IN THE ARBITRAL INSTITUTE OF

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB(AF)/20/78

VEMMA HOLDINGS INC.

(CLAIMANT)

V.

THE FEDERAL REPUBLIC OF MEKAR

(RESPONDENT)

- MEMORANDUM FOR RESPONDENT-

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LIST OF ABBREVIATIONS

1994 BIT	Bonooru-Mekar Bilateral Investment Treaty, 1994
AF Rules	Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID
Bonooru	The Commonwealth of Bonooru
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CRPU	Mekar's Committee on Reform of Public Utilities
External Advisors	The External Advisors to the CRPU
FET	Fair and Equitable Treatment
FMV	Fair Market Value Standard of Compensation
GATT	General Agreement on Tariffs and Trade
IBA	International Bar Association
ICJ	International Court of Justice
ICSID	Convention for the Settlement of Investment Disputes Between States and Nationals of Other States
ICSID AF	The Additional Facility of the International Centre for the Settlement of Investment Disputes
ILC Articles	International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, 2001
Mekar or Respondent	The Federal Republic of Mekar
MFN	Most-Favoured Nation Standard/Clause

MV	Market Value Standard of Compensation
NYC	New York Convention
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
PO3	Procedural Order No. 3
PO4	Procedural Order No. 4
SoE	State-Owned Enterprise
UN	The United Nations
UNCITRAL	The United Nations Commission on International Trade Law
UNCITRAL Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
USD	United States Dollar
VCLT	The Vienna Convention on the Law of Treaties, 1969
Vemma or Claimant	Vemma Holdings Inc.
WTO	World Trade Organisation

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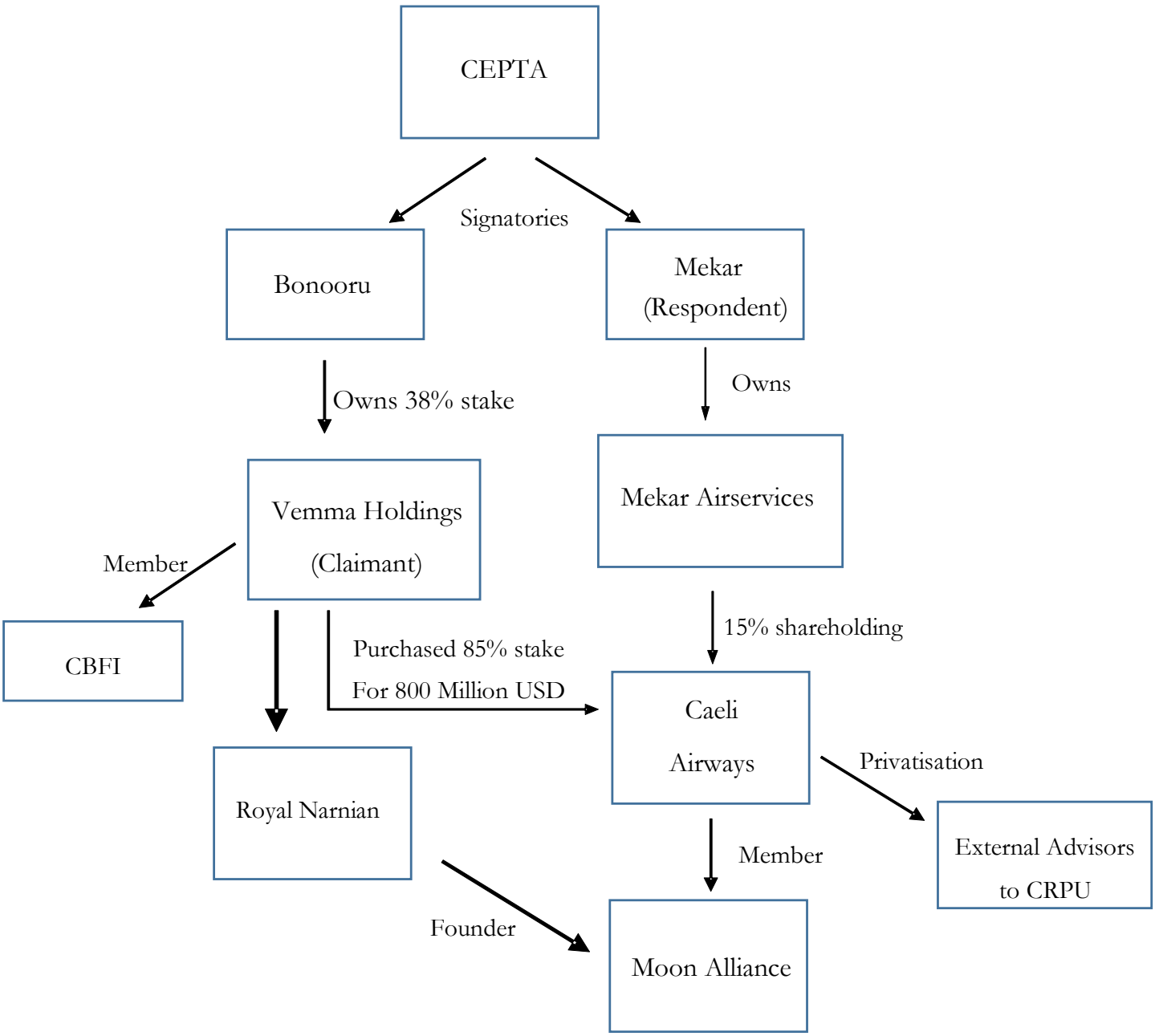

TIMELINE OF EVENTS:

1994	BIT signed between Bonooru and Mekar
2009	Amendment to Mekar's Monopoly and Restrictive Trade Practice Act which created the Competition Commission of Mekar, armed with an independent enforcement directorate.
5 January 2011	Vemma's tender for Caeli Airways valued at 800 million USD was accepted.
29 March 2011	Vemma entered into a Share Purchase Agreement with Mekar Airservices to purchase an 85% stake in Caeli. The remaining 15% shares were beneficially owned by Mekar through Mekar Airservices Ltd.
28 October 2011	Bonooru's Tourism Secretary unveiled the "Horizon 2020" Scheme. On the same day, Vemma received its first subsidy under the scheme.
2014	Mekar and Bonooru signed the Comprehensive Economic Partnership and Trade Agreement (CEPTA) and terminated the 1994 BIT.
9 September 2016	CCM's indicated its intention to investigate Caeli's predatory pricing ("First Investigation"). Interim airfare caps imposed on Caeli by CCM.
December 2016	The consortium of regional airlines in Greater Narnia brought another complaint before the CCM, alleging that Caeli operated flights on specific routes solely for pushing its competitors off these routes. Thus, the CCM launched the "Second Investigation".
March 2017	Advent of currency crisis in Mekar
30 January 2018	To deal with the currency crisis, Mekari government mandated all companies operating in the country to deal exclusively in MON.
27 March 2018	Caeli's claim against the CCM seeking judicial review of airfare caps was registered. However, since the judiciary was and sought to prioritise criminal matters, a hearing on interim measures was scheduled in April 2019.
August 2018	The CCM concluded its First Investigation and found that Caeli engaged in predatory pricing resulting from low airfares and loyalty programmes.

25 September 2019	Executive Order 9-2018, granting subsidies to airlines carrying Mekari citizens was passed. However, the Secretary rejected Caeli's application to seek the same as it would be unfair to grant State-owned companies even more of an advantage in the airline market.
1 January 2019	The Second Investigation was completed by the CCM and it concluded that Caeli had engaged in anti-competitive behaviour in conducting its business activities in Phenac International Airport.
15 June 2019	The Mekar's High Court passed the order against Caeli and declined to grant an interim removal of the airfare caps applicable to it.
December 2019	Vemma secured an offer from Hawthorne Group LLP, a Sinnoh-based private equity firm for Vemma's entire stake in Caeli Airways. However, this was rejected by Mekar Airservices as it was not a bona fide third party offer due to Hawthorne being a Moon Alliance member.
11 February 2020	Mekar Airservices filed a request for arbitration with the Sinnoh Chamber of Commerce's ("SCC") Arbitration Institute.
9 May 2020	Sole Arbitrator rendered an award in favour of Mekar Airservices.
1 August 2020	The Supreme Arbitrazh Court of Sinnograd set aside the award.
23 August 2020	The High Commercial Court of Mekar issued a ruling recognizing and enforcing the 9 May 2020 award in Mekar.
8 October 2020	Vemma sold its stake in Caeli to Mekar Airservices for 400 million USD.
15 November 2020	Vemma filed a notice of arbitration against Mekar to seek compensation for its losses under the CEPTA.

ARGUMENTS ADVANCED

[I]. THE TRIBUNAL DOES NOT HAVE JURISDICTION UNDER THE CEPTA & THE ICSID ADDITIONAL FACILITY RULES

1. In the present dispute, strong linkages exist between the Claimant and Bonooru at a structural as well as a functional level. Resultantly, Claimant is a State-Owned Enterprise ("SoE") and its actions are attributable to Bonooru. As a result, this arbitration has assumed the character of a State-State arbitration since it is effectively between Mekar and Bonooru. However, since neither the applicable treaty nor the arbitration rules contemplate arbitration proceedings between two States, the tribunal cannot exercise jurisdiction over the present dispute.

2. In particular, the Respondent submits that the Tribunal's jurisdiction is precluded by the application of, *firstly,* the provisions of the 2014 Bonooru-Mekar CEPTA ("CEPTA") **[A]** and *secondly,* the provisions of the ICSID Additional Facility Rules ("AF Rules") **[B].**

A. THE TRIBUNAL DOES NOT HAVE JURISDICTION UNDER CHAPTER 9 OF CEPTA

3. Chapter 9 of the CEPTA lays down certain requirements to be fulfilled by the Claimant in order for a tribunal constituted thereunder to exercise jurisdiction over a particular dispute. These requirements include making a covered investment (ratione materiae) and qualifying as an investor (ratione personae).[1]

4. Accordingly, it is submitted that this tribunal cannot exercise jurisdiction under the CEPTA because, *firstly*, the Claimant has not made a valid investment in Mekar **[1]** and *secondly,* it does not satisfy the requirements to be considered an 'investor' **[2]**.

1. The Claimant has not made a valid investment

5. The CEPTA characterises an investment, *inter alia*, as one which includes an expectation of gain or profit and an assumption of risk.[2] Similar requirements are contained in the *Salini Test,* [3] which tribunals have relied on to determine the existence of a valid investment.

[1] Moot Case, Chapter 9 CEPTA p. 72-73.
[2] Moot Case, Article 9.1 CEPTA, p. 73.
[3] *Salini v Morocco* [2001] Decision on Jurisdiction, ICSID Case No. Arb/00/4 [52].

6. An expectation of profit requires that an investment must be made with the *primary* purpose of earning a commercial return and creating an economic value for the investor.[4] However, the Claimant's purchase of Caeli Airways was made in furtherance of non-commercial objectives like advancing Bonooru's strategic interests and securing the mobility rights of its citizens. As evidenced from the Claimant's Memorandum of Association, any commercial activities conducted by it, including the purchase of equity in another entity, are auxiliary to this purpose.[5] Therefore, since the objective of profit was relegated to a secondary purpose, the Claimant did not have an 'expectation of gain or profit' in this case.

7. Further a valid investment requires an element of risk to be attached to it. This includes an operational risk which goes beyond a mere commercial uncertainty, and includes the sovereign risk of governmental interference.[6] However, this risk must be assumed by the investor itself.[7] In the present case, owing to the State-owned nature of the Claimant and the benefits received by it under the Horizon 2020 scheme (which enabled it to transfer the risk of its predatory pricing strategies) demonstrates that its investment does not carry this 'assumption of risk'. This lack of risk is further substantiated by the assurances of support from Bonooru in case Claimant faced difficulties in its investment, as was manifested by the institution of the bail-in program when it faced financial losses.[8] Therefore, the Claimant's purchase of Caeli Airways is not a valid investment under the CEPTA's provisions.

2. <u>The Claimant does not fulfil the requirements to be considered an Investor</u>

8. The CEPTA states that a claim may be submitted by an 'investor of a party'.[9] It defines an 'investor' as a "natural person or an enterprise with the nationality of a party who has made an investment in the territory of the other party." It further defines an 'enterprise of a party' as one which is "constituted or organised under the laws of that party and has substantial business activities in its territory."[10] *Prima facie,* the Claimant may submit that it qualifies this threshold since it is incorporated in Bonooru and has substantial business activities there. However, we submit that the tribunal must interpret these definitions in the context of the definition of an 'enterprise'

[4] *Quiborax v Bolivia* [2012] Decision on Jurisdiction ICSID Case No. Arb/06/2 [219].
[5] Moot Case, Annexure IV p. 44.
[6] *Romak v Uzbekistan* [2009] Award PCA Case No. AA280 [229]-[232].
[7] *Istrokapital v Greece* [2015] Award ICSID Case No. Arb/13/8 [369].
[8] Moot Case, Annexure IX p. 57.
[9] Moot Case, Article 9.16 (1)(a) of CEPTA, p. 79.
[10] Moot Case, Article 9.1 of CEPTA, p. 73 ln. 2589-2597.

contained in the 1994 BIT between Bonooru and Mekar,[11] which forms part of the treaty's supplementary means of interpretation.[12] The pertinent difference between the two is that while the 1994 BIT explicitly included 'government-owned' enterprises within the scope of protection, this explicit protection was dispensed with under the CEPTA's definition. Therefore, we submit that interpreting the CEPTA's definition in ordinary terms and devoid of this context fails to account for the real intention of the parties,[13] which was to restrict the scope of protection granted by it.

9. This intention becomes apparent when viewed in conjunction with the detrimental impact of the wide protections of the 1994 BIT, which resulted in the Respondent being faced with a large volume of claims by Bonoori investors. These investors were, on the balance of probabilities, SoEs owing to the mixed nature of the Bonoori economy, which is pre-dominated by such enterprises.[14] They were able to raise a large volume of successful claims as a result of the explicit protection granted to them. As a consequence, it sought to negotiate a new investment agreement with the specific intention of balancing the rights of investors and host states.[15] One of the differences which emerged from these substantial renegotiations was the removal of the phrase 'whether privately or government-owned' from the definition of an enterprise (whereas other elements contained therein were retained). Thus, we submit that one of the methods adopted to achieve this balance was reducing the volume of claims by excluding a whole class of investors (SoEs) who had received protection under the 1994 BIT.

10. Consequently, the CEPTA must be interpreted in light of this specific intention of the parties and accordingly, the tribunal must determine that SoEs are excluded from its protection owing to the *unambiguous and complete removal of the explicit protection* granted to them previously.[16]

B. THE TRIBUNAL DOES NOT HAVE JURISDICTION UNDER ICSID AF RULES

11. Alternatively, even if the tribunal finds jurisdiction under the CEPTA, we submit that it cannot exercise jurisdiction under the AF Rules, which only contemplate arbitration proceedings between

[11] Moot Case, 1994 Bonooru-Mekar BIT, p. 69.
[12] The Vienna Convention on the Law of Treaties 1969, art. 32.
[13] Mark Villiger, Article 31, Commentary on the 1969 Vienna Convention on the Law of Treaties (Martinus Nijhoff 2009) 443.
[14] Moot Case, Statement of Uncontested Facts [2]-[4].
[15] Moot Case, Procedural Order No. 3 [14].
[16] Claudia Annacker, 'Protection of Sovereign Investment under Investment Treaties' [2011] 10 CJIL 539.

a State and a *National of another State*[17] and not between two States. We further submit that since the Claimant's actions are attributable to Bonooru, the States of Mekar and Bonooru are the real parties in the present proceedings, which is not permissible under the AF Rules.

12. ICSID tribunals have relied on the *Broches Test,* derived by Aron Broches, to determine the attributability of an entity's conduct to the State.[18] It lays down a two-fold test, requiring the tribunal to consider whether an entity, was acting as an Agent of the State or was exercising essentially governmental functions.[19]

13. The Claimant may however contend that, since this test is part of the *travaux preparatoires* of the ICSID Convention, it is not applicable here since this tribunal has been constituted under the AF Rules. However, we submit that the Additional Facility was promulgated by the ICSID Secretariat with a similar underlying purpose as that of the Convention, which was to depoliticise the process and provide a private entity a platform to redress disputes with a State arising from an investment relationship.[20] Consequently, SoEs can only institute proceedings under these rules if they assimilate as a private investor rather than a government agent.[21] Accordingly, Respondent submits that the *Broches Test* has persuasive value because it is the only test which provides an objective standard for determining this assimilation.[22]

14. Applying this test in this case, Respondent submits that the Claimant's actions are attributable to Bonooru because it is acting, *firstly,* as an agent of Bonooru **[1]** and *secondly,* exercising essentially governmental functions **[2].**

1. <u>The Claimant was acting as an Agent of the State</u>

15. The requirement of 'State Agency' mandates the tribunal to establish structural relations between the State and the entity purported to be acting on its behalf. Tribunals have relied upon the structural test prescribed by ILC Article 8[23] to interpret this standard and have observed that, to

[17] ICSID Additional Facility Rules 2006, art 2(a).
[18] *BUCG v Yemen* [2017] Decision on Jurisdiction ICSID Case No. Arb/14/30 [37]-[41].
[19] Aron Broches, 'Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law' [1995] Martinus Nijhoff 202.
[20] Mark Feldman, 'State-Owned Enterprises as Claimants in International Investment Arbitration' [2016] FILJ, vol. 31 p. 27-28.
[21] History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the ICSID Convention [2009] p. 11.
[22] ibid.
[23] ILC Articles on the Responsibility of States for Internationally Wrongful Acts 2001, art 8.

fulfil this requirement, an entity must be acting under the State's 'direction & control'.[24] This is established if sufficient structural linkages exist between the entity and the State which permits it to have a decisive influence over the entity's decisions.[25] Tribunals have observed that the circumstances of an entity's creation can be illustrative of such linkages if the entity was created through a governmental decree.[26] The Claimant in this case is a successor of the national airline Bonooru Air and was created by the Civil Aviation Authority, which is a branch of the Bonoori Tourism Ministry.[27] Accordingly, we submit that since it was created through a governmental action by a government agency, it was beholden to the Bonooru since its inception.

16. This can further be established through majority ownership or control over decision making bodies,[28] which compromises the entity's decisional autonomy.[29] In this case, subsequent to the bail-in program, Bonooru increased its shareholding to a controlling stake of 55%. Moreover, it secured control over the Claimant's decision-making bodies by replacing its board of directors with government functionaries.[30] The Claimant may submit that the tribunal is precluded from considering these new linkages because only the facts in subsistence on the date of institution of proceedings are relevant for establishing a Claimant's standing.[31] Contrarily, Respondent submits that for the tribunal to exercise jurisdiction, the Claimant must maintain a uniform identity from the date of institution to the end of the proceedings and all facts which arise between these dates are relevant for consideration.[32] This restructuring also represents an abuse of process since it was undertaken to assist the Claimant in this arbitration,[33] as evidenced by the appointment of government lawyers to its legal team.[34] Consequently, since Bonooru has become the real party in interest, the Respondent implores the tribunal to consider the extensive structural relations resulting from the bail-in program as sufficient for declining jurisdiction.

17. Alternatively, even if the tribunal was to conclude that the control acquired through the bail-in program is beyond its consideration, we submit that the structural linkages subsisting previously

[24] *Emilio Maffezini v Spain* [2000] Decision on Jurisdiction ICSID Case No. Arb/97/7 [76]-[78].
[25] *Caratube International Oil v Kazakhstan* [2014] Decision on Annulment ICSID Case No. Arb/08/12 [253]
[26] *Maffezini v Spain* (n 24) [79].
[27] *Uncontested Facts* (n 14) [7]-[9].
[28] *Noble Ventures v. Romania* [2005] Award ICSID Case No. ARB/01/11 [206]-[210].
[29] *Tatneft v Ukraine* [2010] Partial Award on Jurisdiction PCA Case No. 2008-8 [145]-[147].
[30] *Uncontested Facts* (n 14) [65].
[31] *CSOB v The Slovak Republic* [1999] Decision on Objections to Jurisdiction ICSID Case No. Arb/97/4 [31].
[32] *Loewen v USA* [2003] Award ICSID Case No. Arb (AF)/98/3 [225]-[230].
[33] *Levy & Gremcital v Peru* [2015] Award ICSID Case No. ARB/11/17 [182]-[187].
[34] *Uncontested Facts* (n 14) [65].

are also sufficient. This is because, even in the absence of majority ownership, the requirement of State Agency can be fulfilled if the State exercises *de facto* control over the entity's activities.[35] This requirement is fulfilled if the State maintains an equivalent degree of control[36] through a significant minority shareholding or legal stipulations in the entity's founding documents which provide for its continued *involvement in and influence* over the enterprise's decision making.[37] In the present case, Bonooru is the largest shareholder in the Claimant, owning upto 38% stake prior to the bail-in program[38] whereas the next largest shareholder had a mere 7% stake.[39] Consequently, it has the largest voting share in all shareholder meetings and in certain meetings, where all shareholders are not present, its representatives also form a majority of the total voting members.[40] Additionally, Bonooru is also permitted to appoint a representative on its Board of Directors,[41] who participates in the decision-making process and can influence the same. Since the Board of Directors makes major decisions such as investments in a foreign country, which are usually ratified by vote in shareholder meetings (where Bonooru has the largest voting share), these facts when taken cumulatively demonstrate the extensive control it exercises over Vemma's decision making bodies. This pervasive influence is further epitomised by the fact that Ms. Sabrina Blue, the erstwhile Chairman of Vemma's Board of Directors, was appointed as Bonooru's Tourism Secretary *on the day* Vemma submitted its bid for Caeli Airways.[42]

18. Finally, the context in which control is exercised and the purpose behind it are indicative as to whether it was sufficient to constitute State Agency. Both, the Bonoori Prime Minister[43] and its Constitutional Court[44] have positively averred that the State *preserved shareholding and control* over Vemma to ensure its continued usage as a vehicle to *discharge Bonooru's positive obligation* under Article 70 of its Constitution to facilitate the mobility rights of its citizens. Accordingly, we submit that sufficient structural linkages subsist between the Claimant and Bonooru to conclude that it was acting as an Agent of the State.

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[35] *Thunderbird Gaming v Mexico* [2006] UNCITRAL Award [107]-[109].
[36] Applicability, OECD Guidelines on Corporate Governance of State-Owned Enterprises [2015] OECD Pub. 14.
[37] ibid.
[38] *Uncontested Facts* (n 14) [10].
[39] Moot Case, Procedural Order No.4, p. 89 [2].
[40] *Procedural Order 3* (n 15) [3].
[41] Moot Case, Annexure IV, Articles of Association p. 46.
[42] *Uncontested Facts* (n 14) [22].
[43] ibid [8].
[44] Moot Case, Annexure III, p. 43 [59].

2. The Claimant was exercising Essentially Governmental Functions

19. The Broches test also requires tribunals to examine whether the entity was exercising 'essentially governmental functions' in making the investment. This requirement mirrors ILC Article 5,[45] which has been relied upon by tribunals to determine the standard for constituting 'governmental functions'. This requires the tribunal to consider whether the entity was established to undertake any governmental or public objectives.[46] In the present case, we submit that the Claimant was established to continue operations as a 'national airline and air transport undertaking' and 'assist in developing Bonooru's aviation industry and infrastructure',[47] which is a governmental objective.

20. Additionally, tribunals are required to ascertain the nature *and* purpose of the entity's conduct and determine whether those actions are of a public nature or advance public interest of the State to whom such action is being attributed.[48] These 'governmental functions' must be differentiated from the sovereign functions of the State, which are reserved for the organs of the State, because they can be undertaken by State organs as well as other entities.[49] In the present case, the Claimant operates routes between Mekar and Bonooru which are commercially unprofitable and unviable.[50] However, Respondent submits that the airline industry is one which is constantly undergoing rationalisation whereby airlines are increasingly abandoning unprofitable routes operated to maintain market share in favour of financially viable ones.[51] In this context, the fact that these commercially unviable routes became one of the pillars of Caeli's business model[52] is inconsistent with the Claimant's stated objective of profit maximisation.

21. Consequently, we submit that, in operating these routes, the Claimant was exercising essentially governmental functions. This is because, whether an action is 'governmental' in nature is contingent upon the history and traditions of the concerned State.[53] Traditionally, in Bonooru, the airline industry occupies a unique position in its socio-economic setting because air transport is the predominant mode of travel which connects its various islands and secures the mobility rights of

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[45] ILC Articles on the Responsibility of States for Internationally Wrongful Acts 2001, art 5.
[46] *Maffezini v Spain* (n 24).
[47] *Annexure IV* (n 5), p. 44.
[48] *Flemingo Duty Free v Poland* [2016] UNCITRAL Award [392]-[398].
[49] Bianca Nalbandian, 'State Capitalists in international Investor-State Arbitration' [2021] QIL 5-29.
[50] Moot Case, Annexure VII, p. 55.
[51] Ahmed Abdelghany, 'The Practice of Airline Route Development' [2020] Int. Airport Review; Peter Belobaba, 'The Airline Planning Process' [2009] Global Airline Industry (Wiley & Sons) p. 153-181.
[52] *Uncontested Facts* (n 14) [28].
[53] ILC Articles on Responsibility of States for Internationally Wrongful Acts with commentaries 2001, art. 5 [6].

its citizens.[54] Accordingly, the development of this industry and associated infrastructure is of critical importance for it and since these routes enable Bonooru to advance this critical public interest, Respondent submits that their continued operation qualifies as the exercise of essentially governmental functions.

22. In particular, the operation of these routes must be contextualised in terms of Bonooru's positive obligations under Article 70 of its Constitution to facilitate its citizens' mobility rights[55] by providing them access to air travel.[56] As observed by the Bonoori Constitutional Court, this positive obligation extends to travel within the islands of Bonooru as well as outside it.[57] The fact that Vemma sought to advance these mobility rights across the Greater Narnian region through these routes was also recorded by Ms. Sabrina Blue in her press conference statement,[58] who observed that these activities were also undertaken by Vemma's state-owned predecessor, Bonooru Air. Accordingly, we submit that since the enhancement of mobility rights was a governmental function recognised in the Constitution, the Claimant was exercising 'essentially governmental functions' by advancing this public function.

23. Moreover, the Claimant's investment and the operation of these routes must be juxtaposed with Bonooru's Caspian Project and the Horizon 2020 Scheme. The Caspian Project was initiated by Bonooru to increase regional integration and gain greater control over the region's trade and economic activities.[59] The Claimant's investment furthers this diplomatic objective by increasing Bonooru's economic leverage over Mekar. This is evidenced by the fact that Vemma chose to refinance Caeli's debt from a Bonoori state-owned bank. Further, it used this leverage to influence the Respondent's decisions regarding Caeli Airways by threatening to withdraw funding from the Caspian Project activites[60] and doing so when the Respondent did not oblige.[61] Bonooru also initiated the Horizon 2020 Scheme under this project to develop its tourism sector by providing subsidies to companies investing in tourism infrastructure. The Claimant received these subsidies because it demonstrated that Caeli Airways will be utilised to draw additional travellers from

[54] *Uncontested Facts* (n 14) [5]-[6].
[55] Moot Case, Annexure I, p. 41.
[56] *Annexure III* (n 44).
[57] Moot Case, Annexure II, p. 42 [25].
[58] *Procedural Order 4* (n 39) [6].
[59] *Uncontested Facts* (n 14) [4].
[60] Moot Case, Annexure IX, p. 57.
[61] *Procedural Order 4* (n 39) [1].

Mekar to Bonooru.[62] Therefore, we submit that these routes, despite being unprofitable, formed an essential part of its activities because it was primarily focused on enhancing the aviation network available to tourists under this scheme.

24. Accordingly, we submit that since Claimant was willing to financially sabotage its investment and economic prospects to facilitate the development of tourism infrastructure in Bonooru, enhance the mobility rights of its population and enable it to realise its strategic and diplomatic objectives, it was exercising essentially governmental functions.

25. The Claimant, however, may contend that the aforementioned facts are not relevant to establish 'governmental functions' because the tribunal is only concerned with the *nature* of an entity's activities and not its purpose.[63] Contrarily, we submit that this test is unsuitable since SoEs may engage in behaviour which, despite its commercial nature, is motivated by political objectives. Consequently, applying this 'nature test' may enable SoEs to propagate strategic functions disguised as commercial activities.[64] To avoid this situation, it is essential for the tribunal to analyse the purpose behin the conduct to determine its governmental or commercial nature.[65] Accordingly, since the public functions and interest served by Vemma's investment acquired primacy over its commercial interests, it was exercising 'essentially governmental functions'.[66]

Conclusion to Issue 1

26. The tribunal must assess its jurisdiction under the CEPTA and the AF Rules independently. The Claimant has not made a valid investment under the CEPTA. Moreover, there was a specific and common intention on behalf of both parties to exclude SoEs from the CEPTA's protection, as evident from the removal of the explicit protection granted by the 1994 BIT from the CEPTA.

27. Additionally, the AF Rules do not contemplate State-State Arbitration. Applying the *Broches Test,* the Claimant's actions are attributable to Bonooru since it was acting as an 'Agent of the State' under its direction and control. Moreover, it was discharging essentially governmental functions by

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[62] *Uncontested Facts* (n 14) [27]-[28].
[63] *CSOB v Slovakia* (n 31) Award [17]-[20].
[64]Paul Blyschak, 'State-Owned Enterprises and International Investment Treaties: When are their Investments Protected' [2011] Jl. Int. Law & Int. Rel., 31.
[65] *Article 5* (n 53) [6]-[7].
[66] *Repsol YPF v Ecuador* [2004] Award ICSID Case No. ARB/01/10 [120].

purchasing and operating Caeli Airways. Therefore, since the present arbitration is effectively between Mekar and Bonooru, the tribunal must decline jurisdiction under AF Rules.

[II]. THE TRIBUNAL SHOULD ACCEPT THE APPLICATION FILED BY EXTERNAL ADVISORS TO MEKAR'S CRPU AND BAR THE APPLICATION MADE BY THE CBFI

28. Two applications to submit Amicus Briefs have been filed before this tribunal. The first application was filed by the 'Consortium of Bonoori Foreign Investors' ("CBFI"),[67] an industry association representing Bonoori investors and the second was filed by the External Advisors to Mekar's CRPU ("External Advisors"),[68] who were engaged for the privatisation of Caeli Airways.

29. The relevant criteria for determining the admissibility of such applications are provided in Article 41 (3) of the AF Rules ("Article 41").[69] It states that the tribunal *shall* consider the extent to which the submission would assist the tribunal in determining the factual or legal issues by bringing a perspective or insight different than that of the parties,[70] address a matter within the scope of the dispute[71] and, whether the applicant has a significant interest in the proceeding.[72] It also compels the tribunal to ensure that the submission does not disrupt the proceeding and unduly burden or prejudice either disputing party.[73] Article 9.19 (3) of the CEPTA ("Article 9.19") additionally provides that an applicant must disclose any affiliation it has with either disputing party.[74] Tribunals have held that this implicitly requires an applicant to be *independent from the disputing parties*.[75] Additionally, since the 'UNCITRAL Rules on Transparency in treaty-based Investor State Arbitration' ("UNCITRAL Rules") are applicable in the present case,[76] the tribunal is required to account for the *public interest* in the matter while determining the admissibility of each application, in addition to the aforementioned requirements.[77]

30. Consequently, there are 6 relevant criteria which an applicant needs to fulfil in order for its submission to be accepted. The Respondent submits that, pursuant to these provisions, *firstly,* the application filed by the External Advisors must be allowed **[A],** whereas the application by CBFI must be rejected **[B].**

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[67] Moot Case, Amicus Submission by CBFI, p. 15.
[68] Moot Case, Amicus Submission by External Advisors, p. 18.
[69] ICSID Additional Facility Rules 2006, art 41(3).
[70] ibid, art 41(3)(a).
[71] ibid, art 41(3)(b).
[72] ibid, art 41(3)(c).
[73] ibid.
[74] Moot Case, Article 9.19(3) of CEPTA, p. 80.
[75] *Von Pezold & Border Timbers v Zimbabwe* [2012] Procedural Order 2 ICSID Case No. Arb/10/25 [49].
[76] Moot Case, Respondent's Comments on Applications, p. 24.
[77] UNCITRAL Rules on Transparency in treaty-based Investor-State Arbitration 2014, art 1(4)(a).

A. APPLICATION BY EXTERNAL ADVISORS MUST BE ALLOWED

31. The External Advisors are a 'body of independent practitioners' who were engaged as external consultants by the Committee on Reform of Public Utilities to advise on the privatisation of Caeli Airways.[78] They were selected through a transparent process and were engaged for a limited duration, being remunerated through a fixed and variable fee rather than a regular salary.[79] During their engagement, they became privy to information regarding bribes paid by the Claimant to secure its investment, which has not been brought before the tribunal by either party. In providing this information to the tribunal, they seek to ensure that corruption is eradicated from foreign investment, which serves their business interests as well as an essential public interest in ensuring a robust and transparent ISDS process.

32. Accordingly, the Respondent submits that the tribunal may accept the External Advisors' application because, *firstly,* it can assist the tribunal by providing a unique perspective **[1],** *secondly,* its submissions address a matter within the scope of the dispute **[2],** *thirdly,* it has a significant interest in the outcome of the dispute **[3],** *fourthly,* its submissions are in furtherance of public interest **[4],** *fifthly,* it is independent from the disputing parties **[5]** and *sixthly,* its submissions shall not disrupt the proceedings or result in undue burden and prejudice **[6].**

1. <u>The External Advisors can assist the tribunal by providing a different perspective</u>

33. Applicants must demonstrate that their submissions can assist the tribunal by providing a perspective different from that of the parties.[80] To avoid overburdening the proceedings with briefs that are duplicative of the parties' submissions, tribunals have generally adopted a stringent standard which requires the applicant to demonstrate that it can *materially assist* the tribunal.[81] This requirement may be fulfilled when the applicant is in a unique position to provide certain information, crucial for evaluating a particular issue, which the tribunal cannot otherwise access.[82]

34. In this case, the External Advisors were involved in Caeli Airways' privatisation process and have first-hand insight of the deliberations conducted by the Committee over the Claimant's tender.

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[78] *External Advisors' Application* (n 65), p.19.
[79] ibid.
[80] *ICSID AF Rules* (n 66), art 41.
[81] Gary B. Born and Stephanie Forrest, 'Amicus Curiae Participation in Investment Arbitration' [2019] ICSID Review-FILJ vol. 34, 656.
[82] *Infinito Gold v Costa Rica* [2016] Procedural Order 2 ICSID Case No. Arb/14/5 [31]-[32].

This, combined with the fact that they are professional investment bankers who have regularly intervened before Mekari Courts in similar matters, demonstrates that they have the necessary expertise and experience.[83]

35. Additionally, they are in a unique position to acquaint the tribunal with additional information which it cannot access otherwise. This is because tribunals are not empowered to conduct their own investigations and inquiries.[84] Moreover, parties may not be privy to or have an ulterior motive behind not furnishing certain information which is nevertheless crucial for the tribunal's analysis.[85] Consequently, tribunals may permit applicants to furnish such information since they cannot access it either through the parties or on their own. In this case, neither party brought the allegations of corruption before the tribunal. Moreover, the External Advisors are in a unique position to adduce nuanced, unbiased and accurate facts regarding these allegations owing to their first-hand experience and involvement, as evident from the fact that the Mekari Supreme Court took *suo motu cognisance* of the issue based on their allegations.[86] Since this information is crucial for the tribunal to determine its jurisdiction, it may admit the External Advisors' application since it provides the tribunal with a unique perspective.

2. The Submissions address a matter within the Scope of the Dispute

36. Applicants must also assist the tribunal in ascertaining the dispute submitted by the parties. However, this does not entail that they must restrict their submissions to the legal issues or grounds raised by the parties since doing so would hinder their ability to provide the tribunal with a different perspective.[87]

37. The Claimant may submit that, since it challenges the tribunal's jurisdiction on a new legal ground, the External Advisors' submissions are beyond the scope of the dispute.[88] However, we submit that this tribunal, having been constituted under the AF Rules, has an obligation to independently assess its jurisdiction thereunder.[89] Hence, where the tribunal's jurisdiction is limited by matters

[83] *InterAguas v Argentina* [2006] Order on Participation as Amicus Curiae ICSID Case No ARB/03/17 [23].
[84] *United Utilities Tallinn v. Estonia* [2018] Decision on EC's NDP Application, ICSID Case No. ARB/14/24 [11].
[85] *Electrabel SA v Hungary* [2015] Final Award ICSID Case No. ARB/07/19 [234]; *World Duty Free Company v Republic of Kenya* [2006] Award ICSID Case No. ARB/00/7 [142].
[86] *Moot Case, PO 3* (n 13), [13].
[87] Eric de Brabendere, 'Amicus Curae (Investment Arbitration)' in Hélène Ruiz-Fabri, Max Planck Encyclopedia of International Procedural Law [2019] OUP, 8-9.
[88] Moot Case, Claimant's Comments on Application, p. 22.
[89] Christoph Schreuer and Ors, 'The ICSID Convention: A Commentary' [2009] CUP 2nd edn, 160-168.

other than the parties' consent, such as the ratione materiae requirement of there being a valid investment, the tribunal has an independent obligation to address such jurisdictional matters.[90] In such cases, it is suitable to admit amicus briefs addressing these issues even if the same were not raised by the parties.[91] Hence, the issue of whether the Claimant has made a valid investment must inevitably form part of the tribunal's analysis and since the External Advisors seek to address this very issue, their submission is within the scope of the tribunal's consideration.

38. Alternatively, even if the tribunal holds that they have raised a new legal issue, we submit that their submissions would still be within the scope of the dispute. This is because tribunals have admitted applications even where the applicants have made evident their intention to raise new grounds for redress, jurisdictional objections, as long as the new issues are related to the dispute.[92] Since the External Advisors' application is related to the process behind the Claimant's acquisition of Caeli, it fulfils this threshold.

3. They have a Significant Interest in the Proceedings

39. This requirement obligates an applicant to demonstrate that its interests may be *directly impacted* by the tribunal's decision on a particular issue or by the outcome of the arbitration.[93] The External Advisors fulfil this requirement because the present dispute has direct implications for their financial prospects and business activities since one of the chief components of their financial operations is advising potential investors exploring investment opportunities in Mekar.[94] Therefore, if the tribunal is unable to address the issue of bribery effectively and permits anti-corruption efforts in foreign investment to stagnate, it may negatively affect investor confidence and reduce investments in Mekar,[95] which will directly and detrimentally impact their business.

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[90] *Inceysa v El Salvador* [2006] Award ICSID Case No. Arb/03/26 [155].
[91] Rudolf Dolzer & Christoph Schreuer, 'Principles of International Investment Law' [2012] OUP 2nd edn., Chs III.1-III.2
[92] *Micula v Romania* [2016] EU Commission's Brief for Amicus Curae in Support of Romania ICSID Case No. ARB/05/20.
[93] *Apotex Holdings v USA* [2013] Procedural Order on Barry Appleton's Application ICSID Case No. ARB(AF)/12/1 [38].
[94] *External Advisors' Application* (n 65), p.19.
[95] J. Edgardo Campos & Ors., 'Corruption and its implications for Investment: Predictability Matters' [1999] Jl. Of World Dev., vol 27, 1059-067.

4. Their submissions are in furtherance of Public Interest

40. The 'UNCITRAL Rules' require the tribunal to consider the public interest in the matter while determining whether to admit an amicus brief. This requires applicants to demonstrate that their submissions actually further an essential public interest.[96]

41. In the present case, there is an essential public interest in ensuring that foreign investment remains free of corrupt practices and that existing ISDS fora are able to address public policy issues such as corruption in an effective manner which preserves their legitimacy. The External Advisors' application furthers this public interest in preventing corruption by acquainting the tribunal with the allegations of bribery and by adducing certain facts that will enable the tribunal to effectively ascertain the legal status of the investment and accordingly, address the issue of bribery.

5. External Advisors are Independent from both parties

42. The requirement of 'disclosing any affiliation with disputing parties' implicitly compels an applicant to be independent from the disputing parties.[97] This requirement is fulfilled in this case because the External Advisors' were not connected to, influenced or aligned with the Respondent.[98] This is because they were not regular, salaried employees of the Respondent. They were engaged for a short duration to undertake a particular task and were relieved of their duties upon its completion.[99] Moreover, since 10 years have elapsed between this temporary employment and the institution of these proceedings, any influence the Respondent may have exercised has been further diminished. Consequently, since they are not accountable to the Respondent for their statements and are not controlled by it, they fulfil the independence requirement.

6. Their submissions are not disruptive and will not result in undue burden or prejudice

43. An application is construed as being disruptive or causing prejudice if it entails *substantial* delays and *unnecessary* costs upon the disputing parties.[100] We submit that the External Advisors' application, if admitted, will not result in any disruption or prejudice. They filed their application 5

[96] *Resolute Forest v Canada* [2017] Procedural Order 6- Decision on Amicus, PCA Case No. 2016-13 [4.7].
[97] *Suez, Sociedad & Vivendi v Argentina* [2007] Order on Petitions to make Amicus Curae Submission, ICSID Case No. ARB/03/19 [20].
[98] *Border Timbers v Zimbabwe* (n 72) [51]-[52].
[99] *External Advisors' Application* (n 65), p.19.
[100] *Resolute Forest* (n 93) [4.5].

months before the oral hearings, giving the parties sufficient time to respond to the same via written and oral submissions. Hence, their submissions are unlikely to result in any substantial delays.[101]

44. The Claimant may further contend that since they have raised a new legal ground, admitting the same would entail substantial costs upon the parties, who will be required to file additional submissions on the new issue. However, we submit that the tribunal is empowered, under the AF Rules, to mitigate this financial impact by issuing 'cost orders' upon the applicant[102] and making the acceptance of its brief conditional upon an undertaking to reimburse the disputing parties for the additional costs incurred by them.[103] Consequently, the parties will not be burdened with unnecessary costs. Lastly, the mere fact that the External Advisors, in their application, have adopted a legal position unfavourable to the Claimant is insufficient, by itself, to demonstrate any *unfair* prejudice.

B. APPLICATION BY CBFI MUST BE REJECTED

45. The CBFI is an industry association representing Bonoori foreign investors. Along with the Claimant, its members include 38 other Bonoori companies investing in Mekar, two of which are currently pursuing CEPTA Chapter 9. It also includes Lapras Legal Capital ("LLC"), which was heavily involved in the brief's preparation despite the conflict of interest resulting from its involvement with the Claimant. Through its application, it addresses the issue of the tribunal's jurisdiction in light of the Claimant's state-owned nature. However, since the issue has been extensively addressed by the parties, its submissions are duplicative of the parties' and are incapable of assisting the tribunal. Moreover, it has failed to demonstrate its significant interest or an inherent public interest that its application furthers.

46. Accordingly, we submit that the CBFI must not be granted leave because, *firstly,* it does not have a significant interest in the dispute **[1],** *secondly,* it cannot assist the tribunal by providing a different and unique perspective **[2],** *thirdly,* it is not independent from the Claimant **[3]** and *fourthly,* its submissions have not been made in furtherance of public interest **[4].**

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[101] *LSF-KEB v South Korea* [2012] Procedural Order 15 (Unpublished) ICSID Case No. ARB/12/37.
[102] *ICSID AF Rules* (n 66), art 58; Gary Born, Amicus Curae (n 78), 659-660.
[103] *Philip Morris v Uruguay* [2015] Procedural Order No.3 ICSID Case No. ARB/10/7 [31]; *Antin Infrastructure v Spain* [2018] Award ICSID Case No ARB/13/31 [65]-[68].

1. It does not have a Significant Interest in the dispute

47. Non-disputing parties are required to have a significant interest which goes beyond a mere 'general interest'. Simply seeking to maintain the rule of law and upholding a particular legal interpretation is not sufficient to qualify this threshold.[104] Accordingly, the interest demonstrated by CBFI in upholding 'international norms facilitating the participation of SoEs in ISDS' or adopting a wider interpretation of the CEPTA's definition of an investor is insufficient to fulfil this requirement.[105]

48. The Claimant may, however, contend that CBFI's members will be directly impacted by the tribunal's decision on its jurisdiction since they may lose access to the dispute resolution mechanisms guaranteed under the CEPTA as a result. We submit that this interest does not qualify the threshold since, to have a significant interest, the proceedings must have a direct and proximate consequence for the applicant.[106] However, the aforementioned interest results from is a tangential impact that the tribunal's decision *may* have on subsequent arbitrations, which will have an entirely different factual and legal matrix. This vague and uncertain future on other, unconnected arbitrations cannot be considered a significant interest.

2. It cannot provide the Tribunal with a different and unique perspective

49. Applicants must assist the tribunal by providing a different and unique perspective. In order to avoid overburdening the proceedings, tribunals have generally adopted a stringent standard which requires the applicant to *materially assist* the tribunal.[107] Accordingly, submissions such as this one which merely extend or are duplicative of the parties' submissions do not qualify this threshold.[108]

50. The Claimant contends that the CBFI can provide nuanced context regarding the business climate of Bonooru, its economy and its corporate governance framework. However, where the parties have made detailed submissions on the issue which the applicant addresses, as is the case here,[109] merely providing additional 'factual context' to the dispute does not fulfil this requirement.[110] This is because sufficient factual context has been provided by the disputing parties and since CBFI has

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[104] *Resolute Forest* (n93), [4.6].
[105] *CBFI's Application* (n 64), p. 17.
[106] *Lordos v Turkey* [2010] ECHR App No 15973/90; Anna-Karin Lindblom, 'Non-Governmental Organisations in International Law' [2005] CUP 344.
[107] *Gary Born, Amicus Curae* (n 78).
[108] *Philip Morris* (n 100), Procedural Order 4 [26]; *Chevron & Texaco Corp v Ecuador* [2009] Procedural Order No 8 PCA Case No 2009-23 [19].
[109] *Uncontested Facts* (n 14), p. 28.
[110] *Bear Creek Mining Corporation v Republic of Peru* [2017] Procedural Order 6 ICSID Case No. ARB/14/21.

failed to adduce any additional fact or argument not covered by the parties, it fails to qualify the threshold.

3. It is not Independent from the Claimant

51. This criterion requires that the applicant must not be directly related to or aligned with the interests of either party In this case, however, this requirement is not fulfilled on two accounts. Firstly, there is a proximate relationship between the Claimant and CBFI since Vemma Holdings is one of its members. This compromises its independence since the Claimant is in a position to directly influence its amicus brief.[111] This is evidenced by the fact that the CBFI organises networking events for its members,[112] which may be leveraged by the Claimant to influence other members involved in the formation of the brief.

52. Secondly, the participation of LLC in these proceedings through the Claimant as well as its participation in the preparation and voting on the CBFI's application indicates a 'conflict of interest'. Since it is advising the Claimant on litigation strategies, it has an interest in the outcome of the dispute such that it cannot maintain a neutral perspective with respect to the Respondent's interests.[113] As a result of this conflict, the CBFI fails to fulfil the independence requirement.

4. Its submissions do not further any Public Interest

53. The 'UNCITRAL Rules' require the tribunal to consider the public interest while determining an application's admissibility. However, the mere fact that a particular dispute may *tangentially* impact a public interest is insufficient to qualify this threshold.[114] Instead, it must be demonstrated that, if admitted, the submission will actively *further* a public interest.[115]

54. We submit that CBFI's submissions do not further any public interest. Although, in its application, it refers to the public interest in ensuring an accessible ISDS regime, it fails to particularise how its submissions further this public interest. We submit, instead, that it only furthers the narrow,

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[111] *Philip Morris* (n 100), Procedural Order (Unpublished); Sophie Lamb & Ors., 'Recent Developments in the Law & practice of Amicus Briefs in Investor-State Arbitration' [2017] Ind. Jl. Of Arb. Law 72-92, 83.
[112] Moot Case, Procedural Order 3.
[113] *Tennat Energy v Canada* [2020] Procedural Order 4 PCA Case No. 2018-54 [104]; *Canepa Green Energy v Spain* [2020] Decision on NDP Application ICSID Case No. ARB/19/4.
[114] *Gabriel Resources Ltd v Romania* [2018] Procedural Order No 19 ICSID Case No ARB/15/31 [65]; Vivendi v. Argentina (n 94), Order on Transparency [20].
[115] *Resolute Forest* (n 93).

professional business interests of the CBFI's members, which is insufficient to qualify this threshold.[116]

Conclusion to Issue 2

55. The External Advisors, being independent practitioners, have filed their application to safeguard their significant financial interests and the general public interest by ensuring that corruption is eradicated from the ISDS process. Accordingly, they have adduced certain facts before the tribunal regarding the allegations of corruption surrounding the Claimant's investment, which have not been placed before it by either party. Hence, their application must be admitted.

56. Contrarily, the CBFI is beholden to the Claimant and there is a clear conflict of interest resulting from the participation of LLC. Consequently, its submissions mirror those of the Claimant and fail to provide the tribunal with a different perspective. Moreover, it has failed to particularise its interest beyond a mere general interest or how its application furthers any public interest. Accordingly, to ensure the dispute is settled without unnecessary disruption, the tribunal must reject its application.

[116] *Apotex, Order on Appleton* (n 90) [42]-[43].

[III]. THE RESPONDENT HAS NOT VIOLATED ITS OBLIGATIONS UNDER ARTICLE 9.9 OF THE CEPTA

57. Article 9.9(1) of the CEPTA obligates the Respondent to accord fair and equitable treatment ('FET') to a covered investment.[117] The burden of proving the breach of this obligation lies upon the Claimant.[118] The Claimant alleges that the Respondent has violated the FET obligations. However, the Respondent submits to the contrary for the following reasons:

58. *Firstly,* the Respondent's conduct does not amount to a denial of justice **[A]**; *Secondly,* there was no fundamental breach of due process including a fundamental breach of transparency **[B]**; *Thirdly,* the Respondent did not discriminate against the Claimant **[C]**; *Fourthly,* its conduct against the Claimant was not arbitrary **[D]**; *Fifthly,* its actions do not constitute abusive treatment **[E]**; and *sixthly,* the Respondent has not frustrated the Claimant's legitimate expectations **[F]**.

A. THE RESPONDENT'S CONDUCT DOES NOT AMOUNT TO A DENIAL OF JUSTICE

59. Denial of justice was developed as an international delict to protect foreigners against acts of the judiciary of a foreign State. It forms an integral part of FET under customary international law.[119] Article 9.9(2)(a) of the CEPTA prescribes denial of justice as a breach of the FET obligation. A denial of justice occurs, *inter alia,* when the host State's courts subject a suit to *undue delay*, or if justice is administered in a *seriously inadequate way*.[120]

60. The Respondent submits that its conduct does not amount to denial of justice as it did not indulge in either of the aforementioned acts. This is because, *firstly,* the standard of undue delay of judicial proceedings was not met in Caeli Airways' ('Caeli') challenge against the airfare caps imposed by the Competition Commission of Mekar ('CCM') **[1]**; and *secondly,* Mekari courts did not administer justice in a seriously inadequate way while enforcing the Sinnoh Arbitral Award **[2]**.

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[117] Moot Case, 2014 CEPTA p.76.
[118] *Electrabel S.A. v The Republic of Hungary* [2015] Award ICSID Case No. ARB/07/19 [154].
[119] *Loewen Group, Inc. v United States of America* [2003] Award ICSID Case No. ARB(AF)/98/3 [123]; *Bridgestone Americas, Inc. v Republic of Panama* [2020] Award ICSID Case No. ARB/16/34 [221].
[120] *Robert Azinian & Others v The United Mexican States* [1999] Award ICSID Case No. ARB(AF)/97/2 [101]-[102].

1. The standard of undue delay of judicial proceedings was not met in Caeli's challenge against the airfare caps imposed by the CCM

61. In order to determine whether a delay in proceedings amounts to a denial of justice, the tribunal must consider the circumstances of the host State and the behaviour of courts themselves.[121]

62. Accordingly, the Respondent submits that [i] the Mekari judiciary did not have sufficient resources to effect immediate redressal; [ii] alternatively, the Mekari judiciary despite such disadvantages, made the best possible efforts to resolve the airfare cap matter.

i. The Mekari Judiciary did not have sufficient resources to effect immediate redressal

63. In *White Industries,* the tribunal accounted for the fact that India is a developing country, with a population of over 1.2 billion people.[122] Thus, its over-stretched judiciary must be held to different standards than the judiciary of developed countries liken the United States.[123]

64. In this case, it must be noted that high regulatory intervention and late economic reforms affected Mekar's post-independence growth.[124] Furthermore, between 1980 and 2015, the population of Mekar grew from 6 million to 10.8 million.[125] However, its judicial system did not expand at the same rate.[126] Consequently, the average time taken from commencing an action to receiving a final decision in Mekari courts rose from 9 months in 1980 to 22 months in 2015.[127] The average time further increased to around 27 months in commercial matters, as Mekar prioritized criminal cases over them in order to avoid prolonged detention for the accused.[128] Thus, when Caeli's lawyers requested an immediate hearing to secure a stay on the airfare caps, the Mekari Court Registrar reasoned that in light of such lack of resources it was difficult for the court to make immediate redressal possible.[129]

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121 *White Industries Australia Ltd. v Republic of India* Final Award IIC 529 (2011).
122 ibid [10.4.18].
123 ibid [10.4.18].
124 *Uncontested Facts* (n 14) [12].
125 *Uncontested Facts* (n 14) [13].
126 ibid.
127 ibid.
128 ibid.
129 *Uncontested Facts* (n 14) [44].

65. Therefore, the Respondent submits that while adjudicating whether the delay in judicial proceedings amounted to denial of justice under Article 9.9(2)(a) CEPTA, this Tribunal must also take into account the circumstances that the Mekari judiciary was faced with.

ii. The Mekari Judiciary despite such disadvantages made the best possible efforts to resolve the matter

66. In *White Industries*, despite there being a delay of 4 years on part of the Supreme Court of India and an overall delay of 9 years by the Indian judiciary, the Tribunal held that although such a delay was regrettable, there was no suggestion of bad faith.[130] Thus, it did not amount to denial of justice in that case.

67. In the present matter, the constraints faced by the Mekari judiciary have already been shown. To worsen the situation, the Mekari courts were faced with a high volume of cases resulting due to the economic crisis.[131] Despite this, on 15 June 2019 i.e. less than 15 months from the date of registration of Caeli's claim, Justice Van Duzer released his decision on the airfare caps.[132] This was approximately half the time that was taken on an average basis to resolve a commercial matter in Mekar.[133]

68. Thus, it is submitted that despite the challenges it was faced with, such efforts on part of the Mekari courts could not amount to undue delay of judicial proceedings through the lens of denial justice.

2. The Mekari courts did not administer justice in a seriously inadequate way while enforcing the Sinnoh Arbitral Award

69. The Respondent submits that the threshold for administering in a seriously inadequate way is very high and goes beyond mere misapplication of law.[134] In the present matter, the actions Mekari Courts while enforcing the Sinnoh Arbitral Award did not meet such high standards.

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130 *White Industries Australia Ltd. v Republic of India* Final Award IIC 529 (2011) [10.4.21], [10.4.23].
131 *Uncontested Facts* (n 14) [44].
132 *Uncontested Facts* (n 14) [54].
133 *Uncontested Facts* (n 14) [13].
134 *Robert Azinian & Others v The United Mexican States* [1999] Award ICSID Case No. ARB(AF)/97/2 [101]-[102]; *Philip Morris Brand Sàrl (Switzerland) v Oriental Republic of Uruguay* [2016] Award ICSID Case No. ARB/10/7 [499].

70. It is noteworthy that the Claimant in order to save itself from a financial disaster of its own making, secured an offer from a Sinnoh based private equity firm named Hawthorne Group LLP to buy its entire stake in Caeli.[135] However, the offer was rightfully rejected by the Respondent as the price offered was deemed to be artificially inflated and not an arm's length commercial price.[136] Further, the Hawthorne Group was not a bona fide third party purchaser as it was associated with the Claimant due to its Moon Alliance Membership.[137] To resolve this tussle with the Claimant, the Respondent filed a request for arbitration with the Sinnoh Chamber of Commerce's ("SCC"). In this arbitration, the sole arbitrator Mr. Rett Cavanaugh who was appointed by the SCC Secretariat passed the award in the favour of the Respondent herein.

71. The Claimant's main case is that this award was mired in corruption and thus in contravention of transnational public policy.[138] In order to establish this, the Claimant has relied on the CILS Legal Report dated 14 June 2020.[139] However, the Respondent submits that the evidence submitted in the CILS Legal report is circumstantial in the best case.[140] It is to be noted that the circumstantial and hearsay evidence concerning Mr. Cavanaugh's bias must be balanced against his final decision, which according to the Respondent, reflects the correct position of law with respect its Right of First Refusal offers.[141] Further, there are doubts over the credibility of CILS as well because it has been recognised as an entity funded by foreign donations to interfere in Mekar's domestic affairs.[142]

72. Thus, in light of the aforementioned factual matrix, it is established that Sinnoh Arbitral Award was not against transnational public policy and the Mekari judiciary was correct in moving ahead with its plan to enforce it.

73. Insofar as the Claimant's argument regarding the violation of Article V(1)(e) of the New York Convention is concerned, it is pertinent to note that this provision uses the word 'may' instead 'shall'.[143] Therefore, the Respondent argues that the use of 'may' in the 1958 New York

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135 *Uncontested Facts* (n 14) [56].
136 *Uncontested Facts* (n 14) [57].
137 ibid.
138 *World Duty Free Company v Republic of Kenya* [2006] Award ICSID Case No. ARB/00/7 [142].
139 Moot Case, Annexure XII p.61.
140 Moot Case, Annexure XIV p.65.
141 Moot Case, Annexure X p.58.
142 Annexure XIV (n 140).
143 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, art V(1)(e).

Convention provides an enforcing court with discretion to recognize an award that has been set aside at its seat.[144]

74. Thus, it is submitted that the fact that Sinnoh Arbitral Award was set aside by the Apex Court of the arbitral seat i.e. Supreme Arbitrazh Court, does not mandate the Mekari Courts to set aside the award as well. It must also be noted that while enforcing the Sinnoh Arbitral Award, the Superior Court of Mekar had relied on its precedent in the case named *Alta Lumina Trading* wherein it had enforced an arbitral award set aside in the seat of its arbitration.[145] This establishes that Mekari domestic courts were acting in tune with the New York Convention and its precedents. Therefore, there was no misapplication of law on their part, let alone malicious misapplication of law which could administer justice in a seriously inadequate way.

B. THERE WAS NO FUNDAMENTAL BREACH OF DUE PROCESS INCLUDING A FUNDAMENTAL BREACH OF TRANSPARENCY BY THE RESPONDENT

75. Article 9.9(2)(b) of CEPTA prescribes the fundamental breach of due process as a breach of the FET obligation. This standard is infringed when the conduct of the State leads to an outcome which offends judicial propriety through a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in the process.[146] Further, it is pertinent to note that the term 'fundamental' means something that affects the most central and important parts of something.[147] Therefore, the standard for a fundamental breach of due process would be even higher than the aforementioned standard.

76. The central case of the Claimant is that enforcement of the Sinnoh Arbitral Award by the Mekari domestic courts was a fundamental breach of the due process of law including a fundamental breach of transparency. It is because according to the Claimant, this arbitral award was tainted with corruption. However, the Respondent submits that such enforcement in no way offended a sense of judicial propriety or showed a complete lack of transparency. This is evidenced by multiple facts surrounding the Sinnoh Arbitration.

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[144] R Wolff, Article-by-Article Commentary on Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (2nd edn, BHN).
[145] Moot Case, Annexure XV p.67.
[146] *Waste Management, Inc. v United Mexican States (I)* [2001] Award ICSID Case No. ARB(AF)/98/2.
[147] D Lea and J Bradbery, Oxford Advanced Learner's Dictionary (10th edn, OUP).

77. Firstly, it has already been established that Mr. Rett Cavanaugh was a neutral third party arbitrator appointed by the SCC Secretariat.[148] Secondly, it has also been established that the evidence against Mr. Cavanaugh's impartiality was merely circumstantial and hearsay in nature.[149] Thirdly, even the Supreme Arbitrazh Court of Sinnograd had accepted that it did not find itself in a position to conclusively rule on whether the act of bribery had in fact taken place.[150] Lastly, the credibility of the CILS legal report on which this entire allegation rests, has already been called into question in light of the fact that it received foreign donations to interfere in Mekar's domestic affairs.[151]

78. The Respondent while enforcing an award which has been set aside in its arbitral seat has also not violated Article V(1)(e) of New York Convention ('NYC'). It is submitted that according to Article V(1)(e) of NYC, recognition and enforcement of the award '*may*' be refused, at the request of the party against whom it is invoked if that party furnishes proof to the competent authority that such an award has been set aside or suspended by a competent authority of the country which is the arbitral seat.[152] The usage of 'may' in this provision provides an enforcing court with *discretion* to recognize an award that has been set aside at its seat.[153]

79. Thus, it is submitted that the enforcement of the Sinnoh Arbitral Award did not amount to a fundamental breach of due process including a fundamental breach of transparency.

C. THE RESPONDENT DID NOT DISCRIMINATE AGAINST THE CLAIMANT

80. Any measure that involves discrimination is contrary to FET.[154] In the CEPTA, protection from discrimination is provided under Article 9.9(2)(c).[155] To determine if there is discrimination in violation of the FET standard, a tribunal must compare the treatment of the Claimant investor with other investors in a similar position, i.e., in like circumstances.[156] Further, there must be no rational justification for the differential treatment alleged to be discriminatory.[157]

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148 *Uncontested Facts* (n 14) [58].
149 Moot Case, Annexure XIV p.65.
150 Moot Case, Annexure XIII [11].
151 Annexure XIV (n 149).
152 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, art V(1)(e).
153 R Wolff, Article-by-Article Commentary on Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (2nd edn, BHN).
154 *CMS Gas Transmission Company v The Argentine Republic* [2005] Award ICSID Case No. ARB/01/8.
155 Moot Case, 2014 Bonooru - Mekar CEPTA p.76.
156 *Parkerings-Compagniet AS v Republic of Lithuania* [2007] ICSID Case No. ARB/05/8 [288].
157 ibid.

81. In the instant case, the Claimant alleges that the discrimination took place on part of the Respondent while distributing subsidies under Executive Order 9-2018.[158] However, the Respondent refutes this allegation as such a differential treatment was backed by a rational justification.

82. For contextual purposes, it is pertinent for the Tribunal to note that the Executive Order 9-2018 was introduced to provide emergency assistance and health care response for individuals, families, and businesses affected by the 2017 Mekari economic crisis.[159] The reason behind denying Caeli's request for the grant of subsidies as is clear from Mekar's Deputy Transportation Minister's statement was that granting subsidies to State-owned companies like Caeli Airways would give them an unfair advantage over privately-owned companies.[160] This was because State-owned companies have unique advantages over other companies that enable them to out-compete privately owned firms.[161]

83. The Respondent in this light submits that Caeli was one of the only two airlines owned in any significant part by a foreign government operating in Mekar at the time, the other being the wholly government-owned Larry Air.[162] Neither of these two airlines which were situated in 'like circumstances' received subsidies under the said order.[163]

84. Insofar as the airlines Star Wings and JetGreen are concerned, according to the Respondent they were not situated in 'like circumstances' with Caeli. The Respondent contends that merely receiving subsidies from home was not the reason behind the rejection of subsidies to Caeli.[164] It was the State-owned nature of the Claimant which owned Caeli. Furthermore, Star Wings and Jet Green had only received one time lump sum payment from their home state in 2017 to alleviate the effects of the financial crisis prevailing during that time.[165] On the contrary, the Claimant received subsidies under Horizon 2020 scheme because its investment in Caeli would draw more travellers from Mekar and the Greater Narnian region to Bonooru's emerging tourism market.[166]

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158 Moot Case, Annexure VIII p.56.
159 ibid.
160 *Uncontested Facts* (n 14) [46].
161 ibid.
162 *Uncontested Facts* (n 14) [47].
163 ibid.
164 *Uncontested Facts* (n 14) [46].
165 Moot Case, Procedural Order 4 [7].
166 *Uncontested Facts* (n 14) [28].

85. It must also be noted that the said order intended not to skew the intended obligation would not skew market conditions in favour of one or more enterprises.[167] It is evidenced by the fact that the predominant recipients of the subsidies under the said order were the airlines operating on important domestic routes within Mekar with less than 5% market share on such routes.[168] Thus, granting subsidies to Caeli which had an individual market share of 43% in Mekar would clearly have skewed market conditions in its favour.

86. The aforementioned facts establish that the differential treatment between Caeli and airlines such Star Wings and Jet Green was backed by a rational justification as there was an absence of 'like circumstances' between them. Thus, it is submitted that the Respondent's rejection of subsidies to Caeli did not amount to discriminatory treatment under Article 9.9(2)(c) CEPTA.

D. THE RESPONDENT'S CONDUCT AGAINST THE CLAIMANT WAS NOT ARBITRARY

87. Article 9.9(2)(c) of the CEPTA provides protection from arbitrary conduct.[169] Under international investment law, *inter alia* a measure is considered arbitrary if it inflicts damage on the investor without serving any apparent legitimate purpose;[170] or it is based on discretion, prejudice or personal preference rather than legal standards.[171]

88. In the present case, the Respondent submits that its conduct against the Claimant was not arbitrary because, *firstly*, both the CCM Investigations served a legitimate purpose; **[1];** and *secondly*, both the CCM investigations were based on legal standards rather than discretion, prejudice or personal preference **[2].**

1. Both the CCM Investigations served a legitimate purpose

89. On 9 September 2016, the CCM launched the 'First Investigation' into Caeli's activities via a suo moto cognizance.[172] For contextual purposes, it is essential to note that the aforementioned investigation was launched in the backdrop of the predatory pricing tactics adopted by Caeli

[167] Moot Case, Annexure VIII p.56.
[168] Moot Case, Procedural Order 4 [7].
[169] Moot Case, 2014 Bonooru - Mekar CEPTA p.76.
[170] Christoph Schreuer, 'Protection Against Arbitrary or Discriminatory Measures' in *International Protection of Investments* (CUP 2007).
[171] ibid; *Occidental Exploration and Production Company v Republic of Ecuador (I)* [2004] LCIA Case No. UN3467[162].
[172] *Uncontested Facts* (n 14) [36].

through which it hindered the competition in the domestic market of Mekar.[173] Caeli's loyalty programs also had a role in this regard.[174] Further, Caeli engaged in preferential secondary slot trading with fellow Moon Alliance member Royal Narnian.[175] Furthermore, the report at the conclusion of the investigation also noted that the subsidies received by the Claimant under the Horizon 2020 scheme helped Caeli drastically reduce its airfare below its average avoidable costs.[176] Thus, through this investigation, the CCM served a legitimate purpose to secure the interest of the smaller private players in the Mekari airline market which would otherwise be eliminated by Caeli.

90. In December 2016, a consortium of small regional airlines in Greater Narnia complained before the CCM that Caeli had enaged in launching flights on specific regional routes with the sole purpose of pushing its competitors off these routes.[177] Caeli did so by capitalising on its undercutting policies and the privileges it enjoyed at Phenac International Airport.[178] Caeli's actions made it nearly impossible for the smaller companies to penetrate the market linked to Phenac International.[179] Therefore, the CCM launched the Second Investigation into Caeli's business activities with legitimate purpose of placing a check on Caeli's exclusionary tactics on the routes to and from Phenac International.

2. Both the CCM investigations were based on legal standards rather than discretion, prejudice or personal preference

91. The Respondent submits that the CCM was empowered to launch such suo moto investigation under the Monopoly and Restrictive Trade Practice Act (MRTP Act)[180]. Even if it is accepted that Caeli's market share in Mekar was only 43%, the CCM could still launch a suo moto investigation against it by exercising its discretion in industries that required special attention.[181] The airfare cap imposed on Caeli by the CCM as an interim measure under this investigation was also in accordance with Section 4(d) of the MRTP Act.[182] If these caps would have been an outcome of

[173] ibid.
[174] *Uncontested Facts* (n 14) [45].
[175] *Uncontested Facts* (n 14) [36].
[176] *Uncontested Facts* (n 14) [45]
[177] *Uncontested Facts* (n 14) [38].
[178] ibid.
[179] ibid.
[180] Moot Case, Annexure V p.47.
[181] ibid.
[182] ibid.

an investigation based on prejudice, then they would not have been reasonably above the rates Caeli charged on its set routes.[183] Further, these caps were pegged to Mekar's official inflation rate calculated by the Central Bank, released each year in December.[184] This clearly shows the lack of prejudice on part of the CCM while carrying forward the 'First Investigation'.

92. The Second Investigation was launched in pursuance of the prohibition of the 'abuse of dominant position clause' enshrined in Chapter IV of the MRTP Act.[185] It is submitted that Caeli met all the three requirements for the said provision to operate.

93. Firstly, due to its high market share of 43%, Caeli was substantially in control of the Mekari market.[186] Secondly, Caeli had extracted significant additional privileges in terms of airport service fees from Phenac International Airport and attempted to push other competitors off the market.[187] Lastly, such tactics employed by Caeli made it nearly impossible the smaller domestic airlines to penetrate the market linked to Phenac International, which effectively became a fortress hub for Caeli.[188]

E. THE RESPONDENT'S ACTIONS DO NOT CONSTITUTE ABUSIVE TREATMENT OF THE CLAIMANT

94. Tribunals have generally imposed a high standard on allegations of abusive treatment which includes, *inter alia*, threat of criminal proceedings[189], physical obstruction[190] and exercising undue pressure to enter into settlement agreements.[191] Under the CEPTA, an investor has been provided protection from abusive treatment by the host state under Article 9.9(2)(d).

95. The threat of and/or initiation of regulatory proceedings with the aim of punishing or applying pressure on the investor constitutes harassment under FET.[192] In the present matter, the Claimant alleges that both the CCM investigations amounted to the Claimant's harassment which is covered

[183] *Uncontested Facts* (n 14) [37].
[184] *Uncontested Facts* (n 14) [43].
[185] Annexure V (n 180).
[186] *Uncontested Facts* (n 14) [36].
[187] *Uncontested Facts* (n 14) [38].
[188] ibid.
[189] *Tokios Tokelés v Ukraine* [2007] Award ICSID Case No. ARB/02/18 [19].
[190] *Biwater Gauff Limited v United Republic of Tanzania* [2008] Award ICSID Case No. ARB/05/22 [223].
[191] *Desert Line Projects LLC v Republic of Yemen* [2008] Award ICSID Case No. ARB/05/17 [187].
[192] *Krederi Ltd. v Ukraine* [2018] Award ICSID Case No. ARB/14/17 [638].

under Article 9.9(2)(d). However, the Respondent submits that mere "bureaucratic officiousness" or "overzealous enforcement action" will not be equated with harassment.[193]

96. In the instant matter, the 'First Investigation' was initiated by the CCM via a suo moto cognizance in light of the predatory pricing strategies adopted by the Claimant owned Caeli.[194] Through such practices, Caeli was hindering competition in the domestic market of Mekar.[195] The CCM had also received evidence of preferential secondary slot-trading between the Royal Narnian and Caeli which is why it calculated their market share in conjunction for the purposes of this investigation.[196] Thus, the CCM's measure was justified under Section 2 of the MRTP Act, 2009.[197]

97. Further, the CCM had not threatened Caeli or demanded anything in exchange of not moving ahead with this investigation. Had the CCM intended to punish Caeli, it would not have placed the airfare caps reasonably above the rates that Caeli charged on set routes.[198]

98. With respect to the 'Second Investigation', Respondent submits that the CCM only initiated this investigation upon receiving a complaint from a consortium of small regional airlines in Greater Narnia.[199] They had complained that Caeli engaged in pushing its competitors by capitalizing on its undercutting policies and the privileges it enjoyed at the Phenac International Airport.[200] Similar to the First Investigation, here also the CCM had not threatened Caeli or demanded anything in exchange of stopping the investigation. Further, it must be noted that CCM's detailed report at the conclusion of this investigation had also indicated that Caeli's anti-competitive behaviour while conducting its business also did not help it create new customers or increase revenues.[201]

99. Thus, it is established that regulatory proceedings in the form of both the CCM investigations were not initiated with the aim of punishing Caeli but to prevent its anti-competitive practices. Hence, they did not constitute as harassment of the Claimant.

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193 ibid [637].
194 *Uncontested Facts* (n 14) [36].
195 ibid.
196 ibid.
197 Annexure V (n 180).
198 *Uncontested Facts* (n 14) [37].
199 *Uncontested Facts* (n 14) [38].
200 ibid.
201 *Uncontested Facts* (n 14) [49].

F. THE RESPONDENT HAS NOT FRUSTRATED THE CLAIMANT'S LEGITIMATE EXPECTATIONS

100. Article 9.9(3) of the CEPTA seeks to prevent the frustration of an investor's *legitimate expectations* by the Host State. Legitimate Expectations are said to be frustrated where the Host State's conduct creates reasonable and justifiable expectations on the part of an investor, who makes an investment or undertakes any action relying this conduct, such that a failure by the host State to honour these aforesaid expectations would result in unjustifiable losses for the investor.[202] However, for such legitimate expectations to arise in the first place, the representation made to the investor must be specific and unambiguous.[203] Further, such legitimate expectations need to be balanced with the Respondent's sovereign right to regulate domestic matters in public interest.[204]

101. Therefore, the Respondent submits that: first, the Respondent did not make any specific and unambiguous representations at the beginning of the investment which it would later frustrate **[1]**; and second, alternatively, the Claimant's legitimate expectations, if any, must be balanced with the Respondent's right to regulate under Article 9.8 CEPTA **[2]**.

1. The Respondent did not make any specific and unambiguous representations at the beginning of the investment which it would later frustrate

102. Legitimate expectations cannot solely be the subjective expectations inferred by the investor. Therefore, Respondent submits that the representation made by the Host State must be specific and unambiguous in order to give rise to objective expectations in the mind of the investor.[205]

103. At the time of the Claimant's acquisition of 85% stakes in Caeli, the CCM had approved the Caeli's Moon Alliance membership.[206] However, it is submitted that such an approval by the CCM could not be interpreted as a green signal to the predatory pricing strategies that Caeli adopted later. The Claimant's expectation that the CCM should not have factored in the market share of fellow Moon Alliance member i.e. Royal Narnian while calculating Caeli's total market share prior to launching its suo moto investigation is not legitimate. This is primarily because the CCM did not make any specific and unambiguous representations which would lead to such expectations in

[202] *International Thunderbird Gaming Corporation v The United Mexican States* Award IIC 136 (2006) [147].
[203] *Siemens A.G. v The Argentine Republic* [2007] Award ICSID Case No. ARB/02/8.
[204] *EDF (Services) Limited v Republic of Romania* [2009] Award ICSID Case No. ARB/05/13 [219].
[205] ibid.
[206] *Uncontested Facts* (n 14) [25].

this regard. Rather, at the time of acquisition, the CCM had asked for an undertaking from Caeli that it would not engage in high-level co-operation on competition parameters such as prices, schedules and other sensitive information with Moon Alliance members.[207]

104. The Respondent also submits that it had not made any specific and unambiguous representation which would lead to an expectation on part of the Claimant to treat the Phenac International Airport as its fortress hub.[208] Caeli's contract with Phenac International Airport could not have led the Claimant believe that it could make Caeli launch flights on such routes with the sole purpose of eliminating its competitors and practice undercutting policies.[209]

2. Alternatively, the Claimant's legitimate expectations, if any, must be balanced with the Respondent's right to regulate under Article 9.8 CEPTA

105. The Respondent submits that due regard must be paid towards striking a balance between the investor's legitimate expectations and the host State's power to regulate its economic life in the public interest.[210] In the context of investment arbitration, the right to regulate in the public interest is understood as a State's power and right to regulate certain activities affecting the public interest, which may originate in a duty to regulate such activities.[211] In this case, Article 9.8 CEPTA empowers the Respondent to regulate within its territory in order to pursue legitimate policy objectives, even if it harms the investment.[212]

106. In the instant matter, even if it is assumed that the contended representations were specific and unambiguous, the Respondent while launching both the CCM Investigations was within its right to regulate. This is because through both the investigations, the Respondent would achieve the legitimate public policy objective of protecting the consumer interests.[213] This could be done by preventing Caeli from creating a monopoly over the airline market in Mekari through its predatory

[207] ibid.
[208] *Uncontested Facts* (n 14) [38].
[209] ibid.
[210] *EDF (Services) Limited v Republic of Romania* [2009] Award ICSID Case No. ARB/05/13 [219].
[211] LW Mouyal, 'International Investment Law and the Right to Regulate - A Human Rights Perspective' (Routledge 2018) p. 114.
[212] Moot Case, 2014 Bonooru - Mekar CEPTA p.76.
[213] ibid.

pricing strategies[214], secondary slot trading with the Royal Narnian Airways[215] and abuse of dominance over the Phenac International Airport.[216]

Conclusion to Issue 3

107. The Respondent has not breached its FET obligation under Article 9.9 of the CEPTA as its actions did not result in the investment of the Claimant being treated in an arbitrary, discriminatory or abusive manner. It was within it right to regulate while imposing sanctions on Caeli for the violation of anti-competitive policies in Mekar. Additionally, the Claimant's expectations were not legitimate as no specific and unambiguous representations were given by Respondent with respect to legal stability. Thus, Respondent has treated Claimant fairly and equitably and is not liable to pay compensation.

[214] *Uncontested Facts* (n 14) [36].
[215] ibid.
[216] *Uncontested Facts* (n 14) [38].

[IV]. THE CLAIMANT IS ENTITLED TO COMPENSATION ONLY AS PER THE MARKET VALUE OF ITS INVESTMENT, WHICH HAS ALREADY BEEN PAID BY THE RESPONDENT

108. In case the Tribunal finds a breach of Article 9.9 of CEPTA, the Respondent submits that the compensation owed for such breach is USD 400 million, calculated as per the applicable compensation standard of 'Market Value'. Further, since the Respondent has already purchased the Claimant's investment at its market value, it submits that the Claimant is not entitled to an award of compensation by this Tribunal.

109. As per the International Valuation Standard and various Tribunals, Market Value ('MV') is the price, expressed in terms of cash equivalents at which a property would change hands between a willing and able buyer and a hypothetical willing and able seller.[217] Both these parties should be acting at arm's length in an open and unrestricted market. Market value reflects the current value of the asset and does not take into account future projections.[218]

110. The Claimant contests that it is entitled to a total compensation of 1.1 billion USD under the fair market value standard[219] and is thus owed an additional amount of 700 million USD. However, the Respondent submits that the Claimant is entitled to compensation only at the MV for the following reasons:

111. *Firstly,* the MV standard applies as per Article 9.21 of the CEPTA **[A]**; *Secondly,* the Most-Favoured Nation clause under Article 9.7 and 9.11 is not applicable **[B]**; and *thirdly,* the compensation amount must be reduced considering the Claimant's contributory fault and the ongoing economic crisis in Mekar **[C]**.

A. THE MARKET VALUE STANDARD APPLIES AS PER ARTICLE 9.21 OF THE CEPTA

112. Under Article 9.21(1)(a) of the CEPTA, damages must be awarded at the Market Value standard.[220] It is an express treaty provision and distinctly provides for this standard and not the FMV standard. Accordingly, we submit that derogation from this express treaty provision in impermissible.[221]

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[217] *Enron v Argentina* [2007] Award ICSID Case No. ARB/01/3.
[218] ibid.
[219] Moot Case, Response to the Notice of Arbitration [21].
[220] *Factory at Chorzów (Germany v Poland*) [1928] PCIJ Series A. No 17.
[221] *Amoco International Finance Corporation v Iran* [1987] Partial Award IUSCT Case No. 56.

113. Under Customary International Law, the damages owed are remedial in nature to cover the financially accessible damage. However this standard cannot be used in place of an express treaty obligation which provides for *lex specialis* to ascertain the metric of compensation.[222] The principles of *lex specialis* gives primacy to any special law, including treaties like the CEPTA, over a general principle of international law.[223]

114. Further, Article 9.21 was incorporated with the express purpose of providing an appropriate metric standard for compensation.[224] Despite the existence of treaties providing for different valuation standards, the CEPTA's drafters *deliberately chose* this standard.[225] This indicates the specific intention of the parties to give a specific meaning to this provision.

115. To invoke the FMV standard, the Claimant must import it from a provision of the CEPTA, which only mentions provides this standard for the violation of Article 9.12 (Expropriation). However, it is submitted that the application of this Article is outside the scope of the current arbitration as the Claimant has agreed to limit its substantive claims only to the violation of Article 9.9.[226]

116. Therefore, Respondent submits that the Tribunal must calculate the compensation in accordance with Article 9.21.

B. THE MOST FAVOURED NATION CLAUSE UNDER ARTICLE 9.7 AND ARTICLE 9.11 CANNOT BE APPLIED

The Claimant may rely on the MFN clause contained in Article 9.7 and 9.11 to import a clause from another treaty between a third state and the State against whom the allegations have been. However in this case, they cannot be used as the necessary conditions for their application are not fulfilled. In particular, the FMV standard cannot be imputed by applying, *firstly,* Article 9.7 of CEPTA **[1]** and *secondly,* Article 9.11 of CEPTA **[2].**

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[222] ibid.
[223] *Phillips Petroleum Company Iran v The Islamic Republic of Iran, the National Iranian Oil Company* [1989] Award IUSCT Case No. 39.
[224] *Caratube v Kazakhstan* [2012] ICSID Case No. ARB/08/12.
[225] Moot Case, 2006 Arrakis-Mekar BIT, p. 84.
[226] Procedural Order 3 (n 15) [2].

1. Article 9.7 cannot be used to impute the FMV standard

117. Article 9.7(1) relates to the "use" and "enjoyment" of investments. Its MFN clause must be read with Article 9.7(2), which clarifies its applicability by stating that procedures for the resolution of an investment dispute and substantive obligations cannot give rise to a breach of this provision.

118. The Claimant has sought to import the MFN clause from the 2006 Arrakis- Mekar BIT,[227] Article 13 provides for the fair market value compensation standard. The FMV standard can cannot be imported under Article 9.7 using the MFN Clause since due to Article 9.7(2) a substantive obligation in the Arrakis-Mekar BIT does not constitute 'treatment'.[228]

119. Further, the specific inclusion of Article 9.7 (2) makes the intent of the drafters to limit the provision and not include the process of dispute resolution within its ambit clear.[229] The fact that Mekar has, in the past, assented to the FMV standard in the Arrakis-Mekar BIT but has expressly only used the MV standard in the CEPTA, makes it evident that such an inclusion was not merely academic or pedagogical but was included with the intent to limit compensation under the CEPTA to only the MV standard.[230]

2. FMV standard cannot be applied to determine the compensation value in accordance with Article 9.11

120. Article 9.11 of CEPTA states that, *inter alia*, in a "state of emergency", the host State shall accord to the investors who suffered losses, a treatment no less favourable than that it accords to the investors of a third state in matters of compensation.[231]. The Respondent submits there exists no state of emergency in the state of Mekar. The Claimant may contend that there is a state of financial emergency and the same shall be used to include the application of Article 9.11.

121. Although Article 9.11 caters for specific circumstances, its application is not to the exclusion of other provisions in the treaty.[232] In context of the inclusion of the term 'state of emergency', there must exist a state of war, internal aggression, armed conflict or declared emergency that seriously

[227] *Arrakis BIT* (n 225), p. 84.
[228] *Maffezini v Spain* [2000] Award ICSID Case No. ARB/97/7.
[229] Vienna Convention on the Law of Treaties 1969, art 32.
[230] *Devas v India* PCA Case No. 2013-09.
[231] Moot Case, 2014 Bonooru- Mekar CEPTA p.77.
[232] *Guris v Syria* [2020] Final Award ICC Case No. 21845/ZF/AYZ.

threatens the normal functioning of the state.[233] The standard of the domestic state must be applied to determine whether a state of emergency exists.[234] In the present matter, there is no existence of any security or military threat in the state of Mekar. The Claimant cannot seek to rely on the word 'emergency' to include all forms of threats faced by the state of Mekar.

122. Alternatively, even if Article 9.11 were to include a state of 'financial emergency', the necessary conditions are not met in the state of Mekar. While deciding on a existence of a state of financial emergency, there must be an express declaration by the State bodies and the metric of the particular state must be applied to determine the status.[235] Although the state of Mekar is undergoing an economic crisis, there exists no declared form of financial emergency in the state.

123. Further Article 9.11 states that MFN status must be accorded to parties who 'suffer losses owing to' a state of emergency. However the losses to the Claimant's investment were not due to a state of financial emergency but as has been states above were due to the business strategy and violation of Mekari laws by the Claimant. Thus, it is submitted that under Article 9.11, a state of emergency did not exist in Mekar and hence the MFN standard cannot be applied in the present case.

C. THE COMPENSATION AMOUNT MUST BE REDUCED AFTER CONSIDERING THE CLAIMANT'S CONTRIBUTORY FAULT AND THE ONGOING ECONOMIC CRISIS IN MEKAR

124. Under the standard of contributory fault, the contribution of the party must be material and significant and the claimant must have failed to take reasonable steps to minimize its losses.[236] The Claimant must prove that chain of causation has not been broken and the actions of the Claimant have not contributed to the depreciation.[237]

125. However, the Respondent submits that that the Claimant has contributed to its economic depreciation. It is pertinent to note that the Claimant primarily relied on a strategy of re-investing their profits into two strategic programmes focusing on long term growth prospects. The Claimant's business decisions were initially aided by a honeymoon period for the airline industry. However, the subsequent strategies adopted by the Claimant, were made with "lack of care" or

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[233] Alberto Jimenez, 'The interpretation of necessity clauses in bilateral investment treaties after the recent ICSID Annulment decision' [2004] UCPR 94.
[234] *CMS Gas Transmission Co.* v Argentine *Republic* [2005] Award ICSID Case No. ARB/01/8.
[235] *Enron v Argentina* [2007] Award ICSID Case No. ARB/01/3.
[236] *Yukos v Russia* UNCITRAL, PCA Case No. 2005-04/AA227.
[237] *The Rompetrol Group N.V. v Romania* [2013] Award ICSID Case No. ARB/06/3 [188].

"negligence" under Art. 39 of the ILC Articles on State Responsibility.[238] The peak valuation and the initially profitable period that the Claimant enjoyed were only due to positive external factors including a massive fall in oil prices and rising tourist interest in Mekar due to Eldin Volcanic eruptions.[239]

126. The Claimant owned Caeli had initiated a frequent flyers program which allowed it to remain connected to its customers and increase incentives for customer satisfaction.[240] The Claimant also invested in corporate discounts scheme for small and medium enterprises.[241] Both these schemes which ultimately came at the cost of the airlines' deteriorating financial health. Thus, it is submitted that the Claimant has contributed to its losses and the depreciation in its value was due to the risky business strategies adopted by it.[242]

127. The amount of compensation should be reduced under the mitigating circumstances Mekar was faced with.[243] The tribunal must consider the economic situation of a party while awarding compensation.[244] The average projected inflation rate in Mekar for 2020 was 2600%, four consecutive quarters of negative growth and a potential third debt default are signs of a financial crisis in the state of Mekar.[245] Mekar is also facing a third debt default in three decades and would have to transfer twice its consolidated public spending to compensate the Claimant an additional amount of 700 million USD.[246]

Conclusion to Issue 4

128. According to both CEPTA and under international law, the Market Value standard is the applicable standard in the present case. Applying the same, the tribunal must conclude that any compensation owed is only to the tune of 400 Million USD. Further, any compensation must be reduced in light of the Claimant's contributory fault and the mitigating circumstances Mekar was faced with resulting from the subsisting economic crisis. The Respondent also wishes to point out

238 ILC's Articles on State Responsibility 2001, art 39.
239 *Uncontested Facts* (n 14) [33].
240 *Uncontested Facts* (n 14) [35].
241 ibid.
242 Moot Case, Response to the Notice of Arbitration.
243 *LG&E Energy Corp.v Argentine Republic* [2007] Award ICSID Case No. ARB/02/1 [139].
244 *El Paso Energy International Company v Argentine Republic* [2011] Award ICSID Case No ARB/03/15 [357].
245 Procedural Order 3 (n 15) [4].
246 ibid.

that it has already purchased the stake of the Claimant according to MV standard for an amount of 400 million USD. Hence, the Claimant should not be awarded any further compensation.

PRAYER FOR RELIEF

In light of the above, the Respondent hereby respectfully requests the Arbitral Tribunal to:

i. Decline to exercise jurisdiction over the present dispute in light of the Respondent's jurisdictional objections;

ii. Grant leave to the External Advisors to file their *amicus brief,* and reject the application filed by the CBFI;

iii. In case it finds jurisdiction, Declare that the Respondent did not breach its 'Fair and Equitable Treatment' obligations under Article 9.9 of the CEPTA;

iv. In case it finds a violation of Article 9.9, declare that the compensation must be calculated in accordance with the 'Market Value' standard and accordingly, hold that the Claimant is not owed any additional compensation.

v. Order the Claimant to reimburse the Respondent for all costs associated with the arbitration.

On behalf of the Respondent

Counsels for the Respondent