TEAM ROBINSON

Vemma Holdings Inc.

(Claimant)

- AND –

The Federal Republic of Mekar

(Respondent)

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

MEMORIAL FOR RESPONDENT

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LIST OF AUTHORITIES

ARBITRAL DECISIONS

Abbreviation	Citation
ADF	ADF Group Inc. v. United States, ICSID Case No. ARB(AF)/00/1 (NAFTA), Award, 9 January 2003.
Aguas	Aguas Argentinas S.A and Othes v. Argentina, ICSID case No.ARB/03/19, Order in Response to a Petition for Transparency and Participationas Amicus Curiae, 19 May 2005.
Apotex	Apotex Inc. v. United States of America, ICSID Case No. UNCT/10/2, Procedural Order No. 2 (On The Participation of a Non-Disputing Party), 11 October 2011.
Arif	Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award, 8 April 2013.
Azurix	Azurix Corp. v. The Argentine Republic (I), ICSID Case No. ARB/01/12, Award, 14 July 2006.
Besserglik	Oded Besserglik v. Republic of Mozambique, ICSID Case No. ARB(AF)/14/2, Award, 28 October 2019.
Blanco	Jorge Luis Blanco, Joshua Dean Nelson and Tele Fácil México, S.A. de C.V. v. United Mexican States, ICSID Case No. UNCT/17/1, Final Award, 5 June 2020.
Border	Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe, ICSID Case No. ARB/10/25, Procedural Order No. 2, 26 June 2012.

BUCG	Beijing Urban Construction Group Co. Ltd. v Republic of Yemen, ICSID Case No ARB/14/30, Decision on Jurisdiction, 31 May 2017.
Cargill	Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2008.
Chevron (I)	Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I), PCA Case No. 2007-02/AA277, Partial Award on the Merits, 30 March 2010.
Consortium	Consortium RFCC v. Royaume du Maroc (ICSID Case No. ARB/00/6), Decision on Jurisdiction, 16 July 2001.
Continental Casualty	Continental Casualty Company v. Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 September 2008.
CSOB	Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999.
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Duke Energy	Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, 18 August 2008.
EDF	EDF (Services) Ltd. v. Romania, ICSID Case No. ARB/05/13, Award, 8 October 2009.

El Paso	El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011.
Eli	Eli Lilly and Company v. The Government of Canada, UNCITRAL, ICSID Case No. UNCT/14/2, Procedural Order No.4, 23 February 2016.
Enron	Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007.
Genin	Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2.
Glamis Gold	Glamis Gold Ltd. v. United States of America, Award, 8 June 2009.
Grand River	Grand River Enterprises Six Nations, Ltd., et.al. v. United States of America, Award, 12 January 2011.
Hamester	Gustav F W Hamester GmbH & Co KG v Republic of Ghana, ICSID Case No ARB/07/24, Award, 18 June 2010.
Helnan	Helnan International Hotels A/S v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction, 17 October 2006.
Iberdrola	Iberdrola Energía, S.A. v. Republic of Guatemala (I), ICSID Case No. ARB/09/5, Award, 17 August 2012.
İçkale	İçkale İnsaat Limited Şirketi v. Turkmenistan, ICSID Case No.ARB/10/24, Award, 8 March 2016.

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Jan de Nul	Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, 6 November 2008.
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Lauder	Ronald S. Lauder v. Czech Republic, Award, 3 September 2001.
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Spyridon	Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, 7 December 2011.
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Thunderbird	International Thunderbird Gaming Corporation v. The United Mexican States, Arbitral Award, 26 January 2006.
Toto	Toto Costruzioni Generali S.p.A. v. Lebanese Republic, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009.
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UAB	UAB E energija (Lithuania) v. Republic of Latvia, ICSID Case No. ARB/12/33, Award, 22 December 2017.
Unglaube	Reinhard Hans Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/09/20, Award, 16 May 2012.
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OCED Guildlines	OECD Guidelines on Corporate Governance of State-Owned Enterprises (2015).
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LEGAL SOURCES

Abbreviation	Citation
ARSIWA	International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10, UN Doc. A/56/10.
ICSID AFR	International Centre for the Settlement of Investment Disputes Additional Facility Rules.
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States.
NY Convention	The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
UN Convention	United Nations Convention on jurisdictional immunities of states and their property abbreviation
UNCITRAL Rules	UNCITRAL rules on transparency in treaty-based investor- State arbitration.
VCLT	Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, entered into force 27 January 1980.

LIST OF ABBREVIATIONS

Term	Abbreviation
Paragraph(s)	¶/¶¶
Treaty between the Federal Republic of Mekar and the Commonwealth of Bonooru for the promotion and protection of investment	1994 BIT
Additional Facility Rules	AFR
Arbitration Rules of the Sinnoh Chamber of Commerce	ARSCC
Article	Art.
The Commonwealth of Bonooru	Bonooru
The Competition Commission of Mekar	CCM
Corporate-Discount Scheme	CDS
Comprehensive Economic Partnership and Trade Agreement between the Commonwealth of Bonooru and the Federal Republic of Mekar	CEPTA
The Mekar's Common Man's Party	CMP
Discounted Cash Flow	DCF
Fair and Equitable Treatment	FET
Frequent-Flyer Programme	FFP
Fair Market Value	FMV
The International Court of Justice	ICJ
International Centre for Settlement of Investment Disputes	ICSID
Investor-State Dispute Settlement	ISDS
Line(s)	l./ll.

Low Cost Carrier	LCC
The Labourers' Party of Mekar	LPM
The Federal Republic of Mekar	Mekar
The Monopoly and Restrictive Trade Practice Act of Mekar	MRTPA
Minimum Standard of Treatment	MST
Bonooru's Ministry of Transport and Tourism	MTT
Market Value	MV
Page(s)	p./pp.
Predatory Pricing Strategies	PPS
State-owned enterprise	SOE

STATEMENT OF FACTS

1. The Claimant, **Vemma**, is an airline holding company incorporated in Bonooru – an archipelagic State with unique geography. Until March 2020, Bonooru retained shareholding ranging between 31% to 38% in Vemma.
2. The Respondent is **Mekar** – a federal republic as well as developing country with high regulatory intervention and late economic reforms starting in 1994.
3. The dispute arises under the Comprehensive Economic Partnership and Trade Agreement which came into force on 15 October 2014 and terminated the 1994 Bonooru-Mekar BIT.
4. In 2010, Bonooru launched Capsian project to facilitate the movements of goods, people and redefine trade patterns in Greater Narnian region. Under the mentioned project, the Boonoru also launched the Horizon 2020 to grant subsidies to certain enterprises, and Vemma was one of the first enterprises to receive such subsidies.
5. In November 2010, Claimant participated in the tendering process to purchase shares in Caeli Airways and had this bid approved by the CCM, who warned the Claimant to not engage in high-level co-operation with Moon Alliance members.
6. From August 2011 to December 2013, through offering low airfares, FFP and CDS, Caeli became the only consistently profitable carrier on many of its routes.
7. In September 2016, the CCM launched a *suo moto* investigation to identify whether Caeli had adopted PPS. In December 2016, the CCM launched the Second Investigation on the alleged anti-competitive acts of Caeli in Phenac International.
8. From September 2016 to October 2019, the CCM also imposed airfare caps onto Caeli as an interim measure to prevent them from earning supra-competitive profits.

9. In March 2017, Respondent started to go through an economic crisis. Although the CCM had adjusted the airfare caps, Caeli decided to seek judicial review and requested an interim hearing. Against the longstanding backlogs, the Court issued a decision in June 2019.

10. Meanwhile, in September 2018, Respondent issued Executive Order 9-2018 to provide subsidies for airlines affected by the economic crisis, giving its Secretary the discretion to grant subsidies in accordance with certain criteria. Subsequently, Caeli's submission was rejected.

11. In November 2019, Claimant announced its intention to sell its stakes in Caeli and secured an offer with another Moon Alliance member. However, Claimant got into a dispute with the other shareholder in Caeli – Mekar Airservices, who contended that the offer Claimant got is not from a *bona fide* third party.

12. In May 2020, Mr. Cavannaugh rendered an arbitral award in favor of Mekar Airservices. Afterwards, Claimant used an evidence released by CILS, an organization that was under investigations by Respondent's authorities, to set aside the award at its seat of arbitration. Nevertheless, Mekar Airservices had the award recognized and enforced by the Respondent's court. Contrarily, Claimant's appeal was rejected.

13. In October 2020, after having been unable to secure yield another buyer, Claimant agreed to sell their stakes in Caeli to Mekar Airservices for USD 400 million.

14. In November 2020, Claimant filed the notice of arbitration.

SUMMARY OF ARGUMENTS

1. The Tribunal lacks jurisdiction *rationae personae* since Vemma is not a national of another State under Art.2 of the ICSID AFR and the present dispute constitutes the State-to-State arbitration which is not within the jurisdiction under Art.2 of the ICSID AFR and Chapter 9 of the CEPTA.
2. Only CRPU should be accepted by the Tribunal to participate as amicus curiae or NDP in this arbitral proceeding.
3. The Respondent did not violate its obligation to accord Claimant's invest with FET under Art.9.9 of the CEPTA because: (i) the CCM's investigations and maintenance of the airfare caps were not arbitrary, (ii) Respondent did not unreasonably discriminate Claimant under the Executive Order 9-2018 subsidies program, (iii) The claims submitted by Claimant into the Mekari courts were not treated with undue delay, (iv) the recognition and enforcement of the May 2020 Award did not manifest fundamental breach of due process. Since these claims do not individually amount to any violation under the FET standard, they shall not constitute any breach when being considered together. Lastly, there was no ground for Claimant's legitimate expectation to arise.
4. However, even if the Tribunal finds that the Respondent had breached one or multiple elements of the FET standard, Claimant is not entitled to any further amount of damages since the Respondent had already paid them under the MV standard. The Claimant cannot invoke the MFN clause to import another standard of compensation. Finally, even if the Claimant is allowed to do so, the amount of damages must be reduced when taking into account Claimant's risky business conducts and the Respondent's public interests.

PLEADINGS

ISSUE 1: THE TRIBUNAL DOES NOT HAVE JURISDICTION RATIONAE PERSONAE OVER THIS DISPUTE.

1. In order to have the standing before this Tribunal, the Claimant must meet the requirements laid down in ICSID AFR and the investment treaty itself.[1] Regarding the ICSID AFR, the Art.2 made it clear that the ICSID Tribunals will only administer proceedings for the settlement of a legal dispute arising directly out of the investment between a State and a national of another State.
2. In the same vein, it is common ground that ICSID AFR Tribunals do not extend to the State-to-State disputes,[2] and jurisdiction of the ICSID is not open to State-owned entities as claimants when they are acting as agents of the State or engaging in activities where they exercise an essentially governmental functions. Falling under either of these two circumstances shall deprive the jurisdiction of the tribunal. This is commonly known as the Broches test, which has been applied by many jurisprudences.[3]
3. Hereby, the Respondent objects the jurisdiction of this Tribunal under the ICSID AFR. Specifically, this Tribunal lacks the jurisdiction ratione personae because [**A**] Vemma is not a 'national of another State' under Art.2 of the ICSID AFR and [**B**] the present dispute constitutes the State-to-State arbitration, thus it falls outside the scope of jurisdiction of the Centre.

A. Vemma is not a national of another State under Art.2 of the ICSID AFR.

4. Although a 'national of another State' is defined under Art.1 of the ICSID AFR, it does not clarify whether the national would include

[1] Douglas, p.285, ¶530; Art.9.1 CEPTA.
[2] Schreuer, p.161, ¶270.
[3] *Id.*

SOEs or not. However, such defintion shares the similarities with the definition of a 'national of another Contracting State' under Art.25 of the ICSID Convention.[4] Under this article, it is well-established that the term 'national' does not prohibit a wholly or partially government-owned company to be a party to ICSID proceedings against a foreign State. This statement is not contradicted in the course of the subsequent deliberations of the Contracting parties to the Convention.[5] However, for the admission of government-controlled and government-owned entities as investors, Mr. Aron Broches – a 'principal architect' of the Convention[6] formulated as follows:

"*[…] for 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*".

5. Commonly, the ICSID Tribunal applied this two-prong test of Mr. Aron Broches to determine the attribution of State entities' conducts.[7] Indeed, an SOE shall not be qualified as a 'national of another State' unless it is acting as an agent for the government or is discharging an essentially governmental function.[8] The conjunction '*or*' suggests that falling under either of these two circumstances, as mentioned above, shall deprive this Tribunal's jurisdiction.

6. In conjunction, ICSID Tribunals often refer Broches test to Art.8 and Art.5 of the ARSIWA respectively upon determination of these factors.[9] The ARSIWA represents the basic rules of international

[4] Schreuer, p.84.
[5] Schreuer, p.161.
[6] Schreuer, p.2. Aron Broches is not only the General Counsel of World Bank who set the basic ideas for the ICSID Convention and presented the First Draft of the Convention, but also a chairperson of several regional consultative meetings of legal experts creating the basis for the Preliminary Draft.
[7] CSOB, ¶20; BUCG, ¶41; Feldman, pp.31-32.
[8] Broches, pp.354–355.
[9] BUCG, ¶34; Toto, ¶¶44, 60; Tatneft, ¶109.

rules concerning the responsibility of States for their internationally wrongful acts and has no binding to any dispute mechanism,[10] however, it is a reliable ground for previous ICSID Tribunals to justify the measures taken by the States.

7. Thus, the Respondent shall prove that firstly, [**I**] Vemma is an SOE, and secondly [**II**] It was discharging the essentially governmental functions. Hence, it actions are attributable to Bonooru and the Tribunal would lack jurisdiction ratione personae since this dispute is a State-to-State dispute.

I. Vemma is an SOE.

8. In this case, there is no definition on SOEs under the CEPTA or any agreements between the State parties. However, Tribunals will generally determine an enterprise as SOE based on two characters, which are [**a**] the ownership and [**b**] control of the State.[11] In light of lacking the agreement on the definition of SOE under CEPTA, this Tribunal can refer to the mentioned approach. Thus, the Respondent shall hereby prove that Vemma is an SOE based on these two broadly recognised factors.

a. Bonooru's government owns a part of shareholdings in Vemma.

9. *Firstly*, in the assessment of ownership, Bonooru held 31-38% of the shareholding in Vemma from the time of incorporation until May 2020.[12] It is obvious that the Bonooru's government has always maintained their ownership in Vemma.

b. Bonooru's government exercises the control over Vemma.

10. *Secondly*, in the assessment of control, there is no broadly accepted test for the control. *However*, the Vacuum Tribunal determined that

[10] Commentaries on ARSIWA, p.31, ¶(1).
[11] Maffezini, ¶¶79-80; Haririan, p.12; WB Report, pp.2-3; OECD Guildlines, ¶14; 2011 UNCTAD Report, p.28.
[12] Record, p.29, ¶10.

the control in an enterprise must be viewed in each particular context, on the basis of all of the facts and circumstances and there is no "formula".[13] Each particular fact within a case will justify the mentioned control.[14]

11. Importantly, *United* Nations under its 2011 World Investment Report defined SOE as as enterprises comprising parent enterprises and their foreign affiliates in which the government has a *controlling interest*, whether or not listed on a stock exchange. Specifically, *the control is defined as a stake of 10% or more of the voting power, or where the government is the largest single shareholder.*[15] The mentioned control is the *control in the linkage with the ownership*, not the effective control under Art.8 of the ARSIWA. This principle is supported by the OECD Guildlines[16] and the *Tatneft* Tribunal. In that particular case, Tartan's government owned 36% of the voting stock in Tatneft which offered **other indications of factual State ownership** despite it is not the control under Art.8 of the ARSIWA referred by the Claimant.[17]

12. In the present case, Bonooru exercises the control in [**i**] the level of shareholders and [**ii**] the level of Board of Directors within Vemma.

i. Bonooru exercises the control in the level of shareholders.

13. Bonooru's government owned the 31-38% of voting powers exactly as equivalent percentage of its shareholding in Vemma. Further, there is no other governmental shareholder in such company and the rest shareholders being Bonoori and Goponga nationals only held less than a 7% stake. Therefore, Bonooru exercised its rights as the sole biggest shareholder.[18] In certain meetings, Bonooru even formed the

[13] Vaccum, ¶43.
[14] OECD Guildlines, ¶14.
[15] 2011 UNCTAD Report, p.28
[16] OECD Guildlines, ¶14.
[17] Tatneft, ¶132.
[18] Record, p.89, ¶2.

majority and pass the decisions in some meetings when other shareholders were absent.[19]

14. Moreover, Bonooru can exercise much control than a mere shareholder. As is evident from the judgment of the Constitutional Court of Bonooru, Bonooru shall be able to make sure that Vemma would ensure the mobility rights for the public benefit. This control over Vemma is significant that they can control Vemma's activities despite being a minority shareholder.[20]

ii. Bonooru exercises the control in the level of Board of Directors.

15. Bonooru can also exercise its control within Vemma's Board of Directors. In the internal rule of the enterprise Vemma, Bonooru is entitled to nominate its officials to participate in the Board of Directior – the decision-making authority of the enterprise.[21] The Board of Directors is the executive body working under the control of the shareholders. Since Bonooru plays the role of biggest shareholders and controls Vemma's voting in shareholders' meetings, it is capable of influencing the Board of Directors by the right to elect the directors as a shareholder.[22]

16. Further, it should also be noted that the company was replaced with the government functionaries in 2021.[23] Though the jurisdiction of this Tribunal shall be determined at the time on which the proceedings are deemed to have been instituted,[24] or in this case, on 15 November 2020, such fact illustrates that at any point of time, the normal course of functioning of this enterprise can be hugely affected by the Bonooru's decisions. Hence, State reserved a significant power

[19] Record, p.86, ¶3.
[20] Record, p.43, ¶59.
[21] Record, p.46, ¶152.4.
[22] Record, p.86, ¶3.
[23] Record, p.40, ¶65.
[24] Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic (ICSID Case No. ARB/09/1), Decision on Jurisdiction, 21 December 2012, ¶4.

in the corporate hierarchy the rather than other mere private shareholders in the company. The control Bonooru has in Vemma is therefore not merely through a corporate governance mechanism, but indeed such control is hugely more.

17. In summation, Bonooru actually owns and controls over Vemma and this company is an SOE.

II. Vemma was discharging the essentially governmental functions.

18. The assessment on the governmental functions is extracted from the second limb of Broches test, which mirrors Art.5 of the ARSIWA.[25] Importantly, each particular society, tradition and history will be taken in to consideration of what would be regarded as 'governmental' function.[26] By conferring this, it is obvious that there is no common formula for the governmental authority but such definition varies on *case-by-case basis*.[27]

19. Hereby, the Respondent shall prove that Vemma was discharging two essentially governmental functions, including [**a**] the function to ensure and promote the mobility rights of the citizen; and [**b**] the function to promote long-term agenda of Bonoori government. More specifically, an entity would be deemed to discharge an essentially governmental function if *it is empowered by the law of the State to exercise functions of a public character normally exercised by State organs;* and *its investment relates to the exercise of the governmental authority concerned*.[28]

[25] BUCG, ¶¶35-36.
[26] Commentaries on ARSIWA, p.43, ¶6.
[27] Masdar, ¶¶145-146, 170; Crawford, p.129; QIL, ¶5.1.
[28] Commentaries on ARSIWA, p.43, ¶2.

a. Vemma was discharging the function to ensure and promote the mobility rights of the citizen when making the investment.

i. The function to ensure and promote the mobility rights of the citizen is a governmental function, and Vemma was empowered to exercise such function.

20. *Firstly*, 'governmental function' shall be determined on the *case-by-case* basis as mentioned above. In this context, ensuring and promoting mobility rights of the citizen is the function of Bonooru's government upon unique geography of this country. Bonooru is an archipelagic State with 109 islands, however, vital public facilities such as healthcare or educational institutions are concentrated on only 04 islands.[29] This requires the State to positively ensure the easily denied mobility rights.[30] Furthermore, the Constitutional Court of Bonooru concluded that most of the citizens could not move between the islands or even leave the islands for another nation.[31] As can be seen, Bonooru's government and its aviation sector is obligated to serve the unique demand of the publics in this particular country.[32]

21. Considering these circumstances, the function to protect and promote the right to mobilize of the citizens in the context of this country is the function of the Bonoori government.

22. *Secondly*, Vemma was empowered to exercise the function to ensure and promote the mobility rights. As stated, the Bonooru's Constitutional Court asserted that the government will ensure the utilisation of Royal Narnian owned 100% by Vemma for the public benefits.[33] Afterwards, Mr. Sabrina Blue – the Secretary of MTT – even lauded in a press conference that Vemma lived up to the standards

[29] Record, p.28, ¶5.
[30] Record, p.42, ¶[25].
[31] Record, p.43, ¶[56].
[32] Record, p.43, ¶[56].
[33] Record, p.43, ll.1495-1497.

of BA Holdings, which are the enhancement of Bonooru's tourism infrastructure and mobility rights of its population.[34] Such statement once again confirmed the previous delegation of governmental authorities.

23. For avoidance of doubts, it should be noted that the empowerment to exercise governmental functions would seem to require the specific delegation rather than legality under the general law.[35] Regarding this matter, The Tribunal in *Helnan* case has followed such principle when the Tribunal stated as follows:

"*Even if EGOTH has not been officially empowered by law to exercise elements of the governmental authority, its actions within the privatisation process are attributable to the Egyptian State*".[36]

24. Following *Helnan* Tribunal, the exercise of governmental functions needs not to be empowered officially by law but also be recognised in the website, announcements of state authorities. In other words, even when the government functions delegated to Vemma was not recognized under any law. The fact that Vemma applied and received the subsidies under the Horizon 2020 with the commitment to serve one of the governmental functions illustrated this empowerment

25. Hence, Vemma was empowered to exercise the function of the public entity, namely the function to ensure and promote the mobility rights of the citizen.

ii. Vemma was discharging such function when making the investment

26. The Respondent acknowledges that ICSID Tribunals often focused on a context-specific analysis of the investment and nature of these activities.[37] However, the analysis on the purpose for which the

[34] Record, p.89, ¶6.
[35] Crawford, pp.130-131.
[36] Helnan, ¶93.
[37] CSOB, ¶20; BUCG, ¶¶35-36.

governmental functions are to be exercised is necessary to be assessed under Commentaries on ARSIWA.[38] Additionally, the purpose of a commercial transaction (including the investment) has been accepted under the customary international law.[39] Following that, ICSID Tribunals also applied such element.[40] Therefore, in the evaluation of specific conduct, both nature and purpose must be determined in a discreet manner. Thus, the nature and purpose of the investment shall be hereby considered in sequence.

27. Regarding the purpose, when making the investment, Vemma's application to receive subsidies from Bonooru highlighted that its investment would draw more potential travelers from Bonooru and enhance the civil aviation network.[41] Further, by fulfilling those missions, Vemma has received a continuous influx of funds from Bonooru since 2011.[42] In the light of these subsidies, Vemma even decides to make Caeli's flights to transport its citizens from and to Bonooru and Mekar even it rendered losses to the airline.[43]

28. Hence, when investing in Caeli Airways, Vemma aims at promoting the governmental objectives of Bonoori Government. Besides, the nature of the investment is also clear – Vemma's acquisitition of Caeli Airways is political in nature.

b. Vemma was discharging the function to promote long-term agenda of Bonoori government.

i. The function to promote governmental agenda is a governmental function and Vemma was empowered to discharge this function.

29. The Bonoori government revealed its intention to facilitate the movement of goods, people, services, and knowledge amongst its

[38] Commentaries on ARSIWA, p.43, ¶6; Feldman, p.34; Hyatt, ¶¶89-91.
[39] Preamble and Art.2(2) UN Convention; JISATP Articles, p.20, ¶23, ¶¶25-26; Zhang, p.1151, ¶9.
[40] Hamester, pp.189-190.
[41] Record, pp.32-33, ¶28.
[42] Record, p.89, ¶6.
[43] Record, pp.30-33, ll.1105-1107, l.1102, l.1122.

neighbours, with the long-term goal of redefining trade patterns through the Caspian Project. Remarkably, the Capsian Project and the Horizon 2020 programme as a part of such project were even condemned as economic diplomacy by other countries in Greater Narnian Region.[44] Moreover, according to the former high-ranking official of Bonooru – Ms. Misty Kasumi, Bonooru aimed to intergrate and control in Mekari regions.[45] This statement was reaffirmed by the Aviation Analytics – a leading international quarterly, which disclosed the negative aspect of Capsian Project which is used as hostage to put pressure on the Respondent Mekar.[46]

30. As mentioned above, the Constitutional Court has justified that Vemma is utilised for the public benefits.[47] By receiving the subsidies under Horizon 2020 programme, Vemma committed to invest and assist the government in achieving the long-term trade policies of Bonooru,[48] which overally redefine the trade pattern in Great Narnian regions.

31. In *Helnan* case, EGOTH – an SOE of Egypt was an active operator in the privatisation of of the tourism industry on behalf of the Egyptian Government. It was concluded that EGOTH was exercising the governmental function.[49] In addition, the *Maffezini* Tribunal also presented the similar conclusion after finding that SODIGA – an SOE of Spain was utilized to undergo the tasks such as undertaking of studies for the introduction of new industries, seeking and soliciting such new industries, investing in new enterprises, processing loan applications with official sources of financing, providing guarantees for such loans, and providing technical assistance, which is all the

[44] Record, p.28, ¶4.
[45] Record, p.55, l.1879.
[46] Record, p.57, ll.1953-1954.
[47] Record, p.43, ll.1495-1497.
[48] Record, pp.32-33, ¶28.
[49] Helnan, ¶93.

governmental plans.[50] In both cases, the Tribunals concluded that such SOEs were discharging the governmental functions in pursuant to the government's plans.

32. Henceforth, activities relating to the promotion of this Bonoori Government's agenda is a governmental function, and Vemma was also empowered to discharge this function.

ii. Vemma was discharging such function when making the investment.

33. Similarly as above, the Respondent shall respectively prove that both the nature and the purpose of the investment point to the fact that the investment into Caeli Airways is to discharge another governmental function – that is to promote the government's agenda.

34. Regarding the purpose, Bonooru decided to grant subsidies to enterprises to have them discharge their intentions in order to achieve its mentioned long-term goals.[51] When making the investment, Vemma has always been receiving the recurring subsidies from the Bonooru's government under the Horizon 2020 program, and certainly so as to perform specific works to achieve the aforementioned result that government aims at.

35. Regarding the nature of such investment, it is associated with the political and diplomatic strategy between Bonooru and Mekar. Shortly after the bid was accepted, the Chairperson of the CRPU asserted that Vemma's ties to Bonooru were an asset.[52] Moreover, according to the formerhigh-ranking official of Bonooru – Ms. Misty Kasumi, Bonooru aimed to intergrate and control in Mekari regions.[53] This statement was reaffirmed by the Aviation Analytics – a leading international quarterly, which disclosed the negative aspect of

[50] Maffezini, ¶86.
[51] Record, p.32, l.1080.
[52] Record, p.31, ¶24.
[53] Record, p.55, l.1879.

Capsian Project which is used as hostage to put pressure on the Respondent Mekar.[54]

36. Remarkably, the Capsian Project and the Horizon 2020 programme as a part of such project were even condemned as economic diplomacy by other countries in Greater Narnian Region.[55] Indeed, Bonooru in 2010 promised a USD 30 billion fund in developing infrastructure in Greater Narnian and Phenac International Airport in Mekar is subjected to parts of this fund. However, Bonooru in fact withdrew the funds for Mekar under Capsian Project only after 07 days since the CCM concluded on its Second Investigation as detrimental for Caeli's business.[56]

37. Hence, such investment is the Bonooru's political and diplomatic policies in essence. Following this context, Vemma was discharging a governmental function by pursuing the agenda of the government through the investment in Caeli Airways.

38. For the sum of foregoing arguments, Vemma was discharging the essentially governmental functions during it made investments in Mekar. Such actions were attributable to Bonooru.[57]

CONCLUSION: Vemma *is not a national of another State* under Art.2 of the ICSID AFR since [**I**] it is an SOE and [**II**] was discharging governmental functions when making the investment in Mekar, which was attributable to Bonooru.

B. The present dispute constitutes the State-to-State arbitration.

39. Regarding the disqualification of Vemma's standing before the ICSID Tribunal, it has been acknowledged by many investment tribunals that principle of attribution could lead the involvement of the State instead of the private companies. Specifically, the *Consortium*

[54] Record, p.57, ll.1953-1954.
[55] Record, p.28, ¶4.
[56] Record, p.89, ¶1.
[57] Commentaries on ARSIWA, p.35, ¶4-6.

Tribunal is challenged its jurisdiction ratione personae, however, the result was ADM – an SOE acting on behalf of the State would involve the State in the dispute.[58] In the same vein, the Tribunal in *Helnan* held that the action of EGOTH – an Egypt enterprise was attributable to the Egyptian State, and the State should therefore be a party to the dispute. In other word, the status of EGOTH cannot be sustained and the Claimant in such case established a *prima facie* dispute involving Egyptian State.[59]

40. Similarly, in the present case, it has been proven that Vemma's investment into Caeli Airways was to discharge the essentially governmental functions. Thus, the party having the real interest in such investment must be the Bonooru government. By analogy with the *Helnan* case, the Bonooru should be the real party in the present dispute with Respondent.

41. Based on the foregoing reasons, this dispute has constituted a State-to-State arbitration between Mekar and Bonooru. However, as mentioned earlier, the ICSID Tribunals only administers the proceedings between a State and a national of another State.[60] Besides, Mekar and Bonooru has not consented to the State-to-State arbitration under Chapter 9 of the CEPTA.

CONCLUSION: This dispute constitutes a State-to-State arbitration and falls outside the jurisdiction under Art.2 of the ICSID AFR and Chapter 9 of the CEPTA.

CONCLUSION TO ISSUE 1: The Tribunal lacks jurisdiction *rationae personae* since [**A**] Vemma is not a national of another State under Art.2 of the ICSID AFR and [**B**] the present dispute constitutes the State-to-State arbitration which is not within the jurisdiction under Art.2 of the ICSID AFR and Chapter 9 of the CEPTA.

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[58] Consortium, ¶¶39-40.
[59] Helnan, ¶¶93-94.
[60] Art.2 of the ICSID AFR.

ISSUE 2: THE TRIBUNAL SHOULD ONLY GRANT LEAVE FOR CRPU'S SUBMISSION.

42. The parameters of amicus participation are laid down in provisions of the ICSID AFR and Art.9.19 of the CEPTA. Pursuant to that, the governing rules in this specific matter shall be CEPTA, ICSID AFR, UNCITRAL rules.[61] These legal authorities also set out a bundle of requirements as follows:

(i) the submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;

(ii) the submission is within the scope of the dispute;

(iii) a non-disputing party has a significant interest in the arbitral proceedings.

43. Importantly, the submission would have to bring a perspective, particular knowledge or insight that **is different from that of the disputing parties**. On this matter, ICSID tribunals concluded that it implies the requirement that the NDP or amicus curiae must be independent.[62] This inquiry is also rational since amicus curiae are 'the friend of the court' but not 'the friend of any parties'.[63]

44. Following the governing rules, this Tribunal should [**A**] dimiss amicus submission from CFBI because [**I**] CBFI is not independent of the Claimant; [**II**] it fails to bring the perspective, particular knowledge or insight in the. determination of legal or factual issues different from the disputing parties; and [**III**] CBFI fails to prove its significant interest in the present dispute. Conversely, [**B**] this Tribunal should

[61] Bastin, pp.212-213, pp.215-219.
[62] UNCITRAL, p.50; Pezold, ¶56; Suez, ¶23; Eli, ¶¶(D)-(E); Schliemann, pp.378-380.
[63] Aguas, ¶8.

grant leave for CRPU's submission, despite the ungrounded reasons on the scope of the dispute from the Claimant.

A. This Tribunal should dismiss amicus submission from CBFI.

45. Respondent shall hereby submit that CBFI is not independent; it also fails to bring the perspective, particular knowledge or insight in the determination of legal or factual issues different from the disputing parties; and to prove its significant interest in the dispute.

I. CBFI is not independent of the Claimant.

46. Since Art.9.19 of the CEPTA requires the NDP to disclose any direct or indirect affiliation with the disputing parties, this shows the intention of the drafters to bar the dependent amicus curiae from submitting the brief. Although the definition of independence is not explicitly regulated in this case, the Tribunals generally consider two things, including the relationship of financial dependence or the determinative influence when amicus curiae submit the brief.[64] However, CBFI fails to meet this threshold due to there is a possibility of CBFI being determinatively influenced.

47. *Firstly*, Lapras – a CBFI's member is not independent of the Claimant. In *Methanex* case, Tribunal is in questions whether accepting NDPs is within its powers, and NDPs can be accepted as expert under Art.1133 NAFTA or not. With that sense, the *Methanex* Tribunal affirmed that *amici* is different from experts and not 'independent' in that they advance a particular case to a tribunal.[65] The *amici* could have a purported interest in the outcome of the dispute because that is the reason they participate in the proceedings. However, their point of view must be put in a way that is indepedent of the parties' procedural strategies.[66]

[64] Pezold, ¶49; Schliemann, p.360.
[65] Methanex, ¶38.
[66] Mourre, p.269.

48. On the contrary, Lapras in fact was even advising the funding strategies such as potential litigation funding and funders for Vemma in respect of the claim against Mekar.[67] Afterwards, the CEO of such company even attended the voting panel to decide the amicus submisison of CBFI. This stipulates a serious doubt that CBFI shall stand from the viewpoints of the Claimant rather than be a neutral party in this arbitral proceeding.

49. *Secondly*, the two CBFI members such as SRB Infrastructure and Wiig Wealth Management Group holding investment right in Mekar are also not independent of the Claimant. In the *Border* case, the Claimant proposed that two petitioners as ECCHR and four isndigenous communities are not independent because they have a connection with Mr. Sacco in Chimanimani, whom the Claimants were engaged in an "on-going dispute". The Sacco is an activist of the ruling political party and he published a paper in favor for the respondent's policies – the Republic of Zimbabwe. The *Border* Tribunal in such particular instance held that these circumstances give rise to legitimate doubts and grounds to deny the NDP application.[68] Given that CBFI members are currently pursing claims against Mekar under the similar CEPTA's Chapter on investment,[69] they would deliver the opinions supporting investors rather than delivering an independent one.

50. Moreover, CBFI apparently comprises all Bonoori investors, among which are 38 members holding investment rights in Mekar. It plays role as a national leader who is professional in public policy advocacy. Hence, CBFI is participating from the standpoint of investors, which is essentially those of the Claimant in this proceeding.

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[67] Record, p.16, ¶7, p.87, ¶12.
[68] Border, ¶7, ¶35, ¶49, ¶¶55-56.
[69] Record, p.16, ¶6.

51. When viewing all these circumstances in conjunction, it raises the legitimate doubts against the ability of CBFI to be independent. In sum, CBFI is not independent from the Claimant since Lapras was advancing the case in favour for the Claimant, SRB Infrastructure and Wiig Wealth Management Group are involved in claims against Mekar.

II. CBFI fails to bring the perspective, particular knowledge or insight in the determination of legal or factual issues different from the disputing parties.

52. Overall, CBFI has not achieved the requirement set out obviously in Art.41.3(a) of the ICSID AFR because it brings to this Tribunal the matters already raised by one or both parties. On the other hand, the *Suez* Tribunal explained the 'determination of legal or factual issues' as the amicus submission may relate to law, facts, or the application of law to the facts.[70]

53. *Firstly*, CBFI provided the regulatory framework in Bonooru, specifically some of the prevailing laws. However, the information of the Privatisation of Enterprises Act 1972, the Airways Infrastructure Rescue Act and Companies Act is cited in the dispute's record.[71] Moreover, the national laws of a country is not particular knowledge but it is mere information and such laws are irrelevant to the Claimant's investment in Mekar. Thus, it is not helpful for this Tribunal to determine any legal and factual issue.

54. *Secondly*, the free market without the direction or instruction of government irrespective of their ownership structure is similar to the fact about the market-based economy which was agreed by both parties. Such matter is earlier raised by the Respondent. In subsequence, this statement is not different from that of the parties.

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[70] Suez, ¶20.
[71] Record, p.29, ¶7; p.40, ¶65; p.45, l.1552.

55. *Thirdly*, CBFI claims that the nature of activities of such enterprises and not their purpose should guide a tribunal's decision. However, this completely overlaps the arguments made by the Respondent among the jurisdictional matters. Thus, this statement fails to be different from that of the parties.

56. *Finally*, the two remaining statements written by CBFI is the subjective perspective which only focuses on the social consequences but disregards the principle of 'rule of law' under CEPTA's Preamble. In addition, those issues are not the facts because it has not happened in the reality and not even the legal issues. Thus, it is helpless to assist the Tribunal.

57. In sum, no perspective, particular knowledge or insight in the determination of legal or factual issues different from the disputing parties is brought by CBFI.

III. CBFI fails to prove its significant interest in the present dispute.

58. In spite of no definition of significant interest under Art.9.19 of the CEPTA and Art.41.3 of the ICSID AFR, ICSID Tribunals interpreted that the NDP must show a 'more than general' interest, which relates to the rights or principles that might be affected by the decision of the arbitral tribunal or the outcome of the overall proceedings.[72]

59. Based on the requirement of significant interest, the Claimant only stated that it pursues fostering a strong, competitive economic environment that facilities growth and development of Bonooru as well as the Greater Narnian Region. Nevertheless, it has not pointed out the resemblance between the other investors in Mekar and Vemma. From the Respondent's standpoint, the legal status of Vemma is one of the core issues causing dispute between the disputing parties. However, CBFI has not proved that the rest of the investors has some of the relatively similar characters in comparison

[72] Simões, pp.193-194; Apotex, ¶28.

with Vemma. Thus, it is irrelevant to conclude that the decisions of the Tribunal would bar the right to arbitrate at ICSID Centre or do harm to the current investment of other Bonoori investors.

CONCLUSION: The Respondent respectfully requests the Tribunal to reject the participation of CBFI since CBFI is not independent of the Claimant and its application fails to bring the perspective, particular knowledge or insight in the determination of legal or factual issues different from the disputing parties, and fails to prove its significant interest in the present dispute.

B. This Tribunal should grant leave for CRPU's submission.

60. Even though the CRPU's submission has satisfied all the necessary requirements set out by CEPTA and ICSID AFR, the Claimant has challenged this amicus submission on the ground that their submission has falling outside the scope of the dispute. However, the Respondent disagrees with that argument from our perspective.

61. *Firstly*, this Tribunal has issued four Procedural Orders to date and no order restricts or limits the scope of jurisdictional matters to be discussed at the hearing. More importantly, as stated in the Preamble of CEPTA, this treaty is to promote transparency and eliminate bribery and corruption in trade and investment, which means that the investment made through bribery would not be protected according to The *WDF* Tribunal as follows:

> *This Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.*[73]

[73] WDF, ¶157.

62. Since there is an allegation regarding the legality of investment, this tribunal in any case would solve all matters relating to its jurisdiction. Therefore, the submission of CRPU concerning the legality of investment, which is examined when this Tribunal deliberates its jurisdiction *ratione materiae*, meets this requirement.

63. *Secondly*, the aforementioned governing rules did not define what is a 'dispute'. Previously, the International Court of Justice defined a dispute as "*a disagreement on a point of law or fact, a conflict of legal views or interests between parties*".[74] Relying on that definition, ICSID Tribunals generally adopted a similar definition.[75] Following such definition, both disputing parties in this case has not limited to any agreement on the nature of the investment. Certainly, the Respondent disagreed on such point of fact related to the nature of the investment, which is 'governmental' and the Claimant did not share the similar view. Notwithstanding, the matters of bribery or corruption, which relate to the legality of investment,[76] was only another aspect of the nature of the investment. Hence, CRPU did raise a matter within the scope of the dispute.

CONCLUSION: This Tribunal should accept grant leave for CRPU's submission because its application is within the scope of the dispute.

CONCLUSION TO ISSUE 2: Only CRPU should be accepted by the Tribunal to participate as amicus curiae or NDP in this arbitral proceeding.

ISSUE 3: THE RESPONDENT DID NOT VIOLATE ART. 9.9 OF THE CEPTA.

64. The Claimant contended that Respondent had failed to accord their investment in Caeli with FET. These allegations were based off a series of events, including the two investigations conducted by the

[74] Mavrommatis, p.11; Maffezini, ¶94.
[75] Maffezini, ¶¶93-94; Impregilo, ¶¶302-303.
[76] Nakagawa, pp.174-177.

CCM,[77] the maintenance of the airfare caps,[78] the denial of subsidies,[79] the delays in court proceedings[80] and the recognition and enforcement of the May 2020 award.[81]

65. The FET standard is enfolded within Art.9.9 of the CEPTA.[82] From the Heading of Art.9.9 itself, the Contracting Parties explicitly linked the MST in customary international law to the given FET standard,[83] which acts a floor, an absolute bottom, below which would not be acceptable in the international sphere.[84] Moreover, the concerned FET standard also comes with additional substantive contents to avoid overexpansive interpretation[85] and arbitrators will not enjoy the discretion to create grounds for violation that exceed the scope provided.[86]

66. Regarding the threshold for violations, the "*historical starting point for discussion*"[87] is the benchmark set out in the *Neer* case of 1926.[88] However, this no longer reflect the modern FET standard[89] as it has gone through a process of development with time.[90] Notwithstanding such temporal evolution, the threshold for violations under the MST standard still remains high.[91] Hence, only measure that are "*arbitrary, grossly unfair, unjust or idiosyncratic"* and lead to *"an outcome which offends judicial propriety"*[92] would violate the MST of FET.

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[77] Record, p.3, ¶¶14-15.
[78] Record, p.4, ¶6.
[79] Record, p.4, ¶18.
[80] Record, p.4, ¶20.
[81] Record, pp.4-5, ¶¶22-28.
[82] Record, p.76.
[83] UPS, ¶97. Loewen, ¶128. Waste Management, ¶¶90-91. Cargill, ¶268.
[84] S.D. Myers, ¶615. Grand River, ¶214.
[85] UNCTAD FET, pp.28-29.
[86] Islam, pp.65-67.
[87] Dolzer & Schreuer, pp.128-130.
[88] Neer, ¶4.
[89] Haeri, pp.30-33.
[90] ADF, ¶179. Waste Management, ¶93.
[91] Thunderbird, ¶194.
[92] Waste Management, ¶98.

67. The Respondent asserts that [**A**] it has neither acted arbitrarily nor [**B**] discriminatorily towards Claimant, [**C**] has neither denied Claimant of justice with undue delay nor [**D**] with fundamental breach of due process. Furthermore, [**E**] these conducts do not carry cumulative effect that can amount to violations under the FET standard. Lastly, [**F**] there can be no ground for legitimate expectations to arise.

A. The conducts of the CCM did not amount to arbitrariness.

68. In the international investment sphere, there are generally three different schools that seek to define the meaning of arbitrariness,[93] namely through dictionaries' definitions,[94] through the twofold test developed by the ICJ in the *ELSI* case[95] and through the criteria proposed by Professor Christoph Schreuer.[96] Among these three, the first is considered imprecise[97] while the third is just a synopsis of practice.[98] On the other hand, the classic definition established by the ICJ in *ELSI* is the starting point of any analysis on arbitrariness,[99] and thus, is often cited in international investment arbitration.[100]

69. The definition provided by the ICJ embodies two elements: an objective element (*disregard of due process, something opposed to the rule of law*) and a subjective element (*an act which shocks, or at least surprises, a sense of judicial propriety*).[101]

70. For the first element, although the analysis may depart from the compliance with domestic law,[102] whether such measure is

[93] Marc Bungenberg, pp.798-800.
[94] Lauder, ¶221. Occidental ¶162.
[95] Azurix ¶392. Noble Ventures ¶¶177-178. Siemens ¶318. Duke Energy ¶378.
[96] EDF ¶303. Toto Award, ¶157.
[97] Bungenberg, pp.798-800.
[98] Reinisch & Schreuer, p.834.
[99] Dumberry, p.122.
[100] Veijo, p.101.
[101] ELSI, ¶128. Bungenberg, pp.798-801.
[102] Stone, pp. 88-89.

inconsistent with the law is not pertinent.[103] This view is clearly provided by Art.9.9.6 of the CEPTA as breaches of domestic laws do not automatically lead to violations under the FET standard. Hence, the second element establishes a threshold for such breaches as something "shocking" or "surprising". This is interpreted by the Tribunal in *Noble Ventures* as if there is a public purpose, a necessity to achieve the public purpose and if the same measure is provided by other legal systems, an act would not be arbitrary.[104]

71. Overall, the analysis would base on an "*I know it when I see it*" approach,[105] while bearing in mind that the threshold for violations is high.[106]

72. On that note, the Respondent asserts that neither [**I**] the First Investigation initiated by the CCM nor [**II**] the maintenance of the airfare caps amounts to arbitrariness.

I. The First Investigation was not arbitrary.

a. The First Investigation was initiated in accordance with the law.

73. The requirements that the CCM must comply with when initiating any *suo moto* investigation can be found in Chapter III.(2) of the MRTPA.[107] Since the Claimant only based on the first requirement to deem this as unlawful,[108] the Respondent will now proceed to elaborate solely on this ground.

74. From the wordings of Chapter III.(2).(a) of the MRTPA, it is clear that the law does not prohibit the CCM to investigate companies who enjoy market shares of less than 50%, suppose that they are operating in an industry that requires special attention.

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[103] Enron, ¶281.
[104] Noble Ventures, ¶178. *See also* Bungenberg, p.799. *See overall* Reinisch & Schreuer, pp.813–854.
[105] Veijo, pp. 101-103.
[106] Hamrock, p.847.
[107] Record, p.47, ll.1598-1606.
[108] Record, p.3, ¶14.

75. For the case at hand, Caeli is an airline in the aviation industry, which has been known for being heavily regulated,[109] and thus, requires special attention.

76. First, the aviation industry has comparatively high market entry/expansion barriers, making the market power more durable.[110] Like many other jurisdictions,[111] even the Respondent's MRTPA view this as a factor when analyzing an anti-competitive act.[112] In the context of predatory pricing strategies, which aim at the supra-competitive profits after competitors have been driven off the market, an industry that has higher market entry barriers surely requires special attention.

77. Second, although the trend of de-regulating the aviation industry is emerging among states, certain circumstances still call for states' intervention from an antitrust perspective.[113] This is because the rise of LCCs and airlines alliances have a negative impact on the competition in the long run.[114] Here, Caeli was offering low airfares and simultaneously cooperating with another airline through an alliance, the matter does provide grounds for the CCM's scrutiny.

78. In short, the CCM was simply acting in accordance with its authority provided by the law itself. Hence, there can be no further arguments on arbitrariness.

b. The First Investigation was neither shocking nor surprising.

79. Even if there were to be any misapplications of law, the measure was neither shocking nor surprising.

80. First, there was a legitimate public policy objective behind the measures taken by the CCM, which is for social and consumer

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[109] Belobaba, pp.19-46.
[110] ICN, pp.6-7.
[111] EU Journal, ¶71. US Sherman Act, Chapter 2.III.
[112] Record, p.49, ll.1689-1692.
[113] OECD Summary, pp.3-4. *See also* ICAO.
[114] *See overall* Kim.

protection. Such objective is explicitly provided in Art.9.8 of the CEPTA[115] and emphasized within the preamble of the MRTPA.[116]

81. Second, the measure taken was an investigation towards Caeli's PPS,[117] which is an anti-competitive act provided in Chapter IV of the MRTPA.[118] When initiating the First Investigation, the CCM made preference to the fact that Caeli was offering pursuing low airfares to its competitors and practicing preferential secondary slot-trading with the Royal Narnian.[119] Later on, the CCM concluded that the FFPs and CDSs offered by Caeli contributed to the PPS. For the aviation industry, Caeli was indeed raising structural and behavioral market entry barriers[120] while offering low airfares, which ultimately serve the purpose of PPS that could hurt consumer welfare. Hence, the measure taken was in close relation with the objective of consumer protection.

82. Lastly, even Caeli could have foreseen that its way of business conducts would invite attention from the CCM. In 2010, CCM warn Caeli to not engage in high-level co-operation with other Moon Alliance Members, namely in prices, schedules, facilities, etc.[121] Hence, once there is evidence they are participating in slot-trading scheme, the CCM acted upon that. Furthermore, antitrust regulations within the aviation industry relating to FFPs, CDSs, LLCs and slot-trading is widely adopted by legal systems around the world.[122]

83. In *Genin*, even though the Tribunal found that the Host State could have done a better job to meet the legal requirements, the annulment of the investors' banking license was just the execution of a statutory

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[115] Record, p.76, ll.2725-2729.
[116] Record, p.47, ll.1590-1593.
[117] Record, p.34, ¶36.
[118] Record, p.48, ll.1658-1659.
[119] Record, p.34, ¶36.
[120] OECD Summary, pp.3-4.
[121] Record, p.32, ¶25, ll.1042-1049.
[122] OECD Summary, pp.3-4.

power. Furthermore, the political and economic transition that Estonia was going through could justify for the heightened scrutiny of certain economic sectors.[123] Similarly, in the current case, the CCM was just acting in accordance with its statutory obligations to protect the competition within the aviation industry, one that plays a crucial role in the transitory economy of the Respondent.

84. Therefore, the First Investigation was neither shocking nor surprising.

II. The maintenance of the airfare caps was not arbitrary.

a. The airfare caps were maintained in accordance with the law.

85. Chapter III.(4).(e) of the MRTPA lays down 03 requirements for the enactment of any *interim measure*, namely: (i) its purpose being preventive, (ii) its time duration being specified and (iii) it being be renewed insofar it is still necessary and proportionate.[124] Since the Claimant's arguments are based on the third requirement,[125] the Respondent will now proceed to address this.

86. To begin with, the caps renewal was necessary. The caps act as the ceiling price in case Caeli raise its airfares to earn supra-competitive profits.[126] At the same time, they were imposed in the context of two investigations, the former is related to PPS[127] while the latter is related to anti-competitive acts in the Phenac International.[128] For the Second Investigation, suspicion towards Caeli dominating an airport must be understood as them raising the market entry barriers,[129] which also serve their purpose of pursuing PPS.

87. Next, the caps were imposed in a proportionate manner. Indeed, even Claimant themselves acknowledged that the caps was reasonable

[123] Genin, ¶370.
[124] Record, p.47, ll.1623-1626.
[125] Record, p.4, ¶16.
[126] Record, p.34, ¶37, ll.1160-1161.
[127] Record, p.34, ¶36.
[128] Record, p.35, ¶38.
[129] Belobaba, pp.33-39.

when first being implemented.[130] From there, the CCM adjusted the caps each year based on the official inflation rate calculated by the Central Bank.[131] On the other hand, Caeli representatives only "felt" that the spot rate "could" be much higher[132] without providing any evidence on the caps being unproportionate. After all, the caps were imposed in the context of 02 investigations manifesting how Caeli was pursuing PPS. Hence, the threat of Caeli earning supra-competitive profits was still present at the time the caps were renewed and the CCM only acted to prevent that from happening.

88. Since the caps were maintained in accordance with the law, arbitrariness is, therefore, excluded.

b. The maintenance of the caps was neither shocking nor surprising

89. Similar to the First Investigation, the caps were aimed to protect consumers.[133] Moreover, there is a rational relationship between the caps and such objective as elaborated on how it was necessary above.

90. Although there may be few countries around the world who use airfare caps as a tool to control competition in the industry, such practice is not unprecedented. In India, the authorities have been using caps to tackle PPS[134] while in Vietnam, the caps have been imposed since 2006 to avoid collusion between domestic airlines.[135]

91. Therefore, the caps maintenance was neither shocking nor surprising.

[130] Record, p.3, ¶15, ll.79-80.
[131] Record, p.36, ¶43, ll.1223-1224.
[132] Record, p.36, ¶43, ll.1224-1227.
[133] Record, p.47, ll.1623-1626. Record, p.4, ¶16.
[134] Firstpost.
[135] VNExpress.

CONCLUSION: The First Investigation and the maintenance of the airfare caps implemented by the CCM did not constitute arbitrary measures under the FET standard.

C. The refusal to grant subsidies to Caeli under the Executive 9-2018 was not discriminatory.

92. In *Saluka*, the test for discrimination is threefold, which is as follows:

93. "*State conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification.*"[136]

94. Simply put, the FET standard only prohibits unreasonable difference in treatment.[137] Hence, the Tribunal can refer to one of the four principles associated with the FET standard, which is reasonableness[138] to determine whether there is justification for the measure taken. This can be done by looking into the public interest that the Respondent state is pursuing[139] and identify whether it has a rational relationship with the measure taken. This is classified as the "*means/ends*" or "*suitability*" test.[140]

95. Thus, the Respondent asserts that there is justification for how Caeli was treated.

96. First, the legitimate public policy of consumer protection that the Respondent was pursuing is explicitly provided in Art.9.8 of the CEPTA.[141] Moreover, the Respondent has clearly affirmed this objective in the Executive Order 9-2018 as one of the criteria for grant of subsidies is to "not skew market conditions".[142] The Respondent did not at any point claim that it has the obligation to alleviate for all

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[136] Saluka, ¶313.
[137] Kenneth J., p.43.
[138] *Ibid*, pp.50-52.
[139] S.D. Myers, ¶250.
[140] Ortino, ¶¶40-42.
[141] Record, p.76, ll.2725-2729.
[142] Record, p.56, ll.1922-1923.

airlines but rather gave the Secretary the discretion to decide on these subsidies.[143]

97. Second, as explained by the Respondent's deputy Minister of Transportation, the subsidies were not granted to certain State-owned enterprises.[144] As the result, the only two airlines significantly owned by a foreign government did not receive subsidies under the program.[145] In short, the measure taken was to "**not grant airlines significantly owned by foreign government**" with subsidies, not on the basis of whether one has received subsidies from their home State or not.

98. Third, there is a rational relationship between the above objective and measure since airlines like Caeli had received advantages from their home States that gave them an edge compares to other competitors.

99. To begin with, the source of subsidies received by Caeli over a period of time under the Horizon 2020 program was granted so they can pursue PPS.[146] On the other hand, other competitors only had help from their home States in the context of an economic crisis under the form of a one-time lump-sum payment.[147] Next, Caeli also received support from the Bonoori government. This can be demonstrated through Claimant's confidence in bold, risky investments worldwide[148] and as soon as the Second Investigation was initiated, Bonooru employed economic leverage as a tool for diplomacy as they hold back funds to build Phenac International.[149] Thus, airlines like Caeli do received significant advantages compares to other competitors, which allowed them to gain significant market shares through time and pursuing PPS.

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[143] Record, p.56, l.1919.
[144] Record, p.37, ¶46, ll.1264-1265.
[145] Record, p.37, ¶47.
[146] Record, p.36, ¶45, ll.1246-1247.
[147] Record, pp.89-90, ¶7, ll.3301-3303.
[148] Record, p.57, ll.1947-1950.
[149] Record, p.8, ¶18, ll.277-280. Record, p.89, ¶1.

100. With the above advantage, providing Caeli with subsidies could potentially put them back into the position they were in prior to the economic crisis, which is against the objective of protecting competition of the Respondent. After all, the subsidies granted was only in the form of loans and loan guarantees,[150] which had to be limited within the budget of a developing country like Respondent.[151] In reality, Respondent instead focused on helping out airlines operating important domestic routes with less than 5% market shares.[152]

CONCLUSION: Although Caeli was treated differently under the subsidies program, it was reasonable for the State to protect the consumers from such treatment. Hence, the State was not acting discriminatorily.

D. There was no undue delay in judicial proceedings.

101. Although Caeli filed 02 different claims[153] into the Mekari courts, Claimant only argued that the first one relating to the interim hearing on the airfare caps faced undue delay.[154] Thus, the Respondent contends that the actions of the Court when resolving this claim did not amount to denial of justice.

102. There is currently no "one-size-fits-all" test for undue delay in international investment jurisprudence.[155] A period of 09 years in *El Oro* can be deemed excessive[156] while a period of 10 years in *Interhandel* can was considered a reasonable time span.[157] Hence, the analysis must be done on a case-by-case basis[158] to assess whether the delay was abnormal or abusive.[159]

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[150] Record, p.56, l.1906.
[151] Record, p.56, l.1914.
[152] Record, p.89, ¶7, ll.3299-3301.
[153] Record, p.36, ¶44. Record, p.37, ¶50.
[154] Record, p.4, ¶20.
[155] Demirkol, pp.156–198.
[156] El Oro, ¶9.
[157] Interhandel, ¶¶26–29.
[158] Paulsson, pp.177-178.
[159] Freeman, p.247.

103. Some factors that the Tribunal may consider include the complexity of the case, the behavior of the litigants involved, the significance of the interests at stake in the case and the behavior of the courts themselves.[160] The Respondent contends that three out of four preceding factors can be found in the given case.

104. First, the case on the interim measure has a complex nature. By the time Caeli registered its claim, the caps had been imposed for 19 months[161] and were related to 02 investigations conducted by the CCM, which came with "voluminous" report.[162]

105. Second, the Claimant was not the only one whose interests was at stake. After all, the Claimant was asking to remove the airfare caps in the context of an economic crisis where the inflation rate was rising, resulting in the surge in the cost of everyday items and the decline in consumer spending power.[163] Under such circumstance, price control in the form of price ceiling can act as a tool to overcome inflation for the Respondent.[164]

106. Third, the Courts were acting in a reasonable time span to resolve the claim. In 2015, the average time for the Mekari courts to resolve a matter was 22 months.[165] However, it only took 15 months in total for the claims on the airfare caps to be resolved.[166] This incredibly swift time span was achieved despite the courts being flooded with claims[167] after the economic crisis in March 2017.[168]

107. In short, these three factors justify for the amount of time it took for the Respondent's court to resolve the Claimant's case. Hence, there was no undue delay.

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[160] White Industries, ¶11.3.2.
[161] From September 2016 (Record, p.34, ¶37) to March 2018 (Record, p.36, ¶44).
[162] Record, p.36, ¶45, l.1243.
[163] Record, p.35, ¶39, ll.1387-1388.
[164] Zaid, p.30.
[165] Record, pp.29-30, ¶13, ll.949-953.
[166] The claim was registered on 27 March 2018 (Record, p.36, ¶44, l.1233) and the final decision was rendered on 15 June 2019 (Record, p.38, ¶54, ll.1321-1322).
[167] Record, p.36, ¶44, ll.1233-1235.
[168] Record, p.35, ¶39, l.1187.

108. In case the Claimant argues that Respondent had failed to maintain an effective mechanism to resolve civil claims timely, the Respondent contended that such argument only corresponds with the effective means standard, not with denial of justice under customary international law. Effective means standard only exists in cases where the Respondent states have explicitly promise to provide effective means of asserting claims and enforcing rights.[169] On the other hand, Art.9.9 of the CEPTA only accords the Claimant with the MST of FET. The Tribunal in Chevron I even noted that: "*the "effective means" standard is lex specialis and is a distinct and potentially less demanding test, in comparison to denial of justice in customary international law*".[170] Hence, the question is not whether the Respondent's courts were performing as efficiently as they ideally could but rather whether they were performing so badly that amount to breaches under the FET standard.[171]

CONCLUSION: With the aforementioned factors, the Respondent's court was actually acting in a reasonable and proper manner to treat the Caeli's claim. Thus, there was no undue delay.

E. The recognition and enforcement of the May 2020 Award was not a fundamental breach of due process and shall not amount to denial of justice.

109. The Claimant contested the recognition and enforcement of the May 2020 Award based 02 grounds, that [**I**] the Award as been set aside at the seat of arbitration and that [**II**] there was evidence on bribery, which Claimant interpreted as a denial of justice.[172]

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[169] e.g., Art.II(7) Ecuador – United States of America BIT (1993), Art.3.3 Kuwait – Portugal BIT (2007), Art.3.6 Croatia – Sweden BIT (2000).
[170] Chevron (I), ¶244. Quoted by the Tribunal in White Industries, ¶11.3.2.
[171] Vannessa Ventures, ¶227.
[172] Record, p.5, ¶28, ll.149-150.

110. Alternatively, the Claimant could put forward arguments under the concept of fundamental breach of due process.

111. Nevertheless, the Respondent hereby pleads that none of the above grounds can constitute violations under both principles of denial of justice and due process of law.

112. To begin with, fundamental breaches of due process is the heart of denial of justice.[173] Although most Tribunals interpret the former as part of the latter,[174] equate one to the other,[175] or simply find they are closely linked,[176] few Tribunals considered that under certain circumstances, fundamental breaches of due process can be established without amounting to denial of justice.[177] The distinguishment among the two can be done to assess the requirement of local remedies exhaustion[178] or to set a lower threshold.[179]

113. Regarding the "*finality rule*",[180] the need to distinguish among the two seems redundant since the Claimant in reality had already exhausted local remedies.

114. Regarding the threshold for violations, under both concepts of denial of justice and fundamental breach of due process, the benchmarks of assessment are high in correspondence with the MST standard linked to the FET standard under Art.9.9 CEPTA, "*an outcome which offends judicial propriety*".[181]

115. Therefore, although the Art.9.9 of the CEPTA separates fundamental breach of due process from denial of justice as grounds of violations

[173] Paulsson, p. 180.
[174] Loewen, ¶132. Jan de Nul, ¶178. Rumeli, ¶653.
[175] Spyridon, ¶315 Thunderbird, ¶197.
[176] Siag, ¶452.
[177] Deutsche Bank, ¶478.
[178] Lahoud, ¶466.
[179] Tatneft Merits, ¶405, 411.
[180] Douglas DOJ, p.873.
[181] Waste Management, ¶98. Blanco, ¶358.

under the FET standard, the analysis for both of these concepts in the current case remains the same.

116. Finally, the Tribunal shall not act as the appellate body[182] to the judgement rendered by the Respondent's judicial organs and thus, only procedural errors can amount to denial of justice.[183]

I. Recognizing and enforcing an arbitral award that had been set aside at its seat of arbitration is not a fundamental breach of due process.

117. The Respondent has the discretion to recognize and enforce the May 2020 Award despite it being set aside by the Court in Sinnograd.

118. First, Art.VI of the NY Convention does not impose upon States the obligation to set aside an arbitral award that has been set aside at its seat of arbitration. This is because the language used by the Drafters was "*may*" and under Art.31 of the VCLT, the word "*may*" must be understood as giving the States the discretion to decide on the matter. Furthermore, interpreting the NY Convention in a way that would disfavor the enforcement of arbitral awards would go against its very own purpose.[184]

119. Second, from a domestic perspective, a national court is not bound by the decisions rendered by a foreign court. Moreover, the case law in Respondent state shows that it has enforced an arbitral award that were set aside at its seat of arbitration.[185] Hence, domestic law shall prevail.

120. Thus, the enforcement of the May 2020 award cannot be considered as a procedural error on part of the Respondent's court.

121. Lastly, even if the Courts had misinterpreted the international law, Respondent's liability would be founded on the breach of the NY

[182] Thunderbird, ¶125. Mondev, ¶126.
[183] Rumeli, ¶652. Unglaube, ¶273. *See also* Padilla, pp.296-301 (2011).
[184] Gaillard, p.16.
[185] Record, p.68, ¶11.

Convention (*lex specialis*), not on the basis of denial of justice under the CEPTA.[186]

II. The Courts did not unreasonably disregard evidence of corruption.

122. The Respondent once again emphasizes that the role of the Tribunal in reviewing the claims for denial of justice must not be conducted in a sense that they would act as an appellate body to review the substance of the case that have been resolved by the domestic court.[187] Instead, it is the methodology and reasoning employed by the domestic court that is in question.[188] After all, the FET standard is not ground for Claimants to have the domestic judgements reviewed just because they simply disagree with the outcome of the case resolved by the courts.[189]

123. For the given case, the Respondent asserts that the Courts had considered the evidence on corruption closely and provided rationales.

124. To begin with, the Respondent contends that the Mekari courts did analyze the evidence on corruption before ruling on its creditability. In the August 2020 judgement, the High Commercial Court pointed out that: (i) the CILS report was the only evidence weighing in Claimant's favor[190] but (ii) the CILS has been recognized as "*as entity funded by foreign donations to interfere with Mekar's domestics affair.*"[191] Meanwhile, to set aside an arbitral award, the threshold is much higher.[192] The High Court highlighted that there must be strong circumstantial evidence to deny the recognition and

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[186] Paulsson, pp. 84-87.
[187] *Supra* fn.182.
[188] Demirkol, p.165.
[189] Iberdrola, ¶491. Liman, ¶377.
[190] Record, p.66, ¶10, ll.2273-2274.
[191] Record, p.66, ¶13, ll.2286-2290.
[192] The Mekari arbitration law is based on UNCITRAL Model Law (Record, p.40, ¶66, l.1417). *See overall* Bantekas, pp.927-976.

enforcement of an arbitral award, i.e., successful allegations of fraud or bribery that had previously been made against the same judicial authority.[193] In other words, the evidence did not meet the threshold of the domestic law.

125. In *Arif*, the Tribunal noted that the courts decisions were carefully drafted, allowing the readers to following their reasonings from A to Z.[194] Thus, no breach of denial of justice was found. For the current case, the courts did not fundamentally breach the due process of law when enforcing the May 2020 award as they have provided specific analysis and legal basis for their conclusion. Hence, it is the Claimant who bears the burden of proof to show how the courts' decisions could have resulted in any gross misapplication of the law under the high threshold set out by the FET standard.[195]

126. Since the decisions of the Mekari courts were rendered through an outcome of an analytical process conducted in a plausible and reasonable manner,[196] there is no ground to conclude that there was a fundamental breach of due process.

CONCLUSION: The Respondent did not deny Claimant of justice nor fundamentally breach the due process of law when recognizing and enforcing the May 2020 Award.

F. The above conducts/measures do not have cumulative effect that can amount to breaches under the FET standard.

127. To begin with, the Respondent asserts that the above measures do not constitute violations under the FET standard individually nor conjunctively. This is because the concept of "creeping violations of the FET standard"[197] is problematic.[198]

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[193] Record, p.66, ¶9, ll.2269-2270.
[194] Arif, ¶453.
[195] Liman, ¶377.
[196] Demirkol, p.187.
[197] El Paso, ¶518.
[198] *See overall* Vesel, pp.553-564.

128. First, the Tribunal in *El Paso* based on Art.15 of the ARSIWA to establish the cumulative effect for the measures in accordance with the concept of "*composite act*".[199] However, this concept refers to cases where a series of measures was employed to achieve a certain goal,[200] which is fundamentally different from the findings of violations based on separate, non-related measures under FET. Second, unlike "creeping violations" analysis that focuses on the final effect,[201] assessment under the FET standard requires the Tribunal to take into account the relevant circumstances[202] and other principles like proportionality or reasonableness.[203] Hence, analysis solely on the final outcome would contradict FET standard itself and is considered alarming for developing Respondent states.[204]

129. Furthermore, when being considered conjunctively, the above measures do not amount to abusive treatments under the FET standard. To claim that the Respondent was pursuing collusion, conspiracy or campaign to harass investors, Claimant has to provide cogent evidence, not mere allegation from the surrounding facts. Here, the standard of proof for a conspiracy involving a component of bad faith is a demanding one.[205]

130. The above measures when being considered together cannot result in any form of conspiracy that the Respondent was trying force Claimant into selling their shares in Caeli. This is because the decision to sell the shares was also subsequent to multiple events, including: (i) the increase of oil price,[206] Caeli's refusing the loan offer from a bank,[207] Claimant not being able to yield in another buyer,[208]

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[199] El Paso, ¶516.
[200] Commentaries on ARSIWA, ¶62.
[201] Siemens, ¶263.
[202] UNCTAD FET, p.7.
[203] Vandevelde, pp.51-53.
[204] Islam, pp.158-161.
[205] Besserglik, ¶362.
[206] Record, p.37, ¶48, ll.1269-1271.
[207] Record, pp.37-38, ¶51.
[208] Record, p.40, ¶63, l.1390-1391.

etc. These factors significantly contributed to Claimant's decision yet were well out of the Respondent's reach.

CONCLUSION: The concept of "creeping violation" of the FET standard cannot be adopted so each individual measure does not carry cumulative effect that could amount to breach of the FET standard. Furthermore, when being considered as a whole, these measures do not constitute abusive treatments.

G. There is no ground for Claimant's legitimate expectation to arise.

131. Legitimate expectation is an important yet controversial principle under the FET standard.[209] Therefore, the Drafting Parties of the CEPTA have explicitly provided guidance for the Tribunal to assess claims on legitimate expectation under Art.9.9.3.
132. In international jurisprudence, there are 03 grounds for legitimate expectation to arise that the Tribunal can consider: (i) through contractual relationship with States,[210] (ii) through representations from States,[211] and (iii) through the States' general regulatory framework.[212] However, under the CEPTA, Art.9.9.3 clearly demonstrates that expectation shall only arise from specific representation to a specific investor.[213]
133. Since there is no fact indicating any representation from the Respondent that induce Claimant in making or maintaining the investment, legitimate expectation is excluded.

CONCLUSION: There is no ground for legitimate expectation to arise.

CONCLUSION TO ISSUE 3: The Respondent did not violate Art.9.9 of the CEPTA since the CCM did not acted arbitrarily [**A**], the refusal to grant

[209] Kläger, p.164.
[210] MTD, ¶163. Continental Casualty, ¶262. Glamis Gold, ¶766.
[211] Parkerings, ¶331. Metalclad, ¶89.
[212] National Grid, ¶84. Lemire, ¶267. Merrill, ¶233.
[213] Record, p.76, l.2748.

subsidies was not discriminatory [**B**], there was no undue delay in court proceedings [**C**], no fundamental breach of due process in recognizing and enforcing the May 2020 Award [**D**]. The Tribunal also cannot consider the cumulative effect of these measures and together, they do not amount to abusive treatments [**E**]. Finally, there is no ground for legitimate expectation to arise [**F**]. Therefore, the Respondent bears no obligation to pay for damages.

ISSUE 4: Even if the Respondent has breached the FET standard, sufficient amount of damages has been paid under the MV standard of compensation.

134. Art.9.21 of the CEPTA stipulates that for breaches of the FET standard, investors shall be entitled to monetary damages under the MV standard. The FMV standard is only applicable in the case of expropriation under Art.9.12.2 of the CEPTA.
135. The Respondent contends that Claimant cannot use the MFN clause to import standards of treatment [**A**]. Moreover, even if the Tribunal finds that the appropriate standard of compensation is FMV, the amount of damages paid must be reduced [**B**].

A. Claimant cannot invoke the MFN standard to import another standard of treatment on Respondent.

136. For the case at hand, the Claimant is trying to use the MFN clause to import another standard of compensation called the FMV standard provided under Art.13 of the 2006 Arrakis – Mekar BIT.[214] The Respondent hereby maintains that the MFN clause in the CEPTA is not a "choice-of-law" clause.
137. To begin, the MFN clause is an autonomous standard, not an obligation that derives from customary international law.[215] Hence,

[214] Record, p.84, ll.3089-3094.
[215] UNCTAD MFN, p.22.

the interpretation of the MFN clause must be done from a "bottom-up" approach[216] through Art.31 and 32 of VCLT.[217] The MFN clause under Art.9.7 of the CEPTA can be classified as one that comes with express provisions and express territorial limitations.[218]

138. First, the word "treatment" was given special meaning by Art.9.7.2 of the CEPTA. Here, the Drafting Parties made it clear that obligations from other treaties do not in themselves constitute treatment under Art.9.7.1. Thus, under Art.31.4 of the VCLT, the Tribunal has to respect the intentions of the Drafting Parties.

139. Second, regarding the term "in like situation", the given MFN clause requires factual analysis to be applied. In *İçkale*, when the Claimant tried to invoke standards of protection like FET, FPS or an "umbrella clause" that were absent in the Turkey-Turkmenistan BIT, the Tribunal rejected because: "*The terms "treatment accorded in similar situations" therefore suggest that the MFN treatment obligation requires a comparison of the factual situation [...] it cannot be read, in good faith, to refer to standards of investment protection included in other investment treaties.*"[219] Since there is no other third investor from Arrakis that can be compared with Claimant to establish whether they were "in like situations", the MFN clause cannot be invoked.

CONCLUSION: In short, the MFN clause does not perform as a "choice-of-law" clause to import another standard of compensation.

[216] Batifort, p.874.
[217] ILC, p.162.
[218] ILC, Annex.
[219] İçkale, ¶¶328-329.

B. Even if another standard of compensation is applied, the amount of damages must be reduced.

I. The Claimant handled their investment in Caeli riskily.

140. Losses caused by bad management of investment risk should not be compensable under the FET standard.[220] At the end of the day, BITs are not "*insurance policies against bad business judgment.*"[221]

141. The Respondent contends that Claimant also contributed to the devaluation of the investment in Caeli.

142. First, Claimant did not conduct proper due diligence when investing in Caeli. Back in 2010, the proposed business plan submitted by Claimant was said to be "*overly optimistic*" as it did not take into account the fluctuation of fuel prices and potential competition in the market.[222] Furthermore, Claimant is widely known for deliberately choosing to invest in distressed airlines worldwide.[223]

143. Second, Claimant did not hedge fuel price when operating Caeli.[224] Hence, it is only natural that Claimant faced financial difficulties when the spot price rose and left them unprotected by hedging strategies.[225]

144. Third, Claimant did not invest incrementally but rather hastily, without trying to improve the financial health of Caeli overtime. When Claimant submitted its bid for Caeli's shares, its bid stated that it would refinance for the remainder of Caeli's debt liability.[226] Sadly, Claimant did not do so despite several warnings[227] from Mekar Airservices when conducting business in Caeli.

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[220] *See overall* Muchlinski, pp.527-558.
[221] Maffezini Award, ¶64.
[222] Record, p.31, ¶24, ll.1034-1037.
[223] Record, ll.1948-1950. Record, p.89, ¶5, ll.3284.
[224] Record, p.34, ¶34, ll.1130-1132.
[225] Record, p.37, ¶48, ll.1269-1271.
[226] Record, p. 31, ¶21, l.1025.
[227] Record, p.33, ¶31, ll.1108-1010. Record, p.34, ¶35, ll.1136-1138.

145. The above grounds were part of the reasons why Caeli could not negotiate on a favorable loan to save itself from the risk of insolvency.[228]

146. In *UAB*, although the Tribunal found that Latvia had violated Art.3(1) of the Lithuania v. Latvia BIT (Arbitrary, unreasonable and/or discriminatory measures), they also found that the Claimant's conduct contributed to the final loss. In the end, the Tribunal awarded Claimant with only 50% of the loss incurred.[229]

CONCLUSION: Since the Claimant also contributed to their own loss in Caeli, any subsequent amount of damages must be deducted to hold them accountable.

II. The interests of Claimant should be balanced against the public interests of Respondent.

147. First, the Tribunal should take into account the fact that Respondent is still a developing country who is in transition towards a market-based economy. In *Lemire*, the Tribunal considered account the transitory status of the Host State as post-Communist country and decided to reduce the compensation by increasing the country-risk rate in the DCF valuation formula.[230]

148. Second, to pay an absurd amount of USD 700 million that Claimant demands,[231] Respondent would have to transfer about twice its consolidated annual public spending.[232] The consequences that entailed from such a gigantic amount would be devasting for the general public in Respondent state. In *ConoccoPhillips*, the Tribunal also awarded an enormous amount of compensation despite the warning of the IMF about the sophisticated situation that was going

[228] Record, pp.37-38, ¶51, ll.1300-1308.
[229] UAB, ¶1144.
[230] Lemire, ¶304.
[231] Record, p.5, ¶30.
[232] Record, p.86, ¶4, ll.3164-3165.

on in Venezuela,[233] resulting in the devastating situations in that country's entire economy.[234] Hence, the Respondent asserts that the effect of the final award on its general public must be treated with due consideration.

CONCLUSION: Any subsequent amount of damages must take into account: (i) the Claimant's risky conducts and (ii) the overall public interests of the Respondent. These shall be grounds for damages deduction.

CONCLUSION TO ISSUE 4: The Respondent does not have the obligation to pay for damages since it has not violated Art.9.9 of the CEPTA. However, in case the Tribunal established otherwise, the Respondent affirms that it had paid compensation under the MV standard for Claimant, and they are not entitled to the FMV standard. Lastly, regardless of the compensation standard, if there is to be any amount of damages that still need to be paid, deduction must be made based on the risky business strategies of Claimant and the public interests of the Respondent.

[233] IMF Transcript.
[234] Guardian.

PRAYERS FOR RELIEF

For the aforementioned reasons, Respondent respectfully asks the Tribunal to render that:

1. This Tribunal does not have the jurisdiction *ratione personae* over this dispute;
2. Only CRPU can participate as *amicus curiae* or an NDP in this arbitral proceeding;
3. The Respondent has not violated the FET standard under Art.9.9 of the CEPTA; and
4. Even if the Respondent did, the applicable standard of compensation shall be the MV standard, under which the Respondent had already paid damages to the Claimant.

Respectfully submitted on 23 September 2021 by

ROBINSON

On behalf of the Respondent

The Federal Republic of Mekar.