TEAM: 1589 MENSAH

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

Vemma Holdings Inc.

(Claimant)

v.

The Federal Republic of Mekar

(Respondent)

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

Members of the Tribunal

Ms. Twyla Sands (President)

Mr. Long Feng

Professor Jaqen H'ghar

Secretary of the Tribunal

Ms. Kaushiki Agarwal

WRITTEN SUBMISSIONS ON BEHALF OF RESPONDENT

SEPTEMBER 23, 2021

TABLE OF CONTENTS

LIST OF ABBREVIATATION

ABBREVIATION	FULL NAME
%	Percentage
&	And
1994 BIT	1994 BONOORU – MEKAR BIT
Arrakis	The Kingdom of Arrakis
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
Bonooru	Commonwealth of Bonooru
Caeli	Caeli Airways
CCM	The Competition Commission of Mekar
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CEPTA	Bonooru - Mekar Comprehensive Economic Partnership and Trade Agreement
CILS	The Centre for Integrity in Legal Service
e.g.	For example
ed.	Edition/editor
FET	Fair and Equitable Treatment
i.e	That is
Ibid	The same

ICSID	International Centre for Settlement of Investment Disputes
ICSID Additional Facility Rules	International Centre for the Settlement of Investment Disputes Additional Facility Rules
Mekar	Federal Republic of Mekar
MFN	Most Favored Nation
MRTP Act	Monopoly and Restrictive Trade Practice Act
No.	Number
OCED	Organization for Economic Co-operation and Development
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
PO3	Procedural Order No. 3
PO4	Procedural Order No. 4
P.	Page
Para./paras.	Paragraph/paragraphs
Record	FDI Moot Case 2021
Sinnograd Court	Supreme Arbitrazh Court of Sinnograd Ruling
Supra	Above
The CBFI	The Committee on Bonoori Foreign Investors
The CRPU	The Committee on Reform of Public Utilities
The submission by external	Amicus Submission by External Advisors to the Committee on

advisors to the CRPU	Public Utilities
The submission by the CBFI	Amicus Submission by the Consortium of Bonoori Foreign Investors
the Tribunal	The Arbitral Tribunal of ICSID
UNCITRAL	United Nations Commission on International Trade Law
UNCONTESTED FACTS	Statement of Uncontested Facts
UNCATD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties
vol.	Volume

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Conventions/ Treaties	
1994 BIT	1994 BONOORU – MEKAR BIT
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
CEPTA	Bonooru - Mekar Comprehensive Economic Partnership and Trade Agreement
Commentary on ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries
MRTP Act	Monopoly and Restrictive Trade Practice Act
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties
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Peru	ARB/14/2, Procedural Order No. 6 of 21 June 2016.
BUCG v. Yemen	*Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction 31 May 2017.
Blusun v. Italian	*Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award of 27 December 2016.
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STATEMENT OF FACTS

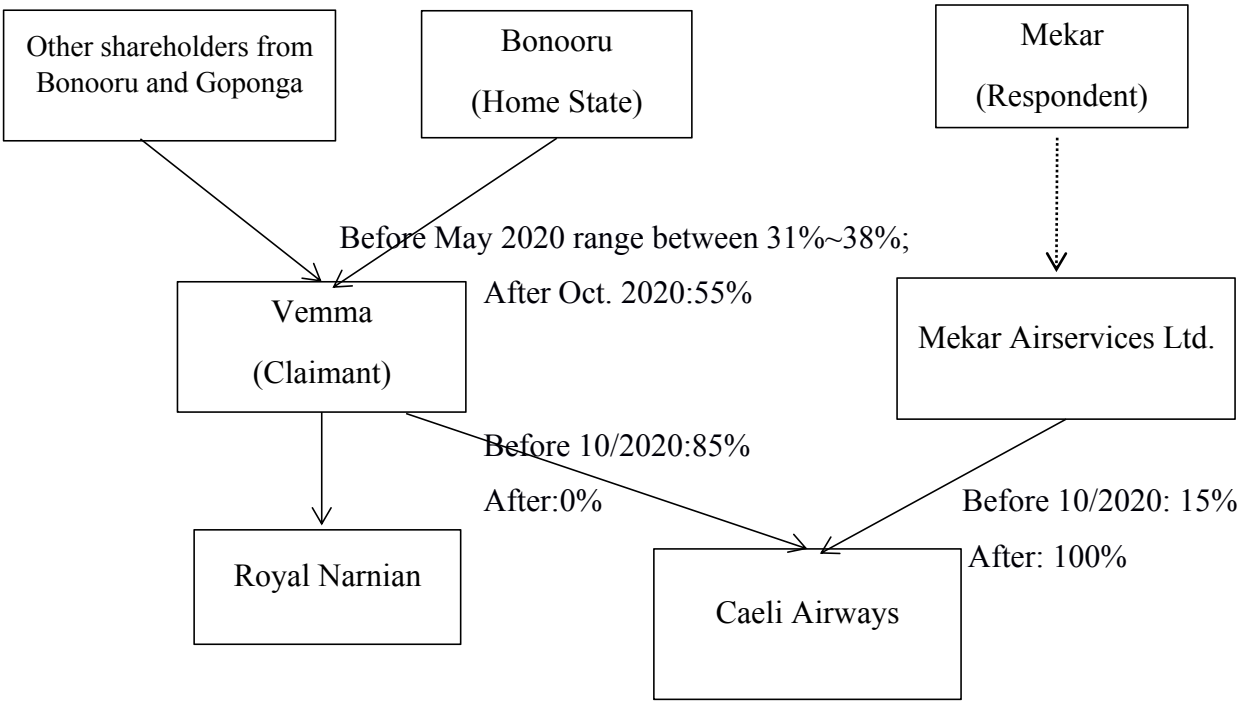
Relevant Persons in the Case

1. Claimant, Vemma Holdings Inc., is an aviation holding company registered in the Commonwealth of Bonooru (Home State). Its predecessor, BA Holdings. is a state-owned enterprise in Bonooru. In order to improve the yield of BA Holdings, the Civil Aviation Authority in Bonooru decided to sell 70% of BA Holding's stakes, which resulted in the foundation of Vemma. Additionally, BA Holding was the parent company of Bonooru Air, which monopolized the civil aviation business of Bonooru at that time. The latter became three airlines in the process of privatization, of which Royal Narnian was the flag carrier of Bonooru. Vemma is the wholly-owned parent company of Royal Narnian.

2. Respondent, the Federal Republic of Mekar (Host State), is a developing country whose post-independence growth was affected by regulatory intervention and late economic reforms starting in 1994. Large-scale privatization of state-owned enterprises and rescinding bailout proposals has been carried out since 2009 under the Emergency Recovery Act. Additionally, to inspire investor confidence, Mekar's MRTP Act was amended in 2009, and the Competition Commission of Mekar (*hereinafter* "CCM") was created as a result.

3. Caeli Airway, is an aviation company incorporated in Mekar via the investment of Vemma. Caeli used to be a state-owned enterprise by Respondent. Given the unfavorable merger with Caeli and 2008 financial crisis, Respondent decided to end bail-outs to "zombie enterprises" and privatized Caeli. After Respondent's first two attempts to restructure failed, in September 2010, Claimant participated in the tendering process for the controlling stake in Caeli Airway and won the bid. As a result, Claimant acquired an 85% stake in Caeli Airways and Respondent maintained 15% ownership through Mekar Airservices Ltd.

Relations Diagram



Basic Introduction

1. The Parties to this arbitration are Vemma Holdings Inc. ("Claimant") and the Federal Republic of Mekar ("Respondent").

2. On 5 March 2011, CCM approved Claimant's acquisition of an 85% stake in Caeli. The remaining 15% shares were owned by Respondent through Mekar Airservices.

3. Ever since 2012, Mekar Airservices has frequently cautioned Claimant against taking an "extravagant approach" in conducting business. However, Claimant has consistently ignored these signals.

4. In 2016, CCM launched two investigations into Caeli due to clear evidence of its anti-competitive behavior. Consequently, airfare caps and fines were imposed.

5. When Caeli sought judicial review of the airfare caps, Respondent managed to dispense justice within thirteen months.

6. 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. Neither received subsidies under Executive Order 9-2018.

7. Claimant decided to sell its stake in Caeli in November 2019 and soon secured an offer from Hawthorne Group LLP. Respondent deemed the price offered to be artificially inflated and not an arm's length commercial price. The dispute was submitted to arbitration in the Sinnoh Chamber of Commerce's (*hereinafter* "SCC") Arbitration Institute and was decided in Respondent's favor. Although the award was later set aside by Sinnograd due to the alleged bribery reason, the High Commercial Court of Mekar issued a ruling recognizing and enforcing the award set aside, purely in consideration of Respondent's public policy.

8. Claimant filed a notice of arbitration against Respondent on 15 November 2020 to seek compensation for its losses under the CEPTA.

9. Although Claimant's strategies turned Caeli, a previous "zombie enterprise", into profit within just three years, Respondent began to actively impede Claimant's efforts. First, in September 2016, CCM imposed interim airfare caps; in December 2016, CCM decided to impose on Claimant a fine due to the privileges it enjoyed at the Phenac Airport. Although Caeli sought the judicial review for both investigations, they were either refused or failed. Furthermore, in September 2018, Respondent granted subsidies for foreign airlines operating in Mekar. However, it denied such subsidies to Caeli. As a consequence of the above moves made by Respondent, Caeli faced the risk of insolvency. When Claimant decided to sell its stake, Mekar Airservices bribed the sole arbitrator deciding on the matter of the sale price and got a ruling in favor of Respondent. Even after this award was subsequently set aside, the Mekari court still to choose to enforce it. Finally, Claimant commenced these arbitral proceedings.

STATEMENT OF ARGUMENTS

Arguments on Procedure

1. Issue A: The Tribunal does not have jurisdiction under CEPTA. First, there is the lack of parties' consent for the Tribunal to hear the dispute due to the fact that Claimant is not qualified as an investor under CEPTA. Second, neither is Claimant a qualified national under the ICSID Additional Facility Rules, since it performs the governmental function, as well as performs as an agent for the government. This arbitration would in effect be between Bonooru and Respondent, a State-to-State case, over which the Tribunal does not have jurisdiction.

2. Issue B: The Tribunal should accept the *amicus* submission by the External Advisors to the Committee on Reform of Public Utilities and reject the *amicus* submission by the Consortium of Bonoori Foreign Investors. First, the submission by the External Advisors to the CRPU should be accepted as it meets all the criteria required for a successful *amicus* submission. Second, the submission by the Consortium of Bonoori Foreign Investors should be rejected as it fails to offer a different perspective to the Tribunal, as well as pursue any public in the arbitral proceedings.

Arguments on Merits

3. Issue C: Respondent did not violate Article 9.9 of CEPTA. First, each of the alleged wrongful acts is individually consistent with the requirement of Article 9.9 and thus does not amount to the breach of FET obligation, since there is no arbitrary conduct, no discriminatory conduct, no denial of justice, and no frustration of the legitimate expectation. Second, these acts cannot in the aggregate amount to a creeping violation of Article 9.9.

4. Issue D: The compensation standard for fair and equitable treatment (*hereinafter* "FET") violation is market value. First, Article 9.21 of CEPTA expressly prescribes that the compensation standard for FET violation of CEPTA is the market value standard. Second, Neither the most favored nation clause contained in CEPTA, nor the general principle of full reparation allows Claimant to derogate from this market value standard. Third, Respondent has already purchased Claimant's investment at "market value" and therefore, owes Claimant no compensation. In the alternative, any compensation awarded should be reduced considering Claimant's contributory fault and the dire economic situation in Mekar.

ARGUMENTS

ARGUMENTS ON PROCEDURE

I. ISSUE A: THE TRIBUNAL DOES NOT HAVE JURISDICTION UNDER CEPTA.

1. Pursuant to Article 9.16 of Bonooru - Mekar Comprehensive Economic Partnership and Trade Agreement (*hereinafter* "CEPTA"), "a claim can be submitted under chapter 9 by an 'investor' under the ICSID Additional Facility rules". However, in the present case, Claimant as a state-owned enterprise, is excluded from the scope of investor under CEPTA. The parties to CEPTA have not consented to the arbitration brought by a state-owned enterprise.

2. Further, pursuant to Article 2 of the International Centre for the Settlement of Investment Disputes Additional Facility Rules (*hereinafter* "The ICSID Additional Facility Rules"), the ICSID tribunal only contemplates proceedings between a State and a national of another State. However, not only is Claimant performing governmental function, but also it is an agent for the Bonoori government. Therefore, Claimant is not qualified as a national under Article 2 of the ICSID Additional Facility Rules. This arbitration would in effect be between Bonooru and Respondent, a State-to-State case, over which the Tribunal does not have jurisdiction.

3. Therefore, the Tribunal does not have jurisdiction upon this dispute for two reasons: First, Claimant is not entitled to bring the claim as an investor under CEPTA (A). Second, Claimant is not a national under ICSID Additional Facility Rules (B).

A. Claimant is not entitled to bring the claim as an investor under CEPTA.

4. Claimant is a state-owned enterprise (1). The definition of "investor" of CEPTA does not include a state-owned enterprise (2). Therefore, Claimant is not entitled to bring the claim as an investor under CEPTA.

1. Claimant is a state-owned enterprise.

5. The definition of state-owned enterprise is not provided explicitly under CEPTA. According to the World Bank, the state-owned enterprises are the "government owned or government controlled economic entities that generate the bulk of their revenues from selling goods and

services".[1] One measure of control is expressed through the ownership of shares by a government, either by ownership of a majority of shares, or by a specified minimum minority ownership if the government is the largest shareholder.[2]

6. In the present case, the Commonwealth of Bonooru is the only governmental shareholder of Claimant. The Bonoori government held over 30% of stake[3] while no other shareholder holds more than 7% stake in Claimant.[4] Therefore, the Bonoori government is the largest shareholder and Claimant is a state-owned enterprise accordingly.

2. State-owned enterprises are not protected under CEPTA.

7. According to the Article 31.1 of Vienna Convention on the law of treaties (*hereinafter* "VCLT"), "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Thus, there are three aspects that shall be taken into considerations for the purpose of interpreting the "investor" scope under CEPTA: the ordinary meaning of the term (a), the context (b) and the objective (c).

a. The ordinary meaning of "investor" under CEPTA is neutral and abstract.

8. Under Article 9.1 of CEPTA, the ordinary meaning of investor is neutral, which neither includes a state-owned enterprise nor excludes it as an investor. However, it cannot be presumed that state-owned enterprises are included automatically, because presumptions in favor of jurisdiction are inappropriate in the context of investment arbitration.[5]

9. As decided by the tribunal in the case *Inceysa v. El Salvador*, states parties' will of the scope of their consent to arbitration under a BIT shall be respected and scrutinized on an individual basis, free and clear of any presumption either for or against jurisdiction.[6] Second, evidence arguing

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[1] World Bank, Bureaucrats in Business: The Economics and Politics of Government Ownership (World Bank Publications 1995), p. 26.

[2] 5.Mark McLaughli, Defining a state-owned enterprise in International Investment Agreements, ICSID Review, (2020), p. 1–31, p.11； US–Singapore FTA, which provides for a rebuttable presumption of effective control where the government owns more than 20 percent of its shares and is the largest shareholder.

[3] UNCONTESTED FACTS, p.29, para. 10.

[4] *Ibid.*

[5] BLYSCHAK, Paul, *State-Owned Enterprises and International Investment Treaties: When Are State-Owned Entities and Their Investments Protected*?, in Journal of International Law and International Relations, vol. 6, Issue 2, p.24 (2011).

[6] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Decision on Jurisdiction of 2 August 2006, para. 176.

against the standing of state-owned enterprises to bring arbitration under a BIT need not necessarily appear in the relevant definition of an investor in the specific BIT, nor need it be express. It may thus appear either expressly or arise by implication.[7] Therefore, it is necessary to rely on the other two interpretive sources, the context and the objective of the treaty, as set out in Article 31(1) of the VCLT, to determine whether the parties are intended to include a state-owned enterprise in the scope of an "investor".

b. An "investor" under CEPTA does not include a state-owned enterprise by the contextual interpretation.

10. According to Professor Hudson, the context of a treaty includes not only the content within the treaty, but also the content in the related treaties with regard to the similar terms,[8] such as the treaties concluded between the parties before or after. In the present case, applying such interpretation mechanism, it should be concluded that the scope of an "investor" does not include state-owned enterprises in CEPTA.

11. First, before CEPTA, Respondent and Bonooru had reached a bilateral investment treaty in 1994 (*hereinafter* "1994 BIT"), in which when deciding the scope of investors, the state parties used "any" before "enterprise", but used "a" before "natural person" in the text.[9] This implies the parties' intention to have a broad scope of enterprise investors.[10] However, things are different in case of the following CEPTA concluded in 2014. The determiner before "enterprise" changed from "any" to "a".[11] The alteration implies the parties' cautious attitude toward the scope of an "enterprise investor". Thereby, the interpretation of an "enterprise investor" in 2014 CEPTA shall be restrictive.

12. Second, in the 1994 BIT, the scope of an "investor" explicitly includes "government-owned enterprises".[12] This indicates the parties' clear inclusion of the state-owned enterprises as investors. Contrarily, in the 2014 CEPTA, the scope of an "investor" does not mention a

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[7] BLYSCHAK, Paul, *supra* note 5, p.24.

[8] Manley O. Hudson, The protection Court of International Justice 1920-1942, New York: The Macmillan Company, p. 646-647 (1943).

[9] 1994 BIT, p.69, Article 1.

[10] Cambridge Dictionary, Grammar: Nouns, pronouns and determiners, available at: https://dictionary.cambridge.org/grammar/british-grammar/any, (last visited: 20 September 2021).

[11] 2014 BONOORU-MEKAR CEPTA, p. 73, Article 9.1.

[12] 1994 BONOORU-MEKAR BIT, p.69, Article 1.

government-owned enterprise.[13] The comparison between these two treaties should lead to the conclusion that it is an intentional exclusion of state-owned enterprises from the scope of an "investor" under CEPTA.

13. Furthermore, under Article 9.15, the subrogation clause of CEPTA, the parties extend subrogation rights to Contracting Parties or any "agency authorised by a Party", which includes the standing to bring the claim by the party or the authorized agency. However, generally the subrogation clauses are constructed to extend the subrogation rights only to private entities, such as an investor's insurance company.[14] According to the drafters of the ICSID Convention, the state and the authorized agency of the state cannot bring the claim before ICSID on behalf of the investor even if they have made the indemnity to the investor.[15] Therefore, the subrogation clause under CEPTA is of great significance. According to Professor Blyschak, it suggests that when the parties intended to provide some standings to state or a state-owned enterprise, they would express that explicitly. However, if the parties did not express it, it should be read as an intentional omission.[16] In the case at hand, the silence towards the investor standing of a state-owned enterprise under CEPTA implies that the parties did not intend to give the standing to it.

14. Besides, not only did CEPTA keep silent on the standing of state-owned enterprises in the scope of investor under Article 9.1, but also it made a specific stipulation for state enterprises in Article 9.13 independently. The clause emphasizes the consistent manner of state enterprises with the state in exercising government delegated authority. This further indicates the parties' intention to take the state enterprise' status as the agency for government, rather than as a private investor and thus excluded that from the scope of protected investors under CEPTA.

c. An "investor" under CEPTA does not include state-owned enterprises by the teleological interpretation.

15. Under Article 1.3 of CEPTA, the parties elaborate their objective as to "promote conditions of fair competition". This also justifies the exclusion of state-owned enterprises from the scope of

[13] 2014 BONOORU-MEKAR CEPTA, p. 73, Article 9.1.

[14] BLYSCHAK, Paul, *supra* note 5, p. 23; see also Agreement on reciprocal promotion and protection of investments between the Government of the Republic of Kazakhstan and the Government of the Islamic Republic of Iran, January 1996, Art. 9(1), available at: http://www.unctad.org/sections/dite/iia/docs/bits/egypt_china.pdf, (last visited: 20 September 2021).

[15] The ICSID Convention: a commentary, p. 187, para. 3.

[16] BLYSCHAK, Paul, *supra* note 5, p. 23.

protected investors. Generally, state-owned enterprises fail to be neutrally competitive in the market due to their close relationship with the powerful government. The government linkages can increase the capacity of firms to act anti-competitively because they may not be fully exposed to market pressures. Politicians, regulators, and other commentators are concerned that politically motivated operations of state-owned enterprises could lead to market inefficiencies.[17] This should be also read as the concern and reason for Respondent and Bonooru to refuse to protect the state-owned enterprises as private investors when concluding the CEPTA. Unfortunately, the above concerns have materialized in the instant case. Claimant got the recurring subsidies from the state of Bonooru,[18] which has supported Claimant significantly to conduct the low-fare strategy and influence other competitors in Respondent's market.

16. In summary, as a state-owned enterprise, Claimant is disqualified as an investor under CEPTA. Since Article 9.16 of CEPTA stipulates that a claim can only be submitted by an investor, Claimant cannot file this arbitration under CEPTA. The Tribunal therefore does not have jurisdiction upon this dispute.

B. Claimant is not a national under ICSID Additional Facility Rules.

17. Furthermore, Claimant is disqualified as a national under ICSID Additional Facility Rules. According to Article 9.16 of CEPTA and Article 2 of the ICSID Additional Facility Rules, since Respondent is not a Contracting Party to the ICSID Convention, the ICSID Additional Facility Rules apply. Under Article 2 of the ICSID Additional Facility Rules, the ICSID Tribunal *only* contemplates the arbitration between a State and a national of another State. In determining whether a state-owned enterprise can be regarded as a "national", reference to the Broches test will be useful. The Broches test has been applied in numerous cases, including *CSOB v. Slovakia*[19] and *BUCG v. Yemen*,[20] and it allows to find that "a mixed economy company or state-owned company should not be qualified as a national of another Contracting State" if it is acting as an agent for the government or is discharging governmental function.[21] Applying the Broches

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[17] BLYSCHAK, Paul, supra note 5, p. 8; Antonio Capobianco, *Competition Law and Foreign-Government Controlled Investors, in* Paris: OECD Investment Division, January 2009, at 3.

[18] UNCONTESTED FACTS, p. 32, para. 28.

[19] *Ceskoslovenska Obchodni Banka v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction 24 May 1999, para. 17.

[20] *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction 31 May 2017, para. 34.

[21] BROCHES, Aron, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, in* Collected Courses of the Hague Academy of International Law, vol. 136, p. 354–5 (1972).

test, the tribunal in *BUCG v. Yemen* found that "[t]he Broches factors are the mirror image of the attribution rules in Articles 5 and 8 of the ILC's Articles on State Responsibility."[22] Therefore, the Tribunal in this case can and should turn to Responsibility of States for Internationally Wrongful Acts (*hereinafter* "ARSIWA") for reference to make its determination.

18. Although as long as either one factor of the Broches test exists, the entity concerned is not a "national". In the present case, both factors exist. It is Respondent's position that Claimant should not be qualified as a national as it not only exercises governmental function (1), but also acts as an agent for the Bonoori government (2).

1. Claimant is performing governmental function

19. According to Article 5 of ARSIWA and its official commentary, the governmental function refers to "the conduct...concern[ing] governmental activity and not other private or commercial activity in which the entity may engage."[23] To recognize a particular conduct as a governmental function, the nature of such conduct and the motivation should be both considered.[24] This can be determined by looking into whether a state-owned enterprise has crossed the line between conduct exercised by private commercial entities motivated purely by commercial objectives and conduct exercised primarily by entities motivated totally or in part by the greater political and social concerns of the state. In the present case, the mobility rights are the basic constitutional rights of Bonoori citizens (a); and Claimant is performing the governmental function by protecting the mobility rights of the citizens (b).

a. The mobility rights are the basic rights of Bonoori citizens.

20. First of all, Bonooru is an archipelagic State comprising 109 islands, of which only four are 'major islands', spanning over 5000 square kilometers. Due to the disparate nature of Bonooru's geography, its major public facilities such as healthcare and educational institutions are concentrated on these 'major islands'. To tackle this disproportionate distribution, Article 70 of the Constitution of Bonooru assigns special importance to mobility rights of its population.[25] According to the Constitution of Bonooru, the mobility right refers to "[e]very citizen of

[22] *Supra* note 20.

[23] Commentary on ARSIWA, p.43, para. 5.

[24] *Ibid.*, para. 6.

[25] UNCONTESTED FACTS, p. 28, para. 5; ANNEX I, p. 41.

Bonooru has the right to enter, remain in, and leave its territory".[26] Therefore, the mobility right includes traveling within Bonooru and traveling abroad. In 1964, the Constitutional Court of Bonooru established that Article 70 bestows positive obligations upon the state to assist and ensure provision of essential transportation.[27]

b. Claimant is performing the governmental function by protecting the mobility rights of Bonoori citizens.

a) The conduct of Claimant.

21. Protecting citizens' mobility rights is one of the governmental functions, which was used to be performed by Claimant's predecessor, the BA Holdings, the 100% state-owned enterprise. It was then transferred to Claimant, after the privatization program.[28] To be precise, during the privatization program of the BA Holdings, the Bonoori government, in order to ensure the governmental function to be successively performed, excluded the other domestic carrier competitors as bidders, and finally chose Claimant as the governmental function performer.[29]

22. In practice, Claimant not only flies to the most remote island in Bonooru to ensure the citizens' mobility rights within Bonooru by its wholly owned subsidiary Royal Narnion, which was chosen as the flag carrier of Bonooru,[30] but it also made this investment to ensure the citizens' mobility rights within the whole Greater Narnian region by providing more and affordable international flights. In the press conference on 31 May 2016, Ms Sabrina Blue, the erstwhile head of Claimant's board of directors and the then Secretary of Transport and Tourism of Bonooru lauded Claimant's "contribution to the enhancement of . . . the mobility rights of our population within the Greater Narnian region. Vemma has certainly lived up to the standards set by its predecessor in Bonooru".[31] Therefore, it should be found that Claimant was in fact performing the discussed governmental function.

b) The purpose of Claimant.

23. Claimant pursues the objective of promoting the governmental function rather than promoting its commercial profits. In the Memorandum of Association of Claimant, it is expressly established that Claimant aims "[t]o assist in developing the aviation industry as well as the civil aviation

[26] ANNEX 1, p. 41.

[27] UNCONTESTED FACTS, p. 28, para. 5; ANNEX II, p. 42.

[28] PO4, p. 89, para. 6.

[29] UNCONTESTED FACTS, p. 29, para. 7.

[30] *Ibid.*, para. 9.

[31] PO4, p. 89, para. 6.

infrastructure in Bonooru for the benefit of its population".[32]

24. During Claimant's investment in Respondent, as one of the pillar businesses of Caeli, Claimant puts significant resources into the flights between Respondent and Bonooru. Despite the fact that the routes have suffered a lot of losses, Claimant still did not cut back its operations on these routes.[33] Therefore, it should be concluded that Claimant did not make the investment being purely motivated by commercial objectives. Instead, Claimant has been concerned about the public benefits and the governmental objectives of Bonooru.
25. Therefore, as decided by the tribunal in *Maffezini v. Spain*, when the entity's objectives and functions are by their very nature typically governmental tasks rather than usually carried out by private entities, the entity is performing governmental functions and the conduct can be attributed to the state.[34] Same in our case, protecting the basic constitutional rights of citizens is typically the governmental task. Claimant is performing the governmental function motivated by social concerns, and Claimant's conduct should be thus attributed to the state. As a consequence, Claimant is not qualified as a national under the ICSID Additional Facility Rules and thus the Tribunal lacks the jurisdiction to decide this case.

2. Claimant is an agent for the government.

26. According to Article 8 of ARSIWA Articles and its official commentaries, if the state was using its ownership interest or control of a corporation to achieve a particular result within its interest, then the conduct of the entity is attributable to the State.[35] Such entity therefore is the agent of the government and is disqualified as a national. In the present case: First, Claimant is controlled by the Bonoori government (a); Second, Claimant's investment pursues the result within the governmental benefits (b).

a. Claimant is controlled by the Bonoori government.

27. The control standard can be assessed from two points of view: the ownership view, and the voting rights view.

28. According to the US–Singapore FTA, the control can be established where the government owns

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[32] ANNEX IV, p. 44, para 3h.

[33] UNCONTESTED FACTS, p. 33, para. 33.

[34] *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction of 25 January 2000, para. 80.

[35] *EDF (SERVICES) LIMITED v. Romania*, ICSID Case No. ARB/05/13, Final Award of 8 October 2009, para. 200.

more than 20 percent of its shares and is the largest shareholder.[36] Moreover, according to the drafters of the ICSID Convention, the meaning of a "controlling interest", includes not only a majority holding, but also interests sufficiently to be able to block major changes in the company. Even a minority holding of as little as 25% or even 15% might impose significant influence through a capacity to block major changes or otherwise. In the case at hand, the Bonoori government owned over 30%, almost up to 40% shareholding in Claimant, and Bonooru has been the largest shareholder from the date of Claimant's incorporation. Such a proportion of shareholding is sufficient to gain control upon Claimant. [37]

29. Furthermore, from the voting right view, based on the controlling interest, the Bonoori government has also selected significant number of representatives on the board, which results in the ability of the Bonoori government to easily form the majority of the board and impose the decisive influence on the decision-making process of Claimant.[38]

30. Moreover, on the same day as when Claimant participated in the tendering process of Caeli on 23 November 2010, Ms Sabrina Blue, the former head of Claimant's board of directors was appointed as the Secretary of Transport and Tourism of Bonooru.[39] Besides, in the same year when Claimant managed to make this investment in 2011, Ms Sabrina Blue, as Bonooru's Secretary of Transportation and Tourism, unveiled the "Horizon 2020" Scheme as part of the Caspian Project.[40] These facts further imply the inalienable connection between the Bonoori government and the decision for Claimant to make this investment.

b. Claimant's investment pursues the result within governmental benefits.

31. It should be further observed that Claimant's investment pursues the result within governmental benefits, that is to promote the Caspian Project. Specifically speaking, the Bonoori government lunched the Caspian project to facilitate the movement of goods, people, services and knowledge amongst its neighbors.[41] To assist the government, Claimant made the investment in dispute as a

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[36] US- Singapore Free Trade Agreement (2003) (signed 6 May 2003, entered into force 1st January 2004) Article 12.8.5.

[37] Because normally, to approve the important changes, including mergers and acquisitions, division of company, require a supermajority of shareholders (generally 67% to 80%), therefore, 33% stake in a company is enough to block almost every major change and impose significant influence upon the company.

[38] PO3, p. 86, para. 3.

[39] UNCONTESTED FACTS, p. 31, para. 22.

[40] UNCONTESTED FACTS, p. 32, paras. 26, 28.

[41] UNCONTESTED FACTS, p. 28, para.4.

part of the Caspian Project. By insisting on operating the routes between Respondent and Bonooru as the pillar of Caeli's business, Claimant brought benefits to Bonooru. In doing so, not only has Claimant's investment enhanced the aviation network available to prospective tourists of Bonooru, but also it has boosted the tourism infrastructure in Bonooru.[42] And this is precisely the goal of Horizon 2020 Scheme, a part of Caspian project.[43]

32. Further, Claimant has also obtained significant assistance from the Bonoori government for pursuing the governmental benefits. Specifically speaking, to support Claimant's investment to pursue governmental benefits, the Bonoori government has provided a lot of financial assistance to Claimant. First, after Claimant's acquisition of Caeli, the Bonoori government then started to provide constant subsidies to Claimant under the Horizon 2020 Scheme.[44] Second, Claimant was able to refinance from the Bonoorian People's Bank, a nationalized bank in Bonooru, at more favorable rates than those available on the market.[45] Besides, to protect the investment to pursue governmental benefits, Bonooru promised Claimant that it would step in if anything bad were to happen. During Claimant's investment, Bonooru has often exerted pressure on Respondent to treat Claimant favourably such as threatening Respondent to hold back funds promised to rebuild Respondent's airport as part of the Caspian Project.[46]

33. In summary, all these facts combined together further make it clear that the Caspian project is the tool of diplomacy of the Bonoori government. Claimant made the investment as part of the tool to achieve the governmental benefits. The present claim in front of this Tribunal is clearly retaliation from Bonooru against Respondent's refusal to relent to Claimant, the agent of the Bonoori government.[47]

34. In the present case, Claimant not only performs the governmental function, but also performs as an agent for the government. Therefore, according to the Broches test, Claimant is not qualified as a national under the ICSID Additional Facility Rules. The present dispute constitutes State-to-State arbitration, upon which the Tribunal has no jurisdiction.

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[42] UNCONTESTED FACTS, p. 33, para.1.

[43] *Ibid.*, para. 28.

[44] *Ibid.*

[45] UNCONTESTED FACTS, p. 32, p.33, para.30.

[46] UNCONTESTED FACTS, p. 57, para.3; p. 8, para.18.

[47] RESPONSE TO THE NOTICE OF ARBITRATION, p. 8, para. 18.

Summary and Conclusion on Issue A

35. In summary, first, there is the lack of parties' consent for the Tribunal to hear the dispute due to the fact that Claimant is not a qualified as an investor under CEPTA. Second, neither is Claimant a qualified national under the ICSID Additional Facility Rules, since it performs the governmental function as well as performs as an agent for the government. Therefore, the Tribunal does not have jurisdiction upon this dispute.

II. ISSUE B: THE TRIBUNAL SHOULD ACCEPT THE AMICUS SUBMISSION BY THE EXTERNAL ADVISORS TO THE COMMITTEE ON REFORM OF PUBLIC UTILITIES AND REJECT THE AMICUS SUBMISSION BY THE CONSORTIUM OF BONOORI FOREIGN INVESTORS.

36. According to Article 9.19.3 of CEPTA[48] and Article 41(3) of the ICSID Additional Facility Arbitration Rules, after consultation with the disputing parties, the tribunal may accept and consider written *amici curiae* submissions if they fulfill the following criteria. First, a submission needs to address a matter of fact or law within the scope of the dispute. Second, a submission may assist the tribunal in evaluating the submissions and arguments of the disputing parties by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties. Third, applicants have a significant interest in the proceeding.

37. Further, according to Article 9.20(6) of CEPTA,[49] Respondent shall duly consider the application of the UNCITRAL Rules on Transparency in treaty-based investor-state arbitration to any international arbitration proceedings initiated against it. Accordingly, in Respondent' s application to bar the *amicus* submission by the Consortium of Bonoori Foreign Investors (*hereinafter* the "CBFI"),[50] Respondent asks this Tribunal to apply the UNCITRAL Rules on Transparency, in which the public interest in transparency is required to be considered when deciding on the acceptance of an *amici curiae* submission. It should be thus seen as the forth requirement to be satisfied.

38. Based on the above-mentioned four criteria, Respondent argues that: first, the Tribunal should accept the *amicus* submission by the External Advisors to the Committee on Reform of Public Utilities (*hereinafter* the "CRPU") (A). Second, the Tribunal should reject the *amicus* submission by the CBFI (B).

A. The Tribunal should accept the *amicus* submission by the External Advisors to CRPU.

39. The External Advisors to CRPU, as members of Respondent's civil society, are professionals in the field of investment banking. In the privatization program of Caeli, they were selected as external advisors and engaged to ensure a transparent and competitive process. In the submission,

[48] 2014 BONOORU-MEKAR CEPTA, p. 80.

[49] 2014 BONOORU-MEKAR CEPTA, p. 82.

[50] MEKAR'S APPLICATION TO BAR THE AMICUS SUBMISSION BY THE CONSORTIUM OF BONOORI FOREIGN INVESTORS, p. 24 para. 3.

the External Advisors to CRPU disclose the fact that Claimant won the tender and made the investment by a bribery paid to Mr. Dorian Umbridge, the Chairperson of the CRPU which was in charge of the privatization program.[51]

40. Based on the four criteria for the *amicus* participation, Respondent argues that the submission by the External Advisors to CRPU should be accepted by this Tribunal. First, the submission by the External Advisors to CRPU addresses a matter within the scope of the dispute (1). Second, the submission can assist the Tribunal by bringing a different perspective (2). Third, the External Advisors to CRPU have a significant interest in the arbitral proceedings (4). The submission pursues public interest in the arbitral proceedings (5).

1. The submission by the External Advisors to CRPU addresses a matter within the scope of the dispute.

41. Claimant asserts that the submission by the External Advisors to CPUR fails to address a matter within the scope of the dispute by raising a new jurisdictional question about *ratione legis* jurisdiction of the tribunal.[52] Such assertion cannot stand.

42. First, according to the Procedural Order 2 (*hereinafter* "PO2"), the first procedural issue is "whether the Tribunal has jurisdiction under Chapter 9 of CEPTA".[53] Thus, any argument concerning this issue should be accepted and considered by this Tribunal. The submission discloses the fact of bribery during Claimant's investment, impacting the Tribunal's jurisdiction over this case. To support, in *Metal-Tech v. Uzbekistan* the tribunal found that it lacked jurisdiction as parties did not give their consent to protect an investment procured by a bribery, where the legality requirement for investments was explicitly expressed in the applicable BIT.[54] Besides, in *Phoenix Action v. Czech*, the tribunal found that the legality requirement for investment is "implicit even when not expressly stated in the relevant BIT."[55] Thus, in the pending case, even though there is no explicit expression requiring the legality of the investment under CEPTA, such requirement should be considered implied in parties' intention.

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[51] AMICUS SUBMISSION BY EXTERNAL ADVISORS TO THE COMMITTEE ON REFORM OF PUBLIC UTILITIES, p. 19.

[52] VEMMA'S APPLICATION TO BAR THE AMICUS SUBMISSION BY THE EXTERNAL ADVISORS TO THE COMMITTEE ON REFORM OF PUBLIC UTILITIES, p. 22.

53 PO2, p.27.

54 *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award of 4 October 2013, para. 386.

[55] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, para. 101.

Consequently, the jurisdiction of this Tribunal would be impacted since it lacks consent from parties to protect an illegal investment involving corruption, namely the Claimant's investment.

43. Moreover, the Tribunal can accept an *amicus* submission regarding the jurisdiction dispute on the legality of investment even not mentioned by parties. According to Article 45 (3) of the ICSID Additional Facility Rules, the Tribunal can on its own initiative examine the jurisdiction issue without it being alleged by disputing parties. In *Infinito v. Costa Rica*, the tribunal exerted such power to engage in its own inquiry on jurisdiction issue and accepted an *amicus* submission concerning bribery issue without it being mentioned by parties.[56] Similar to the case at hand, even though parties have not raised such dispute on the legality of investment, concerning the seriousness of corruption offenses and its influence on jurisdiction, the Tribunal should accept the External Advisors to CRPU's submission.

44. Thus, the submission by the External Advisors to CRPU addresses a bribery issue, which concerns the jurisdiction of the Tribunal, which falls within the scope of the dispute.

2. The submission can assist the Tribunal by bringing a different perspective.

45. The ICSID Additional Facility Arbitration Rules requires that an *amicus* submission should be able to assist the Tribunal by bringing a different perspective. In *Apotex Inc. v. United States of America*, the tribunal held that the perspective provided by an *amicus* should be materially different, on the basis of either relevant expertise or experience, that extend beyond or differ from that of parties[57].

46. The External Advisors to CRPU, as auditors and analysts dealing with financial issues, are involved entirely in the privatization program of Caeli. They are in the unique position to share the relevant experience on the bidding process before the Tribunal. In the submission, the External Advisors to CRPU disclose the bribery paid to the Chairperson in charge of the program, which did affect the legality of the investment and further impacts the Tribunal's jurisdiction. Since such fact and argument have not be submitted by any disputing party, thus the submission can assist the Tribunal by bringing a different perspective.

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[56] *Infinito Gold Ltd. v. Costa Rica*, ICSID Case No. ARB/14/5, Procedural Order No. 2 of 1 June 2016, para. 31.

[57] *Apotex Holdings Inc. and Apotex Inc. v. United States of Americ*a, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party of 4 March 2013, para. 23.

3. The External Advisors to CRPU have a significant interest in the arbitral proceedings.

47. The External Advisors to CRPU have a significant interest in the arbitration in two aspects. First, it is their duty to point out the bribery fact in the privatization program. The External Advisors to CRPU were selected to engage in the program, in order to ensure the transparency and competitiveness of the privatization process. However, the bribery during the investment means impacting such transparency and competitiveness. Thus, they have a significant interest in disclosing this fact before the Tribunal.

48. Second, corruption during the investment can impact their financial operations. The External Advisors to CRPU regularly advise potential investors who are looking for opportunities in Respondent state, and the failure to combat corruption would exert negative influence on foreign firms' enthusiasm for investing in Respondent. Consequently, without retaining those clients, the External Advisors' business would suffer from the corruption. Thus, they have a significant interest in disclosing and combating corruption in Respondent state.

4. The submission pursues public interest in the arbitral proceedings.

49. According to Article 1.4(a) of the UNCITRAL Rules on Transparency, when an arbitral tribunal determines whether to accept an *amicus curiae* submission, the public interest shall be considered.

50. Public interest concerns the welfare or well-being of the general public.[58] According to United Nations Global Compact, businesses should work against corruption in all its forms, including extortion and bribery.[59] Besides, in *World Duty Free v. Kenya*, the tribunal explicitly held that the bribery is contrary to international public policy. Therefore, it is a basic requirement for an entity to engage in foreign investment without bribery since only when a fair market environment is created, could the public interest be maintained. In the present case, the submission from the External Advisors to CRPU discloses the bribery from Claimant to the Chairperson of the CRPU. This aims to combat corruption and promote business fairness. Thus, the submission authors do pursue public interest via their submission.

51. In summary, the External Advisors to CRPU meet all conditions in filing their *amicus* submission, and therefore, the Tribunal should accept it.

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[58] Public Interest, Black's Law Dictionary (10th ed.2014).

[59] *World Duty Free Company v. Republic of Kenya*, ICSID Case No. Arb/00/7, Award of 4 October 2006, para. 157.

B. The Tribunal shall reject the *amicus* submission by the CBFI.

52. Meanwhile, the *amicus* submission by the CBFI should be rejected for two reasons. First, it cannot assist the Tribunal by bringing a different perspective (1). Second, it does not pursue any public interest in the arbitral proceedings (2).

1. The submission cannot assist the Tribunal by bringing a different perspective.

53. In *Bear Creek Mining v. Peru*, the tribunal decided that the assistance criterion is the most important requirement for *amicus* participation.[60] Further, in *Resolute Forest Products v. Canada*, the tribunal held that an *amicus* submission can fulfill this criterion by two means. First, it can provide the tribunal with different information on factual issues. Second, it can provide different perspective or insight on legal issues where the counsels representing the parties had not made a submission.[61]

54. In the pending case, concerning the factual issues, the CBFI does not provide any new information related to the investment. Further, concerning the legal issues, the arguments in its submission on jurisdiction issue have already been made by the counsels on both sides. To illustrate, the points the CBFI provided in reference with protecting state enterprises, including business landscape and the legal regulatory framework in Bonooru, as well as the necessity to protect state enterprises in this arbitration, are closely aligned with what Claimant submits. Thus, the submission by the CBFI is of little assistance to this Tribunal and accepting it would unreasonably burden the parties and delay the proceedings.

2. The submission does not pursue any public interest in the arbitral proceedings.

55. Claimant alleges that the submission by the CBFI should be accepted as it represents a number of firms investing in the Respondent state and it is necessary for the CBFI to voice their concerns. However, such assertion cannot stand.

56. The UNCITRAL Rules on Transparency requires an *amicus* submission to pursue public interest,

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[60] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/2, Procedural Order No. 6 of 21 June 2016, para. 36.

[61] *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Procedural Order No. 6 - Decision on *Amicus* Application of 29 June 2017, para. 4.4.

which is different from the significant interest criterion set forth by the ICSID Additional Facility Arbitration Rules. However, the CBFI only shows it has a significant interest in the proceeding, but fails to explain how the submission can further public interest.

57. In its submission, the CBFI argues that the protection of state enterprise in this case would affect the rights of other foreign investors it represents and this may result in influence on the economic growth of the Greater Narnian region. Respondent, however, argues that, first, according to the rule established in *Resolute Forest case*, the outcome of this arbitration by affecting other foreign investors cannot constitute public interest.[62] Second, realistically speaking, every ICSID arbitration does have certain impacts on investors beyond the disputing parties and can cause some economic influence. Following Claimant's logic, it is useless to set forth the public interest criterion, since any *amicus* submission concerns the protection of investors. Thus, the CBFI fails to demonstrate how its submission can further the public interest.

58. In summary, the submission by the CBFI should be rejected since it cannot bring a different perspective and does not pursue any public interest.

Summary and Conclusion on Issue B

59. The submission by the External Advisors to the CRPU should be accepted as it meets all the criteria required for a successful *amicus* submission. On the other hand, the submission by the CBFI should be rejected as it fails to offer a different perspective to the Tribunal, as well as pursue any public in the arbitral proceedings.

[62] *Resolute Forest v. Canada*, supra note 61, paras. 4.7.

ARGUMENTS ON MERITS

III. ISSUE C: RESPONDENT DID NOT VIOLATE ARTICLE 9.9 OF CEPTA.

60. Article 9.9 of CEPTA, titled "Minimum Standard of Treatment", provides a list of measures that can violate this Article by breaching FET obligation. Arbitrary or discriminatory conduct, denial of justice and fundamental breach of due process are included in it.

61. The express wording of the "minimum standard of treatment" indicates an extremely high threshold of determining FET violation under this article. Respondent argues that each of the alleged "wrongful acts", as tried to argued by Claimant, is individually consistent with the requirement of Article 9.9 and thus no breach occurs. Further, the alleged "wrongful acts" cannot in the aggregate amount to the violation of Article 9.9. Thus Claimants arguments should be dismissed.

A. Each wrongful act alleged by Claimant is individually consistent with the requirement of Article 9.9.

1. CCM decisions do not constitute arbitrary conduct.

62. Responding to Claimant's allegations that Respondent's behavior, and here specifically the decisions of the Competition Committee of Mekar (*hereinafter* "CCM"), constitute "arbitrary conduct", it first essential to decode the meaning of such conduct. Based on its ordinary meaning, as provided by Article 31 of the Vienna Convention on the Law of Treaties (*hereinafter* "VCLT"), a measure should be understood as "arbitrary" when it is not founded on reason or fact. ICSID tribunals have frequently emphasized the high threshold of constituting arbitrary conduct, holding that it is "an act which shocks, or at least surprises, a sense of judicial propriety."[63] In response to Claimant's assertion undermining the decisions of CCM, Respondent argues that CCM had good reason to calculate Caeli's market share in conjunction with Royal Narnian when conducting its investigation.

63. Consolidation of the two companies' market share can be justified by their virtual merger. This can be supported by the practice of the European Commission. In 1996, the alliance between

[63] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award of 6 February 2007, para. 318; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award of 12 October 2005, para. 176; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award of 31 October 2001, para. 319.

KLM Royal Dutch Airlines and Alitalia was conducting a preferential secondary slot-trading of the right to fly certain routes. The European Commission concluded that this practice had led to a high degree of integration of two airlines. Therefore, they could and should be considered as a joint venture under the EC Merger Regulation - despite the fact that they did not merge.[64] Similar logic should be applied in the case at hand.

64. In the present case, the secondary slot-trading between Caeli and Royal Narnian was also found to be a preferential one.[65] The preferential secondary slot-trading means that two airlines favor each other and fail to trade slots in an equitable, nondiscriminatory and transparent way.[66] Since slots are a bundle of rights that allow airlines to take off, land, use other infrastructure at a given airport and to fly certain routes, the secondary slot-trading already involves all the main aspects of airline business. The preferential slot-trading in the case at hand further led to the high-level co-operation, and even collusion between Caeli and Royal Narnian. This amounted to nothing less than the virtual merging of the alliance members' activities. Such virtual merger thus justified the way in which CCM calculated Caeli's market share as a basis to launch its investigation.

65. Hence, Respondent's behavior is justified and does not constitute any arbitrary conduct.

2. Dismissing Caeli's application for subsidies does not constitute discriminatory conduct.

66. The alleged discriminatory conduct in the case at hand is solely based on the different treatment, whereby Caeli did not receive subsidies from the Secretary of Civil Aviation under Executive Order 9-2018 while the privately-owned airlines did. However, discrimination requires more than just different treatment.[67] To amount to discrimination, a case must be treated differently from similar cases without justification.[68] Respondent argues that (i) the privately-owned airlines that received subsidies are not similar to Caeli; (ii) alternatively, there is a reasonable justification for different treatment.

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[64] Presentation by Mr Joos Stragier, Deputy Head of Unit DG Competition of European Commission, on the 11th Annual Conference on Recent developments in European air transport law and policy, also available at: https://ec.europa.eu/competition/speeches/text/sp1999678_en.html, (last visited: 18 September 2021).

[65] UNCONTESTED FACTS, p. 34, para. 36.

[66] DE WIT, J & BURGHOUWT, G, *Slot Allocation and Use at Hub Airports, Perspectives for Secondary Trading,* European Journal of Transport and Infrastructure Research, vol. 8, issue 2, p. 147, 157 (2008).

[67] *Joseph Charles Lemire v. Ukraine*, ICSID No. ARB/06/18, Decision on Jurisdiction and Liability of 14 January 2010, para. 261.

[68] *Saluka Investments BV v. Czech Republic,* PCA, UNCITRAL, Partial Award of 17 March 2006, para. 313.

67. First, to illustrate the issue of "similarity", as the tribunal in *Saluka v. Czech* held, the four banks in that case were recognized as "similar cases", because they were of comparable size and market position.[69] In the present case, however, the predominant recipients of subsidies under Executive Order 9-2018 were airlines with less than 5% market share.[70] By comparison, Caeli enjoyed a 43% market share in Respondent.[71] Therefore, Caeli had a much stronger market position than the others. Different cases call for different treatment and thus there is no discriminatory conduct involved.

68. Second, and alternatively, Respondent has a reasonable justification for different treatment. As the tribunal in *SICAR v. Spain* pointed out, the purpose of subsidies is to reach the "level playing field". Once the level playing field has been achieved, there should be no payment of subsidies in order to avoid market distortions.[72]

69. In the present case, Caeli had already obtained the support to achieve the "level playing field" because of its strong connection to Bonooru. Firstly, Caeli was able to refinance its inherited debt liability from Bonoorian People's Bank at more favorable rates than those available on the market.[73] Secondly, according to Aviation Analytics, a leading international quarterly, it has been reported widely that behind-the scenes, Bonoori officials are putting pressure on Respondent to treat the Claimant favorably.[74]

70. It is anticipated that Claimant may allege that the recipients of subsidies under Executive Order 9-2018 actually received greater subsidies from their home jurisdictions in 2017. However, this is not the full picture. The subsidies these airlines received from their home jurisdiction were one-time lump sum payment, while the subsidies that Claimant received under the Horizon 2020 scheme has spanned over years.[75] Therefore, this allegation is not enough to deny Claimant's unique advantages over the privately-owned airlines.

71. To conclude, Claimant has significant competitive advantages over its counterparts, and thus

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[69] *Saluka Investments BV v. Czech Republic,* PCA, UNCITRAL, Partial Award of 17 March 2006, paras. 314-319.

[70] PO4, p. 89, para. 7.

[71] UNCONTESTED FACTS, p. 34, para. 36.

[72] *Novenergia II Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Final Award of 15 February 2018, para. 349.

[73] UNCONTESTED FACTS, p. 33, para. 30.

[74] ANNEX IX, para. 3.

[75] PO4, p. 89, para. 7.

Respondent was not obliged to pay additional subsidies to further enlarge Claimant's competitive advantages. Hence, Respondent did not commit any discriminatory conduct.

3.The summary judgment on interim airfare caps of 15 June 2019 does not breach the due process obligation.

72. Pursuant to Article 9.9 (2) (b) of CEPTA, a Party breaches the due process obligation only when the alleged breach is fundamental. By reference to "fundamental", this article implicates a very high threshold of the breach of due process obligation. This high threshold is frequently confirmed by investment tribunals. They held that for procedural shortcomings to amount to the breach of due process obligation, they must represent a "complete lack of candour"[76] and "go far beyond the mere misapplication of domestic law"[77]. Respondent argues that, contrary to Claimant's allegations, the summary judgment on interim airfare caps of 15 June 2019 is not sufficiently serious to amount to fundamental breach of due process.

73. Under Executive Order 5-2014,[78] a court does have the ability to dismiss without appealing a case, where the judge finds that there are very little chances of success on the merits. This is a common practice also in a number of other jurisdictions, including the US and the UK.[79] More importantly, in the case at hand Justice VanDuzer did not jump to the conclusion recklessly. Rather, he carried out a *prima facie* assessment, and found the airfare caps reasonable taking into consideration of Claimant's anti-competitive conduct.[80]

74. Hence, the summary judgment was rendered properly. No misapplication of domestic law can be found and Respondent cannot be blamed for the legally issued summary judgment.

4. The decision to enforce the annulled award does not constitute a denial of justice.

75. According to *Arif v. Moldova*, a "denial of justice" is taking place when the court has rendered decisions, which misapplied the law in such an egregiously wrong way, that no honest,

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[76] *Waste Management v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004, para. 98.

[77] *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2I, Award of 11 October 2002, para. 127.

[78] PO3, p. 86, para. 8.

[79] For U.S, see Federal Rules of Civil Procedure 56; For UK, see Part 24 of the Civil Procedure Rules which governs the award of summary judgment.

[80] UNCONTESTED FACTS, p. 38, para. 54.

competent court could have possibly done so.[81] The tribunal in that case found that the Moldovan judiciary ordered relief decisions based on the plaintiff' s submission, and thus there is no *ultra petita* rulings to establish a substantive denial of justice.[82] Correspondingly, concerning the decision to enforce the annulled award in favor of Respondent in the case at hand, Respondent argues that it does not constitute a denial of justice.

76. Article V(1) (e) of New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*hereinafter* "New York Convention") provides that the recognition of an award may, but not must be denied where an award is annulled in the country where it was issued. While "must" means imperative, "may" means discretionary. In this context, some states choose to recognize and enforce arbitral awards annulled by the courts in the seat of arbitration. By way of example, this happened in the *Hilmarton* and *Chromalloy* case by French courts.[83]

77. In the case at hand, it should be observed that Mekari court exercised the discretion very cautiously. Should the alleged bribery, points as problematic by Claimant, be indeed proven to exist, Mekari court should not have enforced the award. However, there is no convincing evidence of corruption. The tribunal in *African Holding Company of America v. Congo* case confirmed that the evidence of corruption must be "sufficient to exclude any reasonable doubt".[84] In this case, the only evidence in favor of Claimant's position was the audio-recording provided by the Centre for Integrity in Legal Service (*hereinafter* "CILS"). Even the Sinnograd court, which annulled the award, did not find itself in a position to conclusively rule on whether the act of bribery had in fact taken place.[85]

78. Consequently, by enforcing the annulled award, the Mekari court did nothing "wrong", let alone "egregiously wrong", to amount to a denial of justice. As such, the high threshold of denial of justice has not been met.

5. The change in investment environment does not frustrate Claimant's legitimate expectation.

79. Under Article 9.9 (3) of CEPTA, when applying FET obligation, a tribunal may consider

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[81] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award of 8 April 2013, para. 260.

[82] *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award of 8 April 2013, para. 262.

[83] *Société Hilmarton Ltd v. Société Omnium de traitement et de valorisation* (OTV) (1995) XX YB Com. Arb. 663; *Chromalloy Aeroservices and the Arab Republic of Egypt*, 939 F. Supp. 906 (DC Cir. 1996).

[84] *African Holding Company of America v. Congo*, ICSID Case No. ARB/05/21, Award, 27 August 2009, para. 142..

[85] ANNEX XIII, p. 64, para. 11.

whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

80. Respondent argues that (a) there is no specific representation for Claimant to rely on; (b) Claimant's expectation is not reasonable.

a. There is no specific representation for Claimant to rely on.

81. The tribunal in *Total v. Argentina* suggests that the more specific a representation is, the more credible the claim that the foreign investor concerned is entitled to rely on it.[86]

82. Taking the state of law at the time of the investment as a reference point for the investor's expectations,[87] it should be observed that when Caeli invested in Respondent, there was only a BIT between Bonooru, Claimant's state, and Respondent. It should be further noted that the BIT merely contains general terms "to create favorable conditions for investments".

83. Hence, absent specific representations made *vis-à-vis* Claimant, Claimant has no legitimate expectation that the investment environment will not change to its specific disadvantage during the whole period of its investment.

b. Claimant's expectation is not reasonable.

84. In *Frontier v. Czech*, the tribunal found that an investor has to shape its expectations on the basis of the law and the factual situation prevailing in the country at the moment of making the investment.[88] Claimant, however, failed to do so. Respondent's position can be supported by two relevant facts.

85. First, CCM specifically sought an undertaking from Caeli that it would not engage in high-level co-operation on competition parameters such as schedules, capacity and facilities.[89] When Claimant engaged in the preferential secondary slot-trading with Royal Narnian, that was Claimant who broke its promise in the first place. Claimant, therefore, cannot blame Respondent

[86] *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability of 27 December 2010, para. 121.

[87] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award of 27 August 2009, para. 190.

[88] *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL Award of 12 November 2010, para. 287.

[89] UNCONTESTED FACTS, p. 32, para. 25.

for subjecting it to antitrust investigations under the domestic laws of Respondent, which were in force when Claimant made its investment.

86. Second, regarding the average time taken from commencing an action to receiving a final decision in Mekari courts,[90] Claimant should have been aware of the limited judicial resources in Respondent. However, it should be noted that even despite its overloaded judicial system, Respondent managed to release the final decision *vis-à-vis* Claimant on interim measures within just 15 months, that is, a year shorter than the average proceeding time.[91]

87. Hence, Claimant's expectation is not reasonably based on the law and the factual situation prevailing in Respondent at the moment of making its investment.

88. To conclude, the alleged conduct of Respondent do not frustrate Claimant's legitimate expectation.

B. The alleged wrongful acts cannot in the aggregate amount to a violation of Article of 9.9.

89. Claimant also seeks to accuse Respondent of a "creeping" FET standard violation. This should be also rejected. For a series of acts to constitute creeping FET violation, they must (i) be leading in the same direction; and (ii) lead to a cumulative effect of the total alteration of the entire legal framework for foreign investment. This has not happened in the case at hand; neither of requirements has been satisfied. Respondent's position can be supported by the case logic of *El Paso v. Argentina*.[92]

90. First, the alleged acts or omissions are not leading in the same direction. In *El Paso v. Argentina*, all the six challenged acts were aimed at ending the calculation of capacity payment in U.S. Dollars.[93] The alleged acts or omissions in the case at hand, however, served different goals. As argued above, the initiation of the First Investigation by CCM was a reasonable response to Caeli's anti-competitive conduct. Further, the dismissal of Caeli's application for subsidies was a proper exercise of discretion under the Executive Order 9-2018. Also, the decisions of the Mekari courts may not have a desirable outcome for Claimant, but they were legal.

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[90] UNCONTESTED FACTS, p. 30, para. 13.

[91] UNCONTESTED FACTS, paras. 44, 54.

[92] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award of 31 October 2011, para. 518.

[93] *Ibid.*, para. 95.

91. Second, there is no total alteration of the entire legal framework. The only modification to Mekar's legal framework was the new requirement for all companies to offer services denominated exclusively in MON.[94] This modification was made under the advice of IMF to establish credibility in the local currency.[95] In line with Article 9.8 of CEPTA, the mere fact that the host State modifies its law is the proper exercise of right to regulate and it does not amount to a breach of FET obligation.

92. Hence, Claimant fails to establish a creeping FET violation.

93. Respondent's position can be further supported by the logic of *Blusun v. Italy* case, in which the tribunal held that the challenged acts did not breach FET standard in aggregate any more than they did individually.[96] In this regard, focusing on the totality of the circumstances in the FET context cannot be understood as lowering the high threshold of the breach of each obligation.

94. To conclude, all the challenged measures are individually consistent with FET obligation requirement. As a consequence, these actions could not in the aggregate amount to a FET violation.

Summary and Conclusion on Issue C

95. Each of the alleged wrongful acts is individually consistent with the requirement of Article 9.9 and thus does not amount to the breach of FET obligation. There is no arbitrary conduct, no discriminatory conduct, no denial of justice, and no frustration of the legitimate expectation. Further, these acts cannot in the aggregate amount to a creeping violation of Article 9.9.

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[94] UNCONTESTED FACTS, p. 35, para. 42.

[95] UNCONTESTED FACTS, p. 35, para. 39.

[96] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award of 27 December 2016, paras. 361-363.

IV. ISSUE D: THE COMPENSATION STANDARD FOR FET VIOLATION IS MARKET VALUE.

97. Under Article 9.21(a) of CEPTA, the compensation standard for violation of CEPTA is monetary damages at a market value. Contrarily, Article 9.12 stipulates fair market value as the compensation standard *only* for the cases of direct expropriation. It is, therefore, clear that the intention of CEPTA is to limit the use of fair market value standard in the prescribed way. Consequently, the market value standard shall apply in any cases of violation, except for direct expropriation.

98. Respondent argues that neither the most favored nation (*hereinafter* "MFN") clause in CEPTA, nor the general principle of full reparation allows Claimant to derogate from the standard expressly prescribed in CEPTA.

A. The MFN clause in CEPTA cannot be invoked to replace the market value standard.

1. Compensation standard falls outside the scope of "treatment" under Article 9.7 of CEPTA.

99. An MFN clause applies to only those rights that fall within the subject matter of the clause.[97] Therefore, the scope of the right being accorded under an MFN clause, in other words, what "treatment" encompasses, is an important interpretative issue.

100. Article 9.7(1), the MFN clause in CEPTA, makes an exhaustive list of "treatment". The list includes the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of investments. Compensation standard cannot be found in the list.

101. Moreover, Article 9.7 (1) CEPTA expressly stipulates that the treatment referred to in this article does not include the dispute settlement procedures. It should be noticed that, compensation standard is prescribed in Article 9.21 of CEPTA, and that Article 9.21 is placed under the Section of Disputes Settlement in CEPTA. Therefore, it is reasonable to argue that the drafters of CEPTA identified the issue of compensation standard as a part of the dispute settlement procedure. This is in line with customary international law that recognizes the calculation of compensation as a dispute settlement procedure.[98] Compensation standard is therefore precluded from "treatment"

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[97] International Law Commission, *Final Report of Study Group on the Most-Favored-Nation Clause*, A/CN.4/L.852, para. 79 (2015).

[98] *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Separate Opinion on the issues at the quantum phases

under Article 9.7.

102. To conclude, compensation standard does not constitute a "treatment" and hence MFN clause cannot be the basis to invoke the fair market value standard.

2. Alternatively, MFN clause does not have a retroactive effect.

103. MFN clauses apply only to future more favorable treatment. In *Bayindir v. Pakistan*, the tribunal was confronted with the respondent state's objection with regard to a third-party BIT that had been concluded before the basic treaty. It finally decided to resort to another third-party treaty, which was the non-objected one concluded after the basic treaty.[99] This result suggests that the tribunal shared the respondent's view that an MFN clause could only import more favorable treatment contained in subsequent third-party treaties.

104. The Arrakis-Mekar BIT was concluded in 2006. CEPTA, however, was concluded subsequently, in 2014. As such , the third-party BIT had been concluded before the basic treaty. Therefore, Claimant cannot import the already existing treatment stipulated in Arrakis-Mekar BIT.

105. Finally, Respondent's position can be further supported by the last paragraph of Article 9.9 CEPTA. It reads, "[t]he provisions of this Article shall not apply to invoke a more favorable treatment accorded by either Party under bilateral investment treaties or other agreements containing provisions relating to investments signed prior to the entry into force of this Agreement."

B. The full reparation principle shall not be considered.

106. The *lex specialis* principle is generally accepted as a principle of treaty interpretation.[100] According to this principle, special rules override general ones.

107. Indeed, there are several cases in which the tribunal held that the fair market value standard is the appropriate compensation standard for FET violation.[101] However, all the investment treaties

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by Ian Brownlie of 14 March 2003, para. 11.

[99] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award of 27 August 2009, para. 160.

[100] International Law Commission, Conclusions of the work of the Study Group on the Fragmentation of international law: Difficulties arising from the diversification and expansion of international law, Yearbook 2006, vol. II, Part Two, at conclusion 5.

[101] *See e.g.*, *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award of 12 May

in these cases offer no guidance as to the appropriate compensation standard for FET violation. It is the absence of an explicit standard that justifies the resort to the principle of international law, here – the principle of full reparation. This is, however, inapplicable in the case at hand, since the market value standard is expressly prescribed in Article 9.21 CEPTA.

108. Hence, the full reparation principle finds no space to apply to Article 9.21 CEPTA.

1. Respondent has already paid the "market value" for Claimant's investment.

109. While the fair market value standard corresponds to the notion of the "hypothetical normal course of events"[102] and thus ignores extraordinary circumstances,[103] the market value standard takes extraordinary circumstances into consideration.[104]

110. Given the Claimant's inability to attract another suitable buyer for its shares in Caeli,[105] as well as the currency crisis in Mekar, Respondent has already paid the "market value" price for Claimant's investment by purchasing its stake in Caeli Airways for USD 400 million. Therefore, Claimant is not entitled to any further compensation.

2. Alternatively, the Tribunal should reduce any compensation awarded considering Claimant's contributory fault and the dire economic situation in Mekar.

a. An investor's own conduct can be taken into account to reduce compensation.

111. Recognized as customary international law, Article 39 of ARSIWA provides that "[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilfull or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought." Following that approach, the tribunal in *MTD v. Chile* reduced the damages as a result of the claimant's negligence of business risk inherent in the transaction.[106]

2005, para. 409; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006; *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Award of 22 May 2007.

[102] *Germany v. Poland* ("*Chorzów at Factory"*), PICJ, Merits Judgment of 13 September 1928, p. 51.

[103] WÖSS, Herfried and ROMÁN, Adriana San, *Damages in Investment in Treaty Arbitration*, *in* International Arbitration and EU Law, (DONA, José R. Mata and LAVRANOS, Nikos ed.) p.214, 216 (2016).

[104] *Ibid*.

[105] UNCONTESTED FACTS, p. 40, para. 63.

[106] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment of 21 March 2007, para. 99.

112. It should be noted that during the bidding process, Respondent has already flagged that Vemma's proposal relied on an overly optimistic forecast. It did not account for oil price fluctuations.[107] It is thus not particularly surprising that Caeli suffered deep financial distress when oil prices in 2018 rose to the highest since 2013.[108]

113. Moreover, Caeli has been unable to secure a steady revenue since the currency crisis began.[109] At that time, the only measure adopted by Respondent (i.e. the airfare caps) was found harmless to Caeli's profitability.[110] The currency crisis is the direct cause of at least part of Caeli's loss.

114. Both the rise of oil prices and the currency crisis are business risks that Claimant failed to consider. Respondent continuously warned Claimant against its risky business choices, but Claimant still refused to exercise caution.[111]

115. Hence, Claimants should bear the consequences of its own actions. Respondent cannot be held accountable for Claimant's risky business choices. This should be taken into account by this Tribunal in case it would be ordering damages.

b. Any compensation that may be awarded would have to take the dire economic situation in Mekar into account.

116. According to Paparinskis, in the determination of compensation, the host State's ability to pay it should be taken into account.[112]

117. To pay the USD 700 million that Claimant demands, Respondent would have to transfer about twice its consolidated annual public spending to Claimant.[113] Therefore, the payment of such high compensation would be crippling for Respondent and Respondent's citizens.

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[107] UNCONTESTED FACTS, p. 31, para. 24.

[108] UNCONTESTED FACTS, p. 37, para. 48.

[109] UNCONTESTED FACTS, p. 35, para. 40.

[110] UNCONTESTED FACTS, p. 35, para. 37.

[111] UNCONTESTED FACTS, p. 29, para. 31.

[112] Martins Paparinskis, *A Case Against Crippling Compensation in International Law of State Responsibility*, Modern Law Review (2020). Also suggested by The International Institute for Sustainable Development (an independent think tank championing sustainable solutions to 21st–century problems).

[113] PO3, p.86, para. 4.

Summary and Conclusion on Issue D

118. Article 9.21 of CEPTA expressly prescribes that the compensation standard for the FET violation of CEPTA is the market value standard. Neither the most favored nation clause contained in CEPTA, nor the general principle of full reparation allows Claimant to derogate from this market value standard. Respondent has already purchased Claimant's investment at "market value" and therefore, owes Claimant no compensation. In the alternative, any compensation awarded should be reduced considering Claimant's contributory fault and the dire economic situation in Mekar.

PRAYER FOR RELIEF

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

a. Decline to exercise jurisdiction due to Claimant is neither a qualified investor under CEPTA nor a qualified national under ICSID Additional Facility Rules;

b. Admit the external advisors to CRPU's submission and reject that submitted by CBFI;

c. Find that Respondent did not violate Article 9.9 of CETPA; and

d. In case the Tribunal finds Respondent did violate Article 9.9 of CEPTA, the Tribunal should find that Respondent has already purchased the Claimant's investment at "market value" and thus award the Claimant no compensation; in the alternative, the Tribunal should reduce any compensation awarded considering the Claimant's contributory fault and the ongoing economic crisis in Respondent.