14TH FDI INTERNATIONAL. **TEAM ALIAS: MEERSCH**

ARBITRATION MOOT, 2021

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

BETWEEN

Vemma Holdings Inc.

(*Claimant*)

-v-

The Federal Republic of Mekar

(*Respondent*)

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

MEMORIAL FOR RESPONDENT

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CEPTA	2014 Bonooru-Mekar Comprehensive Economic Partnership and Trade Agreement.
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ECT	European Charter Treaty.
Harvard Draft	Harvard Draft on the Responsibility of States for damage done in their territory to the Person or property of foreigners (1961).
ICSID AF Rules	*International Centre for Settlement of Investment Disputes Additional Facility Rules* 1978.
ICSID Convention	*Convention on the Settlement of Investment Disputes between States and Nationals of Other States* 1966.
ILC ARSIWA Commentary	ILC (2001), 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries', Supplement No. 10 (A/56/10), YBILC, 2(2).
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UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985.

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UNCITRAL Report	UNCITRAL (2012) 'Report of the Working Group II (Arbitration and Conciliation) on the work of its fifty-sixth session'. New York.

LIST OF ABBREVIATIONS

AF	Additional Facility
ARSIWA	International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, (A/56/10)
BA	Bonooru Air
BAK	Bakugo
BIT	Bilateral Investment Treaty
Bonooru	The Commonwealth of Bonooru
CA	Caeli Airways
CAA	The Civil Aviation Authority
CC	Constitutional Court
CCM	Competition Commission of Mekar
CCSI	Columbia Centre on Sustainable Development
CBFI	Consortium of Bonoori Foreign Investors
CRPU	External Advisors to the Committee on Reform of Public Utilities
FET	Fair and Equitable Treatment
ibid	Ibidem (the same)
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICTY	International Criminal Tribunal of the Former Yugoslavia
ILC	International Law Commission

ISDS	Investor-State Dispute Settlement
MoA	Memorandum of Association
MON	Mekar's Currency
NAFTA	North American Free Trade Agreement
No.	Number
Para/paras	Paragraph/s
PO	Procedural Order
SOEs	State-Owned Enterprises
SoUF	Statement of Uncontested Facts
UNCITRAL	United Nations Commission on International Trade Law

STATEMENT OF FACTS

Parties to the Dispute and Background

1. Claimant is an airline holding company incorporated pursuant to the laws of Bonooru.
2. Bonooru is a developing country, with crude oil and natural gas dominating its exports. The CAA, an arm of Bonooru's Ministry of Transport, regulates all civil aviation.
3. Respondent sits approximately 1,600 km to Bonooru's south. Until 2003, Respondent's civil aviation industry consisted of Aer Caeli and Caeli Airways JSC.
4. In April 2014, Respondent and Bonooru signed CEPTA, which entered into force in October 2014. Respondent and Bonooru agreed to terminate the pre-existent 1994 BIT.

Claimant's Acquisition of Caeli Airways

5. In 2011, as part of Respondent's privatisation programme through the Committee on Reform on Public Utilities, Claimant acquired an 85% stake in Caeli Airways.
6. CRPU alleges that this acquisition was induced by bribes made to the Chairperson of the Committee, resulting in its illegality under Respondent's law.

Bonooru's Influences over Claimant's investment in Caeli Airways

7. Throughout, Bonooru maintained significant shareholding in Claimant, ranging between 31-38%. Bonooru has furthermore had additional influence on the decision-making of Claimant, through its membership on Claimant's board of directors.
8. Bonooru used its control to induce Claimant's investment decisions. Claimant's investment in Caeli Airways was financed by a nationalised bank in which Bonooru holds a 59% stake. Bonooru has also provided Claimant with repeated subsidies for the role it played in the "Horizon 2020" scheme as part of its Caspian Project.
9. In March 2021, following major restructuring, Bonooru increased ownership in Claimant to 55%, replacing Claimant's full board of directors with government functionaries. It now possesses full decision-making power. This resulted in the replacement of Claimant's legal team in its claim against Respondent with lawyers from Bonooru's justice department. It furthermore led to an expansion of Claimant's activities to paramilitary ones.

Claimant's Performance of Governmental Functions

10. In its investment in Caeli Airways, Claimant took decisions that were not commercially viable. Against advice of Respondent, Claimant invested heavily to cater customers on the route from Mekar to Bonooru, and *vice versa*.
11. By catering customers travelling on those routes, Claimant was performing a key part of Bonooru's "Horizon 2020" Scheme to attract tourists to Bonooru.

Respondent's Unprecedented Economic Crisis

12. In late 2016, Respondent's currency (MON), began to nosedive, resulting in an economic crisis. In January 2018, Respondent decided to pass a decree requiring all companies operating in the country to offer services exclusively in MON. Respondent took these steps with a view to stabilise its economy.

Claimant's Anti-Competitive Behaviour

13. When approving Claimant's acquisition of an 85% stake in Caeli Airways, the CCM sought an undertaking from Claimant that it would not engage in high-level co-operation on competition parameters, such as prices and facilities with Moon Alliance Members.
14. Nevertheless, in 2016, the CCM found evidence of preferential secondary slot-trading between the Royal Narnian, a fellow Moon Alliance partner, and Caeli. This allowed it to adopt predatory pricing strategies, driving smaller competitors out of the market.
15. In a second investigation following complaints by a consortium of small airlines in Greater Narnia, the CCM concluded that Claimant engaged in anti-competitive behaviour. Claimant was found abusing its dominant position at Phenac International Airport, undercutting ticket fares and pushing competitors off the market.
16. As a result of the outcome in both investigations, the CCM imposed interim measures to, firstly, prevent it from earning supra-competitive profits in the future, and, secondly, to ensure that Caeli Airways' market share, with its fellow Moon Alliance members, fell below 40% to ensure the viability for other competitors on the market.

Respondent's Domestic Court Proceedings

17. Respondent's judicial system is known to the world for being overwhelmed. The average time for a case's resolution rose from 9 months in 1980 to 22 months in 2015, because of Respondent's rapid population growth. In commercial matters it is even longer, taking on average 27 months, as Respondent prioritises criminal cases to avoid prolonged detention.
18. Claimant brought a claim against Respondent in its domestic courts to challenge the CCM's imposition of airfare caps on 20 January 2019. The hearings took place before the High Court from 25 April to 27 April 2019 and Claimant's submissions were heard by Respondent's judges. The decision was rendered on 15 June 2019 by Justice VanDuzer and the interim removal of the airfare caps was declined due to the evidence collected.

The SCC Arbitration

19. Mekar Airservices filed a request of arbitration against Claimant on 20 February 2020, asking the SCC tribunal to find that Claimant had failed to secure a *bona fide* third party offer under the Shareholders' Agreement they have entered. The sole arbitrator, known worldwide for being a skilled practitioner and a learned scholar in the field, was appointed.
20. The award was rendered on 20 May 2020, following a fast-track procedure. The arbitrator found that the offer received by Claimant could not to be considered *bona fide*, due to the affiliation of the prospective purchaser and Claimant.
21. Claimant challenged the award before the Court in Sinnograd, following a press leak alleging that the arbitrators was bribed. The Court on 1 August 2020 decided to set aside the award on public policy grounds. Respondent enforced the award, and Claimant appealed to the Superior Court to resist the enforcement. Claimant's appeal was dismissed because there was no reason to interfere with the award based on hearsay evidence.

Respondent's Purchase of Caeli Airways

22. Claimant failed to secure another buyer for their shares in Caeli. Therefore, Respondent purchased the shares through Mekar Airservices on 8 October 2020 for 400 million USD, which was the company's "market value" at that moment.

Claimant’s Notice of Arbitration

23. Claimant submits to ICSID AF arbitration through the Notice of Arbitration concerning the alleged unfair treatment of its investment in Caeli Airways.

ARGUMENTS

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE DISPUTE

1. For the Tribunal to have jurisdiction, it needs to be proved not only that Claimant is protected under CEPTA but also that the jurisdictional requirements under the ICSID AF Rules are present.

2. Claimant and its investment in CA were closely linked to Bonooru from the start. Bonooru consistently maintained a shareholding of at least 31-38%.[1] Bonooru also had members on the board of directors of Claimant, and thus the capability to influence decision-making.[2] Its investment in Mekar was financed by a nationalised bank in which Bonooru holds a 59% stake,[3] and the investment was viable only due to repeated subsidies by Bonooru.[4] Claimant furthermore performed significant functions of the State, ensuring compliance with Bonooru's constitutional obligations of mobility[5], and constituting an integral part of the Caspian Project in a quest to redefine trade patterns and profit Bonooru's tourism industry.[6] Following restructuring in March 2021, Bonooru holds a 55% stake in Claimant and has replaced the board of directors with government officials.[7] Claimant is now also performing paramilitary activities on behalf of Bonooru.[8]

3. Therefore, Respondent submits that neither of the instruments' jurisdictional requirements have been made out: *First*, Claimant is not an investor within the definition set out in Article 9 CEPTA [**A**]. *Second*, Claimant is not a 'national of another State' within the meaning of Article 2 ICSID AF Rules [**B**].

[1] SoUF, §10.
[2] Annex IV, §152.2.
[3] SoUF, §23.
[4] *ibid*, §28.
[5] Annex I, Art 70.
[6] SoUF, §28.
[7] *ibid*, §65.
[8] *ibid*, §65.

A. The Tribunal does not have jurisdiction under Article 9 CEPTA

4. According to Article 9.2 CEPTA, substantive protections apply only to a measure adopted or maintained by a Party in its territory relating to a covered investment by an 'investor of the other Party'. Respondent does not challenge Claimant's assertion that the purchase of an 85% stake in CA constitutes a 'covered investment'. However, Respondent maintains that only private entities are protected and have standing to bring a claim under CEPTA [**1**]. Since Claimant is not a private entity [**2**], the proceedings do not meet the jurisdictional requirements in CEPTA.

1. CEPTA excludes activities that flow from SOEs

5. In interpreting investment treaties, tribunals almost invariably rely on Articles 31 and 32 VCLT[9], which constitute customary international law. Article 31 VCLT requires a term of a treaty to be interpreted with its ordinary meaning in light of its object and purpose, as well as context [**a**]. Article 32 furthermore permits recourse to the circumstances of conclusion of the treaty to confirm a meaning derived under Article 31 VCLT [**b**]. Pursuant to the application of these two provisions, it is evident that the definition of an investor in Article 9.1 CEPTA does not extend to State-owned and/or controlled entities.

a. The ordinary meaning of 'investor' in light of its context excludes SOEs

6. Article 9.1 CEPTA defines 'investor' as any 'enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party'. The 'enterprise' must be 'constituted or organised under the laws of that Party and ha[ve] substantial business activities in the territory of that Party'.

7. Under Article 31 VCLT, a provision's context includes the entire text of the treaty. It is submitted that the following provisions within CEPTA cannot be consistent with an interpretation of the term 'enterprise' which would comprise SOEs. Firstly, in stipulating the ICSID AF Rules as the sole arbitral forum available (Article 9.16 CEPTA), the Parties to the treaty have clearly signalled that CEPTA is concerned with 'private investment'.

[9] Schreuer, p. 129.

The purpose of ICSID Convention, and, analogically, the ICSID AF Rules is 'the promotion of private foreign investment'[10].

8. Secondly, the Parties expressly addressed involvement by States when they wished to. Firstly, Article 9.13 imposes an obligation to ensure that SOEs comply with a Party's obligations under the treaty. Secondly, Article 9.15 provides for the subrogation rights of the Parties and agencies authorised by them[11]. It has been noted that there is a trend towards more 'sophisticated and detailed treaties'[12]. Indeed, CEPTA is supposed to be a '*comprehensive* trade agreement'. The matter of standing of SOEs is as important as the matters addressed in Articles 9.13 and 9.15 CEPTA. It follows that the omission of SOEs within the definition of 'enterprise' must be deemed intentional.

b. <u>The circumstances of CEPTA's conclusion confirm that SOEs are excluded</u>

9. Under Article 32 VCLT one can look to supplementary means of interpretation, including circumstances of conclusion, to confirm the meaning derived under Article 31 VCLT. Investment tribunals have often looked to other provisions to confirm the meaning of a treaty provision[13]. They have looked especially to the provisions of treaties antecedent to the one being subject of the dispute[14].

10. In the present dispute, CEPTA has been drafted upon the foundations laid down by the 1994 BIT. Hence, the respective differences between it and CEPTA are of crucial importance in shedding light on the latter's scope. There exist two key differences. Firstly, the removal of 'governmentally owned' entities[15]. Secondly, the removal of the ICJ as an option of dispute resolution[16]. These two changes signal a narrowing of the scope of a tribunal's jurisdiction and the exclusion of State-to-State disputes.

[10] Broches, p. 354; Schreuer et al., p. 160; Feldman, p. 31; Hamida, p. 24.
[11] Blyschak, p. 23.
[12] Shima, p. 11.
[13] Fauchald, p. 345; *Emilio Maffezini*, §§52-3; *Waste Management*, §§29-30.
[14] *Pope & Talbot*, §§110-111 & 115.
[15] 1994 BIT, §2405; CEPTA, §2590.
[16] 1994 BIT, §2440; CEPTA, §2860.

11. This conclusion is reinforced by two factors. Firstly, CEPTA had been negotiated for four years[17]. Hence the Parties had sufficient time to pay attention to details. Secondly, CEPTA had been negotiated and agreed upon due to Respondent's dissatisfaction with the 1994 BIT. Under the 1994 BIT, Respondent had lost several investment arbitrations against investors from Bonooru[18]. It is uncontested that Respondent 'sought to negotiate a more comprehensive trade and investment agreement with Bonooru which adequately balanced investors' and host States' rights'[19]. Their aim was thus to produce a treaty with clear boundaries and of a more limited scope. Therefore, Respondent submits that CEPTA does not extend to confer protection and standing to SOEs.

2. Claimant is a SOE

12. Claimant has always been tied to Bonooru in several ways. Firstly, Bonooru maintained 31-38% ownership in Claimant throughout[20]. Presently it owns 55%[21]. Secondly, Bonooru possessed significant decision-making power. Throughout the entire duration of the investment, unless every single shareholder attended the board meeting, Bonooru's government representatives on the board were in the majority[22]. Since they were present for every meeting[23], Bonooru was able to frequently make decisions for Claimant.

13. Thirdly, the circumstances of Claimant's inception and public statements surrounding it make it impossible to conclude that Claimant was ever meant to be a private entity in the ordinary meaning of that term. To begin with, Claimant is a successor of BA Holdings, a State-owned BA's parent company[24]. Following its 'privatisation', the then Prime Minister of Bonooru proclaimed that '[o]ur government plans to maintain a significant interest in Bonooru Air and always will'[25]. This was confirmed by Bonooru's CC, holding that it was 'sufficiently convinced that Bonooru will be able to ensure the

[17] SoUF, §§20 & 32.
[18] PO No. 3, §14.
[19] PO No. 3, §14.
[20] SoUF, §10.
[21] SoUF, §65.
[22] PO No. 3, §3.
[23] *ibid*.
[24] SoUF, §9.
[25] SoUF, §8.

utilisation of the Royal Narnian for public benefit'[26]. Bonooru's CC was thus convinced that Bonooru would have enough influence over Claimant to control its actions.

14. Finally, Claimant is performing governmental functions under Article 70 of Bonooru's Constitution Act, 1947[27]. As such it is intrinsically linked to the government, since it can only fulfil its constitutional obligations through Claimant as a medium.

15. It has thus been established that Claimant is not a private entity but is partially owned and controlled by the State of Bonooru. As such it is not protected under the provisions of CEPTA, and thus this Tribunal does not have jurisdiction to hear this case on merits.

B. The Tribunal does not have jurisdiction under the ICSID AF Rules

17. In addition to jurisdiction under CEPTA, the Tribunal must ascertain its jurisdiction under the ICSID AF Rules. To establish the Tribunal's jurisdiction under the ICSID AF Rules, there must be consent by both Parties; jurisdiction *ratione materiae*; and jurisdiction *ratione personae*.[28] Respondent accepts that the first two conditions are met. Respondent submits, however, that jurisdiction *ratione personae* in this dispute is absent.

18. Under Article 2 ICSID AF Rules, the Tribunal may administer 'proceedings between a State … and a national of another State', provided that one of the two States is a party to the ICSID Convention. Respondent is a 'State' but not a party to the Convention. Claimant, although holding the nationality of a State party to the Convention, is not a 'national of another State' within Article 25 ICSID Convention and Article 2 ICSID AF Rules for the following reasons: *First,* Claimant was in its investment in Mekar not acting in its capacity as a 'national of another State' [**1**]. *Second*, from Claimant's restructuring in March 2021, Bonooru became the real party in interest in the proceedings [**2**].

1. Claimant was in its investment not acting as a 'national of another State'

19. The ICSID AF Rules do not define the term 'national of another State'. However, the objective of the ICSID AF Rules is only 'to open access to the Centre in certain situations

[26] Annex III, §1495.
[27] Annex IV, §§1515-20.
[28] ICSID AF Rules, Art 2.

where the Convention's jurisdictional requirements *ratione personae* and *materiae* have not been met',[29] one of those being the 'jurisdictional gap where either the host State or the State of the investor's nationality is not a Contracting State'.[30] Hence, it is reasonable to make use of its equivalent term contained in Article 25 ICSID Convention.

20. Article 25(2)(b) ICSID Convention defines the term 'national' as 'any *juridical person* which had the nationality of a Contracting State other than the State party to the dispute on the date on which the Parties consented to submit such dispute to conciliation or arbitration'. It does not explicitly address the term's application to SOEs. The *travaux preparatoires* to the ICSID Convention clarifies that SOEs were not meant to be fully excluded from its scope.[31]

21. Broches, former Secretary-General of ICSID, set out that a 'government-owned corporation should not be disqualified as a 'national of another Contracting State' *unless* it is acting as an agent for the government or is discharging an essentially governmental function'.[32] This was endorsed by ICSID tribunals in *CSOB*[33] and *BUCG*[34]. The term 'national' or 'juridical person' remains however subject to treaty interpretation, the Broches test being only an elaboration of the term when faced with SOEs. Art 31 VCLT requires treaty provisions to be interpreted with their ordinary meaning in light of a treaty's object and purpose. Art 32 VCLT permits recourse to *travaux preparatoires* of a treaty where a provision's meaning remains ambiguous or to be confirmed.

22. Claimant does not qualify as 'national of another State': It was acting as an agent of Bonooru [**a**] and discharging essentially governmental functions of Bonooru [**b**]. Importantly, given the Broches test's disjunctive wording ('or'), the Tribunal's satisfaction with either submission would result in the disqualification of Claimant as 'national of another State' within Article 2 ICSID AF Rules.

[29] Schreuer, p. 84.
[30] *ibid*, p. 147.
[31] History ICSID Convention, pp. 11, 170, 230 & 580.
[32] Broches, p. 354.
[33] *CSUB*, §16.
[34] *BUCG*, §33.

a. <u>Claimant was acting as agent of Bonooru</u>

23. The Tribunal in *BUCG* noted that the 'Broches factors are the mirror image of the attribution rules in Articles 5 and 8 of [ARSIWA]'.[35] Article 8 ARSIWA attributes where a person 'is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'. In line with this, the tribunal in *BUCG* held that in assessing whether a SOE is an agent of the State 'the issue is not the corporate framework of the SOE, but whether it *functions* as an agent of the State in the fact-specific context'[36].

24. Respondent accepts that ARSIWA may provide guidance in the application of the Broches test. However, this assimilation must not be taken too far. The ILC acknowledged that 'the rules concerning attribution … are formulated for this particular purpose, and not for other purposes for which it may be necessary to define the State or its government'[37]. The dominant test under Article 8 ARSIWA, of 'effective control', as set out by the ICJ in *Nicaragua*[38], has never been successfully invoked in practice[39].

25. A broader analysis of control over a SOE is warranted when applying principles of treaty interpretation. The purpose of the ICSID Convention was to encourage *private* investment. The preamble was, on the urging of delegations, changed to encompass only '*private* international investment'[40]. The *travaux preparatoires* informs us as to why ICSID's focus is strictly on *private* international investment. Several delegations raised concerns over the politicization of disputes[41]. It was emphasised that 'any possibility of conflict between sovereign States about investment should be avoided'[42].

26. To ignore the broader influence that a State has on a SOE would thus undermine the ICSID Convention's purpose and rationale. The test 'overall control', set out by the ICTY, is adequate to meet concerns of politically charged disputes. In *Tádic*, the Tribunal held that if an organised group was 'under the overall control of a State' responsibility

[35] *ibid*, §34.
[36] *BUCG*, §37.
[37] ILC Report (2001), p. 39, §5.
[38] *Nicaragua*, p. 14.
[39] Maddocks, p. 7.
[40] History ICSID Convention, p. 293 (emphasis added).
[41] *ibid*, pp. 396 & 760.
[42] *ibid*, p. 978.

will ensue 'whether or not each of [the activities] was specifically imposed, requested or directed by the State'[43]. This test has later been rejected in the context of State responsibility. But the ICJ acknowledged that the 'overall control' framework may be adequate in a different context[44]. Respondent submits for the reasons above, i.e., avoiding the politicisation of ICSID proceedings, that, since overall control takes a broader approach to the question of control by a State over an entity, the test is adequate to address standing of SOEs in the ICSID (AF Rules') context.

27. Respondent thus submits that Claimant was an agent of Bonooru, since it was always acting subject to Bonooru's overall control [**(1)**], but that even if control and direction over the *specific* investment is required, such direction is also present on the facts [**(2)**].

(1) <u>Claimant was acting under the overall control of Bonooru</u>

28. When considering the term 'overall control', UNCITRAL has observed that it 'is quite common in the international corporate world to control a business activity without owning the majority voting rights in the shareholders meetings'[45]. Similarly, according to the ICSID tribunal in *Vacuum Salt,* when considering the meaning of 'foreign control', a tribunal 'may regard any criterion based on management, voting rights, shareholding or any other reasonable theory as being reasonable for the purpose'[46].

29. Claimant was under the overall control of Bonooru. Bonooru always retained a considerable shareholding in Claimant[47]. Bonooru's representatives on Claimant's board are present for every meeting. Since Claimant passes its decisions by majority, often 'Bonooru's representatives form a majority of members present and voting when not all other shareholders attend'.[48] Indeed, the overall control by Bonooru was acknowledged by Bonooru's Prime Minister[49]. And its CC was 'sufficiently convinced that Bonooru will be able to ensure the utilisation of the Royal Narnian for public benefit', given its

[43] *Tádic*, §122.
[44] *Bosnian Genocide*, §404; see also *Tádic*, Separate Opinion by Judge Shahabuddeen, §17.
[45] *International Thunderbird*, §§107-8.
[46] *Vacuum Salt*, §43.
[47] SoUF, §10.
[48] PO No. 3, §3.
[49] SoUF, §8.

shareholding but also the entity's MoA.[50] This is a direct acknowledgement of Bonooru' overall control over Claimant. Since Claimant's actions in Mekar were subject to its overall control, Claimant was acting as an agent of Bonooru in its investment in CA.

(2) <u>Claimant was acting under the control *and direction* of Bonooru</u>

30. If required to show direction over the investment, the question is whether Claimant functioned as agent of the State in the fact-specific context. This can be shown by 'evidence… that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result', by identifying 'clear manifestations of the links between the SOE and its home State and the means through which control over the investment is exercised'[51]. Means of control, direction or influence on decision-making may include the provision of resources to incentivise decisions[52].

31. Importantly, such financial incentivisation (apart from mere *general* financial support) appears to have been absent in *BUCG*. In that case, Claimant company entered a construction contract with the Yemen CAA to improve facilities at its Sana International Airport. The tribunal found that the company was subject to the overall control and supervision of China, but there appears to have been no evidence of *any actual influence of or involvement by* China in the specific investment[53].

32. Bonooru exercised significant control through financial means over Claimant's investment in CA. Bonooru provided repeated subsidies, without which the route Bonooru-Mekar would not have been profitable[54]. Claimant's investment into CA itself was financed by a 'nationalised bank in Bonooru in which the government holds a 58.96% stake'[55]. That it was Bonooru who was ultimately controlling and directing Claimant's investment in Mekar is further supported by the fact that CA's exclusionary strategy 'could only run competitors out of the market, without helping CA gain new customers or increase revenues'[56]. In this manner, Bonooru was using its financial and

[50] Annex III, §59.
[51] Blyschak, p. 40.
[52] *International Thunderbird*, §§107-8.
[53] *BUCG*, §§37-8.
[54] *ibid*, §28.
[55] *ibid*, §23.
[56] *ibid*, §49.

overall control in Claimant to redefine existing trade patterns in the region. As such, the present dispute is distinguishable from the tribunal's decision in *BUCG*, and Claimant was acting under Bonooru's control and direction, i.e., as an agent of Bonooru.

b. <u>Claimant was discharging governmental functions of Bonooru</u>

33. The 'governmental functions' limb of the Broches test 'focuses on the degree to which a SOE may be performing investment activities with elements of governmental or regulatory authority'[57]. This is the mirror image of Article 5 ARSIWA. An entity must be empowered by the law of the State to exercise elements of governmental authority and must have exercised this governmental authority in that instance[58]. In assessing whether Claimant exercised governmental functions, the Tribunal must consider both the actions' nature and purpose[59]. To focus on nature only, as the tribunal in *CSOB* has done, would undermine the Convention's purpose. Such an approach would ignore the motives behind investments, and thus be incapable of avoiding politically charged disputes.

34. Several domestic courts in the US, Canada and UK noted that to distinguish between nature and purpose 'is to attempt the impossible'[60]. The tribunal in *BUCG* thus chose not to endorse *CSOB*, emphasising merely that *CSOB's* 'focus on a context-specific analysis of the commercial function of the investment'[61].

35. Other ICSID tribunals have, in applying a functional test to determine the nature of activities by companies, also taken account of the 'objectives of the company in question'[62]. In *Maffezini*, the tribunal, observing that '[m]ore is required in terms of the functional test', concluded that 'it is clear from the background leading to the establishment of [the company in question] that *the intent* of the Government was to create an entity to carry out governmental functions'[63].This approach is also supported

[57] Blyschak, p. 40.
[58] *EDF*, §191.
[59] Hamida, p. 20.
[60] *Re Canadian Labour Code*, p. 73; see also *I Congreso del Partido*, p. 272; and *De Sanchez*, pp. 1392-3.
[61] *BUCG*, §35.
[62] *Salini*, §31.
[63] *Emilio Maffezini*, §85 (emphasis added).

by ARSIWA, Article 5 of which states that 'the *purposes* for which [the powers conferred upon the entity] are to be exercised' are of 'particular importance'[64].

36. Claimant was empowered by its MoA to 'establish and continue business as a national airline and air transport undertaking'[65] and to 'assist in developing the aviation industry as well as the civil aviation infrastructure in Bonooru for the benefit of its population in accordance with Article 70 of the Constitution'[66]. Claimant exercised governmental functions, providing citizens with a means of mobility 'within *and outside'* Bonooru[67]. A right to such was recognised in Article 70(2) of Bonooru's Constitution. The CC stated that the right includes that to '*leave the island for another nation*'[68]. In practice, one of the 'pillars' of CA's business model was always 'catering to customers travelling from Mekar to Bonooru' and on routes that been 'flown frequently under State ownership'[69].

37. Further, Claimant was empowered to support redefining trade patterns in Royal Narnia, to ensure Bonooru's control in the area. Claimant's investment in CA is part of Bonooru's Caspian Project, launched in 2010, to facilitate free movement as well as to build infrastructure in Narnian States[70]. In 2011, Bonooru's Minister of Transportation and Tourism – also former head of Claimant's board of directors – unveiled the "Horizon 2020" Scheme, to attract tourists to Bonooru[71], as part of which Claimant received subsidies[72]. Claimant's investment in CA was thus an integral part of Bonooru's Caspian Project. Hence, Respondent submits that Claimant was discharging governmental functions of Bonooru and does not have standing to bring a claim.

2. <u>In any event, Bonooru is the real party in interest in the present proceedings</u>

38. Even if the above submissions are not accepted, Respondent submits that since March 2021, the real party in interest behind the present proceedings is Bonooru. Claimant may refer to the wording of Article 25(2) ICSID which in defining the term 'national' refers

[64] ARSIWA Commentary, Article 5, §6.
[65] Annex IV, §3(a).
[66] *ibid*, §3(h).
[67] Annex II, §25 (emphasis added).
[68] Annex III, §56 (emphasis added).
[69] SoUF, §28.
[70] *ibid*.
[71] *ibid*.
[72] *ibid*.

to the 'date on which the Parties consented to submit such dispute to conciliation or arbitration'. Apparently based on this, in *CSOB* the tribunal held that the standing of a party is determined 'by reference to the date on which such proceedings are deemed to have been instituted'. The tribunal thus concluded that the fact that 'CSOB agree[d] to assign to the Czech Republic ... all claims CSOB ha[d] against … the Slovak Republic' was irrelevant since it occurred a month after the initiation of proceedings[73].

39. On the present facts, all investment decisions took place before November 2020, the date at which Claimant brought these arbitral proceedings[74]. It was only on 2 March 2021 that Bonooru implemented a bail-in program through the Airways Infrastructure Rescue Act which resulted in even greater involvement by Bonooru in Claimant[75]. According to *CSOB*'s logic, Claimant's major restructuring would thus be wholly irrelevant.

40. Respondent submits, however, that the tribunal's reasoning in *CSOB* is flawed. While jurisdiction may *in general* be determined by the date of initiation of the proceedings, this rule cannot be absolute. Taken to its very extreme, *CSOB*'s reasoning would allow a State to fully take over and run a claim of its national after initiating the proceedings *for purely political reasons*. At ICSID's very heart, however, lies the prohibition of inter-State disputes[76]. Thus, developments after the initiation of proceedings must be considered in proceedings under the ICSID AF Rules, if such developments result in what is really an inter-State dispute.

41. This conclusion is buttressed by the fact that an, *in effect*, analogous process – that of subrogation – has been rejected by delegations in the ICSID Convention's drafting process. Indeed, with subrogation it was pointed out to delegations that 'the [home] State would then stand in the shoes of the investor [and] would only possess the same rights and be subject to the same obligations as those of the private investor and would not be acting as a sovereign State'[77]. Nonetheless, the possibility of subrogation was criticised

[73] *CSOB*, §28.
[74] SoUF, §63.
[75] *ibid*, §65.
[76] History ICSID Convention, p. 261.
[77] *ibid*, p. 543.

by various delegations, including ones from Spain[78], France[79], India[80], Panama[81], Tunisia[82], and Uganda[83], as *inter alia* and modifying 'the purpose of the Convention which is to deal with disputes between States and nationals of other States'[84]. In the end, the provision allowing for subrogation, included in all Draft Conventions, was voted upon, and removed[85]. To allow a State to take over and run the proceedings of its nationals in ICSID proceedings would thus clearly undermine the Parties' intention.

42. Claimant's restructuring in March 2021 allowed Bonooru to become a majority shareholder. Moreover, it allowed Bonooru to *fully* replace the board of directors with government functionaries[86]. Bonooru now has full decision-making power over Claimant, which has already resulted in the expansion of Claimant's activities to include paramilitary ones – an inherently sovereign activity. Claimant's legal team was furthermore fully replaced with lawyers from Bonooru's justice system department for the sheer purpose of running the claim against Respondent[87]. This shows that both structurally and functionally, the real party behind Claimant *and* behind this claim is Bonooru. As a result, Respondent submits that this dispute is one of inter-State nature and the Tribunal does not have jurisdiction over it.

43. It is established that Claimant was, and continues to be, always acting in pursuit of the sovereign purposes of Bonooru. As a result, Claimant does not qualify as a 'national of another State' and the Tribunal does not possess jurisdiction *ratione personae* under Article 2 ICSID AF Rules. Since the jurisdictional requirements under neither CEPTA nor the ICSID AF Rules are made out for this dispute, the Tribunal lacks jurisdiction.

[78] *ibid*, pp. 395-6.
[79] *ibid*, p. 761.
[80] *ibid*.
[81] *ibid*, p. 760.
[82] *ibid*.
[83] *ibid*, p. 761.
[84] *ibid*, p. 760.
[85] *ibid*, p. 1018.
[86] *ibid*, §65.
[87] *ibid*.

II. ADMISSIBILITY OF *AMICI* SUBMISSIONS

44. Three instruments apply to the admissibility of *amicus* submissions in this dispute: Article 9.19(3) of CEPTA, Article 41(3) of ICSID AF Rules and the UNCITRAL Rules. It is submitted that CEPTA is the governing authority. According to the International Centre for the Settlement of International Disputes, in 'treaty-based cases, the relevant treaty rules will prevail, failing which ICSID Rules on Transparency will apply.'[88] Hence, ICSID AF Rules take a supplementary role to the criteria contained in CEPTA. The issue of whether it is CEPTA's or the UNCITRAL Rules' wording that applies, is a matter of treaty interpretation, i.e., of Article 9.20(6) CEPTA.[89] This provision allowed Respondent to apply the UNCITRAL Rules to assess the admissibility of *amici* submissions. It is unclear whether 'application' means that the UNCITRAL Rules are to chiefly govern the issue of admissibility or merely supplement CEPTA.

45. It is submitted that the UNCITRAL Rules only apply to CEPTA as a supplementary measure. Neither the ordinary meaning of the term 'application,' nor CEPTA's object and purpose shine light on the meaning of Article 9.20(6). Its *travaux preparatoires* is not readily available. The context is however determinative. Since Article 9.19(3) CEPTA contains its own criteria for the determination of *amicus* submissions, Claimant submits that Article 9.20(6) CEPTA merely provides for the UNCITRAL Rules to take a supplementary role. Therefore, the governing authority to determine leave to file *amicus* submissions is contained in Article 9.19(3) CEPTA, supplemented by Article 41(3) ICSID AF Rules, and the UNCITRAL Rules.

46. Therefore, Respondent submits that the Tribunal should grant CRPU's leave to file *amicus curiae* submissions [**A**], but that it should bar CBFI's application [**B**].

A. CRPU should be granted leave to file *amicus* submissions

47. CRPU are members of Respondent's civil society whose professional focus is investment banking. They were engaged as external advisors to advise on the privatisation, liquidation and/or restructuring of CA. They regularly acted as interveners in Mekar's

[88] ICSID Comparison.
[89] UNCITRAL Report, §91.

federal courts regarding the privatisation of State property and have an interest in promoting anti-corruption. As a result, they seek to make submissions in this dispute in line with the following conditions set out in CEPTA.

48. Article 9.19(3) CEPTA *allows* a tribunal to accept and consider *amicus* submissions if they deal with 'a matter of fact or law within the scope of the dispute' [**1**] that 'may assist the tribunal in evaluating the submissions and arguments of the disputing parties' [**2**], provided that the *amici* have a 'significant interest in the arbitral proceedings' [**3**]. Furthermore, the Tribunal must 'ensure that the submissions do not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party' [**4**]. If those conditions are present, the Tribunal '*may* accept and consider' such submissions, i.e., it remains at the discretion of the Tribunal. The Tribunal may thus also consider the public interest in the dispute and in transparency in the arbitral proceedings [**5**] as well as the independence of the *amici* from the disputing Parties [**6**]. Respondent submits that CRPU satisfies all applicable conditions as well as factors, and that leave ought thus to be granted.

1. CRPU's written submissions address a matter within the scope of the dispute

49. This criterion is intended to 'avoid the unnatural broadening of the scope of the dispute by non-disputing Parties.'[90] Jurisdictional matters can raise 'matters of public interest in themselves, on which non-disputing Parties might be well-placed to provide assistance and perspective or insights beyond those of the disputing parties.'[91] This will be the case if either (1) the jurisdictional matter has been raised by one of the Parties to the dispute, or (2) there exists an independent obligation on the tribunal to ascertain its jurisdiction.[92]

50. This occurred in *Infinito Gold*, where an *amicus* raised an objection to the *ratione legis* jurisdiction of the Tribunal, alleging that the investment had been procured by corruption. Neither party had raised any such jurisdictional concern. The tribunal allowed the *amici*'s submissions since it was under an 'independent obligation' to ascertain its jurisdiction.[93] Further, the tribunal in *Ampal-American* noted that 'it is a well-established principle of international law that a tribunal constituted on the basis of an investment treaty has no

[90] *Apotex*, PO Appleton, §35.
[91] *Apotex Inc*, §32.
[92] Born & Forrest, p. 650.
[93] *Infinito Gold*, §31.

jurisdiction over a claimant's investment which was made illegally in violation of the laws and regulations of the Contracting State'[94].

51. CRPU makes submissions concerning the legality of Claimant's investment which is crucial to the determination of the Tribunal's own jurisdiction. If Claimant's investment in CA had been made illegally in violation of Mekar's domestic law, it would be impossible for the Tribunal to find its own jurisdiction. Therefore, CRPU's submissions address a matter of law and fact squarely within the scope of the dispute.

2. CRPU's submissions may assist the Tribunal

52. UNCITRAL Rules and Article 41(3) ICSID AF Rules supplement CEPTA specifying that assistance may take the form of 'bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.' In other words, *amici* may assist 'by providing the [tribunal] with arguments, perspectives, and expertise that the litigating parties may not provide' or going beyond what has been provided[95].

53. CRPU has direct information close to the facts of the acquisition of CA.[96] This detailed knowledge will assist the Tribunal to apply the facts with sufficient precision to determine the investment's legality. This determination will assist the Tribunal as a different additional consideration when evaluating, and going beyond, the submissions of the disputing Parties regarding the Tribunal's jurisdiction.

3. CRPU possesses a significant interest in the arbitral proceedings

54. To demonstrate a significant interest, an 'applicant needs to show that he has more than a "general" interest in the proceeding.'[97] Any entity that has been directly or indirectly impacted by the proceedings will have a significant interest in them.[98] This means it must demonstrate that the outcome of the proceeding may have a direct or indirect impact on the rights or principles it represents and defends.[99] An example of this is the CCSI, which was granted leave to file *amici* submissions in *Bear Creek* because the arbitration's policy

[94] *Ampal-American*, §301.
[95] *Apotex Inc*, §§21-2.
[96] *Bear Creek*, PO No. 5, §53.
[97] *Apotex*, PO Appleton, §38.
[98] Schliemann, p. 374.
[99] *Apotex*, PO Appleton, §38; Obadia, p. 370.

implications on the sustainable development of international investment were directly relevant to CCSI's mission.[100]

55. CRPU's financial operations are directly affected by anti-corruption efforts as they advise potential investors in Mekar. *Amici* are concerned with acts of corruption that serve as an 'insidious plague' on ISDS. Like the CCSI, the Tribunal's determinations on jurisdiction have policy implications on anti-corruption efforts that are directly relevant to CRPU's mission and animates their work. These extensive and relevant interests in the dispute demonstrate CRPU's significant interest in the dispute.

4. CRPU does not unfairly burden or prejudice the disputing Parties or Tribunal

56. CRPU does not unduly burden the Tribunal. CRPU complied with all requirements under CEPTA and the ICSID AF Rules and has made all relevant disclosures. Thus, CBFI is compliant with Article 4 of UNCITRAL Rules as provided for in Article 9.20(6) of CEPTA. There is moreover no evidence that CRPU's participation would impose significant costs. Therefore, and because of the submission's utility to the Tribunal, CRPU's do not constitute undue burden or prejudice to the Tribunal.

5. CRPU's submission expresses a relevant public interest

57. Public interest is regularly considered by the investment arbitration tribunals.[101] Both the ICSID AF Rules and UNCITRAL Rules, in using the language of 'among other things' and 'among other factors' respectively, leave the door open for public interest considerations.[102]

58. CRPU's submissions amount to a public interest because they are in a unique position to adduce unbiased facts regarding matters in the privatisation process that might be tainted with corruption contrary to Respondent's public policy. This is like the admission of the CCSI as *amicus* in *Bear Creek,* where potential changes to public policy in Peru and in international human rights generally were considered as demonstrating sufficient public interest for the purpose of granting leave to file *amici* submissions.[103] CRPU will make

[100] *Bear Creek*, PO No. 6, pp. 3-4.
[101] *Apotex*, PO Appleton, §§42-3; *Methanex*, §49; *Suez (Amici)*, §17; Schliemann, p. 373.
[102] *ibid*, §26.
[103] *Bear Creek*, PO No. 6, pp. 4-5.

submissions regarding the 'insidious plague of corruption' that serves as an obstacle to accountability and good governance. Thus, CRPU's submissions pursue a public interest.

6. CRPU is independent from the disputing Parties

59. *Amici* must show that they possess independence from the Parties. This was implied in *Bernhard von Penzold* on the basis that Article 37(2) ICSID requires *amici* to raise points that bring an insight or perspective *different* from that of the disputing Parties.[104]

60. *Amicus* were engaged as *external* advisors to the Committee on Reform of Public Utilities. They were selected through a transparent and competitive process. None of them received any financial support from the disputing Parties. There is therefore no evidence whatsoever that they are not independent from either Party.

61. As a result, since CRPU meets all CEPTA's conditions, and satisfies those other factors that the Tribunal may consider in exercising its discretion, Respondent submits that CRPU ought to be granted leave to file its *amici* submission.

B. CBFI should not be granted leave to file *amicus* submissions

62. CBFI is an association representing the interests of Bonoori investors. It is submitted that CBFI fails to meet CEPTA's various conditions and factors. Their submissions do not assist the Tribunal **[1]**. They fail to demonstrate a significant interest in the proceedings beyond the general interest of investor rights in ISDS **[2],** which is wholly contrary to any pursuit of public interest **[3].** Their members have several conflicts of interest permeating through this dispute which questions their independence **[4]** and because of their baseless submissions, they unduly burden the work of the Tribunal and unfairly prejudice the position of Respondent **[5].**

1. CBFI's submission is of no assistance to the Tribunal

63. CBFI submits that the Tribunal ought not to consider the purpose of enterprises' activities but their nature only; and that the outcome of this case might have the adverse effect of portraying the investment protection regime as 'protective of purely private investment'.

[104] *Bernhard von Pezold,* §49.

CBFI's submissions are thus addressing the jurisdictional questions raised in this dispute, that is, whether Claimant has standing under (1) CEPTA and (2) the ICSID AF Rules.

64. In *Apotex Inc,* the tribunal noted that the *amici* submission would have to be 'well-placed to provide assistance and perspectives or insights beyond those of the disputing parties'[105]. Submissions made by CBFI however provide no assistance to the Tribunal. The question of jurisdiction is one of treaty interpretation – i.e., what the Parties agreed and consented to[106]. CBFI however submits policy arguments only, none being relevant to the legal questions raised in this dispute.

65. Further, questions of treaty interpretation are to be addressed by both Parties' legal counsels in far more detail and depth. *Amicus* submissions which are *duplicative* of other submissions are unlikely to be considered useful to the Tribunal[107]. The decision in *Apotex* demonstrates that even an exquisite expertise will not suffice in such cases. In that case the tribunal found *amici*'s assistance to be redundant despite the applicant's vast knowledge on NAFTA[108]. Thus, even if CBFI could provide the same degree of expertise as *amici* in *Apotex,* they would still be deemed unable to assist the Tribunal. Therefore, CBFI is unable to be of assistance to the Tribunal in evaluating the Parties' submissions.

2. <u>CBFI has no significant interest in the dispute</u>

66. The applicant must show a 'significant interest'[109] rather than 'general interest' only[110]. Interests such as developing a 'marketplace that rewards investments in innovation and creation', and fostering 'stronger economic growth, new jobs, and greater prosperity' are general interests that nearly every citizen and commercial party in the Greater Narnian region will have. In *Apotex*, BNM's 'mission' was supporting 'a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, … making a substantial difference in emerging and frontier countries as well as in poor areas in developed countries.' This was deemed insufficient to find a 'significant interest'.[111]

[105] *Apotex Inc*, §§32-3.
[106] Born & Forrest.
[107] *Apotex*, PO Appleton, §§32-3.
[108] *ibid*, §§7-8.
[109] CEPTA, Article 9.19(3); UNCITRAL Rules, Article 4(3)(a); ICSID AF Rules, Article 41(3)(c).
[110] *Apotex*, PO BNM, §33.
[111] *ibid*, §33.

67. Just like *Apotex*, it appears that CBFI's 'significant interest' in this arbitration lies only in having the Tribunal reach a decision that could be advantageous to the consortium's members that are currently pursuing or might pursue a similar dispute in the future[112]. Hence, CBFI is not pursuing a significant interest of their own, but only of third Parties.

3. CBFI is not pursuing a public interest

68. The subject matter of an arbitration proceeding itself is deemed to be of public interest 'when the decisions to be issued in that arbitration are likely to affect individuals or entities beyond the Disputing Parties'[113]. Yet, in *Apotex* the tribunal made it clear that although the outcome of the proceedings might affect third Parties, if one is in fact pursuing a 'particular and professional interest and not a 'public interest' affecting him personally' the requirement will not be met[114].

69. This dispute might affect Parties other than Respondent and Claimant. Nevertheless, CBFI pursues the interests of SRB Infrastructure and Wiig Wealth Management Group, and the remainder of its members, particularly those 38 with investments in Mekar. CBFI is thus seeking to improve the position of its members under the current ISDS regime. This is not surprising given that (1) one of the benefits of CBFI membership is 'collective advocacy'[115] and (2) CBFI is directly funded by its members[116]. Therefore, CBFI is not pursuing any public interest.

4. CBFI is manifestly lacking independence from Claimant

70. CBFI is lacking independence for the reason of Claimant's and Lapras Legal Capital's membership in it. In *Philip Morris*, the tribunal found that the Inter-American Association of Intellectual Property was not independent since Claimant's lawyers were on its management board and certain of its committees[117].

71. The situation in the present dispute has notable similarities. Lapras Legal Capital is advising Claimant on 'funding strategies'[118] and two members of CBFI are currently

[112] *Apotex*, PO Appleton, §40.
[113] *ibid*, §42.
[114] *ibid*, §43.
[115] PO No. 3, p. 11
[116] *ibid*.
[117] *Philip Morris*, §§53-5.
[118] *Amicus* Submissions CBFI, §7.

pursuing claims under Article 9 CEPTA[119]. Lapras Legal Capital likely has a financial interest in the outcome of this dispute while SRB Infrastructure and Wiig Wealth Management Group have legal and financial interests in the outcome of this dispute. As previously noted, CBFI is pursuing interests of its members, including (1) SRB Infrastructure and Wiig Wealth Management Group; (2) Lapras Legal Capital; and (3) Claimant itself. Therefore, CBFI manifestly lacks independence from Claimant.

5. CBFI's submissions would unduly burden the Tribunal and the Parties

72. Finally, CBFI's submissions unduly burden the Parties to the dispute as well as the Tribunal itself. CBFI's submission impose further work, time and expense, without assisting the Tribunal in any way at all.

73. Since CBFI's submissions fail to assist the Tribunal and pursue a public interest, imposing undue burden on the Tribunal; and since CBFI itself does not hold a significant interest and lacks independence from Claimant; its submissions ought to be barred.

[119] *ibid*, §6.

III. RESPONDENT DID NOT VIOLATE FET UNDER CEPTA

76. Under Article 9.9(1) CEPTA, each Party shall accord FET to covered investments of the other Party. Claimant argues that Respondent violated this obligation through Respondent's government, its administrative organs, and its judicial courts.

77. As shown hereunder, none of the components of FET have been compromised by Respondent. Respondent did not violate Claimant's legitimate expectations [**A**], act in an arbitrary [**B]** or discriminatory [**C**] manner, delay justice or violate due process [**D**], or subject Respondent to discriminatory treatment [**E**]. On the contrary, it was the risky strategy adopted by Claimant which led to its failure.

A. Respondent did not violate Claimant's legitimate expectations

78. The notion of legitimate expectations is addressed in Article 9.9(3) CEPTA. It establishes that, the Tribunal may consider whether (i) a Party made a specific representation to an investor to induce an investment, (ii) a legitimate expectation was created, (iii) there was investor's reliance, and (iv) the legitimate expectation was frustrated. In this sense, the drafters have expressly confined the concept of legitimate expectations to events where these four elements are present. This is in line with the reasoning of tribunals, such as *Micula v Romania*[120]. Thus, a specific promise by the State is required to create a reasonable and legitimate expectation on the investor.

79. In the instant case, there is no evidence of a specific representation by Respondent which could have given rise to a legitimate expectation by Claimant. On the contrary, there is proof that Respondent warned Claimant several times to moderate its risky investment strategy[121] and Claimant refused to listen to these repeated cautions.

80. Should the Tribunal apply a broader notion of legitimate expectations, Respondent submits that even then no breach has occurred. Arbitral tribunals have been consistent in sustaining that what is protected is not the investor's subjective expectations, but its *reasonable* expectations. According to the tribunal in *Suez*, 'one must not look single-

[120] *Ioan Micula*, §668.
[121] SoUF, §§29, 31.

mindedly at Claimants' subjective expectations. The Tribunal must rather examine them from an objective and reasonable point of view'[122].

81. It would be unreasonable to expect Respondent to maintain its economic policy when struggling with an unprecedented economic crisis, especially when Article 9.8(1) CEPTA itself reserves the right for the Contracting States to change their domestic legal framework to achieve legitimate public policy objectives, such as social and consumer protection[123]. Article 9.8(2) moreover explains that the fact that a State modifies its laws, negatively affecting an investment or interfering with an investor's expectations, does not amount to a breach of a treaty obligation. These provisions are in accordance with arbitral case law. Hence in *Micula*, the tribunal held that FET 'does not give a right to regulatory stability per se'[124]. It follows that Respondent always retained its right to regulate its economic and juridical framework to achieve legitimate objectives.

82. It is thus unreasonable for the investor to expect the State's regulation to be frozen in time. This is precisely why Claimant's allegations must be dismissed. Respondent required all companies operating in the country to offer services denominated in MON *only* to secure Respondent's economic situation, protecting social well-being. By March 2017, there already existed increased inflation, which was affecting consumer spending power[125]. Had Respondent not acted and allowed companies to continue operating in foreign currencies, it would have posed an even greater risk of inflation, resulting in an irreversible economic crash that would have affected social stability in the country.

83. In *Continental v Argentina*[126], the conversion by Argentina of all existing USD deposits into pesos was held to be lawful despite leading to an unavoidable devaluation of continental investment. The Argentinian measure was more extreme than the decree issued by Respondent in the instant case, which only required companies to denominate in MON future offers of goods and services. Accordingly, Respondent is not in violation of international law. The decree was a legitimate exercise of Respondent's regulatory

[122] *Suez (Award)*, §304.
[123] CEPTA, Art 9.8(1).
[124] *Ioan Micula*, §666.
[125] SoUF, §39.
[126] *ibid*, §197 and subsequent.

powers, as recognised by CEPTA. Consequently, as the measure was taken to assure social and consumer protection, Respondent cannot be found liable.

B. Respondent did not act in an arbitrary manner

84. According to Claimant, the measures adopted by the CCM should be considered unfair due to arbitrariness. The ICJ in *ELSI* held that 'arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law (...) It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety'[127]. This notion is adopted by investment tribunals[128], and *Philip Morris* added that arbitrary conduct is often associated with unreasonable measures[129].

85. CCM followed due process of law under the Monopoly and Restrictive Trade Practice Act. The First Investigation was launched in accordance with Chapter III(2) of said Act. It was the CCM's duty to investigate Claimant's potential anti-competitive behaviour since its pricing strategy could have given rise to predatory prices that would have shut its competitors out of the market.

86. Claimant moreover submits that the CCM initiated these proceedings against Respondent's law, in that CA's market share was 43% and the Act required at least 50%. In fact, CA's participation in the market, when considered in conjunction with Royal Narnian – its Moon Alliance partner – exceeded 54%[130]. In any case, as stated in Chapter III(2)(a) of the Act, the CCM is allowed to initiate an investigation even when the market share has not yet reached 50%, when industries require special attention. This is precisely the case in the aviation industry, which is of great importance to Respondent.

87. The Second Investigation was initiated due to complaints of competitors of Claimant, who were affected by the fact that Claimant launched flights on specific regional routes, capitalising on the privileges it had on Phenac International Airport, and making it nearly impossible for its competitors to penetrate the market[131]. As for Chapter III(3)(b) of said

[127] *Elettronica Sicula*, §128.
[128] *Tecnicas*, §154.
[129] *Philip Morris*, §§409-10.
[130] SoUF, §36.
[131] SoUF, §38.

Act, the market share should be at least 10% in such cases, a requirement that Claimant has clearly fulfilled. Therefore, the second investigation was also conducted following due process of law. Thus, it cannot be classified as an arbitrary conduct.

88. The findings of these two investigations made it clear that Claimant's behaviour was anti-competitive. As such, Article 4(d) of the Monopoly and Restrictive Trade Practice Act allowed the CCM to impose any remedies it found adequate, so long as they remain proportionate to the infringement committed. The fines imposed by the CCM, in virtue of the two investigations, were in accordance with the anti-competitive conduct of Claimant. Indeed, Claimant was found to have put in place predatory prices and to have abused its dominant position, to push smaller competitors out of the market. Had the fines imposed by the CCM been smaller, they would not have deterred Claimant from continuously breaching antitrust law.

89. Claimant itself recognised that the caps at the time were reasonable[132]. According to Claimant, what made them 'arbitrary' was merely the fact that they were not lifted when it desired to. It is hard to sustain that the mere passing of a period of time turns a reasonable measure into an unreasonable one, considering that as soon as the market share dropped below 40%, Respondent lifted Claimant's air caps[133]. Had Respondent lifted the caps before, it would have put smaller competitors at risk of being pushed out of the market. As a result, Respondent submits that it did not act in an arbitrary manner.

90. In any case, even if the Tribunal finds that the internal procedural law has been violated, under international law it is generally understood that domestic law does not affect the legality of a State's actions under international law[134]. Thus, a mere breach of domestic law does not amount to a breach of CEPTA; a fundamental breach of due process would have been needed, which Claimant has failed to prove.

[132] Notice of Arbitration, §15.
[133] SoUF, §55.
[134] ARSIWA Commentary, Article 3.

C. Respondent's Executive Order 9-2018 is not discriminatory

91. Claimant alleges that the Executive Order 9-2018 is discriminatory, since Respondent did not give any subsidy to Claimant, although it did to its competitors. There exists discrimination when there is unequal treatment in equal circumstances, without a valid reason. According to *Cengiz,* Claimant must satisfy a three-step test: (i) an appropriate comparator must be identified; (ii) Claimant must prove that a more favourable treatment has been applied to the comparator, and (iii) a reasonable purpose must be absent[135].

92. Claimant failed to prove all the above. To have a correct comparator, there should be an identical legal and factual situation between the two terms of comparison, including their legal regime[136]. Claimant has not identified a suitable comparator, since the airlines that received subsidies are very different to Claimant. Indeed, the legal and regulatory regimes of the airlines that received subsidies are quite different from Claimant, in that, whereas the former are private companies, the latter is a SOE. It is undeniable that SOEs have unique advantages over its private competitors, as they tend to receive great subsidies from their home States[137]. This is also the case with Claimant, which received a constant influx of money from Bonooru under the "Horizon 2020" Scheme.

93. It follows that the only right comparator would be another SOE. In relation to such an SOE, Larry Air, Respondent acted in precisely the same manner, not providing it with any subsidy under Executive Order 9-2018[138]. Given that, therefore, Respondent treated all SOEs in the same manner, it was not discriminating against Claimant.

D. Respondent did not delay justice or violate due process

94. Claimant alleges that the delay [**1**], as well as the apparent lack of access to Respondent's domestic Courts [**2**], constituted a denial of justice. Claimant further alleges that Respondent's enforcement of the annulled SCC award constitutes a violation of due process [**3**]. Respondent denies all such allegations.

[135] *Cengiz*, §525.
[136] *Apotex Inc*, Award, §8.15
[137] SoUF, §46.
[138] SoUF, §47.

1. The delay in Respondent's Courts did not delay justice

95. Under customary international law an *illegal* delay in national court proceedings can in principle amount to a denial of justice[139]. The qualification of the delay as an FET breach should be assessed on a case-by-case basis, depending on the factual circumstances[140]. However, the threshold to assess such a serious violation under international investment law is extremely high. A State commits a denial of justice if its conduct amount to a 'manifest injustice in the sense of a lack of due process, leading to an outcome which offends a sense of judicial propriety'[141].

96. Mere delay cannot amount to an 'illegal' conduct, nor is it able to offend the 'sense of judicial propriety'[142]. For the delay to be considered a denial of justice claimant must prove the existence of 'prolonged periods of complete inactivity'[143] by the Courts, a circumstance that, in the case at hand, did not occur. The time frame sufficient to qualify a delay as a denial of justice must amount to several years, if not a decade[144].

97. Respondent maintains that no violation has occurred. The alleged 'delay' on the present facts amounted to less than 6 months[145]. Indeed, Claimant should have known that this was the average time frame for Respondent's Courts to render a decision[146]. Claimant is not entitled to receive better treatment than the one it has implicitly agreed to when deciding to make its investment in Mekar.

98. In similar circumstances, in *White industries*, the tribunal dismissed the denial of justice claim, considering the swift rise of the host State's population[147]. This is also a relevant factor for the present case[148]. It is inherent in the judiciary system of a developing country with a fast-growing population that it might be acting slower than the system of a developed country. This further factual element, combined with the ones considered

[139] Fabiani, p. 25.
[140] *Toto Costruzioni*, §163.
[141] *Loewen Group*, §132; see also *Mondev*, §127 & *Barcelona Traction*, §144.
[142] *White Industries* §§10.4.20-2
[143] *ibid*., §5.4.5.
[144] *El Oro*, 9-year delay; *Chevron*, 10+ year delays.
[145] SoUF §§49 & 54.
[146] SoUF, §13.
[147] *ibid*.
[148] SoUF, §13.

above, *a fortiori*, confirms the legitimacy of Respondent's Courts' actions and the fact that the proceeding was not to be considered sufficiently delayed to constitute a denial of justice for the purposes of international law.

2. Respondent did not deny access to its Courts

99. Claimant further alleges that it has been denied justice in respect of access to the Courts. Under international law, justice is denied to a foreigner when a State refuses to hear its claim and to provide it with a means to obtain justice[149]. Thus, it can defined as 'the unjustified refusal of a tribunal to hear a matter within its competence'[150] that 'could be pleaded if the relevant courts refuse to entertain a suit'[151].

100. Respondent's Courts in the case under examination, have considered the matter and rendered a judgment over it, deciding to dismiss the plea according to the evidence collected[152]. The decision has been correctly motivated[153] under the discipline of the summary judgment regulation[154]. Such a tool was introduced by Respondent for the purpose of speeding up the tribunals' activity, through the dismissal of manifestly ungrounded claims[155]. Thus, it is quite contradictory for Claimant to firstly deplore an alleged tardiness of Respondent's courts while simultaneously attacking a decision because it is rendered according to a fast-track procedure, and therefore reasoned its judgement in a less extensive way.

101. As it has been correctly pointed out, 'international tribunals are not courts of appeal'[156] and Claimant cannot pretend to have a regularly delivered judgment revised by an investment tribunal only because the result of it is unsatisfactory in its view.

[149] Harvard Draft, Article 9.
[150] *Iberdrola*, §432. See also *Krederi*, §451.
[151] *Robert Azinian*, §102.
[152] SoUF, §54.
[153] SoUF, §55.
[154] PO No.3, §8.
[155] *ibid.*
[156] *Mondev*, §70; see also *Chevron*, §247.

3. Respondent did not breach due process enforcing the SCC Arbitration

102. The enforcement of the SCC award pronounced on 23 August 2020 was not a violation of Article 9.9 of CEPTA, since Respondent's Courts were entitled to recognise and enforce the award under domestic law [**a**] and the New York Convention [**b**].

a. Respondent's Courts were entitled to recognise and enforce the SCC award

103. Section 36 of the Commercial Arbitration Law 1998 states that a foreign award may be refused enforcement if proof is furnished that the award has been set aside by a competent authority of the country in which, or under the law of which, that award was made, or if the court finds that the enforcement of the award would be contrary to the public policy of Mekar. The public policy defence must be construed narrowly: as the Superior Court of Mekar has previously affirmed that an enforcement must be refused on this basis[157] only if upholding it 'would violate the most basic notions of morality and justice [which] would take a very strong case before such a conclusion can be properly reached'.[158] A result giving effect to corruption would undermine Respondent's public policy.

104. The High Commercial Court found that the report by the Centre for Integrity in Legal Services, which Claimant relied on, was 'circumstantial at best' and the 9 May 2020 award suggested the arbitration to have 'considered both parties' submissions equitably, applied his mind, and arrived at a well-reasoned decision'[159]. The Court concluded that the award cannot be set aside since there are not sufficiently serious, specific, and consistent *indicia* of corruption.

105. Further, the Superior Court of Mekar at Phenac relied on its judgments in *Alta Lumina*[160] and *Bey City*[161] to assess the scope of interference with an arbitral award under Section 36 and in appeal under Section 39 of the Commercial Arbitration Law 1998. *Alta Lumina* enforced an international arbitral award set aside at the seat of arbitration. The Tribunal's reasoning was grounded in consideration of Section 36, noting that it may not refuse

[157] Annex XIV, §14.
[158] *ibid*, §8.
[159] *ibid.*
[160] Annex XV, §2.
[161] *ibid.*

enforcement except in limited circumstances, that any refusal is not mandated (given the wording of the New York Convention, considered below) and that the award rendered was an international award which was not integrated into the legal order of the seat, such that its existence continues despite nullification. *Bey City* considered the standard of review under Section 39, noting that deference is usually given to the lower court judge.

106. Therefore, Respondent's law permitted Respondent's Courts to recognise and enforce the SCC arbitral award.

b. <u>The New York Convention allowed Respondent to enforce SCC's award</u>

107. Article V(1)(e) of the New York Convention uses permissive language for recognition and enforcement of annulled awards[162]. Thus, States are granted the discretion to enforce awards despite annulments in their home jurisdiction. Such discretion is expressly recognised in many national law systems. For instance, in France, in the *Hilmarton* case, the Court relied on the New York Convention, which enables Contracting States to apply a more liberal domestic regime for enforcement of arbitral awards. The Court held that the permissive language of Article V(1)(e), in conjunction with Article VII, constituted a sufficient basis to enforce awards annulled at the seat, since annulment of an award is not one of the grounds for refusing enforcement under the Convention[163].

108. Moreover, in the US, Courts have repeatedly noted that under Article V(1)(e) of the New York Convention, a tribunal has the discretion to decline to enforce an award that 'has been set aside (...) by a competent authority of the country in which, or under the law of which, that award was made'.[164] The District Court in the *Chromalloy* case noted that, while Article V provides a discretionary standard, Article VII(1) of the New York Convention included the imperative 'shall'; it requires that 'the provisions of the present Convention shall not deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law (…) of the country where such an award is sought to be relied upon'.

[162] New York Convention, art. 5, §1.
[163] *Société Hilmarton*.
[164] *Chromalloy Aeroservices*.

109. It follows that, with no further guidance contained in the New York Convention and in the absence of any internationally relevant standard, domestic courts may enforce awards annulled elsewhere at their discretion. The enforcement of the SCC arbitral award was a decision permitted under national and international law. Respondent did not deny justice.

E. Respondent did not subject Claimant to abusive treatment

110. Claimant assumes that the measures taken by Respondent were part of a hostile attitude towards investors and pursued the aim of pressuring Claimant into selling its shares in CA. An investigation carried out by a sovereign body can, in principle, amount to abusive behaviour towards a foreigner[165]. However, as shown in arbitral practice, an investigation cannot be considered abusive only because damage occurred. Investigating illegitimate conduct is a sovereign right of States, to protect their essential interests[166].

111. The existence of a plan to damage the investor to force him to sell its shares must be proven[167]. As it has been pointed out 'care must be taken in such cases to ensure that the hindsight afforded by the arbitral process does not construe mere bureaucratic officiousness – a decision to 'play it by the book' – as a campaign of harassment'[168]. Until the contrary is proven, the conduct by Respondent thus was as a legitimate exercise of its sovereignty and investigative powers, and the damages suffered by Claimant because of it cannot be traced back to abusive conduct by Respondent.

112. As a result of all the above, Respondent submits that it is not in breach of FET under CEPTA and, hence, that it is not liable to pay compensation to Claimant.

[165] *Swisslion*, §53; *Rompetrol Group*, §61.
[166] *Krederi*, §638; *Teinver*, §189.
[167] *Krederi*, §639.
[168] McLachlan et al., §7.127.

IV. THE APPROPRIATE COMPENSATION STANDARD IS THE "MARKET VALUE"

113. Nevertheless, if the Tribunal finds Respondent to have breached CEPTA, Respondent still maintains that no compensation is owed to Claimant, since Respondent already purchased the investment at its market value. This is because the 'market value' is the proper standard of compensation **[A]**, a 'fair market value' is not guaranteed under the MFN clause **[B]** and Respondent can rely on mitigating circumstances **[C].**

A. The market value is the proper standard of compensation

114. The international law standard for compensation for a wrongful act committed by a sovereign entity is not settled[169]. One of the approaches that can be followed is the one set out *Factory at Chorzow*[170], where the PCIJ awarded the 'fair market value' of the asset seized. Under that standard, the State should reimburse the investor with the value of the assets at the moment of the act, including any prospective profits that the investors would have gained, had the undertaking not taken place[171].

115. Despite such authority, some adjudicating bodies have opted for the market value standard[172]. The concept of market value is generally defined as 'the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arm's-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently, and without compulsion'[173]. The concept of market value therefore does not encompass the notion of loss of profits and refers only to the value at which an asset can be exchanged in the referential market[174].

116. This is also the standard of compensation endorsed by CEPTA. It is a well-established authority that the standard of compensation contained in the applicable Treaty is to be considered *lex specialis* in respect of general international law[175]. Therefore, there should

[169] *ibid*, §9.01.
[170] *Factory at Chorzow*.
[171] *ibid*, §§49-52.
[172] *Tecmed*, §476.
[173] *IVS*, p. 104.
[174] *Tecmed*, §191.
[175] *Philips Petroleum*, §§107 & 116; *ADC*, §481.

be no doubt that the standard to be applied is contained in Article 9.21 CEPTA. CEPTA, in Article 9.21, clearly prescribes that an investment tribunal created under the Treaty may award to an investor, as compensation, only the market value of the asset seized or damaged[176]. Had the drafters wanted to encompass the concept of 'fair market value', they could have added the word 'fair, as it can be found in other investment treaties applying such a method of evaluation[177]. Respondent has already paid Claimant the market value and thus no compensation is owed. This is shown by the fact that no other buyers were found in the referential market at the relevant time[178].

117. In any event, the sum demanded by Claimant also exceeds the fair market value of the investment. ARSIWA includes loss of profits when it comes to awarding the 'fair market value'[179]. However, such loss can be awarded only when 'it is established'[180]. In other words, there must be sufficient evidence that the figure was not speculative, and convincing evidence of ongoing and expected future profitability[181].

118. Claimant has not furnished sufficient evidence to demonstrate that the genuine value of its asset would amount to 1.1 billion USD. This figure in fact was unilaterally asserted by Claimant in November 2016, before the economic crisis took place[182]. As the aviation analytics have stressed, the 1.1. Billion figure represents the 'peak valuation'[183] of the company and *a fortiori* cannot constitute its value before the alleged wrongful conduct. Hence, Claimant has not furnished sufficient evidence to establish the probable losses.

119. In light of the foregoing submissions, even if the Tribunal believed the standard for compensation to be the fair market value, the amount of compensation due would already have been paid by Respondent, and no further money would be owed.

[176] CEPTA, Article 9.21, §1.
[177] ECT, Article 13, §1; ECT, Article 1100, §2.
[178] SoUF, §63.
[179] ARSIWA Commentary, Article 36, §2.
[180] *ibid*, p. 104.
[181] UN Security Council, §718.
[182] PO No.4, §3.
[183] Annex IX.

B. The Fair Market Value Standard is not guaranteed under the MFN Clause

120. Claimant further affirms that, applying the MFN clause contained in Article 9.7 CEPTA, the compensation standard should be 'fair market' value, as it is granted in the Arrakis-Mekar BIT, instead of the 'market value' as established in CEPTA. There are two main reasons why this argument should be dismissed.

121. First, the MFN clause cannot be used to leverage more favourable provisions contained in BITs that were signed before the treaty containing the MFN clause, as it would apply the treaty retroactively, which is unacceptable under international law. This was confirmed by arbitral tribunals such as *Tecmed v Mexico*, wherein it was stated that the temporal scope of a BIT is part of its core elements, whose 'application cannot therefore be impaired by the principle contained in the most favoured nation clause'[184].

122. Furthermore, the application of Article 31 VCLT leads to the same outcome. Indeed, the ordinary meaning of the terms 'shall accord', contained in Article 9.7 CEPTA, entails that the most favourable treatment clause applies in the future. This is in line with the object and purpose of CEPTA, which was to provide 'a more comprehensive trade and investment agreement with Bonooru which adequately balanced investors' and host States' rights'[185]. In this sense, allowing a retroactive application of the CEPTA would go against the balance of the investors' and host States' rights that was sought.

123. This is precisely what Claimant is trying to accomplish. CEPTA was signed on 15 October 2014, which means that, in applying the MFN clause, Claimant could only import more favourable provisions contained in BITs signed after that date. However, the Arrakis-Mekar BIT was signed on 14 January 2006. Thus none of its provisions fall within the scope of the MFN clause. An opposite conclusion would entail going against core principles of international law.

124. Second, Article 9.7(1) CEPTA specifies the type of treatment that should be no less favourable than the one granted to a third party. In this sense, the provision expressly mentions that the MFN clause applies with respect to 'the establishment, acquisition,

[184] *Tecmed*, §69.
[185] PO No.3, §14.

expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal' of the investment. Moreover, Article 9.7 CEPTA requires that the treatment is granted 'in like situations.' The scope of application of the MFN clause in CEPTA is thus restricted to treatment granted in similar circumstances in respect to similar measures.

125. Claimant intends to import the standard of compensation enshrined in the Arrakis-Mekar BIT. However, Claimant fails to prove that this matter is within the material scope of the MFN clause. A standard of compensation is not related to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment, sale or disposal. It follows that the Parties did not agree on applying the MFN clause to grant fair market value instead of market value.

126. The above is confirmed in Article 9.7(2) CEPTA. This provision specifies that (i) no MFN clause is guaranteed for procedural matters and (ii) substantive obligations are only considered 'treatment' when the State has adopted measures pursuant to these obligations. The standard of compensation is not a substantive obligation pursuant to which Respondent has adopted any measure. Substantive obligations are those established under Section D CEPTA, i.e., to guarantee FET and lawful expropriation. This reaffirms that the standard of compensation, not being a substantive obligation, is outside the material scope of the MFN clause.

127. Claimant is thus unable to rely on the MFN clause to amend CEPTA. Should the Tribunal find that a breach had been committed, the standard to calculate any compensation is the market value, which Respondent already paid when purchasing Claimant's stake in CA for USD 400 million. Accordingly, Claimant is owed no compensation.

C. <u>Respondent can rely on mitigating circumstances</u>

128. For the reasons explained above, Respondent submits that no compensation is due to Claimant. Should the Tribunal disagree with that submission and find that compensation should be paid, Respondent submits that it must be reduced considering the contributory negligence by Claimant.

129. It is a *jurisprudence constante* in treaty arbitration that in cases where the investor has contributed to its own damage, compensation owed must be reduced accordingly[186]. Claimant has acted in an irresponsible manner that contributed to the depreciation of its asset[187]. The potential risks of the business activities conducted by Claimant has been acknowledged by external observers, such as the IICRA, an independent rating authority, which, for those reasons, has classified the security of the investment in one of lowest categories, i.e., CCC+. In 2020, the rating was further decreased by Fitch, and Claimant's rating reached CCC[188]. The wrong policy choices made by Claimant started in 2014, when it expanded the fleet even though several routes were not active in the winter period[189]. Respondent warned Claimant several times about the risks of such a strategy[190]. Therefore, Claimant should bear at least *some* responsibility for its own losses.

130. Hence Respondent submits that either Claimant is owed no compensation whatsoever, or that the Tribunal should reduce such compensation given Claimant's own negligence.

[186] *Ex multis*, *Occidental Petroleum*, §687.
[187] predatory pricing, SoUF, §49; rise in the debts, SoUF, §52; shut down of profitable routes, SoUF, §53; extra-charges for baggage, *ibid.*
[188] PO No.3, §3.
[189] SoUF, §31.
[190] SoUF §§29 & 31.

PRAYER FOR RELIEF

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

1. Not find jurisdiction over the dispute;

2. Grant permission for the CRPU to file its *amici* brief;

3. Deny permission for the CBFI to file its *amici* brief;

4. Find that Respondent treated the Claimant's investment fairly and equitably and thereby did not breach Chapter 9 of CEPTA;

5. Find that, if Respondent did breach Chapter 9 of CEPTA, the correct valuation method for damages in this arbitration is market value and;

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