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

BETWEEN:

Vemma Holdings Inc.

Claimant

AND

The Federal Republic of Mekar

Respondent

MEMORIAL FOR THE RESPONDENT
TEAM 1605 PATHAK G

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

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INDEX OF ABBREVIATIONS

¶/¶¶	Paragraph(s)
Additional Facility Rules	Rules Governing the Additional Facility for the Administration of Proceedings by The Secretariat of The International Centre for Settlement of Investment Disputes
AF (Arbitration) Rules	Additional Facility (Arbitration) Rules
Arrakis-Mekar BIT	Treaty between the Federal Republic of Mekar and the Kingdom of Arrakis for the Promotion and Protection of Investments.
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
Bonooru	Commonwealth of Bonooru
Bonooru Constitution	Constitution Act of Bonooru, 1947
CAA	Mekar Commercial Arbitration Act
Caeli/Caeli Airways	Caeli Airways JSC
CCM	Competition Commission of Mekar
CEPTA	Comprehensive Economic Partnership and Trade Agreement between the Commonwealth of Bonooru and the Federal Republic of Mekar
CILS	Centre for Integrity of Legal Services
Consortium	Consortium of Bonoori Foreign Investors

EACRPU	External Advisors to the Committee on the Reform of Public Utilities
FMV	Fair Market Value
Hawthorne	Hawthorne Group LLP
the Centre	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ILC	International Law Commission
IMF	International Monetary Fund
ISDS	Investor-State Dispute Settlement
L:	Line
LLC	Lapras Legal Capital
Mekar	Federal Republic of Mekar
Mekar Airservices	Mekar Airservices Ltd
Memorandum of Association	Memorandum of Association of Vemma Holdings Inc.
MFN	Most-Favoured Nation
MRTPA	Monopoly and Restrictive Trade Practice Act
MV	Market Value

P:	Page
PCA	Permanent Court of Arbitration
Phenac	Phenac International Airport
SCC	Sinnoh Chamber of Commerce
Shareholders' Agreement	Shareholders' Agreement relating to Caeli Airways
SOE	State-owned Enterprise
the First Investigation	Competition Commission of Mekar's first investigation into Caeli Airways on 9 September 2016
the HCCM	High Commercial Court of Mekar
the Mekari Courts	High Commercial Court of Mekar and Superior Court of Mekar
the SCM	Superior Court of Mekar
the Second Investigation	Competition Commission of Mekar's second investigation into Caeli Airways in December 2016
UNCITRAL Rules	United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration
VCLT	Vienna Convention on the Law of Treaties 1969

From the Record

Annex I	Constitution Act of Bonooru, 1947

Annex II	Constitutional Court of Bonooru on Mobility Rights (excerpts)
Annex III	Constitutional Court of Bonooru on Privatisation of BA Holdings (excerpts)
Annex IV	Memorandum of Association of Vemma Holdings Inc.
Annex V	Monopoly and Restrictive Trade Practice Act, as Amended in 2009
Annex XII	14 June 2020 Centre for Integrity in Legal Services Report
Annex XIII	Supreme Arbitrazh Court of Sinnograd Judgement
Annex XIV	High Commercial Court of Mekar ruling - 23 August 2020
NOA	Notice of Arbitration
Response to NOA	Response to the Notice of Arbitration
SOUF	Statement of Uncontested Facts

STATEMENT OF FACTS

Dramatis personae

The Claimant is an airline holding company incorporated in Bonooru, the economical giant and dominant capital exporter of the Greater Narnian Region. Until March 2020, Bonooru retained minority shareholding in the Claimant. The Claimant acquired the right to initiate the present arbitration through CEPTA.

The Respondent is Mekar, a country south of Bonooru. It has a history fraught with political instability, corruption struggles, mass emigration and resource exploitation by intermediate occupying powers.

The Claimant's investment

On 5 January 2011, the Respondent accepted the Claimant's tender, valued at 800 million USD. The Claimant acquired an 85% stake in Caeli, while the Respondent maintained 15% ownership through Mekar Airservices. Simultaneously, the Claimant and Mekar Airservices entered into a Shareholders' Agreement.

On 5 March 2011, CCM approved Claimant's acquisition of an 85% stake in Caeli and the airline's participation in the Moon Alliance.

In April 2014, the Respondent and Bonooru signed the CEPTA, which came into force on 15 October 2014. As the Respondent has not signed and ratified the ICSID Convention, the Claimant submits the present dispute to arbitration under the Additional Facility Rules.

CCM's investigation into Caeli Airways

In September 2016, CCM launched the First Investigation into Caeli for predatory pricing and placed caps on Caeli's airfare. The caps were not protested and did not affect Caeli's profitability.

In December 2016, CCM launched the Second Investigation into Caeli in response to complaints from a consortium of small regional airlines for price undercutting.

Mekar's currency crisis

On 30 January 2018, the Respondent decreed all companies operating in Mekar to offer goods denominated exclusively in MON in response to a currency crisis.

Caeli requested an exception to this measure to allow them to denominate their airfare in USD, which was initially granted by Mekair authorities in October 2017. Subsequently, the exception was nullified in January 2018 due to political changes and the need for currency stabilisation, which was protested by Caeli. On 27 March 2018, Caeli registered a judicial review claim against CCM. A hearing on interim measures was scheduled only in April 2019 due to a high volume of cases considering Mekar's dire financial circumstances; the Court Registrar further rejected Caeli's request for an immediate hearing due to a lack of resources and a need to prioritise criminal matters.

Conclusion of CCM's Investigations

By end August 2018, CCM concluded its First Investigation into Caeli. The CCM found a breach of Mekar's antitrust legislation, fined Caeli MON 150 million, and kept the airline caps in place pending the Second Investigation.

On 1 January 2019, CCM completed its Second Investigation into Caeli, fined Caeli MON 200 million, and retained the airfare caps on Caeli.

On 20 January 2019, Caeli's representatives appealed both orders of CCM in Mekari courts. On 15 June 2019, Justice VanDuzer declined to remove the airfare caps on a balance of convenience and consideration of the merits of the claim.

The Claimant's exit from Caeli

In November 2019, representatives of the Claimant announced their intention to sell their stake and secured an offer from Hawthorne, an affiliate of the Claimant's through the Moon Alliance, for the Claimant's entire stake in Caeli.

In its response dated 17 December 2019, Mekar Airservices rejected the offer on the grounds the price was artificially inflated. Mekar Airservices filed a request for arbitration on 11 February 2020. It requested the tribunal to find that the Claimant had failed to secure a bona fide third party offer under Article 39 of the Shareholders' Agreement.

Upon the parties' failure to agree upon a sole arbitrator, the SCC Secretariat appointed Mr. Rett Eichel Cavanaugh, who rendered an award in favour of Mekar Airservices on 9 May 2020. A report released on 14 June 2020 by the CILS alleged that Mr. Cavannaugh had received bribes from Mekar Airservices representatives to render a favourable decision, allegations that were denied by Mekar.

The Claimant filed to set aside the award of 9 May 2020 at the court in Sinnoh. On 1 August 2020, the Supreme Arbitrazh Court of Sinnograd set aside the award in an unprecedented move. Mekar Airservices nonetheless sought to enforce the award before the High Commercial Court of Mekar. On 23 August 2020, the Court ruled to recognize and enforce the award in Mekar. The Claimant appealed the judgment before the Superior Court of Mekar. On 25 September 2020, the Superior Court dismissed the Claimant's appeal.

Between February and September 2020, the Claimant failed to find another buyer. Thus, the Claimant sold its stake in Caeli to Mekar Airservices on 8 October 2020 for 400 million USD.

The initiation of the present proceedings

The Claimant filed a notice of arbitration against the Respondent on 15 November 2020 to seek compensation for its losses, pursuant to the CEPTA and Additional Facility Rules.

SUMMARY OF ARGUMENTS

Phase I

Jurisdiction:

The Tribunal does not have jurisdiction under Article 2 of the Additional Facility Rules because the Claimant is not a 'national' of another state.

Firstly, the Claimant was discharging an essentially governmental function through the course of its investment in Caeli Airways. It invested in Caeli Airways in furtherance of the Caspian Project, a governmental initiative by the Bonoori government. Further, it managed Caeli Airways in a manner so as to assist the Bonoori government in satisfying its positive obligations under Article 70 Bonooru Constitution.

Secondly, further or in the alternative to the first, the Claimant made its investment as a *de facto* agent for the Bonoori government. This is on the basis that at all times, the Claimant was under the influence of and indirect control of the Bonoori government.

Filing of Amici Submissions by the Consortium:

This Tribunal should bar the Consortium's submission to file amici submissions because it does not fulfil the necessary criteria under Rule 41(3) Arbitration (AF) Rules and Article 9.19(3) CEPTA.

Firstly, the submission does not bring a perspective, particular knowledge or insight that is different from the Disputing Parties as the Consortium's submissions will be duplicative of the Claimant's.

Secondly, the submission does not further the public interest in the transparency of the arbitration.

Finally, the Consortium's lack of independence from the Claimant raises a conflict of interest which unfairly prejudices the Respondent.

Filing of Amici Submissions by EACRPU:

This Tribunal should grant leave for EACRPU to file amici submissions because it fulfils all the necessary criteria under Rule 41(3) Arbitration (AF) Rules and Article 9.19(3) CEPTA.

Firstly, the submission is within the scope of the dispute because the definition of 'investment' in the CEPTA has an implicit legality requirement.

Secondly, the EACRPU has a significant interest in the proceedings, provides a particular knowledge or insight that is different from the Disputing Parties, and there is a clear public interest in the subject matter of the arbitration.

Phase II

Merits:

The Respondent did not breach Article 9.9 CEPTA by its measures either individually or taken together.

Firstly, the Respondent was justified in investigating the Claimant's investment, and requiring it to maintain its airfares below the capped limit to ensure that consumers were protected.

Secondly, the Respondent was acted reasonably and proportionately in requiring companies to denominate their goods and services in MON to bolster the economy.

Thirdly, the Respondent did not unfairly discriminate against the Claimant by refusing grant it financial assistance.

Fourthly, the Respondent did not deny the Claimant justice in its Courts because the Claimant was able to receive a prompt and reasonable judgement from the Courts.

Finally, the Respondent was justified in enforcing the arbitral award given that it is not proven that the award was tainted by corruption.

Remedy:

Firstly, the Respondent has fully compensated the Claimant for its losses based on the MV of its investment which is the appropriate standard of compensation based on a proper interpretation of CEPTA.

Secondly, the Respondent is not obligated by the CEPTA to compensate the Claimant based on FMV given the existence of the MFN clause due to the *ejusdem generis* rule.

Finally, the measure of the compensation should be reduced because of the Claimant's contributory negligence and the dire economic crisis the Respondent was facing.

ARGUMENTS

PHASE I: JURISDICTION AND AMICI SUBMISSIONS

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION *RATIONE PERSONAE* TO DECIDE ON THE PRESENT CASE

1. Under Article 2 Additional Facility Rules, there are two jurisdictional requirements for the Secretariat of the Centre to be authorised to administer proceedings. *Firstly*, the proceedings must fall within one of the categories enumerated in Article 2(a)-(c). *Secondly*, the proceedings must be between a State and a national of another State (herein referred to as the 'national' requirement).

2. In the present circumstances, the Tribunal does not have jurisdiction over the present dispute as the Claimant does not satisfy the 'national' requirement.

A. The rules of attribution under ARSIWA are the relevant standard to assess the 'national' requirement

3. Under the Additional Facility Rules, the 'national' requirement exists to ensure fidelity to the goal of the Centre as an Investor-State dispute resolution regime[1] and therefore precludes the arbitration of State-to-State disputes. However, this is complicated by the existence of SOEs given that such entities do not fall neatly into either side of the Investor-State dichotomy.

4. Although the Additional Facility Rules are silent as to the treatment of SOEs, the relevant rules of interpretation under the VCLT indicate that the rules of attribution under ARSIWA are the relevant standard to determine whether the Claimant should be regarded as a 'national' of another State.

[1] ICSID World Bank Group.

1. The Additional Facility Rules are silent as to the treatment of SOEs vis-à-vis the 'national' requirement

5. The general rule of interpretation requires that a treaty be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty.[2] While both the ICSID Convention[3] and the Additional Facility Rules[4] offer definitions of the clause "national of another [Contracting] State", neither definition resolves the ambiguity in determining whether SOEs would fall within the scope of the clause.

2. ARSIWA is a relevant and applicable set of international laws under Article 31(3) VCLT

6. Under Article 31(3) VCLT, "any relevant rules of international law applicable in the relations between the parties" are to be taken into account in interpretation.

7. In this regard, the ARSIWA is relevant as "a codification of customary international law with regard to the issue of attribution of conduct [of a State]."[5] Although ARSIWA only *expressly* covers the responsibility of States to "another State, to several States, or to the international community as a whole",[6] it is "without prejudice to any right arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State."[7]

8. Further, ARSIWA has found favour in numerous investment tribunal decisions to determine whether the acts of corporations or entities, committed towards a foreign investor or its investment, could be attributed to the host State and give rise to that State's responsibility.[8]

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[2] VCLT, Article 31.
[3] ICSID Convention, Article 25(2).
[4] Additional Facility Rules, Article 1(6).
[5] *Tulip,* ¶281.
[6] ILC ARSIWA, Article 33(1).
[7] *Ibid*, Article 33(2).
[8] *Flemingo*, ¶420. See also *Bayindir* and *Tulip*.

3. The relevant travaux préparatoires *confirms the applicability of ARSIWA*

9. Where interpretation "leaves the meaning ambiguous or obscure",[9] the tribunal is permitted recourse to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion."[10]

a) The jurisprudence of Article 25 ICSID Convention is persuasive

10. As a preliminary matter, it is apposite to note that the jurisprudence of Article 25 ICSID Convention is highly persuasive in interpreting Article 2 Additional Facility Rules. This is on the basis that the two provisions are *in pari materia*—Article 2 Additional Facility Rules restricts the jurisdiction of the Secretariat of the Centre to proceedings "between a State…and a national of another State" while Article 25 ICSID Convention restricts the jurisdiction of the Centre to disputes "between a Contracting State…and a national of another Contracting State."

11. In *Lion Mexico*, the tribunal justified reliance on the jurisprudence of Rule 41(5) ICSID Convention to interpret Article 45(6) Additional Facility Rules on the basis that the two provisions contained "effectively the same language."[11] Given that Article 2 Additional Facility Rules and Article 25 ICSID Convention similarly contain "effectively the same language", the jurisprudence of Article 25 ICSID Convention is highly persuasive.

b) The jurisprudence of Article 25 ICSID Convention endorses the ARSIWA as the relevant standard

12. In this regard, the jurisprudence of Article 25 ICSID Convention endorses the ARSIWA as the relevant standard to assess the 'national' requirement.

13. In addressing the issue of the qualification of SOEs under Article 25 ICSID Convention at a Hague Academy of International Law course in 1972, Aaron Broches, the first secretary-general of ICSID and one of the principal drafters of the Convention, formulated what has now come to be known as the *Broches* test:

[9] VCLT, Article 31.
[10] *Ibid*, Article 32.
[11] *Lion Mexico*, ¶56.

> "[F]or purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' *unless it is acting as an agent for the government* ***or*** *is discharging an essentially governmental function*" (emphasis added).[12]

14. The *Broches* test has found favour in numerous tribunal decisions.[13] More importantly, the factors in the *Broches* test have been characterised as "mirror image[s]"[14] of the attribution rules in Articles 5 and 8 of the ARSIWA. In particular, the 'agency' requirement mirrors Article 8 ARSIWA which deals with attribution of conduct "directed or controlled by a State"[15] while the "discharging an essentially governmental function" requirement mirrors Article 5 ARSIWA which deals with attribution of conduct of entities "exercising elements of governmental authority."[16]

15. In this regard, the ARSIWA is the most persuasive standard by which we can determine whether the Claimant, as an SOE, was acting in the capacity of a 'national' of another state or whether its conduct can be attributable to its home state of Bonooru.

B. The Claimant does not satisfy the 'national' requirement under the ARSIWA rules as reflected in the *Broches* test

16. In the present circumstances, the Claimant therefore does not satisfy this 'national' requirement for two reasons. *Firstly*, through the course of its investment in Caeli Airways, the Claimant was discharging an essentially governmental function. *Secondly*, further or in the alternative to the first, it made such investments under the effective control of the Bonoori government.

[12] Selected Essays, P:202.
[13] See *CSOB*, *Maffezini*, and *BUCG*.
[14] *BUCG*, ¶34.
[15] ILC ARSIWA, Article 8.
[16] *Ibid*, Article 5.

1. The Claimant was discharging an essentially governmental function through the course of its investment in Caeli Airways

17. Under the second limb of the *Broches* test, an SOE is disqualified from being a 'national' of another state where it is "discharging an essentially governmental function". This mirrors Article 5 ARSIWA which states that where an entity is "empowered by the law of that State to exercise elements of the governmental authority", such conduct is attributable to the State, provided the entity was acting in that capacity. As noted in the ARSIWA Commentary, this limb aims to capture "situations where former State corporations have been privatized but retain certain public or regulatory functions."[17]

18. It is generally understood that if the act is to be regarded as an act of the state, "the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage." [18] Further, the appropriate focus is not on the *general* functions of the state entity but rather the functions of the entity *in the particular instance*, [19] i.e. in the Claimant's investment in Caeli Airways.

19. In this regard, in its investment in Caeli Airways, the conduct of Claimant should be regarded as more 'governmental' than 'commercial' for two reasons.

20. *Firstly*, the Claimant's investment in Caeli Airways was carried out under the auspices of the Caspian Project, an initiative by the Bonoori government dedicated to developing regional infrastructure in Greater Narnia.[20]

21. *Secondly*, in managing Caeli Airways, a cornerstone of its business model was the offering of low-cost flights between Bonooru and Mekar in furtherance of the government's positive obligation under Article 70 of the Bonooru Constitution, notwithstanding that these were loss-making routes.

[17] ILC ARSIWA, Article 5(1).
[18] *Ibid*, Article 5(5). See also *CSOB,* ¶20, *Maffezini*, ¶80, and *BUCG*, ¶35.
[19] *BUCG,* ¶31.
[20] PO 4, ¶1.

a) The investment in Caeli Airways was for the purpose of a governmental initiative, the Caspian Project

22. The Caspian Project is an initiative by the Bonooru Government to "facilitate the movement of goods, people, services, and knowledge amongst its neighbours"[21] by "developing regional infrastructure in Greater Narnia."[22] As part of the Caspian Project, the Bonoori Ministry of Transport and Tourism also implemented the Horizon 2020 Scheme. Under this scheme, companies investing in tourism-related infrastructure in Bonooru may apply to receive recurring subsidies.

23. In this respect, an overriding purpose of the Claimant's investment in Caeli Airways was the furtherance of the Caspian Project. This was in fact expressly declared in the Claimant's application to receive subsidies under the Horizon 2020 Scheme. In its application, the Claimant "credibly outlined" how its expansion into Mekar would bring "substantial benefits not only to Vemma but to all of Bonooru by enhancing the aviation network available to prospective tourists."[23] It was on this basis that Ms. Sabrina Blue, Bonooru's Secretary of Transportation and Tourism and former head of Vemma's board of directors, declared that the Claimant's investment would "boost the tourism infrastructure at [Bonooru's] disposal."[24]

b) Caeli Airways' business was managed for the purpose of fulfilling the responsibilities of the Bonoori government

24. In the Claimant's management of Caeli, the provision of high-traffic routes between Mekar and Bonooru as a "pillar"[25] of its business model was more 'governmental' than 'commercial' for two reasons.

25. *Firstly*, one of the principal objectives of the Claimant was to assist the Bonoori Government in upholding its positive obligation under Article 70 Bonooru Constitution.

[21] SOUF, ¶4.
[22] PO 4, ¶1.
[23] SOUF, ¶28.
[24] *Ibid*.
[25] *Ibid*.

26. Within Bonooru there exists a positive obligation[26] under Article 70 Bonooru Constitution for the Bonooru government to uphold the mobility rights of its citizens through, *inter alia*, ensuring the provision of essential transportation to the population living in remote areas (herein known at the Article 70 obligation).[27]

27. In the context of Bonooru's erstwhile centralised command economy,[28] this positive obligation was fulfilled through BA Holdings, the now-defunct state-owned parent company to Bonooru Air, Bonooru's former national carrier and monopoly civil airline. As the successor to BA Holdings, the Claimant has inherited this fundamentally governmental responsibility of satisfying the Article 70 obligation as enshrined in the Memorandum of Association of Vemma[29] and recognised by the Constitutional Court of Bonooru.[30]

28. The significance of this governmental purpose can be seen from the implementation of the bail-in program to rescue Vemma from insolvency, which was carried out on the basis of "secur[ing] the citizens' rights under Article 70."[31] This unequivocally weighs in favour of the assertion that the in upholding of mobility rights under Article 70 obligation, the Claimant was upholding such a critical and essential governmental function that Bonoori government was forced to intervene in order to protect it.

29. *Secondly*, that the management of Caeli Airways to provide high-traffic routes between Mekar and Bonooru was done not for commercial reasons, but for the purpose of upholding the Article 70 obligation. This is on the basis that the continued provision of these high-traffic routes was in fact detrimental to Caeli Airways' business.

[26] Annex II, ¶25.
[27] SOUF, ¶5.
[28] *Ibid*, ¶3.
[29] Annex IV, ¶3(h).
[30] Annex III, ¶59.
[31] SOUF, ¶65.

30. Historically, Caeli Airways' suffered losses incurred from regional flights as result of a seasonal decline in demand during the fall-winter period.[32] Based on the statistics from 2014, these losses were particularly concentrated in the high-traffic routes between Bonooru and Mekar.[33] Such losses were unlikely to be a surprising outcome given the emergence of regional competitors offering low-fare flights between Bonooru and Mekar.[34] Despite being warned of the volatility of demand in fall and winter months,[35] the Claimant was resolute in continuing the high-traffic routes between Bonooru and Mekar. In fact, Caeli Airways' business strategy of increasing the the number of Caeli's international routes was for the purpose of offsetting the fall-winter losses,[36] incurred primarily from the high-traffic routes between Bonooru and Mekar.

31. In light of these facts, it seems apparent that the provision of these high-traffic routes was not for the commercial purpose of profit. Instead, these high-traffic routes were for the purposes of fulfilling the Article 70 obligation.

32. Thus, in totality, it is evident that in its investment in Caeli Airways, the Claimant was discharging essentially governmental functions insofar as the investment was made in furtherance of the Caspian Project and the management of Caeli Airways centred on assisting the government to fulfil the Article 70 obligation.

2. Further or in the alternative, the Claimant was acting as an agent of Bonooru

33. Under the 'agency' limb of the *Broches* test, SOEs that act as an agent for the government cannot satisfy the 'national' requirement. This mirrors Article 8 ARSIWA, which provides that 'agency' is satisfied where an entity acts "on the instructions of" or "under the direction or control" of the State in carrying out the conduct.[37]

[32] SOUF, ¶30.
[33] *Ibid*, ¶33.
[34] *Ibid*, ¶33.
[35] *Ibid*, ¶29.
[36] *Ibid*, ¶31.
[37] ILC ARSIWA, Article 8.

34. In *BUCG*, it was emphasised that the analysis was focused on the "fact-specific context."[38] This is consistent with the Commentary to ARSIWA which notes that conduct will be attributable to the State "only if it directed or controlled the specific operation", and not conduct "only incidentally or peripherally associated with an operation."[39] Nevertheless, it is submitted that the agency requirement here is satisfied because the Claimant was, for all intents and purposes, under the *de facto* control of the Bonoori government.

35. *Firstly*, Bonooru has historically maintained a sizable stake in the company, holding between 31% to 38% of the shares in Vemma enshrined the company's Memorandum of Association.[40] Further, it has always been the largest single shareholder in Vemma—no other shareholder holds more than a 7% stake in Vemma.[41]

36. *Secondly*, even though the only official representative of the Bonoori government is through the nomination of a single non-executive director by the Ministry of Transport and Tourism,[42] the true extent of governmental control within Vemma runs far deeper. Vemma's articles of incorporation only require 50 per cent of voting shares for a quorum at regular meetings, which includes meetings for the election of directors.[43] As acknowledged by the Claimant, Bonooru's representatives form a majority of members present and voting when not all other shareholders attend.[44] Thus, the Bonoori government in fact has a significant and direct say in the constitution of Vemma's board of directors, the Company's decision-making authority.[45]

37. This relationship of *de facto* control between the Bonooru government and Vemma is common knowledge[46]—in fact, one of the foremost reasons why Vemma was granted the tender to invest in Caeli Airways was precisely because of Vemma's close ties with the Bonoori government.[47]

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[38] *BUCG*, ¶39.
[39] ILC ARSIWA, Article 8, Commentary, ¶3.
[40] Annex IV, ¶5.
[41] PO 4, ¶2.
[42] Annex IV, ¶152.4.
[43] PO 3, ¶3.
[44] *Ibid*.
[45] Annex IV, ¶152.
[46] Annex VII, L:1860.
[47] SOUF, ¶24.

38. Ultimately, the intimate relationship between the Bonoori government and the management of Vemma is demonstrated by the fact that in 2010, Ms. Sabrina Blue, the erstwhile head of Vemma's board of directors, was appointed as the Secretary of Transport and Tourism in a cabinet reshuffle in Bonooru.[48]

39. While each factor alone is equivocal in ascertaining the level of 'control' the government of Bonooru has over Vemma, when considered in totality, it leads to the irresistible conclusion that Vemma *was* in fact influenced and controlled by the Bonoori government.

[48] SOUF, ¶22.

II. THIS TRIBUNAL SHOULD BAR THE SUBMISSION BY THE CONSORTIUM OF BONOORI FOREIGN INVESTORS

40. This Tribunal, in deciding whether to admit any amicus submissions, must take into consideration the applicable requirements under Rule 41(3) AF (Arbitration) Rules and Article 9.19(3) CEPTA.

41. The applicable requirements under the AF (Arbitration) Rules and CEPTA are substantially similar; in essence, for this Tribunal to admit a potential amicus submission, it must consider the following:

    a) Whether it would assist the Tribunal in the determination of a factual or legal issue by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;[49]

    b) Whether it would address a matter within the scope of the dispute;[50]

    c) Whether the amicus applicant has a significant interest in the proceedings.[51]

42. This Tribunal should bar the submission by the Consortium, on the grounds that **[A]** the Consortium's submission does not bring a perspective, particular knowledge or insight that is different from the disputing parties; **[B]** the Consortium's submission is not in pursuit of public interest; and **[C]** the Consortium's lack of independence from the Claimant raises a conflict of interest.

[49] AF (Arbitration) Rules, Rule 41(3)(a); CEPTA, Article 9.19(3).
[50] AF (Arbitration) Rules, Rule 41(3)(b); CEPTA, Article 9.19(3).
[51] AF (Arbitration) Rules, Rule 41(3)(c); CEPTA, Article 9.19(3).

A. The Consortium's submission does not bring a perspective, particular knowledge or insight that is different from the disputing parties

43. The enquiry under Rule 41(3)(a) AF (Arbitration) Rules focuses on the applicant's potential "contribution of particular knowledge and expertise" and "likely utility" to the tribunal.[52] Amicus submissions that would be 'duplicative' of other submissions, either by the disputing parties or other amici curiae, are disfavoured.[53] Hence, where the parties have made detailed submissions, tribunals often conclude that an applicant will not provide a different perspective than the parties.[54]

44. Further, the assessment as to the likely utility of a non-disputing party submission "should be made on the assumption that the Disputing Parties will provide all the necessary assistance and materials required by the Tribunal to decide their dispute".[55] In *Apotex*, despite the tribunal finding that the petitioner had acquired the experience and expertise in NAFTA matters, the tribunal did not find that "this knowledge and insight[,]… however extensive, equals (still less surpasses) the very considerable experiences and insights possessed by the Disputing Parties' several counsel".[56]

45. In addition, mere expertise alone should be insufficient to grant leave to file a submission. The petitioner must show that he possesses some knowledge, expertise or a particular perspective on the case that surpasses or supplements that of the parties and he must link it to the specific case.[57] This ensures that the petitioner's submissions will be "within the scope of the dispute", as required by Article 41(3) AF (Arbitration) Rules.

46. In the present case, given the assumption that the Disputing Parties will provide all the necessary assistance and materials required by the Tribunal to decide their dispute, the Consortium's submission does not offer a perspective, particular knowledge or insight that is different from the disputing parties.

[52] *Methanex*, ¶48; *Biwater Gauff*, ¶49-50; *InterAguas*, ¶23.
[53] Born, Forrest.
[54] *Apotex*, Order on BNM ¶24-26; *Bear Creek Mining Corporation*, PO 6, ¶38.
[55] *Methanex*, ¶48; *Apotex*, ¶21-26.
[56] *Apotex*, Order on Appleton, ¶32.
[57] *Apotex*, ¶21.

47. The Consortium's submission will be duplicative of the Claimant's submissions. Particularly, the Consortium aims to provide context on Bonooru's business climate, the existing regulatory and corporate framework in which enterprises operate, the nature of the aviation industry in Bonooru, and the impact of uncertainty on access to capital. The Claimant is well-placed to submit on these very matters. The Claimant is a key player in the aviation industry, owning and operating Royal Narnian, a leading global airline,[58] and until recent events, Caeli. Caeli particularly catered to customers travelling between Bonooru and Mekar.[59] Hence, the Claimant is intimately acquainted with the business climate, regulatory and corporate framework, and the nature of the industry that the Claimant itself operates in.

48. The Consortium also submits that it is an international norm under the ISDS regime for an SOE's standing to be tied only to its commercial activities, instead of the activities' purpose. This is the very issue the Claimant, who is also an SOE, will be submitting on. Hence, the Consortium's submissions will be duplicative of the Claimant's submissions.

49. Further, the Claimant is a member of the Consortium in good standing.[60] Consortium members enjoy the benefits of services, like collective advocacy.[61] The availability of collective advocacy is indicative of the common perspective Consortium members all share as Bonoori investors investing in the Greater Narnian region and internationally.[62] While Consortium members may be from different industries and geographic locations, this is irrelevant to the Consortium's perspective as the Consortium does not represent their individual industries, but their collective identity as Bonoori investors investing internationally. Hence, Consortium members, as Bonoori investors, all share a similar perspective as they would all be equally affected by the policy or laws that outline Bonoori foreign investment. Hence, the Claimant, as a Bonoori foreign investor, offers the same perspective that would be propounded by the Consortium on behalf of Bonoori foreign investors.

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[58] SOUF, ¶10-11.
[59] *Ibid*, ¶28.
[60] CBFI's Application, ¶7.
[61] PO 3, ¶11.
[62] CBFI's Application, ¶2.

50. The Consortium also aims to identify facts and business structures in impacting industries beyond the aviation sector that merit protection under CEPTA.[63] In its application, the Consortium stated that these industries "may not otherwise find an audience within these arbitration proceedings"[64] – this is rightly so because these submissions are not connected to the legal or factual issues within the scope of the dispute. The dispute centres on (1) the Claimant's standing in the ISDS regime, given its unique background of state ownership, its performance of governmental functions, and its existing ties with the Government of Bonooru; (2) whether the Respondent's particular actions in this case breached the CEPTA; and (3) the appropriate compensation standard. Given the unique circumstances of this case, the facts and business structures of industries that are not involved in this case are not linked to the dispute. Further, in light of the assumption that the disputing parties' multiple counsels will be providing the Tribunal with all necessary materials and assistance, the Claimant, as a member of the Consortium in good standing, is well-placed to provide any such necessary materials.

51. Hence, the Consortium's submission should be barred, since it does not offer a perspective, particular knowledge or insight that is different from the disputing parties.

B. The Consortium's submission does not further the public interest in the transparency of the arbitration

52. The UNCITRAL Rules apply to the present proceedings. Bonooru has assented to the the application of the UNCITRAL Rules to all CEPTA arbitrations initiated against it.[65] Pursuant to Article 9.20(6) CEPTA, the Respondent has called for the application of the UNCITRAL Rules to the present proceedings.

53. The UNCITRAL Rules expressly require the Tribunal to take into account whether there is a "public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings".[66] The tribunal in *Methanex* defined a public interest in the subject-matter of the arbitration to exist if the issues in the case "extend far beyond those raised by the usual transnational arbitration between commercial parties".[67]

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[63] CBFI's Application, ¶10.
[64] *Ibid*.
[65] CEPTA, Article 9.20(6).
[66] Article 1(4)(a).
[67] *Methanex*, ¶49.

54. It is undisputed that transparency in arbitral proceedings is important in demonstrating the legitimacy and credibility of the arbitration process. However, the Consortium's submissions – on Bonooru's business climate, corporate framework, and the Claimant's standing in the ISDS regime – do not further transparency in the proceedings. Although allegations of corruption surround the present case and raise concerns on transparency, the Consortium's submissions are not connected to these issues.

55. Further, the Consortium's submissions do not provide a different perspective from the Claimant's. Hence, admitting the Consortium's submissions will not further the public interest in transparency of the proceedings, and will unduly burden these proceedings and the Respondent.

C. The Consortium's lack of independence from the Claimant raises a conflict of interest which unfairly prejudices the Respondent

56. The tribunals in *von Pezold* and *Border Timbers* held that there is an implicit requirement of independence in requiring amici to possess a "a perspective, particular knowledge or insight that is different from that of the Parties".[68] Both tribunals concluded that the applicant, a non-governmental organisation, was not independent because, among other things, its founder was engaged in an on-going dispute with the claimant. The tribunal stated that "the apparent lack of independence or neutrality" of the applicants was sufficient ground to deny the application.[69]

57. Further, where the applicable rules prescribe disclosure requirements, tribunals have considered it implicit that independence is necessary.[70] In the present case, Article 4.2 UNCITRAL Rules and Article 9.19(3) CEPTA delineate disclosure requirements for the amici's affiliation with the disputing parties and any financial or other assistance received from those parties. Hence, independence is implicitly required.

[68] *von Pezold*, ¶49; *Border Timbers*, ¶49.
[69] *von Pezold*, ¶56.
[70] *Eli Lilly*, PO 4, 2; *Bear Creek Mining*, PO 5; ¶23; *Bear Creek Mining*, PO 6; ¶23.

58. In addition, independence should be required to ensure that the proceedings do not "unfairly prejudice" either party.[71] The requirement of independence ensures that parties cannot use amicus curiae to circumvent rules on evidence that limit its ability to present information and advance its case to the tribunal.[72] This would affect due process and the procedural equality of the parties.[73] Further, the role of amici in international arbitration proceeding is to assist the Tribunal, not to support a disputing party or act as its "mouthpiece".[74]

59. Partiality is problematic when an international court solicits or receives information from an amicus curiae that it expects to be neutral, when in fact they are lobbying for a certain outcome. In these cases, support for a party or outcome may taint the reliability and credibility of the amicus and the court might even appear biased.[75]

60. In the present case, the Consortium is not independent from the Claimant since the Claimant is a member of the Consortium. Further, 38 Consortium members currently hold investment rights in Mekar, with 2 such members, SRB Infrastructure and Wiig Wealth management Group, currently pursuing claims against the Respondent under Chapter 9 CEPTA. There is a risk of procedural inequality, due to the close ties between the Consortium and the Claimant. Given that 38 Consortium members are also foreign investors in Mekar, they share a common interest in obtaining a decision against the Respondent. Further, as foreign investors in Mekar, the 38 Consortium members' perspective is duplicative of the Claimant's. Hence, it is likely that the Consortium will merely be the Claimant's mouthpiece, leading to procedural inequality.

61. In addition, the Tribunal may expect the Consortium to be neutral in providing the context on Bonooru's business climate and corporate framework. However, Consortium members, as foreign investors in Mekar themselves, have an interest in obtaining an award for the Claimant. Hence, while the Tribunal may expect the Consortium to be neutral in its submissions, there is a risk that the Consortium is lobbying for a decision against the Respondent.

[71] AF (Arbitration) Rules, Article 41(3).
[72] Wiik, P:263.
[73] *Ibid*.
[74] *Ibid*.
[75] *Ibid*, P:265.

III. THIS TRIBUNAL SHOULD ADMIT THE SUBMISSION BY THE EXTERNAL ADVISORS TO THE COMMITTEE ON THE REFORM OF PUBLIC UTILITIES

62. The EACRPU seeks to adduce unbiased facts regarding the claim that the rights received by the Claimant were procured by means of bribes paid to Mr. Dorian Umbridge, the Chairperson of the Committee. The EACRPU, as independent advisors involved in the entirety of the privatisation process, are in the unique position to adduce such facts that may not be obtained from the disputing parties.

63. This Tribunal should admit the EACRPU's submission, on the grounds that **[A]** the EACRPU's submission is within the scope of the dispute; and **[B]** the other requirements under the AF (Arbitration) Rules are fulfilled.

A. The EACRPU's submission is within the scope of the dispute

64. The EACRPU's submission is within the scope of the dispute. The assessment of legality of Vemma's investment is crucial to the determination of the Tribunal's competence-competence, and hence, is not a new jurisdictional question not raised by the disputing parties.

1. The definition of 'investment' in the CEPTA has an implicit legality requirement

65. Tribunals have denied jurisdiction *ratione materiae* due to the unlawfulness of the underlying investment, often due to the requirement in the underlying investment agreement that the investment be made in accordance with law. In *Fraport AG*, the tribunal decided that "[b]ecause there is not "investment" in accordance with law," the tribunal "[lacked] jurisdiction *ratione materiae*".[76] Similarly, the tribunal in *Inceysa* denied jurisdiction as the investment was made in a fraudulent manner, which was clearly unlawful under the laws of El Salvador.[77] Similarly, the tribunal in *Ioannis* addressed the lawfulness of the investment to analyse its jurisdiction *ratione materiae*.[78]

[76] *Fraport AG*, ¶401.
[77] *Inceysa*, ¶255.
[78] *Ioannis*, ¶142, ¶194.

66. However, tribunals have found an implicit legality requirement, even where such a requirement is not explicit in the underlying investment agreement. The tribunal in *Phoenix* found that the legality requirement is "implicit even when not expressly stated in the relevant BIT".[79] Similarly, the tribunal in *Hamester* found that regarding the legality requirement, there "are general principles that exist[s] independently of specific language to this effect in the Treaty", like ensuring the investment is in accordance with the host State's law.[80] Further, the tribunal in *SAUR* found that the "condition not to commit serious violations of the legal order is a tacit condition which exists in every BIT".[81]

67. Hence, the definition of 'investment' in the CEPTA has an implicit legality requirement. Although the definition of 'investment' under Article 9.1 does not expressly refer to the legality of the investment, the CEPTA's preamble states that the contracting parties aim to "promote transparency, good governance, and the rule of law, and eliminate bribery and corruption in trade and investment". Further, Article 1.3 states that the one of the CEPTA's objectives is to "promote conditions of fair competition in the free trade area" – bribery and corruption would directly contradict this objective.

68. Further, there are cogent public policy reasons for denying treaty protection on the grounds of illegality. The tribunal in *Phoenix* stated that the "purpose of international [investment] protection is to protect legal and bona fide investments… States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws".[82]

69. Similarly, the tribunal in *Hamester* stated that there are general principles surrounding the legality of the investment – an "investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud or deceitful conduct… [or is] a misuse of the system of international investment protection under the ICSID Convention… [or is] made in violation of the host State's law".[83]

[79] *Phoenix*, ¶101.
[80] *Hamester*, ¶123-124.
[81] *SAUR*, ¶308.
[82] *Phoenix*, ¶100-101.
[83] *Hamester*, ¶123-124.

70. The tribunal in *SAUR* found that "it is inconceivable that a State would offer the benefit of protection through investment arbitration if the investor, to obtain that protection, has acted against the law".[84]

71. Therefore, the definition of "investment" in the CEPTA should be found to have an implicit legality requirement. EACRPU's submissions to the legality of the investment is thus within the *ratione materiae* of the dispute.

2. Amici have a unique role to play in bringing forward issues of illegality, which neither party would consider it advantageous to disclose

72. In addition, in the interests of promoting transparency, the Tribunal should be more willing to admit amicus submissions on the legality of the dispute. Amicus curiae have a role to play in bringing forward "[i]ssues of bribery or corruption",[85] since these are likely to be circumstances where neither party would consider it advantageous to disclose that their agreement was founded on corruption. In this situation, informed amicus curiae can play an important role in bringing relevant allegations of corruption to the arbitral tribunal. Notably, the issue of agreements based on illegality is significant since "[t]here is a strongly held view within the arbitration community that an in arbitral tribunal has the power and jurisdiction to consider issues of illegality and can do so of its own motion, if the issue has not been put before it by the parties".[86]

73. Therefore, the EACRPU's submission is within the scope of the dispute.

B. The EACRPU fulfils all requirements under AF (Arbitration) Rules and the CEPTA

74. *Firstly*, the EACRPU has a significant interest in the proceedings. The EACRPU has an interest in promoting fair business practices in Mekar, as the EACRPU has regularly acted as interveners before federal courts in Mekar in relation to judicial proceedings concerning approval for privatisation projects. In addition, stagnation in anti-corruption efforts in Mekar also impacts the financial operations of the EACRPU, who regularly advise potential investors prospecting opportunities in Mekar.

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[84] *SAUR*, ¶308.
[85] Kinyua, ¶40.
[86] *Ibid*.

75. *Secondly*, the EACRPU will be providing particular knowledge or insight that is different from the disputing parties. The EACRPU, as independent advisors involved in the entirety of Caeli's privatisation process, are in a unique position to adduce unbiased facts regarding the alleged corruption, that may not be obtained from either disputing party.

76. *Thirdly*, there is a clear public interest in the subject matter of the arbitration. The nature of investor-State relations provides fertile ground for acts of corruption. The EACRPU's submission sheds light on corruption, preventing this investor-State arbitration from being tainted by corruption and illegality. This is in the public interest of ensuring that investor-State dispute settlement address public policy issues fairly and in an unbiased manner, taking the regulatory interests of the State into account. Further, there is a public interest in promoting fair business practices in Mekar.

77. Therefore, this Tribunal should admit the submission by EACRPU, on the grounds that the requirements under the AF (Arbitration) Rules and CEPTA are fulfilled.

PHASE II: MERITS AND REMEDIES

IV. THE RESPONDENT'S ACTIONS DID NOT VIOLATE THE FAIR AND EQUITABLE TREATMENT STANDARD UNDER ARTICLE 9.9 OF THE CEPTA

78. Pursuant to Article 9.9(1) CEPTA, the Respondent has an obligation to accord the Claimant and its investment fair and equitable treatment in accordance with paragraphs 2 through 7 of Article 9.9.[87]

79. Preliminarily, it must be noted that the FET standard is an autonomous treaty standard[88] that cannot be defined in abstract.[89] Hence, it must be interpreted in light of the circumstances of the case.[90] In particular, an adherence to the FET standard requires a State to balance the investor's interests against its own "legitimate right subsequently to regulate domestic matters in the public interest".[91]

A. The Respondent's investigations and measures taken as a result thereof did not violate the FET standard

80. In 2016, the CCM decided to launch an investigation into Caeli Airways' business activities to investigate whether it had adopted predatory pricing strategies. This decision was prompted by Caeli's rapid expansion and unrivalled profitability[92]. Subsequently, in December 2016, the CCM received a complaint that Caeli was price undercutting on certain routes to and from Mekar's largest airport, Phenac International Airport.[93] Accordingly, the CCM launched the Second Investigation in response to the complaint.

81. The Claimant asserts that Respondent has breached the CEPTA because the First Investigation was conducted in violation of Mekar's domestic laws[94] and the measures imposed as a result of both investigations are "unfair and arbitrary".[95]

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[87] CEPTA, Article 9.9(1).
[88] Mann, 244.
[89] *Mondev*, ¶118; *Waste Management*, ¶99.
[90] *Saluka*, ¶285; *Flemingo*, ¶¶530 and 535.
[91] *Saluka*, ¶305; *Electrabel*, ¶165; *Lemire*, ¶273; *EDF International*, Award, ¶1005.
[92] SOUF, ¶¶35-36.
[93] *Ibid*, ¶38.
[94] NOA, ¶14.
[95] *Ibid*, ¶15.

82. On the contrary, the Respondent submits that the First Investigation was justified and conducted in accordance with Mekar's domestic laws, and the measures taken as a result of both investigations were fair and reasonable.

1. The CCM was justified in investigating the Claimant's anti-competitive behaviour

83. Pursuant to the MRTPA, the CCM is generally permitted to open a *suo moto* investigation into a corporation where: (1) the corporation's market share is greater than 50%; (2) the corporation poses a unique threat to the competition in a particular market; and (3) there is evidence that the corporation's actions have or are likely to push competitors out of the market in the near future.[96]

84. In the present case, it is uncontested that requirements (2) and (3) are satisfied. The Claimant and Caeli posed a unique threat to the competition in the airline market in Mekar because they were in receipt of recurring subsidies from the government of Bonooru,[97] which allowed them to strategically offer very low prices to customers.[98] There was also evidence to suggest that the Claimant and Caeli's pricing strategies were likely to push competitors out of the market in the near future given that Caeli had rapidly captured 15-20% market share from its competitors in a span of four years.[99]

85. Instead, the Claimant asserts that the CCM was not permitted under the MRTPA to investigate Caeli because its market share was "only 43%".[100] However, the Respondent submits that the CCM was justified in launching the investigation because Caeli's market share taken in conjunction with Royal Narnian's does exceed 50%. Further and in the alternative, the MRTPA confers discretionary powers on the CCM to conduct investigations even where the market share of the corporation in question is less than 50%.

[96] Annex V, Chapter III s (2)(a).
[97] SOUF, ¶28.
[98] *Ibid*, ¶29.
[99] *Ibid*, ¶34.
[100] NOA, ¶14.

a) The CCM was correct to view Caeli's market share in conjunction with the Respondent

86. In the present case, the CCM concluded that Caeli's market share exceeded 54% when taken in conjunction with Royal Narnian's market share.[101] It is submitted that the CCM was justified in viewing the market share of these two airlines in conjunction.

87. *Firstly*, while Royal Narnian and Caeli are technically distinct entities, they essentially operate akin to a single economic entity in practice. It has been recognised that where a single parent company wholly owns its subsidiary such that it can "*control every movement of the subsidiaries… [t]hese subsidiaries are bound hand and foot to the parent company and must do just what the parent company say*",[102] the entities may be considered in practice a single economic unit for the purpose of attributing liability.

88. In the present case, while Caeli is not wholly owned by the Claimant, the Claimant nonetheless owns a significant majority stake of 85% in Caeli Airways.[103] Moreover, despite Mekar's 15% stake and representation in the company, almost all control over Caeli's decisions rest in the Claimant's hands,[104] such that Caeli is essentially bound by the Claimant's will.

89. *Secondly*, Royal Narnian and Caeli engage in high-level cooperation. The Claimant undertook the obligation to avoid engaging in high-level cooperation on competition parameters such as prices, schedules, capacity, facilities, and other sensitive information[105]. In the present case, Royal Narnian and Caeli have engaged in cooperation with respect to facilities sharing. By engaging in preferential secondary slot-trading,[106] the two airlines essentially ensure that highly sought-after slots at Phenac were prioritised for each other, likely at a rate lower than the prevailing market price. This practice eventually "made it nearly impossible" for competitors to penetrate the market linked to Phenac which became a "fortress hub" for Caeli.[107]

[101] SOUF, ¶36.
[102] Pankaj; DHN, P:467; Vodafone, ¶27.
[103] SOUF, ¶26.
[104] *Ibid*, ¶31, ¶35.
[105] *Ibid*, ¶25.
[106] *Ibid*, ¶36.
[107] *Ibid*, ¶38.

90. *Thirdly*, both Caeli and Royal Narnian benefitted from subsidies from the government of Bonooru through the Claimant. Under the Horizon 2020 Scheme, the Claimant received subsidies to facilitate its expansion into Mekar.[108] As a result, both Royal Narnian and Caeli are the beneficiaries of these subsidies through Vemma.

91. Based on the reasons above, it is submitted that the CCM was justified in viewing Caeli's market share in conjunction with Royal Narnian's market share because they essentially operate as 'two arms' of the same parent company.

b) Alternatively, the CCM is permitted to investigate a corporation even if its market share is less than 50%

92. Pursuant to the MRTPA, the "CCM may exercise discretion in industries that require special attention to open an investigation where a corporation owns a lower market share" than 50%.[109] The Respondent notes that the use of discretion should be exceptionally rare.[110]

93. In the present case, the Respondent submits that it was entitled to conduct the First Investigation even if Caeli's market share was lower than 50% because the airline industry required special attention from the CCM at that point in time. It was clear that Caeli was rapidly capturing market share from its competitors[111] and was engaging in a low-cost pricing strategy that was potentially predatory. As such, it was not unreasonable for the CCM to conduct the investigation, given that it was empowered with the discretion to do so even where a corporation's market share was below 50%.

c) Even if this Tribunal were to find the Respondent in breach of the MRTPA, such a breach does not amount to a violation of the FET standard under the CEPTA

94. Generally, an action by the State that is a mere illegality alone would be insufficient to breach the FET standard. It is submitted that for an illegal act to rise to the threshold of a breach of FET, the State must have acted in manifest disregard of the law or even bad faith.[112]

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[108] SOUF, ¶28.
[109] Annex V, Chapter III s (2)(a).
[110] *Ibid.*
[111] *Supra* note 13.
[112] *IMFA*, ¶228; *Elettronica*, ¶128.

95. In the present case, the Respondent has not acted in bad faith nor in manifest disregard of the law. The Respondent had genuine concerns about the state of competition in the airline market as a result of Caeli's expansion and pricing strategies. Further, there is no evidence to suggest that the CCM had acted with the purpose of harming the Claimant's investment.

2. The measures imposed by the CCM as a result of the investigations were fair and reasonable

96. *Firstly*, the airfare caps imposed by the CCM on Caeli Airways' airfares as a result of the First Investigation were reasonable.

97. While the term 'arbitrary' is not defined in the CEPTA, it has been recognised in international law that a measure is 'arbitrary' if it is taken in "wilful disregard of due process of law" or if it "shocks, or at least surprises, a sense of juridical propriety".[113] More specifically, an action may also be arbitrary where it is "improper"[114] and "not based on legal standards but on discretion, prejudice or personal preference".[115]

98. In the present case, the airfare caps were intended to ensure that Caeli Airways would be estopped from raising its airfares unreasonably once it had consolidated its market share. This was in accordance with the underlying purpose of the MRTPA, which included protecting the interests of consumers.[116] Further, even the Claimant did not protest the airfare caps themselves and there was no evidence that the airfare caps had hurt its profitability.[117]

99. *Secondly*, the fines imposed by the CCM as a result of the Second Investigation were reasonable. These fines are imposed pursuant to findings that Caeli did in fact engage in anti-competitive behaviour. In fact, the CCM explained its rationale for the fines in significant detail in its report. The report explained that Caeli had abused its dominant position to extract significant privileges, which allowed it to undercut competitors and push them out of the market.[118]

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[113] *ELSI*, ¶128; *Asylum,* ¶284.
[114] *Micula,* ¶520.
[115] *EDF,* ¶303; *Infinito,* ¶549; *Global Telecom,* ¶561; *OperaFund,* ¶588.
[116] Annex V, Preamble.
[117] SOUF, ¶37.
[118] *Ibid*, ¶49.

100. Therefore, neither the fines nor the airfare caps were unfair nor arbitrary given that they were based on reasoned judgement and in furtherance of Mekar's competition policy.

B. The Respondent's measures to mitigate the impact of the currency crisis were implemented in exercise of its right to regulate and not in breach of the FET standard

101. Pursuant to Article 9.8(1) CEPTA, the Respondent has the right to regulate within its territory to achieve legitimate public policy objectives such as national security, the protection of public health, safety, the environment, public morals, social and consumer protection, or the promotion and protection of cultural diversity.[119] The right to regulate has also been recognised in customary international law as a right that stems from a Sovereign State's inherent power.[120]

102. Tribunals have considered certain factors in determining whether a State has overstepped its right to regulate, *viz*, whether the measure is bona fide and non-discriminatory,[121] as well as proportionate.[122] Specifically, it has been articulated that a regulatory measure is "rationally connected to a legitimate State objective, where the means chosen are proportionate to achievement of the objective".[123]

103. In the present case, the Respondent had exercised its right to regulate in order to mitigate the impact of inflation on the economy. Amid a currency crisis, the Respondent made the careful and considered decision to require all companies to offer their goods and services in MON. In late 2016, the MON began depreciating rapidly and inflation in Mekar soared[124]. As a result, the economy began deteriorating and the costs of everyday items for consumers surged.[125]

[119] CEPTA, Article 9.8(1).
[120] *Oxus Gold*, ¶742;
[121] *Hydro Energy 1*, ¶568; *Apotex*, ¶8.75.
[122] *OEG*, ¶89.
[123] *9REN*, ¶323.
[124] SOUF, ¶39.
[125] *Ibid.*

104. In response to the dire economic situation, the IMF emphasised that Mekar needed to "establish credibility" in the MON.[126] The Respondent's decision to issue the decree,[127] was clearly connected to the objective of bolstering the credibility of the MON. Further, given the dire state of the economy, the Respondent was justified in taking a measure of such magnitude.

105. Therefore, the Respondent's decision to denominate goods and services in MON was not a breach of the FET standard, but rather a legitimate exercise of its right to regulate.

C. The Respondent's decision not to grant the Claimant subsidies was not discriminatory

106. While the term 'discriminatory' is not expressly defined in the CEPTA, it has been recognised that a State's actions are discriminatory when it treats one party differently from other similar parties without justification.[128] To prove the existence of discrimination, a three-step approach ought to be adopted: (i) an appropriate subject for comparison must be identified, i.e., an investor in a similar situation to the Claimant, (ii) the other investor in a similar situation must have been treated more favourably, and (iii) there must be a lack of reasonable justification for such a difference in treatment.[129]

107. In the present case, the Respondent did have a reasonable justification to refuse subsidies to the Claimant and Caeli. This is because Caeli is supported by subsidies from the government of Bonooru under the Horizon 2020 Scheme.[130] The Respondent retains the discretion to decide which airlines should and should not receive subsidies based on whether they receive assistance from foreign governments. While Star Wings and JetGreen did receive subsidies from their home States, the Claimant received *recurring* subsidies under the Horizon 2020 Scheme.[131]

108. The Respondent submits that it was justified to deny the Claimant subsidies since it was a SOE that received recurring assistance from Bonooru. Therefore, the Respondent has not acted discriminatorily, in breach of the FET standard.

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[126] SOUF, ¶39.
[127] *Ibid*, ¶42.
[128] *Lidercón,* ¶169; *Lemire,* ¶261.
[129] *Cengiz,* ¶525; *Saluka,* ¶313.
[130] SOUF, ¶28.
[131] *Ibid.*

D. The Respondent did not deny the Claimant justice in its courts

109. A denial of justice may occur where a claimant is subject to undue delay in legal proceedings.[132] This includes "overly long court proceedings" which do not result from the claimant's own actions.[133] In determining whether a delay is undue or excessive, several factors have been recognised as relevant: (i) the complexity of the case, (ii) the behaviour of the litigants, (iii) the significance of the interests at stake and the behaviour of the Mekari courts themselves,[134] (iv) the need for celerity of decision,[135] as well as the overall circumstances and context of the case.[136]

110. In the present case, the Respondent's courts did not deny the Claimant justice. Firstly, the delay in hearing the Claimant's case was not unreasonable given Mekar's policy to prioritise criminal matters. The Court Registrar explained the rationale for the delay to the Claimant in the hearing, stating that the Court did not have the resources necessary to expedite commercial claims.[137]

111. Secondly, the decision of Justice VanDuzer on 15 June 2019 was fair and reasonable under the circumstances. This is because the Court did in fact consider the merits of the case before deciding to dismiss it.[138] Hence, its decision to dismiss the appeal at the interim stage was justified given that the Claim itself was unmeritorious from the outset and the Court saw no possibility of arriving at a different conclusion.

112. Therefore, the Respondent has not denied the Claimant justice in its Courts, nor has it breached due process. As such, the Respondent is not in breach of the FET standard.

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[132] *Krederi,* ¶455; *Azinian,* ¶102.
[133] *Ibid.*
[134] *Krederi,* ¶458; *Oostergetel,* ¶290.
[135] *Toto,* ¶163.
[136] *Oostergetel,* ¶290.
[137] SOUF, ¶44.
[138] *Ibid*, ¶54.

E. The Respondent's decision to enforce the arbitral award was in accordance with the Mekar's public policy and did not breach the FET standard

113. The CAA provides for the refusal of the enforcement of an arbitral award if it is contrary to the public policy of Mekar.[139] The Courts have held that an award should only be set aside on this ground if it violates "the most basic notions of morality and justice" such as where it enables corrupt practices.[140] The Courts further recognise that "strong circumstantial evidence is enough to deny recognition and enforcement".[141]

114. In the present case, the only evidence that the arbitral award was tainted by corruption is the report from the CILS which the HCCM has noted is "circumstantial at best".[142] Hence, while the Respondent does acknowledge that preventing corruption is a cornerstone of the CEPTA, the Mekari courts were still justified in enforcing the arbitral award given that the evidence from CILS is inconclusive. The CILS report makes mention of leaked audio recordings involving unidentified persons,[143] and hence does not offer any certainty as to whether the arbitration involving Mr Rett Eichel Cavannaugh was tainted by corruption.

115. Therefore, the Respondent's decision to enforce the arbitral award cannot be considered a breach of the FET standard under the CEPTA.

V. THE TRIBUNAL SHOULD APPLY THE ARTICLE 9.21 MV STANDARD AS NEITHER INTERNATIONAL LAW NOR ARTICLE 9.7 ALLOWS THE CLAIMANT TO DEROGATE FROM THIS STANDARD

A. The MV standard should be applied as it is the prescribed compensation standard in CEPTA

1. The MV standard is the only applicable standard on a plain interpretation of Article 9.21 CEPTA

116. Article 9.21 CEPTA states that "where a tribunal makes a final award against a respondent, the tribunal may award monetary damages at a market value, except as otherwise provided for in Article 9.12".[144]

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[139] Annex XIV, ¶8.
[140] *Ibid*, ¶9.
[141] *Ibid.*
[142] *Ibid*, ¶10.
[143] Annex XII, ¶2.
[144] CEPTA, Article 9.21(1)(a).

117. In interpreting this, it is apposite to utilise the interpretive approach enshrined within the VCLT. Article 31(1) stipulates that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[145]

118. Further, Article 32 states that recourse may be had to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion if interpretation under Article 31 would result in an ambiguous or obscure meaning."[146]

119. Applying these provisions, the ordinary meaning of Article 9.21 is that in instances where monetary damages are awarded by arbitral tribunals, the default standard of compensation to be awarded is that of "market value [unless] provided for in Article 9.21".[147] The phrase "provided for" implies that the standard of compensation should remain at "market value" unless the conditions of Article 9.21 are engaged.

120. Article 9.12(3) CEPTA further clarifies that FMV includes "interest at a normal commercial rate",[148] a clarification conspicuously absent from Article 9.21. The lack of a similar clarifying provision thus suggests that that FMV damages are not an option for tribunals outside of expropriation.

121. Furthermore, since the phrase "may" is ambiguous and could suggest discretion on the part of tribunals to award FMV damages, it is apposite to consider the circumstances of CEPTA's conclusion.[149] *Firstly*, CEPTA was an attempt to negotiate a "more comprehensive trade and investment treaty" than the 1994 treaty that more "adequately balanced investors' and host States' rights".[150]

[145] VCLT, Article 31(1).
[146] *Ibid*, Article 32.
[147] CEPTA, Article 9.21(1)(a).
[148] *Ibid*, Article 9.12 (3).
[149] VCLT, Article 31(3).
[150] PO 3, ¶14.

122. *Secondly*, Mekar's Model BIT refers to compensation at a "market value".[151] The combination of these facts suggests that 'market value' damages were specifically negotiated for to lessen the economic burden on Mekar, particularly considering Mekar's impecuniosity relative to Bonooru (which has a GDP that dwarfs the next five largest countries in the region combined).[152] The enormity of this burden is explicated by the fact that the FMV damages the Claimant is demanding from the Respondent will be twice its consolidated annual public spending".[153]

123. Thus, there is ample evidence to suggest that MV damages were specifically negotiated for considering Mekar's relative impecuniosity and should not be detracted from to uphold the sanctity of CEPTA.

2. The Chorzow *principle should not prevail over the clear language of the treaty*

124. Even if FMV accords better with the *Chorzow* principle of full reparation,[154] the plain language of the treaty should not be supplanted by international custom. According to the principle of *pacta sunt servanda* as enshrined in Article 26 VCLT, treaties in force are binding upon the parties to it and must be performed by them in good faith.[155]

125. In light of this, the plain language of the CEPTA should be adhered to, **even where** it may differ from international custom. While Article 31(3)(c) makes reference to "relevant principles of international law", academics have cautioned against the use of this provision as a means of incorporating extraneous rules "that oversteps the boundaries of the judicial function".[156] As noted by Judge Buergenthal in *Oil Platforms*,[157] inordinate extension of the meaning of treaty text to incorporate principles of international law would "jeopardize the willingness of States to accept the Court's jurisdiction for the adjudication of disputes relating to the interpretation or application of specific rules of international law".

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[151] PO 3, ¶17.
[152] SOUF, ¶4.
[153] PO 3, ¶3.
[154] *Chorzow*, P:47.
[155] VCLT, Article 26.
[156] *Crawford*, P:605.
[157] *Oil Platforms*, ¶22.

126. In addition, this would undermine confidence in arbitral tribunals, and "international justice itself".[158] Thus, there should only be three situations in which s 31(3)(c) should be invoked: Where a treaty rules' ambiguity can be resolved by reference to a "developed body of international law", where the term's used in the treaty "have a well-recognised meaning in customary international law", and where they "are by nature open-textured".[159]

127. On the facts, the ambiguity of Article 9.21 has been resolved by reference to the context of CEPTA, and it has not been laid out in an "open texture". Further, the phrase "market value" clearly denotes a standard at odds with the FMV standard laid out in Article 9.12 of the same treaty and does not possess a "well-recognised meaning" in customary international law that would attract an alternative interpretation.

128. Thus, the *Chorzow* principle of full reparation cannot be wielded bluntly to obscure the clear intentions of the parties in drafting CEPTA and cannot be an adequate basis to superimpose the FMV standard of compensation over MV compensation.

B. Substituting MV damages for a different compensation standard falls outside the scope of the MFN provision

129. Under the *ejusdem generis* principle, the beneficiary state may only acquire rights that fall within the limits of the subject-matter of the MFN clause.[160]

130. This was explicated in the *Ambatielos* case, where the Commission held that MFN clauses "can only attract matters belonging to the same category of subject as that to which the clause itself relates".[161] Applying this principle, it was found that provisions related to the administration of justice fell within the ambit of "all matters relating to commerce and navigation" for the purposes of MFN treatment.[162]

131. While this decision seems to suggest wide discretion on the part of tribunals to read rights into the plain language of the MFN clause, this must be viewed with caution and within context.

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[158] French, P:311.
[159] ILC Conclusions, ¶20.
[160] ILC Articles on MFN, Article 9, Commentary, ¶1.
[161] *Ambatielos*, P:107.
[162] Ibid.

132. *Firstly*, such a purposive approach should be confined to the import of **dispute settlement** provisions. In the subsequent case of *Maffezeni*, the tribunal applied *Ambatielos* in the realm of investment, stating that an MFN clause pertaining to "all matters subject to [the] Agreement" applied to dispute settlement provisions because "dispute settlement arrangements are inextricably related to the protection of foreign investors".[163] Thus, it is apparent that tribunals have taken a broader approach **only** with respect to dispute settlement provisions given that they are integral to the protection of traders/investors.

133. *Secondly*, the cases where the *ejusdem generis* principle was not fatal to importation involved MFN provisions that possessed sufficiently wide language to accommodate protective provisions not explicitly stipulated. In *Ambatielos,* the clause pertained to "all matters of commerce and navigation",[164] while the MFN clause in *Maffezeni* involved "all matters subject to [the agreement]".[165]

134. This was also the case in *CME v Czech Republic*, which involved the successful invocation of an MFN clause to import a FMV standard of compensation. The subject matter of the MFN clause was extremely broad and pertained to all "provisions of law of either contracting party or obligations of international law".[166] Thus, tribunals should only interpret MFN clauses broadly where the language of the provision is sufficiently wide and should otherwise be slow to make unprincipled extrapolations.

135. Finally, any interpretation of MFN clauses must be limited by any public policy considerations undergirding the conclusion of the treaty. As was axiomatically noted by the tribunal in *Maffezeni*, there is a distinction between a "legitimate extension of rights and benefits by means of operation of" MFN clauses, and "disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions".[167]

[163] *Maffezeni,* Jurisdiction, ¶53.
[164] *Ambatielos*, P:107.
[165] *Maffezeni*, Jurisdiction, ¶38.
[166] *CME*, ¶397.
[167] *Maffezeni*, Jurisdiction, ¶63.

136. Thus, where the subject matter of the MFN clause has been specifically enumerated and especially where there are strong policy considerations militating against the import of provisions, tribunals should be slow to superimpose additional obligations on top of the explicit language of the provision.

137. On the facts, there is nothing in Article 9.7 CEPTA that explicitly pertains to the valuation of compensation or awards. In contrast to dispute settlement provisions, the valuation of awards given by tribunals is hardly a matter so integral to the protection of foreign investors that it warrants a gross over-interpretation of the clear language of the treaty.

138. Furthermore, the language of Article 9.7 merely delineates the specific facets of the investment *simpliciter* and does not extend this to include the "matters" associated with them. This may be distinguished from *CME,* where the language of the treaty was sufficiently broad to justify superimposition of the FMV standard.

139. The argument that compensations standards are covered by Article 9.7(1) based on the omission of a carve-out clause similar to Article 9.7(2) also cannot stand. There is no indication that Article 9.7(2) is intended to be exhaustive, and it merely exists for "greater certainty".[168]

140. Finally, the existence of strong policy reasons stemming from Mekar's history of volatility and comparatively impecunious nature militates against an unprincipled importation of an FMV standard of compensation.

141. Therefore, the *ejusdem generis* principle applies to disallow Claimant from importing the FMV compensation standard from the *Arrakis-Mekar BIT.*

[168] Article 9.7(2), CEPTA.

VI. THE FMV COMPENSATION SHOULD BE REDUCED BASED ON THE CLAIMANT'S CONTRIBUTORY NEGLIGENCE

A. The Claimant was negligent in managing their investment

142. The principle of contributory fault is enshrined within Article 39 RSIWA, which stipulates that in the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured.[169] Negligent action can be further explicated as that which "manifests a lack of due care on the part of the victim of the breach for his or her own property or rights".[170]

143. In *MTD*, this principle was invoked to reduce the Claimant's damages by 50% considering their "lack of diligence and of prudent business judgment"[171] in purchasing the investment without first securing the necessary development permissions.

144. Likewise, in *Maffezeni*, the tribunal also reduced damages under the apodictic notion that investment agreements "should not be insurance policies for bad business judgements".[172]

145. Furthermore, a negligent action is not qualified by any requirement that it should have "reached the level of being 'serious' or 'gross'", as the tribunal in *Copper Mesa* astutely pointed out.[173]

146. In fact, in *MTD,* the tribunal appeared to set the standard of negligence as anything a "wise investor" would not have done, implying that foreign investors are held to a high standard of care.[174] It is submitted that such a high standard is warranted, given FDI denotes a certain degree of experience on the part of investors and has wide ranging effects on state economies.

147. On the facts, the Claimant was negligent in making bad business judgements at multiple stages of the investment that no 'wise investor' would have made.

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[169] ILC ARSIWA, Article 39.
[170] ILC ARSIWA, Article 39, Commentary, ¶5.
[171] *MTD*, ¶167.
[172] *Maffezeni*, Award, ¶64.
[173] *Copper Mesa*, ¶6.92
[174] *MTD,* ¶242.

148. *Firstly*, their decision to pursue fleet expansion based on reduced operational expenses in the wake of plummeting oil prices was plainly injudicious. A responsible investor would not have premised its strategy on an unsustainably low price of oil especially since officials in the CEPO already "saw no possibility of further decline" and were "preparing for a strong uptick in prices in the near future".[175] The Claimant's experience with the airline industry as the owner of Bonooru's flagship airline[176] also meant they would have been acquainted with its vagaries.

149. *Secondly*, the Claimant's business model of "undercutting competition with low prices" was clearly risky and was noted by experts to be "not a good long-term model" [177] given that it resulted in a low profit margin and hinged on consistent customer demand and operating costs. The low prices would also have conceivably invited intervention from the Mekari government due to their anti-competitive nature.

150. Finally, and most egregiously, the Claimant's risky expansionary strategies were preferred over resolving their outstanding debt and improving their tenuous financial health.[178]

151. This was an atrocious act of negligence that is analogous to the case of *Micula v Romania*, where the Claimant was found negligent for choosing to spend profits on "business necessities" rather than paying off their tax debts owed to the state of Romania.[179] While the tribunal acknowledged that this was with the underlying objective to "maintain the competitive nature of their business", they reiterated that paying off their debts was a "a legal obligation that had "legal and financial consequences attached to it", [180] thus rendering it an act of negligence.

152. Likewise, the Claimant's failure to pay off their debt obligations should be considered negligent, and they should not be allowed to enjoy the prospects of profit from their risky strategies without bearing the accompanying risk.

[175] SOUF, ¶33 (Note 2).
[176] *Ibid*, ¶9.
[177] Annex VII.
[178] SOUF, ¶35.
[179] *Micula,* ¶ 1150.
[180] *Ibid*, ¶1151.

A. There was a sufficient causal link between their negligence and the consequent loss

153. Furthermore, to show that the Claimant's alleged negligence contributed to its injury, it must be shown that that there was "cause, effect and a logical link between the two". [181] This necessarily entails an element of "foreseeability" of the consequences of one's actions, and the exclusion of damage that was too "remote" or "consequential". [182] Thus, in *Gemplus*, the tribunal held that the doctrine of contributory fault could not be applied where the claimant does not know or could not have reasonably known that their actions would result in the resulting consequences. [183]

154. On the facts, the consequences of the Claimant's unwise investment strategies were something reasonably foreseeable from the onset. In the first place, Mekar's political and economic instability has been a historical phenomenon, involving high regulatory interventions and mass migrations as well as having consistently low scores on Transparency International's corruption perceptions index.[184] It was despite these visible risks that Claimant chose to invest in Mekar and adopt an investment strategy dependent on stable consumer demand that would be extremely vulnerable to disruptions.

155. It was further foreseeable that abundant fleet renewal and expansion would result in losses in the wake of an oil surge, a surge that had already been predicted by the CEPO.[185] The fact that Caeli's rapid expansion was "ill-advised" was something that "almost every industry expert"[186] would have agreed with. Thus, it is illogical for the Claimant to claim that the potential losses from employing a risky strategy in a historically precarious socio-political climate were unforeseeable.

[181] *Lemire,* ¶157.
[182] ILC ARSIWA, Article 31, Commentary, ¶10.
[183] *Gemplus*, ¶11.14.
[184] SOUF, ¶12.
[185] SOUF, ¶33 (Note 2).
[186] Annex IX.

156. It is further acknowledged that negligence must have a material and significant contribution to the damage to trigger a finding of contributory fault.[187] However, the contributory negligence does not have to be the direct cause of the resulting loss, but only needs to have contributed in a significant manner to the extent of the injury. This is clear from the existing jurisprudence.

157. In *MTD*, the claimant paid full price up front for the land of their investment on legitimate expectations that they could be granted the necessary permits, permits that were subsequently revoked resulting in the loss of the investment. While the revocation of the permissions was a breach of FET[188] that was the proximate cause of the loss suffered, the tribunal nonetheless reduced damages by 50% on the grounds of this negligence because the negligence heavily exacerbated the extent of the loss.

158. Another line of cases where contributory negligence involves situations where some wrongful behaviour on the part of the Claimant invited reprisals from the State, even where said reprisals were inequitable. In *Yukos,* the tribunal found that the claimant's "abuse of low-tax regions" and "questionable use of the Cyprus–Russia DTA"[189] to avoid taxes "made it possible for [the] Respondent to invoke and rely on that conduct as a justification"[190] to expropriate the investment, thus being a material contribution to the investment's destruction. Thus, contributory fault can be found where the Claimant's wrong either enabled or significantly exacerbated the resulting loss.

[187] *Yukos,* ¶1600.
[188] *MTD,* ¶240.
[189] *Yukos*, ¶1622.
[190] *Ibid*, ¶1614.

159. On the facts, the Claimant's negligence both enabled and exacerbated the resulting loss. *Firstly*, the Claimant's airfare slashes and the debilitating effect they had on other domestic airlines were what prompted the Mekari government to intervene by placing airfare caps on Caeli airways. While the subsequent inflexibility of the Mekari government in removing the caps may have contributed to Caeli's downfall, this would not have happened but for Caeli's anti-competitive behaviour, which they implicitly acknowledged given that they did not protest the caps initially.[191] In any case, there was no evidence that the caps had any impact on Caeli's profitability until the currency crisis.[192]

160. *Secondly*, the Claimant's expansionary policies understandably left it susceptible to the foreseeable surge in oil prices, and "left Caeli in a state of deeper financial distress", showing how their negligence exacerbated Caeli's demise.

161. These expansionary policies were also pursued against multiple cautions by Mekar Airservices at various points in the investment's tenure. In 2012, Mekar Air Services warned against the "extravagant approach" taken by the Claimant in pursuing route expansion despite the volatility of demand in the region, advice which went unheeded.[193]

162. In response to seasonal falls in revenue in 2014, the Respondent once again cautioned the Claimant to no avail, advising them to curtail expansion to avoid exorbitant costs associated with maintaining its fleet during seasons of low demand.[194] The Claimant's heedlessness of the Respondent's advice persisted in 2015 when they favoured expansionary policies over injecting their profits into outstanding debt.[195]

163. This consistent pattern of the Claimant's heedless stratagems had a significant contribution to Caeli's downfall regardless of the Respondent's actions and in spite of their attempts to ameliorate the resulting risks. Therefore, the Claimant should have their damages reduced under the principle of contributory fault.

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[191] SOUF, ¶37.
[192] *Ibid.*
[193] *Ibid*, ¶29.
[194] *Ibid*, ¶31.
[195] *Ibid*, ¶35.

VII. THE RESPONDENT'S ECONOMIC CIRCUMSTANCES WARRANT A REDUCTION IN COMPENSATION TO ACCOUNT FOR THE REALITY OF THE CRISIS

164. While the Respondent's actions cannot be absolved on the grounds of necessity, the compensation awarded should nonetheless be adjusted to accommodate the extenuating circumstances caused by the financial crisis suffered by Mekar.

165. This finds precedence in multiple cases made during the Argentinian financial crisis. In *Sempra*, the tribunal reduced damages to account for the "changed reality" and consequent "likely effect of the economic crisis" on investments.[196] In making this pronouncement, the tribunal stressed that this did not "excuse the wrongfulness of the measures taken in respect of the investment" and this was merely to ensure that investors shared "some of the burden of the general economic crisis".[197]

166. Similarly, in *Enron*, the tribunal made downward adjustments in its DCF valuation of the investment to "reflect the reality of the crisis" as compared to a "normal business scenario".[198] While the awards in both cases were subsequently annulled, this was due to the improper application of the relevant principles on the state of necessity[199] and the annulment committees did not disapprove of the reduction in damages.

167. In light of the "rigorous standard"[200] of the customary law principle of necessity, it is submitted that tribunals **should** reduce damages as a matter of equity owing to the extenuating circumstances faced by states. Such reductions should not be predicated on the fault of the State, as this would place tribunals in the "uncomfortable situation" of having to "analyse, ponder and even criticize" the economic measures of countries in crisis".[201]

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[196] *Sempra*, ¶417.
[197] *Ibid*, ¶436.
[198] *Enron,* ¶407.
[199] *Sempra*, 328–97; *Enron*, ¶347–405.
[200] Burke-White, P:14.
[201] *Lavopa*, P:6.

168. This is buttressed by *Sempra,* where it was opined that it was not for the "tribunal to substitute its view for the Government's choice between economic options",[202] which a tribunal would have to do if reduction of damages were to be based on whether the measures were justifiable in light of the circumstances.

169. Reduction of damages for equitable considerations based solely on the level of severity of the state's financial crisis would thus avoid the unsavoury outcome of tribunals having to confront complex macroeconomic matters which they have no expertise in.

170. On the facts, Mekar was in the midst of a dire currency crisis that resulted in it running deficits in both its fiscal and current accounts.[203] This led to surging inflation and an "economy in freefall" by November 2017.[204] It was this currency crisis that required Mekar to impose a decree requiring all companies operating in the country to offer goods and services denominated exclusively in MON, which indirectly contributed to Caeli's downfall.[205]

171. While this policy may not reach the threshold required by the principle of 'necessity', it is clearly that it bore relation to the financial crisis Mekar was facing at the time. The ramifications of awarding full compensation to the Claimant would be devastating for a developing country for Mekar, and the astronomical amount that the Claimant demands would outweigh Mekar's consolidated annual public spending twice over.[206] Thus, as a matter of sympathetic equity, the tribunal should reduce compensation to account for these extenuating circumstances Mekar was facing at the time.

[202] *Sempra*, ¶351.
[203] SOUF, ¶39.
[204] *Ibid*, ¶41.
[205] *Ibid*, ¶39.
[206] PO 3, ¶3.

PRAYER FOR RELIEF

172. In light of the above submissions, the Respondent respectfully requests this Tribunal to find that:

(i) It does not have jurisdiction over the present dispute;
(ii) The amicus submissions by the Consortium are inadmissible;
(iii) The amicus submissions by EACRPU are admissible;
(iv) The Respondent did not breach its obligations under Article 9.9 of the CEPTA;
(v) The Claimant is not entitled to damages in the amount of USD 700,000,000 with interest as of the date of violation at a rate to be fixed by the Tribunal.
(vi) In the event that the Tribunal finds the Respondent in breach of Article 9.9 of CEPTA, then the Tribunal should conclude Mekar has already purchased the Claimant's investment at "market value" and award the Claimant no compensation; in the alternative, the Tribunal should reduce any compensation awarded considering the Claimant's contributory fault and the ongoing economic crisis in Mekar.
(vii) The Respondent is entitled to reimbursement for all costs and expenses associated with this arbitration;

Respectfully submitted on September 23, 2021

On behalf of the Respondent, The Federal Republic of Mekar

By TEAM 1605 PATHAK G,

Ms. Vishakha Choudhar
Ms. Elina Arocena Basso
Mr. Mitchell Dorbyk