TEAM PADILLA

INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES

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

Vemma Holdings Inc.

(Claimant)

v

The Federal Republic of Mekar

(Respondent)

MEMORIAL FOR RESPONDENT

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LIST OF ABBREVIATIONS

¶/ ¶¶	Paragraph/paragraphs
%	Percent
Annex I	Constitution Act of Bonooru, 1947
Annex II	Constitutional Court of Bonooru on Mobility Rights, CCB Case No. 1964-08 (excerpts)
Annex IV	Memorandum of Association of Vemma Holdings Inc.
Annex V	Monopoly and Restrictive Trade Practice Act, as Amended in 2009
Annex VII	Phenac Business Today Podcast Transcript, 17 November 2014
Annex VIII	Executive Order 9-2018
Annex IX	Right of First Refusal Offer Notice
Arrakis-Mekar BIT	Treaty between the Federal Republic of Mekar and the Kingdom of Arrakis for the Promotion and Protection of Investments signed at Arrakeen on 16 January 2006
ARSIWA	The ILC's Articles on Responsibility of States for Internationally Wrongful Acts
BA Holdings	Bonooru Air's parent company
BAK	Bakugo currency
BIT	Bilateral investment treaty
Bonooru	Commonwealth of Bonooru
Bonooru Air	Bonooru's national carrier and monopoly civil airline

Bonooru-Mekar BIT	Treaty between the Federal Republic of Mekar and the Commonwealth of Bonooru for the Promotion and Protection of Investment signed at Phenac on 24 August 1994
Caeli Airways	Caeli Airways JSC
Caspian Project	governmental initiative to facilitate the movement of goods, people, services, and knowledge amongst neighbours launched in Bonooru in 2010
CBFI	Consortium of Bonoori Foreign Investors
CBFI Application	Application for leave to file a non-disputing party amicus curiae submission by the Consortium of Bonoori Foreign Investors of 19 April 2021
CCM	Competition Commission of Mekar
CEO	Chief Executive Officer
CEPTA	Bonooru - Mekar Comprehensive Economic Partnership and Trade Agreement
Claimant	Vemma Holdings Inc.
Constitutional Court of Bonooru	Presidential Decree No. 2424 dated 7 September 2016 (Exhibit 5)
EA Application	Application for leave to file a non-disputing party amicus curiae submission by External Advisors to the Committee on Reform of Public Utilities of 28 May 2021
EU	European Union
External Advisors	External Advisors to CRPU
Facts	Statement of Uncontested Facts
FET	Fair and equitable standard of treatment

First Investigation	Investigation of CCM into the activities of Caeli, announced on 9 September 2016, concerning the alleged predatory pricing strategies
Hawthorne Group	Hawthorne Group LLP
ICSID	International Centre for Settlement of Investment Disputes
ICSID AFR	ICSID Additional Facility Rules
ICSID Convention	ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, in force since 14 October 1966
Mekar	The Federal Republic of Mekar
Mekar's amici response	Respondent's comments on application for leave to file amicus submissions of 18 June 2021
Memorial	this Memorial for Claimant
MRTPA	Monopoly and Restrictive Trade Practice Act
NGO	non-governmental organization
Notice of Arbitration	Notice of Intent to Submit a Claim to Arbitration Under Chapter 9 of CEPTA
p/pp	Page/pages
PO1	Procedural Order No. 1 dated 25 March 2021
PO2	Procedural Order No. 2 dated 1 July 2021
PO3	Procedural Order No. 3 dated 16 July 2021
PO4	Procedural Order No. 3 dated 1 September 2021
Respondent	The Federal Republic of Mekar

Response to the Notice of Arbitration	Response to Notice of Intent to Submit a Claim to Arbitration Under Chapter 9 of CEPTA
Royal Narnian	a leading global airline
SOE	a state-owned enterprise
Second Investigation	Investigation of CCM involving Caeli, concerning alleged price undercutting on certain routes to and from Phenac International
Tribunal	Arbitral tribunal constituted in this case
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	United Nations Commission on International Trade Law Rules on Transparency in Investor-State Arbitration,
USD	United States Dollar
VAT	Value Added Tax
VCLT	Vienna Convention of the Law on the Treaties
Vemma	Vemma Holdings Inc.

STATEMENT OF FACTS

1 Vemma Holdings Inc. ('Claimant') is an entity incorporated under the laws of the Commonwealth of Bonooru ('Bonooru'). Pursuant to Boonoru's Constitution Act, 1947, the government is obliged to ensure the mobility rights of its citizens. To that end, Claimant's Memorandum of Association provides that Claimant assists in developing the aviation industry in accordance with Article 70 of the Constitution Act.

2 The government of Boonoru has always held a sizable stake in Claimant. Until March 2021, it remained between 31 and 38%. The Bonoori Ministry of Transport and Tourism could nominate one of its officials for a non-executive director position in Claimant's Board of Directors. Bonoori representatives were oftentimes capable of forming a majority during Shareholders' meetings and could therefore pass decisions by their vote alone.

3 At present, the Bonoori government's share in Claimant is 55%. No other shareholder holds more than a 7% stake. Furthermore, Claimant's entire Board of Directors consists of government functionaries.

4 The Republic of Mekar ('Respondent') is a state in the south of the Greater Narnian region. Having witnessed a period of prolonged political instability and exploitation of resources by occupying powers, has taught Respondent caution in terms of limiting its sovereignty. Various economic and political crises, entailing Respondent's weak political standing compared its neighbors, have further increased Respondent's sensitivity to its citizens' protection.

5 Respondent has therefore decided to amend its Monopoly and Restrictive Trade Practice Act ('MRTPA') in view of protecting consumers and competition, simultaneously encouraging investor confidence. Respondent also created an independent anti-trust authority, the Competition Commission of Mekar ('CCM').

6 Against this background, Claimant acquired from Respondent an 85% stake in Caeli Airways, a previously Respondent-owned airline. The remaining 15% stake was held by Mekar Airservices, a State-owned enterprise led by a renowned aviation consultant. Before the acquisition was finalized, CCM gave its approval, requiring from Caeli an undertaking that the latter will not engage in anti-competitive behaviors.

7 The investment was made under the Bonooru-Mekar BIT, pursuant to which Claimant was recognized as one of entities explicitly stated as ‘investor’ - a state-owned enterprise (‘SOE’).

8 In order to limit the number of investors from Bonooru entitled to bring investment claims against Respondent, the Parties concluded a new treaty and agreed to terminate the pre-existing BIT. Comprehensive Economic Partnership and Trade Agreement (‘CEPTA’) entered into force on 15 October 2014. This time, the Parties excluded SOEs from the definition of an ‘investor’. CEPTA aimed at achieving more balance between investor and State rights.

9 Almost from the beginning of its investment, Claimant pursued an ill-advised policy of overexpansion. Claimant’s strategy of undercutting competitor’s prices was dependent on exceedingly low prices of oil. Claimant bought only one type of aircraft, namely Boeing 737 MAX, acquired from Caeli’s Moon Alliance partner. In the duration of the investment, Caeli has acquired and leased over 50 of Boeing 737.

10 Boeing 737 MAX has been grounded worldwide after two consecutive crashes, revealing its technical failures.

11 Caeli’s pursued strategy of predatory pricing and abuses of its dominant position triggered CCM’s two consecutive investigations and temporary imposition of airfare caps.

12 In 2017, Respondent faced by an economic and currency crisis. It therefore implemented multiple regulatory and executive measures to protect its citizens and alleviate some of the burdens for the companies operating in its territory. Respondent issued a decree requiring the denomination of services exclusively in MON. It further implemented a burden-alleviation scheme, granting loans to financially secure companies of mostly small and medium range of operations.

13 Claimant requested CCM to remove the interim airfare caps and appealed both orders of CCM in the Mekari courts. In 2019, Mekar’s High Court heard submissions from Caeli Airways and CCM concerning a stay on the imposition of airfare caps and declined to remove them. Hearings in respect of appeal against the decision of CCM-imposed fines were held in May 2020, but the appeal was later dropped.

14 The applicable airfare caps were lifted by CCM in October 2019. Nevertheless, in consideration with Claimant’s increasing liabilities, representatives of Claimant announced their intention to sell their stake in Caeli Airways in November.

15 Claimant acquired an offer from Hawthorne Group. Under the Shareholders' Agreement, Mekar Airservices had the right to purchase the Caeli Airways' shares at the price offered by the Hawthorne Group. Mekar Airservices rejected the offer and after failed negotiations between the parties, a request for arbitration has been filed with the Sinnoh Chamber of Commerce's Arbitration Institute. Arbitral award confirmed that Claimant had failed to secure a bona fide third party offer since Hawthorne Group's offer could not be considered as an arm's length commercial price due to Hawthorne Group's affiliation with Claimant through the Moon Alliance.

16 Claimant failed to yield another buyer for its shares. It decided to sell its stake in Caeli to Mekar Airservices on 8 October 2020 for 400 million USD. Simultaneously, Claimant filed a notice of arbitration against Mekar on 15 November 2020.

17 In April and May 2021, two applications for granting leave to file the non-disputing party *amicus curiae* were: one from CBFI, an organization of which Claimant is a member, and one from External Advisors to the CRPU, an entity offering insight into Claimant's investment process in Caeli Airways.

SUMMARY OF ARGUMENTS

18 **Jurisdiction.** The Tribunal has no jurisdiction over Claimant's claims. Claimant is a State-owned and State-controlled entity and hence is not an 'investor' under CEPTA. Moreover, Claimant has no standing before this Tribunal due to the fact that it has acted as agent of the Bonoori government and exercised its governmental functions.

19 The Tribunal should grant leave to the submission of the External Advisors to the CRPU as it respects all the formal and material requirements set by CEPTA, UNCITRAL Rules and ICSID AFR. Meanwhile, Respondent submits that the Tribunal should reject the CBFI's application as it fails to meet all the above requirements.

20 **Merits.** Respondent has treated Claimant fairly and equitably in all their dealings, respectfully to the Minimum Standard of Treatment contained in CEPTA. Respondent's conduct fell within the scope of Respondent's regulatory power, complying with the standard of due process. Furthermore, Respondent's actions and measures also reasonable, proportionate and necessary, falling therefore outside of the scope of arbitrariness, discrimination or denial of justice. They were neither coercive nor abusive and did not amount to conspiracy or concerted practice.

21 Nonetheless, in case the Tribunal finds Respondent had violated Article 9.9 of CEPTA, any compensation requested by Claimant shall be assessed at the market value as the standard expressly prescribed in CEPTA. Since Respondent has already paid the market value of Claimant's investment, Claimant is entitled to no compensation. If the Tribunal finds otherwise, any compensation paid to Claimant should be reduced considering the Claimant's contributory fault and the ongoing economic crisis in Respondent.

PART ONE: JURISDICTION AND ADMISSIBILITY

I THE TRIBUNAL HAS NO JURISDICTION OVER CLAIMANT'S CLAIMS

22 Claimant submitted the Notice of Arbitration, requesting this Tribunal to rule on the dispute between Claimant and Respondent, which arises out of an investment that Claimant has made in 2011 on the territory of Respondent.

23 Claimant submitted the Notice of Arbitration, requesting this Tribunal to rule on the dispute between Claimant and Respondent, which arises out of an investment that Claimant has made in 2011 on the territory of Respondent.

24 Respondent contests this this Tribunal's jurisdiction to hear the case since it constitutes a State-to-State arbitration, proscribed by the applicable law, i.e. ICSID AFR and CEPTA.

25 Specifically, Respondent submits that Claimant is not an investor within the meaning of CEPTA (**A**). Moreover, the Tribunal lacks jurisdiction in this case due to Claimant's ties to the government of Bonooru (**B**). In any case, the present dispute constitutes a State-to-State arbitration, since Claimant is a State-controlled entity (**C**).

A. Claimant is not an 'investor' within the meaning of CEPTA since it is a State-owned entity

26 Under the Bonooru-Mekar BIT, the definition of 'investor' included 'any enterprise incorporated or duly constituted in accordance with applicable laws in that State, who makes the investment in the territory of the other State'. An 'enterprise', in the meaning of the Bonooru – Mekar BIT, explicitly included also 'government-owned' entities.[2]

27 However, under CEPTA, which is a subsequent treaty between the same parties, 'investor' was defined as without such specification.[3]

[2] Bonooru – Mekar BIT.

[3] CEPTA, Article 9.1.

28 Hence, it is clear that under the Bonooru-Mekar BIT, a government-owned entity could benefit from investment protection. Parties explicitly included such entities in the definition of investor.

29 There is no analogous provision in the now binding and applicable CEPTA, concluded later between Mekar and Bonooru. While CEPTA's definition of investor, while broad ('*an enterprise with the nationality of a Party'*), could in theory include State-owned entities, this view must be rejected when all circumstances are considered.

30 Both Mekar and Bonooru are parties to VCLT.[4] Pursuant to Article 31(4) VCLT, *'[a] special meaning shall be given to a term if it is established that the parties so intended'*. To establish the meaning stemming from the general rules of interpretation, recourse may be had to the supplementary means, including the circumstances of conclusion of the treaty.[5] Supplementary means of treaty interpretation may be employed in order to confirm the meaning resulting from the application of Article 31 VCLT.[6]

31 Parties' intention to bar State-owned entities from bringing claims under CEPTA finds support in the fact that the Bonooru-Mekar BIT turned out to be far less favourable to Respondent, having been sued numerous times by investors from Bonooru.[7] At the same time, Bonooru has not been sued by investors from Mekar.[8] The parties decided to conclude a new treaty in order to limit the number of investors from Bonooru entitled to bring investment claims against Respondent.[9]

32 In the case at hand, the circumstances of the conclusion of CEPTA confirm the interpretation of the notion of 'investor' under CEPTA. These circumstances manifest parties' intention to limit the scope of investment protection when concluding a subsequent treaty – CEPTA. The notion of 'investor' in CEPTA must therefore be interpreted narrower than this notion under the Bonooru-Mekar BIT, hence excluding State-owned entities.

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[4] *SoUF*, ¶66.
[5] *Villiger*, p. 446.
[6] *Ibid*., p. 447.
[7] *SoUF*, ¶14.
[8] *Ibid*.
[9] *Ibid*.

B. The Tribunal lacks jurisdiction due to Claimant's ties to the government of Bonooru

33 Respondent submits that Claimant does not have standing before this Tribunal under the *Broches test* (**i**). Furthermore, pursuant to customary international law attribution principles, the purpose of an investment should also be considered in order to determine the standing of a State-owned entity before an arbitral tribunal (**ii**).

i. Claimant does not have standing before this Tribunal pursuant to the *Broches test*

34 At the time of drafting the ICSID Convention, a question arose as to the status of SOEs in bringing claims. Aron Broches, one of the principal drafters of the Convention, devised what is now known as the *Broches test* in order to accommodate this question. He concluded that a SOE

> *'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'.*[10]

35 The test has since been applied by many arbitral tribunals and acclaimed by the doctrine.[11] Therefore, since Claimant is a State-owned entity, it should be applied in the present case. To that end, Respondent submits that pursuant to the *Broches test*, Claimant does not have standing in the present proceedings since it was acting as an agent for the government and exercised governmental functions.

36 It was found in *BUGC* that *'a company is an agent of the State if it performs public functions on behalf of a state or one of its constituent subdivisions'*.[12] Hence, the question of whether an entity has acted as a government's agent (i.e. performed public function on State's behalf) and whether it has exercised governmental functions is interdependent and may be addressed in conjunction.

37 Claimant is a company incorporated and constituted under the laws of Bonooru and a successor of BA Holdings. The privatization of BA Holdings, the predecessor of Claimant, was implemented with a view of meeting the needs of Bonoori citizens.[13]

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[10] *Broches*, p. 354-5.

[11] *CSOB*, ¶21; *BUCG*.

[12] *BUCG*, note 21.

[13] *SoUF*, ¶8.

Claimant has made an investment on the territory of Mekar by acquiring shares in Caeli Airways JSC.

38 Respondent submits that Claimant's investment in Mekar, i.e. acquisition of Caeli Airways, was in furtherance of Bonoori government's obligation to ensure the mobility rights of its citizens.

39 Article 70 of the Constitution of Bonooru provides that:

> *'(1) Every citizen of Bonooru has the right to enter, remain in, and leave its territory;*
> *(2) Bonooru shall ensure that every citizen is guaranteed travel to and from its many islands'.*[14]

40 Even though companies operating on the commercial aviation market rarely perform public functions, a fact-specific context must be taken into account in order to determine whether such functions have been exercised.[15]

41 As stated by the Constitutional Court of Bonooru, Article 70(2) imposes positive obligations on the government.[16]

42 Thus, one of the functions and obligations of the government of Bonooru is to ensure that its citizens may travel between islands of the country. To that end, it is explicitly stated in Claimant's Memorandum of Association that the company is to

> *'assist in developing the aviation industry (...) for the benefit of its population in accordance with Article 70 of the Constitution Act, 1947 including servicing remote communities'.*[17]

43 Clearly, the Memorandum's provisions incorporate the obligations of the government of Bonooru, hence making Claimant a government's agent, tasked with fulfilling these obligations.

44 The airline acquired by Claimant operated on domestic and regional routes, providing the citizens of Bonooru with the means of transport.[18] Hence, the acquisition of the airline was in furtherance of the functions of the government.

45 In addition to that argument, what should be taken into consideration is the reaction of the Bonoori people to the news of Claimant's plans to minimize services in Bonooru,

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[14] Annex I.
[15] *BUCG*, ¶39.
[16] Annex II.
[17] Annex IV.
[18] *SoUF*, ¶28.

namely the eruption of protests.[19] The protesters demanded that the mobility rights under Article 70 of the Constitution are protected.[20] That demonstrates that in the public eyes the investment has always served as a mean of fulfilling the Bonoori government's obligations. Moreover, the government's immediate strong response and implementation of a bail-in program indicate Claimant's extremely close ties to Bonooru.

46 To further confirm that the Claimant was exercising the Bonoori government's functions, it must be noted how the investment itself has never been purely economic. Servicing flights from Bonooru to Mekar has actually not been profitable for the Claimant.[21] Specifically, this was also pointed out by a former high-ranking employee within Bonooru's Ministry of Tourism.[22] Despite that, significant resources were put into flights between Mekar and Bonooru.

47 The investment in Caeli Airways was always a part of the Bonooru's agenda of strengthening its influence in the Greater Narnian region. It was supplemented by projects such as the Caspian Project, which consisted of Bonooru's significant investment in regional infrastructure like Mekar's port and the Phenac International Airport.[23] Claimant played a vital part in the implementation of this plan, hence fulfilling its role as the government's agent.

48 To summarize, when making the investment, Claimant acted as an agent for the government and exercised governmental functions. Pursuant to the *Broches test*, Claimant does not have standing in the present dispute and therefore it must be found that the Tribunal lacks jurisdiction to hear its claims.

ii. The purpose of an investment should also be considered in order to determine the standing of a State-owned entity before an arbitral tribunal

49 Respondent submits that the premises of the *Broches test* closely resemble customary international law attribution rules reflected in the ILC Articles, according to which a conduct of a person is attributable to a State if this person:

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[19] *SoUF*, ¶65.
[20] *Ibid*.
[21] *SoUF*, ¶33.
[22] Annex VII.
[23] PO4, ¶1.

> *'(i) 'is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct' [ILC Article 8], or*
> *(ii) 'is empowered by the law of that State to exercise elements of the governmental authority ... provided the person ... is acting in that capacity in the particular instance' [ILC Article 5].'*

50 Therefore ILC Articles 5 and 8, like the *Broches test*'s factors, address the following two situations: conduct by a person acting under State control and conduct by a person exercising delegated State authority.[24]

51 Similar to the 'government agent' branch of the *Broches test*, ILC Article 8 is concerned with whether the conduct of a non-state actor should be attributed to a state. Furthermore, The ILC Commentary makes clear that, *in 'the text of article 8, the three terms 'instructions', 'direction' and 'control' are disjunctive; it is sufficient to establish any one of them.'*[25]

52 Additionally, commentary to ILC Article 5 provides that the purposes for which powers are to be exercised are of particular importance when determining whether a person has exercised governmental authority.[26]

53 In fact, tribunals often consider both the nature and the purpose of an entity's activities when determining whether the entity has exercised government authority.[27] The *Maffezini* tribunal stated that in instances where there are no guiding principles for deciding whether a particular entity is a state body in applicable treaties, the tribunal may look to the applicable rules of international law. In this case, the tribunal proposed a formal/structural point of view (regarding the entity's purpose or objectives and whether the entity is owned or controlled by the state), together with a functional test, which looks to the functions of or role to be performed by the entity.[28]

54 The *Salini* tribunal also agreed that in order to determine the degree of control and participation of a State in a company it must take into account the international rules governing the liability of States, in particular *'the objectives of the company in question.'*[29]

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[24] *Feldman*, p. 13.

[25] ILC Commentary.

[26] *ILC Articles*, (n 13) 43.

[27] *Hamester,¶190, EDF ¶¶175-180, ¶185.*

[28] *Maffezini*, ¶¶77-79.

[29] *Salini.*

55 Moreover, it is also argued in the contemporary scholarship that customary international law attribution rules require to consider not only the nature, but also the purpose of an entity's activities when identifying sovereign conduct[30].

56 Respondent is aware of the most notable case where a different approach to the *Broches test* was employed - *CSOB*. There, the tribunal stated that the critical element under the test was the nature of an SOE's activities and not their purpose. Such an approach to the *Broches test* was deemed '*functional'*. However, Respondent submits that *CSOB* tribunal cited little authority in support of its decision and its reasoning has since been met with little acceptance[31].

57 Respondent submits that in applying the *Broches test* it is necessary to consider not only the nature, but also the purpose of an SOE's activities when determining the boundaries of sovereign conduct. The Claimant's activities were undertaken in governmental capacity, as they were conducted in the view of fulfilling the government's obligation to ensure the mobility rights of Bonooru's citizens.

C. In any case, the present dispute constitutes a State-to-State arbitration, since Claimant is a State-controlled entity

58 Under Article 2 of ICSID AFR, the Centre may administer proceedings between a State and a national of another State. The term 'national of another state', pursuant to Article 1(6) of the ICSID AFR, means a person who is not a national of the State party to that proceeding.

59 The Rules do not provide for a State-to-State arbitration. As found in *BUCG*:

> *'It is common ground that Article 25(1) of the ICSID Convention is not a State-to-State dispute resolution mechanis*m *and is not open to State-owned companies as claimants when acting as agents of the State or when engaged in activities where they exercise governmental functions. It is common ground that in such circumstances State-owned enterprises are barred from bringing a claim under Article 25(1)'*[32]

60 The same applies to ICSID AFR, which set analogous jurisdictional requirements in that regard.

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[30] *Feldman*, p. 13.

[31] *Blyschak.*

[32] *BUCG*, ¶31.

61 It is widely recognized that the existence of adequate control is a complex question requiring examination of several factors and must be viewed in its own particular context, on the basis of all the facts and circumstances.[33] Control may therefore be weighed via a multiplicity of criteria, including voting rights, management powers, executive influence, access to capital and other resources, and unofficial but authoritative sources of power.[34]

62 To that end, Respondent submits that not only does Bonooru hold 55% shares in Claimant, but no other shareholder holds more than a 7% stake.[35] Hence, no other entity has such an influence on Claimant as Bonooru. Additionally, at the time of making the investment, the Ministry of Transport and Tourism had the right to nominate one of its officials for a non-executive director position in Claimant's Board of Directors.[36] As the Board consisted of 8 directors in total and Bonooru has always held a sizable stake in Claimant, the director nominated by the Ministry could potentially have had serious influence on the Board's decisions. Now, the situation is even more dire, as Claimant's board of directors has been replaced with government functionaries.[37]

63 Moreover, it has been recognized that for some Board of Directors' meetings, Bonooru's representatives could form a majority of members present and voting and could pass decisions by their majority vote.[38] Most importantly, a situation could have arisen when a meeting for electing directors is held and Bonooru has a majority and therefore the power to decide on such matters. To that end, as stated by the tribunal in *Aguas del Tunari*, 'an entity may be said to control another entity [merely] if it possesses the legal capacity to control it'.[39] Therefore, what is deemed crucial by arbitral tribunals is the legal capacity of an entity to control another entity. This has also been acclaimed by the doctrine.[40] Taking all the criteria into consideration - voting rights, 55% shares, executive influence - Bonooru does have control over Claimant's actions, as it could decide on its key matters, such as electing directors.

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[33] *Schreuer*, pp. 864-865, *Vacuum Salt.*

[34] *Blyschak.*

[35] PO4.

[36] Annex IV.

[37] *SoUF*, ¶65.

[38] PO3.

[39] *Aguas del Tunari*, ¶242, ¶264.

[40] *Blyschak.*

64 Respondent submits that the many ways in which Bonooru exercises its influence on Claimant are a clear indicator that Claimant is in fact a State-controlled entity and does not have a standing in these proceedings.

65 Since Claimant is a State-controlled entity, the dispute in fact constitutes State-to-State arbitration, as Claimant acts effectively as a government's subdivision.

66 The present dispute would in fact constitute such State-to-State arbitration. Hence, the Tribunal should find that it has no jurisdiction over Claimant's claims.

II THE TRIBUNAL SHOULD GRANT LEAVE TO THE SUBMISSION OF THE EXTERNAL ADVISORS TO THE CRPU WHEREAS IT SHOULD REJECT THE CBFI'S SUBMISSION

67 On 19th April and respectively 28th May 2021, the Consortium of Bonoori Foreign Investors and the External Advisors to the Committee on Reform of Public Utilities filed their written applications for leave to file a non-disputing party *amicus curiae* submission.[41]

68 External Advisors are members of Mekari civil society whose professional focus is investment banking. *Amici* were selected in 2010 through a competitive process based on criteria of competence to advise the CRPU on the privatisation and restructuring of Caeli Airways.[42]

69 CBFI is an industry association that represents Bonoori foreign investors. Its members include businesses of different sectors of the Bunoori economy. Claimant to this dispute is CBFI's member, similarly as Lapras Legal Capital and 38 other companies holding investment rights in Mekar.[43]

70 Under the Article 9.19(3) CEPTA and Article 41(3) ICSID AFR the Tribunal is authorized, after consultation with the disputing parties, to accept and consider written *amicus curiae* submissions regarding a matter of fact or law within the scope of the dispute that may assist the tribunal in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party but has a significant interest in the arbitral proceedings.[44] Moreover, the *amicus* application should meet certain formal and procedural requirements.

71 Respondent submitted under Article 9.20(6) CEPTA that the Tribunal should apply in this dispute not only CEPTA and ICSID AFR but also the UNCITRAL Rules and therefore they should be applied.[45]

72 Under the above legal sources the *amicus* submission must meet various requirements.

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[41] CBFI application; EA application.
[42] EA application.
[43] CBFI application, ¶¶2-3.
[44] CEPTA, Article 9.19(3).
[45] Mekar's amici response.

73 **First**, among the formal requirements UNCITRAL Rules, CEPTA and PO No. 1 provide that the *amicus* application should describe the applicant, including, where relevant, its membership, legal status and its general objectives.[46]

74 Moreover, the application should disclose whether or not the applicant has any affiliation, direct or indirect, with any disputing party and identify any entity that has provided any financial or other assistance in preparing the submission.[47] UNCITRAL Rules stipulate also that it should indicate any entity that has provided it with substantial assistance in either of the two years preceding the application (e.g. funding around 20 per cent of its overall operations annually).[48]

75 Finally, the application should be dated and signed by the person filing the application, and include the address and other contact details of the applicant.[49]

76 **Second**, regarding the material requirements, the *amicus* submission should be useful to the tribunal i.e. it should assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.[50]

77 The tribunal in the *InterAguas* explained that the purpose of *amicus* submissions is to help the tribunal arrive at a correct decision by providing it with arguments and expertise that the parties may not have provided.[51]

78 **Third**, the *amicus curiae* submission should address a matter within the scope of the dispute.[52]

79 The tribunal in the *Suez* explained that an *amicus curiae* submission is considered addressing the matter within the scope of the dispute if the decision of the tribunal could have a certain impact on the matter addressed by the *amicus*.[53]

80 Furthermore, the tribunal in the *Biwater* agreed that the fact that a potential *amicus curiae* and its counsels were all seasoned legal practitioners with considerable experience inside

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[46] UNCITRAL Rules, Article 4(2); CEPTA, Article 9.19(3); PO1, ¶21.
[47] *Ibid*; UNCITRAL Rules, Article 4(2)(b).
[48] *Ibid*.
[49] *Ibid*.
[50] CEPTA, Article 9.19(3); ICSID AFR, Article 41(3).
[51] *InterAguas*, ¶23.
[52] CEPTA, Article 9.19(3); ICSID AFR, Article 41(3).
[53] *Suez*, ¶18.

legal processes was a sufficient basis to consider them in advance able to file a submission addressing the matter within the scope of the dispute.[54]

81 **Fourth**, the potential *amicus curiae* must have a significant interest in the proceeding.[55]

82 To consider an interest significant it should be related to a certain public interest that is in close connection with the dispute. The tribunal in the *Aguas Provinciales* indicated that a matter is deemed to be of public interest when the final decision in a dispute has the potential to affect, directly or indirectly, persons beyond those immediately involved as parties in the case.[56]

83 The interest of a petitioner can be considered significant especially when the public interest is accompanied by a private interest of an *amicus.*

84 According to the tribunal in *Glamis* the potential negative impact of the judgement on the matters being of the petitioner's interest is a sufficient reason to consider the *amicus* interest significant.[57]

85 **Fifth**, the applicable law sets certain requirements concerning the just administration of the proceeding. The above provisions say that the *amicus* submission should not disrupt the proceeding or unduly burden or unfairly prejudice either party.[58]

86 Respondent states that the Tribunal should grant leave to the External Advisors' submission since it respects all the formal and material requirements (**A**) whereas it should reject the CBFI's submission as it fails to meet all the requirements stated by the applicable law (**B**).

A. THE TRIBUNAL SHOULD GRANT LEAVE TO THE EXTERNAL ADVISORS' SUBMISSION

87 Respondent argues that the Tribunal should grant leave to the External Advisors' *amicus curiae* submission as it meets all the formal requirements (**i**), would be useful for the

[54] *Biwater* ¶6.7.B1; ¶50.
[55] Ibid.
[56] Aguas Provinciales, ¶18.
[57] *Glamis I*, pp. 4-5; *Glamis II*, ¶10.
[58] Ibid.

Tribunal (**ii**), would lay within the scope of the dispute (**iii**), External Advisors have a significant interest in the affair (**iv**) and their submission would not (**v**).

i. External Advisors' application meets all the formal requirements

88 External Advisors' application meets all the formal requirements. It duly describes the petitioner and assures that no third person has ever given it its assistance in the preparation of the submission.[59] Moreover, it discloses all the necessary affiliation the *Amici* could have with Respondent or Claimant, in particular that External Advisors were providing services to the CRPU i.e. a Mekari public entity.[60]

89 The document provides also the information sufficient to state that no substantial assistance has been given to the *Amici* in either of the two years preceding its application. The assistance to be considered significant, and consequently not permitting admission, should exceed a certain threshold which is quite high.[61] It clearly indicates that the remuneration received from the CRPU cannot be considered a significant assistance to the External Advisors but simply a due consideration for the provided services.[62] Moreover, the External Advisors did not receive any other funding than remuneration for the provided services and therefore they did not get any significant financial assistance.

90 Furthermore, the External Advisors' application is evidently duly dated, signed and includes the address and other contact details of the applicant.[63]

ii. External Advisors' submission would be useful

91 The External Advisors' submission would be useful for the Tribunal.

92 The *Amici* in the period of their cooperation with CRPU advised on the privatisation and restructuring of Caeli Airways, actively participating in the deliberations of CRPU in the process leading up to the acquisition of an 85% stake in Caeli Airways JSC by Claimant.[64] They have a precious neutral look from the inside on the transaction being the subject

[59] EA application.
[60] Ibid.
[61] UNCITRAL Rules, Article 4(2)(c).
[62] EA application.
[63] Ibid.
[64] Ibid.

matter of this dispute thanks to which they are able to provide the Tribunal with the impartial information concerning the investment.

93 Moreover, the *Amici* have regularly acted as interveners before federal courts in Mekar in relation to judicial proceedings concerning approval for privatisation projects.[65] Their high level of expertise guarantees that their opinion will be useful for the Tribunal.

94 Hence, the External Advisors' submission is useful for the Tribunal.

iii. External Advisors' submission would address a matter within the scope of the dispute

95 The External Advisors' submission would address a matter within the scope of the dispute.

96 The scope of the matters addressed by the *Amici*, i.a. the issue of corruption in the Caeli Airways acquisition process, touches the core of the dispute i.e. whether the investment was made in accordance with the law and whether the pre-investment stage can have an impact on the outcome of the dispute and whether the Tribunal has jurisdiction. Moreover, the *Amici* are legal professionals and are able to construct a submission which lays within the scope of the affair.

97 However, even if the Tribunal found that certain elements of the *Amici*'s submission exceeded the scope of the dispute it should not disqualify the *amici*'s application.

98 As indicated in the *Biwater*, the tribunal can grant leave to *amicus'* submission even if certain elements of this submission exceed the scope of the dispute.[66] In cases where an *amicus* submission would be useful the Tribunal can ignore these parts of the submission that exceed the scope of the dispute and accept the rest of the submission.

99 Here, if the Tribunal found that certain parts of the External Advisors' submission exceeded the scope of the dispute it can ignore them and take into consideration only the parts that lay within this scope.

100 Thus, the Tribunal should consider the External Advisors' submission laying within the scope of the dispute.

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[65] Ibid.

[66] *Biwater*.

iv. External Advisors have significant interest in the dispute

101 External Advisors have a significant interest in the present proceedings.

102 In the present case, External Advisors act both in the public interest and at the same time in their private interest.

103 The public interest pursuit by the *Amici* is the fight against the corruption and transparency of the arbitral proceedings. As revealed by the External Advisors, bribes paid by Claimant to the Chairperson of CRPU played a significant role in the investment process at hand.[68] The *Amici*, as independent advisors involved in the entirety of the privatisation process, are in the unique position to adduce unbiased facts concerning the bribery before the Tribunal that may not be obtained from either disputing party.

104 At the same time, the *Amici* act in their private interest which is the increase of anti-corruption efforts in Mekar. The acceptance of the bribery practice by the Mekari authorities impacts the financial operations of the *Amici* who regularly advise potential investors planning to locate their capitals in prospering Mekari companies.[69]

105 The decision of the Tribunal in the present case undoubtedly can have a severe impact on the other investment processes in Mekar biased by the corruption, therefore the interest of the *Amici* should be considered significant.

106 Therefore, External Advisors should be considered having the significant interest in the present case.

v. The External Advisors' participation would not disrupt the proceeding nor unduly burden or unfairly prejudice either party

107 The External Advisors' participation would not disrupt the proceeding nor unduly burden or unfairly prejudice either party.

108 Firstly, as it was explained above, the External Advisors' submission would be useful for the Tribunal. Therefore, it would not disrupt the proceedings in any way since there would

[68] EA application.

[69] Ibid.

be no unnecessary prolongation of the process and all the additional costs concerning the *amicus'* participation would be justified and necessary for the resolution of the dispute.

109 Second, the submission of the External Advisors to the CRPU would not prejudice any party to the dispute since the *Amici* have no strong connection with neither Claimant nor Respondent.

110 The External Advisors are fully independent from Claimant therefore their participation in the dispute would not prejudice Respondent. Similarly, their submission would not prejudice Claimant since External Advisors are independent from Respondent. They were selected for their role through a transparent and competitive process based on criteria of competence as identified by the law. All these facts guarantee the impartiality of the *Amici* and guarantee that there are no reasons for Claimant to be considered prejudiced.

111 Therefore, External Advisors' submission would not prejudice Claimant.

112 To summarize, Respondent argues that the External Advisors' submission should be accepted by the Tribunal as it meets all the necessary requirements.

B. THE TRIBUNAL SHOULD REJECT THE CBFI's SUBMISSION

113 Respondent claims that the Tribunal should reject the CBFI's *amicus curiae* submission as it fails to meet all the formal requirements (**i**), would not be useful for the Tribunal (**ii**), CBFI has no significant interest in the affair (**iii**) and its submission would disrupt the proceeding nor unduly burden or unfairly prejudice either party (**iv**).

i. CBFI's submission fails to meet the formal requirements

114 CBFI's application fails to meet one of the crucial formal requirements.

115 Under the Article 4(2)(c) UNCITRAL Rules the potential *amicus curiae* is obliged to disclose any substantial assistance in either of the two years preceding the application that it received from any third person.[70]

116 Here, CBFI failed to assure in its application that no such substantial assistance exists. The only information that is given by CBFI is that no third person assisted it with the elaboration of its submission but this does not guarantee the *amicus'* impartiality. As the Consortium is silent on that matter the Tribunal cannot be certain whether the requirements concerning the *amicus*' independence are met.

117 Therefore, CBFI failed to meet the formal requirements.

ii. CBFI's submission would not be useful for the Tribunal

118 CBFI's submission would not be useful for the Tribunal since it does not bring any particular knowledge Claimant would not have and presents substantially the same point of view as the Claimant's one.

119 CBFI's submission concerns the internal economic situation of Bonooru and possible consequences the Tribunal's decision can have on the Bonoori economic panorama.[71] All that information can be provided by Claimant and there is no need to file any *amicus curiae* submission in this respect.

120 Moreover, the applicable law requires that the *amicus'* submission should bring *a perspective, particular knowledge or insight that is different from that of the disputing*

[70] UNCITRAL Rules, Article 4(2)(c).

[71] CBFI application, ¶10.

parties.[72] However, CBFI presents substantially the same point of view on the matters mentioned in its submission as Claimant.

121 As CBFI does not provide any particular knowledge nor it presents an opinion different from the one of Claimant its submission is not useful.

iii. CBFI has no significant interest in the dispute

122 As it was indicated above, the significant interest of an *amicus* should be based on the public interest in the certain case. Respondent argues that CBFI has no significant interest in the present case as it lacks any public interest.

123 The interest which is invoked by CBFI is the well-being of the Bonoori state-owned enterprises. However, this issue cannot be considered a public interest since it is in fact only a private interest of the CBFI members. It does not fulfill the premises of a public interest established by the tribunal in the *Suez* case since it does not concern providing *basic public services* to the large group of people. It rather refers to a certain number of Bonoori companies that are indirectly interested in the outcome of the present case because of their potential change of economic situation.

124 Therefore, the CBFI's interest in the affair cannot be considered significant.

iv. CBFI's submission would disrupt the proceeding and unduly burden the parties to the dispute

125 CBFI's submission would disrupt the proceeding and unduly burden the parties to the dispute.

126 Disruption of the proceeding occurs when an *amicus* submission is unnecessary for the resolution of the dispute and therefore prolongs superfluously the proceedings and generates the additional costs.[73]

127 As it was explained above, the CBFI's submission would not be useful for the Tribunal. Therefore, its admission is not necessary for the evaluation of the present case and would excessively prolong the proceeding and entail additional costs.

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[72] ICSID AFR, Article 41(3)(a).

[73] *Methanex*, ¶50.

128 Thus, as the CBFI's submission would disrupt the proceedings and unduly burden the parties to the dispute the Tribunal should reject their application.

129 Furthermore, the CBFI's submission prejudices Respondent.

130 As indicated in the *Bernhard von Pezold*, according to the applicable law and the principle of equality of the parties to the dispute the Tribunal is obliged to accept only such *amicus* submissions that do not spoil that equality and do not prejudice any of the parties.[74]

131 A party to the dispute is prejudiced by an *amicus curiae* submission when a potential *amicus* is closely connected to the other party to this dispute.

132 Here, Respondent is obviously prejudiced by CBFI.

133 Firstly, Claimant is the CBFI's member.[75] There cannot exist a closer connection between a potential *amicus* and a party to the dispute than the one between CBFI and Claimant. CBFI is an organization which is completely financially dependent on its members.[76] Moreover, it will always pursue their interest and support their point of view.

134 Secondly, CBFI prejudices Respondent due to the close financial connections between Lapras Legal Capital and Claimant. Lapras is another CBFI's active member. Moreover, Lapras worked for Claimant in the domain of advising on funding strategies with respect to its claim against Respondent in this dispute. Lapras is individually engaged in the present proceeding and it provided significant support in this respect to Claimant. This fact undoubtedly raises the conflict of interest since Lapras, who advised Claimant on the present dispute, would be now an *amicus curiae*.

135 Therefore, the Tribunal should reject the CBFI's submission.

136 To summarize, as the CBFI's submission fails to meet all the necessary requirements it should be rejected by the Tribunal.

137 Respondent argues that the Tribunal should grant leave to the External Advisors' submission as it respects all the formal and material requirements set by CEPTA, UNCITRAL Rules and ICSID AFR. Meanwhile, Respondent submits that the Tribunal should reject the CBFI's application as it fails to meet all the above requirements.

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[74] CEPTA, Article 9.19(3); ICSID AFR, Article 41(3); *Methanex*, ¶26; *Scherer et al*.; *Bernhard von Pezold*, ¶6.

[75] CBFI application, ¶7.

[76] PO3, ¶11.

III RESPONDENT HAS ACTED IN ACCORDANCE WITH THE MINIMUM STANDARD OF TREATMENT CONTAINED IN ARTICLE 9.9 OF CEPTA

138 Claimant's investment in Caeli Airways is a story of how a series of investor's ill-advised decisions, such as over-tolerance of risk, lack of diversification in airfare acquisition, dependence on unpredictable events and imprudence in financing schemes, lead to investment's demise. Claimant now seeks for Respondent to take the blame. The Tribunal will find, however, that Respondent has treated Claimant fairly and equitably, in harmony with its domestic and international standards.

139 The fair and equitable treatment standard offers a general point of departure in formulating an argument that the foreign investor has not been well treated by reason of discriminatory or other unfair measures being taken against its interest.[77] To determine its breach however, tribunals must consider primarily the terms of the applicable investment treaty.[78] Their judgement must further depend on the facts of the particular case,[79] with emphasis on the countervailing factors such as the responsibility of foreign investors, in terms of prior due diligence, subsequent conduct, as well as the risk that investor itself takes on in entering a particular investment environment.[80] As emphasized by numerous tribunals, a threshold for finding a breach of fair and equitable standard is a high one.[81]

140 Article 9.9 of CEPTA contains Minimum Standard of Treatment accommodating a Fair and Equitable standard provision. Article provides that:

> *'A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or measures constitute: denial of justice in criminal, civil or administrative proceedings; fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; arbitrary or discriminatory conduct; abusive treatment of investors, such as coercion, duress, and harassment'*[82]

141 It further specifies that:

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[77] *Biwater*, ¶596, *Muchlinski*, p. 625.

[78] *MTD Partial Award*, ¶67.

[79] *Mondev*, ¶118, *Waste Management*, ¶99, *Saluka*, ¶304.

[80] *Biwater*, ¶601.

[81] *Thunderbird*, ¶194, *Biwater*, ¶597, *Genin*, ¶367, *SD Myers Partial Award*, ¶263.

[82] CEPTA, Article 9.9.(1)-(2)(a)-(d).

> *'For greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article. In order to ascertain whether the measure breaches this Article, the Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1.'*[83]

142 Respondent has treated Claimant fairly and equitably in all their dealings, respectfully to the Minimum Standard of Treatment contained in CEPTA. Each of Respondent's actions and measures individually abided by the standards provided in CEPTA, falling in the scope of Respondent's regulatory power (**A**). Furthermore, Respondent's proceedings complied with the standard of due process and did not amount to a denial of justice (**B**). Respondent's actions and measures were also reasonable, in accordance with domestic law and international standards and therefore cannot be regarded as arbitrary nor discriminatory (**C**). Moreover, they were neither coercive nor abusive and did not amount to conspiracy or concerted practice (**D**).

A. All Respondent's actions and measures fall within the scope of its regulatory power

143 Respondent has in all its actions treated investors fairly and equitably. In the midst of an economic crisis, Respondent strived to restore the economic stability for the benefit of all investors, including Claimant. It legitimately exercised its regulatory power to stabilize the unstable and calm what was turbulent. Claimant's allegations to the contrary are thus unfounded.

144 The State's FET obligation cannot serve the same purpose as stabilization clauses, virtually freezing the legal system and preventing States from regulation of economic activities.[84] Investment treaties do not eliminate States' right to modify their regulatory regimes to meet evolving circumstances and public needs.[85] On the contrary, *"[i]t is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion."*[86] For the

[83] CEPTA, Article 9.9.6.
[84] *EDF*, ¶¶217, 218, *CMS*, ¶277, *BG Group*, ¶298, *Micula*, ¶666.
[85] *Eiser*, ¶362, *Parkerings*, ¶332, *EDF*, ¶217.
[86] *Parkerings*, ¶332.

sake of its citizens, the State needs to adapt to changing economic, political and legal circumstances. Therefore, its regulatory power remains unimpaired.[87]

145 Moreover, tribunals are not to be political referees, as articulated in *SD Myers:*

> *'[T]ribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive.'*[88]

146 Should governments commit errors, however, those errors are to be remedied through political and legal processes, and not by arbitral tribunals.[89]

147 Lastly, tribunals must accord a high measure of deference to the right of domestic authorities to regulate matters within their own borders.[90]

148 Respondent's regulatory, administrative, and executive bodies have all exercised their legitimate powers prescribed by the law to cope with the economic crisis. Their actions and measures fell within the scope of the regulatory power and were in accordance with CEPTA.

149 Article 9.8 of CEPTA expressly secures the host State's right to *regulate 'to achieve legitimate public policy objectives, such as national security, (…) safety, (…) or social and consumer protection.'*[91] Furthermore, CEPTA expressly provides that:

> *'the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.'*[92]

150 Furthermore, its further specified that Parties shall ensure, that State enterprises exercising administrative, regulatory, or governmental functions, such as approving transactions, or imposing quotas or fines, shall function in accordance with CEPTA.[93]

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[87] *BG Group*, ¶298, *CMS*, ¶277.

[88] *SD Myers R Partial Award*, ¶261.

[89] *Ibid*.

[90] *SD Myers Partial Award*, ¶263, *Saluka*, ¶305.

[91] CEPTA, Article 9.8(1).

[92] CEPTA, Article 9.8(2).

[93] CEPTA, Article 9.13.

151 The Parties' right to regulate as well as exercise of administrative or governmental functions is thus expressly protected under CEPTA.

152 Respondent's regulatory measures were consistently aimed at achieving its public policies such as social and consumer protection. This commenced with Respondent's MRTPA, and creation of CCM as an autonomous body independent of government influence, armed with an independent enforcement directorate.[94] The goal of this regulatory change was to protect the competition and consumer welfare as well as to inspire investor confidence.[95]

153 Furthermore, when the economic and currency crisis ensued, Respondent was understandably forced to react. Following what International Monetary Fund identified as *'the need to establish credibility in the [local] currency to avoid a debilitating economic situation,'*[96] Respondent issued a decree requiring all companies operating in the country to offer goods and services denominated exclusively in MON. Such a measure is widely recognized to shift the burden of inflation away from consumers. By denominating services in USD, the enterprises try to shield themselves from inflation, transferring this burden on the consumers. By requiring enterprises to denominate services in MON, Respondent not only followed the IMF's guidance but also strived to protect the consumers, the right to which is explicitly protected under CEPTA.

154 Respondent's following regulatory change was grounding all Boeings 737 MAX.[97] This decision followed an accident in Jakarta in which all 189 passengers on board lost their lives.[98] Boeing 737 MAX was ultimately grounded worldwide,[99] with its producer announcing cutting of this aircraft's production. Respondent's decision was therefore manifestly and undisputedly aimed at protection of Respondent's citizens' safety, Respondent's right to which is explicitly protected under CEPTA.

155 Lastly, during the deepening economic crisis, Respondent attempted to alleviate some of the burdens caused by the economic crisis through Executive Order 9-2018.[100] Its

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[94] *SoUF*, ¶19.

[95] *SoUF*, ¶19, Annex V, ¶1590.

[96] *SoUF*, ¶39.

[97] *SoUF*, ¶49.

[98] *SoUF*, ¶49.

[99] https://theconversation.com/boeing-737-max-why-was-it-grounded-what-has-been-fixed-and-is-it-enough-150688; https://www.faa.gov/newsroom/faa-updates-boeing-737-max-0 .

[100] *SoUF*, ¶46.

objective was to *'provide emergency assistance and health care response for individuals, families, and businesses*'[101] through making or guaranteeing loans to eligible businesses. The resources allocated for this Order were limited.[102] The discretion to grant or refuse loans was vested to Respondent's Secretary of Civil Aviation and was exercised in a non-arbitrary and non-discriminatory manner, as demonstrated further.

156 In conclusion, all of Respondent's regulatory changes pursued objectives of protection of national security, safety, and social and consumer welfare. Respondent's right to regulate thus falls under the scope of protection by CEPTA.

B. Respondent's proceedings complied with the standard of due process and did not amount to a denial of justice

157 Claimant alleges that Respondent committed breaches of due process ultimately leading to denial of justice. This allegation is, however, erroneous as Respondent's measures have strictly followed standard of due process of both domestic and international law. Furthermore, Respondent's courts offered Claimant a just forum to express its grievances, striving to provide speedy judicial review, even under extremely demanding circumstances.

158 Respondent will address separately three alleged breaches of FET, namely the proceedings conducted by CCM (**i**), the duration of judicial proceedings (**ii**) and the alleged administering of justice in a seriously inadequate way, by dismissing Claimant's appeal in a form of summary judgement and the alleged failure to properly review evidence (**iii**).

i. CCM conducted proceedings in harmony with the standard of due process

159 CCM has initiated, conducted and finalized its proceedings against Claimant acting in harmony with the standard of due process. It has conducted extensive investigations, giving Claimant every chance to provide context and explanations, itself explaining and

[101] Annex XVIII, ¶1900.
[102] Annex XVIII, Sec. 3101 (b)(1)-(b).

justifying reasonably and substantially its every step. Claimant's allegation to the contrary is therefore misconstrued.

160 The standard of due process is not one of perfection.[103] Not every process failing or imperfection that will amount to a breach of FET.[104] Only serious procedural shortcomings, such as a complete lack of transparency and candour in an administrative process, will constitute violations of FET.[105]According to some tribunals, the standard of what constitutes a breach is even higher, requiring a procedural irregularity to amount to *'bad faith, a willful disregard of due process of law or an extreme insufficiency of action.'*[106]

161 Furthermore, the *Thunderbird* tribunal reasoned that the administrative due process requirement is lower than that of a judicial process.[107] It further noted that providing investor with a reasoned decision followed by an opportunity to be heard and present evidence during a hearing satisfies the standard of due process.[108]

162 In the case at hand, all CCM proceedings, including the initiation of the First Investigation (**a**), imposition and maintenance of airfare caps throughout the duration of the Second Investigation and after (**b**), satisfied the above described standard.

a. Initiation of the First Investigation was in accordance with the law and international standards

163 Claimant alleges that CCM lacked the power to open the First Investigation as Caeli's market share did not exceed 50%. Claimant asserts that the composite calculation of Caeli's market share along with that of Royal Narnian was abusive and in breach of due process. This assertion is unfounded in its entirety.

164 The doctrine of *single economic entity* is widely recognized in model anti-trust regulations, such as EU, US and in many of Asian anti-monopoly regulations.[109] It provides that firms withing the same corporate group consisting of a unitary

[103] *AES*, ¶9.3.40.
[104] *AES*, ¶9.3.40.
[105] *Bayindir*, ¶¶343,344.
[106] *Genin*, ¶371.
[107] *Thunderbird*, ¶198.
[108] *Thunderbird*, ¶200.
[109] *Whish & Bailey*, pp. 93, 94.

organization and pursuing a specific economic aim on a long-term basis form *a single economic entity*.[110] The consequences of this is that the when evaluating market shares of respective corporations, the competition authorities ought to consider the market share of the *single economic entity* as a whole.[111] Similarly when calculating fines, the competition authorities should consider *'the entire group's turnover, not just the turnover of the entity that actually committed the infringement. '*[112]

165 The test for determining existence of a single economic doctrine encompasses an examination of economic, organizational, and legal links, including the shareholding structure and the extent to which the parent influences the policy of the subsidiary.[113] Furthermore, it is presumed that where the parent has a 100% shareholding in a subsidiary, the two form a *single economic entity.*[114]

166 In the case at hand, it is apparent that both Caeli and Royal Narnian formed a *single economic entity* with Claimant. Claimant has a 100% ownership in Royal Narnian.[115] Claimant bore also a decisive 85% stake in Caeli.[116] The stake held by Claimant gave it decisive influence over Caeli's strategy and its policies. Claimant unilaterally decided Caeli's long-term investment strategy,[117] distribution of profits,[118] financing structure,[119] policy of aircraft acquisition,[120] disregarding the dissent of the minority shareholder.[121] Caeli therefore formed a *single economic entity* with Claimant and Royal Narnian.

167 It follows that calculating Caeli's market share with that of Royal Narnian is in accordance with international practice.

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[110] *Whish & Bailey*, p. 94.
[111] *Whish & Bailey*, pp. 99, 100.
[112] *Whish & Bailey*, p. 99.
[113] *Whish & Bailey*, p. 95.
[114] *Whish & Bailey*, p. 95.
[115] *SoUF,* ¶10.
[116] Annex VI, ¶1735.
[117] *SoUF,* ¶¶29, 31.
[118] *SoUF,* ¶30.
[119] *SoUF,* ¶¶ 30, 35.
[120] *SoUF,* ¶¶27, 35.
[121] *SoUF,* ¶29, 31, 35.

168 Alternatively, even if *the single economic entity doctrine* should not have been applied, CCM still had the power to open the First Investigation stemming from MRTPA, which states:

> *'CCM may exercise discretion in industries that require special attention to open an investigation where a corporation owns a lower market share.'*[122]

169 Airline sector, particularly in times of crisis, requires special attention. Considering the intricate interdependencies and interlinks between different airlines, often remaining hidden for years, but which ultimately have the potential of affecting international political scene, it should be understood if not commanded that competition authorities supervise them thoroughly.

170 Therefore, CCM has acted in accordance with domestic law and international practice, when opening the First Investigation. It has thus satisfied the standard of due process.

b. Imposition and maintenance of Airfare Caps was proportionate and necessary

171 MRTPA gives CCM a power to impose any interim measures it deems just, including fines or behavioral or structural measures.[123] Those measures must be proportionate to the infringement committed and necessary to bring the infringement effectively to an end.[124] In cases of urgency due to the risk of serious and irreparable damage to competition, CCM may order interim measures for preventive purposes for a specified period.[125] This period may be renewed insofar the renewal is necessary and proportionate.[126]

172 CCM initiated the First Investigation,[127] noticing the risk that Caeli's predatory pricing strategies may hinder the competition, driving smaller competitors out of the market.[128] CCM imposed airfare caps on Caeli, to prevent it from earning supra-competitive

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[122] Annex V.

[123] Annex V, Chapter III (4)(d).

[124] *Ibid*.

[125] Annex V, Chapter III (4)(e).

[126] *Ibid*.

[127] *SoUF,* ¶36.

[128] *SoUF,* ¶36.

profits, until the conclusion of its investigations.[129] The measure was proportionate and necessary. It did not obstruct Caeli's activities, preventing it from profiting from anti-competitive behaviors.[130] It was also necessary. Should the risks be confirmed, the damage incurred would be irreparable as small competitors serving on regional routes would have been driven out of the market.[131]

173 The renewal of a period for which the airfare caps were imposed, prolonging it to such time as both investigations are concluded,[132] and later, until such time as Caeli's market share drops below 40%,[133] was also proportionate and necessary.

174 Firstly, airfare caps, as a behavioral measure, are a mean of preventing an enterprise from undercutting its competitors by offering predatory prices, sufficiently low as to drive the competitors out of the market. Average Avoidable Costs (AAC) consist of all costs, including both variable costs and product-specific fixed costs, that could have been avoided by not engaging in an anti-competitive strategy.[134] Prices which are set below the AAC threshold are presumed to be predatory.[135] By setting airfare caps, a competition authority prevents the anti-competitive enterprise from later recovering the losses, having driven out the competition, by setting overly high prices.[136]

175 In the case at hand, Caeli's long-term strategy followed this exact pattern, as demonstrated in two voluminous and detailed reports issued by CCM.[137] Caeli first set the prices below the AAC threshold,[138] pushing its small competitors out of the market. This was confirmed by an international consortium of small regional airlines.[139] Caeli managed to continue financing its operations offering extremely low airfare due to its

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[129] *SoUF,* ¶37.

[130] *Ibid*.

[131] *Ibid*.

[132] *SoUF*, ¶45.

[133] *Ibid*. ¶49.

[134] https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-4#N_156_.

[135] *Whish & Bailey*, p. 238.

[136] *Whish & Bailey*, p. 239.

[137] *SoUF*, ¶¶45, 49.

[138] *SoUF*, ¶45.

[139] *SoUF*, ¶38.

continued operation of old aircrafts inherited from Respondent[140] in combination with 5 years of extraordinarily low oil prices.[141]

176 However, at the time of the economic and currency crisis, Caeli lost its source of easy revenue as the oil prices once again rose.[142] It was therefore unable to finance its predatory pricing strategy and was forced to increase the prices. The airfare caps prevented it from doing so. They were simply serving their purpose of preventing Caeli from recovering the losses of its long-term predatory pricing strategy, proving to be a necessary measure of protection of the competition and consumers.

177 Furthermore, the airfare caps were adapted to the official inflation rate, calculated by the Central Bank, which demonstrates that they remained proportionate.[143] Caeli never sought their adaptation by CCM but only their removal.[144]

178 Lastly, the Second Investigation revealed that not only has Caeli implemented predatory pricing, it has also abused its dominant position by threatening to shift its traffic out of Phenac International Airport, in this way squeezing out concessions.[145]. Caeli extracted significant anti-competitive privileges from Phenac Airport, allowing it to undercut ticket fares and eventually push other competitors out of the market.[146]

179 That is why CCM was forced to prolong the imposition of airfare caps until such time as Caeli's market share drops below 40%. In CCM's view, it was the only measure that would effectively prevent Caeli from abusing its dominant position by threatening to shift its business elsewhere.

180 The Tribunal should find, that CCM's conduct and all its measures strictly followed the process prescribed by the law and international practice. CCM remained within its legitimate power, providing Caeli with an opportunity to cooperate in its investigations[147] and issuing its decisions in voluminous and detailed reports. CCM also

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[140] *SoUF*, ¶¶35,48.
[141] *SoUF*, ¶¶33-35.
[142] *SoUF*, ¶48.
[143] *SoUF,* ¶43.
[144] *Ibid*.
[145] PO3 ¶7.
[146] *SoUF,* ¶49.
[147] *SoUF,* ¶37.

provided Caeli with a forum for appeal from CCM's decisions in civil proceedings. Caeli duly took advantage of this opportunity.[148]

181 The Tribunal should thus find CCM's conduct harmonious with the standard of due process.

ii. Duration of the proceedings did not amount to denial of justice

182 Apart from CCM's compliance with the standard of due process, Respondent's courts have also provided Claimant with swift and efficient judicial review.

183 Important procedural delays constitute one of the classic forms of denial of justice.[149] However, 'important procedural delays' were recognized as those continuing more than several years.[150] A mere existence of a delay does not imply a violation of the FET standard.[151] Even a multi-year delay does not necessarily constitute a breach of FET, as it must be assessed in light of the situation in the country concerned,[152] and considering the complexity of the matter.[153]

184 In the case at hand, Respondent's courts provided justice fairly and relatively speedily. In 2015, i.e., before the economic crisis ensued in Mekar, the average length of commercial proceedings in Mekar was 27 months.[154] Furthermore, due to the economic crisis, the volume of cases has only increased.[155]

185 Nevertheless, in matters concerning Caeli, the courts have scheduled hearings and solved matters within respectively 14 and 16 months.[156] Claimant's allegation that it was denied justice due to delays in judicial proceedings is therefore groundless.

iii. Claimant was not denied his procedural rights

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[148] *SoUF*, ¶¶44,50.
[149] *Pey Casado*, ¶660.
[150] *Pey Casado*, ¶660, *Siag*, ¶453.
[151] *Frontier Petroleum*, ¶327.
[152] *Jan de Nul*, ¶¶202-204.
[153] *Toto*, ¶160.
[154] *SoUF*, ¶13.
[155] *Ibid*., ¶44.
[156] *Ibid*., ¶¶44, 50.

186 Furthermore, Claimant's allegation that Respondent's courts administered justice in a seriously inadequate manner is untruthful. Respondent's courts provided justice fairly and legitimately.

187 Denial of justice is a charge which condemns the State's judicial system as such.[157] It implies the failure of a national system as a whole to satisfy minimum standards of fair and equitable treatment[158]. It therefore requires an elevated standard of proof.[159]

188 To prove occurrence of denial of justice, claimants must demonstrate an outrageous failure of the judicial system, existence of a systemic injustice, or that the impugned decision was clearly improper and discreditable.[160] A denial of justice cannot be attributed to ordinary mistakes of the judiciary or misapplications of national law[161] but to more significant, systemic violations by the judiciary organs of a state.[162]

189 Lastly, the tribunals must rather determine whether a 'flagrant violations of the law' or decisions 'manifestly unjust' have taken place; it is not arbitral tribunals' role to provide another instance for domestic disputes, nor to decide whether one view of the law or the other would be preferable.[163]

190 In the case at hand, Respondent's courts have given this Tribunal no reason to consider whether a denial of justice has taken place. They decided on Caeli's every motion within the limits and their discretion prescribed by the law.[164] They have provided a forum for Caeli and Claimant to voice their grievances.[165] They also have, contrary to Claimant's allegations, reviewed all evidence thoroughly and diligently.[166]

191 It is not this Tribunal's role to serve as an extraordinary instance for Claimant questioning the verdicts reached by Respondent's courts. Even if this Tribunal disagrees with Respondent's courts findings, the real question is only whether there has existed a systemic injustice. The answer is – there has not.

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[157] *PMI*, ¶499.
[158] *PMI*, ¶500.
[159] *Ibid*., ¶499, *Thunderbird*, ¶194.
[160] *PMI*, ¶500.
[161] *Paulsson*, p. 87.
[162] *Sornarajah*, p. 340.
[163] *Dolzer & Schreuer*, p. 182.
[164] PO3, ¶8.
[165] Annex XIV, ¶¶10,11.
[166] Annex XIV, ¶¶10,11, Annex XV ¶6.

192 This Tribunal should thus find that Claimant's allegations are baseless, and that Respondent's conduct both by its administrative and judicial branches has been in accordance with the standard of due process and did not amount to denial of justice.

C. Respondent' actions cannot be regarded as arbitrary nor discriminatory

193 Respondent has obeyed the standard of FET in all of its proceedings, initiating proceedings and issuing decisions in accordance with its own domestic law as well as international standards. Respondent's measures were reasonable, non-discriminatory and enacted in a rational decision-making process. Claimant's allegation to the contrary is therefore misconstrued.

194 The standard of reasonableness requires that the State's conduct bears a reasonable relationship to some rational policy.[167] Furthermore, to determine whether a measure is discriminatory, a two-step test must be conducted. Firstly, one must make a comparison with other investors in a similar position and under similar circumstances[168] and determine whether a measure provides the foreign investment with a treatment equally favorable as domestic investment.[169] Secondly, one must determine whether any differential treatment of a foreign investor can be rationally justified.[170] If the answer to either of the questions is in affirmative, the measure is non-discriminatory.

195 Furthermore, the fair and equitable standard can also be violated by measures which amount to manifest arbitrariness.[171] The threshold, however, remains high.[172] The treatment must rise to a level that is unacceptable from the international perspective,[173] and be sufficiently egregious and shocking[174] as to shock, or at least surprise an impartial tribunal.[175] Lastly, manifest arbitrariness occurs where a measure is opposed not merely to *a* rule of law, but rather to *the* rule of law.[176]

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[167] *Biwater*, ¶693, *Saluka*, ¶460.
[168] *Parkerings*, ¶288, *Goetz*.
[169] *Saluka*, ¶695.
[170] *Saluka*, ¶460.
[171] *Thunderbird*, ¶194, *Glamis*, ¶¶625, 627.
[172] *Thunderbird*, ¶194.
[173] *SD Myers*, ¶263.
[174] *Glamis*, ¶627.
[175] *Mondev*, ¶167, *Duke Energy*, ¶378.
[176] *Duke Energy*, ¶378, *Glamis*, ¶625.

196 In the case at hand, Respondent's administrative (**i**) and executive (**ii**) measures and decisions were implemented in the larger framework of public policy. They were reasonable, uniform and implemented fairly based on existing legal framework.

i. Respondent's administrative measures and decisions were reasonable, non-discriminatory, and implemented in a non-arbitrary manner

197 Respondent's proceedings strictly followed the standard of due process accorded in both the domestic regulations and international standards. Decisions implemented by Respondent were also reasonable and far from meeting the high threshold of arbitrariness or discrimination.

198 Firstly, as demonstrated above, CCM strictly followed the MRTPA, which was enacted before Claimant invested in Caeli.[177] Furthermore, CCM as an autonomous body, tasked with protection of competition was also formed and regulated prior to Claimant's investment.[178] Claimant should therefore have been aware of the content of MRTPA and the powers of CCM when investing in Mekar. Any of CCM's decisions within the scope of MRTPA cannot therefore be deemed arbitrary.

199 Secondly, before approving Claimant's investment, CCM sought an undertaking from Caeli that '*it would not engage in high-level co-operation on competition parameters such as prices, (…) or facilities, with Moon Alliance members.*'[179] Such an undertaking was duly given. It must therefore be deemed reasonable and far from surprising that when CCM acquired preliminary evidence of Caeli's breaching of the given undertaking,[180] CCM used the power vested in it to protect the competition and consumers. Such conduct, especially after previous warning, should be found reasonable and non-discriminatory by this Tribunal.

200 Thirdly, although CCM's diligent investigations were called '*harsh*'[181], the criticizing source has stated that they concern the aviation industry *'as a whole.'*[182] Even these voices of criticism recognized that CCM's conduct is not turned against an individual

[177] *SoUF,* ¶19.
[178] *SoUF,* ¶19.
[179] *SoUF,* ¶25.
[180] *SoUF,* ¶36.
[181] Annex IX, ¶1965.
[182] *Ibid*.

investor, but rather that CCM will act '*harshly'* in reaction to any anti-competitive behavior identified in the *'sector as a whole*'. This Tribunal should recognize that competition authorities must protect the competition and consumers, and that CCM's measures, although possibly '*harsh*', were not arbitrary nor discriminatory.

201 Lastly, Claimant seeks a confirmation of its allegation in the fact, that after the acquisition of Caeli by Respondent, CCM authorized the Ministry of Civil Aviation to infuse capital in Caeli under the '*public interest*' exception in the MRTPA and forewent fines until such time as Caeli's financial recovery was complete.[183] Claimant's interpretation is , however, untrue.

202 According to Respondent's Superior Court's judgement, CCM may allow infusion of public funds under the '*public interest*' exception under Chapter IV of the MRTPA into services of an economic nature that public authorities identify as being of particular importance to citizens. Such infusion of funds would not constitute a breach of the State aid provisions under Chapter IV. Both, the discussed provision and the judgement, existed at the time when Claimant made its investment in Caeli.

203 After the acquisition of Caeli by Respondent, the airline's purpose of operations shifted from mere production of commercial profits, to conducting activities of public importance such as search and rescue operations, emergency medical evacuations, and distributing humanitarian aid.[184] Its operations have therefore become '*of paramount importance*' to Respondent's citizens, which was not the case when Caeli's policy was dictated by Claimant. The infusion of public funds was therefore a non-arbitrary and non-discriminatory act.

ii. Respondent's executive measures were reasonable, non-discriminatory and implemented in a non-arbitrary manner

204 Furthermore, Respondent' executive measures were also reasonable and do not meet the threshold of arbitrariness or discrimination.

205 **Firstly**, Claimant alleges that Respondent frustrated its investment by issuing a decree to denominate services exclusively in MON, which was done in an arbitrary manner.

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[183] *SoUF*, ¶64.

[184] PO3, ¶10.

206 Respondent's decree, however, fails to meet the high threshold for manifest arbitrariness nor does it shock or surprise an impartial third party.

207 The decree was simply a measure of protection of Respondent's citizens, applied in a unified manner to all entities in Respondent's territory in a non-discriminatory manner. It was an economic decision within a sovereign power of a State in the time of a crisis. As such, it should not fall under substantive review of this Tribunal as it evidently fails to meet the 'egregious' and 'shocking' threshold of breach of FET.

208 **Secondly**, Claimant alleges that Respondent acted arbitrarily and discriminatory when denying Caeli subsidies under the Executive Order 9-2018. Also this assertions is erroneous.

209 Executive Order 9-2018 vested to power to grant or refuse the loans in Respondent's Secretary of Civil Aviation.[185] The Order provided guidance to determining, at the Secretary's discretion, which enterprise is to be granted a loan in form of a four-step test:

> *(A) the obligor is an eligible business for which necessary credit is not reasonably available at the time of the transaction;*
> *(B) the intended obligation would not skew market conditions in favour of one or more enterprises;*
>
> *(C) the intended obligation by the obligor is prudently incurred; and*
>
> *(D) the loan is sufficiently secured.*[186]

210 It is not within this Tribunal's power to act as second instance for Respondent's discretionary decisions. Nonetheless, for the sake of clarity and transparency, Respondent explains that Caeli failed to fulfill any of the points.

211 Firstly, Caeli was a business for which necessary credit was reasonably available. Caeli's Head of the Board of Directors was Ms. Sabrina Blue, who was also the Secretary of Transport and Tourism in Bonooru,[187] responsible for granting subsidies under 'Horizon 2020' Scheme.[188] Caeli, which operated internationally, belonging to several organizations, was presumed to be eligible for credit also in foreign states. It

[185] Annex XVIII, SEC. 3101 (c)(1).
[186] *Ibid*.
[187] *SoUF*, ¶22.
[188] *SoUF*, ¶28.

was therefore reasonable to presume that '*necessary credit*' was in fact '*reasonably available*' for Caeli.

212 Secondly, the loan given to Caeli might have skewed further the market conditions in its favor. Caeli was already under two investigations regarding its abuses of dominant position, harmful for competition itself, competitors, and consumers. It should be therefore understandable, that granting Caeli additional advantages could have further skew market conditions in Caeli's favour. This is confirmed by the fact that predominant recipients of subsidies under Executive Order were airlines with less than 5% market share, operating Respondent's important domestic routes.[189]

213 Thirdly, both Caeli and Claimant were financially insecure. In 2019, Caeli was granted credit rating of CCC+, based on its risky investment choices, long-standing debts that Caeli failed to service, and large fines.[190]Furthermore, Claimant has been given a BB rating, based on its looming liquidity crunch, risky investments, and exposure to external risks.[191] Both Caeli and Claimant thus fail to guarantee that a loan would be *'sufficiently secured'*.

214 It is thus evident, that in its granting of the loans under Executive Order, Respondent followed transparent and non-discriminatory criteria.

215 In conclusion, all of Respondent's administrative and executive measures were rooted in rational decision-making processes which fail to meet the required standard for a breach of FET.

D. Respondent's actions and measures were neither coercive nor abusive and they did not amount to conspiracy or concerted campaign

216 Contrary to Claimant's allegations, Respondent's actions were not abusive nor coercive. They also did not amount to conspiracy or concerted campaign.

217 The leading case *Pope & Talbot,* when discerning the meaning of '*abuse*' and '*coercion*', places emphasis on the '*confrontational and aggressive*'[192] character of the

[189] PO4, ¶7.
[190] *SoUF*, ¶51.
[191] PO4, ¶5.
[192] *Pope & Talbot*, ¶181.

measures implemented by the State. It further attributes the responsibility for a combat-like state of affairs between the investor and the State to the latter.[193] The State in *Pope & Talbot* subjected the investor to i.a. threats and unnecessary expenses, causing it to suffer a loss of reputation.[194] These actions were what should be deemed 'abusive' or 'coercive' in eyes of the tribunal. The threshold to be met is therefore a high one.[195] Furthermore, for an act to be deemed a conspiracy or a concerted campaign, the State's conduct and intention needs to be of even more egregious character. A '*conspiracy*' is *'a conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement.'*[196] It is a '*purposeful*' infliction of damage upon the investment,[197] where the intent must be clearly demonstrated and proved by the investor.[198]

218 Lastly, as is the case with other breaches of FET, the act must be attributable to the host State.[199]

219 In the present case, Claimant's allegations are two-fold. Claimant submits that the actions of CCM and Mekar Airservices were abusive and coercive, forcing Claimant to sell its investment. Claimant further elaborates that actions of different branches of Respondent's government taken together amounted to a concerted practice, aimed at re-nationalization of Caeli. Both assertions, however, are erroneous.

i. CCM's conduct was neither confrontational nor aggressive

220 As demonstrated above, all actions of CCM were conducted in a non-arbitrary and non-discriminatory manner that was respectful of awarding Caeli due process. CCM has not initiated or supported any confrontations with Caeli or Claimant. It has not imposed measures which would be burdensome but followed the principles of necessity and proportionality.

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[193] *Ibid*.
[194] *Ibid*.
[195] *EDF*, ¶300, *Bayindir*.
[196] *Waste Management*, ¶138.
[197] *Vivendi*, ¶7.4.39.
[198] *Ibid*.
[199] *Dolzer & Schreuer*, p.222.

221 CCM's conduct thus fails to meet the threshold of abusiveness defined in *Pope & Talbot.*

ii. Actions of Mekar Airservices do not constitute a breach of FET

222 Secondly, actions of Mekar Airservices also fail to constitute a breach of FET by Respondent for two reasons. Firstly, they also fail to meet the threshold of confrontationality and aggressiveness from *Pope & Talbot.* Secondly, and most importantly, actions of Mekar Services are not attributable to Respondent.

223 It is undisputed that actions of entities exercising government authorities are attributable to the host State.[200] The state is responsible for its organs, e.g. courts, competition authorities or the Central Bank. However, the test for attribution for natural persons or legal entities is more elaborate.[201] According to Article 8 of ILC Articles, attribution to the state of conduct under the 'direction or control' of the state requires not only that the entity is generally controlled by the state but that the individual operation in question was effectively controlled by the State.[202]

224 Claimant has failed to meet the burden of proof required for actions of Mekar Airservices to be attributed to Respondent. They cannot thus constitute a breach of FET.

iii. Respondent's conduct does not amount to conspiracy or concerted campaign

225 Lastly, Claimant also fails to meet the burden of proof for conspiracy and concerted campaign. It not only fails to demonstrate the intentionality of Respondent's alleged misconduct, but also presents as a '*purpose*' of Respondent's activity the objective of re-nationalization of Caeli. Claimant seems to forget, however, that at no moment was Claimant forced to or coerced into selling its stake in Caeli. Claimant's right of ownership remained uninfringed. Claimant was free to dispose of its shares, or to keep them. It is therefore illogical for Claimant to blame Respondent for Claimant's own free exercise of its right.

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[200] *ILC*, Article 5.

[201] *Dolzer & Schreuer*, p. 222.

[202] *Dolzer & Schreuer*, p. 222.

226 In conclusion, Claimant fails to meet the burden of proof for the allegation that Respondent's measures were coercive, abusive, and amounted to conspiracy and concerted campaign.

227 This Tribunal should find that Claimant's allegations are groundless. Respondent has treated Claimant fairly and equitably. Respondent obeyed its own domestic law and international standards. It behaved in a non-arbitrary, non-discriminatory and non-confrontational, enacting measures that were reasonable, proportionate and necessary. The Tribunal should thus find that Respondent has not breached the Article 9.9 of CEPTA.

IV THE COMPENSATION REQUESTED BY CLAIMANT SHALL BE ASSESSED ON THE BASIS OF THE MARKET VALUE STANDARD

228 Respondent has not violated CEPTA thus no compensation to Claimant is due. However, if the Tribunal concludes that Respondent has violated CEPTA and owes Claimant compensation, the compensation requested by Claimant shall be assessed on the basis of the 'market value' standard (**A**).

229 Under a 'market value' standard Claimant is owed no compensation, since Respondent has already paid the market value of Claimant's investment (**B**).

230 In any event, any compensation paid to Claimant should be reduced considering the presence of mitigating factors (**C**).

A. The compensation requested by Claimant shall be assessed on the basis of the 'market value' standard

231 Respondent respectfully requests the Tribunal to find that the 'market value' is an appropriate compensation standard for quantification of damages under CEPTA (**i**). By no means the most favored nation clause can derogate from the standard expressly prescribed in CEPTA (**ii**).

i. The 'market value' standard of compensation should govern the valuation under CEPTA

232 The 'market value' standard of compensation should govern the valuation on the basis of Article 9.21 of CEPTA.

233 In order to determine the appropriate standard of compensation for the breach of FET, investment tribunals start the analysis with an appropriate investment treaty.[203]

234 Article 9.21 (1) (a) of CEPTA expressly provides that:

> *'Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination:*

[203] *SD Myers*, ¶309, *MTD*, ¶238.

(a) monetary damages at a market value, except as otherwise provided for in Article 9.12; and […]'.

235 CEPTA differentiates the standard of compensation appropriate for the expropriation and other breaches of the agreement. Under Article 9.21 (1) (a) any monetary damages awarded against the Respondent are compensated at the market value, except the damages from expropriation cases wherein the compensation shall amount to the fair market value of the investment.

236 Respondent further differentiates 'market value' and 'fair market value' standard of compensation in its investment treaties. Respondent's model BIT refers to compensation at 'market value'.[204]

237 Principles of international law shall apply only if an investment treaty lacks the definition of compensation standard itself. In the past, investment treaties determined the compensation standard only within the expropriation section in terms of 'prompt, adequate and effective compensation', whereas in terms of compensation standard for a violation of the FET, these treaties themselves are silent so that the remedies were sought by applying the relevant principles of public international law.[205]

238 Here, differentiation made under Article 9.21 is sufficient enough to determine the appropriate standard of compensation for the breach of FET. Thus, under Article 9.21 of CEPTA 'market value' standard of compensation should govern the valuation.

ii. The most favored nation clause does not allow Claimant to derogate from the standard expressly prescribed in CEPTA

239 Contrary to Claimant's submission, the most favored nation clause does not allow Claimant to derogate from the standard expressly prescribed in CEPTA, as Article 9.7 of CEPTA excludes the application of its provision in procedural matters.

240 Pursuant to Article 9.7 (2) of CEPTA the most favored nation clause provided for in Article 9.7 (1) of CEPTA does not apply to '*procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements*.'

[204] PO3, p. 87.

[205] *Weiniger*, p. 198.

241 The most favored nation clause does not apply to the assessment of compensation standard in CEPTA, as its application is expressly excluded in procedural matters for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. *A contrario*, in *CME v. Czech Republic* where the tribunal applied the most favored nation clause to assess the appropriate standard of compensation under the Czech Republic-Netherlands BIT, the Czech Republic-Netherlands BIT explicitly extended the application of the most favored nation clause to the treatment as compensation.

242 Article 13 of Arrakis-Mekar BIT, explicitly adopting fair market value compensation standard, establishes the procedural framework of compensation under Arrakis-Mekar BIT. Therefore, such a provision does not constitute 'treatment' within the meaning of Article 9.7 of CEPTA itself.

243 Since compensation does not qualify as 'treatment' under CEPTA, Claimant cannot avail the 'fair market value' compensation standard according to the most favoured nation obligation contained in CEPTA.

B. Respondent has already paid the market value of Claimant's investment

244 Respondent has already paid the market value for Claimant's investment by purchasing its stake in Caeli Airways for USD 400 million. Therefore, Claimant is owed no compensation.

245 International Valuation Standards, a widely adopted understanding of valuation standards developed by the IVS Committee, an NGO with a consultative status with the United Nations, defined the market value as:

> *'The estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction after proper marketing and where the parties had each acted knowledgeably, prudently, and without compulsion'.*

246 Claimant allegedly acquired a 'bona fide third party' offer from Hawthorne Group to buy Claimant's stake in Caeli Airways. However, Hawthorne Group's offer could not be considered as an arm's length commercial price due to Hawthorne Group's affiliation with Claimant through the Moon Alliance. Thus, Respondent could not have accepted an

offer to purchase the shares at artificially inflated price, as it was further confirmed by an arbitration.[206]

247 Claimant was unable to attract other suitable buyers for its shares in Caeli Airways, so that Respondent has purchased its stake in Caeli at the market value estimated at USD 400 million. Therefore, the Claimant is owed no compensation.

C. In any event, any compensation paid to Claimant should be reduced considering the presence of mitigating factors

248 In any event, any compensation awarded to the Claimant should be reduced, as Claimant bears responsibility for the losses it has incurred (**i**). In any case, the compensation that may be awarded should have to take the dire economic situation in Mekar into account (**ii**).

i. Claimant bears responsibility for the losses it has incurred

249 Compensation that may be awarded should have to take into account Claimant's responsibility for the losses it has incurred.

250 Tribunals in the past have reduced compensation, if they considered that the investor contributed substantially to risk or damage and did not apply professional due diligence.

251 In *MTD,* tribunal noted that the BITs are not insurance against business risk and held that the claimants should bear the consequences of their own actions as experienced businessmen. Since claimants took risks irrespective of respondent's actions, *MTD* tribunal reduced the compensation payable by 50 per cent.[207]

252 Here, industry experts in Aviation Analytics, a leading international quarterly, admitted that Claimant's rapid expansion in Respondent's market was ill-advised.[208] Such assessment was confirmed by Fitch Ratings. Claimant was assigned a 'BB' Long-Term Issuer Default Rating, due to its looming liquidity crunch, risky investments, and

[206] *SoUF*, p. 39.
[207] *MTD*, ¶178
[208] Annex IX, p. 57.

exposure to external risks, little financial flexibility and insufficient funds for overall sustainable growth.[209]

253 Respondent continuously warned the Claimant against such an exorbitant approach. However, while Respondent's representatives present on Caeli Airways' board advised injecting Claimant's profits into outstanding debt and improving financial health, Claimant's representatives preferred fleet expansion and slashed airfares.[210] Thus, Respondent cannot be held accountable for Claimant's risky business choices.

ii. Compensation that may be awarded should have to take into account the dire economic situation in Respondent

254 In addition, losses incurred by Claimant were a result of drastic change in economic situation. Respondent cannot bear responsibility for the macroeconomic situation, in particular unpredictable commodity prices.

255 As derived from the tribunal in *SD Myers*, compensation should be awarded for the overall economic losses sustained by the claimant that are an approximate result of the state's measure, not just those that appear on the balance sheet of its investment.[211] Thus, to be recoverable a loss must be linked causally to interference with an investment located in a host state.[212]

256 Caeli Airways' business model was based around undercutting competition with low prices, as it benefited from low oil prices. Rise in oil prices in 2018 left Caeli Airways in a state of deeper financial distress, especially due to its continued operation of old aircraft until this time. Furthermore, Claimant's extravagant approach to its investment activities, funneling funds towards rapid expansion and ill-strategized business plans precipitated into a precarious financial situation for the Claimant when the economic downturn hit Respondent.

257 Respondent was engulfed in economic crises, caused *inter alia* by shaky investor sentiment and tariff threats from trading partners.[213] As a result, Respondent was facing

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[209] PO4, p. 89.
[210] *SoUF*, p. 34.
[211] *SD Myers*, ¶122.
[212] *Weiniger*, p. 199.
[213] *SoUF*, p. 35.

a potential third debt default in as many decades. A 2019 IMF report predicted four consecutive quarters of negative growth for Respondent, an 8 per cent fall in GDP, and a 2600 per cent average inflation rate in 2020.[214] In order to pay the USD 700 million demanded by Claimant, Respondent would have to transfer about twice its consolidated annual public spending to Claimant.[215]

258 Losses sustained by Claimant in the aftermath of the financial downturn in Respondent cannot be attributed to Respondent's measures. Caeli Airways' profitability was hurt by the change of commodity prices together with an economic crisis in Respondent. Thus, overall economic losses sustained by the Claimant cannot be causally linked to Respondent's actions. Since total economic losses incurred by Claimant are a combined result of the 2017 economic crisis in Respondent, currency and commodity prices fluctuations, any compensation awarded to Claimant should be reduced considering the presence of mitigating factors beyond causal link to any Respondent's interference.

259 Therefore, the Tribunal should reduce any compensation awarded considering the ongoing economic crisis in Respondent.

[214] PO3, p. 86.

[215] PO3, p. 86.

PRAYER FOR RELIEF

In light of all submissions, Respondent respectfully requests this Tribunal to find that:

(1) it lacks jurisdiction over the present dispute under Chapter 9 of CEPTA;

If this Tribunal finds that it has jurisdiction to hear the dispute:

(1) it should grant the leave to the submission of External Advisors to CRPU whereas it should reject the CBFI's *amicus curiae* submission

(2) Respondent has not violated Article 9.9 of CEPTA;

(3) Claimant is entitled no compensation, since any compensation requested by Claimant shall be assessed at the market value and Respondent has already paid the market value of Claimant's investment; in the alternative, the Tribunal should reduce any compensation awarded considering the presence of mitigating factors.

Respectfully submitted on 23 September 2021

By:

Team Padilla

On behalf of Respondent:

The Federal Republic of Mekar