TEAM KRYLOV

INTERNATIONAL CENTER FOR SETTLEMENT OF

INVESTMENT DISPUTES

VEMMA HOLDINGS INC.

- CLAIMANT -

AND

THE FEDERAL REPUBLIC OF MEKAR

- RESPONDENT -

MEMORIAL FOR RESPONDENT

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Philip Morris v. Uruguay	*Philip Morris Brands Sàrl*, *Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (formerly FTR Holding SA*, *Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay)*, ICSID Case No. ARB/10/7, Award of 8 July 2016
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UAB E Energija v. Latvia	*UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award of the Tribunal of 22 December 2017
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	Bau Ag (In Liquidation) v. Kingdom of Thailand (formerly Walter Bau AG (in liquidation) v. Kingdom of Thailand), UNCITRAL, Award of 1 July 2009
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ICAO	International Civil Aviation Organization Review of the Classification and Definitions Used for Civil Aviation Activities, 2009
ILC Report	International Law Commission Report of the International Law Commission on the work of its twenty-eighth session, *Yearbook of the International Law Commission*, Vol. II, 1976
MPEIL	Max Planck Encyclopedias of International Law Available at: https://opil.ouplaw.com/home/MPIL
Nikièma	Nikièma, Suzy The Most-Favoured-Nation Clause in Investment Treaties, *IISD Best Practice Series*, February 2017
OECD	Organization for Economic Cooperation and Development OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015
Trade Part of EUMAA	European Commission

	Trade part of the EU-Mercosur Association Agreement, announced on 28 June 2019
World Bank	World Bank Bureaucrats in Business: The Economics and Politics of Government Ownership, *World Bank Publications*, 1995

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ABBREVIATION	FULL CITATION
ARS	Articles on Responsibility of States for Internationally Wrongful Acts (2001)
VCLT	Vienna Convention on the Law of Treaties (1969)
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
UNCITRAL Transparency Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014)
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018)
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985)

INDEX OF ABBREVIATIONS

BIT	Bilateral Investment Treaty
Bonooru	Commonwealth of Bonooru
BPB	PJSC Bonoorian People's Bank
Caeli	Caeli Airways JSC
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CILS	Centre for Integrity in Legal Services
CMP	Mekar's Common Man's Party
CRPU	Committee on Reform of Public Utilities
FET	Fair and Equitable Treatment
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICSID	International Center for Settlement of Dispute
Law on Privatization	Law on Privatization of State Property
LPM	Laborer's Party of Mekar
Mekar Airservices	Mekar Airservices Ltd.

Mekar; Respondent	Federal Republic of Mekar
MFN	Most Favored Nation Treatment
MON	Currency of Mekar
Notice	Notice of Arbitration
PO1	Procedural Order 1
PO2	Procedural Order 2
PO3	Procedural Order 3
PO4	Procedural Order 4
Response	Response to the Notice of Arbitration
SCA	Secretary of Civil Aviation
SCC	Sinnoh Chamber of Commerce's Arbitration Institute
Sinnoh	Principauté de Sinnoh
SOE	State-Owned Enterprise
SUF	Statement of Uncontested Facts
Vemma; Claimant	Vemma Holdings Inc.

STATEMENT OF FACTS

1. Claimant, Vemma, is an airline holding company incorporated in Bonooru, who has acquired an 85% stake in Caeli on 5 January 2011.

2. Respondent, Mekar, is a state sitting approximately 1,600 km to Bonooru's south, which adopted a series of measures to intervene Vemma's operation in Caeli.

VEMMA'S INVESTMENT IN MEKAR

3. Having failed in first two attempts at restructuring Caeli, Mekar launched a third attempt in September 2010 and set up a competitive bidding process, securing bids from various airlines.

4. Vemma's tender valued at 800 million USD was accepted on 5 January 2011. On 5 March 2011, CCM approved Vemma's acquisition of an 85% stake in Caeli and the airline's participation in the Moon Alliance. On 29 March 2011, Vemma entered into a Share Purchase Agreement with Mekar Airservices to purchase an 85% stake in the company, while the remaining 15% shares were beneficially owned by the Mekar through Mekar Airservices.

MEASURES TAKEN BY MEKARI AUTHORITIES

5. On 9 September 2016, CCM indicated its intention to investigate whether Caeli had adopted predatory pricing strategies ("First Investigation"). At the time of the investigation, Caeli enjoyed a 43% market share in Mekar, for which the MRTP set the threshold at 50%. As an interim measure, CCM placed caps on Caeli's airfare. In December 2016, upon complaints brought by a consortium of small regional airlines in Greater Narnia, CCM launched another investigation into Caeli's business activities focusing specifically on price undercutting on certain routes to and from Phenac International ("Second Investigation").

6. By the end of August 2018, the CCM concluded its First Investigation and imposed a total penalty of MON 150 million on Caeli and decided to keep the airline caps in place pending

the Second Investigation. On 1 January 2019, the CCM completed its Second Investigation into Caeli and decided to continue to impose airfare caps until Caeli's market share, with its fellow Moon Alliance member factored in, were to fall below 40%.

7. On 25 September 2018, the President passed Executive Order 9-2018, granting subsidies to airlines for each Mekari citizen travelling on board. SCA denied Caeli's application for the subsidy.

8. Caeli's claim against the CCM was registered on 27 March 2018, and a hearing on interim measures was scheduled in April 2019. On 15 June 2019, Justice VanDuzer released his interim decision on the airfare caps, declining to remove them. On 23 August 2020, the Mekar's High Commercial Court recognized and enforced the 9 May 2020 award.

MEKAR'S ECONOMIC CRISIS AND CURRENCY POLICY

9. In late 2016, the MON began to nosedive, and a currency crisis ensued in Mekar in March 2017. In October 2017, having received several requests, Mekari authorities approved the denomination of airfare in US Dollars for all airlines operating in its territory.

10. On January 2018, Mekar's government passed a decree requiring all companies operating in the country to offer goods and services denominated exclusively in MON, which nullified the short-lived exemption granted to airlines.

VEMMA SOLD IT SHARES TO MEKAR AIRSERVICES

11. At the November 2019 meeting of Caeli's board, representatives of Vemma announced their intention to sell their stake in Caeli. Vemma secured an offer from Hawthorne Group LLP for Vemma's entire stake. In a notice dated 9 December 2019, Vemma communicated the terms of this offer to representatives of Mekar Airservices. In its response dated 17 December 2019, Mekar Airservices rejected the offer and filed a request for arbitration to SCC on 11 February 2020.

12. Following a fast-track arbitration procedure, the sole arbitrator rendered an award in favour of Mekar Airservices on 9 May 2020, which has later been set aside by the Supreme

Arbitrazh Court of Sinnograd on the ground of potential corruption on 1 August 2020. On 23 August 2020, the High Commercial Court of Mekar issued a ruling recognizing and enforcing the 9 May 2020 award in Mekar upon the application of Mekar Airservices. Having failed to yield another buyer, Vemma sold its stake in Caeli to Mekar Airservices on 8 October 2020 for 400 million USD.

SUMMARY OF ARGUMENTS

1. **JURISDICTION.** The Tribunal does not have jurisdiction over the current dispute. First, current dispute constitutes a state-to-state arbitration, which is not covered by Article 2 ICSID AF Rules. Furthermore, pursuant to Broches test, Claimant is an SOE acting as a state agent and exercising governmental function and is not eligible in this arbitration. Second, Claimant has no qualified investment since its investment was established on bribery.

2. ***AMICUS CURIAE* SUBMISSIONS.** The tribunal shall accept *amicus curiae* submission from CRPU external advisors but reject that from CBFI. First, CRPU external advisors, independent from any disputing parties, is a qualified third party under Article 4(3) UNCITRAL Transparency Rules and has a significant interest in this dispute. Moreover, CRPU external advisors' admission imposes no undue burden on the arbitral proceeding and is capable of assisting the Tribunal by bringing a perspective different from disputing parties. Second, the Tribunal shall reject the *amicus curiae* submission from CBFI since it does not have public interest in the Tribunal's decision and has a conflict of interest in the arbitral proceedings. More importantly, CBFI lacks independence.

3. **VIOLATION OF FET.** Mekar did not violate FET under CEPTA. First, acts carried out by Mekari administrative bodies, namely, CCM and SCA imposed measures on Caeli in order to achieve public policy objective by exercising regulatory power granted by Article 9.8 CEPTA. Second, conducts of Mekari Courts are also in line with the requirements under CEPTA and international law. Third, the conception of "cumulative breach of FET standard" finds no support in international law.

4. **COMPENSATION STANDARD.** The Tribunal shall award Claimant no compensation; or in the alternative, any compensation awarded shall be reduced. First, Respondent has already purchased the Claimant's investment at "market value" as stipulated in Article 9.21 CEPTA and owed no compensation to Claimant, since neither the

MFN clause in CEPTA and the precedent cases in favor of fair market value standard should be applied. Second, ill-strategized business model adopted by Claimant substantially contributed to its economic losses, which shall be taken into consideration by the Tribunal when deciding the amount of any compensation awarded.

ARGUMENTS

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

1. Claimant as an SOE is ineligible in an investor-state arbitration under ICSID AF Rules. After the privatization of the national airlines in Bonooru,[1] Claimant still remained the characteristics of state capital[2] and under great control of Bonoori government.

2. Therefore, the Tribunal does not have jurisdiction over current dispute since it constitutes state-to-state arbitration which is not covered by ICSID AF Rules (**A**). Besides, Vemma did not have qualified investment under CEPTA (**B**).

A. THE CURRENT DISPUTE CONSTITUTES STATE-TO-STATE ARBITRATION

3. To determine whether the Tribunal has jurisdiction over the current dispute where the SOE is involved, the Tribunal shall apply both ICSID AF Rules and Article 25 ICSID Convention.[3]

4. It is clear that state-to-state arbitration is not covered by these applicable rules. Article 4(2) ICSID AF Rules provides that proceedings under ICSID AF Rules shall be initiated "*between a State (or a constituent subdivision or agency of a State) and a national of another State*".[4] Furthermore, *BUCG v. Yemen* tribunal also upheld respondent's claim by affirming that "*it is common ground that Article 25(1) of the ICSID Convention is <u>not</u> a State-to-State dispute resolution mechanism*" [emphasis added].[5]

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[1] SUF, p. 29, ¶7, lines 913-915.
[2] *Ibid*, p. 29, ¶10, line 934.
[3] *ICSID AF Rules*, Article 4(2).
[4] *Ibid*, Article 4(2).
[5] *BUCG v. Yemen*, ¶31.

5. In this case, Vemma is an SOE (**1**), and the Broches test incorporated within the meaning of Article 25 ICSID Convention[6] should be applied to determine the eligibility of SOE as an investor.[7] In this case, Vemma is an agent of the government (**2**) exercising governmental functions (**3**) and does not constitute an eligible investor.

1. Claimant is an SOE

6. Although ICSID tribunals have dealt with the eligibility of SOEs in many cases, they still don't have a clear definition to the SOE. Besides, neither in CEPTA nor the 1994 BIT can the Respondent observe any definition to the SOE. For lack of such definition within both the ICSID legal system and governing treaties in this case, Respondent submits that the Tribunal shall consider definition given by some well-known international organizations and investment treaties as a reference to see the global trend on the definition to SOE.

7. OECD, for example, has defined the SOEs as "*enterprises where the state has significant control through full*, *majority*, *or significant minority ownership*".[8] Also World Bank has defined SOEs as "*government owned or government controlled economic entities that generate the bulk of their revenues from selling goods and services*".[9] These definitions all require the state control to be a vital criterion in determining the status of SOE for a company.

8. EU-Mercosur Association Agreement, also states that SOE means "*an enterprise owned or controlled by the Party*."[10] However, they further explained that "*owned*

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[6] *Commentaries to ICSID Convention*, p. 16.

[7] *CSOB v. Slovakia*, ¶19; *BUCG v. Yemen*, Award on Jurisdiction, ¶35.

[8] *OECD*, p. 17.

[9] *World Bank*, p. 26.

[10] *Trade Part of EUMAA*, Article 1.

or controlled" refers to situations in which a Party owns more than 50% of the share capital or controls.[11]

9. It is similar to the definition given by CPTPP which concludes SOE is "*an enterprise engaged in commercial activities which directly owns more than 50 per cent of the share capital.*"[12] These practices focusing on the proportion of share were also applied by other investment tribunals.

10. In *Maffezini v. Spain*, tribunal accepted claimant's *prima facie* claim that SODIGA was an SOE for the reason that government held over 50% share although SODIGA was in the form of private enterprise.[13] Also in *Tatneft v. Ukraine*, tribunal applied the standard of shareholding proportion. Tatneft was an enterprise 36% owned by Tartarstan government.[14] Tribunal held that the "*golden share*"[15] held by Tatarstan government had not been shown "*to have been exercised in the conduct of Tatneft's affairs*"[16] and governmental representative in the board of Tatneft "*does not constitute a majority of its members*"[17].

11. In Claimant's memorandum, objective of this enterprise is to continue business as a national airline[18] and to develop aviation industry in Bonooru[19]. These purposes are all aimed at enabling Bonoori government to exercise its ownership.

12. Besides, Claimant is an enterprise whose 31% to 38% of shares were held by Bonoori government.[20] This proportion is similar to that in *Tatneft*. Furthermore, from the shareholding structure of the Claimant, 40% of share was separately held

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[11] *Trade Part of EUMAA*, p. 2, footnote 3.

[12] CPTPP, Article 17.1.

[13] *Maffezini v. Spain*, ¶83.

[14] *Tatneft v. Ukraine*, ¶130.

[15] *Ibid.*

[16] *Ibid.*

[17] *Ibid.*

[18] Annex IV, p. 44, ¶(a).

[19] *Ibid*, ¶(h).

[20] SUF, p. 29, ¶10, line 934.

by the signatories to the memorandum and 29% was open to be purchased by the public, rest of which were maintained by Bonoori government.[21] Furthermore, Bonoori government is the only governmental shareholder in Claimant and other shareholders holds no more than 7% of share.[22] This has become the "*significant minority ownership*" held by Bonoori government.[23]

13. Consequently, being the shareholder holding largest proportion of share, no important decision can be made without the consent of Bonoori representatives. Therefore, based on the specific shareholding structure of Claimant and conclusion in *Tatneft*, the Tribunal shall find the shares held by Bonoori government in Claimant to be a "golden share".

14. However, different from *Tatneft v. Ukraine* but in line with definition from OECD and World Bank, Claimant in this case was exercising the golden share in Bonooru's affair. Bonoori government has long been using Claimant as a tool to guarantee the Bonoori people's mobility right. This was confirmed by Bonoori Prime Minister[24] and its Constitutional Court[25]. Besides, Bonoori representatives can also form a majority vote in some circumstances.[26] Therefore, the Tribunal shall consider that Bonoori government has controlled Claimant through its golden share and representatives in the board of directors.

15. Furthermore, Bonoori government increased its share over Claimant to 55% by 2021 and used it to operate paramilitary activities.[27] Such a proportion of share held by Bonoori government has already reached a doubtless majority of share.

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[21] Annex IV, p. 45, ¶¶4-5, lines 1541-1549.

[22] PO4, p. 89, ¶2, lines 3273-3274.

[23] *OECD*, p. 17.

[24] SUF, p. 29, ¶8, lines 922-926.

[25] Annex III, p. 43, line 1497.

[26] PO3, ¶3, lines 3156-3160.

[27] SUF, p. 40, ¶65, lines 1408-1414.

Therefore, pursuant to *Maffezini v. Spain*, regardless of the entity's form,[28] Claimant is an SOE based on this majority share.

16. To conclude, from both references of other international organizations and practices under ICSID, Claimant is doubtlessly an SOE.

2. Claimant is a state agent

17. First of all, pursuant to Article 5 ARS, an entity's act is attributable to the state if it is authorized by the law to operate governmental service.[29] To prove such authorization of law, Respondent will submit domestic decision of Bonooru. Generally speaking, domestic court's decision shall not be accepted by the investment tribunals. In *Maffeizini v. Spain*, however, tribunal held that domestic decisions *in re* judicial structure of an entity shall "*be given considerable weight*".[30]

18. Article 70(2) Bonooru Constitution law provides that Bonooru has the obligation to ensure citizen's mobility right.[31] As an SOE, Claimant is empowered by this law to fulfill its obligation in the civil aviation industry. This authorization was also reflected by Boonori constitutional court's decision proving Claimant's operation on Royal Narnian for public interest will continue.[32]

19. With regard to the governmental elements of Claimant's operation, Respondent notice that determination over this issue depends on a particular circumstance.[33] This was also confirmed by the tribunal in *BUCG v. Yemen*.[34] However, mobility right is a purpose with clear public interest due to Bonooru's special geographical

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[28] *Maffeizini v. Spain (I)*, ¶83.

[29] *ARS*, Article 5.

[30] *Maffeizini v. Spain (I)*, ¶82.

[31] Annex I, p. 41, line 1429.

[32] Annex III, p. 43, line 1496.

[33] *Commentaries to ICSID Convention*, p. 16.

[34] *BUCG v. Yemen*, Decision on Jurisdiction, p. 10, ¶35.

condition.[35] Furthermore, before the privatization, all the airlines in Bonooru are national ones.[36] These have made the governmental elements more obvious.

20. Therefore, Claimant's operation on Royal Narnian shall be regarded as service with governmental elements.

21. Although current dispute is focused on the operation on Caeli, there are still some relations between Caeli and Royal Narnian thus making these two entities connected.

22. First of all, Royal Narnian is the founder of Moon Alliance, an airline consortium which involves Caeli.[37] Secondly, there was a slot trade between Royal Narnian and Caeli thus proving the economic relations in between.[38] Finally, when Claimant met obstacles in its operation on Caeli, it began to scale back its operation on Royal Narnian.[39] Therefore, these have clearly shown that the condition of Royal Narnian has a great impact on Caeli. It naturally comes to the conclusion that operation of Royal Narnian constitutes the relevant evidence in this particular case thus making Claimant a state agent.

3. Claimant is exercising governmental function

23. Claimant is exercising governmental function pursuant to Article 8 ARS.

24. In *CSOB v. Slovakia*, tribunal held that determination over the function of an entity should depend on the nature of its operation.[40] However, purpose of an entity was considered by the tribunal in *Maffeizini v. Spain* as a standard developed from the precedents.[41] Finally, in *Tatneft v. Ukraine*, tribunal combined these two

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[35] SUF, p. 28, ¶5, line 896.
[36] *Ibid*, p. 29, ¶6, line 910.
[37] *Ibid*, p.29, ¶11, line 938.
[38] *Ibid*, p.34, ¶36, lines 1154-1155.
[39] *Ibid*, p.40, ¶65, lines 1405-1407.
[40] *CSOB v. Slovakia*, ¶20.
[41] *Maffezini v. Spain*, ¶76.

elements.[42] Therefore, we submit that Claimant is exercising governmental function from both purpose and nature.

25. With regard to the nature, in *Tatneft v. Ukraine*, tribunal linked the nature to an enterprise's profitability.[43] This requirement over the profitability was also reflected in ICAO's definition to the aviation commercial operation.[44]

26. In this case, Bonoori Prime Minister claimed in its political rally that Vemma Holdings will operate Royal Narnian without considering the profitability.[45] This was further concluded in Bonoori Constitutional Court's decision.[46] Therefore, *as per* the nature of Claimant's operation, since it has the very chance of being not profitable, it's not of a commercial nature.

27. Furthermore, Ms Sabrina Blue, as the head of Claimant's board of director once precisely described the nature of Claimant's operation. She said in a press conference on 31 May 2016 that "*Vemma has certainly lived up to the standards set by its predecessor in Bonooru*".[47] By saying Claimant's predecessor, combining Claimant's purpose listed in its memorandum,[48] it reveals that the nature of Claimant's operation is similar to that of Bonoori national airlines before privatization,[49] *inter alia*, providing public service for Bonoori people. Therefore, Respondent further observes that Ms Sabrina Blue as Claimant's representative has admitted Claimant's operation to be of a public nature.

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[42] *Tatneft v. Ukraine*, ¶¶94, 135.
[43] *Ibid*, ¶163.
[44] *ICAO*, Appendix B.
[45] SUF, p. 29, ¶8, lines 922-926.
[46] Annex III, p. 43, line 1496.
[47] PO4, p. 89, ¶6, lines 3294-3297.
[48] Annex IV, p. 44, ¶a).
[49] SUF, p. 29, ¶6, line 910.

28. As for the Claimant's purpose, it has been illustrated by Article 70(2) Bonoori constitutional law that Bonooru aims to ensure the mobility right of Bonoori people while Claimant is used as a tool to reach such an end.[50]

29. Therefore, either from purpose or nature, Claimant is exercising governmental function.

B. CLAIMANT DOES NOT HAVE QUALIFIED INVESTMENT UNDER CEPTA

30. Claimant's investment acquired through bribery[51] is not protected under CEPTA since the treaty protection does not extend to the illegal investments based on the good faith principle.

31. Principle of good faith is a foundational principle in international law from which other concepts flow, including the doctrine of *abus de droit*.[52]

32. Good faith principle encompasses general elements of "*honesty*, *fairness and reasonableness*".[53] Moreover, *abus de droit* arising from the good faith principle sets itself against

> *"a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different to that for which the right was created*, *to the injury of another State*".[54]

33. In this case, however, Claimant acquired investment through bribery to Mr. Dorian Umbridge.[55] Additionally, the Amici possess a general interest in promoting fair business practice in Mekar. Moreover, Bonoori Constitutional Court has initiated *suo moto* cognizance on this bribery which has further proved this fact to exist.[56]

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[50] Annex I, p. 41, line 1429.

[51] CRPU external adivsors' *amicus* submission, p. 19, lines 635-640.

[52] *MPEIL*, Abuse of Process in Inter-State Dispute Resolution, Andrew D Mitchell, Trina Malone, ¶¶2-5.

[53] *Ibid*, ¶7.

[54] *Ibid*, ¶8.

[55] CRPU external advisors' *amicus* submission, p.19, line 635.

[56] PO3, p. 87, ¶13, line 3213.

Due to the unlawful conduct, Claimant's investment is based on "unclean hands". In *Salini v. Morocco*, tribunal held that claimant's unclean hands can deprive tribunal of competence to rule on a legal dispute.[57]

34. Therefore, Claimant's investment is illegal thus enjoying no protection from international investment treaty.

35. **To conclude on Submission I**, the Tribunal does not have jurisdictional standing over the current dispute since it is not an eligible investor and does not have qualified investment.

II. THE TRIBUNAL SHALL ACCEPT AMICUS SUBMISSION FROM CRPU EXTERNAL ADIVSORS BUT REJECT THAT FROM CBFI

36. Respondent submits that the Tribunal shall grant leave to CRPU external advisor but reject CBFI's submission under CEPTA[58] and UNCITRAL Transparency Rules.

37. Additionally, pursuant to CEPTA, Respondent submits that the Tribunal shall apply UNCITRAL Transparency Rules as the governing rules on the admission of *amicus curiae*.[59] Article 4 UNCITRAL Transparency Rules provides that:

> "*[…] the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing party to the treaty ("third person(s)"), to file a written submission with the arbitral tribunal regarding matter within the scope of the dispute*".[60]

38. In this case, CRPU external advisors is a qualified third party under Article 4(3) UNCITRAL Transparency Rules and its *amicus curiae* submission shall be accepted **(A)**. Besides, Respondent also requests the Tribunal to reject the *amicus curiae* submission from CBFI **(B)**.

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[57] *Salini v. Morocco*, ¶46.

[58] *CEPTA*, Article 9.19.

[59] *Ibid*, Article 9.20(6).

[60] *UNCITRAL Transparency Rules*, Article 4(1).

A. *AMICUS CURIAE* SUBMISSION BY CRPU EXTERNAL ADVISORS SHALL BE ACCEPTED

39. The Tribunal shall accept *amicus curiae* submission by CRPU external advisors, since it has met the requirements under UNCITRAL Transparency Rules.[61]

40. First, CRPU external advisors has a significant interest in this dispute **(1)**. Second, CRPU external advisors' admission imposes no undue burden on the arbitral proceeding **(2)**. Third, CRPU external advisors is capable of assisting the Tribunal by bringing a perspective different from disputing parties **(3)**. Finally, CRPU external advisors is independent from any disputing parties **(4)**.

1. CRPU external advisors has a significant interest

41. CRPU external advisors is the only third party having a significant interest in this proceeding.

42. Article 4(3)(a) UNCITRAL Transparency Rules provides that significant interest shall be considered by the tribunals in deciding a third party's admission.[62] Anyone who is directly or indirectly affected by the tribunal's decision shall be deemed to have a significant interest in the case as stated in *Apotex v. US.*[63] In *Glamis*, Indian Quechan Nation argued that

> "*their own rights*, *which is the right of indigenous peoples*, *to protect their sacred sites and cultural heritage were at stake*, *and the tribunal deemed this sufficient to satisfy the criteria for amicus participation*".[64]

43. CRPU external advisors' significant interest lies in the fair business environment in Mekar in this case.[65] If the Tribunal were to hold that they have jurisdiction over the current case even on the basis that Claimant's investment was established on

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61 *UNCITRAL Transparency Rules*, Article 4(3).

62 *Ibid*, Article 4(3)(a).

63 *Apotex v. US*, ¶38.

64 *Schliemann*, p. 372.

65 CRPU external adivsors' *amicus* submission, p. 19, line 642.

the bribery, such fair business environment in Mekar will no longer exist thus harming its interest as an advisor for the foreign investors.

2. CRPU external advisors' admission imposes no undue burden

44. Article 4 UNCITRAL Transparency Rules provides that a third party shall not impose undue burden on the arbitral proceeding.[66] In *Glamis v. US*, Indian Quechan Nation claimed that the contested environmental regulation on the operation of open pit mines was legitimate, as it was necessary to protect their sacred sites and cultural heritage.[67] Tribunal accepted this submission since it would impose no undue burden.[68]

45. Furthermore, in *UPS v. Canada*, in order to impose no undue burden, tribunal ruled that the Union's submission shall not exceed 20 pages and disputing parties shall have the opportunity to respond.[69]

46. In this case, submission from CRPU external advisors is clearly less than 20 pages and fits the requirement either clarified by the Tribunal[70] or provided in CEPTA[71]. Furthermore, after the CRPU external advisors' submission, both parties had made the respond to its submission. Opportunity to respond is equally designated to every disputing party thus further proving that no undue burden was imposed.

47. As a result, CRPU external advisors' admission will not impose undue burden to the Tribunal.

3. CRPU external advisors is capable of assisting the Tribunal

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66 UNCITRAL Transparency Rules, Article 4(5).

67 *Glamis v. US (I)*, p. 1.

68 *Glamis v. US (II)*, ¶12.

69 *UPS v. Canada*, ¶54.

70 PO1, pp. 13-14, ¶21, lines 432-448.

71 *CEPTA*, Article 9.20(1).

48. Bribery in the Claimant's investment submitted by CRPU external advisors is an insight different from disputing parties.

49. Article 4(3)(b) UNCITRAL Transparency Rules provides that submission from the third party shall assist the tribunal by "*bringing a perspective*, *particular knowledge or insight that is different from that of the disputing parties*".[72]

50. In *Suez v. Argentina*, tribunal held that dispute is relevant to public interest.[73] Tribunal further concluded that the proceeding involved more than regular public interest, but basic public interest for millions of people since

> "*it may raise a variety of complex public and international law questions*, *including human rights considerations. Any decision rendered in this case*, *whether in favor of the claimants or the respondent*, *has the potential to affect the operation of those systems and thereby the public they serve*".[74]

51. In this case, although arguments on Claimant's bribery brought by CRPU external advisors was not submitted by any disputing party, it fits the requirement that perspective should be "different". Furthermore, discretion equipped to the Tribunal under UNCITRAL Transparency Rules further enables it to grant the leave to CRPU external advisors.[75] Such a discretion in the third party's admission was also used in *Walter Bau v. Thailand*.[76] Besides, bribery, in *World Duty Free v. Keneya*, was deemed as a violation to the public interest worldwide.[77] Eliminating bribery is also a purpose contained in CEPTA.[78]

52. In the similar vein, CRPU external advisors has provided the Tribunal with evidence regarding the bribery from Claimant to Mr. Dorian Umbridge during its

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[72] *UNCITRAL Transparency Rules*, Article 4(3)(b).

[73] *Suez v. Argentina (I)*, ¶19.

[74] *Ibid*, ¶20.

[75] *UNCITRAL Transparency Rules*, p. 6, ¶4(a).

[76] *Walter Bau v. Thailand*, ¶15.3.

[77] *World Duty Free v. Keneya*, ¶157.

[78] *CEPTA*, preamble.

acquisition of the investment.[79] Such bribery constitutes as a serious violation to Mekar's public interest whether or not bribery is regarded as a public perception in Mekar.

53. Consequently, even it was not brought by any disputing party, based on the Tribunal's discretion over *amicus curiae* arising from UNCITRAL Transparency Rules and evidence regarding bribery, the Tribunal shall grant the leave to CRPU external advisors.

4. CRPU external advisors is independent from disputing parties

54. In practices, independence has long been an important element on the admission of a third party.[80]

55. In *von Pezold v. Zimbabwe*, third parties' submission was rejected by the tribunal for lack of independence.[81] Furthermore, in *Suez v. Argentina*, tribunal stressed that a qualified *amicus curiae* shall have "*the expertise*, *experience*, *and independence to be of assistance in this case.*"[82] Tribunal in *Suez*, when searching for qualified financial expert to assist the tribunal, stated the requirement for such an expert was that

> "*he or she should not have financial relationships with any of the parties and should not have been engaged in any litigation on behalf of or against any of the parties or for any law firm that had represented any of the parties in these cases or any law firm that had engaged in litigation against any of the parties*".[83]

56. CRPU external advisors is an independent institution focusing on the advising in investment banking. During the process of privatization, liquidation and

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[79] CRPU external adivsors' *amicus* submission, p. 19, line 635; Vemma's Applications to Bar the *Amicus* Submission by the External Advisors to the CRPU, p. 22, line 715.

[80] *Baltag*, p. 27; *von Pezold v. Zimbabwe (I)*, ¶56; *Eli Lilly v. Canada*, PO4, ¶D.

[81] *von Pezold v. Zimbabwe (I)*, ¶56.

[82] *Suez v. Argentina (I)*, ¶24.

[83] *Suez v. Argentina (II)*, ¶12.

restructuring Caeli, different from *von Pezold*, CRPU external adivsors did not receive any fund or financial support from any disputing party.[84]

57. Consequently, CRPU external advisors is independent from any disputing party.

B. THE TRIBUNAL SHALL REJECT CBFI'S AMICUS CURIAE SUBMISSION

58. CBFI as a consortium where the Claimant also has a membership, it is not an eligible third party under UNCITRAL Transparency Rules in this arbitration. First, CBFI does not have public interest in the Tribunal's decision **(1)**. Second, CBFI has a conflict of interest thus being ineligible to appear in the arbitral proceedings **(2)**. Third, CBFI lacks independence **(3)**.

1. CBFI does not have public interest

59. Under UNCITRAL Transparency Rules, tribunal shall consider the public interest when exercising discretion in an arbitral proceeding. It naturally comes to the conclusion that public interest *per se* shall be taken into the Tribunal's consideration when addressing third parties' eligibility. Furthermore, in *Eli Lilly v. Canada*, tribunal also regarded public interest as an element to consider when granting leave to a third party.[85]

60. In *Apotex v. US*, although under ICSID AF Rules, definition to public interest from its tribunal is still of great importance in interpreting the public interest under UNCITRAL Transparency Rules.[86] Tribunal in *Apotex* concluded that the public interest occurred when the tribunal's decision was likely to affect individuals or entities beyond disputing parties.[87]

61. In this case, however, CBFI only submitted to the Tribunal that it has significant interest in the Tribunal's decision. This alleged interest was not submitted by CBFI

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[84] CRPU external advisors' *amicus* submission, p. 20, line 660.

[85] *Eli Lilly v. Canada*, PO 4, ¶H.

[86] *UNCITRAL Transparency Rules*, p. 6, ¶4(a).

[87] *Apotex v. US*, ¶42.

itself as public interest initially. Similar to *Apotex* where the tribunal held that the interest of Mr Appleton was "*a particular and professional interest*",[88] interest in this case was only a particular interest of CBFI and its member entities. Consequently, it does not constitute a public interest.

2. CBFI has a conflict of interest

62. Although conflict of interest may arise when an arbitrator has a close relationship to one of the parties or has a personal interest in the outcome of the case,[89] this concept has been extended to the relationship between a disputing party and a third party in practice.

63. In *von Pezold v. Zimbabwe*, for example, tribunal held that relationship between the President of Zibabwe and the chiefs of the indigenous communities might give rise to conflict of interest.[90]

64. Moreover, pursuant to CBFI's *Amicus* Brief Submission Guidelines, members of CBFI's Executive Committee shall not participate in discussion or voting concerning a dispute in which they have a conflict of interest.[91]

65. In this case, Claimant is a member in CBFI while Lapras Legal Capital as another member is advising Claimant in this arbitration against Respondent.[92] Besides, Horatio Velveteen, as the CFO in Lapras Legal Capital is also a member in CBFI's Executive Committee.[93] Moreover, CBFI has thirty-eight members holding investment in Mekar two of which are currently pursuing claims against Mekar.[94]

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[88] *Apotex v. US*, ¶43.

[89] *Reinisch/Knahr*, p. 107.

[90] *von Pezold v. Zimbabwe (II)*, ¶53.

[91] PO3, ¶12, lines 3203-3211.

[92] CBFI's *Amicus* Submission, p. 16, ¶7, line 520.

[93] PO3, ¶12, lines 3203-3211.

[94] CBFI's *Amicus* Submission, p. 16, ¶6, line 517-519.

66. As a result, either from the requirement of international practices or CBFI itself, since a conflict of interest exists for CBFI in this case, it shall not be a qualified third party.

3. CBFI lacks independence

67. Tribunal in *von Pezold v. Zimbabwe* rejected ECCHR and four indigenous communities of Zimbabwe for lack of independence or neutrality.[95] In *Philip Morris v. Uruguay*, tribunal also denied the petition from ASIPI by concluding that tribunal shall consider not only a third party's expertise, but also "*whether it is sufficiently independent from the disputing parties to be of assistance to the Tribunal*".[96]

68. CBFI claims itself to represent the interest of its members as foreign investors in Mekar.[97] However, Claimant is also a member in CBFI.[98] It naturally comes to the conclusion that based on CBFI's own submission, Claimant's interest is also represented by it. Therefore, CBFI is not entitled to claim itself to be an independent third party having the eligibility to appear in the current arbitration.

69. **To conclude on Submission II**, the Tribunal shall grant leave to CRPU external advisors pursuant to Article 4(3)(a) UNCITRAL Transparency Rules but reject CBFI.

III. RESPONDENT DID NOT VIOLATE ITS FET OBLIGATION UNDER ARTICLE 9.9 CEPTA

70. Article 9.9 CEPTA provides that "*arbitrary and discriminatory conducts*" and "*denial of justice*" may give rise to the breach of FET standard. However, in this case, Mekar's administrative bodies (**A**) have imposed necessary measures to

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[95] *von Pezold v. Zimbabwe (II)*, ¶56.

[96] *Philip Morris v. Uruguay*, ¶55.

[97] CBFI's *Amicus* Submission, p. 16, ¶9, line 534.

[98] *Ibid*, p. 16, ¶7, lines 520-522.

achieve legitimate public policy objectives which has been granted by Article 9.8 CEPTA and general obligations under international law and conducts of Mekari Courts were also in line with the requirements under CEPTA and international law (**B**). In any event, such measures cannot be taken together to give rise to a cumulative breach of FET standard (**C**).

A. MEKARI ADMINISTRATIVE BODIES' ACTS WERE REASONABLE AND NECESSARY EXERCISES OF RESPONDENT'S REGULATORY POWER GRANTED BY CEPTA

71. Considering Claimant's identity as an SOE and its overexpansive business strategies, CCM (**1**) and SCA (**2**) has taken measures to protect Mekar's public interest, which are by no means construed as the "arbitrary or discriminatory" conducts.

1. CCM did not pose arbitrary measures on Claimant

72. Article 9.8(2) CEPTA entitles its contracting states to exercise regulatory power in their territories even if such acts may "*negatively affects an investment*".[99] Exercising such a regulatory power, based on Article 9.8(1) CEPTA, is in an attempt to fulfill the legitimate public purpose listed in a non-exhaustive list.[100]

73. To be more specific, when exercising this regulatory power, it constitutes a violation to FET only when the state's conduct meets the condition listed in Article 9.9 CEPTA.[101]

74. CCM did not conduct arbitrary measures on the Claimant thus not violating FET under Article 9.9 CEPTA.[102]

75. In *Philip Morris v. Uruguay*, tribunal held that in order to protect the public welfare, measures taken must be "*proportionate*".[103] Furthermore, in *AES v. Hungary*,

[99] CEPTA, Article 9.8(2).
[100] *Ibid*, 9.8(1).
[101] *Ibid*, Article 9.9(2)(c).
[102] *Ibid*, Article 9.9.
[103] *Philip Morris v. Uruguay*, ¶305.

tribunal concluded "*the existence of a rational policy and the reasonableness of the act in question*" are two elements of arbitrariness.[104]

76. Consequently, Respondent submits that MRTP is the rational policy granting CCM administrative power to impose any measure thus making CCM's measure reasonable (**a**). Based on MRTP, CCM's measure is proportionate (**b**). Therefore, CCM's measures are by no means arbitrary.

(a) CCM's measures are reasonable with regard to MRTP

77. In previous practices, interpretation to arbitrary by the tribunals focuses on the basis of a measure is the state's discretion without reason[105] or the reason of fact[106]. Such an interpretation is not clear enough to provide the Tribunal with a profound understanding on the inner meaning of "arbitrary". Therefore, Respondent submits another authoritative approach adopted by *ELSI v. Italy*, *inter alia*, a way to contrast arbitrary acts with rule of law. In *ELSI v. Italy*, ICJ described arbitrary acts as "*something opposed to rule of law*".[107] As a result, Respondent holds that as long as there's proper rule of law supporting an administrative body's measure, such a measure is not arbitrary.

78. In *AES v. Hungary*, to constitute a qualified legal basis preventing measures from being arbitrary, such policy must be "*following a logical explanation*" and "*with the aim of addressing a public interest matter*".[108]

79. First of all, CCM's was established pursuant to MRTP.[109] It grants CCM the "*sole competence*"[110] to initiate the investigation as an autonomous body free from the

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[104] *AES v. Hungary*, ¶¶10.3.7-10.3.9.
[105] *National Grid v. Argentina*, ¶197.
[106] *Lauder v. Czech Republic*, ¶221.
[107] *ELSI*, p. 76.
[108] *AES v. Hungary*, ¶¶10.3.7-10.3.9.
[109] SUF, p. 30, ¶19, lines 993-996.
[110] Annex V, Chapter III, line 1596.

governmental impact.[111] Based on this authorization, CCM is competent to initiate investigation as long as it follows the requirement under MRTP.[112]

80. CCM, in this process, has initiated two investigations on the Claimant. Initiating process of all these two investigations are in line with Chapter III MRTP.[113]

81. First investigation was a *suo moto* investigation.[114] This *suo moto* investigation was based on the fact that considering Caeli and Royal Narnian together, 54% of market share was held by these two entities.[115] Although Royal Narnian is *prima facie* an enterprise independent from Caeli, they have much connection in the real operation. Apart from the economic relation in between proved by the fact that Royal Narnian had a slot trade with Caeli,[116] Claimant's operation on Caeli also has a great impact on its operation on Royal Narnian. When the operation on Caeli got stuck in Mekar, it considered to scale back Royal Narnian.[117] All these connections have further revealed that Caeli and the Claimant both breached its undertaking made to CCM by the time it gained its investment through CCM's approval.[118] As a result, it can be inferred that it's reasonable to combine the market share of Royal Narnian and Caeli due to their close connection.

82. Now that counting method to reach 54% of market share is reasonable, it naturally comes that requirement to initiate a *suo moto* investigation is met under MRTP.

83. Second investigation was not a *suo moto* one, it was brought by an airline consortium instead.[119] In Chapter III MRTP, an investigation can also be launched once it was brought by a "*direct competitor*".[120] As an airline consortium in Great

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111 SUF, p. 31, ¶19, lines 997-998.
112 Annex V, Chapter III, lines 1596-1628.
113 *Ibid*.
114 SUF, p. 34, ¶36, lines 1146-1147.
115 *Ibid*, lines 1152-1153.
116 *Ibid*, line 1155.
117 *Ibid*, p. 40, ¶65, lines 1405-1407.
118 *Ibid*, p. 32, ¶25, lines 1046-1049.
119 *Ibid*, p. 35, ¶38, lines 1170-1174.
120 Annex V, p. 47, line 1609.

Narnian, its member entities certainly have competitive relationship with Caeli, which is also an airline company offering airlines in Great Narnian. Although Caeli claimed that its competitors are not other airline companies flying short-distance airlines, figures revealed that its domestic airlines increased by 21% from 2010 to 2013.[121] Caeli, for such a rapid growth rate, is certainly a competitor against the entities in the consortium. Therefore, this consortium was qualified to bring a complaint to CCM which has made CCM's second investigation conducted on a rule of law.

84. As for the airfare cap, it was taken by CCM as an interim measure instead of a punishment. The right to impose interim measure was also provided in Chapter III MRTP.[122] Despite the fact that airfare cap is not in the non-exhaustive list in Chapter III, such interim measure is still in the purpose to "*bring a corporation in line with this Act*".[123] Such a purpose was especially reflected by the fact that airfare cap changes when CCM's market share changes.[124] Therefore, CCM is entitled to impose airfare cap as an interim measure.

85. Besides, the length of airfare caps was also in line with MRTP. Chapter III MRTP provides that in urgent issues, CCM may order preventive interim measure based on *prima facie* finding by decision.[125] For the first airfare cap, since no time limit is set in MRTP, maintaining the interim measure till the investigation ends is not prohibited. As for the second one, *prima facie* finding of Claimant's violation to Mekari law was sufficient to establish such an interim measure to prevent further violation. Dominant position was established since Caeli was the only consistently profitable carrier on half the routes to and from the busy Phenac International Airport, dominating in its hub-and-spoke network[126] and Claimant inherited the

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121 SUF, p. 33, ¶30, lines 1101-1102.
122 Annex V, p. 47, lines 1615-1628.
123 *Ibid*, p. 47, lines 1616-1617.
124 SUF, p. 38, ¶59, lines 1336-1338.
125 Annex V, p. 46, lines 1623-1627.
126 SUF, p. 34, ¶35, line 1146.

privileges in the discount of navigation fees at Phenac International Airport[127]. This was further admitted by a member in Claimant's board of directors by saying that the privilege in Phenac International Airport offered Claimant "*unparalleled access to Mekar's airline market*".[128] Besides, evidence before CCM is sufficient to be called *prima facie* since Justice VanDuzer named it as "*a range of potentially reasonable conclusions*".[129]

86. The abusing behaviour, on the other hand, occurred in its low-price strategy specifically applied in airlines to and from Phenac International Airport. Its low-price strategy attracted 35% passengers in Mekar to take Caeli[130] and its investment in two programs attracting passengers with extra discount further made it to be the only profitable airline company in Phenac International Airport.

87. Based on the two arguments above, CCM's airfare cap is reasonable with regard to MRTP.

88. Finally, all the interim measures taken by CCM were in a preventive purpose regarding Mekar's public interest, *inter alia*, preventing the Claimant from having access to "*supra-competitive profits*".[131] Consequently, the intention of Claimant is also fulfilled as a public purpose.

(b) CCM's measures were proportionate

89. In *LG&E v. Argentina*, tribunal held that arbitrary measures include "a balance of interests of the State with any burden imposed on such investments".132 Such a balance between state interest and burden imposed reflects an actual meaning of the proportionality. This also provided a general definition to the "proportionality".

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[127] SUF, p. 32, ¶26, lines 1053-1056.
[128] *Ibid*, p. 31, ¶23, line 1030.
[129] *Ibid*, p. 38, ¶54, lines 1325-1326.
[130] *Ibid*, P. 34, ¶34, lines 1132-1134.
[131] *Ibid*, p. 34, ¶37, lines 1160-1161.
[132] *LG&E v. Argentina (I),* ¶158.

90. Definition to the proportionality can hardly be found in a clear way in previous practices. In *Philip Morris v. Uruguay*, tribunal held that regulatory authorities' decision made within the state's territory is entitled to "*a substantial measure of deference*".[133] Such an attitude towards decision of regulatory authorities was deemed by the tribunal as a rule reflecting customary international law.[134] The opinion of "minimum standard" and "deference to regulatory authorities" was also upheld in *S. D. Myers v. Canada*.[135]

91. In this case, airfare caps were continued after two investigations but still went through certain changes. When Caeli's market share dropped below 40%, CCM lifted the imposed airfare caps.[136] Such a change made on the airfare caps reveals that measures' purpose was to prevent the anti-competitive acts and the measures taken served for that purpose. Since the extent of measure changes along with the purpose and current condition, it naturally comes that measures taken by CCM are proportionate.

92. Besides, such proportionality was also reflected by the fact that the execution of the airfare caps was in line with the due process. To be more specific, in the process of court review submitted by the Claimant, airfare caps, together with other punitive measures could not be enforced pending this proceeding.[137] As a result, the execution of such measures followed the rule of proportionality.

93. Finally, from the perspective of real effect, Caeli' terrible financial condition was not led by CCM's measures. In the process of first airfare caps, Caeli did not protest it since caps did not impair its profitability.[138] Dispute on this issue did not arise until the financial crisis in Mekar broke out in late 2016.[139] Consequently, the

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133 *Philip Morris v. Uruguay*, ¶137.
134 *Ibid*, ¶141.
135 *S. D. Myers v. Canada*, ¶263.
136 SUF, p. 38, ¶55, lines 1136-1138.
137 *Ibid*, p. 37, ¶50, lines 1296-1298.
138 *Ibid*, p. 35, ¶37, lines 1167-1169.
139 *Ibid*, ¶39, line 1183.

negative impact on Caeli's condition was led by the financial crisis rather than CCM's measure. Nevertheless, as an autonomous body free from the governmental impact,[140] CCM could do nothing on the financial crisis. Furthermore, no exception over the interim measures related to the financial crisis is provided in MRTP. Therefore, no causal link exists between Caeli's subsequent condition and CCM's measure.

2. SCA's refusal to grant subsidies does not constitute discriminatory conducts

94. Article 9.8 CEPTA provides such circumstances for the host state to regulate such laws to protect public policy as below:

> "*[….] the Parties recognize their right to regulate in their territories in order to achieve legitimate public policy objectives*, *such as national security*, *the protection of public health*, *safety*, *the environment*, *public morals*, *social and consumer protection*, *or the promotion and protection of cultural diversity*" [emphasis added].[141]

95. Article 9.8 clearly illustrates that the host state may enact new regulations to safeguard national security. National security may be threatened if strategic assets, such as aerospace, nuclear power, weapon production and transportation, are controlled by a foreign investor.[142] Likewise, Vemma is an airline holding company incorporated in Bonooru[143] and hold an 85% stake in Caeli through acquisition.[144] Caeli, which a foreign company owns, may harm Mekar's national security.

96. In 2017, the Mekar's currency dramatically dropped that leading to the economic crisis. Therefore, Mekar's president passed Executive Order 9-2018 to provide subsidies to the losses suffered by airlines due to the 2017 crisis. SCA rejected

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[140] SUF, p. 31, ¶19, lines 996-998.
[141] *CETPA*, Article 9.8.
[142] *Al-Mukhaizeem*, p. 14; *McLaughlin*, p. 6.
[143] SUF, p. 29, ¶26, line 1051.
[144] *Ibid*, p. 32, ¶10, line 932.

Caeli's subsidy application as to protect national security (**a**), and did not discriminate against Caeli (**b**).

(a) SCA's refusal protect national security

97. The host state can be excused from its treaty obligations under the principle of necessity. Pursuant to ARS, it provides some circumstances in which the State may not be held responsible for breaching their international obligations, including necessity.

98. Article 25 ARS stated that:

> "*Necessity may not be invoked by the State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole*" [emphasis added].[145]

99. At that time, Mekar was under economic crisis which constituted necessity and SCA's rejecting the Caeli's application for subsidies under the Executive Order 9-2018 was reasonable as stated under Article 25 ARS and its commentaries, which make it clear that:

> "*the pleas for necessity arise where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that is subject to strict limitations to safeguard against possible abuse*".[146]

100. To support this, tribunals in *CMS v. Argentina*, [147] *LG&E v. Argentina*[148] and *Enron v. Argentina*[149] discussed the essential security interest while Argentina

[145] *ARS*, Article 25.
[146] *Commentaries to ARS*, Article 25.
[147] *CMS v. Argentina*, ¶¶360-361.
[148] *LG&E v. Argentina (I)*, ¶226.
[149] *Enron v. Argentina*, ¶333.

faced an economic crisis in 2000. Three cases in Argentina were very similar to the situation in Mekar, which faced an economic crisis in 2017.

101. The SCA has full knowledge that the currency crisis in Mekar may lead Mekar to have an economic crisis. Moreover, SCA has the power to provide subsidy to any airlines companies who suffered from currency crises following Executive Order 9-2018.[150] Professor Crawford also supported and stated that "*when a State invokes the state of necessity*, *it has full knowledge of the fact that it deliberately chooses a procedure that does not abide an international obligation*".[151]

102. Therefore, SCA has the right to decide on subsidies' applicants regarding the necessity and follow Executive order 9-2018.

(b) SCA's measure did not constitute discrimination against Caeli

103. Understanding the conduct of discrimination requires having a nationality comparison test.[152] The tribunal treated the issue of discrimination as part of the fair and equitable treatment standard under Article 9.9(2)(c) CEPTA[153] and found that "*State conduct is discriminatory*, *if (i) similar cases are (ii) treated differently (iii) and without reasonable justification*" under *Saluka v. Czech* Republic.[154]

104. In *Saluka v. Czech Republic*, dispute arose from the imposition of a forced administration upon the investor's banking enterprise by the Czech National Bank. There had been four banks of comparable size and market position. The other three banks were domestically owned and received stated aid. The fourth, who was a claimant, had not received similar aid. The tribunal found that the four banks had been in a comparable position and had differential treatment regarding state

150 ANNEX VIII, Executive Order 9-2018.
151 *Crawford*, pp. 27-28.
152 *Reinisch/Schreuer*.
153 *CEPTA*, Article 9.9(2)(c).
154 *Saluka v. Czech Republic*, ¶313.

assistance with no reasonable justification. The tribunal ruled there had been a discriminatory response.

105. However, it is separately different from this present case for two reasons. Firstly, there are no domestic companies, which received subsidies in the aviation sector. Secondly, there is a reasonable justification that SCA rejected Caeli's application for subsidies.

106. Star Wings, JetGreen, Caeli and Larry Air are foreign companies, which all invested in the aviation sector. SCA provided differential subsidies based on that Caeli, controlled under Vemma, already received subsidies from the Horizon 2020 program. The predominant recipients of subsidies under Executive Order 9-2018 were airlines operating important domestic routes and less than 5% of the market share in Mekar.[155] Nevertheless, even Caeli did not profit during the currency crisis, but Caeli still enjoys below 40% of the market share. Furthermore, when Vemma departed, the market share of Caeli has still stood below 30% in Mekar.[156]

107. In addition, Vemma is an SOE, which already had unique advantages over other companies that enable them to outcompete privately-owned firms. Hence, the subsidies from Executive Order 9-2018 should assist the most affected victims.

108. Therefore, the SCA's measure did not discriminate against Caeli or Vemma. It is a reasonable justifiable decision based on state national security and necessity.

B. MEKARI COURTS DID NOT DENY JUSTICE

109. A denial of justice can be established if the relevant courts subject a suit to undue delay, or if they clearly and maliciously misapply the law.[157] However, in this case, mekari court did not subject Caeli's claim to undue delay due to their backlog and limited judiciary resources (**1**). Moreover, the courts did not maliciously applied

[155] PO4, ¶7, line 3300.
[156] SUF, p.40, ¶64, line 1394.
[157] *Azinian v. Mexico*, ¶¶102, 103; *Mondev v. United States*, ¶¶126-127; *Parkerings v. Lithuania*, ¶317.

the law since it possess discretion to recognize and enforce the nullified award under New York Convention and its domestic arbitration act (**2**).

1. Mekar's High Court did not subject Caeli's claim to undue delay given the backlog in Mekari courts[158]

110. The Claimant claim that the Mekari courts deny justice as the hearing is delayed.[159]

111. The Respondent would like to argue that the Mekari Court gave the Claimant all opportunity for the judicial process.[160] Under the public international law, there has not been the fixed time limits for the Court to decide each case.[161] The time for settling the case needs to consider the "complexity" and the "circumstance" of each case.[162]

112. Therefore, as established in *White Industries v. India*[163] and *Toto v. Lebanon*,[164] the Tribunal should take into account the circumstances affecting the court docket.

113. In this present case, Claimant's submission in Mekari court was registered on 27 March 2018, and a hearing on interim measures was scheduled in April 2019. Also, the final release of the decision in the interim measure was released only after 1 month after the hearing, June 15, 2019.[165] Therefore, the period around 13-14 months was within the best capacity of Mekari judiciary system under the situation that there had been many cases resulting from the economic crisis.[166] Therefore, undoubtedly, such circumstance affects the function of the Mekari Court similar to

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158 *Toto v. Lebanon*, ¶165; *White Industries v. India*, ¶¶10.4.10-10.4.24.

159 Notice, ¶20.

160 Response, ¶16; *Thunderbird v. Mexico*, ¶¶197-201.

161 *White Industries v. India*, ¶10.4.9.

162 *Toto v. Lebanon*, ¶¶146, 163.

163 *White Industries v. India*, ¶¶10.4.10-10.4.24.

164 *Toto v. Lebanon*, ¶¶146, 165.

165 *White Industries v. India*, ¶10.4.17.

166 SUF, ¶¶44, 54, *Toto v. Lebanon*, ¶¶162, 165.

Toto v. Lebanon that the prolonged political crisis could affect the judicial system.[167]

114. In *Elettronica v. Italy*, tirbunal clearly identified that 16 months for the appeal process is not considered as the denial of justice.[168] Therefore, in this present case, the period around 13-14 months is even speedier than that of.[169]

115. In addition, while considering "*behavior of the Mekari Court*", the commercial matter tends to spend a long time for the commercial matter like in our case as the Mekar prioritized criminal matters to avoid prolonged detention for the accused to protect the individual rights.[170] Also, the population of the Mekar is quite huge, which was over 10.8 million in 2015. Therefore, similar to *White Industries v. India*, while examining the behavior of the court, no conclusion of denial of justice can be made where there is a huge population with serious overstretched judiciary. There should not be the denial of justice.[171] Therefore, such procedure by the Mekari Court is not abnormal, and the Mekari Court render the decision within a reasonable time. Therefore, such a situation is not constituting the violation of deny justice[172]

2. Mekari courts exercised discretion and balanced interests when it recognized and enforced the nullified awards

116. On 23 August 2020, the High Commercial Court of Mekar issued a ruling recognizing and enforcing the 9 May 2020 award[173] and Claimant challenged the ruling on the ground of non-compliance with New York Convention and Mekar's Commercial Arbitration Act. However, by adopting the word "may", New York

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[167] *Toto v. Lebanon*, ¶165.

[168] *ELSI*, ¶¶65-67, 109-110.

[169] SUF, ¶¶44, 54.

[170] *White Industries v. India*, ¶10.4.17; SUF, ¶13.

[171] *White Industries v. India*, ¶¶10.4.18, 10.4.24; SUF, ¶13.

[172] *Toto v. Lebanon*, ¶¶148, 156, 160, 168; *White Industries v. India*, ¶10.4.12.

[173] SUF, p. 39, ¶62, lines 1385-1386.

Convention has granted the court the discretion to recognize and enforce an award although it has been set aside (**a**). Moreover, there is no evidence, which is otherwise required by Mekar's arbitration act, showing that the arbitrator has accepted bribes (**b**), or even if there is, it is not necessarily that Mekari courts should take public policy of Sinnoh into consideration (**c**).

(a) New York Convention grants the court the discretion to decide whether or not to recognize and enforce a set-aside award

117. As the prerequisite, the court "may" recognize and enforce the set-aside awards under Article V(1)(e) New York Convention.[174] Therefore, the courts shall have their own discretion to grant the enforcement notwithstanding the previous ground of refusing to enforce the award.[175] Furthermore, under Article V(2)(b) New York Convention, every country has the discretion to recognize and enforce an award considering the state's public policy.

(b) No clear evidence supports that Mr. Cavannaugh accepted bribes

118. Under the Section 36 Mekar Commercial Arbitration Act, the Superior Court of Mekar previously affirmed that an award should only be set aside in case of there has been an apparent violation of morality and justice.[176]

119. In this present case, there has never been any clear evidence that Mr. Cavannaugh accepted bribes during performing as arbitrator in the arbitration proceeding between the Vemma and Mekar as recognized by the Supreme Arbitrazh Court of Sinnograd Ruling that related to the setting aside the arbitral award which provides:

> "*…the Court does not find itself in a position to conclusively rule on whether the act of bribery had in fact taken place*".[177]

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[174] Annex XV, ¶¶6, 18.; *Van den Berg*, p. 19.

[175] *Van den Berg*, p. 19.

[176] Annex XIV, ¶8.

[177] Annex XIII, ¶¶1, 11.

120. In addition, the nullification of the arbitral award in Supreme Arbitrazh Court of Sinnograd solely depended on the CILS's report, which was malicious and suspicious towards Mekar since CILS is considered as "*an entity funded by foreign donations to interfere in Mekar's domestic affairs*".[178] If Mekari courts abided by the judgment of setting aside the award, huge threats would be posed to Mekar as "*it is against Mekar's public policy to give credence to the reports prepared by such an organization*".[179]

(c) The public policy can be varied, and the setting aside based on public policy within one jurisdiction does not affect another

121. Supreme Arbitrazh Court of Sinnograd set aside the arbitral award based on the bribes would contravene Sinnoh's public policy.[180] However, Austria Supreme court enforced the award set aside in the seat of arbitration due to the violation of the public policy. Court found that the public policy could be different on various jurisdictions and the setting aside based on public policy within one jurisdiction does not affect that in another.[181]

122. Likewise, in *Chromalloy v. Egypt*,[182] the US Court of Appeals for the D.C. Circuit enforced an arbitral award that had been set aside at the seat of arbitration, finding that launching an appeal against the award in Egypt violated the final and binding nature of the award and that failing to recognize the award would violate US pro-arbitration public policy.[183]

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178 Annex XIII, ¶¶10-11; Annex XIV, ¶¶10-11, 13.

179 Annex XIV, ¶13.

180 Annex XIII, ¶¶7, 9-10.

181 *Van den Berg*, p. 12-13.

182 *Chromalloy v. Egypt*, pp. 912-913.

183 *Van den Berg*, p. 17.

123. In *Saluka v. Czech Republic*[184] and *S.D. Myers v. Canada*[185], the treatment would constitute the violation of fair and equitable treatment only in case "*that is unacceptable from the international perspective*".

124. Since conducts of Mekari courts were in accordance with the international practice, this Tribunal shall find that Mekar courts do not violate FET standard under Article 9.19 CEPTA.

C. THE CONCEPTION OF "CUMULATIVE BREACH OF FET STANDARD" FINDS NO SUPPORT IN INTERNATIONAL LAW

125. Claimant challenges that Respondent's acts and omissions, when taken together, has violated FET standard.[186] Nevertheless, the so-called "*creeping form of FET violation*" cannot find support in international law, since the measures in question only constitute a "complex act" rather than a "composite act" contained in Article 15 ARS.

126. In offering support for the conception of "creeping" form of FET violation, *El Paso* tribunal placed particular reliance on Article 15 ARS, finding that a series of measures taken by Argentina constituted a "composite act" within the meaning of that article.[187]

127. The focus of Article 15 is "*a series of acts or omissions defined in aggregate as wrongful*".[188] In other words, composite acts in question are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such.[189] Examples include the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, systematic acts

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184 *Saluka v. Czech Republic*, ¶297.

185 *S. D. Myers v. Canada*, ¶263.

186 Notice, p. 5, ¶29, lines 151-152.

187 *El Paso v. Argentina*, ¶516.

188 *Commentaries to ARS*, p. 62.

189 *Vesel*, p. 556.

of discrimination prohibited by a trade agreement, etc. Some of the most serious wrongful acts in international law are defined in terms of their composite character. The importance of these obligations in international law justifies special treatment in Article 15.[190]

128. *Commentaries to ARS* further makes a clear distinction between a "composite act" and, a "complex act", which is defined as:

> "*…the aggregate of a series of actions or omissions on the part of a single organ or*, *more frequently*, *of various organs*, *relating to a single matter and not*, *as in the case of a composite wrongful act*, *to a series of separate and independent situations*" [emphasis added].[191]

129. In the ILC's deliberations, the "complex act" was conceived in relation to international obligations to achieve a particular result, under which each State was free to select the means for achieving the result.[192] Put differently, the ILC considered that a State's freedom to choose the means for meeting the obligation meant that a breach was not certain to have occurred until it was "complete" in the sense that "*even the last organs which could still have rectified the situation and brought about the result required by the international obligation must have failed to do so*".[193]

130. ILC's focus was not on assessing the existence of a general proposition according to which a breach could be constituted by a series of actions rather than a single action, but rather on identifying "*the time of breach*" for the purpose of determining whether the international obligation was in force for the State in question.[194] The fact that ILC included a narrow and specific conception of "composite act" but omitted the conception of "complex act" meant that the general proposition was

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190 *Salmon*, p. 94.

191 *ILC*, p. 94.

192 *Salmon*, pp. 94-95.

193 *Ibid*, p. 95.

194 *Vesel*, p. 558.

enshrined in the ARS only in part leaving some confusion as to the status of the broader principle.[195]

131. The ILC members may well have considered that the general proposition was sufficiently self-evident so as not to require specific inclusion, yet the inclusion of a narrow and specific conception of 'composite act' while omitting the conception of "complex act" meant that the general proposition was enshrined in the ILC Articles only in part, leaving some confusion as to the status of the broader principle.

132. *Vivendi* tribunal also adopted a broader principle than the concept of "composite act", affirming that

> "*…it is well-established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation*, *several acts taken together can warrant finding that such obligation has been breached*" [emphasis added].[196]

133. However, in referring to ARS for support, *Vivendi* tribunal could say no more than that Article 15(1) was "*to like effect*".[197] The conception of a "creeping" FET violation articulated by the *El Paso* tribunal involves multiple acts relating to the same case rather than different cases, and thus does not correspond to the ARS definition of a "composite act" but rather to the definition of "complex act" that was not retained in the final ARS.

134. Likewise, in this case, measures taken by Respondent does not fall within the scope of "composite act" either.

135. **To conclude on Submission III**, Mekar has exercised its regulatory power and the measures taken by its administrative bodies and judiciary bodies, individually or taken together, has not violated its obligation under Article 9.9 CEPTA.

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195 *Vesel*, p. 558.

196 *Vivendi v. Argentina*, ¶¶7.5.31-7.5.32.

197 *Ibid*.

IV. THE TRIBUNAL SHOULD AWARD CLAIMANT NO COMPENSATION; IN THE ALTERNATIVE, ANY COMPENSATION AWARDED SHOULD BE REDUCED

136. Since there was no other suitable buyer, Mekar Airservices purchased Vemma's shares in Caeli at market value which is contained in Article 9.21 CEPTA. Therefore, Respondent owed no compensation to Claimant (**A**). In the alternative, considering Vemma's contributory fault and the ongoing economic crisis, any compensation awarded should be reduced (**B**).

A. THE TRIBUNAL SHALL AWARD CLAIMANT NO COMPENSATION

137. Article 9.21 CEPTA clearly provides that

> "*where a tribunal makes a final award against a respondent*, *the tribunal may award*, *separately or in combination: (a) monetary damages* *at a market value*, *except as otherwise provided for in Article 9.12…*" [emphasis added].[198]

138. In this case, Respondent has purchased Vemma's investment at market value and owed no compensation to Claimant. Furthermore, Claimant's submission of invoking MFN clause should be rejected (**1**) and precedent cases supporting "fair market value" standard shall not be considered (**2**).

1. MFN clause shall not be applied

139. MFN clause is a relative obligation. Unlike other BIT obligations, it is not possible to have an advanced and absolute definition to the content of "no less favorable" treatment to be granted by the host state. Everything will depend on what is granted to investors of other nationalities and their investments in the host state. In this, we can say that the host state may only grant to others what it was initially willing to give to some.[199]

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198 *CEPTA*, Article 9.21.
199 *Nikièma*, p.2.

140. Article 9.7 CEPTA provides that:

> "*Each Party shall accord to an investor of the other Party and to a covered investment*, *treatment* *no less favorable than* *the treatment it accords* *in like situations*, *to investors of a third country and to their investments with respect to the establishment*, *acquisition*, *expansion*, *conduct*, *operation*, *management*, *maintenance*, *use*, *enjoyment and sale or disposal of their investments in its territory*" [emphasis added].[200]

141. Therefore, there are three criteria to consider whether MFN clause can be invoked, namely, whether the compensation constitutes treatment (**a**), whether market value standard is "less favorable' than fair market value (**b**) and whether "like situations" occurred (**c**).[201]

(a) Compensation standard in another BIT does not constitute treatment

142. Under the *ejusdem generis* principle, the benefits to be invoked under an MFN clause must be limited to the appropriate Subject matter: '[T]he grant of most-favoured-nation rights on one subject or order of subjects, cannot confer a right to enjoy the treatment granted to another country in respect of a different subject-matter or category of subject-matter'.[202]

143. In addition, in *Maffezini v. Spain*[203] and *Wintershall v. Argentine*[204], the MFN Clause could be invoked only the "substantive treatment" (investment related activity), not including the "procedural treatment". Moreover, allowing the "treatment" to extend to the beneficiary under other treaty leading the subject matter does not deal with the beneficiary under the genuine application treaty that is the CEPTA in this present case. Therefore, the "fair market value" as the compensation to be awarded could not be invoked by the Claimant.[205]

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200 *CEPTA*, Article 9.7
201 *Mclachlan et al.*, p. 344.
202 *Yannaca-Small*, p.601.
203 *Maffezini v. Spain*, ¶¶40,41,45-46.
204 *Wintershall v. Argentina*, ¶¶168-170.
205 *Maffezini v. Spain*, ¶¶40,41,45-46; *Wintershall v. Argentina*, ¶¶168-170.

144. In *RosInvest v. Russian*, tribunal clearly pointed out that issue concerning the amount of the compensation is the jurisdictional clause.[206]

145. This has been recognized by Article 9.7 CEPTA that the "treatment" shall not be included the procedural treatment under other treaties.[207]

146. In *Siemens v. Argentina*, tribunal clearly identified that under VCLT treaty shall be interpreted in good faith and MFN clause shall cover all matters "*…except those expressly excluded…*" as the limitation of MFN clause was specifically agreed by the parties.[208]

147. Therefore, since there has never been any substantive treatment under the MFN Clause,it could not be invoked in this present case.

148. In the alternative, even if the Tribunal rules that the compensation is considered as the substantive treatment, MFN Clause under Article 9.7 clearly identifies that

> "*...Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute 'treatment', and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations*" [emphasis added].[209]

149. To sum up, the "fair market value" as the compensation standard could not be considered as the treatment under the MFN Clause. Therefore, the "fair market value" could not be applied.

(b) Market value is "no less favourable" than "fair market value"

150. The tribunal in *CME v. Czech Republic* pointed out that the "fair market value" is equivalent to that of just "market value" as the compensation that the respondent should pay shall be based on the basic treaty; therefore, the "market value" as the just compensation is "no less favorable" than "fair market value"[210]

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206 *RosInvest v. Russian*, ¶¶91.
207 *CEPTA*, Article 9.7.
208 *Siemens v. Argentina*, ¶¶ 60, 106.
209 *CEPTA*, Article 9.7.
210 *CME v. Czech Republic*, ¶¶493, 497, 500.

151. Therefore, in this present case, the compensation shall be based on the current treaty "the CEPTA" and the "market value" under Article 9.21 of the CEPTA as the just compensation is "no less favorable" than Fair Market Value under Article 13 of the 2006 Arrakis-Mekar BIT.

(c) "Like situations" have not occurred

152. *İçkale v. Turkmenistan* clearly pointed out that just reading the wording from the treaty does not mean that violation of the MFN clause has occurred. Contrarily, such treaty provision shall have the effect to make "like situations" occurred.[211]

153. *Parkerings v. Lithuania* provided that the treatment under the MFN clause shall be accorded to another "foreign investor" in a similar situation.[212] In this case, there has never been any clear evidence that there has been another investor of Arrakis as the foreign investor. Therefore, MFN clause could not be invoked.

2. Cases in favor of "fair market value" standard are not applicable

154. Investment treaties do not typically address the issue of compensation for non-expropriation damages. Customary international law also provides little guidance to the method for measuring "full reparation" in case of violations of FET standard. Hence, tribunals recognized their discretion in this regard.[213]

155. Claimant may make references to cases such as *Crystallex v. Venezuela*,[214] *Lemire v. Ukraine*,[215] *Azurix v. Argentina*[216] and *CMS v. Argentina*,[217] *Enron v. Argentina*[218] in support of the application of fair market value as the compensation standard, which were generally based on two grounds: first, applicable treaties involved are silent on or does not assign a particular standard of compensation for

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[211] *İçkale v. Turkmenistan*, ¶329.
[212] *Parkerings v. Lithuania*, ¶369.
[213] *CMS v. Argintina*, ¶409; *LG&E v. Argentina (II)*, ¶40.
[214] *Crystallex v. Venezuela*, ¶846.
[215] *Lemire v. Ukraine*, ¶149.
[216] *Azurix v. Argentina*, ¶424.
[217] *CMS v. Argentina*, ¶410.
[218] *Enron v. Argentina*, ¶363.

violations other than expropriation; and second, they applied fair market value standard concerning the cumulative nature of the breaches.

156. It was a common problem that BITs did not contain standards of compensation other than that relating to expropriation. Therefore, it was understandable that the tribunal decided to adopt the fair market value as the standard for compensation. However, Article 9.21 CEPTA articulately provides "market value" as the standard of compensation, which is clearly distinctive from the "fair market value" contained in Article 9.12 CEPTA. In this regard, it is not appropriate to borrow the compensation standard from expropriation.

157. Furthermore, as submitted in Submission III, measures taken by Respondent shall not be taken together to give rise to a cumulative breach of FET standard, the second reason is not applicable either.

B. ALTERNATIVELY, ANY COMPENSATION AWARDED SHOULD BE REDUCED

158. Pursuant to Article 39 ARS,

> "*In the determination of reparation*, *account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought*" [emphasis added].[219]

159. Tribunal in *MTD v. Chile* found that the respondent had violated its FET obligation of FET but awarded only 50%of the investor's expenditures, since it found that Chile was only partly responsible for MTD's losses.[220] The tribunal found that the investors had made decisions that unnecessarily increased their risks and for which they should bear part of the damages suffered.

160. In the similar vein, Vemma should bear responsibility for the economic losses due to its high-risky business strategies, such as unreasonable route expansions.[221]

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[219] *ARS*, Article 39.
[220] *MTD v. Chile*, ¶¶242-246.
[221] SUF, p. 31, ¶23, lines 1022-1023.

161. **To conclude on Issue IV**, the Tribunal shall award no compensation to Claimant since neither the MFN clause contained in CEPTA nor the precedent cases can be applied in this case. In the alternative, any compensation awarded should be reduced considering Vemma's contributory fault to its economic losses.

PRAYER FOR RELIEF

In light of the above, Respondent respectfully requests the Tribunal to find that:

1. This dispute constitutes state-to-state arbitration, and the Tribunal does not have jurisdictional standing;
2. *amicus curiae* submission of CRPU external advisors shall be accepted but that of CBFIA shall be rejected;
3. Respondent did not violate FET standard under Article 9.9 CEPTA;
4. Respondent owed no compensation to Claimant; or in the alternative, any compensation awarded should be reduced.

Respectfully submitted on 23 September 2021.

TEAM KRYLOV

COUNSEL FOR

THE FEDERAL REPUBLIC OF MEKAR