IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 9 OF THE BONOORU - MEKAR COMPREHENSIVE ECONOMIC PARTNERSHIP AND TRADE AGREEMENT AND THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES ("ICSID") ARBITRATION (ADDITIONAL FACILITY) RULES

BETWEEN:

Vemma Holdings Inc.

Claimant

AND

The Federal Republic of Mekar

Respondent

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

MEMORIAL FOR RESPONDENT

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ILC Articles with commentaries	Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries

TABLE OF ABBREVIATIONS

AFR	ICSID Additional Facility Rules
Alleged Promised Grounds	CCM's previous represention that the amended MRTP Act would not cover Caeli's cooperation with Moon Alliance members and state subsidies from Bonooru
1994 BIT	1994 Bonooru-Mekar BIT
AMBIT	2006 Arrakis-Mekar BIT
BIT	Bilateral Investment Treaty
Bundle	The 2021 Case
CBFI	The Consortium of Bonoori Foreign Investors
CBFI Submission	Amicus Submission by CBFI
CCM	The Competition Commission of Mekar
CEPTA	Comprehensive Economic Partnership and Trade Agreement between the Commonwealth of Bonooru and the Federal Republic of Mekar
CRPU	Committee on Reform of Public Utilities
CDP	Corporate discount programme
External Advisors	External Advisors to CRPU
External Advisors Submission	Amicus Submission by External Advisors
FFP	Frequent-flyer programme
FET	Fair and Equitable Treatment
First Investigation	First Investigations Conducted by the CCM Against Caeli
FMV	Fair Market Value
Hawthorne	Hawthorne Group LLP
ICSID	International Centre for Settlement of Investment Disputes
Lapras	Lapras Legal Capital

Mekari Subsidies	Subsidies granted airlines for each Mekari citizens traveling on board pursuant to the Executive Order 9-2018
MFN	Most-Favored-Nation
MON Denomination	Respondent's sudden change of policy on 30 Jan 2018 requiring all companies operating in the country to offer goods and services denominated exclusively in MON
MV	Market Value
Mr. Cavannaugh's Award	Mr. Cavannaugh's award in favour of Mekar Airservices in the SCC arbitration
O&D	Origin & Destination
Phenac	Phenac International Airport
PO3	Procedural Order 3
PO4	Procedural Order 4
SCC	The Sinnoh Chamber of Commerce
Second Investigation	Second investigation conducted by the CCM against Caeli
SOE	State-owned enterprise
SACS	Supreme Arbitrazh Court of Sinnograd
SSNIP	The test of small but significant and non-transitory increase in price
Two Investigations	Two investigations initiated by the CCM against Caeli in September and December 2016 respectively
UF	Statement of Uncontested Facts

STATEMENT OF FACTS

Parties to The Dispute

1. Vemma ("**Claimant**") is a Bonoori state-owned enterprise ("**SOE**"), being an airline-holding company with 100% ownership in Royal Narnian, a leading global airline which created the Moon Alliance and served in 178 countries. It is a member of the Consortium of Bonoori Foreign Investors ("**CBFI**").

2. Mekar ("**Respondent**") is a developing nation witnessing burgeoning population growth, prolonged political instability and resource exploitation, thereby adopting a gradual economic development approach. To gain for balanced rights between foreign investors and the State, Respondent entered into CEPTA with Bonooru, replacing the 1994 Bonooru-Mekar BIT ("**1994 BIT**"). It has yet to sign and ratify the ICSID Convention.

Background to the Investments

3. Caeli had been in financial distress since 1994, followed by the unfavorable merger with Aer Caeli in 2003 and the financial crisis in 2008 leading to ballooning debt.

4. In 2011, Claimant invested in the State-owned Caeli by securing bids for controlling 85% stake, leaving 15% ownership to Mekar Airservices, thereby entering into a Share Purchase Agreement with Mekar Airservices, with USD$800M as consideration. Also, Claimant covenanted to sign leasing contracts for Boeing 737 aircrafts on favorable terms.

5. Claimant duly submitted the undertaking requested by the Competition Commission of Mekar ("**CCM**"), as a pre-condition for selection, not to engage in high-level co-operation on competition parameters such as prices, capacity, facilities, and other sensitive information with Moon Alliance members.

6. On 28.10.2011, Caeli received the first subsidy from Bonooru's Horizon 2020 Scheme, owing to the potential substantial benefits brought by Claimant's investment to Bonooru.

7. Subsequently at the first annual shareholders' meetings, despite the caution given by Mekar Airservices representatives, Claimant opted for a regrettably extravagant approach to recklessly expand routes for international routes to Mekar using its A340 fleet, adding 20 new destinations within a year.

8. Caeli's board continued to project optimism notwithstanding the repeated well-reasoned warnings from Mekar Airservices representatives to control exorbitant costs, in view of the fall-winter decline from 08.2011 to 12.2013.

9. While Mekar Airservices representatives sensibly suggested repaying Caeli's outstanding debt and improving financial health with the profits derived from the low old prices in 2014, Claimant insisted upon reckless fleet expansion and slashed airfares.

10. Caeli's short-lived profitability halted in 07.2017 due to its failure to secure steady revenue. The subsequent all-time high old price and the tragic accident of Boeing 737 MAX aircraft in 2018 left Caeli in deep financial distress.

Events Leading to Dispute

11. In 09.2016, considering the market share of Caeli and close-connected Royal Narnian being over 54%, the CCM initiated its First Investigation on Caeli, imposing interim airfare caps set reasonably above Caeli airfare price, which was not protested by Caeli.

12. In 12.2016, the CCM's Second Investigation commenced under the complaint by other small regional airlines in Greater Narnia about Caeli's undercutting policies and privileges enjoyed at Phenac International Airport ("**Phenac**")

13. In 03.2017, Respondent suffered from a phenomenal financial crisis and thus passed a decree requiring all companies operating in the country to offer goods and services denominated exclusively in MON ("**MON Denomination**") to mitigate against capital outflows and secure its macroeconomic situation.

14. By 08.2018, Caeli was found to breach MRTP Act with predatory pricing resulting from frequent-flyer programme ("**FFP**") and corporate discount programme ("**CDP**"), and imposed a MON$150M fine without enforcement. Airfare caps was kept.

15. On 25.09.2018, Caeli was denied subsidies under the Executive Order 9-2018 because of Bonooru's significant stake in Claimant.

16. On 01.01.2019, under Second Investigation, Caeli was also judged as anti-competitive with its excessively low-pricing and exclusionary strategy in Phenac. A MON$200M fine was imposed without enforcement and airfare cap was kept until its total market share with fellow Moon Alliance member decreased to 40% or below.

17. Despite the overwhelming caseload in Mekari Courts, it awarded Claimant every opportunity to voice its grievances expeditiously, exercising its discretion appropriately while considering the evidence on record and the public policy of Respondent.

18. The airfare caps were lifted in late-2019 when Caeli's market share dropped below 40%.

19. On 17.12.2019, Mekar Airservices rejected the offer from a third-party offer from Hawthorne Group LLP ("**Hawthorne**"), an affiliated Sinnoh firm purchasing Claimant's entire stake in Caeli with artificially inflated price.

20. On 11.02.2020 , Mekar Airservices initiated an arbitration with the Sinnoh Chamber of Commerce ("**SCC**") Arbitration Institute after multiple failing negotiations regarding Hawthorne's offer with Claimant.

21. On 09.05.2020, Mr. Cavannaugh, the sole arbitrator, ruled in favor of Mekar Ariserices ("**Mr. Cavannaugh's Award**"), which was subsequently enforced by Mekari Courts with proper discretion on 23.08.2020. Caeli's further appeal was dismissed.

***Amicus Curiae* Application**

22. CBFI and External Advisors to CRPU ("**External Advisors**") applied for leave to file *amicus curiae* submissions under CEPTA Chapter 9.

23. CBFI is a non-profit industry association representing Bonoori investors in all sectors and of all sizes investing in Greater Narnia and internationally. It is a leader in public

policy advocacy, striving on fostering a strong, competitive economic environment that facilitates growth and development of Bonooru as well as the Greater Narnia.

24. Thirty-eight of its members invest in Mekar, including SRB and Wiig Wealth which are currently pursuing claims against Claimant; another member Lapras Legal Capital ("**Lapras**") is advising Claimant on funding strategies of the current claim.

25. External Advisors advised on privatization, liquidation and/or restructuring of Caeli, specialized in investment banking. Its major scope of work was on preparatory work of Caeli's share auction, *inter alia* performing audit and analysis on technical and financial performance of Caeli, preparation of a financing model, initial price setting, and identification of potential investors. Its remuneration package included both a set fee and a success fee.

26. External Advisors helpfully bring to the Tribunal's attention Claimant's bribery to Committee on Reform of Public Utilities ("**CRPU**") Chairperson Mr. Dorian Umbridge .

Compensation Claim

27. Respondent, rightfully exercising its domestic regulatory power, treated Claimant's investment fairly and equitably.

28. However, Claimant unreasonably requested USD$700M as redress for the fair market value ("**FMV**") of Caeli to redress the alleged fair and equitable treatment ("**FET**") violations and reimbursement of all costs associated with the current arbitration.

SUMMARY OF ARGUMENTS

I. Jurisdiction

29. The Tribunal has no jurisdiction to hear this claim. First, Claimant is a government-owned company ("**SOE**"), which does not fall within the definition of an "investor" under CEPTA Art.9.1, and thus has no standing to claim under CEPTA.

30. Secondly, although "national" under Art.2 of the ICSID Additional Facility Rules ("**AFR**") includes some partially government-owned enterprises, Claimant should be attributed to a state status both under the Broches Test and/or due to its lack of an independent interest, and thus has no standing to claim under the AFR.

II. Leave for Filing Amicus Submissions

31. Leave should be granted for the *amicus* submission of External Advisors ("**External Advisor Submission**") because of the appropriateness of the subject matter for *amicus* submissions and its suitability to act as *amicus*.

32. Leave should be rejected for the *amicus* submission of CBFI ("**CBFI Submission**") owing to its lack of relevant submissions, independence and specific interest.

III. Merits

33. Respondent did not breach CEPTA Art.9.9 because the CCM, the Mekari Executive and Judiciary branch of government accorded FET to Claimant's investment in Caeli on all occasions.

34. There is no accumulated breach of the FET standard on Respondent's part. Respondent did not orchestrate a scheme that consists of a series of acts to coerce the unfairly cheap sale of Claimant's shares in Caeli.

IV. Compensation

35. Claimant is entitled to no further compensation. First, Claimant's loss, being the MV of Caeli at USD$400, has been paid through Respondent's purchase of Caeli's share. Also, Respondent did not cause to Claimant's loss.

36. Alternatively, any compensation under FMV standard shall be reduced due to Claimant's contributory fault and economic crisis.

PLEADINGS

I. JURISDICTION

A. Claimant has no standing to claim under CEPTA

37. Art.31(1) of the Vienna Convention on the Law of Treaties ("**VCLT**"), to which Bonooru and Respondent are parties, requires treaty interpretation to comply with the "*ordinary meaning […] in their context and in the light of its object and purpose*".

i. Ambiguous treaty language

38. The applicability of CEPTA Ch.9 is set out in Art.9.2, where a claim must be concerned with "*a measure adopted or maintained by a Party in its territory relating to an investor of the other Party*".

39. Art.9.1 defines "*investor*" as, *inter alia*, "*an **enterprise** with the nationality of a Party or seated in the territory of a Party that seeks to make, is making or has made an investment in the territory of the other Party*".

40. A plain reading of these articles indicates that they leave open the issue of whether an SOE should be treated as an *enterprise* under CEPTA.

ii. Context of the treaty

41. Further, in the context of the treaty, as per VCLT Art.31(1), neither the preamble nor other CEPTA articles indicates the contracting States' intentions on this matter. The preambles do not provide any indication either.

42. It is concluded that ordinary meaning of the Arts.9.1 and 9.2 as to the inclusion of SOE is ambiguous under general rule of interpretation. Therefore, pursuant to VCLT Art.32(a), supplementary means of interpretation is adopted.

iii. Supplementary means of interpretation

43. VCLT Art.32 provides a non-exhaustive list of supplementary means of interpretation, including the circumstances of treaty conclusion. Under the supplementary means of interpretation, CEPTA excludes SOE from its application.

a. Removal of SOE from the scope of application

44. Circumstances mean "*factual circumstances present at the time of conclusion and the historical background of the treaty*", supposedly considered by the people who concluded the treaty.[1]

45. Taking the circumstances of the conclusion of CEPTA into account, the then-prevailing treaty between Bonooru and Mekar, 1994 BIT, should be examined. 1994 BIT expressly includes SOE as an "*enterprise*",[2] and thus an "*investor*":[3] *'"enterprise" means any entity…whether privately-owned or* ***government-owned****…*'.[4] However, such reference to include government-owned entities is removed in Art.9.1, the equivalent provision in CEPTA.

46. Moreover, CEPTA Art.1.6 provides that rights derived from 1994 BIT "*will cease to have effect from the date of entry into force of this Agreement* (CEPTA)." In this case, as the rights of SOE is a right derived from 1994 BIT, and not provided again expressly in CEPTA, such rights will cease to have effect now, after CEPTA entered into force.

47. These circumstantial observations indicate that Bonooru and Respondent both intended to exclude SOE from the purview of the then-newly concluded CEPTA.

b. Restrictive principle

48. Under the restrictive principle (*dubio mitius* rule), it should not be interpreted to impose States with the burden to fulfil the obligations *vis-à-vis* SOE. Under this principle, in cases of ambiguity, an interpretation "*less onerous to the party assuming an obligation*" is preferred.[5]

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[1] Dörr, ¶22.
[2] Art.I(a), 1994 BIT.
[3] *Ibid.*, Art.I(d).
[4] *Ibid.*, Art.I(a).
[5] Mbengue, p.394.

49. This principle has been recognized as a means in aid of interpretation. The ICSID Tribunal in *SGS*[6] expressly adopted it in its interpretation of the Pakistan–Switzerland BIT. Moreover, the World Trade Organization Appellate Body clearly pronounced that the restrictive principle '*[is] widely recognized by international law as a "supplementary means of interpretation"*'.[7] Therefore, Mbengue concluded that the restrictive principle is a legal presumption proper to international law that can be used as supplementary means of interpretation under VCLT Art.32.[8]

50. Here, CEPTA Chapter 9 imposes obligations on the Respondent to guarantee Claimant's investment interests. Arts.9.1 and 9.2 are the specific provisions delineating the scope of investors Respondent would be liable to.

51. Applying *dubio mitius*, when comparing the competing interpretations of including or excluding SOEs as "*enterprises*" and "*investors*", that excluding SOEs would be *less* onerous as Respondent would be responsible to a narrower range of entities, and such interpretation should be preferred.

52. To conclude, utilizing the ordinary and supplementary means of interpretation under VCLT, CEPTA Arts.9.1 and 9.2 should be interpreted to exclude SOEs from the protection of CEPTA. As Claimant is an SOE, it is not entitled to claim under CEPTA. Therefore, the Tribunal has no jurisdiction.

B. Claimant has no standing to claim under AFR

i. Partially government-owned companies can be "*nationals*" under AFR Art.2

53. The ICSID Tribunal in *CSOB*[9] stated that "*juridical persons*" and "*national*" in ICSID Convention Art.25 was intended to "*embrace also wholly or partially government-owned companies*".

[6] ¶171; Mbengue, p.395.
[7] *Hormones*, ¶165, fn 164; Mbengue, p.395.
[8] Mbengue, p.394.
[9] *CSOB,* ¶16.

54. The ICSID Tribunal is established by the ICSID Convention to "*provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States*". Further, AFR authorizes the ICSID Secretariat to administer proceedings between States and nationals of other States that fall outside the scope of the ICSID Convention.[10]

55. AFR Art.2 sets out the scope of the said authorization. The proceedings must be "*between a State (or a constituent subdivision or agency of a State) and a national of another State*", where "*either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State*".

56. In this understanding, AFR is made to extend the jurisdiction of the Tribunal established by the ICSID Convention, and both AFR and the ICSID Convention use concepts "*State*" and "*national of a State*" to delineate the Tribunal's jurisdiction. Therefore, AFR is also intended to allow partially government-owned companies to qualify as a "*national*" of a State, subject to the test below.

ii. Broches criteria is the applicable test

57. The applicable test supplemented to the ICSID Convention should be adopted to the AFR. The ICSID Tribunal in *CSOB*[11] accepted that the qualification of a company as a "*national*" depends on whether it satisfies the Broches factors. The factors are adopted again by the ICSID Tribunal in *BUCG*[12] as *"[laying] down markers for the non-attribution of State status*" under the ICSID Convention.

58. The formulation by Aron Broches, the main drafter of the ICSID Convention, quoted in *CSOB,* provides that an SOE should not be disqualified as a '*national of another Contracting State*' unless it is:-

(1) Acting as an agent for the government or

(2) Discharging an essentially governmental function.[13]

[10] Introduction, AFR.
[11] *CSOB,* ¶17.
[12] *BUCG*, ¶34.
[13] Broches, ¶354–5.

a. Structural test: Claimant acts as an agent of the State

59. Firstly, from the date of incorporation until March 2020, the State maintained a sizable shareholding of 31-38%,[14] which is a significant portion.

60. Secondly, in terms of control and direction, Bonooru controlled Claimant through:-

(a) The non-executive director nominated by the Ministry of Transport and Tourism and;[15]

(b) Its representatives in the Board of Directors, forming a majority of members present and voting from time to time.[16]

As the Board is prescribed to be "*the Company's decision-making authority*",[17] the State's extensive participation in the Board indicates its power to control and direct Claimant's decisions, including that to invest in Caeli.

61. Thirdly, several signs indicate the State's informal directions to the company:-

(a) State directions in actual company operation: Recognised by the Constitutional Court of Bonooru, the State has power to ensure the utilization of the Royal Narnian, a wholly owned subsidiary of Claimant,[18] in pursuit of public benefit.[19] This can be achieved despite the State only having "*minority participation*" in Claimant.[20]

(b) The Prime Minister of Bonooru asserted that the government would direct Claimant in terms of its choice of routes, *regardless of profitability*.[21]

(c) The subsequent appointment of Ms Sabrina Blue, erstwhile head of Claimant's board of directors, to be the Secretary of Transport and Tourism due to cabinet

[14] UF, ¶10.
[15] Bundle, p46.
[16] PO3, ¶3.
[17] Bundle, p45.
[18] UF, ¶10.
[19] Bundle, p43, ¶59.
[20] *Ibid.*
[21] UF, ¶8.

reshuffling, signifies Ms Blue's status as a governmental personnel or *aide*, who could channel the State's directions regarding investment in Caeli.

62. Viewing the above facts in *totality*, Claimant is an agent of the State.

b. Functional test: Claimant discharges an essentially governmental function

63. Claimant invested in Caeli *jure imperii*. The investment serves to fulfil State obligations and policy objectives, shown in the facts below.

64. Firstly, Claimant is a "*national airline*" in its Memorandum of Association, and it would "*continue business*" in such a manner despite its restructuring to include new investors.[22] As the Memorandum should guide Claimant's operations at all times, this signifies its nature to serve national instead of commercial interests, including investment in Caeli.

65. Secondly, Claimant's operation is to fulfill the Bonooru's *constitutional duty*. As recognized by the Constitutional Court, Bonooru has a positive duty to enable mobility rights of citizens, which applies to air travel.[23] The Memorandum of Association also requires Claimant to operate for the benefit of the Bonoori population under Art.70 of the Constitution Act.[24] Through investing in Caeli, air transportation to and from Bonooru is more convenient,[25] and connectivity can be improved with the utilization of Phenac, which is "*closer to nearly 90 major regional airports in surrounding high-traffic destinations*".[26] These help develop the aviation industry and the civil aviation infrastructure to fulfil the said constitutional duty.

66. Thirdly, Claimant's bid in the purchase of Caeli's stake was not selected on *commercial merits*, which was a determinative factor for attribution to a commercial status in

[22] Bundle, p44, ¶3a.
[23] Bundle, p43, ¶56.
[24] ¶3h.
[25] Bundle, line 1866.
[26] UF, ¶27.

BUCG.[27] It is undisputed that selecting members were skeptical about the commercial prospect of Claimant's business model, whereas the Chairperson of CRPU cited Claimant's ties to Bonooru and the attraction to Bonoori investment to invest in Mekar in the deliberations, which eventually led to Claimant's successful bid.[28] These show that Claimant was selected not on commercial strength, but State's connections, thus being strongly suggestive of a State status.

67. Fourthly, Claimant's investment in Caeli was not for profit, but for *furthering State policy objectives*. As former Bonoori official Kasumi suggested, Claimant-owned Caeli focused on Mekar-Bonooru flights that were unprofitable.[29] She also suggested that[30] such operation was related to Bonooru's Caspian Project, which facilitated goods, people, services and knowledge movement.[31] It is also related to the Horizon 2020 scheme, which fostered tourism in Bonooru and under which Claimant received governmental subsidies.[32] Also, such arrangements of routes are more beneficial to Bonooru than to Claimant and Caeli. Therefore, the investment aimed at furthering State policy instead of commercial objectives.

68. As shown in the abovementioned facts, Claimant discharged an essentially governmental function. By the structural and/or the functional test, Claimant should be attributed to a State status. As it is not a "*national*" but the "*State*", it has no right to claim under AFR. Therefore, the Tribunal has no jurisdiction.

iii. Unity of interest between the State and Claimant

69. Further or in the alternative, Claimant should be attributed to a State status because it "*acts indistinctively as one*"[33] with the State in this claim. When the entity bringing a case is a "*mere shell*", it can hardly be an independent legal body capable of pursuing an autonomous interest other than that of its "*effective*" controller, and possess the full procedural capacity to institute proceedings.[34]

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[27] *BUCG*, ¶¶40-41.
[28] UF, ¶24.
[29] Bundle, lines 1866-1867.
[30] *Ibid.*, lines 1868-1871.
[31] UF, ¶4.
[32] *Ibid.*, ¶28.
[33] Badia, p.202.
[34] Cortesi, pp.113-114.

70. Subsequent to Bonooru's bail-in on 02.03. 2021, interests of Bonooru and Claimant have been intertwined, and Bonooru controls Claimant in its operations and in bringing this action. These are evidenced by the facts that:-[35]

(a) Bonooru has a controlling stake of Claimant at 55% now;
(b) Government functionaries are in place of the Board of directors;
(c) Claimant is used for paramilitary purposes; and
(d) Government lawyers participated in the current arbitral proceedings.

71. Therefore, Claimant is not independent from the State, has no procedural capacity to bring this action, and should be treated as the State itself. As it is not a "*national*" but the "*State*", it has no right to claim under AFR. Therefore, the Tribunal has no jurisdiction.

72. As Claimant has no right to claim under both CEPTA and AFR, the Tribunal has no source of authority, and thus has no jurisdiction.

[35] UF, ¶65.

II. LEAVE FOR FILING AMICUS SUBMISSIONS

73. It is submitted that leave should be granted for the External Advisors' Submission, whereas leave should not be granted for that of the CBFI.

74. Pursuant to AFR Art.41(3) and CEPTA Art.9.19, the following principles on *amici* participation are applicable:-

(1) the non-disputing party submission would 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;
(2) the non-disputing party submission would address a matter *within the scope* of the dispute;
(3) the non-disputing party has a *significant interest* in the proceeding.

A. CBFI's Submission should be granted leave

75. Specifically, leave should be granted to External Advisors for the following two reasons:-

(1) Appropriateness of Subject Matter for *Amicus* Submissions; and
(2) Suitability to act as *Amicus*.[36]

i. Appropriateness of Subject Matter - Public Interest

76. It is appropriate to adduce External Advisors' submission because it is in public interest to do so.

77. It is trite that public interest exists if the applicant demonstrates that the Tribunal's decision is likely to affect "*persons beyond those immediately involved as parties in the case*".[37]

[36] *Aguas*, ¶17.
[37] *Apotex*, ¶¶42-43; *Glamis Gold* ¶269; *Sociedad*, ¶18; Born, pp.626-665.

78. Here, the present dispute goes far beyond the legality of the Claimant's investment alone and reflects its global implications for the Mekari investment protection regime.

79. In particular, the element of public interest is amplified by the potentially wide implications, being the effect of the present decision on:-

(1) Mekar's future regulatory interest in investor-State dispute settlement to address public policy issues fairly and in an unbiased manner;[38] and thereby
(2) the confidence of foreign investors whose confidence could reasonably be shaken by the alleged corruption and malfeasance in office by Mr. Dorian Umbridge during the bidding process of Mekar's CRPU tainted by corruption.[39]

80. Most importantly, the international responsibility of a state, Respondent, is at stake. This case concerns Respondent's regulatory power under domestic and international law.[40] The exercise of such regulatory power is a matter of public interest which supports admission of *amicus* submissions.[41]

81. Thus, the global implications for the investment protection regime are patently beyond the mere protection of the purely private investment between the disputing parties.

ii. Appropriateness of Subject Matter - Relevance

82. There is a strongly held view within the arbitration community that an arbitral tribunal has the power and jurisdiction to consider issues of *illegality* and can do so of its *own motion*, if the issue has not been put before it by the parties.

83. Specifically, it is important to recognize that there are likely to be circumstances where neither party would consider it advantageous to disclose that their agreement was founded on official corruption. Kinyua suggests that *amicus curiae* may have a role to play in bringing forward "*[i]ssues of bribery or corruption*."[42] In this situation, informed amicus curiae can play an important role in bringing relevant allegations of corruption to the Tribunal.

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[38] Bundle, Lines 652-653.
[39] *Ibid.*, Lines 635-637.
[40] *Ibid.*, Line 651.
[41] *Aguas*, ¶18; Crawford, p.624; Brownlie, p.509.
[42] Kinyua, ¶4.1.1.

84. Here, Claimant would understandably choose to conceal such a taint while Respondent might be ignorant of the private association between Claimant and CRPU's Chairperson. External Advisors are thus in the unique position to assist the Tribunal by adducing unbiased facts and providing a different perspective before the Tribunal, especially when evidence of corruption may not be obtained from either disputing party.

85. While Claimant might argue that legality is not expressly included as a requirement to constitute investment, or specially the clear hand doctrine, Respondent could confidently show the Tribunal the contrary.

86. In *Krederi*,[43] the Tribunal, relying on the *international ordre public*, has ruled that corruption should lead to loss of treaty protection, even in the absence of an *express* legality requirement, by rightly identifying that violation of core values such as anti-corruption protected by international law would clearly be not in good faith and could lead to the loss of investment protection under the Treaty, to which this Tribunal should not turn a blind eye.

87. Similarly, in the present proceeding, even when such crucial piece of information is not raised by either of the disputing parties, Respondent would pray that the Tribunal take it into account such significant factual and legal issues of the alleged corruption and violation of criminal laws by allowing the *amicus* application of External Advisors.

iii. Suitability to act as *Amicus* - Expertise & Experience

88. It is trite that Tribunals will only accept *amicus* submissions from persons who HAS established to the Tribunal's satisfaction their expertise and experience to be of assistance.[44]

89. In order for the Tribunal to make that determination, External Advisors have applied to the Tribunal for leave to make an *amicus* submission, furnishing the Tribunal with comprehensive information on their background, experience and expertise with *sufficient* degree of specificity.

[43] ¶¶384-385.
[44] *Aguas*, ¶13.

90. Here, External Advisors are a suitable *amicus* to provide the Tribunal with relevant information given their expertise as:-

(1) independent advisors involved in the entirety of the privatization process;[45]
(2) selected through transparent and competitive process approved by the Cabinet of Ministers of Mekar based on competence;[46] and
(3) actively participating in Committee's deliberation leading up to acquisition of an 85% stake in Vemma.[47]

91. Consequently, External Advisors' well-recognized professional focus in investment banking would render themselves an excellent candidate to contribute reliable information across the privatization, liquidation, and/or restructuring of Caeli,[48] particularly economic, technical and financial performance, financing model and investor identification of Caeli Airways,[49] which are critical to the Tribunal's consideration when assessing merits and compensations.

iv. Suitability to act as *Amicus* - Significant interest

92. AFR Art.41(3) stipulates that the petitioner must have a significant interest in the proceeding. More concretely, in *Von Pezold*, significant interest test was applied to determine the suitability of an *amicus*.[50]

93. Here, External Advisors appear before this Tribunal not only as:-

(1) one of the leading organizations committed to promoting fair business practices in Mekar;[51] but also as
(2) a regular intervener before federal courts in Mekar in relation to judicial proceedings concerning approval for privatization projects.[52]

[45] Bundle, Lines 637-638.
[46] *Ibid.*, Lines 620-621.
[47] *Ibid.*, Lines 622-623.
[48] *Ibid.*, Line 621.
[49] *Ibid.*, Line 625-630.
[50] *Von Pezold*, ¶61.
[51] Bundle, Line 641.
[52] *Ibid.*, Lines 643-644.

94. Thus, External Advisors certainly has a *significant interest* in this proceeding, who regularly advises potential investors prospecting opportunities in Mekar and has been affected by such stagnation in anti-corruption efforts in Mekar in terms of financial operations.[53]

v. Suitability to act as *Amicus* - Independence

95. External Advisors' independence is also evident from its application submissions, especially as independent advisors[54] without assistance, financial or otherwise, from government, person or organization associated with Respondent,[55] which fulfills the requirements set out in *Vivendi*[56] and *Aguas*[57] in no time.

vi. Additional Benefit/ Merit - Transparency

96. External Advisors' strong interest in this proceeding is also based on the transparency requirements in the rules that govern this proceeding, which is critical to the success of an independent and impartial judicial system that guarantees the rights of foreign investors against arbitrary acts of another sovereign, and in this case induces the flow of capital from Bonooru into such States. In other cases, such as *Methanex*, *Suez* and *Biwater*, the significant interest of third parties in participating in Tribunal proceedings has well been recognized, even when they had less direct involvement with the subject matter of those cases than External Advisors' interest in the present case.

97. For example, the Tribunal in *Aguas* pointed out that:-

> *"The acceptance of amicus submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration. Public acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how the process function."*[58]

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[53] Bundle, Line 644-646.
[54] *Ibid.*, Lines 637-638.
[55] *Ibid.*, Lines 660-661.
[56] ¶24.
[57] ¶23.
[58] *Aguas*, ¶21.

B. CBFI's Submission should be denied leave

98. The CBFI's submission with respect to the potential disruption to the current proceeding shall not be accepted as *amicus* brief for its lack of relevant submissions, independence and specific interest.

99. Firstly, CBFI intends to provide no more than the context regarding the business climate of Bonooru, corporate framework and the nature of the industry, which fails to assist the tribunal in comparing and evaluating competing claims by offering a different point of view[59] or a new argument from that of the disputing parties.

100. Secondly, leave shall be denied for CBFI's lack of independence. It is trite that the friend of the Tribunal "*should not be the friend of one of the parties*",[60] especially when independence of the non-party influences the admissibility of the submission.[61] Lapras Legal Capital is advising Claimant on funding strategies with respect to its claim against Mekar,[62] creating a conflict of interest.

101. Further, an applicant must have a "*significant*" instead of a merely "*general*" interest in the arbitration.[63] CBFI in this case possesses no more than a remote financial interest tie to the membership fee it collects from its members, which is not even calculated based upon its members' financial performance such as annual revenue or profit but the number of employees.[64]

102. Based on the submissions aforesaid, the Tribunal shall see that:-

(1) this case is not simply a contractual dispute between private parties where non-parties attempting to intervene as friends of the court might be seen as officious intermeddler; and that

[59] Bundle, Lines 511-512.
[60] Mourre, ¶5(2), 257-271.
[61] *von Pezold*.
[62] Bundle, Lines 543-545.
[63] *Bear Creek*, ¶19.
[64] PO3, ¶11.

(2) it is possible that appropriate nonparties such as External Advisors may be able to afford the Tribunal perspectives, arguments, and expertise that will help it arrive at a correct decision.

103. Rather than to reject offers of such assistance peremptorily, it would be most important for the Tribunal to consider carefully External Advisors' participation as an *amicus*, while taking care to preserve the procedural and substantive rights of the disputing parties and the orderly and efficient conduct of the arbitration.

III. MERITS

104. Respondent accepts that FET is enshrined in CEPTA Art.9.9, which, as the heading suggests, lays down the *minimum* standard of treatment.

105. Respondent however submits that its conducts on all occasions were consistent with FET standards, *inter alia*:-

(1) Respondent neither breached due process nor frustrated Claimant's legitimate expectation, if any, when the CCM instigated investigations and found against Caeli's favour;

(2) Respondent's change of policy on 30.01.2018 by ordering MON Denomination did not deprive Claimant of a stable business environment;

(3) Respondent did not discriminate against Claimant by not granting subsidies to Caeli but to other airlines;

(4) Mekar Airservices as the agent of Respondent did not coerce Claimant to sell Caeli's shares by rejecting Hawthorne's offer;

(5) Respondent neither handled Caeli's judicial review with undue delay nor denied its full access to justice;

(6) Respondent did not commit a substantive denial of justice as the decision to enforce Mr. Cavanaugh's Award was justified; and

106. Most importantly, Respondent strongly opposes that the above occasions, viewed together, constituted an *accumulated* breach of FET standard.

107. Quite on the opposite, Respondent suggests that Claimant started the current arbitration only because they were dissatisfied by Respondent's rightful exercise of its domestic regulatory power. As Respondent submits below, this Tribunal does not act as a court of appeal; Claimant's complaints ought to be dismissed *outright*.

A. The CCM complied with due process of law whilst instigating Two Investigations on Caeli

108. The Two Investigations complied with due process of law on administrative proceedings.

109. CEPTA Art.9.9(2) provides that a breach of FET standard includes a "*fundamental breach of due process [...] in judicial and administrative proceedings*".

110. The starting point is to note that the administrative due process requirement is *lower* than that of a judicial process.[65] Further, it is only when host State acting "*manifestly unfair and unreasonable*" that the standard is found to be infringed.[66] In this regard, the misconduct has to be "*particularly serious*",[67] or in "*gross or flagrant disregard of ... fairness, consistency, even-handedness, due process or natural justice*".[68]

111. The First Investigation was fair and reasonable because the conditions warranting investigations under Ch.III(2)(a)-(c) were all met:-

(1) The CCM was right to add up Caeli's market share with that of Royal Narnian, thereby concluding Caeli had over 50% market share under Ch.III(2)(a), MRTP Act;

(2) In any event, discretion could be exercised to investigate Caeli, even when it had less than 50% market share, under Ch.III(2)(a), MRTP Act;[69] and

(3) Caeli breached anti-competitive provisions in Ch.IV, MRTP Act, and hence satisfying the requirements in Ch.III(2)(b)-(c).

112. Firstly, the CCM could add up Caeli and Royal Narnian's shares because they are in the same market:-[70]

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[65] *Thunderbird*, ¶200.
[66] *Waste Management*, *II*, ¶98; *AES*, ¶9.3.40; McLachlan, ¶7.176.
[67] *Genin*, ¶371.
[68] *Al Tamimi*, ¶390.
[69] Ch.III(2)(a), MRTP Act.
[70] ECA Air Traffic Working Group, ¶36; Sciaudone, p.43.

(1) Market definition could be *widened* instead of adopting a traditional Origin & Destination ("**O&D**") analysis if an airline enjoys network effects.[71] Considering network effects of the Moon Alliance, the relevant market of Caeli was the routes that Caeli and Moon Alliance members operate.

(2) In any event, if the traditional O&D approach is adopted, the relevant market of Caeli was a combination of international long-haul and regional short-haul routes. Particularly, Caeli's long-haul cross-continental flights using her A340 fleet were in the same market with Royal Narnian's international routes.[72]

(3) This is consistent with the SSNIP test in defining the relevant market – Caeli could increase airfare price without losing customers in the market of international long-haul and regional short-haul routes.[73]

(4) Regarding airline category, both Caeli and Royal Narnian were full-service carriers.[74]

(5) Both point-to-point passengers and connecting passengers belong to the same relevant market.[75] Therefore, although Caeli served connecting passengers, she could still be in the same relevant market with Royal Narnian.

113. Secondly, the CCM was right to exercise discretion to investigate Caeli when she had 43% market share:-

(1) Pursuant to Ch.III(2)(a), the CCM "*may exercise discretion in industries that require special attention*".

(2) A firm with 40-45% market share is dominant, which warrants a CCM investigation.[76]

(3) Further, the case of *Virgin/British Airways* is apposite. The Court held that British Airways' 39.7% market share established market dominance because

[71] *Lufthansa/Eurowings*, p.14; *BMI/United Airlines*, ¶69; ECA Air Traffic Working Group, ¶¶25, 26.
[72] UF, ¶¶11, 29.
[73] Sciaudone, p.41; UF, ¶¶30, 34.
[74] UF, ¶¶11, 34.
[75] ECA Air Traffic Working Group, ¶11; *Lufthansa/Eurowings*, p.14; UF, ¶¶27-28.
[76] *United Brands*, pp.214, 218; Kalén, p.14; Tokarczuk, p.13.

she enjoyed "*structural position of offering largest selection of flights*" in her hub airport.[77] Similarly, with her structural position in Phenac on slots, Caeli dominated the market with her 43% market share.[78]

(4) Regarding other factors indicating dominance, Caeli enjoyed "*a highly developed sales network*", further proving her dominance.[79]

114. Thirdly, Caeli engaged in anti-competitive acts defined in Ch.IV, MRTP Act, and thereby breached Ch.III(2)(b)-(c):-

(1) Caeli "*created unique threat to competition*" and "*pushed competitors out of the market*" by creating barriers to market entry,[80] in that:-

i. *Slots*. Caeli acquired the valuable slots in the congested Phenac intentionally and engaged in preferential secondary slot-trading with Royal Narnian, whereby secondary slot-trading by airlines having a dominant position is anti-competitive;[81]

ii. *Operation structure*. Caeli adopted a hub-and-spoke structure where Phenac was its "*fortress hub*",[82] and thereby created entry barrier by "*coordination of resources*" at a "*congested airport*".[83]

iii. *Ground handling*. Caeli dominated in the ground handling with her profitable subsidiary CA Handling,[84] where there was no self-handling in Phenac to disprove Caeli's monopoly;[85]

iv. *Strategic behaviours*. Caeli's FFP and CDP created network effects among Moon Alliance members, given that passenger's choice for an airline or alliance would be influenced by such network effects.[86]

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[77] *Virgin/British Airways*, ¶¶47, 91.
[78] UF, ¶21.
[79] *Ibid.*, ¶48.
[80] Ch.III(2)(b)-(c), MRTP Act.
[81] Jaap de Wit, p.43.
[82] UF, ¶38.
[83] *Lufthansa/AuA*, ¶¶78, 99(a).
[84] UF, ¶21.
[85] *Swissair/Sabena*, ¶34.
[86] *British Midland/United Airlines*, ¶68; *Air Canada/Canadian Airlines*, ¶2.83.

(2) Caeli's membership in Moon Alliance brought no efficiency gain to passengers because there was a great degree of services overlapping between Caeli and Royal Narnian.[87]

(3) A firm engaged in predatory pricing when she charged her customers at average variable costs.[88] Given that Caeli's business model was "*based around undercutting competition with low prices*", which it "*can't afford to keep*",[89] customers were charged by Caeli at average variable costs instead of marginal costs. Caeli was engaging in predatory pricing.

115. Additionally, the Second Investigation was justified because the conditions for the CCM to instigate that investigation in Ch.III(3), MRTP Act were met.

116. In this regard, Caeli was a "*direct competitor*" of regional airlines under Ch.III(3)(a), MRTP Act:-

(1) One of the pillars of Caeli's business was Mekar-Bonooru routes, which were *regional* routes because the two countries were only 1,600km apart,[90] whereas regional airlines flew intra-Greater Narnian routes.[91]

(2) Caeli had at least 68 Boeing 737 planes for regional routes.[92]

(3) The fact that Caeli served connecting passengers whereas regional airlines served point-to-point passengers was irrelevant because both point-to-point passengers and connecting passengers belong to the *same* relevant market.[93]

117. Regional airlines have brought sufficient evidence on Caeli's potential anti-competitive behaviours under Ch.III(3)(c):-

(1) Caeli intended to push regional airlines off the market because she was charging each customer at average variable costs, i.e. below marginal costs.[94]

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[87] *British Midland/United Airlines*, ¶132; UF, ¶¶11, 29.
[88] Sciaudone, pp.45-49; *Akzo*, p.3372.
[89] Bundle, Lines 1890-1892.
[90] UF, ¶¶12, 28.
[91] UF, ¶29.
[92] UF, ¶¶27, 35.
[93] ECA Air Traffic Working Group, ¶11; *Lufthansa/Eurowings*, p.14; UF, ¶¶27-28.
[94] Sciaudone, pp.45-49; Akzo, p.3372.

(2) Caeli was not competing with trains, cars and buses because the latter were not alternatives to Caeli's low-cost O&D routes, [95] further proving Caeli's dominance in the market.

118. Further, whilst FET standard is breached when power is misused by host State for improper purposes, [96] Respondent did not abuse her power because the Two Investigations were justified.

119. Further, Respondent's instigation of the Two Investigations were neither "arbitrary conducts"[97] nor "*a wilful disregard of due process of law*"[98] because they were justified under internationally accepted competition laws. In other words, the Two Investigations did not aim to damage Claimant's investments, but to ensure a competitive airline industry.[99]

120. Further or alternatively, admittedly, FET standard is infringed when representations, made by host State, reasonably relied on by a claimant are breached by subsequent acts of host State.[100] However, such representation shall also be "*a clear and identifiable commitment*",[101] whereas mere *political* statements would not be relevant.[102]

121. In this regard, an investor could not claim a violation of legitimate expectation whilst herself engaging in "*illegal operation*" and thereby having "*unclean hands*".[103]

122. Although the CCM previously represented that the amended MRTP Act would not cover Caeli's cooperation with Moon Alliance members, and Bonoori subsidies (the "**Alleged Promised Grounds**"), the CCM sought an undertaking from Caeli not to engage in high-level cooperation with Moon Alliance members.[104]

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[95] Macario, p.349; *Olympic/Aegean Airlines*, ¶¶847, 875, 897; UF, ¶38.
[96] *Metalclad*, ¶87; *Tecmed*, ¶174.
[97] Art.9.9(2)(c), CEPTA.
[98] *ELSI*, ¶128.
[99] *Cargill*, ¶¶297-300.
[100] Arts.9.9(1), (3), CEPTA; McLachlan, ¶¶7.176, 7.184; Dolzer & Schreuer, p.147; *Waste Management II,* ¶98; *Occidental*, ¶191; *Saluka*, ¶302.
[101] *El Paso*, ¶378; *Continental Casualty*, ¶261.
[102] *Mamidoil*, ¶643.
[103] *Ibid*, ¶716; *Hesham*, ¶¶645-647; Seifil, p.152.
[104] UF, ¶25.

123. Given that Caeli engaged in high-level cooperation with Royal Narnian on slot-trading, terminals, lounge access and code-sharing, Claimant could not reasonably rely on the Alleged Promised Grounds because those anti-competitive behaviours were "*illegal operations*", rendering Claimant with "*unclean hands*".[105]

124. Therefore, First Investigation neither amounted to a frustration of Claimant's legitimate expectation, nor breached any FET standard.

B. Respondent did not frustrate Claimant's expectation on stable business environment by MON Denomination

i. No breach of legitimate expectation on stable business environment by Respondent

125. Admittedly, a host State is responsible to provide a stable and predictable legal framework and business environment to meet FET standard.[106] However, the requirement of stability is *not absolute* and shall not affect host State's sovereign power to legislate in accordance with changing circumstances.[107]

126. Further, an investor's legitimate expectation on stable business environment would be seriously reduced considering general instability on political conditions of host State.[108] Particularly, the Tribunal would examine "*the political, socioeconomic, cultural and historical conditions prevailing in the host State*".[109]

127. Here, Respondent wielded the sovereign power to enact MON Denomination swiftly to rescue the Mekari economy from collapse. In return, Claimant's investment in Caeli could be preserved as the Mekari economy weathered the crisis with MON Denomination.

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[105] *Mamidoil*, ¶¶643, 716
[106] Dolzer & Schreuer, p.147; *Occidental*, ¶191.
[107] Dolzer & Schreuer, p.148; *Parkerings*, ¶332; *MTD*, ¶178; *El Paso*, ¶352.
[108] *Bayindir*, ¶¶192-193; *Saluka*, ¶304; *Ukraine*, ¶ 20.37.
[109] *Duke Energy*, ¶340.

128. In any event, Claimant had no legitimate expectation upon stable business environment in Mekar because Mekar had general and prolonged political instability previously.[110] Any reliance on Respondent's stable business environment was unreasonable.

129. In addition, the Tribunal would weigh an investor's legitimate expectations against host State's duty to act in public interest.[111] Here, grave public interest of rescuing the whole economy was at stake to prompt Respondent to enact MON Denomination.

ii. In any event, the defence of necessity could be made out

130. Further, the necessity defence under the ILC Articles (State Responsibility) Art.25 could be made out.

131. Firstly, the MON Domination was "*the only way*" for Respondent to weather the economic crisis.[112] As a developing nation with limited fiscal reserves, Respondent could only impose denomination decrees but cannot launch fiscal stimulation measures or facilitate credit access to producers to get through the economic crisis.[113]

132. Secondly, the necessity defence is applicable herein. In *LG&E*, Argentina made out the defence successfully for her measures in compelling investors to denominate in Pesos instead of USD for a limited period, given that such measure was "*necessary to maintain public order and protect essential security interests*".[114]

133. Had Respondent not acted swiftly to enact MON Denomination, the Mekari economy would have collapsed and, with historical precedents, extremely severe crises in political, economic and social sectors would have happened.[115] MON Denomination was therefore necessary.

134. Further, Respondent did not contribute to the situation of necessity.[116] The predominant causes of the economic crisis were in dispute, which included, *inter alia*, shaky investor

[110] UF, ¶12.
[111] *Saluka*, ¶306; *Total*, ¶¶123, 309.
[112] Art. 25(1), ILC Articles (State Responsibility).
[113] Gurtner, ¶¶22-24; *Total*, ¶223.
[114] *LG&E*, ¶226.
[115] *LG&E*, ¶231; UF, ¶12;
[116] Art. 25(2), ILC Articles (State Responsibility).

sentiment and tariff threats from trading partners.[117] Claimant had insufficient evidence to allege Respondent contributing to the economic crisis in "*sufficiently substantial manner*".[118]

135. In this regard, *CMS*, holding that a plea of necessity was rejected on the ground of Argentina's contribution to the crisis, shall be distinguished[119] because Respondent had no alternatives other than MON Domination, and Respondent did not substantially contribute to the economic crisis.[120]

C. Respondent did not discriminate against Claimant by not granting the subsidies

136. Respondent treated Caeli fairly and equitably even when Respondent did not grant subsidies to Caeli for each Mekari citizens traveling on board pursuant to the Executive Order 9-2018 ("**Mekari Subsidies**").

137. CEPTA Art.9.9(2)(c) provides that host State breaches FET standard when she made "*discriminatory conducts*". This also encompasses national treatment and MFN treatment as they are common forms of discrimination on nationality.[121]

138. Discrimination occurs when an investor received less favourable treatment than another in like circumstances without justification.[122] To establish discrimination, Claimant must prove that there are **(i)** like circumstances; **(ii)** differential treatment; and **(iii)** lack of justifications.[123]

i. Caeli was not in like circumstances with airlines receiving the Mekari Subsidies

[117] UF, ¶39.
[118] *CMS*, ¶¶328-329.
[119] *Ibid*.
[120] *LG&E*, ¶257; Dolzer & Schreuer, p.186.
[121] *Waste Management*, ¶98; *Glamis*, ¶559; McLachlan, ¶7.218; Dolzer, p.195.
[122] *Saluka*, ¶313; *Genin,* ¶368; *Olin*, ¶214, Klager, p.196.
[123] *Bayindir*, ¶399

139. The starting point is to ascertain whether the investor is comparable to another investor,[124] whereby an investor would not be in like circumstances with another when they have *different identities*.[125]

140. Here, Caeli was not in like circumstances with airlines receiving Mekari Subsidies. The predominant recipients of Mekari Subsidies were domestic airlines operating routes *within* Mekar, whereas Caeli operated international routes with cross-continental long-haul routes and intra-Greater Narnian routes.[126]

141. Further, other foreign airlines receiving the Mekari subsidies might not have same business model with Caeli. Subject to more facts, Star Wings and JetGreen might well be low-cost carriers competing in a different market with Caeli.[127]

ii. Respondent did not treat Caeli less favourably

142. Further, the Tribunal shall determine whether an investor was treated less favourably.[128] An investor is treated less favourably than her comparators when the measures have a discriminatory effect in not conferring a benefit to her but to other comparators.[129]

143. Here, Caeli was not treated less favourably by being refused with Mekari Subsidies because the predominant recipients of Mekari Subsidies were *domestic* airlines, implying that many international and regional airlines were also refused Mekari Subsidies.[130]

iii. Respondent's discrimination was justified

144. Regulatory purpose pursuing a legitimate objective is a defence on differential treatments on investors.[131] In this regard, such measure must be connected to a legitimate objective "*with the aim of addressing a public interest matter*".[132]

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[124] *Parkerings*, ¶371; *Total*, ¶210
[125] *Genin,* ¶¶368-369; *BG Group*, ¶357; *El Paso*, ¶315; Dolzer & Schreuer, pp.196-197.
[126] PO4, ¶7; UF, ¶29.
[127] UF, ¶46.
[128] *Total*, ¶210.
[129] *Merrill*, ¶233.
[130] PO4, ¶7.
[131] Mitchell, p.103; *Bayindir*, ¶¶399, 411; *Levy de Levi*, ¶393.
[132] *AES*, ¶10.3.9; Mitchell, p.105.

145. Assuming *arguendo* Mekari Subsidies were differential treatments, they were addressing a public interest matter, aiming to promote the Mekari national security. Domestic airlines have always been a critical industry to the national security of a nation as it could assist military operations.[133] This point is epitomized by Bonooru expanding Claimant's function to conduct paramilitary activities.[134]

146. Here, Caeli was not treated differently. In any event, Caeli was treated differently with justifications. Hence, Respondent did not discriminate against Caeli by refusing to grant Mekari Subsidies.

D. Mekar Airservices did not coerce Claimant to sell Caeli's shares by rejecting Hawthorne's offer

147. Respondent did not coerce Claimant to sell the shares cheaply by rejecting Hawthorne's allegedly *bona fide* offer to buy Claimant's shares in Caeli.

148. CEPTA Art.9.9(2)(d) provides that FET standard is violated if Respondent made "*abusive treatment of investors, such as coercion, duress, and harassment*".

149. In general, it is a high threshold of proving coercion because an investor must prove "*compulsion … created by a superior force*".[135] Usually, the Tribunal would only find for coercion upon "*threats*", "*misrepresentations*", "*attacks on integrity of investment*" and "*attacks to the safety of the staff*".[136]

150. Here, Mekar Airservices exercised her *lawful* rights to reject Hawthorne's non-*bona fide* offer of USD$600M. Neither threats nor misrepresentations were made by Mekar Airservices.

151. An offer is *bona fide* if made at arm's length without collusion between the purchaser and seller.[137] As Claimant took ill-strategised business plans, ran multiple loss-making routes and incurred burgeoning liabilities,[138] Hawthorne's offer at USD$600M was a

[133] Rodrigue, pp.215-217.
[134] UF, ¶65.
[135] *Desert Line*, ¶155.
[136] *Pope & Talbot*, ¶68; *Desert Line*, ¶¶171, 185; McLachlan, ¶7.224;
[137] *United Company Rusal*, ¶¶94-95.
[138] UF, ¶¶51, 56.

bogus offer at an *inflated* price. The actual market price was USD$400M because no other purchasers were willing to take Caeli's shares above this price.[139] Therefore, similar to the Court finding an inflated price as a non-*bona fide* offer in *United Company Rusal*,[140] Hawthorne's offer being USD$200M above Caeli's actual market price was not made at arm's length, and thereby not a *bona fide* offer. Therefore, Mekar Airservices was entitled to refuse the transaction between Claimant and Hawthorne.

152. Further, Hawthorne was not a "*bona fide* ***third-party***". Being members of Moon Alliance, Claimant and Hawthorne were affiliated entities which were susceptible to collusions. Consequently, Hawthorne was an affiliated party with an intention to assist Claimant.[141]

153. Therefore, Mekar Airservices exercised her legitimate right to reject Hawthorne's non-*bona fide* offer, and consequently did not coerce Claimant to sell Caeli's shares. No FET standard was breached.

E. Respondent did not handle Claimant's judicial review in a way that denied justice

i. Claimant's judicial review was not handled with undue delay

154. FET standard under CEPTA is breached if a measure or measures constitute a denial of justice in criminal, civil or administrative proceedings.[142] Respondent accepts that a denial of justice could be pleaded if the national courts subject judicial proceedings to undue delay.[143]

155. However, as one form of denial of justice, the threshold to establish undue delay is high. The error on the part of the national court needs to be "*manifest injustice*" or "*gross*

[139] UF, ¶63.
[140] *United Company Rusal*, ¶¶64, 143.
[141] *Ibid.*, ¶64.
[142] Article 9.9(2)(b), CEPTA.
[143] *Azinian*, ¶102; *O and L*, ¶274; *Iberdrola*, ¶432 cited by *Krederi*, ¶444.

unfairness",[144] "*flagrant and inexcusable violation*",[145] or "*palpable violation*" in which "*bad faith […] seems to be the heart of the matter*".[146]

156. Similarly, the overarching test for denial of justice is "*whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome*".[147]

157. Claimant submits its judicial review against the CCM's interim airfare caps on 27.03.2018, and the interim hearing was scheduled on 04.2019.[148] Respondent submits that the 13-month delay was reasonable and not undue.

158. In determining whether justice is rendered within a reasonable delay, a long period of delay is not conclusive.[149] The Tribunal will examine the circumstances and the context of the case.[150] In particular, the Tribunal will take note of **(1)** the complexity of the matter,[151] **(2)** the behaviour of the national court,[152] and **(3)** the circumstances affecting the national court's docket.[153]

159. *Matter's Complexity*. It is inaccurate to say that interim hearings are necessarily unsophisticated. Although the standard of proof governing interim hearings under the Mekari law is the "*balance of convenience*",[154] there is still a need for the court to review the merits of the case to decide whether to exercise the discretion under Executive Order 5-2014.

160. Executive Order 5-2014 empowers the Mekari court to dismiss without appeal a case by way of summary judgment.[155] The judge would be required to review the merits of parties' case, and to dismiss Claimant's case if it has "*very little chance of success on the merits*".

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[144] Gamer, p.183.
[145] Arechaga, p.282.
[146] O'Connel, p.498.
[147] *Mondev*, ¶127.
[148] UF, ¶44.
[149] *Jan de Nul*, ¶204.
[150] *Chevron*, ¶250.
[151] *Toto*, ¶163; *White Industries*, ¶10.4.10; *Chevron*, ¶250; *Oostergetel*, ¶290.
[152] *Chevron*, ¶250; *White Industries*, ¶10.4.10; *Oostergetel*, ¶290.
[153] *Toto*, ¶165.
[154] UF, ¶54.
[155] PO3, ¶8.

161. *Court's Behaviours*. A state can only be held liable for denial of justice when it has not remedied the denial domestically, as there is no denial of justice unless and until local remedies are exhausted.[156]

162. Even if the 13-month period may have been longer than satisfactory, the Mekari Court has already managed to dispense justice speedily in the overall case management. Undue delay, if there had been any, was ratified.

163. In making his judgment on 15.06.2019, Justice VanDuzer expressly explained that the basis for him to exercise his discretion under Executive Order 5-2014 is to "*save the precious resources of our courts*" and to "*avoid the parties waiting in anticipation*".

164. It was on this basis that the Mekari court conducted a preliminary screening on the merits of Claimant's case. To dispense justice effectively, in the April 2019 hearing, the Mekari court not only "*balanced*" the "*convenience*", as the court would do in normal interim hearings, but also proceeded to consider the merits of Claimant's case.

165. *National Court's Circumstances*. When determining whether delay was undue, it must be borne in mind that the Mekari judicial system has been swamped with a high volume of cases since the beginning of the economic crisis.[157]

166. In fact, as the Court Registrar explained to Claimant, the Mekari court system does not have the resources to allow parties immediate redressal as Respondent prioritises criminal matters.[158] This is reasonable as Mekar is after all still a developing country recovering from its past political turmoil.[159] With scarce resources, rising crime rate that follows economic downfall deserves priority for its far-reaching impact on society's well-being.

167. In any event, it is submitted that a 13-month delay is far below the high threshold required to establish a denial of justice.

ii. Access to justice was not denied when Respondent dismissed without appeal Claimant's case by summary judgment

[156] Paulsson, pp.245-246.
[157] UF, ¶44.
[158] UF, ¶44.
[159] UF, ¶12.

168. Respondent accepts that justice is also denied when a national court unjustifiably refuses to hear a matter within its competence, such that access to justice is prevented.[160]

169. It is anticipated that Claimant would argue that Executive Order 5-2014 denied access to justice, or that the same was misapplied by the Mekari Court. Respondent strongly objects both arguments.

170. Access to justice protects the right for foreigners to:-

> "*use the Courts fully and to avail himself of any procedural remedies or guarantees provided by the law of the land in order that justice may be administered* ***on a footing of equality with nationals of the country***".

171. No concerns on access to justice should therefore arise as the discretion conferred on judges by Executive Order 5-2014 is applicable to all cases coming before the Mekari Court. Claimant was deprived of the right to put its case at trial because the chance of success does not meet the standard, instead of its status as a foreign investor.

172. Similarly, the rule that a decision to dismiss a case by summary judgment cannot be appealed applies to all claimants. Foreigners and Mekari nationals are treated on a footing of equality.

173. Further or alternatively, there was no misapplication of Executive Order 5-2014. Cases should be dismissed if the court finds there is "*very little chance of success on the merits*",[161] and Claimant's case was accordingly dismissed because it failed to show a *prima facie* case.[162]

174. The test in deciding whether there is a *prima facie* case is to see if the evidence, if uncontradicted, would justify men of ordinary reason and fairness in affirming the

[160] *O and L*, ¶274; *Iberdrola*, ¶432 cited by *Krederi*, ¶444; *Duke Energy*, ¶391.
[161] PO3, ¶8.
[162] UF, ¶54.

proposition which the proponent is bound to maintain.[163] It therefore create a rebuttable presumption that the matter asserted is true, subject to contradiction.

175. Having no *prima facie* case signifies that the evidence adduced by Claimant cannot support its own case before the evidence is subject to contradiction by the opposing party. There is literally no or nearly no chance for its case to succeed on the merits. The discretion is rightly exercised. Access to justice is not denied.

F. Justice was not denied substantively when Respondent decided to enforce Mr. Cavannaugh's Award

176. Repeating [127], undeniably, FET standard is breached if any of Respondent's measures constitutes a denial of justice in judicial proceedings.[164]

177. While there is some academic debate as to whether denial of justice can be substantive, as tribunals do not after all act as courts of appeal,[165] it has become increasingly clear that the content of the national court's judgment is also relevant and should therefore be reviewed.[166]

178. However, not every error in a judgment amounts to a denial of justice. Only when the error is so grave that it constitutes a "*gross miscarriage of justice*", which refers to situations when no impartial judge could have reached the result in question, can it amount to a denial of justice.[167]

179. The dispute between Claimant and Mekar Airservices regarding the validity of Hawthorne's offer was submitted to SCC for arbitration as agreed.[168] Mr. Cavannaugh, the sole arbitrator, handed down an award in favour of Mekar Airservices.

180. Following the release of the CILS Report which alleged that Mr. Cavannaugh was bribed by parties to the arbitration, the SACS set aside Mr. Cavannaugh's Award.

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[163] Cross & Tapper, pp.171-172.
[164] Article 9.9(2)(a), CEPTA.
[165] *Azinian*, ¶99; *Mobil*, ¶167; *Lemire*, ¶283; *Eli Lilly*, ¶¶221-225; *Pantechniki*, ¶¶96-102; *Alps*, ¶¶249-250; *Enkev*, ¶327; *Gavrilovic*, ¶879.
[166] Yannaca-Small, ¶20.41.
[167] Dolzer & Schreuer, Chapter VII(4).
[168] UF, ¶57.

181. Respondent submits there was no denial of justice in enforcing Mr. Cavannaugh, because **(i)** Respondent has the discretion to enforce an award set aside at the seat of arbitration, and **(ii)** the discretion was rightly exercised.

i. Respondent has the discretion to enforce an award set aside at the seat of arbitration

182. It is trite international law principles that the validity of an international arbitral award hinges on transnational legal principles.[169] The international arbitration regime transcends the domestic law of both the seat of arbitration and the enforcing state.

183. This approach is consistent with **(1)** the statutory language in the Commercial Arbitration Act, **(2)** Respondent's jurisprudence, **(3)** legislative intent, and **(4)** international practice.

184. First, *Statutory Language*. ss36(1) and (2) provided a list of grounds on which the national court *may*, as opposed to *shall*, refuse the enforcement of an arbitral award. In other words, even if any of the stipulated grounds are caught, the question of enforcement ultimately turns on the Mekari Court's discretion.

185. Second, *Respondent's Jurisprudence*. Under Mekari jurisprudence, it was explained in *Alta Lumina Trading* that the way how the courts should exercise its discretion depends on *"transnational public policy*", such that "*[the award's] recognition in Mekar is not contrary to transnational public policy*".

186. Third, *Legislative Intent*. It was shown in the *travauz préparatoires* of UNCITRAL Model Law, from which the Commercial Arbitration Act modelled, that the word "*may*" was carefully intended to grant national court the discretion to enforce annulled international awards.

187. The drafters of the UNCITRAL Model Law noted that if the New York Convention's language "*may be refused*" is adopted, it may create ambiguity in that "*it might be*

[169] Gaillard, ¶¶40-58.

construed as giving discretion to the court".[170] The wording "*shall be refused*" was proposed.[171]

188. This proposal was however rejected, and the discretion of national courts was preserved by retaining "*may*" in the final version of the Model Law to minimize the deviation of the Model Law from the New York Convention.[172]

189. Fourth, *International Practice*. In *Yukos Capital*, the English court clearly rejected the principle of *ex nihilo nil fit*,[173] i.e., the legal theory that if an arbitral award is set aside in the seat of arbitration, it ceases to exist in a legal sense. Instead, the court's decision on enforcement of awards depends on whether the awards offended against basic principles of honesty, natural justice, and public policy.[174]

190. Similarly, in *Société Hilmarton*, the French court also held that international award sources its validity from international jurisprudence, instead of the local judicial system at its seat of arbitration in Switzerland. It subsequently ruled that an award can be enforced worldwide despite its being set aside at its seat.[175]

191. As such, Mekari Court is entitled to a discretion to decide whether to enforce Mr. Cavannaugh's award. It is not bound by the Sinnograd's decision to set the award aside. The question that remains is whether the discretion was rightly exercised.

ii. Respondent exercised its discretion rightly

192. Respondent repeats [80], that this Tribunal does not act as a court of appeal. Considering the high threshold to establish denial of justice, this Tribunal should also be slow to interfere the Respondent court's finding of facts and evaluation of evidence.

193. Respondent submits that discretion was rightly exercised because **(i)** the Mekari court's decision is supported by balanced analysis of the evidence, and **(ii)** the decision is consistent with Mekari jurisprudence.

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[170] UN Report, ¶140.
[171] Polkinghorne, p.934
[172] Binder, ¶8-028; Polkinghorne, p.934.
[173] *Yukos Capital*, ¶22.
[174] *Yukos Capital*, ¶20.
[175] *Société Hilmarton*, p.484

194. First, Bundy J at first instance doubted the reliability of the CILS report, as CILS, the publisher of the report, was "*an entity funded by foreign donations to interfere in Mekar's domestic affairs*".[176] No evidence was adduced by Claimant in rebuttal and court is therefore fully entitled to question the authenticity and reliability of the recordings.

195. If circumstantial evidence is to be relied, it needs to be strong under the Mekari law.[177] This is especially so in the present case as conversation revealed in the report is in nature hearsay evidence. Bundy J rightly recognized that and accordingly saw little evidential value in the report.[178]

196. Respondent's court did not stop there. It went on further to review the substance of the final decision and find that it "*reflects the correct position of law*".[179]

197. The Mekari Supreme Court also rightly decided not to interfere with the lower court's detailed findings.[180]

198. Even if the Respondent's court made any mistake or error in the judgments, which none is suggested, it is submitted that they are a far cry from constituting a "*gross miscarriage of justice*".

199. Second, although it is part of Mekari's jurisprudence that decisions made by the seat of arbitration would usually be deferred to when a breach of "*transnational concepts of public policy*",[181] the Sinnograd court judgment only ruled on the "*public policy of the Principauté de Sinnoh*".[182]

200. The Sinnograd court failed to give effect to the principle that the validity of international awards rests on transnational legal principles. Instead, it based its decision on *domestic* principles and public policies. Respondent therefore submits that there are no decisions at the seat of arbitration for it to defer to.

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[176] Bundle, p66, ¶13.
[177] *Ibid*, ¶9.
[178] *Ibid*, ¶10.
[179] *Ibid*, ¶10.
[180] Bundle, p67, ¶6.
[181] *Alta Lumina Trading* (extracted from Annex XV, ¶11).
[182] Bundle, p61, ¶14.

G. Respondent's acts, taken collectively, did not constitute cumulative breach of the FET standard

201. Although the cumulative effect of host State's actions could constitute a separate ground for breach of FET standard,[183] previous Tribunals found for breaches of the FET standard on this ground only when there were separate and individual breaches of FET standards by host State.[184]

202. Particularly, in *El Paso*, the Tribunal held that Argentina's episodes of forcing the investor to sell her shares had the cumulative effect of breaching the FET standard on the basis that the measures "*were regarded, in isolation, as violations of the FET standard*".[185]

203. Here, given that Respondent's measures did not constitute breach of FET standards when considered individually, they would not have a cumulative effect in breaching the FET standard. In that, Respondent had instigated the Two Investigations and rejected Hawthorne's non-*bona fide* third-party offer lawfully.

[183] McLachlan, ¶7.168; Dolzer & Schreuer, p.142.
[184] *Micula*, ¶682; *Walter Bau*, ¶12.43; *Bayindir*, ¶181.
[185] *El Paso*, ¶459.

IV. COMPENSATION

204. Claimant claims an unduly high USD$700M. Even if Respondent has violated FET obligations, Claimant would still have no compensation, as USD$400M Market Value ("**MV**") has already been paid, and Respondent's measures never caused Claimant's loss. Alternatively, compensation shall be reduced.

205. The primary source of international law is the treaty signed between State parties.[186] CEPTA shall prevail over inconsistent international obligations.[187]

206. Three issues shall be dealt with: **(A)** appropriate compensation standard and its associated value; **(B)** causation; and **(C)** mitigation of compensation.

A. MV as the appropriate compensation standard with associated value of USD$400M

207. Claimant is only entitled to MV standard compensation under CEPTA Art.9.21, with USD$400M as MV of Caeli *prior to* purchase of its share[188] or just *after* dismissal of Claimant's appeal by the Superior Court of Mekar.[189]

208. The MV standard here is defined as follows:-

(1) The starting point is to look at the technical meaning of "MV" under customary law:-[190]

> "*the estimated amount […] an asset […] exchange on the valuation date between* ***a willing buyer and a willing seller*** *in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion*"

[186] Sabahi, ¶8.11.
[187] CEPTA, Art.1.4.
[188] UF, ¶63.
[189] UF, ¶62.
[190] Marboe, ¶4.39

(2) However, with silence as to the valuation date under this technical meaning, CEPTA's clauses shall be primarily examined.[191]

(3) Here, a discernible indication to valuation date is under CEPTA Art.9.12(2):

"[…] at the time immediately ***before the expropriation*** *or the impending expropriation became known, whichever is earlier*".

Art.9.12(2) is apt notwithstanding the current claim concerning FET violations and the literal difference because:-

i. The fact supporting FET claim is in essence an expropriation leading ultimate loss of Caeli's share; and

ii. Respondent has been using "FMV" and "MV" interchangeably,[192] so the difference between FMV standard contended by Claimant and MV standard is in essence a difference on valuation date rather than technical meaning.

(4) Therefore, referring to Art.9.12(2), MV standard's valuation date shall be the moment before the sale of Caeli's share or after dismissal of Claimant's appeal.

209. Neither **(i)** CEPTA's MFN clause, nor **(ii)** international law avail Claimant with an FMV standard.

i. MFN clause cannot be invoked to import a better compensation standard

210. CEPTA Art.9.7 laid down Respondent's MFN obligation. However, it cannot be invoked here to import any allegedly more favorable compensation standard.

[191] VCLT, Art.31.
[192] PO3, ¶15.

211. Previously, tribunals interpreted MFN clauses broadly to import substantive benefit.[193] Procedural provisions importation, however, are inclined to be denied.[194] Following the increasing treaty-shopping concern, tribunal has been faithfully applying narrowly-drafted MFN clauses and guarding against unlimited multilateralization of MFN obligation.[195]

212. The starting point in assessing an MFN clause has always been interpretation under VCLT.[196]

213. CEPTA Art.9.7, as per its drafting and tribunal's ruling on similar clauses,[197] set out three cumulative requirements for Claimant to satisfy:- [198] **(a)** like situations; **(b)** more favorable treatment; and **(c)** scope of the treatment.

a. Arakkeen investors/investments are not in "like situations" to Claimant/Caeli

214. The first issue is to evaluate whether Arrakeen investors/investment and Claimant/Caeli are in "*like situations*". Merely investing in the same country does not constitute "*like situations*".

215. *İçkale*[199] famously held the phrase "*similar situations*" would be *effet utile* if merely interpreted to mean investing in the same country, affirmed in *Muhammet*[200]. As explained below, Claimant is protected from *de facto* discrimination, where the comparison test is rigorously applied.[201]

216. Further, *Parkerings* observed that,[202] likeness requirement is likely satisfied if investments belong to the same business or economic sector.[203] Some tribunals even

[193] *MTD (annulment)*, ¶64; *Bayindir*, ¶159.
[194] *Telenor*, ¶92.
[195] Sharmin, pp.120, 135.
[196] Sabahi, ¶17.39.
[197] *UPS*, ¶83; ILC 2015, ¶68.
[198] *UPS*, ¶84.
[199] ¶329.
[200] *Muhammet*, ¶789.
[201] UNCTAD (MFN), p.64.
[202] ¶371.
[203] *SD Myers*, ¶¶248, 250; *Pope,* ¶78.

went further, requiring investment under program with similar policy objectives[204] or both being market new entrants.[205]

217. *Occidental*'s extremely wide interpretation of "*like situations*" can be distinguished:[206] the clause's objective there is investment protection, not liberalization under CEPTA.[207]

218. Here, Claimant cannot even satisfy[208] a lower threshold of identifying Arrakeen investor/investment being in similar logistic sectors, not mentioning similar identities.

b. **FMV standard is not more favorable**

219. Next, Tribunal must assess whether Arrakeen investors were afforded a more favourable treatment than Claimant.

220. In principle, an earlier date of valuation is not itself more favorable.[209] It may give a lower amount of valuation depending on specific context. Sometimes, after treaty violations, subsequent circumstances, such as oil price drop and tourism growth, may increase the value of investment,[210]. This explain why sometimes claimants also claim *ex ante* valuations.[211]

c. **"*Treatment*" does not encompass compensation**

221. The third step is to ascertain the scope of acts/omissions constituting "*treatment*" under CEPTA Art.9.7.

222. First, under CEPTA Art.9.7(2), "*for greater certainty*", treatment "*does not include **procedures"*** for dispute resolution in a third-party treaty. However, the compensation standard in 2006 Arrakis-Mekar BIT ("**AMBIT**") is a dispute settlement procedure:-

[204] *Windstream,* ¶¶397, 414.
[205] *Pope,* ¶93.
[206] Tzanakopoulos, p.491; Ünekbaş, p.383.
[207] CEPTA Arts.1.3(a)-(c).
[208] *UPS*, ¶84.
[209] *BayWa,* ¶52.
[210] *Burlington*, ¶331.
[211] *Burlington*, ¶308.

(1) Under AMBIT Art.13, "*the Tribunal **may award** compensation*" in favor of investors. Plainly read,[212] "*may award*" indicates arbitrators' *discretion*, a mechanism enforcing substantive rights, rather than substantive protection entitled when discretion is exercised.[213]

(2) In common law, it is trite that remedies, as opposed to rights, are deemed as *procedural* issues.[214]

(3) Further, Art.9.7 aim to "*create effective procedures for […] application of this Agreement […]*".[215] It cannot be parties' intentions to render compensation standard uncertain.

223. Alternatively, Respondent submits that any *de jure* discrimination claim, i.e., importation of substantive benefit from a third-party treaty is not allowed under CEPTA Art.9.7.

224. "*Substantive obligations*" in AMBIT do not constitute treatment "*absent measures adopted or maintained*" by Respondent.[216] Naturally interpreted, CEPTA only intended to protect *de facto* discrimination only, i.e., *factual* better treatment on a comparator is required.[217] Thus, any importation of an AMBIT clause is strictly prohibited.

225. This interpretation is further supported by:-

(1) Reading "*treatment*" together with "*like situations*".[218]

(2) Objectives of MFN clause in "*establish[ing] a framework for further bilateral, regional, and **multilateral** cooperation […]*"; and[219]

[212] VCLT, Art.31.
[213] *Sociedad*, ¶12; Talmon, p.982.
[214] *Harding*, ¶13.
[215] CEPTA Art.1.3; VCLT, Art.31.
[216] CEPTA, Art.9.7(2).
[217] Sabahi, ¶17.64; Barifort, p.905.
[218] *İçkale*, ¶329; *Muhammet*, ¶789.
[219] CEPTA, Art.1.3(e).

(3) Respondent's *gradual* liberalization approach[220] and intention to have a treaty adequately *balancing* investors' and host States' rights.[221]

These suggests that treaty shopping is the last thing Respondent would agree.

226. However, repeating above, Claimant failed to point out a specific comparator in like situations receiving more favorable factual treatment.

227. In conclusion, Claimant has failed to establish the three requirements under CEPTA Art.9.7 and merely identified a provision in AMBIT as allegedly more favorable. Thus, Claimant cannot claim FMV standard compensation.

ii. Further or alternatively, international law cannot avail Claimant of FMV-standard-equivalent valuation through interpretation of MV

228. Primarily, where the treaty has stipulated the appropriate valuation date, there is simply no need to look at international customary law.[222]

229. Alternatively, even the international customary law has been fixing the valuation date as follows:-

(1) Where aggregate acts/omissions constitute FET violations, at the *"watershed"* moment or when "*the most serious damage arose in connection with"* the complained measures. [223]

(2) Where individual acts/omissions in effect lead to a final expropriation, the date when deprivation of property rights was irreversible.[224]

[220] Bundle, p.7, ¶9.
[221] PO3, ¶14.
[222] Sabahi, ¶8.11.
[223] *Watkins*, ¶679.
[224] *Rumeli*, ¶¶768-769.

230. Here, the date of purchase of Caeli's share would be the most serious damage, resulting in a complete loss of investment, while dismissal of Caeli's appeal is when deprivation of property becomes irreversible, considering its inability to attract customers other than the non-*bona fide* Hawthorne's offer. On both dates, the value of Caeli was only USD$400M given Respondent was the only available purchaser.[225]

231. Therefore, the Tribunal should find Claimant's compensation under MV, USD$400M, has been paid by Respondent in purchasing Caeli's share.

B. **Alternatively, Mekar's acts/omissions never caused Claimant's loss**

232. Respondent is only responsible for "*injury caused by*" its treaty violations. Both factual causation, with a but-for test, and legal causation, which exclude the "*remote*" or "*indirect*" causes, have to be proved.[226]

233. Here, Claimant fail to prove that FET violations **(i)** factually and **(ii**) legally caused the reduction of Caeli's value.

i. But for Mekar's measures, Caeli would still worth USD$400M ultimately

234. Caeli's value, being a stock market bubble[227] under the reckless investment approach and over-optimistic market attitude, will be crashed anyway under the inevitable currency crisis.

235. First, Caeli's peak valuation of USD$1.1B must be viewed in the context of *over-optimistic* market assessment of Caeli's value. It is inflated far beyond "*intrinsic*

[225] UF, ¶63.
[226] Art.31(10), ILC Articles with commentaries; *Biwater*,¶785; *Tethyan*,¶286
[227] Blowing Bubbles.

value"[228] due to a misleading picture of profitability on Caeli under rapid expansion. Such market bubble is way too uncommon for over-enthusiastic market investors.[229]

236. Various aspects of Caeli's finance has been neglected by market investors in 2016, namely:-

(1) Increasing and unpaid debt liability;[230]

(2) Excessively low price which cannot generate sufficient profit in absence of Bonooru's subsidies.[231] Such subsidies were only available to Claimant, a Bonoori SOE; and

(3) Ignorance to oil price change which significantly impact airline operational costs and travel demands.[232]

237. Such valuation bubble would "*pop*"[233] eventually either when market found out the Caeli's resulting inflexible debt structure,[234] or at the time of economic crisis.

238. Further or alternatively, regardless of Caeli's intrinsic value, the characteristic of Caeli's business model renders its downfall inevitable under economic crisis and oil price uptick.

239. Caeli's model is featured with **(1)** reckless expansion, and **(2)** excessive low-pricing. Such low-pricing model is precarious to macro-economic deficiencies and oil fluctuations.[235]

240. The vulnerability is furthered by rapid expansion: the exorbitant cost in maintaining a large-scale fleet has led to minimal savings, and deliberate choice in failing to repay

[228] *Ibid.*
[229] Rapp, p.237.
[230] UF, ¶31.
[231] Bundle, Lines 1868, 1892.
[232] Xiao, Introduction.
[233] Blowing Bubbles.
[234] PO4, ¶5.
[235] Bundle, Line 1893.

long-standing debt has led to difficulty in debt-financing.[236] Saving and loans could have been used to counter a loss[237] from reduction in Caeli's operational capacity.[238]

241. In any event, a currency crisis is destinated to significantly injure all Mekari enterprises, especially airline industry,[239] and Caeli[240] with Mekari people, lack of purchasing power and interest to travel,[241] as its major business source.[242]

ii. The economic crisis has rendered any contribution of Mekar's measures towards Caeli's valuation loss too remote

242. An initial act will be rendered remote or indirect if an intervening cause has broken the chain of causation.[243]

243. Assuming *arguendo* Caeli's value remained intact but for FET violations, the *unexpected* development of currency crisis has broken the chain of causation: without economic crisis, none of Respondent's measures can directly lead to Caeli's fall. For instance, 2016 airfare cap did not hurt the profit of Caeli and the fines are never enforced.[244]

244. Therefore, Claimant fails to prove causative effect between Mekar's alleged FET violations and Caeli's downturn.

C. In any event, any compensation awarded shall be reduced

245. Even if *arguendo* there is causation between alleged FET violations and the loss, the Tribunal shall still take the other mitigating factors into account in assessing compensation fairly, namely **(i)** contributory fault of Claimant, and **(ii)** economic crisis.

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[236] UF, ¶51.
[237] Chin, Section 4.2.
[238] UF, ¶53.
[239] Harvey, p.4.
[240] Chin, Section 4.1.
[241] *Ibid*., p.90.
[242] UF, ¶33
[243] *Lemire (causation)*, ¶163.
[244] UF, ¶¶37, 64

i. Claimant's negligent/willful investment approach materially contributed to own loss

246. According to ILC Articles (State Responsibility) Art.39, damage shall be reduced if **(a)** Claimant's negligence/willfulness **(b)** materially *contributed* to loss.

a. Rapid expansion and low-pricing strategy are as a whole risky and willful

247. Acts/omissions which "*manifestly lack due care... for [own] property right*" are sufficiently culpable in attracting application of Art.39.

248. First, expansion without regard to sufficiency of financial support and existing debt liability is *willful*, compromising sustainability only for immediate market share gain. Scholarly research shows that over-fast capacity expansion significantly increases airlines' failure probability.[245]

249. Second, low-pricing strategy is problematic if the revenue barely compensates the cost. Repeating above, with exorbitant cost, Caeli's price is too low to generate a real-sense profit.

250. The unwiseness of strategies is further evident from resulting low default-rating and credit-rating,[246] and dangerous debt structure.[247]

251. Therefore, Claimant is not acting as "*a wise investor*".[248]

b. The wilful investment approach materially contribute to Caeli's loss

[245] Fan, p.188.
[246] UF, ¶51.
[247] PO4, ¶5.
[248] *MTD*, ¶242.

252. First, while the willfulness must contribute in a "*significant and material*" way[249], it is satisfied when Claimant's seemingly anti-competitive acts, excessive expansion and low-pricing, "*made it possible for Respondent to invoke and rely on that conduct as a justification of its actions against*", even the State's respond unreasonably.[250]

253. Second, repeating above, Claimant has itself to blame. The unwise approach at least *materially* contributed to a devaluation.

254. Therefore, Respondent's liability shall be reduced accordingly.

ii. Further or alternatively, the economic crisis shall be considered

255. The economic crisis shall be considered when assessing compensation in three ways, **(a)** under the Tribunal's equitable jurisdiction, **(b)** as concurrent cause, or **(c)** as a necessity defence.

a. The equitable discretion, *aequitas intra legem*, apply

256. *Total*[251] noted inherent uncertainties of FMV valuation:

> *"[…] assessment of the [FMV] of a business is not an exact science, particularly when there is **no** current market price based on **comparable actual transactions**, so that the valuation is based on estimations of future revenues […] in a hypothetical scenario (but-for analysis)."*

257. Therefore, the Tribunal has an equitable discretion, *aequitas infra legem*,[252] as opposed to *ex aequo et bono*, for compensation assessment,[253] by considering all other risk that could impact on Caeli's value.

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[249] *Yukos*, ¶1633.
[250] *Yukos*, ¶1614.
[251] *Total (compensation)*, ¶32.
[252] *Amco (Annulment)*, ¶26.
[253] *Iran*, ¶231.

258. In *Phelps*, the Tribunal considered "*the obvious and significant negative effects of the Iranian Revolution on SICAB's business* ***prospects***".[254] Here, the Tribunal shall equally consider negative impacts of economic crisis on Caeli's business prospects. It is unfair for Respondent, with great economic difficulty, to bear Claimant's loss from acts of God.

b. Material contribution of economic crisis towards Claimant's loss

259. Repeating above, Claimant cannot escape from currency crisis and inflation. The economic crisis is at least a *concurrent* factor, if not sole factor, reducing Caeli's value to USD$400M.

260. Thus, compensation shall be reduced, referring to the loss under economic crisis of a Mekari airline enterprise of comparable size, without alleged wrongful measures imposed, like JetGreen,.[255]

c. So far as MON Denomination is concerned, a necessity defence apply

261. Repeating argument under Merits, the economic crisis attract a necessity defence, thus extinguishing liability in relation to the emergency measures responding to crisis.

262. In sum, the compensation shall be reduced in any event to reflect Claimant's contributory fault and economic crisis.

[254] ¶30.
[255] ILC Articles with commentaries, ¶31(13).

PRAYERS FOR RELIEF

264. In light of the above, Respondent respectfully invites the Tribunal to:

(1) Declare that the Tribunal has no jurisdiction under CEPTA and AFR;

(2) Grant leave to External Advisors' *amicus curiae* application;

(3) Deny leave to CBFI's *amicus curiae* application;

(4) Declare that Respondent did not violate CEPTA Art.9 as it treated Claimant's investment in Caeli fairly and equitably;

(5) Reject all claims from Claimant regarding damages; and

(6) Order Claimant to reimburse Respondent for all costs and expenses associated with this arbitration.

Respectfully submitted on September 23, 2021

On behalf of Respondent
The Federal Republic of Mekar