TEAM: *KREVA*

IN THE MATTER OF AN ARBITRATION PURSUANT TO

COMPREHENSIVE ECONOMIC PARTNERSHIP AND TRADE AGREEMENT BETWEEN THE COMMONWEALTH OF BONOORU AND THE FEDERAL REPUBLIC OF MEKAR

("**CEPTA**")

AND

ICSID ARBITRATION (ADDITIONAL FACILITY) RULES

("**ICSID AF RULES**")

BETWEEN

VEMMA HOLDINGS INC. **CLAIMANT**

AND

THE FEDERAL REPUBLIC OF MEKAR **RESPONDENT**

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

TRIBUNAL

Ms. Twyla Sands (President)
Mr. Long Feng
Professor Jaqen H'ghar

MEMORIAL ON BEHALF OF RESPONDENT

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Infinito (PO2)	Infinito Gold Ltd. v. Costa Rica, ICSID Case No. ARB/14/5, Procedural Order No. 2 (01 June 2016)
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Philip Morris (PO4)	Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Procedural Order No. 4 (24 March 2015)
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Thunderbird	International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL Award (26 January 2006)
Toto	Toto Costruzioni Generali S.p.A v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Award (07 July 2012)
Toto (Jurisdiction)	Toto Costruzioni Generali SpA v. The Republic of Lebanon, ICSID Case No. ARB/07/12 Decision on Jurisdiction (11 September 2009)
Ulysseas	Ulysseas, Inc. v. The Republic of Ecuador, Case No. PCA Case No. 2009-19, Award (12 June 2012)
Urbaser (Jurisdiction)	Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26, Decision on Jurisdiction (19 December 2012)
Vacuum	Vacuum Salt Products Ltd. v. Republic of Ghana, ICSID Case No. ARB/92/1, Award (16 February 1994)
Waste Management	Waste Management Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB(AF)/00/3, Award (30 April 2004)
White Industries	White Industries Australia Limited v. Republic of India, UNCITRAL Final Award (30 November 2011)

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EMV (English Court)	European Media Ventures SA v. Czech Republic, Judgment of the English High Court of Justice on the Application to Set Aside Award on Jurisdiction, London (05 December 2007)
NNPC (English Court)	Nigerian National Petroleum Corporation v. IPCO (Nigeria) Ltd., Court of Appeal, England and Wales (21 October 2008) [2008] EWCA
Oil Joint (Hong Kong Court)	China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd., High Court, Supreme Court of Hong Kong, Hong Kong, (13 July 1994) [1995] 2 HKLR 215

BOOKS

Abbreviation	Citation
Aust	Aust A, *Modern Treaty Law and Practice* (CUP 2013)
Dolzer/Schreuer (2012)	Dolzer R/ Schreuer C, *Principles of International Investment Law* (OUP 2012)
Gardiner	Gardiner R, *Treaty Interpretation* (OUP 2015)
Marboe	Marboe I, *Calculation of Compensation and Damages in International Investment Law* (OUP 2017)
McLachlan/Shore/Weiniger	McLachlan C/ Shore L/ Weiniger M, *International Investment Arbitration: Substantive Principles* (OUP 2017)
Paulsson (2005)	Paulsson J, *Denial of Justice in International Law* (OUP 2005)

Reinisch/Schreuer	Reinisch A/ Schreuer C, *International Protection of Investments: The Substantive Standards* (OUP 2020)
Ripinsky/Williams	Ripinsky S/ Williams K, *Damages in International Investment Law* (BIICL 2008)
Schicho	Schicho L, *State Entities in International Investment Law* (Nomos 2012)
Schreuer	Schreuer C/ Malintoppi L/ Reinisch A/ Sinclair A, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009)
Suleimenova	Suleimenova M, *MFN Standard as Substantive Treatment* (Nomos 2019)
Sinclair	Sinclair I, *The Vienna Convention on the Law of Treaties* (Manchester University Press 1987)
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Wiik	Wiik A, *Amicus Curiae before International Courts and Tribunals* (Nomos 2018)
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Born	Born G, 'The New York Convention: A Self-Executing Treaty' (2018) 40(1) Michigan Journal of International Law 115
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Broches	Broches A, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' in Collected Courses of The Hague Academy of International Law: Part II (1972) 353
Cole	Cole T, 'The boundaries of most favoured nation treatment in international investment law' (2012) 33 Michigan Journal of International Law 537
De Nanteuil	De Nanteuil A, 'Article 8.14' in Marc Bungenberg and August Reinisch (eds), *CETA Investment Law: Article-by-Article Commentary* (Hart/Beck/Nomos *forthcoming*)
Dörr	Dörr O, 'Article 31' in Dörr O/ Schmalenbach K (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018)
Douglas	Douglas Z, 'International Responsibility For Domestic Adjudication: Denial Of Justice Deconstructed' (2014) 63(4) International & Comparative Law Quarterly 867
Feldman/SOEs	Feldman M, 'State-Owned Enterprises as Claimants in International Investment Arbitration' (2016) 31(1) ICSID Review 24

Fuller/Winston	Fuller L/ Winston K, 'The Forms and Limits of Adjudication' (1978) 92(2) Harvard Law Review 353
Hamida	Hamida WB, 'Sovereign and International Investment Agreements: Questions Relating to the Qualifications of Sovereign Entities and the Admission of their Investments under Investment Agreements' (2010) 9 The Law and Practice of International Courts and Tribunals 17
Hober	Hober K, 'State Responsibility and Attribution' in Muchlinski, Ortino and Schreuer (eds.), *The Oxford Handbook of International Investment Law* (OUP 2008)
Jones	Jones D, 'Investor-State Arbitration in Times of Crisis' (2013) 25(1) National Law School of India Review 27
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Paulsson (1998)	Paulsson J, 'May or Must Under the New York Convention: An Exercise in Syntax and Linguistics' (1998) 14 Arbitration International 227
Sampliner	Sampliner GH, 'Enforcement of Foreign Arbitral Awards After Annulment in their Country of Origin' (1996) 11(9) International Arbitration Report 22

Schill	Schill SW, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator' (2010) (23) Leiden Journal of International Law 401
Simoes	Simoes F, 'Public Participation: Amicus Curiae in International Investment Arbitration', in J. Chaisse et al. (eds.), Handbook of International Investment Law and Policy (Springer Nature Singapore Pte Ltd. 2020)
Wöss/San Roman	Wöss H/ San Roman A, 'Damages in Investment Treaty Arbitrations', in Rafael Mata Dona and Nikos Lavranos (eds.), International Arbitration and EU Law (Elsevier 2021)
Yannaca-Small	Yannaca-Small K, 'Fair and Equitable Treatment: Have its Contours fully evolved?' in Yannaca-Small K (ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (2nd edn, OUP 2018)

MISCELLANEOUS

Abbreviation	Citation
ARSIWA Commentary	International Law Commission, 'Responsibility of States for Internationally Wrongful Acts: General Commentary, in Report of the International Law Commission on the work of its fifty-third session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. No. A/56/10 (2001)
Crawford	Crawford J, 'Third Report on State Responsibility', Addendum, 15.06.2000, A/CN.4/507
ICSID AF Rules	ICSID Arbitration (Additional Facility) Rules (2006)
VCLT	Vienna Convention on the law of Treaties (1969)

LIST OF ABBREVIATIONS

¶(¶¶)	Paragraph/Paragraphs
Amicus application by CBFI	Application for leave to file a non-disputing party *amicus curiae* submission by the Consortium of Bonoori Foreign Investors
Amicus application by the external advisors to CRPU	Application for leave to file a non-disputing party *amicus curiae* submission by the external advisors to the Committee on Reform of Public Utilities
Bonooru-Mekar BIT	Treaty between the Federal Republic of Mekar and the Commonwealth of Bonooru for the Promotion and Protection of Investments, 1994
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	Comprehensive Economic Partnership and Trade Agreement between the Commonwealth of Bonooru and the Federal Republic of Mekar, 2014
Ch	Chapter
Claimant's Comments on *Amicus*	Claimant's Comments on Applications for Leave to File *Amicus* Submissions dated 15 June 2021
CRPU	Mekar's Committee on Reform of Public Utilities
f/ff	Following page(s)/paragraph(s)
FET	Fair and Equitable Treatment
Fn	Footnote
ICSID AF Rules	ICSID Arbitration (Additional Facility) Rules, 2006
MFN	Most Favoured Nation
MRTP Act	Monopoly and Restrictive Trade Practice Act, 2009
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
Notice	Claimant's Notice of Arbitration
PO	Procedural Order
Respondent's Comments on *Amicus*	Respondent's Comments on Applications for Leave to File *Amicus* Submissions dated 18 June 2021
Response	Respondent's Response to the Notice of Arbitration
SOE	State-owned enterprise
SOUF	Statement of Uncontested Facts
UNCITRAL Transparency Rules	UNCITRAL Rules on Transparency in Investor-State Arbitration
VCLT	Vienna Convention on the Law of Treaties, 1969

STATEMENT OF FACTS

Parties to the Dispute

1. **Claimant:** Vemma Holdings Inc. ("Vemma"), a state-owned airline holding company incorporated in the Commonwealth of Bonooru ("Bonooru"). From its date of incorporation, Bonooru held 31%-38% shares in Vemma and in March 2021 increased to 55%.

2. **Respondent:** The Federal Republic of Mekar ("Mekar"), a state in the Greater Narnian region.

Background to Claimant's Investment

3. In January 2010, Mekar decided to privatise the national airline Caeli Airways JSC ("Caeli").

4. Although Vemma's bid was found to be the most financially attractive business model for Caeli's development, members of Mekar's Committee on Reform of Public Utilities ("CRPU") noted that it relied on an overly optimistic forecast which did not account for serious volatility of fuel prices and potential takeover of some routes by competitors.

5. In March 2011, the Competition Commission of Mekar ("CCM") approved Vemma's acquisition of a stake in Caeli and the airline's participation in the Moon Alliance. However, CCM sought and obtained an undertaking from Caeli that it would not engage in high-level co-operation on competition parameters and other sensitive information with other Moon Alliance members. Subsequently, Vemma acquired an 85% stake in Caeli and entered into a Shareholders' Agreement with a Mekari state-owned company, Mekar Airservices Ltd. ("Mekar Airservices").

Events leading to the Dispute

6. Since its acquisition, Caeli was able to capitalise on growing tourist interest in Mekar and cheap fuel prices. Vemma received subsides from the Bonooru government under the Horizon 2020 scheme for expansion into Mekar and for boosting tourism in Bonooru. While Mekar Airservices suggested to strengthen Caeli's long-term financial health, Vemma decided to rapidly expand Caeli's fleet, despite the volatility of fuel prices and the airline industry.

7. In September 2016, Caeli's rapid expansion drew the CCM's attention, prompting it to initiate an investigation against Caeli for predatory pricing to hinder competition in the Mekari market ("First Investigation").

8. As an interim measure, and under its authority, CCM imposed airfare caps on Caeli to prevent it from earning supra-competitive profits. At the time, Caeli did not protest the imposition of the airfare caps.

9. In December 2016, CCM initiated another investigation against Caeli based on a complaint by a consortium of small regional airlines about anti-competitive behaviour and abuse of dominant position ("Second Investigation").

10. In 2017, with a rapidly depreciating domestic currency, MON, Mekar faced an economic crisis. On 30 January 2018, to stabilise the currency, Mekar passed a decree requiring all companies operating in Mekar to offer goods and services exclusively in MON.

The Dispute

11. Caeli requested the removal of the airfare caps and filed a complaint before a Mekari court. Due to the court's limited resources, an ongoing economic crisis and the prioritisation of criminal matters, the court scheduled a hearing for April 2019.

12. In August 2018, CCM concluded the First Investigation, determining that Caeli engaged in predatory pricing and imposed a fine of MON 150 million.

13. In September 2018, to alleviate the impact of the economic crisis, Mekar passed an Executive Order 9-2018, granting relief subsidies to airlines for each Mekari citizen travelling on board. Mekar did not grant subsidies to foreign state-owned airlines operating in Mekar, including Caeli, considering the advantages those enterprises have over other privately owned enterprises.

14. In January 2019, CCM concluded the Second Investigation and found that Caeli had engaged in abuse of dominant position by extracting significant additional privileges from Phenac International Airport, which allowed it to undercut prices and push competitors out of the market. Hence, a fine of MON 200 million was imposed. Caeli appealed both CCM's decisions rendered upon results of the First and the Second Investigations before the Mekari High Court.

15. In June 2019, the Mekari High Court declined to remove the airfare caps as an interim decision. Additionally, given the very little chance of success on the merits, the court also dismissed Caeli's case by way of a summary judgment.

16. By September 2019, Caeli's market share fell below 40% and consequently, CCM removed the airfare caps.

17. In November 2019, given Caeli's financial distress, Vemma decided to sell its stake. Based on the right of first refusal, Vemma notified Mekar Airservices of the terms of the offer it got from Hawthorne Group. Mekar Airservices rejected the offer, since it was not made at arm's length due to Hawthorne Group's affiliation to Vemma through the Moon Alliance.

18. In February 2020, Mekar Airservices initiated commercial arbitration against Vemma disputing the validity of the offer. In May 2020, an award in favour of Mekar Airservices was rendered.

19. On 1 August 2020, the award was set aside for violating public policy of Sinnoh, the seat of arbitration.

20. On 23 August 2020, considering the public policy of Mekar, the Mekari High Commercial Court, in exercise of its power, recognised and enforced the award. The Superior Court of Mekar upheld this decision and dismissed Vemma's appeal.

21. Vemma failed to find another buyer for its shares and on 8 October 2020 sold its stake in Caeli to Mekar Airservices for USD 400 million, the investment's market value.

This Arbitration

22. On 15 November 2020, Vemma filed the notice of arbitration ("Notice") against Mekar, submitting the dispute to arbitration under the ICSID Arbitration (Additional Facility) Rules ("ICSID AF Rules"). Vemma requested the Tribunal to find that Mekar treated its investment unfairly and inequitably in breach of CEPTA. As compensation, Vemma requested the payment of USD 700 million.

23. In its response to the Notice ("Response"), Mekar raised objections to the Tribunal's jurisdiction, denied all of Vemma's claims and challenged the compensation.

24. The Tribunal was duly constituted in accordance with CEPTA. Two applications to make *amicus curiae* submissions – by Consortium of Bonoori Foreign Investors ("CBFI") and by the external advisors to CRPU – were filed in these proceedings. Both disputing parties commented on the admissibility of *amici* submissions.

PART I: CLAIMANT LACKS STANDING BEFORE THIS TRIBUNAL

25. This Tribunal's jurisdiction *ratione personae* rests on the definition of "investor" under Article 9.1 CEPTA, which covers "*an enterprise with the nationality of a Party or seated in the territory of a Party*". In *casu*, Vemma, due to its existing ties to its home state, Bonooru, qualifies as a state-owned enterprise ("SOE"). The Tribunal should decline jurisdiction over the present claim because CEPTA's definition of "investor" does not cover SOEs **[I]**. Alternatively, if CEPTA *does* extend protection over SOEs, Claimant should not be granted standing before this Tribunal, because its operations in Mekar are attributable to Bonooru **[II]**.

I. CEPTA'S DEFINITION OF "INVESTOR" DOES NOT COVER SOES

26. Article 9.1 CEPTA is silent on the matter whether SOEs are included in the definition of "investor". The *Inceysa* tribunal held that "*any analysis of jurisdiction must be made with meticulous care, without starting from presumptions in favour or against the jurisdiction,"* particularly when a sovereign state and its consent to arbitration is involved.[1] Hence, a jurisdictional instrument is to be interpreted neither restrictively, nor expansively, but rather objectively and in good faith.[2] As a matter of treaty interpretation in accordance with Article 31 Vienna Convention on the Law of Treaties ("VCLT"), Article 9.1 CEPTA shows that Mekar and Bonooru did not grant protection to SOEs **[A]**. In addition, supplementary means of interpretation, as provided in Article 32 VCLT, confirm this conclusion **[B]**.

A. THE CEPTA PARTIES DID NOT GRANT PROTECTION TO SOES UNDER ARTICLE 9.1 CEPTA

27. Pursuant to Article 31(1) VCLT "*a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*". When a treaty is silent as to the standing of SOEs, a holistic interpretation of the entire treaty may elucidate that SOEs are excluded from bringing claims before a tribunal.[3] In particular, other provisions of the investment treaty, not only those related to the definition of "investor", may imply the exclusion of the standing of SOEs.[4]

[1] Inceysa, ¶176.
[2] Southern Pacific Properties, ¶63.
[3] McLaughlin, 610.
[4] Blyschak, 21, 23.

28. In the present case, CEPTA contains other provisions, from which the implied intention of excluding SOEs from investment protection under Article 9.1 can be derived. *First*, Article 9.13 CEPTA explicitly refers to "State Enterprises" and their role under the treaty, which does not contemplate acting as an investor or bringing claims to arbitration. *Second*, Article 9.15 CEPTA extends subrogation rights, including the right to bring a claim on behalf of an investor, to a "Party" or an "agency authorised by a Party". The term "agency authorised by a Party" within subrogation clauses in other treaties covers entities such as national investment guarantee agencies, which are in fact SOEs.[5] An explicit focus of the treaty on the subrogation rights of the "parties" and their "agencies" suggests that where the contracting parties intended to grant them standing, they did so expressly; correspondingly, where the treaty does not expressly mention them, this was intentional and such entities were not intended to be given standing.[6] Hence, the CEPTA Parties explicitly provided standing to SOEs only in case of subrogation.

29. In sum, the Tribunal should interpret Article 9.1 CEPTA, which is silent as to the standing of SOEs, in the context of Article 9.13 and 9.15 CEPTA. Thus, the ordinary meaning of Article 9.1 CEPTA excludes SOEs from its definition of "investor", depriving them from treaty protection *besides the explicit case* of subrogation rights under Article 9.15 CEPTA.

B. Supplementary Means of Interpretation confirm the intentional Exclusion of SOEs from the Protection under Article 9.1 CEPTA

30. Pursuant to Article 32 VCLT, in order to confirm the meaning resulting from the application of Article 31 VCLT, "*recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion*". The circumstances of treaty conclusion refer to the historical background, economic, political and social factors against which the treaty has been negotiated and concluded.[7] They include all evidence in practice attached to the conclusion of a treaty and affecting its content.[8] Moreover, Article 32 VCLT allows to look at other treaties on the same subject matter adopted either before or after the one in question that use the same or similar terms.[9]

[5] De Nanteuil, ¶16.
[6] Blyschak, 23.
[7] Mbengue, 392; Sinclair, 141; Villiger, 445.
[8] Gardiner, 343.
[9] Aust, 220; Gardiner, 345.

31. In *casu*, the definition of an "investor" under Article 1 Bonooru-Mekar BIT – a previous investment agreement between Bonooru and Mekar – explicitly extended protection to "*privately-owned or government-owned*" enterprises. Throughout the lifetime of the Bonooru-Mekar BIT, Mekar lost several high profile investment arbitrations against investors from Bonooru, while there were few Mekari investors operating in Bonooru and no claims against Bonooru under the BIT.[10] Some politicians in Mekar considered the Bonooru-Mekar BIT as "*the worst BIT in the history of BITs*".[11] Due to the change in public sentiment and increasing economic interdependence between the countries, Mekari officials sought to negotiate a more comprehensive trade and investment agreement with Bonooru, which adequately balanced investors' and host states' rights.[12] This led to the CEPTA's conclusion.

32. Thus, such historical background and the evident difference in definitions of the protected investors between the Bonooru-Mekar BIT and CEPTA are capable of confirming that the common intention of the CEPTA Parties in particular circumstances of its conclusion was not to grant protection to SOEs under Article 9.1 CEPTA.

II. ALTERNATIVELY, CLAIMANT'S OPERATIONS IN MEKAR ARE ATTRIBUTABLE TO BONOORU AND FALL OUTSIDE THE TRIBUNAL'S JURISDICTION

33. Should the Tribunal determine that the definition of "investor" under Article 9.1 CEPTA provides protection to SOEs, Claimant still lacks standing in these proceedings. Article 9.1 CEPTA only covers an investor that "*seeks to make, is making or has made an investment*". As such, only SOE's investment made for "*the expectation of gain or profit*", as per the CEPTA definition of "investment", falls within Article 9.1 CEPTA. This aligns with the traditional understanding in investment arbitration, under which SOEs have standing only when acting in commercial capacity, which can be assessed through the "Broches test".[13] According to the test, an SOE does not have standing if it is acting as an agent for the government or discharging an essentially governmental function.[14]

[10] PO3, ¶14.
[11] PO3, ¶14.
[12] PO3, ¶14.
[13] Blyschak, 26ff; Hamida, 28-29; Mcneill/Purisch, 163-164.
[14] Broches, 353; Schreuer, 160–161.

34. This in turn assimilates to the rules of attribution in Article 8 and Article 5 ARSIWA,[15] which reflect customary international law.[16] Certainly, matters of attribution often come up when the state argues that acts by state entities cannot be attributed to it.[17] However, investment tribunals can equally draw on the concepts outlined in ARSIWA when assessing the nature of an SOE's activities to determine whether it has standing as a claimant in a particular case.[18]

35. In *casu*, Claimant's operations in Mekar were carried out at Bonooru's behest because Claimant was conducting its investment either in the exercise of governmental authority **[A]**, or acting under Bonooru's control **[B]**. Thus, Claimant cannot avail itself of investment arbitration under CEPTA and the tribunal should decline jurisdiction.

A. Claimant was conducting its Investment in the Exercise of Governmental Authority

36. According to Article 5 ARSIWA "*the conduct of […] entity […] which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance*". In the case at hand, Vemma's investment activities in Mekar were carried out in the exercise of governmental authority and financed by Bonooru. Even if Vemma was not empowered by law to exercise such governmental authority, this is not fatal for attribution.

37. *First*, with respect to the exercise of governmental authority: even though an entity engages in commercial activities, the specific conduct under scrutiny may still be "governmental" within "*the particular society, its history and traditions*".[19] Moreover, the greater context in which an SOE's activities take place – including their purpose and objectives – is relevant, since an SOE's conduct may be motivated by political rather than strictly commercial concerns.[20] By considering the purpose behind the entity's activities, a tribunal may find a broader governmental scheme to which such activities may belong, and such purpose could be determinative for an investor's standing.[21] The *Maffezini* tribunal stated that a presumption of

[15] Feldman/SOEs, 27; BUCG, ¶34.
[16] Crawford, 43; Hober, 553; Noble Ventures, ¶70.
[17] Dolzer/Schreuer, 219.
[18] Beus, 563; Blyschak, 35-41; Feldman/SOEs, 34; Masdar, ¶¶145-146, 168-169; Mcneill/Purisch, 164.
[19] ARSIWA Commentary, 43, ¶¶5-6.
[20] Blyschak, 30-31; Feldman 34; McLaughlin, 614.
[21] Beus, 566.

attribution would arise "*if an entity's purpose or objectives is the carrying out of functions which are governmental in nature or which are otherwise normally reserved to the State, or which by their nature are not usually carried out by private businesses or individuals*".[22]

38. Vemma's operations are of a governmental nature both in Bonooru as well as in Mekar. With respect to Vemma's activities in Bonooru, Article 70 of the Bonooru Constitution Act states that "*Bonooru shall ensure that every citizen is guaranteed travel to and from its many islands*".[23] Moreover, "*air travel serves a unique purpose in Bonooru compared to other nations […]; without modern air travel, most of* [Bonoori] *citizens could not move between* [Bonoori] *islands or even leave the islands for another nation*".[24] In this context, Vemma's Articles of Association foresee the public objective "*to assist in developing the aviation industry as well as the civil aviation infrastructure in Bonooru for the benefit of its population in accordance with Article 70 of the Constitution Act, 1947 including servicing remote communities*".[25] Accordingly, Bonooru's Constitutional Court has confirmed that Vemma is an active operator in observation of this constitutional mobility right of Bonoori citizens.[26] Moreover, Bonooru's Prime Minister publicly assured the operation of routes for the benefit of its people, regardless of the airline's profitability.[27]

39. This evinces that based on societal traditions, Bonooru fulfils its constitutional obligations to ensure the mobility rights of its citizens through Vemma's activities. Thus, Vemma was carrying out functions which are otherwise normally reserved to the state and which by their nature are usually not performed by private businesses. Vemma's governmental functions did not stop in Bonooru.

40. Vemma was pursuing Bonooru's social and geopolitical agenda in Mekar. Using Caeli, Vemma advanced the Caspian Project, which is Bonooru's strategic governmental initiative to facilitate the movement of goods, people, services, and knowledge amongst its neighbours, by means of infrastructure with the long-term goal of redefining trade patterns.[28] Some neighbouring states have accused Bonooru of using economic leverage as a tool of diplomacy.[29] Notably, Bonooru

[22] Maffezini (Jurisdiction), ¶77.
[23] Annex I, 41.
[24] Annex III, 43.
[25] Annex IV, ¶3.
[26] Annex III, 43.
[27] SOUF, ¶28.
[28] SOUF, ¶4.
[29] SOUF, ¶4.

even retaliated against Mekar by withdrawing funding and halting all infrastructure plans in Mekar under the Caspian Project,[30] when Caeli was not treated favourably.

41. *Second*, with respect to Bonooru's subsidisation of Vemma: an indicator for pursuing governmental functions can be the sources of financing,[31] for instance through state subsidies. When a private business permanently relies on state subsidies, there is a presumption that it is fulfilling a public function, as the public resources would not be bestowed on the business without state interest concerned.[32]

42. After Vemma's acquisition, one of the pillars of Caeli's business model aimed at catering to customers travelling between Mekar and Bonooru.[33] Vemma was financially supported under the "Horizon 2020" Scheme, part of the Caspian Project, as unveiled by Bonooru's Secretary of Transportation and Tourism.[34] A key part of the Scheme was to offer recurring subsidies to companies investing in tourism-related infrastructure in Bonooru.[35] Vemma received the first subsidy on 28 October 2011,[36] a few months after its acquisition of Caeli's shares. As an explanation for these subsidies, Bonooru's Secretary of Transportation and Tourism noted that "*Vemma's expansion into Mekar will offer substantial benefits not only to Vemma but to all of Bonooru by enhancing the aviation network available to prospective tourists. This will boost the tourism infrastructure at our disposal*".[37] Later, against the background of Vemma's investment in Caeli, the Secretary also lauded Vemma's significant contribution to Bonooru's tourism infrastructure, which in turn enhanced the mobility rights of Bonoori citizens.[38]

43. Bonooru's subsidies aided Vemma to operate unprofitable routes that favoured Bonooru's tourism interests. In 2014, Caeli's losses were particularly concentrated in the high-traffic routes between Bonooru and Mekar.[39] But the operation on these routes was not cut back, as it would have been done by any ordinary commercial entity, motivated to gain profits and to avoid losses. A former high-ranking employee within Bonooru's Ministry of Tourism[40] offered an explanation for Vemma's unsound business decision. She observed that Vemma's investment

[30] PO4, ¶1.
[31] Schicho, 138.
[32] Schicho, 138.
[33] SOUF, ¶28.
[34] SOUF, ¶28.
[35] SOUF, ¶28.
[36] SOUF, ¶28.
[37] SOUF, ¶28.
[38] PO4, ¶6.
[39] SOUF, ¶33.
[40] Annex VII, 54.

had to be seen "*in the context of Bonooru's Caspian Project and the Horizon 2020 scheme*" and that "*these routes seem to more benefit Bonooru than Vemma or Caeli*".[41] She further admitted that "*it could be some sort of closed-door deal, arrangement […] with Bonooru where Vemma ensures that Caeli flies these routes to benefit Bonooru. […] Bonooru wants more integration and control in our region".*[42] Thus, Bonooru financed Vemma's operations in Mekar for its public benefit.

44. *Third*, with respect to Vemma's lack of empowerment: the exercise of governmental activities does not necessarily require an official empowerment by law.[43] The *Helnan* tribunal attributed conduct of an enterprise to the state with reference to Article 5 ARSIWA, albeit the lack of empowerment, given the numerous close links between the enterprise and the state.[44] Thus, even in the absence of an official empowerment by Bonooru, Vemma's close links to Bonooru evinces that Vemma was exercising governmental authority, while conducting its investment in Caeli.

45. In sum, Claimant's investment in Mekar crossed the line from purely commercial activities to furthering Bonoori citizens' mobility rights and the government's geopolitical interests. Thus, Claimant's actions in Mekar are attributable to Bonooru, barring Claimant's access to dispute settlement under CEPTA.

B. CLAIMANT WAS ACTING UNDER BONOORU'S CONTROL

46. According to Article 8 ARSIWA, the conduct of a person is attributable to a state if the person "*is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct*". Whether an enterprise's conduct is controlled by the state does not depend solely on state ownership, but rather on the use of such ownership for inducing the specific conduct.[45] As such, a tribunal must assess the particular context of each case since control over business activities may equally be exercised without majority ownership.[46] In this sense, the

[41] Annex VII, 55.
[42] Annex VII, 55.
[43] Helnan (Jurisdiction), ¶¶92-93.
[44] Helnan (Jurisdiction), ¶¶92-93.
[45] Schicho, 205.
[46] Vacuum, ¶43; Thunderbird, ¶107.

ability to select members of the decision-making body,[47] and to directly appoint and remove such members,[48] are crucial factors to consider.

47. In *casu,* at the time of Claimant's investment in Caeli, Bonooru's shareholding in Claimant ranged between 31% to 38%,[49] while no other shareholder held more than a 7% stake.[50] Claimant's Articles of Incorporation require 50% of voting shares for a quorum at regular meetings, which includes meetings for electing directors.[51] Bonooru's representatives on Claimant's board are present at every meeting.[52] Hence, by effect, when not all other shareholders attend a meeting, Bonooru's representatives form a majority of members present and voting,[53] for instance, when selecting Board members. Moreover, Claimant's Board of Directors consists of eight directors.[54] Herein, the Ministry of Transport and Tourism of Bonooru shall nominate one of its officials as one director.[55] In practice, Claimant's Directors are interchangeable with governmental officials as evinced by the appointment of Ms Sabrina Blue – erstwhile head of Claimant's Board of Directors – as the Secretary of Transport and Tourism in Bonooru *on the same day* as Claimant submitted its bid for the purchase of Caeli.[56] This demonstrates that the shareholding and corporate structure of Claimant ensured Bonooru's continued control over the decision-making body of Claimant, thereby steering Claimant's investment activities in Mekar and fostering Bonooru's political interests. Thus, Claimant's investment in Caeli is attributable to Bonooru.

48. Additionally, Bonooru's control over Claimant was further confirmed in March 2021, when the former suddenly and unilaterally took over the majority shareholding up to 55%, following which Claimant underwent large-scale restructuring: its Board of Directors was replaced with government functionaries, its functions were expanded to include paramilitary activities, and its legal team was equipped with lawyers from Bonooru's justice department to assist in this arbitration.[57] Such rapid increase in control was only possible where there already existed significant control over Claimant.

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[47] Schicho, 197, 206.
[48] Schicho, 197.
[49] SOUF, ¶10.
[50] PO4, ¶2.
[51] PO3, ¶3.
[52] PO3, ¶3.
[53] PO3, ¶3.
[54] Annex IV, ¶¶152, 152.2
[55] Annex IV, ¶152.4.
[56] SOUF, ¶22.
[57] SOUF, ¶65.

49. In sum, the Tribunal should decline jurisdiction over the present claim because CEPTA does not grant standing to SOEs such as Claimant. Alternatively, Claimant's operations in Mekar are attributable to Bonooru, thus, turning this case into a state-to-state arbitration. Since neither Chapter 9 CEPTA nor the ICSID AF Rules contemplate arbitration between two sovereign states, this Tribunal should decline jurisdiction.

PART II: THE TRIBUNAL SHOULD REJECT THE *AMICUS* SUBMISSION BY THE CONSORTIUM OF BONOORI FOREIGN INVESTORS AND ADMIT THE *AMICUS* SUBMISSION BY THE EXTERNAL ADVISORS TO MEKAR'S COMMITTEE ON REFORM OF PUBLIC UTILITIES

50. Two requests to submit *amicus curiae* briefs were filed in this arbitration. The Tribunal should reject the application to file an *amicus* submission from CBFI **[I]** and grant leave to the external advisors to CRPU to submit their *amicus* brief **[II]**. Rejecting the former while accepting the latter will not disrupt or unduly burden the proceedings, or unfairly prejudice either disputing party **[III]**.

I. THE TRIBUNAL SHOULD *NOT* GRANT LEAVE SOUGHT BY CBFI TO FILE AN *AMICUS* SUBMISSION

51. The Tribunal has the authority to allow *amici* to file written submissions in the proceedings as long as the criteria under Article 41(3) ICSID AF Rules and Article 9.19(3) CEPTA are satisfied. Furthermore, Respondent has requested the Tribunal to apply the UNCITRAL Rules on Transparency in Investor-State Arbitration ("UNCITRAL Transparency Rules"), in accordance with Article 9.20(6) CEPTA.[58]

52. All mentioned instruments foresee similar criteria for the admission of *amicus* briefs. Certainly, a tribunal retains full discretion in considering the non-exhaustive list of corresponding criteria and their weight, but the failure to satisfy any of the criteria in the applicable instruments ordinarily results in the denial of an *amicus* application.[59]

53. Accordingly, the Tribunal should reject CBFI's application, because its submission would not assist the Tribunal in the determination of a factual or legal issue related to the proceedings by bringing a different perspective, knowledge, or insight **[A]**. In addition, CBFI does not hold a significant interest related to this dispute **[B]**. Finally, CBFI's application does not pursue any public interest to warrant admission **[C]**.

[58] Respondent's Comments on *Amicus*, 24.
[59] Born/Forrest, 656; Resolute Forest (PO6), ¶4.5; Bear Creek (PO6), ¶39.

A. CBFI WOULD NOT ASSIST THE TRIBUNAL BY BRINGING A PERSPECTIVE, KNOWLEDGE, OR INSIGHT DIFFERENT FROM THAT OF THE DISPUTING PARTIES

54. Article 41(3)(a) ICSID AF Rules, Article 9.19(3) CEPTA and Article 4(3)(b) UNCITRAL Transparency Rules require to consider the extent to which an *amicus* submission will assist the Tribunal in "*the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties*". Hence, the purpose of an *amicus* submission is to help the tribunal arrive at a correct decision by providing it with arguments, expertise and perspectives that the parties may not have provided by themselves.[60] An *amicus* submission by CBFI would not satisfy this requirement because it would be duplicative of Claimant's submission **[1]** and could not offer a different point of view, since CBFI is not impartial and independent from Claimant **[2]**.

1. CBFI's Brief would be duplicative of Claimant's Submission

55. The criterion under Article 41(3)(a) ICSID AF Rules requires that the applicant demonstrates that its submission will be sufficiently "different" in content and perspective from, and not duplicative of, the parties' submissions.[61] As stated by the tribunals in *Apothex* and *Bear Creek*, an *amicus* applicant will not provide a different perspective from the parties, when the parties have made detailed submissions on the matter which *amicus* applicant intends to address in its submission.[62]

56. In its submission, CBFI intends to provide the context of the business climate in Bonooru, the existing corporate framework in which enterprises operate and the nature of the aviation industry in Bonooru.[63] Given Claimant's experience with the airline industry and its membership in CBFI,[64] Claimant is able to assist the Tribunal by presenting extensive submissions, *inter alia*, on the industry-specific issues required to resolve the present dispute. Therefore, CBFI's submission would be of no assistance to the Tribunal, since it would not bring specific knowledge that the disputing parties do not already possess.

[60] Suez (Amicus), ¶23; Bernhard (PO2), ¶49.
[61] Born/Forrest, 646; Philip Morris (PO4), ¶¶26-27.
[62] Apotex (BNM), ¶26; Bear Creek (PO6), ¶38.
[63] *Amicus* application by CBFI, ¶10.
[64] *Amicus* application by CBFI, ¶7.

2. CBFI is not sufficiently impartial and independent from Claimant

57. Neither Article 41(3) ICSID AF Rules nor Article 9.19(3) CEPTA expressly require an applicant's independence or impartiality. Nonetheless, the lack of any connection between the applicant and the disputing parties is an essential attribute of an *amicus*, which is implicit in the requirement that an *amicus* must bring a perspective that is *different* from that of the disputing parties.[65] In addition, Article 9.19(3) CEPTA imposes identification and disclosure duties upon the applicants, confirming that *amici* must be independent and impartial from the disputing parties.[66]

58. In this context, the *Bernhard* tribunal considered that *"the apparent lack of independence or neutrality"* of the *amici* applicants constitutes "*a sufficient ground to deny"* an application for leave.[67] In *casu*, CBFI failed to satisfy the threshold of such requirement. Claimant's and its advisor's membership in CBFI creates the latter's dependence and partiality **[a].** In addition, the existence of a dispute between other CBFI's members and Respondent raises serious doubts as to CBFI's impartiality and independence **[b]**.

a. Claimant and its Advisor are Members in CBFI

59. According to CBFI's application, Claimant and Lapras Legal Capital are both members of CBFI, and Lapras Legal Capital advises Claimant on funding strategies in the current arbitration.[68] This creates a close connection between CBFI and Claimant warranting the rejection of the applicant's submission. The *Philip Morris* tribunal denied a request for leave filed by the Inter-American Association of Intellectual Property ("ASIPI"), stating that it "*cannot ignore the detailed information*" about the "*close relationship between ASIPI and claimants*" through the participation of the claimants' lawyers on the management board and other specific thematic committees of ASIPI.[69]

60. The situation is similar in the present case. Horatio Velveteen – CFO of Lapras Legal Capital – is a member of CBFI's Executive Committee.[70] In disregard of the applicant's own "Amicus Brief Submission Guidelines", which prohibit members of CBFI's Executive

[65] Suez (Amicus), ¶23; Bernhard (PO2), ¶49; Philip Morris (Award), ¶55; Iberdrola.
[66] Eli Lilly (PO4), D; Bear Creek (PO6), ¶23.
[67] Bernhard (PO2), ¶56.
[68] *Amicus* application by CBFI, ¶7.
[69] Philip Morris (Award), ¶55.
[70] PO 3, ¶12.

Committee to participate in discussions or votes in relation to a dispute in which they have a conflict of interest, Horatio Velveteen was allowed to vote in respect of the *amicus* submission in Vemma's claim against Respondent.[71] Mr Velveteen's simultaneous role in this arbitration cannot be ignored. On the one hand, Mr Velveteen is an "executive committee member" of CBFI, making him an influential figure in the association seeking to submit an *amicus* brief against Respondent's position. On the other hand, Mr Velveteen acts as financial advisor to Claimant in this arbitration, casting legitimate doubts as to the independence and impartiality of the concerned *amicus*.

61. Moreover, Article 9.19(3) CEPTA mandates an applicant to disclose its financial source in preparing a submission. Such a disclosure must be sufficient to determine the independence of an *amicus* applicant if a financial relationship exists with the parties.[72] In the present case, the CBFI's membership fee is calculated based on the number of employees in the organisation.[73] However, CBFI left undefined the nature and extent of its financing *vis-à-vis* Claimant and Lapras Legal Capital. Furthermore, CBFI's application failed to disclose whether Claimant and Lapras Legal Capital participated in drafting the *amicus* submission. Taken together, all these circumstances call into question CBFI's independence and impartiality in the present case.

b. There are two other Disputes between CBFI's Members and Respondent

62. SRB Infrastructure and Wiig Wealth Management Group – both members in CBFI – are currently pursuing claims against Respondent under Chapter 9 CEPTA.[74] This fact raises further concerns as to CBFI's impartiality and independence. The *Bernhard* tribunal concluded that an *amicus* application gave rise to legitimate doubts as to the applicant's independence given the support received from a non-governmental organisation, whose founder was engaged in an ongoing dispute with a disputing party.[75] In the present case, SRB Infrastructure and Wiig Wealth Management Group are not only engaged in disputes with Mekar, but also directly finance CBFI through their membership fee.[76] This raises legitimate doubts about CBFI's impartiality and independence, which should lead to the rejection of its *amicus* application.

[71] PO3, ¶12.
[72] Suez (Amicus), ¶32.
[73] PO3, ¶11.
[74] *Amicus* application by CBFI, ¶6.
[75] Bernhard (PO2), ¶¶7, 19, 56.
[76] PO3, ¶11.

B. CBFI DOES NOT HAVE A SIGNIFICANT INTEREST IN THE PROCEEDINGS

63. Article 41(3)(c) ICSID AF Rules, Article 9.19(3) CEPTA and Article 4(3)(a) UNCITRAL Transparency Rules further require the Tribunal to consider the extent to which the applicant "*has a significant interest in the proceeding*". Accordingly, the applicant must demonstrate that it might be affected by the issue on which it intends to make a submission.[77] In this regard, the *Apotex* tribunal reasoned that this criterion requires an applicant to explain "*how the rights or principles* [the applicant] *may represent or defend might be directly or indirectly affected by the specific [...] issue on which it intends to make submissions, or indeed by the outcome of the overall proceedings*".[78] Accordingly, as explained by the *Eco Oro* tribunal, an application's "*limited and open-textured wording"* is not sufficient to establish any significant interest.[79]

64. CBFI advances that Bonoori SOEs should have standing in investor-state dispute settlement under CEPTA, and that a decision of this Tribunal on the issue would affect its members.[80] However, this alone does not suffice to justify an applicant's significant interest in the present proceedings.

65. On the one hand, as noted by the *Resolute Forest* tribunal, no significant interest is established where the applicants merely ask the tribunal to adopt a treaty interpretation that is in their favour.[81] In *casu*, CBFI only seeks a favourable interpretation of the CEPTA dispute settlement mechanism, which does not amount to a significant interest.

66. On the other hand, the concept of significant interest aims at allowing *amicus* petitioners to represent people or groups who would be influenced by a tribunal's decision but do not have a legal voice to raise their concerns themselves in a particular case.[82] In *casu*, other CBFI's members – as SRB Infrastructure and Wiig Wealth Management Group already have done – may file their potential claims under CEPTA directly. Thus, they would not be affected by this Tribunal's decision, and they would always find an audience to defend their claims.

67. Consequently, the lack of CBFI's significant interest should lead to the rejection of its *amicus* application.

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[77] Born/Forrest, 650.
[78] Apotex (PO2), ¶28.
[79] Eco Oro (PO6), ¶34.
[80] *Amicus* application by CBFI, 17.
[81] Resolute Forest (PO6), ¶4.6.
[82] Ayad, 25.

C. CBFI'S APPLICATION DOES NOT PURSUE A PUBLIC INTEREST

68. CBFI has not demonstrated that there is a public interest in the subject-matter of this arbitration. Pursuant to Article 1(4)a UNCITRAL Transparency Rules, the Tribunal should take into account whether there is a "*public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings*". This criterion serves as a general justification for the participation of *amici curiae*, as the rationale for their admission is to respond to any public concerns that may arise from the subject matter of a dispute.[83]

69. The public interest criterion is satisfied if the issues to be discussed in the arbitration extend beyond *commercial matters*, involving as access to public commodities, sustainable development, protection of the environment or human rights.[84] For instance, the *Gabriel Resources* tribunal considered the investment project's nature and people's opposition to it for environmental, cultural or historical reasons, as determinative to justify the existence of public interest.[85] The applicant, seeking to intervene as *amicus*, must clearly establish the link between its application and furtherance of public interest.[86] In the case at hand, CBFI has failed to do so.

70. CBFI did not address the nature of Claimant's investment project nor the consequences of its implementation for the general public. Rather, CBFI's application simply focused on the economic interest of Bonoori investors in Mekar and the adoption by the Tribunal of an interpretation of CEPTA provisions that favours the members of the CBFI. This lacks an element of public interest, thus, is not enough to justify CBFI's intervention in the present proceedings.

II. THE TRIBUNAL SHOULD GRANT LEAVE TO THE EXTERNAL ADVISORS TO CRPU TO FILE AN *AMICUS* SUBMISSION

71. As opposed to CBFI's application, the external advisors to CRPU's application complies with all conditions set out in the ICSID AF Rules, CEPTA and the UNCITRAL Transparency Rules. In particular, the submission of the external advisors to CRPU would assist the Tribunal by bringing a different perspective, addressing a matter within the scope of the present dispute **[A]**. In addition, the application of the external advisors to CRPU would pursue a public interest **[B]**.

[83] Wiik, 148, 300.
[84] Wiik, 148; Biwater, ¶366; Methanex (Amicus 1), ¶49; Philip Morris (PO3), ¶26; Philip Morris (PO4), ¶28.
[85] Gabriel Resources (PO19), ¶65.
[86] Resolute Forest (PO6), ¶4.7.

Finally, the applicant's submission would be justified by the significant interest it has in these proceedings **[C]**.

A. THE SUBMISSION BY THE EXTERNAL ADVISORS TO CRPU WOULD ASSIST THE TRIBUNAL ON A MATTER WITHIN THE SCOPE OF THE DISPUTE

72. Claimant objected to the application by the external advisors to CRPU, contending that their *amicus* brief would not address "*a matter within the scope of the dispute*", dealing with a jurisdictional question not raised by the disputing parties,[87] namely the illegality of Claimant's investment due to corruption. This objection is unfounded.

73. In practice, the submission of *amicus* briefs on jurisdictional objections, not raised by the parties, is common in investment arbitration. For instance, the European Commission has been allowed to submit briefs in intra-EU cases contesting the tribunals' jurisdiction, even though the disputing parties themselves have not raised an argument to that effect.[88]

74. Furthermore, with respect to *amicus* submissions concerning issues of public interest, the *Apotex* tribunal considered that "*it is perfectly conceivable that issues of jurisdiction might raise matters of public interest in themselves, on which non-disputing parties might be well-placed to provide assistance and perspectives or insights beyond those of the disputing parties"*.[89] In the particular case of corruption, the tribunals in *Infinito* and *Gran Colombia* have admitted *amicus* submissions alleging corruption, albeit not argued by the parties, due to its public interest nature, to which a tribunal cannot turn a blind eye.[90] Indeed, if a tribunal has manifest ground for suspecting corruption, international public policy imposes a duty on the tribunal to engage in independent fact-finding,[91] which could be assisted via an *amicus* submission.

75. In *casu*, the external advisors to CRPU are independent members of civil society and were engaged in the process of privatisation of Caeli in 2010 and actively participated in the deliberations of CRPU, leading to Claimant's investment.[92] As such, the would-be *amicus* is in the unique position to adduce unbiased facts, providing evidence of the illegality of Claimant's investment acquired by means of bribes paid to the Chairperson of CRPU.[93]

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[87] Claimant's Comments on *Amicus*, 22.
[88] Electrabel (Jurisdiction), ¶¶4.92, 10.2; Micula (Annulment), ¶¶62-63.
[89] Apotex (PO2), ¶¶32-33.
[90] Infinito (PO2), ¶33; Gran Colombia (PO10).
[91] Schill, 423-424.
[92] *Amicus* application by the external advisors to CRPU, 19.
[93] *Amicus* application by the external advisors to CRPU, 19.

76. Since none of the disputing parties are able to adduce this kind of facts, the external advisors to CRPU may furnish the Tribunal with a different *"perspective, particular knowledge or insight*" that is relevant in these proceedings.

77. Therefore, even though the parties have not raised the issue of corruption in these proceedings, the Tribunal should admit the submission by the external advisors to CRPU, considering the element of public policy involved in any allegation of corruption, tainting the Tribunal's jurisdiction if not properly addressed.

B. THE EXTERNAL ADVISORS TO CRPU PURSUE A PUBLIC INTEREST IN ITS *AMICUS* SUBMISSION

78. As opposed to CBFI, the external advisors to CRPU pursue a direct public interest. The public interest in the subject matter of this arbitration is justified by the fact that Claimant received its rights by means of bribes during the privatisation process of Caeli.[94] As stated by the petitioner, this arbitration raises important issues regarding the ability of investor-state dispute settlement to address public policy concerns fairly, particularly, acts of corruption.[95] Naturally, the existence of fair business practices constitute the interest of a large number of private or corporate persons in Mekar, including potential investors seeking opportunities in the country. Thus, by virtue of their mission and expertise, the external advisors to CRPU are able to enlighten the Tribunal as to the potential impact of these proceedings on Mekar's investment environment, if the serious allegations of corruption are indeed present.

C. THE EXTERNAL ADVISORS TO CRPU HAVE A SIGNIFICANT INTEREST IN THESE PROCEEDINGS

79. An applicant must show that the outcome of the arbitration has a direct or indirect impact on the rights or principles it represents and defends.[96] The external advisors to CRPU satisfy this requirement. As independent advisors who regularly intervene in judicial proceedings related to the approval of privatisation projects before the federal courts of Mekar, the external advisors to CRPU have an interest in promoting fair business practices in Mekar.[97] As stated in their

[94] *Amicus* application by the external advisors to CRPU, 19.
[95] *Amicus* application by the external advisors to CRPU, 19.
[96] Apotex (Appleton), ¶38.
[97] *Amicus* application by the external advisors to CRPU, 19.

application, the "*stagnation in anti-corruption efforts in Mekar impacts the financial operations of the Amici, who regularly advise potential investors prospecting opportunities in Mekar"*.[98]

80. In addition, *amicus* petitioners seeking to comment on a public interest could be deemed to meet the threshold of significant interest.[99] Such significant interest is recognised when the arbitration involves issues of obvious public importance, which have direct and indirect relevance to the petitioners' activities at the local, national and international levels.[100]

81. Accordingly, these proceedings, which involve Caeli's privatisation tainted with corruption, will have a direct impact on the day-to-day work of the external advisors to CRPU, who promote fair business practices and privatisation in Mekar. This shows the significant interest of the external advisors to CRPU in the outcome of these proceedings, justifying their intervention as *amicus*.

III. REJECTING CBFI'S *AMICUS* SUBMISSION, WHILE ACCEPTING THE ONE BY THE EXTERNAL ADVISORS TO CRPU WOULD NOT DISRUPT OR UNDULY BURDEN THE PROCEEDINGS

82. Article 41(3) ICSID AF Rules, Article 9.19(3) CEPTA and Article 4(5) UNCITRAL Transparency Rules require the Tribunal to ensure that the *amici* submissions *"do not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party".* Fairness and efficiency are mandatory safeguards that tribunals must ensure by denying an *amicus* participation where it would disrupt or unduly burden the arbitral process or result in unfair prejudice.[101]

83. *Amici curiae,* who meet the applicable requirements, should serve their specific role in the proceedings ("*friends of the tribunal*"), assisting the tribunal in reaching a sound decision.[102] They are not advocates nor experts of the disputing parties,[103] even if their brief favours one party over the other. For instance, the European Commission has intervened as an *amicus* in *Masdar, EDF* and *Electrabel,* supporting the position of the respective respondent host state, without prejudicing the claimant investor.[104]

[98] *Amicus* application by the external advisors to CRPU, 19.
[99] Wiik, 295.
[100] Biwater (PO5), ¶¶50, 15.
[101] Born/Forrest, 653.
[102] Simoes, 14, 22-23.
[103] Baltag, 305.
[104] Masdar; EDF (Hungary); Electrabel.

84. In *casu*, CBFI has proven to be unsuitable to intervene in these proceedings, in particular, due to its inability to assist the Tribunal by offering a different point of view from that of the disputing parties, its lack of independence from Claimant, and its failure to prove significant interest and public interest. In contrast, the external advisors to CRPU fulfil all requirements to be admitted as *amicus curiae*. Under such circumstances, allowing only the submission of the external advisors to CRPU would not unfairly prejudice any disputing party.

PART III: RESPONDENT DID NOT BREACH ITS OBLIGATIONS UNDER CEPTA

85. Without prejudice to Respondent's position on jurisdiction, Respondent's actions did not violate its obligation of fair and equitable treatment ("FET") under Article 9.9(2) CEPTA. They were taken for a legitimate purpose, within Mekar's regulatory authority under CEPTA. Particularly, CCM's measures were not arbitrary **[I]**, Respondent did not discriminate against Claimant while granting relief subsidies **[II]**, Mekari Courts did not deny justice to Claimant and redressed its claims with due process **[III]**, and Mekari Courts legitimately exercised their power to enforce an arbitral award **[IV]**.

I. CCM'S MEASURES WERE NOT ARBITRARY

86. Claimant has argued that CCM's measures against Caeli were arbitrary in nature.[105] For a measure to be arbitrary, it must inflict damage on the investor without serving any apparent legitimate purpose.[106] Hence, the determining criterion for a measure to be arbitrary is whether it can be justified in terms of reasonability and proportionality, in light of the circumstances.[107] Certainly, as stated by the *Antaris* tribunal, arbitrators shall not assess whether the action of the state is "good" or "bad", or that it could have done "more".[108] Rather, the tribunal would examine if there was a public purpose motivating the measure, and the manner of implementation.[109]

87. In *casu*, the exercise of CCM's powers to investigate and impose sanctions to redress Caeli's anti-competitive behaviour had a legitimate purpose **[A],** and the interim measure of airfare caps was reasonably imposed **[B]**.

A. CCM'S INVESTIGATIONS WERE CONDUCTED FOR A LEGITIMATE PURPOSE

88. Claimant, through Caeli, entered into an undertaking to not engage in anti-competitive behaviour by co-operating in competitive parameters such as prices, schedules, capacity, facilities, and other sensitive information with the Moon Alliance members.[110] Additionally,

[105] Notice, ¶15.
[106] EDF (Romania), ¶303; Toto, ¶157; Lemire, ¶262; SAUR, ¶488; OI European Group, ¶¶494, 519.
[107] Teinver, fn 1116; Reinisch/Schreuer, 834.
[108] Antaris, ¶443.
[109] Greentech, ¶462.
[110] SOUF, ¶25.

during the course of business, representatives of Mekar Airservices had cautioned Claimant against the expansion of Caeli in view of the costs associated with seasons of low demand.[111] However, Claimant ignored these warnings. While Mekar Airservices suggested to inject the profits into Caeli's outstanding debts to improve its financial health, Claimant focused on expansion and lower airfares.[112]

89. Caeli's rapid expansion drew the CCM's attention in September 2016, which led to the initiation of the *suo moto* First Investigation on whether Caeli had adopted predatory pricing with an aim to drive out competition in the domestic market.[113] The *Monopoly and Restrictive Trade Practice Act 2009* ("MRTP Act") grants CCM the power to initiate a *suo moto* investigation against a corporation, whose market share is greater than 50%. However, CCM may also exercise discretion in certain investigations where the corporation owns a lower market share.[114] Caeli had a market share of 43% individually and 54% when considered in conjunction with its sister airline, Royal Narnian.[115] Claimant held 100% ownership in Royal Narnian and a majority share in Caeli.[116] Considering the evidence of preferential slot-trading between Royal Narnian and Caeli,[117] including concerns of predatory pricing attested to by a former high-ranking employee of Claimant's home state,[118] CCM's First Investigation was legitimate, following a rational public purpose to protect fair competition in Mekar's domestic market.

90. In December 2016, a consortium of small regional airlines in Greater Narnia complained against Caeli, alleging price undercutting and abuse of dominant position.[119] This triggered CCM's Second Investigation.

91. During the First Investigation, CCM found a breach of Mekar's competition law due to predatory pricing, through the subsidies that Claimant received from Bonooru, which helped Caeli to drastically reduce its prices below the average avoidable costs.[120] During the Second Investigation, CCM found that Caeli abused its dominant position to extract additional

[111] SOUF, ¶31.
[112] SOUF, ¶35.
[113] SOUF, ¶36.
[114] Annex V, Ch III.2.a.
[115] SOUF, ¶36.
[116] SOUF, ¶¶11, 36.
[117] SOUF, ¶ 36.
[118] Annex VII, 55.
[119] SOUF, ¶38.
[120] SOUF, ¶45.

privileges from Phenac International Airport, allowing it to undercut ticket prices and run competitors out of the market.[121] Consequently, CCM imposed certain penalties, which served the legitimate purpose of curtailing Caeli's anti-competitive practices that would have adversely impacted the domestic market.

92. State measures may be unfavourable for foreign investors, but they are not unfair and inequitable if there exists a rational purpose behind them.[122] In this case, CCM had the rational purpose to protect Mekari consumers against Caeli's anti-competitive behaviour.

B. CCM REASONABLY IMPOSED AIRFARE CAPS ON CAELI

93. The airfare caps imposed and maintained by CCM were necessary to curtail Caeli's anti-competitive behaviour described above. The standard of reasonableness, necessary to determine a breach of an FET obligation, requires that a state's conduct bears a reasonable relationship to a rational policy.[123]

94. After a sudden expansion in 2016, Caeli was suspected of lowering its airfares to drive out its competitors from the domestic market. With a dominant position in the market and rising market share, Caeli could potentially force its competitors out of the market and be in a position to charge supra-competitive prices to its customers. To prevent such a situation, CCM imposed airfare caps as an interim measure.[124]

95. Under the MRTP Act, CCM has the power to impose any interim measure it deems just, which may also be renewed if necessary.[125] The airfare caps were set reasonably above the rates charged by Caeli and Claimant never protested its imposition as the caps did not hurt its profitability in 2016.[126] With the findings of abuse of dominant position and price undercutting, CCM continued the airfare caps to keep Caeli's large market share in check.[127]

96. The airfare caps were only kept in place due to clear evidence of anti-competitive practices by Caeli and were removed as soon as its market share along with its sister airline fell below 40%.[128] Since the interim measure taken by CCM was only in response to Caeli's actions

[121] SOUF, ¶49.
[122] Isolux, ¶823.
[123] Saluka, ¶460.
[124] SOUF, ¶37.
[125] Annex V, Ch III.4.d. and III.4.e.
[126] SOUF, ¶37.
[127] SOUF, ¶49.
[128] SOUF, ¶55.

and was imposed to the extent necessary to restore fair competition, the measure must be deemed just and reasonable.

II. RESPONDENT DID NOT DISCRIMINATE AGAINST CLAIMANT WHILE GRANTING RELIEF SUBSIDIES

97. Discrimination by a host state is found where similar cases are treated differently without reasonable justification.[129] Treating different categories of subjects differently does not constitute discrimination because the principle of equality only applies between like subjects.[130]

98. In light of the economic crisis in Mekar, the government granted relief subsides to the airline industry to alleviate their financial concerns.[131] Claimant contends that it was discriminatorily denied relief subsidies under the Executive Order 9-2018.[132] The concerned order relayed discretion on the grant of subsidies to the Secretary of Civil Aviation.[133]

99. The rejection of Caeli's application for subsides was not discriminatory, considering that Claimant was not in the same situation as other airlines. The predominant recipients of subsidies were airlines with less than 5% market share.[134] However, considering that Caeli was already commanding the *largest market share* in the industry (between 43-54%),[135] the differential treatment was reasonably justified.

100. In addition, Caeli was one of the two airlines operating in Mekar owned in a significant part by a foreign government and neither of them received any subsides from Mekar.[136] Respondent's decision to deny the subsidies to these two airlines was based on the fact that state-controlled airlines have unique advantages over other privately owned enterprises. Granting such companies further aid would have been detrimental to Mekar's domestic industry.[137] In fact, Claimant already received subsidies from Bonooru under the Horizon 2020 programme.[138] As

[129] Ulysseas, ¶293; Saluka, ¶313; Electrabel, ¶175; Goetz, ¶121; Plama, ¶184.
[130] Metalpar, ¶162.
[131] SOUF, ¶46.
[132] Notice, ¶18.
[133] SOUF, ¶46.
[134] PO4, ¶7.
[135] SOUF, ¶36.
[136] SOUF, ¶47.
[137] SOUF, ¶46.
[138] SOUF, ¶28.

such, SOEs including Claimant were not placed equally to other privately owned airlines, thus, the differential treatment in granting of subsidies was not discriminatory.

III. MEKARI COURTS DID NOT DENY JUSTICE TO CLAIMANT AND REDRESSED ITS COMPLAINTS WITH DUE PROCESS

101. Article 9.9(2)(a) and (b) CEPTA guarantee investors protection from fundamental breach of due process and denial of justice as elements of the FET standard. In substance, protection against denial of justice is a procedural standard guaranteeing due process of law.[139] FET standard is infringed when conduct attributable to state and harmful to claimant involves a lack of due process leading to an outcome, which offends judicial propriety.[140] An error of a national court, which does not produce manifest injustice does not constitute a denial of justice.[141] Accordingly, the standard does not guarantee the correctness of a judgment as such but affords protection for gross deficiencies in cases where a process fails to provide the most basic qualities of justice.[142]

102. In the present case, the Mekari courts conducted the judicial proceedings in accordance with due process. Claimant was at all times given the opportunity to be heard **[A]**, and the Mekari courts resolved its claims within a reasonable period of time **[B]**.

A. CLAIMANT WAS PROVIDED THE OPPORTUNITY TO BE HEARD

103. Claimant registered its complaint against the airfare caps in March 2018.[143] The Mekari High Court afforded both parties, Claimant and CCM, the opportunity to make their submissions concerning a possible stay on the imposition of the airfare caps in April 2019.[144] The court refused the request for stay on the airfare caps as it found that CCM's decision was within the range of reasonable conclusions given the facts before it.[145] Furthermore, empowered by the Executive Order 5-2014,[146] the court dismissed Caeli's case on merits by way of summary judgement, as it found very little chance of its success.[147]

[139] GEA Group, ¶312; RosInvestCo, ¶279, Paulsson (2005), 7; Douglas, 877–878; Fuller/Winston, 367.
[140] Waste Management, ¶98; Loewen, ¶132; Cargill, ¶296.
[141] Amto, ¶80; Roussalis, ¶315; Oostergetel, ¶273; Yannaca-Small, ¶20.36ff.
[142] McLachlan/Shore/Weiniger, ¶7.109; Amto, ¶80.
[143] SOUF, ¶44.
[144] SOUF, ¶52.
[145] SOUF, ¶54.
[146] PO3, ¶8.
[147] SOUF, ¶54; PO3, ¶8.

104. In parallel, Claimant appealed both orders of CCM imposing fines on Caeli in January 2019, asking the appeal to be joined with the April 2019 hearing on the airfare caps.[148] This request was denied in order to provide CCM with sufficient time to respond to Caeli's notice, guaranteeing its due process rights.[149] The hearing for the appeals took place in May 2020. However, the appeal was dropped ensuing Caeli's sale to Mekar Airservices, before a written decision on the matter could be rendered.[150]

105. Although the decisions by the Mekari courts were not in Claimant's favour, the latter was always provided with a fair judicial process. Both parties were allowed to make their submissions and be heard in front of the court. The decisions were proportionate, taking into consideration Claimant's circumstances and the merits of its complaint. Hence, the proceedings before the Mekari courts did not violate the FET standard under Article 9.9(2)(a) and (b) CEPTA.

B. CLAIMANT'S CLAIMS WERE RESOLVED WITHIN A REASONABLE PERIOD

106. Mekari courts addressed Claimant's claims without any unreasonable delay. To find an unreasonable delay, the tribunal must examine the complexity of the matter, the need for celerity, the diligence of the claimant in prosecuting its claim and the circumstances affecting the court docket in the particular country.[151]

107. In *casu*, the Mekari judicial system could not expand at the same rate as its population, thus overloading the system. As a result, the average time for the redress of an action in Mekari courts increased from 9 months in 1980 to 27 months in 2015 in commercial cases.[152] Claimant's claims could not be heard earlier due to the state of the judicial system and the high volume of cases before Mekari courts during the economic crisis.[153]

108. With the judicial system overwhelmed with cases and the country undergoing an economic crisis, Mekari courts conducted hearings to address Claimant's claims regarding the airfare caps and CCM's fines within 13 months and 16 months respectively.[154] In addition, the Mekari High

[148] SOUF, ¶50.
[149] SOUF, ¶50.
[150] SOUF, ¶64.
[151] Toto (Jurisdiction), ¶¶163, 165; White Industries, ¶¶10.4.10–10.4.24.
[152] SOUF, ¶13.
[153] SOUF, ¶44.
[154] SOUF, ¶¶44, 50, 52, 54.

Court issued an interim decision on the airfare caps within only 2 months after the hearing.[155] Furthermore, when Claimant requested joining the appeal and the hearing on interim relief *vis-à-vis* the airfare caps, the court rejected the request considering the time to be provided to CCM to respond to the claims.[156] In any case, an earlier hearing on the appeal was not indispensable, as Claimant was under no immediate pressure to pay the CCM's fines, since under Mekari law, fines could not be enforced pending court review.[157]

109. Therefore, considering all the factors influencing the judicial system in Mekar and the efforts taken by the Mekari courts for the redress of Claimant's claims, the Tribunal should find that the judicial proceedings were conducted under no violation of the FET standard under CEPTA.

IV. MEKARI COURTS EXERCISED THEIR POWER TO ENFORCE AN ARBITRAL AWARD

110. Contrary to Claimant's allegations,[158] the enforcement of an annulled award does not violate the FET standard. Claimant alleges that the award rendered in favour of Mekar Airservices was enforced in violation of Mekar's domestic laws.[159] Regardless of this allegation, the standard of denial of justice under FET goes far beyond the mere misapplication of domestic law.[160] An "erroneous judgment" by a court in the absence of violation of due process, *i.e.*, denial of justice does not violate FET,[161] as a tribunal does not act as a court of appeal for the national courts.[162] Moreover, a decision based on an objective ground or reasons of fact is not unreasonable or arbitrary and thus, insufficient to violate the FET standard.[163]

111. The Commercial Arbitration Act of Mekar does not mandate Mekari courts to refuse recognition and enforcement of an award in case one of the grounds for refusal is given.[164] Similar to Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"),[165] Section 36(1)(e) of the Commercial Arbitration Act states that the enforcement of a foreign award *"may be refused"* if the competent court at the

[155] SOUF, ¶¶52, 54.
[156] SOUF, ¶50.
[157] SOUF, ¶50.
[158] Notice, ¶25ff.
[159] Notice, ¶27.
[160] Liman Caspian, ¶274.
[161] Roussalis, ¶315; Oostergetel, ¶273.
[162] Amto, ¶80; Liman Caspian, ¶274; ECE and PANTA, ¶4.764; Helnan, ¶106.
[163] Lauder, ¶270; Occidental, ¶163.
[164] Annex XV, ¶11.
[165] Born, 124; NNPC (English Court), 1157; Chromalloy (US Court), 94-2339; Oil Joint (Hong Kong Court), 2411.

arbitral seat set aside the award. Such a wording confers discretion on the enforcing court to recognise and enforce, even awards that have been set aside.[166]

112. When Vemma decided to sell its stake, the offer it received from a third party was disputed by Mekar Airservices.[167] The dispute was brought to commercial arbitration and in May 2020, an award in favour of Mekar Airservices was rendered, finding that the offer was not a *bona fide* third party offer.[168] The court at the seat of arbitration set aside the arbitral award, solely relying on a report issued by the Centre for Integrity in Legal Services ("CILS"), which alleged corruption of the arbitrator.[169]

113. However, the enforcement court, the High Commercial Court of Mekar enforced the award despite having been set aside.[170] The Mekari court considered the CILS report circumstantial at best, and unreliable since CILS was under investigation by Mekari Ministry of Home Affairs, which recognised CILS as an entity receiving suspicious foreign funding to interfere in Mekar's domestic affairs.[171] The court found it against Mekar's public policy to give credence to a report prepared by such an organisation.[172] The Superior Court of Mekar upheld this decision.[173]

114. This Tribunal should not act as a court of appeal for the decisions rendered by the Mekari courts just because the decision was unfavourable to Claimant. In any case, the Mekari courts enforced the award based on objective reasoning and without any procedural irregularities. Thus, the enforcement of the award does not breach the FET standard under Article 9.9(2) CEPTA.

115. In sum, considering that Mekar was dealing with an economic emergency, it was not in a position to cater to Claimant's demands. Its measures were reasonable and proportionate in response to the circumstances existing in the country. Additionally, the Tribunal must consider Claimant's mismanagement of its investment as the triggering factor for the state measures that followed. Hence, Respondent's actions do not constitute a violation of the FET standard under CEPTA.

[166] Paulsson (1998), 227; Sampliner, 23; Junita, 59-60.
[167] SOUF, ¶¶56-57.
[168] SOUF, ¶58.
[169] Annex XIII, ¶14.
[170] SOUF, ¶62.
[171] Annex XIV, ¶13.
[172] Annex XIV, ¶13.
[173] Annex XV, ¶19.

PART IV: THE TRIBUNAL SHOULD CALCULATE ANY DAMAGES AT MARKET VALUE AND REDUCE ANY ADDITIONAL COMPENSATION

116. Without prejudice to the arguments on merits, in case the Tribunal finds the Respondent in violation of CEPTA, the applicable standard for calculation of the compensation is the "market value" standard under CEPTA. Claimant demands compensation on the basis of "fair market value" of the investment.[174] The main difference between "fair market value" and "market value" rests on the fact that distress conditions or economic crises influence the latter but not the former.[175]

117. In the present case, compensation should be determined by the Tribunal on the basis of "market value" as provided under Article 9.21 CEPTA **[I]**. Mekar has already paid the "market value" for Claimant's stake in Caeli and does not owe any more compensation. Contrary to Claimant's allegations,[176] provisions on standard of compensation cannot be imported from other treaties into CEPTA **[II]**. Alternatively, the Tribunal should adjust any additional compensation in light of the prevailing circumstances in this case **[III]**.

I. ARTICLE 9.21 CEPTA ESTABLISHES THE APPROPRIATE STANDARD OF COMPENSATION

118. Article 9.21(1)(a) CEPTA states that if a tribunal makes a final award against a respondent, the tribunal may award monetary damages at "market value". This provision establishes the standard of compensation for treaty breaches other than expropriation. Hence, "market value" is the appropriate standard of compensation under CEPTA for FET violations **[A]** and Article 9.21 CEPTA must be applied over any other standard under public international law **[B]**.

A. "MARKET VALUE" IS THE APPROPRIATE STANDARD OF COMPENSATION UNDER CEPTA FOR FET VIOLATIONS

119. In line with customary rules of treaty interpretation, codified in Article 31(1) VCLT, Article 9.21 CEPTA must be interpreted in good faith in accordance with the ordinary meaning given to its terms in its context and in light of its object and purpose. Article 31(1) VCLT thus

[174] Notice, ¶30.
[175] Wöss/Spiller/Dellepiane, ¶640; Wöss/San Roman, ¶17.37.
[176] Notice, ¶30.

focuses on the wording of a treaty provision.[177] Where a provision is worded in clear and precise terms, and its meaning is evident without leading to absurd conclusions, there can be no reason for refusing to admit the ordinary meaning of such provision.[178]

120. In the present case, the CEPTA provision on *final award* is precise and clear. Article 9.21 CEPTA explicitly provides that a tribunal would award monetary damages at "market value", except for the cases of expropriation referred to in Article 9.12 CEPTA. Since Claimant has not contended any expropriation under Article 9.12 CEPTA, it cannot rely on the "fair market value" standard applicable to expropriation, but rather only on the "market value" standard as foreseen in Article 9.21 CEPTA.

121. A treaty provision is to be interpreted, in respect of its purpose, as a rule with an effective meaning rather than as a rule having no meaning and effect.[179] The principle of *effet utile* or "effective interpretation" thus requires that international agreements be interpreted "*in such a way that a reason and meaning can be attributed to every part of the text*".[180] In *casu*, the Contracting Parties' intention was to restrict the standard of "fair market value" only to expropriations and provide a different standard, *i.e.* "market value", for the violation of all other treaty obligations including FET. Should the standard of "fair market value" under Article 9.12 be applied to *all* kind of treaty breaches, Article 9.21 foreseeing "market value" would be deprived of any meaning. This would contradict the principle of effective interpretation, taking away reason and meaning behind the establishment of different standards of compensation under CEPTA.

122. Thus, the Tribunal should apply the standard of "market value" for compensation as provided under CEPTA.

B. ARTICLE 9.21 CEPTA MUST BE APPLIED OVER ANY OTHER STANDARD UNDER INTERNATIONAL LAW

123. Claimant asserts that compensation must correspond to the "fair market value" standard according to the principles of international law,[181] in complete disregard of Article 9.21 CEPTA. However, as *lex specialis* in the relations between the two states, treaty

[177] Dörr, ¶37; EMV (English Court), ¶17.
[178] AAP, ¶41.
[179] Urbaser (Jurisdiction) ¶52; Dawood, ¶182, AAPL, ¶40.
[180] BUCG, ¶72; Poštová, ¶293.
[181] Notice, ¶ 30.

provisions supersede *lex generalis*, which is customary international law.[182] The rules of customary international law may only be used for ascertaining the meaning of terms in the treaty without derogating from those terms.[183]

124. In the present case, Article 9.21 CEPTA explicitly confer on the Tribunal the authority to award monetary damages at "market value". Hence, Article 9.21 CEPTA constitutes a specific treaty provision, which supersedes any standard of compensation derived from principles of public international law. As a result, the established standard of compensation under CEPTA is monetary damages at "market value". Claimant sold its stake in Caeli to Mekar Airservices at its "market value" of USD 400 million, thus, Respondent does not owe any further compensation to Claimant.

125. In any case, if tribunals find no treaty standard of compensation for FET violations, they have refrained from the application of the compensation standard for expropriation, namely "fair market value".[184] Instead, the quantum of compensation has been based on the nature and extent of the damages and losses actually suffered as a result of the violation.[185]

II. CLAIMANT CANNOT IMPORT PROVISIONS ON STANDARDS OF COMPENSATION FROM OTHER TREATIES

126. Claimant further contends that the "fair market value" standard would be applicable by virtue of the most favoured nation ("MFN") standard in CEPTA.[186] However, Claimant cannot circumvent the "market value" as applicable standard of compensation via an MFN standard: Article 9.7 CEPTA prohibits the importation of standards of compensation from other treaties **[A]** and Article 9.11 CEPTA does not apply in the present case **[B]**.

A. ARTICLE 9.7 CEPTA PROHIBITS THE IMPORTATION OF STANDARDS OF COMPENSATION FROM OTHER TREATIES

127. MFN clauses may serve two functions in an investment treaty: on the one hand, guaranteeing *de facto* treatment; on the other hand, permitting the importation of more beneficial provisions

[182] Amoco, ¶112.
[183] Amoco, ¶112.
[184] ADM, ¶¶277, 278-283; LG&E, ¶¶37-39; PSEG, ¶¶305-309; Feldman, ¶194; SD Myers (First Award), ¶¶306-308; SD Myers (Second Award), ¶144; Alvarado Garzón, ¶21.19.
[185] MTD, ¶ 238; Feldman, ¶194; SD Myers (First Award), ¶¶306-308, 317.
[186] Notice, ¶30.

from third-party treaties.[187] With respect to *de facto* treatment, the claimant must identify a differential treatment accorded to another foreign investor placed in like circumstances.[188] With respect to the importation of more beneficial provisions, MFN clauses do not always permit the importation of substantive standards of treatment,[189] nor do they enable the importation of provisions related to dispute settlement, unless the provision leaves no doubt that the contracting parties intended to do so.[190] Yet, the operation of an MFN clause is restricted to the treaty in which it is contained.[191]

128. In the present case, Article 9.7 CEPTA has a restricted scope of application to only *de facto* treatment. Here, Article 9.7(1) CEPTA provides a guarantee of MFN treatment to investors with respect to their investments. However, Article 9.7(2) CEPTA prohibits importation of third-party treaty provisions: it establishes that substantive obligations in other treaties do not themselves constitute "treatment", thus falling outside of the provision's scope of application, and explicitly excludes provisions on dispute resolution. Therefore, irrespective of whether the Tribunal considers the standard of compensation under Article 9.21 CEPTA as a substantive obligation or as a provision related to dispute settlement, Article 9.7 CEPTA prohibits its circumvention.

129. As held by *Brownlie* in the *CME* case, the application of the MFN clause to standard of compensation would render the explicit choice of the parties for a specific treaty provision on the applicable standard of compensation, nugatory.[192] Here, Claimant intends to ignore the intention of the Contracting Parties and use the MFN clause incorrectly for its benefit. However, Claimant's contention constitutes a derogation from the explicit treaty terms, which is not allowed under Article 9.7 CEPTA.

B. ARTICLE 9.11 CEPTA DOES NOT APPLY TO THIS DISPUTE

130. Article 9.11 CEPTA obligates each party to accord treatment no less favourable than it accords to its own investors or investors of a third country in the case of losses caused by armed conflict, civil strife, a state of emergency or natural disaster. Hence, Article 9.11 CEPTA does not permit the importation of standards of compensation.

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[187] Suleimenova, 26.
[188] Occidental, ¶¶173-176; Parkerings, ¶¶369ff; Bayindir, ¶¶389-390; İçkale, ¶329.
[189] İçkale, ¶329; Batifort/Heath, 30.
[190] Plama (Jurisdiction), ¶223; H&H, ¶358.
[191] Cole, 562.
[192] CME (Brownlie), ¶11.

131. Similar to Article 9.7 CEPTA, Article 9.11 CEPTA is limited to *de facto* treatment. Since Claimant has failed to establish a differential treatment with respect to another investor in a similar situation, this MFN clause cannot be applied.

132. Even if the importation of third-party treaty provisions was possible under Article 9.11 CEPTA, the premise for invoking this article is not present in this case. State of emergency, which may also be understood as a state of necessity,[193] may not be relied upon when dealing with sovereign financial crisis, unless it compromises the very existence of the state and its independence.[194] Furthermore, declaring a state of public emergency might be an indication of the gravity of the situation.[195] In *casu*, although Mekar was suffering from an economic crisis, it did not deteriorate to the point of warranting an official declaration of public emergency. Furthermore, Mekar has not suffered any armed conflict, civil strife or natural disaster that would affect Claimant's investment. Article 9.11 CEPTA is thus not applicable to the current dispute and the Tribunal cannot disregard the applicable standard of compensation under Article 9.21 CEPTA.

III. ALTERNATIVELY, ANY ADDITIONAL COMPENSATION AWARDED TO CLAIMANT MUST BE ADJUSTED

133. Without prejudice to the aforementioned arguments, in case the Tribunal finds any additional compensation owed to Claimant, such compensation should be reduced due to Claimant's contributory fault **[A]**, and the crippling effect on Mekar's economy that USD 700 million might cause **[B]**.

A. COMPENSATION SHOULD BE REDUCED DUE TO CLAIMANT'S CONTRIBUTORY FAULT

134. If an investor acts negligently and thereby contributes to the occurrence of the damage, the quantum of compensation should be reduced.[196] This includes unreasonable and negligent business decisions.[197] Imprudent business decisions on the part of the investor that contributes to the injury may lead to the rejection of its claims[198] or the reduction of the damages.[199] In

[193] LG&E (Liability), ¶245; Mobil, ¶1042.
[194] Enron, ¶306; Sempra, ¶348; Jones, 37.
[195] Continental, ¶180; Jones, 49.
[196] Marboe, ¶3.242.
[197] Azurix, ¶¶428-429.
[198] Genin, ¶367.
[199] MTD, ¶¶242-243; CME, ¶¶310ff.

particular, if an investor faced multiple dangerous financial situations, yet *voluntarily* encountered them, this constitutes contributory fault.[200]

135. Since the acquisition of its investment, Claimant's business decisions were concerning. Claimant engaged in predatory pricing and abused its dominant position in the domestic market to earn higher profits and gain a larger market share, against which CCM imposed fines after conducting two investigations.[201] Mekar Airservices cautioned Claimant regarding the offering of low-fare, long distance flights, extravagant approaches to fleet expansion and slashed airfares.[202] Mekar Airservices further advised the injection of profits into outstanding debt and towards improvement of Caeli's financial health.[203] Against these cautions, Claimant refused to change its business decisions, which led to severe financial distress with the change in market conditions.[204]

136. Notably, even a former high-ranking employee of Boonoru's Ministry of Tourism criticised Caeli's business model stating that it "*is based around undercutting competition with low prices…* [which is] *not a good long-term model*".[205]

137. By ignoring all these warnings and intentionally undertaking anti-competitive practices, Claimant has contributed to the eventual downfall of Caeli. Therefore, the Tribunal should reduce the quantum of compensation in the present case for contributory fault.

B. The Payment of extra USD 700 million would have a Crippling Effect on Mekar's Economy

138. When calculating damages, tribunals should not exclusively focus on the economic interests of investors.[206] Otherwise, such an approach would ignore the significance of the fact that the respondent is a sovereign state responsible for the well-being of its people.[207] Accordingly, the imposition of a high amount of compensation could cause significant adverse effects on the state and its citizens.[208] For instance, tribunals have taken into account the significant impact of

[200] Bederman, 355ff.
[201] SOUF, ¶¶45, 49.
[202] SOUF, ¶31.
[203] SOUF, ¶35.
[204] SOUF, ¶¶35, 39f.
[205] Annex VII, 55.
[206] CME (Brownlie), ¶74.
[207] CME (Brownlie), ¶74.
[208] Ripinsky/Williams, 356.

an economic crisis in determining the appropriate compensation.[209] As such, tribunals should avail themselves of considerations on state's finances, the rationale of the state's measures, the nature of the breach *inter alia*, to avoid "crippling" compensations.[210]

139. In *casu*, in 2016, the Mekari currency started to nosedive, which along with increasing inflation led the country's economy into a dire situation.[211] Mekar is yet to recover from the adverse effects of the crisis and unlike Claimant, Mekar does not operate "for profits", but is a sovereign state responsible to cater for a population of 10.8 million citizens.[212] Claimant has requested compensation of USD 700 million, which would require Mekar to transfer around twice its consolidated annual public spending to Claimant.[213] Thus, Claimant demands a compensation that would prevent Mekar from fulfilling its obligations towards its citizens.

140. Therefore, in view of the economic conditions prevailing in Mekar, its responsibilities towards its citizens and the actions and omissions of Claimant that contributed to the damage, the Tribunal should reduce the quantum of any additional compensation, if awarded to Claimant.

[209] CMS, ¶¶248-251; Sempra, ¶¶397, 417; LG&E (Liability), ¶¶246-261.
[210] Marzal, 296; Paparinskis, 1256ff.
[211] SOUF, ¶39.
[212] SOUF, ¶13.
[213] PO3, ¶4.

PRAYER FOR RELIEF

141. In light of the foregoing submissions, Respondent respectfully request this Tribunal to:

(i) decline jurisdiction over this dispute;

(ii) reject CBFI's application to submit an *amicus* brief;

(iii) grant leave to the external advisors to CRPU to submit an *amicus* brief;

(iv) in the event the Tribunal finds jurisdiction to hear the dispute:

i. find that Respondent did not breach its obligations under Article 9.9 CEPTA;

ii. if the Tribunal finds a violation of Article 9.9 CEPTA, then find that Mekar has paid the appropriate compensation at "market value";

iii. in the alternative, reduce any additional compensation awarded;

(v) find Respondent is entitled to all fees and costs associated with these proceedings.