respondent did not commit willful disregard of due process

[160] In order to find a violation of denial justice, a tribunal must find a violation of international law,[96] such as "manifest injustice in the sense of lack in due process of law, which shocks, or at least surprises, a sense of judicial propriety."[97]

[161] This displays an extremely high threshold where a mere judicial error or misapplication of national law has no bearing on the issue of state responsibility.[98]

[162] On 27 March 2018, Caeli scheduled a hearing on interim measures of airfare caps, contending damages it may bring to airlines.[99] However, Caeli failed to present prima facie in support to its case.[100] As a result, the High Court of Mekar dismissed the proceeding based on lawful grounds by the virtue of Executive Order 5-2014.

[163] Presently, such failure of Claimant to present *prima facie* of the case does not render the Respondent to intentionally disregard the due process of court proceedings, as they did not

[94] White Industries, ¶5.2.19.; Toto, ¶155.
[95] White Industries ¶5.2.19; Chevron, ¶¶250, 263.
[96] Swisslion, ¶264.
[97] ELSI, ¶128; Loewen, ¶132; Arif, ¶49.
[98] Paulsson, p.5.
[99] Record, p.36.
[100] *Ibid.*

violate any form of domestic procedural law and even gave them an equal opportunity to be heard.[101]

[164] Additionally, even if Respondent committed mere judicial errors and violation of due process, it still did not amount to the high threshold of "shock or surprise judicial propriety", as the result should be observed by a third party's objective view - which are impartial courts.[102] In this case, there is no evidence that the application of summary judgement shocked or surprised any impartial courts.

[165] Conclusively, Respondent did not willfully disregard the due process, since no element of "shock or surprise judicial propriety" occurred in the Mekari Court proceedings.

3. Respondent has the discretion to enforce an arbitral award that has been set aside

[166] The test for establishing a denial of justice requires Claimant to show **a palpable violation exposing bad faith (and crucially, not a mere judicial error) at its core**.[103]

[167] Presently, Claimant intended to sell its share to Hawthorne Group, a Sinnoh-based private equity firm with shares in numerous low-cost airlines in November 2019.[104] However, Respondent contended that the offer was not made by a bona-fide third party. Hence, Respondent filed for arbitration under the Sinnoh Chamber of Commerce's **("SCC")** Arbitration Rules and Article 48 of the Shareholders' Agreement.[105]

[168] Shortly after, Mr. Cavanaugh, as the sole arbitrator, ruled in favor of Respondent on 9 May 2020. He declared that Hawthorne Group's offer in respect of Claimant's shares in Caeli could not be considered as one received from a "bona fide third party."[106]

[169] However, the Supreme Arbitrazh Court of Sinnoh set aside the award pursuant to Claimant's mere allegations based on a leaked report published by the Centre for Integrity in Legal

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[101] Arif, ¶219.
[102] Mondev, ¶127.
[103] Loewen, ¶130.
[104] Record, p.38.
[105] *Ibid,* p.39.
[106] *Ibid.*

Services **("CILS")** report, a non-profit organization in Mekar. The leaked report alleged Mr. Cavannaugh had received bribes from representatives of the Respondent to render a favorable decision.

[170] Despite the Supreme Arbitrazh Court Sinnoh setting aside the award, the High Commercial Court proceeded to recognize and enforce the award, even if the evidence obtained was against the Mekari public policy.[107] Specifically, the means to obtain such leaked evidence by CILS report is contrary to Respondent's public policy and the international principle of good faith.

[171] For evidence to be admissible in the arbitral tribunal, it must adhere to the principle of good faith which is recognized by numerous tribunals.[108] For instance, in *Methanex*, the tribunal was faced with evidence obtained through trespass.[109]

[172] The tribunal excluded the evidence, as it was confirmed to be obtained through unlawful conduct by "deliberately trespassing onto private property."[110] The decision was predominantly based on the duty to act in good faith, which the tribunal saw reflected in Article 15(1) UNCITRAL Arbitration Rules."[111]

[173] The tribunal in *EDF* also excluded an audiotape meant to prove an allegation of corruption based on the "unlawful creation" of the evidence. In particular, the tribunal excluded the evidence as it was not obtained within the principle of good faith.[112]

[174] As the report from CILS should be inadmissible as the evidence brought forth was leaked and obtained without the consent of the parties involved, hence cannot be considered by Mekari Court as grounds to refuse the enforcement of the award.

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[107] Record, p.66.
[108] Nuclear Tests, ¶46; Methanex, ¶2.; EDF, ¶38.
[109] Methanex, ¶2.
[110] Ibid, ¶55.
[111] Methanex, ¶54.
[112] *Ibid.*

[175] Article V(2)(b) New York Convention allows Respondent to enforce an award that has been set aside.[113] Specifically, if it was contrary to Mekar domestic law to adhere to illegally obtained evidence under the principle of good faith.[114]

[176] Conclusively, the Mekari court's decision to enforce an award did not even reflect a mere judicial error, as it was made in good faith based on its public policy. Hence, there is no denial of justice.

II. Respondent provided full protection and security

[177] Claimant may contend that Respondents' enforcement of MON has violated its FET obligation by failing to accord FPS to the investment by enforcing a decision, requiring all companies to price their goods and services in MON, due to the currency crisis that ensued within the state of Mekar.[115] However, Respondent argues otherwise that it has not conducted violation towards the FPS.

[178] Past tribunals had interpreted that the phrase 'full protection and security' goes beyond the implication that this protection is inherently limited to protection and security of physical assets.[116] Therefore, to afford such protection the host state is required to conduct due diligence.[117]

[179] The degree of such due diligence is subjective and should be measured in accordance with the factual circumstances.[118] The duty of the host state particularly rises in circumstances that might create instability within an investment environment.[119]

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[113] Article V(2)(b) New York Convention.
[114] Article 15 UNCITRAL Model Law.
[115] Record, p.35.
[116] National Grid, ¶189.
[117] C. Schreuer, p.150.
[118] *Ibid.*
[119] Azurix, ¶408.

[180] Illustratively, the tribunal of *CME* found a breach of the FPS clause as a regulatory authority had enabled the investor's local partner to terminate a contract, in which the investor had relied on, throughout the investment.[120]

[181] Furthermore, the Czech Republic as host State was obliged to ensure that neither by amendment of its laws nor by actions of its administrative bodies, the agreed and approved security and protection through contract of the foreign investor's is to cause the investment to be withdrawn or devalued without any legitimate due diligence upon the impacts.[121]

[182] In contrast to the illustration above, pertaining to MON denomination, there were no prior agreements made, in the form of contracts or laws throughout the investment that ensured Claimants' investment from any possible measures in response to MON denomination that could diminish its value.

[183] Conclusively, with no guidance nor directions, it would be impossible for Respondent to provide such protection towards Claimant the amidst of a currency crisis as there were no means or obligations for Respondent to conduct any due diligence.

III. Claimant is not entitled to the compensation award it seeks

[184] Claimants requested 700 million USD in compensation for the damages resulting from Respondents' alleged breach of the CEPTA. Claimant seeks to obtain the compensation based on the standard of compensation under the FMV **("Fair Market Value")** prior to the violation by Respondent under the MFN provision and International Law.[122]

[185] If Respondent did have violated Article 9.9 of CEPTA, the Tribunal should still apply the Market Value **("MV")** Standard contained in Article 9.21 CEPTA **[A]**; Even if the Tribunal does not agree with our calculation of compensation, the Tribunal shall put limitations towards the amount of compensation requested by Claimant **[B]**.

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[120] CME, ¶408.
[121] *Ibid.*
[122] Record, p.5.

[A] Tribunal should apply the "Market Value" Standard

[186] Should the Tribunal find that Respondent is guilty of violating Article 9.9 CEPTA, the compensation for Claimant should be calculated using the method under Article 9.21 CEPTA in line with the *Lex Specialis* principle **[1]**.

[187] Accordingly, Respondent denies Claimant' argument stating that displaying the breach towards Article 9.9 CEPTA in this case, is enough to apply FMV for compensation method under MFN treatment from other BIT **[2]**; and international law **[3]**.

1. The Tribunal shall use compensation method under Article 9.21 CEPTA in line with the *Lex Specialis* principle

[188] Under Article 1.4 (2) CEPTA, in the existence of inconsistent provisions with other agreements, provisions under CEPTA shall prevail.[123] Recognizing that generally an investment treaty is *lex specialis* and thus prevails over such other agreements.

[189] Presently, the CEPTA provides a clear provision regulating the compensation method for non-expropriatory or unlawful acts conducted by the host state particularly in Article 9.21.

[190] Thus, according to Article 9.21, the Tribunal should award the compensation instead of restitution **[i]**; and under Article 9.21 CEPTA, the Tribunal should find that Respondent has already paid the compensation by purchasing Caeli for USD 400 million **[ii]**.

[i] The Tribunal should award compensation instead of restitution

[191] Under 9.21 CEPTA, the Tribunal may award monetary damages at a market value separately or in combination with restitution of the property. Restitution is a state's obligation to re-establish the situation which existed before the wrongful act was committed.[124]

[192] However, the Tribunal can only award a standard of restitution if the situation is not 'materially impossible' for the disputing parties. Hence, the Tribunal should use compensation instead - if the circumstances to use restitution is considered unrealistic.

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[123] *Ibid,* p.72.
[124] Article 35, ARSIWA Commentaries.

[193] The tribunal in *CMS*, stated that "it would be utterly unrealistic" for the tribunal to order the host state to use restitution which "turn back to the regulatory framework existing before the emergency measures were adopted", whereas before the period of crisis as well. The tribunal then decided to award the investor with compensation.[125]

[194] Presently, it is certain that restitution would not be feasible since it is impossible to expect Respondent to turn back the regulatory framework, pre-crisis, and Claimant's company as the way it used to be before the measures. Therefore, the Tribunal shall award compensation instead of restitution.

[ii] Under Article 9.21 CEPTA, the Tribunal should find that Respondent has already paid the compensation by purchasing Caeli for USD 400 million.

[195] According to Article 9.21(1) of CEPTA, the compensation method shall use *"monetary damages at a market value"*.[126]

[196] In *CMS*, FMV is defined as:

> *"The price at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts"*.[127]

[197] In *American International*, the tribunal established that the valuation of compensation should be made based on the FMV of the shares in Iran America, at the date of assets taken because there was no sufficient evidence of any Government actions prior to that date directly or indirectly intended to diminish the value of investment.[128]

[198] Paragraph 3-part IV Guidelines on the Treatment of Foreign Direct Investment further reaffirmed that compensation "will be deemed adequate" if it is based on the FMV of the taken asset as such value is determined immediately before the time at which the taking occurred or the decision to take the asset became publicly known".[129]

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[125] CMS, ¶406.
[126] Record, p.82.
[127] CMS, ¶402.
[128] American International, ¶106.
[129] Guidelines on the Treatment of Foreign Direct Investment, p.41.

[199] Presently, Claimant should be aware that the diminishing value of Caeli was not because of Respondent's violation of Article 9.9 CEPTA. Respondent will further argue that Claimant suffered its damages due to its own contributory negligence and the challenged measure is under the ambit of Respondent's right to regulate - precluding compensation.[130]

[200] Accordingly, Respondent purchased Caeli for USD 400 million in October 2020 that has been agreed by both parties, without the compulsion to buy or sell when Respondent has reasonable and facts of Caeli's condition, should be considered as a compensation conducted at Caeli's FMV.

2. Claimant can't import FMV as compensation standard under MFN

[201] Claimant might argue that Respondent has committed less favorable treatment under MFN for compensation method under CEPTA in comparison with Article 13 Arrakis - Mekar BIT.

[202] Unfortunately, such an argument is groundless, as Claimant failed to prove that, both Claimant and Arrakis' holding group are in like circumstances and the less favorableness of the method inscribed in the CEPTA is different to the one in the Arrakis - Mekar BIT.

[203] Claimant is not in like circumstances with any investments of investors of the third country, which is JetGreen owned by Arrakis' holding group.[131]

[204] In response to this, Claimant shall not import compensation methods under MFN because: Respondents did not commit less favorable treatment **[i]**; Even if there is less favorable treatment, Claimant cannot import any substantial obligation. **[ii]**

[i] Respondents did not commit less favorable treatment

[205] Respondent acknowledges that there was a different clause upon the compensation method prescribed under the CEPTA and Arrakis - Mekar BIT. However, a different clause does not necessarily indicate that it is less favorable.

[130] See Infra ¶284.
[131] See Supra ¶80.

[206] In *İçkale*, the tribunal denied invoking MFN treatment based on the less favorableness of provisions between two different treaties, because it must be proven that the differences in actual treatment among investors, rather than to mere theoretical differences between the provisions.[132]

[207] Presently, there is no evidence that compensation method under 9.21 CEPTA is less favorable than Article 13 Arrakis - Mekar BIT because it is a mere theoretical difference between both of the treaties, and there is no actual treatment among Claimant and Arrakis' investors.

[ii] Even if there is less favorable treatment, Claimant cannot import compensation method

[208] The MFN treatment provision in CEPTA is drafted symmetrical to the EU-Canada Comprehensive Economic and Trade Agreement **("CETA")**. Scholars opined that the 8.7 CETA clause cannot be invoked to import provisions from another agreement under MFN treatment.[133] Hence, Respondent contends that Article 9.7 does not allow Claimant to import provisions from other agreements.

[209] Accordingly, MFN treatment under Article 9.7 CEPTA should not be invoked to import compensation method clauses from Article 13 Arrakis - Mekar BIT.

[210] Precedents may have granted importation of a more favorable compensation method based on MFN treatment if imported provision is more favorable than the existing. For instance, in *CME*, the tribunal granted the importation of compensation provision on the grounds that the basic Netherlands-Czech BIT Provides such provision.[134]

[211] Contrary to the CEPTA, such BIT stated that it upholds that it upholds primacy of its existing provision, [135] considering it serves as the *lex specialis*.

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[132] İçkale, ¶329.
[133] Article 8.7 CETA; Patrick Dumberry, p. 14; Frank Hoffmeister & Gabriela Alexandru, pp.379, 387–88.
[134] CME, ¶500.
[135] Article 3(5) Netherlands-Czech Republic BIT.

[212] By all means, Claimant has consented to these exceptions when they ratified CEPTA and therefore must stay true to what has been agreed upon. Importing such provisions that were previously not agreed upon and incorporated in the basic treaty will not only be illogical, but will also undermine the consent of both parties.

[213] Accordingly, Respondent wishes to ensure that unconsented importation does not pave the way for what are considered unanticipated and/or undesirable effects that have not been considered during the formulation of the CEPTA agreement.

3. Claimant cannot import FMV as compensation standard under international law

[214] Claimant considers that the method of FMV prior to the violation by Respondent can be imported as a compensation method based on international law.[136] Respondent is aware that the method of FMV prior to the violation by the host state has been accepted as a compensation method based on Customary International Law.[137]

[215] However, Claimant cannot import compensation methods from international law, since it should be assessed on a case-by-case basis.[138] Therefore, Claimant's assessment of damages based on international law is incorrect.

[216] The compensation method of FMV prior to the violation from the host state is generally used for the specific cases of expropriation. However, Respondent is aware that FMV prior to the violation from the host state also can be used for non-expropriation cases, but it is generally used for rare specific cases.

[217] Claimant might argue that the compensation method shall use FMV standard under article 36 (22) ARSIWA Commentaries, which states that *"Compensation reflecting the capital value of the property taken or destroyed as the result of an internationally wrongful act is generally assessed on basis of the FMV of its property lost"*.[139]

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[136] Record, p.5.
[137] Article 36 (22) ARSIWA Commentary.
[138] P.Y. Tschanz and J. E.Viñuales, p.738.
[139] Article 36 (22), ARSIWA Commentary.

[218] Multiple tribunals decided to apply the standard of FMV established by the BIT for cases of expropriation for the violation of non-expropriatory due to the absence to find the standard of compensation in the non-expropriatory or unlawful acts as no guidance was offered by the BIT.[140]

[219] However, CEPTA contains the provision of compensation method for non-expropriatory cases as stipulated under Article 9.21 of CEPTA, which uses monetary damages at market value. Thus, Claimant cannot import the compensation method of FMV prior to the violation based on international law.[141]

[B] Even if the Tribunal does not agree with our calculation of our compensation, the tribunal shall put limitations on compensation for Claimant

[220] In any event the Tribunal refuses to utilize the aforementioned method of compensation, it should acknowledge that Respondent does not have the duty to provide Claimant compensation for conducting MON denomination towards all goods and services pricing in 2018.

[221] The reason being, is such conduct was under the ambit of Respondent's its Right to Regulate **[1]**; additionally, the First and Second Investigation was initiated due to Claimant's contributory negligence **[2]**.

1. The denomination of goods and services into MON was under the ambit of Respondent's its Right to Regulate

[222] Article 9.8 CEPTA is drafted similarly to Article 8.9 CETA, Respondent takes reference from its interpretation of the 'right to regulate' as the legal right exceptionally permitting the host state to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate.[142]

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[140] CMS, ¶410; Azurix, ¶424; Enron, ¶363; Sempra, ¶403; Crystallex, ¶846; El Paso, ¶702; EDF, ¶1210; Gold Reserve, ¶681; BG Group, ¶422.
[141] Record, p.82.
[142] S. Schacherer, and M. Mbengue, p.163; Record, pp.71, 76.

[223] In general, past precedents asserted that a host state may enforce its right to regulate for a legitimate objective; for example, to keep its national security, in the case of an economic crisis.[143] Therefore, there should be a reasonable and consistent relationship between the means employed and its objective.[144]

[224] Presently, the Respondent contends that the measure falls under the ambit of its regulatory rights as *firstly,* it possesses a legitimate objective and *second,* be a reasonable and consistent relationship between the applied means and the objective being pursued.

[225] *First,* the Respondent's decision to denominate all prices of goods and services to MON follows a legitimate objective of national security by maintaining public order and controlling civil unrest.[145]

[226] Referring to *LG&E,* the tribunal classifies the Argentine crisis as extremely severe as it causes public and social pressure. Moreover, the Tribunal legitimized the Argentinian government's conduct to maintain order and control civil unrest, for the sake of national security in the situation.[146]

[227] The measure aims to prevent any political turmoil or civil unrest that may happen in the aftermath of the 2017 economic crisis by attempting to stabilize the domestic currency, thus it is applied to achieve a certain legitimate objective.

[228] *Second,* Respondent did succeed upon one aspect of the currency crisis, to put civil unrest at bay. Therefore, manifests a reasonable between the measure and the objective being pursued

[229] In *Glamis Gold,* A measure possesses a reasonable relationship to the objective if it addresses one aspect of a problem and is not necessary to solve the whole matter all at once.[147]

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[143] LG&E, ¶238.
[144] Tecmed, ¶47.
[145] *Ibid*; Thailand Cigarettes, ¶75.
[146] LG&E, ¶ 238.
[147] Glamis Gold, ¶805.

[230] The measure conducted by Respondent has succeeded to prevent rising social unrest in a changing government which was supported with overwhelming parliamentary majority due to the persisting decline of its economy.

[231] The situation at hand may have possibly turned out worse should we look at the cases of Argentina where currency crises created huge civil unrest.[148] However, Respondent denomination measure have mitigated such possibility to occur, thus the harm it imposes to Claimant should not be considered arbitrary.

[232] Claimant may propose alternatives, that for it to maintain a de jure status for its dollarization in its industry or even de jure dollarization of the whole economy would be a better way to solve the problem. However, Respondent dissent this argument as de jure dollarization contains more risk than it could possibly gain.[149]

[233] Considering the situation in Yugoslavia's in 2006, conducting dollarization to stabilize the economy would result in hyperinflation.

[234] For elaboration, as value of the domestic currency kept falling and the value of foreign currency was stable or even appreciating, locals would try to exchange any unused domestic currency for foreign currency, to minimize losses that occurred in their domestic currency.[150]

[235] This, inevitably, led to the velocity of the exchange of domestic money to enhance and thus price inflation to increase, topping to 313,000,000 % in 1994.[151] Therefore, dollarization of the economy is not a clean-cut solution and comes with risks that could topple a state.

[236] Furthermore, it is not the job of this Tribunal to pass judgment on the reasonableness or effectiveness of the measure as it is a matter of political economy, what this Tribunal needs to be concerned upon is whether Respondent withdrew from any commitments from its treaty without any exceptions that precludes its wrongfulness.[152]

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[148] LG&E, ¶238.
[149] Record, p.35.
[150] He-Liping, p.217.
[151] *Ibid*, p.215.
[152] BG Group, ¶344.

[237] In conclusion, as Respondent's measure of denominating all prices of goods and services in MON possess legitimate objective and possess reasonable relationship to pursue such objective, Respondent's measure was legitimate even if it breached any commitments it had in CEPTA. Thus, any wrongfulness resulting in the need to compensate should be precluded.

2. The First and Second Investigation was initiated due to Claimant's contributory negligence

[238] In any event this Tribunal decides that Respondent's denial in administering justice constitutes as a breach, Respondent submits that its denial would not have happened in the first place if Claimant did not negligently contribute to the First and Second Investigation.

[239] According to Article 39 ARSIWA, when a party has proven to contribute towards its own injury, the amount of compensation should be reduced proportionately to the degree of its contribution.[153]

[240] A party's contribution to its own injury is measured through proving the party's 'lack of due care',[154] which further entails a clear causal link to the alleged injury.[155]

[241] In essence, a lack of due care is established when investors could have reasonably foreseen, be aware, or consciously increased its risk of damage as a cause of its actions. Therefore, investors must act in a manner that would not risk any damages nor help trigger Respondent's act.

[242] As illustrated in *MTD*, the tribunal deemed that the investor was lacking due care when it decided to pay a full price of a land without appropriate legal protection. As a result, as the land was previously preserved for agricultural purposes, Chile revoked MTD's right over it, and couldn't be rezoned because no legal registration was made in the first place.[156]

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153 Burlington, ¶572; Copper Mesa, ¶6.91; Occidental, ¶665; Yukos, ¶1595.
154 Burlington, ¶576.
155 Occidental, ¶666; ARSIWA Commentaries, pp.109-110.
156 MTD, ¶242.

[243] MTD had suffered losses due to Chilean's government act, however its ill-considered business decision had consciously increased risk in the transaction.[157]

[244] Similarly, Respondent submits that Claimant did not act in due care in the First Investigation **[i]**; and the Second Investigation **[ii]**; proving Claimant's negligence had contributed to Respondent's denial of justice.

[i] Claimant had not act in due care in the First Investigation

[245] Respondent acknowledges, under Chapter III (2)(a) of the MRTP, that CCM could only investigate, *suo moto*, if an entity has at least 50% market share.[158] However, in the same clause, MRTP allows the CCM to initiate its *suo moto* investigation via its own discretion.[159]

[246] Thus, Respondent would like to explain its discretion to investigate and would ask the Tribunal to adhere to the tribunal in Occidental,[160] to exercise its authority in determining Claimant and Respondent's apportioned fault on the initiation of the first investigation which leads to the imposition of airfare caps.

[247] To further substantiate its discretion, Respondent submits common practices on competition laws to showcase: Claimant's preferential secondary slot trading **[a]**; and acceptance and usage of the Horizon 2020 scheme to impose low airfares **[b]**; amounts to lack of due care.

[a] Claimant's preferential secondary slot trading lacks due care

[248] Respondent submits that Claimants' lacks due of care since their conduct poses a significant risk of potentially excluding competitors. The reason being is Caeli and Royal Narnia conducted preferential secondary slot trading meanwhile having a collective dominance within the market.

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[157] *Ibid,* ¶243.
[158] Record, p.47.
[159] *Ibid*, p.34.
[160] Occidental, ¶670.

[249] Frameworks of competition law have acknowledged the concept of collective dominance where dominance in the market is being possessed by two separate entities,[161] for example Article 102 of TFEU.

[250] The *Piau* case further interprets Article 102 TFEU by establishing three cumulative prerequisites of collective dominance: *firstly*, each of the dominant oligopoly members should be able to know whether other members are adopting the common policy; *secondly*, the situation of tacit coordination must be sustainable over time; *thirdly*, the foreseeable reaction of current and future competitors and consumers, must not jeopardize the results expected from the common policy.[162]

[251] This interpretation is supported by the academic field as commentators to tacit coordination in antitrust cases highlights the importance of the mutual transparency between competitors' coordination and whether they could sustain such coordination for a long period of time.[163]

[252] Presently, as MRTP also acknowledges collective dominance in Chapter IV: Prohibition where abuse of dominant position (a) states "one or more persons" thus allowing two or more entities to be in control of the market, jointly, at the same time.[164] Respondent submits that Claimant along with Royal Narnian holds a collective dominance based on the three preconditions above.

[253] *Firstly*, it is evident that Caeli and Royal Narnian had the ability to know each other's behavior as they were adopting preferential secondary slot trading.[165] As has been established by OECD, Caeli and Royal Narnian adopt a preferential secondary slot trading when they essentially coordinate as slot holders, to refuse to sell with other competitors.[166] Accordingly, since a refusal to sell to other competitors would not work without transparency between

[161] Section 79 (1)(a) of Canada Competition Act; Article 102 TFEU.
[162] Laurent Piau, ¶110.
[163] Posner, p.1570.
[164] Record, p.48.
[165] *Ibid*, p.34.
[166] OECD, Airline Competition Background Paper by the Secretariat, ¶148.

both airlines upon their commitments, Caeli must have known Royal Narnian's behavior and *vice versa*.

[254] *Secondly*, Respondent asserts that the lack of data on how such practices lasted is precisely the reason why Respondent conducted the First Investigation. Furthermore, it was apparent that Caeli had cooperated extensively with Royal Narnian in low level cooperation (i.e., lounge access) and medium level cooperation (i.e., such as code sharing) since 2011.[167] Thus, Caeli and Royal Narnian had sustained a common policy in the past and had reasonably recognized to apprehend problems of coordination such as cheating.

[255] *Thirdly*, Respondent argues that it is foreseeable that Caeli and Royal Narnian's common policy regarding preferential secondary slot trading would not be jeopardized by other competitors, since Claimant had already possessed valuable slots at two highly congested international airports – which are scarce in nature.[168] Thus, due to the three thresholds to be fulfilled, Claimant and Royal Narnian were jointly dominant.

[256] As Caeli and Royal Narnian is jointly dominant, by cooperating in preferential secondary slot trading increases the risk to be investigated since it refuses to sell to other competitors in the open market other than Royal Narnian

[257] The OECD established that secondary slot trading systems could refuse to sell or lease their slots to new entrants or expanding competitors.[169] For reference, in Canada, the Bureau is concerned with conduct that makes it more difficult for competitors to be effective.[170] Similarly, in the EU, the Commission is also concerned with conduct that impacted expansion from competitors and potential competitors.[171]

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[167] Record, p.32, *See Ibid*, ¶148
[168] *Ibid*, p.31.
[169] OECD, Airline Competition Background Paper by the Secretariat, ¶148.
[170] Abuse of Dominance: Enforcement Guidelines, p.21.
[171] Richard Whish, p.148.

[258] Presently, as Claimant, having 43% market share and Royal Narnian,[172] having 85.6% load factor in 2019,[173] to participate, jointly, in a conduct that utilizes an extremely rare commodity in hub airports raises the concern of the CCM of both entities to raise the barrier to entry into these hub airports by refusing to sell slots to other competitors other than to Royal Narnian

[259] While Claimant might argue that it was not its intent to do so and was only safeguarding its market share, Claimant's act was contrary towards the submitted undertaking that its participation would not engage in high level cooperation such as, *inter alia*, facilities Royal Narnian.[174] Therefore, increasing the risk to be investigated - in which Claimant should have known.

[260] If Claimant had not done so, CCM would not conducted *suo moto* investigation since it does not have the needed market share and there was no complaint for Claimant when the First Investigation was initiated, thus not fulfilling the threshold for an investigation under Chapter III: Tribunal Investigation (b) of the MRTP, concluding that the measure could have been wholly avoided.[175]

[261] Conclusively, Claimant had conducted contributory negligence due to engaging in preferential secondary slot trading while standing in a collective dominance with Royal Narnian, therefore triggers the CCM's discretion.

[b] Claimant's acceptance and usage of Horizon 2020 scheme to price its fares below Average Avoidable Cost

[262] Claimant's acceptance of the Horizon 2020 has increased its risk to be investigated since they have utilized it to their own advantage.

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[172] Record, p.34.
[173] *Ibid*, p.29.
[174] *Ibid,* p.32.
[175] Burlington, ¶580.

[263] Taking a reference to Article 107 TFEU adopted by the EU of utilizing State aid for an unlawful end - including in the context of anti-competitive behavior - is certainly prohibited. Especially, when the distribution of such aid is not adequate to all competitors within the market.[176]

[264] Presently, the Mekari's MRTP follows such objective by the release of the White Paper, CCM had clearly stated that the MRTP's 'Agreement or Arrangements that prevent or Lessen Competition Substantially' could extend through market-disruptive agreements between state-owned enterprises, which provides financial contribution to the other.[177]

[265] A certain monetary support may be classified as state aid should it possess an imputable link between the aid to the beneficiary and where public authorities were actually involved in the adoption of the measure, or in deciding its compass.[178]

[266] Presently, the Horizon 2020 scheme is officially launched by Bonooru's Ministry of Transport and Tourism to pursue the government's objective of tourism in the Caspian Project.[179] Therefore shall be regarded as a form of state aid and falls under the trappings of MRTP.

[267] However, it is not the Respondent's contention that the Horizon 2020 scheme, *per se*, is unlawful, since there are multiple airlines operating under the support of subsidies in our state.[180]

[268] Respondent's contention within this respect focuses on the gravity of Claimant's misuse of the scheme in 2014 to lower its price much further, specifically below average avoidable cost, than its competitors and thus grant a much higher footfall during the oil price crash.

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176 Katia, Anastasios. and Catharine, p.180.
177 Record, p.34.
178 Katia, Anastasios. and Catharine, p.183.
179 Record, p.32.
180 *Ibid*, p.37.

[269] Thus, Claimant's intention of receiving the state aid in the first place was to support its anti-competitive strategy by creating an unfair advantage for its competitors since state aid was not readily available to other competitors in the market at that time.[181]

[270] It is fair to be assume that after the release of the White Paper in July 2016,[182] Claimant should have known any anti-competitive usage that would exclude competitors from its usage of the Horizon 2020 subsidies would increase its risk to be investigated on 9 September 2016.[183]

[271] Lastly, the fact that Respondent benefits from hindsight that Claimant exploited the use such subsidies, since Claimant consciously did, first, price itself below average avoidable cost and, second, use Horizon 2020 scheme to support its pricing, which obviously is inconsistent with Chapter IV: Definition of anti-competitive act (i) of the MRTP.

[272] As Claimant consciously engaging in activities that increases its risk to be investigated in both instances, it is certain that Claimant had not acted in due care and thus negligently contributed to the initiation of the investigation, thus any compensation for Claimant that arises from the First Investigation must be significantly reduced.

[273] Conclusively, Claimant had participated in the airfare caps that were imposed by the First Investigation. Since Respondent had no participation towards Claimant's own conduct in initiating First Investigation, as has been established in *MTD*, there shall be no compensation required for the Respondent to compensate.[184]

ii. Claimant had not act in line of due care during the Second Investigation

[274] In December 2016, Claimant launched flights on specific regional routes with the sole purpose of pushing its competitors off these routes. In doing so, Claimant capitalizes on its

[181] Record, p.32.
[182] *Ibid*, p.34.
[183] *Ibid.*
[184] MTD, ¶245.

undercutting flight fares through the privileges it enjoys from Phenac International Airport which lowers their input cost.[185]

[275] Claimant should be aware of any possibility that this conduct may be subjected to the CCM's investigation, as it consciously squeezed the airline market to have lower input prices for them to undercut flight fares.

[276] A margin squeeze is an economic phenomenon where a firm is dominant in an upstream market and supplies a key input to undertakings that compete with it in a downstream market.[186] This practice is illegal as it involves lowering prices which constitutes a negative margin to other competitors, having the effect of driving out competitors from the market.[187]

[277] Respondent acknowledges that Claimant does not possess dominance in the upstream market, as it does not have the capability to change the price for inputs for any other competitors in the Phenac International Airport. Albeit it is able to squeeze the downstream market, as it could decrease its fares below other competitors due to their relatively cheaper inputs in comparison to other airlines.

[278] To undercut fares, Claimant receives privileges on key inputs, therefore making it difficult for other airlines to compete in the Phenac International Airport, *inter alia*, discounts for airport services, landing and navigation fees.[188] These facilities being provided to a certain party had been established by OECD to be a structural barrier to entry due to its scarcity.[189]

[279] Claimant's privilege on pressed key inputs prices is further acquired through threatening Phenac International Airport that they will move out from its traffic. Claimant exploited its size to threaten Phenac International Airport, as it owned the biggest market share in Phenac

[185] Record, p.35.
[186] Richard Whish, p.754.
[187] OECD: Margin Squeeze, p.10.
[188] Record, p.32.
[189] Abuse of Dominance: Enforcement Guidelines, ¶46.

International Airport by 43% in comparison to its closest competitor, Jet Green, who owns 21%.[190]

[280] Furthermore, Claimant's undercut fares, although haven't been confirmed to serve a negative margin, have pushed small regional airlines in Greater Narnia off the market.[191] This would not in any way be based on efficiency as Claimant acknowledges it could only reduce its fares by forcing Phenac International Airport to provide input privileges.

[281] It is clear to see that based on Chapter IV: Definition of anti-competitive act (a) of the MRTP, such a scheme is in direct violation of the said clause.[192] Therefore, Claimant should have known that by utilizing its cheap inputs to price itself below its competitors in purpose of driving out competitors from the market would increase its risk of being investigated.

[282] Thus, Claimant negligently contributed to the initiation of the Second Investigation. Conclusively.

[283] In conclusion, any compensation that arises from the Second Investigation must be eliminated or reduced as Respondent had not contribute to any events that initiate in the First and Second Investigation[193]

[190] Abuse of Dominance: Enforcement Guidelines, ¶46.
[191] Record, p.37.
[192] *Ibid*, p.47.
[193] MTD, ¶245.

PRAYERS FOR RELIEF

The Respondent respectfully requests the Tribunal to adjudicate and declare that:

1. It lacks jurisdiction as Claimant's action is attributed to Bonooru;
2. Mekar did not violate Article 9.9 of CETPA; and
3. Should the Tribunal finds Mekar did violate Article 9.9, then the tribunal should conclude Mekar has already purchased Claimant's investment at "market value" and award Claimant no compensation; Alternatively, the Tribunal should reduce any compensation awarded considering Claimant's contributory fault and the ongoing economic crisis in Mekar.

On behalf of the Respondent

Team Koroma