TEAM TANAKA

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Vemma Holdings Inc.

(Claimant)

v.

The Republic of Mekar

(Respondent)

MEMORIAL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Treaties

Abbreviation	Citation
ICSID AF Rules	ICSID Additional Facility Rules (entered into force 10 April 2006).
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3.
UNCITRAL Transparency Rules	UNCITRAL Transparency Rules on Transparency in Treaty-based investor-State Arbitration (entered into force 1 April 2014).
VCLT	Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

Arbitral Decisions

Abbreviation	Citation
Amto	*Limited Liability Company Amto v. Ukraine* (Award) [2008] SCC Arbitration.
Apotex Award	*Apotex Holdings Inc. and Apotex Inc. v. United States of America* (Award) [2014] ICSID Case No. ARB(AF)/12/1.
Apotex PO 2	*Apotex Holdings Inc. and Apotex Inc. v. United States of America* (Procedural Order No. 2) [2012] ICSID Case No. ARB(AF)/12/1.
Apotex PO 4	*Apotex Holdings Inc. and Apotex Inc. v. United States of America* (Procedural Order No. 4) [2013] ICSID Case No. ARB(AF)/12/1.
Arif	*Mr. Frank Charles Arif v. Republic of Moldova* (Award) [2013] ICSID Case No. ARB/11/23.
Asian Agricultural Products	*Asian Agricultural Products Ltd. v. Republic of Sri Lanka* (Final Award) [1990] ICSID Case No. ARB/87/3.
Azinian	*Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States* (Award) [1999] ICSID Case No. ARB (AF)/97/2.
B3	*B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia* (Award) [2019] ICSID Case No. ARB/15/5.
Bahgat	*Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (I)* (Award) [2019] PCA Case No. 2012-07.
Banka	*AS PNB Banka and others v. Republic of Latvia* (Procedural Order No. 3) [2018] ICSID Case No. ARB/17/47.
Bayindir	*Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (Award) [2009] ICSID Case No. ARB/03/29.
BCB	*BCB Holdings Limited; and The Belize Bank Limited v. The Attorney-General of Belize (on behalf of the Government of Belize)* (Judgement of The Carribean Court of Justice) [2013] LCIA Case No. 81169.
Bear Creek	*Bear Creek Mining Corporation v. Republic of Peru* (Procedural Order No. 6) [2016] ICSID Case No. ARB/14/21.
Berschader	*Vladimir Berschader and Moïse Berschader v. Russian Federation*

	(Award) [2006] SCC Case No. 080/2004.
Bilcon	*Bilcon of Delaware et al. v. Government of Canada* (Counter Memorial of Canada) [2011] PCA Case No. 2009-04.
Biwater	*Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (Procedural Order No. 5) [2001] ICSID Case No. ARB/05/22.
Bridgestone	*Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama* (Award) [2020] ICSID Case No. ARB/16/34.
BUCG	*Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen* (Decision on Jurisdiction) [2017] ICSID Case No. ARB/14/30.
Burlington	*Burlington Resources, Inc. v. Republic of Ecuador* (Decision on Reconsideration and Award) [2017] ICSID Case No. ARB/08/5 .
Cavalum	*Cavalum SGPS, S.A. v. Kingdom of Spain* (Decision on Jurisdiction, Liability and Directions on Quantum) [2020] ICSID Case No. ARB/15/34.
Cengiz	*Cengiz İnşaat Sanayi ve Ticaret A.S v. Libya* (Award) [2018] ICC Case No. 21537/ZF/AYZ.
Chevron	*Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)* (Partial Award on the Merits) [2010] PCA Case No. 2007-02/AA277.
Churchill	*Churchill Mining PLC and Planet Mining Pty Ltd. v. Republic of Indonesia* (Award) [2016] ICSID Case No. ARB/12/14 and 12/40.
CMS	*CMS Gas Transmission Company v. The Argentine Republic* (Award) [2005] ICSID Case No. ARB/01/8.
Conoco	*ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (Decision on Jurisdiction and Merits) [Award] ICSID Case No. ARB/07/30.
Corn Products	*Corn Products International Inc. v. the United Mexican States* (Decision on Responsibility) [2008] ICSID Case No. ARB(AF)/04/01.
Crystallex	*Crystallex International Corporation v. Bolivarian Republic of Venezuela* (Award) [2016] ICSID Case No. ARB(AF)/11/12.
Daimler	*Daimler Financial Services AG v. Argentine Republic* (Award) [ICSID Case No. ARB/05/1.
Dan Cake	*Dan Cake (Portugal) S.A. v. Hungary* (Decision on Jurisdiction and Liability) [2015] ICSID Case No. ARB/12/9
Doutremepuich	*Christian Doutremepuich and Antoine Doutremepuich v. Republic of Mauritius* (Award) [2019] PCA Case No. 2018-37.
EDF	*EDF (Services) Limited v. Romania* (Award) [2009] ICSID Case No. ARB/05/13.
Electrabel	*Electrabel S.A. v. Republic of Hungary* (Procedural Order No. 4) [2009] ICSID Case No. ARB/07/19.
Enron	*Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (Award) [2007] ICSID Case No. ARB/01/3.
Enron Nigeria	*Enron Nigeria Power Holding Ltd. v. (1) Lagos State Government (2) Federal Republic of Nigeria (3) Power Holding Company of Nigeria* (Decision of The US Court of Appeals for The District of Columbia Circuit) [2016] ICC Case No. 14417/EBS/VRO/AGF.
Fraport	*Fraport AG Frankfurt Airport Services Worldwide v. The Republic of*

	the Philippines (Award) [2007] ICSID Case No. ARB/03/25.
Frontier Petroleum	*Frontier Petroleum Services Ltd. v. The Czech Republic* (Final Award) [2010] PCA Case No. 2008-09.
Fynerdale	*Fynerdale Holdings B.V. v. The Czech Republic* (Award) [2019] PCA Case No. 2018-18.
Garanti	*Garanti Koza LLP v. Turkmenistan* (Decision on The Jurisdiction For Lack of Consent) [2013] ICSID Case No. ARB/11/20.
Genin	*Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia* (Award) [2001] ICSID Case No. ARB/99/2.
Glencore	*Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia* (Award) [2019] ICSID Case No. ARB/16/6.
Goetz	*Antoine Goetz & Others and S.A. Affinage des Metaux v. Republic of Burundi* (Award) [2012] ICSID Case No. ARB/01/2.
Grace	*Alicia Grace and others v. United Mexican States* (Procedural Order No. 4) [2019] ICSID Case No. UNCT/18/4.
Güriş Dis.Op	*(1) Mr Idris Yamantürk (2) Mr Tevfik Yamantürk (3) Mr Müsfik Hamdi Yamantürk (4) Güriş İnşaat ve Mühendislik Anonim Şirketi (Güris Construction and Engineering Inc) v. Syrian Arab Republic* (Partial Dissenting Opinion of Nassib G. Ziadé) ICC Case No. 21845/ZF/AYZ.
Helnan Hotels	*Helnan International Hotels A/S v. Republic of Egypt* (Decision on Objection to Jurisdiction) [2006] ICSID Case No. ARB/05/19.
Hilmarton	*Hilmarton Ltd. c. Omnium de Traitement et de Valorisation S.A.* [1994] Arrêt de la Cour de Cassation.
Iberdrola	*Iberdrola Energía, S.A. v. Republic of Guatemala (I)* (Award) [2012] ICSID Case No. ARB/09/5.
İçkale	*İçkale İnşaat Limited Şirketi v. Turkmenistan* (Award) [2016] ICSID Case No. ARB/10/24.
Infinito Gold	*Infinito Gold Ltd. v. Costa Rica* (Procedural Order No. 2) [2016] ICSID Case No. ARB/14/5.
InterAguas	*Suez, InterAguas Servicios Integrales del Agua S.A., Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic* (Order in Response to a Petition for Participation as Amicus Curiae) [2006] ICSID Case No. ARB/03/17.
Jan De Nul Award	*Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt* (Decision on Jurisdiction) [2008] ICSID Case No. ARB/04/13.
Jan De Nul Jurisdiction	*Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt* (Decision on Jurisdiction) [2006] ICSID Case No. ARB/04/13.
Krederi	*Krederi Ltd. v. Ukraine* (Award) [2018] ICSID Case No. ARB/14/17.
Lao Holding	*Lao Holdings N.V. v. Lao People's Democratic Republic* (Award) [2019] ICSID Case No. ARB(AF)/16/2.
Libananco	*Libananco Holdings Co. Limited v. Republic of* Turkey (Award) [2007] ICSID Case No. ARB/06/8.
Maffezini	*Emilio Agustín Maffezini v. The Kingdom of Spain* (Decision of the Tribunal on the Objections of Jurisdiction) [2000] ICSID Case No. ARB/97/7.
Mamidoil	*Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania* (Award) [2015] ICSID Case No. ARB/11/24.
Mesa Power	*Mesa Power Group, LLC v. Government of Canada* (Award) [2016] UNCITRAL, PCA Case No. 2012-17.

Methanex Amicus	*Methanex Corporation v. United States of America* (Decision of the Tribunal on Petitions for Third Persons to Intervene as "Amici Curiae") [2001] UNCITRAL.
Methanex Award	*Methanex Corporation v. United States of America* (Final Award on Jurisdiction and Merits) [2005] UNCITRAL.
Mondev	*Mondev International Ltd v. United States of America* (Award) [2002] ICSID Case No. ARB(AF)/99/2.
Morris Award	*Philip Morris Brands SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (Award) [2016] ICSID Case No. ARB/10/7.
Morris PO 3	*Philip Morris Brands SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (Procedural Order No. 3) [2015] ICSID Case No. ARB/10/7.
Morris PO 4	*Philip Morris Brands SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (Procedural Order No. 4) [2015] ICSID Case No. ARB/10/7.
Motorola	*Motorola, Inc. v. Iran National Airlines Corporation, The Government of the Islamic Republic of Iran* (Award) [1988] IUSCT Case No. 481.
Muhammet Cap	*Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* (Award) [2021] ICSID Case No. ARB/12/6.
Nelson	*Joshua Dean Nelson and Jorge Blanco v. United Mexican States* (Award of The Tribunal) [2020] ICSID Case No. UNCT/17/1.
Niko Resources	*Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")* (Decision on the Corruption Claim) [2019] ICSID Case No. ARB/10/18.
Noble	*Noble Ventures, Inc. v. Romania* (Award) [2005] ICSID Case No. ARB/01/11.
Oostergetel	*Jan Oostergetel and Theodora Laurentius v. The Slovak Republic* (Final Award) [2012] UNCITRAL.
Parkerings	*Parkerings-Compagniet AS v. Republic of Lithuania* (Award) [2007] ICSID Case No. ARB/05/8.
Reinhard	*Reinhard Hans Unglaube v. Republic of Costa Rica* (Award) [2012] ICSID Case No. ARB/09/20.
RFP	*Resolute Forest Products Inc. v. Canada* (Procedural Order No. 6 on the Participation of Prof. Robert Howse and Mr. Barry Appleton as Amici Curiae) [2017] PCA Case No. 2016-13.
Rompetrol	*The Rompetrol Group N.V. v. Romania* (Award) [2013] ICSID Case No. ARB/06/3.
Roussalis	*Spyridon Roussalis v. Romania* (Award) [2011] ICSID Case No. ARB/06/1.
Rumeli	*Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (Award) [2008] ICSID Case No. ARB/05/16.
Saipem	*Saipem S.p.A. v. The People's Republic of Bangladesh* (Decision on Jurisdiction and Recommendation on Provisional Measures) [2007] ICSID Case No. ARB/05/07.
Salini	*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*

	[I] (Decision on Jurisdiction) [2001] ICSID Case No. ARB/00/4.
Sanum	*Sanum Investments Limited v. Lao People's Democratic Republic* UNCITRAL, PCA Case No. 2013-13.
Tallinn	*United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia* (Award) [2019] ICSID Case No. ARB/14/24.
Tatneft	*OAO Tatneft v. Ukraine* (Partial Award on Jurisdiction) [2010] PCA Case No. 2008-8.
TECO	*TECO Guatemala Holdings, LLC v. Republic of Guatemala* (Award) [2013] ICSID Case No. ARB/10/23.
Toto	*Toto Costruzioni Generali S.p.A. v. Republic of Lebanon* (Decision on Jurisdiction) [2009] ICSID Case No. ARB/07/12.
Tulip	*Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (Award) [2014] ICSID Case No. ARB/11/28.
Union Fenosa	*Unión Fenosa Gas, S.A. v. Arab Republic of* Egypt (Award of the Tribunal) [2018] ICSID Case No. ARB/14/4.
Vanessa Venture	*Reinhard Hans Unglaube v. Republic of Costa Rica* (Award) [2013] ICSID Case No. ARB/09/20.
Vöcklinghaus	*Peter Franz Vöcklinghaus v. Czech Republic* (Final Award) [2011].
Von Pezold	*Bernhard von Pezold and Others v. Republic of Zimbabwe* (Procedural Order No. 2) [2012] ICSID Case No. ARB/10/15.
Wena Hotels	*Wena Hotels Ltd. v. Arab Republic of Egypt* (Award) [2000] ICSID Case No. ARB/98/4.
White Industries	*White Industries Australia Limited v. The Republic of India* (Final Award) [2011] UNCITRAL.
World Duty Free	*World Duty Free Company v. Republic of Kenya* (Award) [2006] ICSID Case No. ARB/00/7.

International Court of Justice Cases

Abbreviation	**Citation**
Oil Platforms	*Oil Platforms (Islamic Republic of Iran v. United States of America* (Merits) [2003] ICJ Rep 161 (Separate Opinion of Judge Higgins).
Paramilitary	*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 4.

Articles

Abbreviation	**Citation**
Paulsson	Jan Paulsson, 'Enforcing Arbitral Awards Notwithstanding Local Standard Annulments' (1998) 6 Asia Pac L Rev 1.
Gaillard	Emmanuel Gaillard, 'The Enforcement of Awards Set Aside in the Country of Origin' (1999) *ICSID Review - Foreign Investment Law Journal.*
Batifort	Simon Batifort, J. Benton Heath 'The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization' (2018) Cambridge University Press.

Textbooks

Abbreviation	Citation
McLachlan	McLachlan, C., Shore, L. and Weiniger, M., *International Investment Arbitration: Substantive Principles*, Oxford University Press, 1st ed., 2018.

UN Documents

Abbreviation	Citation
ARSIWA	ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (November 2001) UN Doc. Supp. No. 10 (A/56/10).
ARSIWA Commentary	ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (November 2001) UN Doc. Supp. No. 10 (A/56/10).

Miscellaneous

Abbreviation	Citation
ICAO	International Civil Aviation Organization, 'The Economic & Social Benefits of Air Transport' (2011) <https://www.icao.int/meetings/wrdss2011/documents/jointworkshop2005/atag_socialbenefitsairtransport.pdf> accessed 1 September 2021.
ICAO Article	International Civil Aviation Organization, 'Future of Aviation' <https://www.icao.int/Meetings/FutureOfAviation/Pages/default.aspx> accessed 1 September 2021.

TABLE OF ABBREVIATIONS

Abbreviation	Term
¶ / ¶¶	Paragraph/Paragraphs
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 Claimant Holdings Incorporated
Annex V	Monopoly and Restrictive Trade Practice Act, as Amended 2009
Annex VII	Phenac Business Today Podcast Transcript, 17 November 2014
Annex IX	Aviation Analytics June 7, 2019
BIT	Bilateral Investment Treaty
CBFI	The Consortium of Bonooru Foreign Investors
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 in Legal Services
CRPU	Mekar's Committee on Reform of Public Utilities
Enforcement Decision	High Commercial Court of Mekar Ruling – 23 August 2020
Facts	Statement of Uncontested Facts
FET	Fair and Equitable Treatment
HCCM	High Commercial Court of Mekar
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Dispute
IICRA	Investment Information and Credit Rating
ILC	International Law Commission
LLC	Lapras Legal Capital
LPM	Labourer's Party of Mekar
MFN	Most Favoured Nation
MON	Mekari MON
MRTPA	Monopoly and Restrictive Trade Practice Act
NOA	Notice of Arbitration
p.	Page

PO 3	Procedural Order 3
PO 4	Procedural Order 4
Sinnograd Award	Supreme Arbitrazh Court of Sinnograd Ruling
USD	United States Dollar

STATEMENT OF FACTS

The Parties

1. Vemma Holdings Inc. is an airline holding company incorporated under the laws of the Commonwealth of Bonooru, the latter being the only governmental shareholder within it.
2. The Federal Republic of Mekar is a country located approximately 1,600 km to the south of Bonooru. Its currency is MON.
3. In early 2010, Respondent and Bonooru began the negotiation of the CEPTA. They signed it in April 2014 and it entered into force on 15 October 2014. Both are parties to the VCLT and the NYC. While Bonooru is a State party to the ICSID Convention, Respondent has not signed the ICSID Convention. Both State's arbitration laws are based on UNCITRAL Model Law.

Pre-Investment

4. Due to Bonooru's unique geographic situation as an archipelagic State comprising 109 islands, mobility has always been considered as an utmost important need to Bonoorian People.
5. Following losses from the 1973 and 1979 oil shocks, the Civil Aviation Authority of Bonooru privatized the State-owned BA Holdings, the parent company of Bonooru's national airline. Subsequently, Claimant was chosen to be the successor of BA Holdings. While only having 38% in Claimant, Bonooru was able to ensure that Claimant will continue to fulfill its predecessor task in fulfilling the Bonoorian People's mobility rights.

Investment

6. **2010:** The Bonoorian government initiated the Caspian Project in 2010 as an initiative to facilitate the movement of goods, people, services, and knowledge amongst Narnian States. Subsequently, in November, Claimant submitted its bid for the purchase of Caeli Airways shares. In its bid, Claimant states the intention of fleets and route expansion.

7. **2011:** In March, the CCM approved Claimant acquisition of 85% stake in Caeli Airways and the airline's participation in the Moon Alliance. Certain undertakings were sought by CCM from Caeli Airways not to engage in high-level co-operation with Moon Alliance members. Despite the acceptance of its acquisition, certain concerns were expressed by members of CRPU in regards to Caeli Airways' strategies.
8. **2014:** Executive Order 5-2014 was passed by Mekari President in an effort to expedite court proceedings in addition to alleviating the backlog in Mekari Courts by the use of summary judgment.
9. **2015:** While initially only having 12 aircrafts, Claimant has increased Caeli Airways' fleet to 80 aircrafts which was then utilized to fly numerous recently added routes while maintaining several loss-making routes, including Bonooru-Respondent route.

Challenged Measures

10. **2016:** Due to the indication of anti-competitive behavior by Caeli Airways, the CCM launched its first investigation to examine whether Caeli Airways had adopted predatory pricing strategies. As an interim measure, the CCM placed caps on Caeli Airways' airfare to prevent it from earning supra-competitive profits in the future. The CCM then launched another investigation against Caeli Airways due to the complaints raised by a consortium of small regional airlines.
11. **2017:** In December, the macroeconomic situation in Respondent continued to deteriorate.
12. **2018:** In January, with a view to stabilise its currency, Respondent's government passed a decree requiring all companies operating in the country to offer goods and services denominated exclusively in MON. In August, the CCM found a breach of Respondent's antitrust legislation in the form of predatory pricing after completing its first investigation. In light of all these circumstances, Caeli Airways sought judicial review over the airfare caps imposed by CCM. Caeli Airways' claim was registered on 27th March 2018. On September 25, Respondent's President passed Executive Order 9-2018 which granted subsidies for airlines operating in Respondent; however, Caeli Airways was one of the airlines that did not receive the subsidy.
13. **2019:** In January, the CCM concluded that Caeli Airways had engaged in anti-competitive behaviour. In April, Mekar's High Court heard submissions from Caeli Airways and the CCM concerning a stay on the imposition of airfare caps in addition to an appeal on the findings of the CCM investigations. This hearing was only held in

April 2019 due to an influx of cases stemming from the economic crisis. In June, Justice VanDuzer released his interim decision on the airfare caps, declining to remove them and dismissing the merits of Caeli Airways' claim by way of summary judgement. The CCM lifted the applicable airfare caps in October. In December, Mekar Airservices rejected the offer of Claimant to buy their stake in Caeli Airways.

14. **2020:** In February, Mekar Airservices filed a request for arbitration with the Sinnoh Chamber of Commerce's Arbitration Institute to find that Claimant had failed to secure a *bona fide* third-party offer. Despite the award being set aside by the Supreme Arbitrazh Court of Sinnograd, Mekar Airservices sought to enforce the 9 May award before the HCCM. Claimant's losses on its investment in Caeli Airways significantly hurt its financial standing. In October, Claimant sold its stake in Caeli Airways to Mekar Airservices for 400 million USD.
15. **2021:** Following financial losses suffered by Claimant on its investment in Caeli Airways, Claimant plans to minimise Royal Narnian's services. As the news broke out, protests erupted in Bonooru. Under civil and political pressure, Bonooru implemented a bail-in program through the Airways Infrastructure Rescue Act in March, allowing it to purchase increased shares in Claimant. Bonooru increased its shareholding in Claimant to 55%, following which Claimant underwent large-scale restructuring.

Arbitration

16. **2020:** In November, Claimant filed this arbitration to seek compensation for its losses under the CEPTA and ICSID AF Rules. In March, the Tribunal released the first procedural order fixing the matter for hearing and gained attention for *amicus* submission by the CBFI and the External Advisors to the CRPU.
17. The CBFI is a non-profit industry association that represents Bonoori investors investing in the Greater Narnian Region and internationally. The External Advisors to the CRPU are members of Mekari civil society whose professional focus is on investment banking and serve as External Advisors to the CRPU to advise on the privatization, liquidation, and/or restructuring of Caeli Airways.
18. In July, the Tribunal released the second procedural order fixing the matter for hearing, including the *amicus* submissions to both parties.

EXECUTIVE SUMMARY

Jurisdiction

19. Both CEPTA and ICSID AF Rules do not govern inter-State dispute. In the event where Claimant invested in Caeli Airways, it was exercising governmental function or in alternative was under the effective control of Bonooru, establishing the existence of attribution under Article 5 or 8 of ARSIWA respectively. Thus, as Claimant was acting in the capacity of a State in such event and not fulfilling the jurisdiction ratione personae under the applicable laws, it does not have any standing to bring a claim in the present forum.

Amicus Curiae Submission

20. CBFI lacks independence due to the insufficient information of the professional relationship between Claimant and LLC. Furthermore, CBFI does not have any knowledge, experience or expertise to provide the tribunal with a particular perspective or insight beyond that of the disputing parties and its submission only contain facts that have already been made privy to this Tribunal.
21. CBFI does not have any significant interest as it has failed to specify the effect of this Tribunal's award would have towards the rights its protecting or in alternative, the rights that its protecting was a mere professional interest, not fulfilling the criteria of furthering public interest.
22. The submission provided by External Advisors of CRPU on the issues of jurisdiction *ratione legis* should be a matter within the scope of the dispute as it is one of the jurisdictional requirements governed under CEPTA.

Fair and Equitable Treatment

23. The Respondent had not breached Article 9.9 of the CEPTA. The conduct of its judiciary had not amounted to such a degree so as to be rendered unacceptable so as to amount to denial of justice; its administrative body, the CCM, had acted in accordance with national law and accorded Claimant fundamental due process; and its subsidy policy was not discriminatory. Ultimately, even if the entirety of Respondent's conduct

was taken as a collective whole, there is no indication that they serve the purpose of harming Claimant's investment in breach of Article 9.9 of the CEPTA.

Valuation of Damages

24. The Claimant cannot replace the market value compensation clause under Article 9.21 of the CEPTA through the use of the MFN clause under Article 9.7 of the CEPTA as it has not satisfied the requirements of the latter clause. In the event that compensation was to be awarded as requested by Claimant, the amount received must be reduced in light of Claimant's reckless conduct.

ARGUMENTS

I. CLAIMANT IS NOT ENTITLED TO BRING CLAIMS UNDER CEPTA AND ICSID AF RULES

26. The Tribunal lacks jurisdiction *ratione personae* to hear the present case given that Claimant does not fall within the definition of an 'investor' under CEPTA and 'national of another State' under ICSID AF Rules.

A. Claimant does not fulfill jurisdiction *ratione personae* requirements under Article 9.1 of CEPTA and Article 2 of ICSID AFR

27. Although worded differently, jurisdiction ratione personae requirements under CEPTA and ICSID AF Rules essentially entail an identical requirement in the context of present case. Both treaties only extend to investor-State arbitration and do not govern inter-State arbitration.

28. By virtue of the customary rules of treaty interpretation, namely Article 31 of the VCLT, the definition of an 'investor' provided by Article 9.1 of CEPTA does not extend to the State as it only covers a natural person with the nationality **of a Party** and an enterprise with the nationality **of a Party** or seated in the territory **of a Party**. By the same token, Article 2 of ICSID AF Rules only governs proceedings between a State and a national **of another State** as held by numerous tribunals.[1]

29. In the case at hand, Claimant's actions are however, attributable to Bonooru and therefore the present proceedings qualify as inter-State arbitration. Thus, Claimant is barred from bringing a claim under Article 9.1 of CEPTA and Article 2 of ICSID AF Rules as it fails to satisfy the requirements of jurisdiction *ratione personae*.[2]

30. By investing in Caeli, Claimant has simultaneously (i) exercised governmental functions in accordance with Article 5 of ARSIWA. Alternatively, (ii) Claimant's action of investing in Caeli was controlled by Bonooru in accordance with Article 8 of ARSIWA.

i. *Claimant's actions are attributable to Bonooru under Article 5 of ARSIWA*

31. The tribunal in *EDF v. Romania* stated that in the context of Article 5, two requirements must be fulfilled. Namely that "the act must be performed by an entity

[1] BUCG, ¶ 31; Maffezini, ¶ 74.
[2] ibid.; Maffezini, ¶ 79.

empowered by the internal law of the State to exercise elements of governmental authority," and that "the act in question must be **governmental in nature**".[3]

32. As to the first requirement, Article 70 of Bonooru Constitution governs a positive obligation for Claimant to fulfill the mobility rights of Bonoorian people for both domestic and international mobility.[4] It has been further confirmed by statements provided by Bonooru's Prime Minister;[5] Constitutional Court of Bonooru's judgment,[6] and Claimant's Memorandum of Association.[7] These facts taken in conjunction demonstrate that Claimant was empowered by law to exercise governmental authority.

33. If this Tribunal were to render that these facts do not suggest the existence of empowerment by law, it is Respondent's position that such empowerment is not indispensable in the context of attribution for jurisdictional purposes.[8] The tribunals in *Maffezini v. Spain, CSOB v. Slovak Republic,* and *BUCG v. Yemen* had arrived at this conclusion; attribution for jurisdictional purposes without considering the existence of empowerment by the law of the host state.[9]

34. Alternatively, the tribunal in *Helnan v. Egypt* confirmed that actions might be attributed to the State under Article 5 even without the existence of 'internal law that empowered a non-State organ to exercise governmental function' if the actions conducted by an entity were an integral part of the government's project.[10] Similarly in this case, Claimant's investment is an integral part of the governmental Caspian Project.

35. The Bonoorian government initiated the Caspian Project in 2010 as an initiative to facilitate the movement of goods, people, services, and knowledge amongst Narnian States.[11] In order to fulfill this objective, Bonooru must work together side by side with its national airline, which is the Claimant,[12] since air travel is essential for mobility nowadays not only in Bonooru,[13] but throughout the region and even the world.[14]

36. In the same year, specifically on 23 November 2010, Claimant submitted its bid for the purchase of Caeli Airways and successfully acquired 85% of Caeli Airways' shares on

[3] EDF, ¶ 191.
[4] Annex II, Line 1455.
[5] Facts, Line 925.
[6] Annex III, Line 1490.
[7] Annex IV, Line 1510, 1520.
[8] Maffezini, ¶ 79; CSOB ¶ 17.
[9] CSOB, ¶ 27; Maffezini, ¶ 89; BUCG, ¶ 47.
[10] Helnan Hotels, ¶ 93.
[11] Facts, ¶ 4.
[12] Annex IV, Line 1510.
[13] Facts, ¶ 5; Annex II, ¶ 25; Annex III, ¶ 56.
[14] ICAO; ICAO Article.

5 March 2011.[15] Subsequently, after such acquisition, Bonooru stated that it would provide funds to update Respondent's port and the Phenac International Airport over the next 10 years to optimize the movement of goods, people, services, and knowledge.[16]

37. However, just before Claimant decided to sell its shares for Caeli Airways in January 2019[17] it becomes apparent to Bonooru that the interests derived from the operation of Caeli Airways through Claimant[18] would cease to exist. It is in light of this realization that Bonooru withdrew its funding from Respondent's port and the Phenac International Airport which ultimately halted its development.[19] This retaliatory action by Bonooru simply highlights the significance of the Claimant's investment to its interests in fulfilling the Caspian Project.

38. As to the second limb of the test for attribution, the nature of the activity in question plays a crucial role.[20] ARSIWA Commentary explains that what is regarded as "governmental authority" varies depending on the particular society; taking into consideration its history and traditions.[21]

39. Considering the unique geographical situation of Bonooru as an archipelagic State[22] and the positive obligations of fulfilling the mobility rights of Bonoorian people,[23] Claimant's activity of investing in Caeli Airways should be considered governmental in nature.

40. In exercising its investment, Claimant has been fulfilling the mobility rights of Bonoorian people regardless of its profitability.[24] In the fall-winter season of 2013, Claimant was suffering from great financial losses although there was constant demand from business travelers in Bonooru.[25] This signifies that the route between Respondent and Bonooru was a loss-making route. However, despite this fact, Claimant nonetheless maintained this route persistently and consistently which ultimately led to further

[15] Facts, ¶ 22.
[16] PO 4, ¶ 1.
[17] Facts, ¶ 56.
[18] PO 4, ¶ 6.
[19] ibid, ¶ 1.
[20] ARSIWA Commentary to Art. 5, ¶ 5; CSOB, ¶ 20; BUCG, ¶ 35.
[21] ibid, ¶ 6.
[22] Facts, ¶ 5.
[23] Annex II, Line 1455.
[24] Facts, ¶¶ 30, 33; Annex VII, Line 1830.
[25] ibid, ¶ 30.

financial losses in the fall-winter season of 2014;[26] up to the point of its demise, Claimant has maintained its loss-making routes for 7 years.[27]

41. Furthermore, while fulfilling the mobility rights of Bonoorian People, Claimant has also been focusing its investment mainly to enhance Bonooru's tourism infrastructure by improving the aviation network for prospective tourists without considering foreseeable risks that could lead to the downfall of its investment. This is further highlighted by the fact that since the beginning of its acquisition, Claimant has been eager to add fleets and expand for Caeli Airways to operate on.[28] While initially having 12 relatively young Airbus A340 in March 2011,[29] Claimant has increased its fleet to 80 aircrafts by the end of 2015.[30] This enormous expansion of Caeli Airways' fleet was utilized by Claimant to expand routes for international and cross-continental travel to the Respondent State.[31] These actions were taken by Claimant despite having knowledge regarding the volatility of fuel prices[32] and customers' demand.[33]
42. By maintaining loss-making routes between Respondent and Bonooru while also providing low pricing for routes from and to Phenac International Airport,[34] Claimant had successfully enhanced the aviation network, which has, in turn enhanced the tourism infrastructure of Bonooru as stated by Ms. Sabrina Blue on 31 May 2016.[35]
43. The tribunal in *CSOB v. Slovak Republic* has established that in determining whether an activity is governmental in nature or commercial in nature, it needs to be scrutinized whether that activity would be beneficial for the company's financial position.[36]
44. Those above-mentioned activities conducted by Claimant had fulfilled the mobility rights of Bonoorian people and enhanced the tourism infrastructure of Bonooru; it is not beneficial for the company's financial position. Thus, it should be considered as being governmental in nature.

[26] Facts, ¶ 31.
[27] ibid, ¶ 53.
[28] ibid, ¶ 23.
[29] ibid, ¶ 26.
[30] ibid, ¶ 35.
[31] ibid, ¶¶ 29, 31.
[32] ibid, ¶¶ 24, 33.
[33] ibid, ¶ 29.
[34] ibid, ¶ 34.
[35] PO 4, ¶ 6.
[36] CSOB, ¶ 25; Tatneft, ¶ 147.

ii. *Alternatively, Claimants actions fall under Article 8 of ARSIWA*

45. Article 8 of ARSIWA governs the circumstances where an act conducted by a person or group of persons was under the instruction or direction or control of a State.[37] It does not matter whether the conducted act was commercial or governmental in nature.[38]

46. The required degree of control in establishing attribution under Article 8 is "effective control".[39] Effective control requires the existence of both general control of the State over the entity and specific control of the State over the conduct carried out by the entity.[40] General control is established when there exists planning, direction and support provided by the State over that entity.[41]

47. Here, despite only owning 38% of shares in Claimant,[42] Bonooru is still the largest shareholder owner as there exists no other shareholder that holds more than 7% stakes in Claimant.[43] This, followed by the fact that Bonooru's board always present in every meeting[44] would have a significant impact towards Bonooru's presence within the general meeting and subsequently within Claimant's board of directors.[45]

48. This is further evidenced by the fact that Bonooru is able to exercise control over Claimant by ensuring that it **will undoubtedly** operate routes in Bonooru in order to fulfill mobility rights irrespective of the profitability of such routes.[46]

49. Furthermore, Claimant as the flag carrier of Bonooru, has been receiving financial support from Bonooru for an indefinite time.[47] These facts taken cumulatively should establish the existence of general control exercised by Bonooru over Claimant.

50. Specific control is established when there exists an involvement of the State in a specific act to achieve a particular result.[48] *In casu,* there exists a high degree of involvement and interest shown by the Bonoorian government towards the Claimant's investment. During the course of Claimant's investment, Bonooru has exerted extensive

[37] EDF, ¶ 200; Saipem, ¶ 148; Arsiwa Commentary to Art. 8, ¶ 7.
[38] Bayindir, ¶ 82.
[39] Tulip, ¶ 304.
[40] Jan de Nul Jurisdiction, ¶ 173.
[41] ARSIWA Commentary to Art. 8, ¶ 4; Paramilitary, ¶ 86.
[42] Facts, ¶ 10.
[43] PO 4, ¶ 2.
[44] PO 3, ¶ 3.
[45] Salini, ¶ 32.
[46] Facts, ¶ 8; Annex III, ¶ 59.
[47] Annex III, ¶ 59.
[48] Bayindir, ¶ 125-129.

pressure on Respondent to treat Claimant's investment favorably by taking the Caspian Project funds directed to update Respondent's Port and Airport as hostage.[49]

51. Bonooru has an interest in fulfilling the mobility rights of Bonoorian people and to enhance the tourism infrastructure of Bonooru, and it is irrefutable that Claimant's investment achieves that particular result.[50] Thus, such involvement and interest should establish the existence of specific control.

52. Lastly, it is important to note that albeit the level of control required to find the existence of attribution under Article 8 is higher in other factual contexts such as foreign armed intervention or international criminal responsibility, however keeping in mind the statement made by Judge Higgins, "the graver the charge the more confidence must there be in the evidence relied on."[51] Thus, international economic law imposes a lower threshold for Respondent to satisfy, in establishing an attribution of conduct rather than one of responsibility in a jurisdictional context.[52]

[49] Facts, ¶ 18; Annex IX, Line 1950.
[50] PO 4, ¶ 6.
[51] Oil Platform, ¶ 33.
[52] Bayindir, ¶ 130.

II. *AMICUS CURIAE* SUBMISSIONS

53. Article 9.19 of CEPTA and Article 41(3) of ICSID AF Rules allows for non-disputing parties to submit an *amicus curiae* submission. However, there are several criteria contained within those provisions that must be fulfilled. Furthermore, pursuant to Article 9.20 of CEPTA, the UNCITRAL Rules on Transparency shall apply in this present proceeding.

A. The *amicus* submission by CBFI should be rejected

i. *Lapras Legal Capital professional relation with Claimant raises doubt to CBFI's independence*

54. In the present dispute, LLC's participation in the process of CBFI's *amicus* submission through its CFO, Mr. Horatio Velveteen, raises an issue of independence.[53]

55. As independence is one of the most important criteria of an *amicus*, the Tribunal must be presented with thorough evidence. *In casu*, while potentially raising an issue of conflict of interest, CBFI has only provided minor details in passing regarding LLC's professional relationship with Claimant.[54] It would certainly be insufficient for the Tribunal to assess CBFI's independence with such a small degree of privity.

56. The tribunal in *Suez v. Argentina* states that to determine that an *amicus* is independent, it is necessary to know the professional and financial relationships that an *amicus* has with the disputing parties.[55] Due to the insufficient information of professional and financial relationships therewith, the tribunal rejected the *amicus*.[56]

57. Alternatively, in *Von Pezold v. Zimbabwe*, the tribunal has established that the existence of doubt in regard to apparent lack of independence is sufficient for rejecting an *amicus* submission.[57]

58. LLC's participation in CBFI's *amicus* submission while simultaneously being the financial adviser for the Claimant in pursuing its claim against the Respondent raises doubts in regard to CBFI's independence.[58]

59. Thus, by the reason of insufficient evidence and the existence of doubt towards CBFI's independence, the Tribunal should reject CBFI's submission.

---

[53] PO 3, ¶ 12.
[54] Amicus Submission by the CBFI, Line 520.
[55] InterAguas, ¶ 32.
[56] ibid, ¶ 34.
[57] Von Pezold, ¶ 56.
[58] Amicus Submission by the CBFI, Line 520; PO 3, ¶ 12.

ii. *CBFI's amicus submission does not provide the tribunal with any utility or assistance*

60. In accordance with Article 41(a) of ICSID AF Rules and Article 4(3)(b) of UNCITRAL Transparency Rules, *amicus curiae* submission should assist the Tribunal in determining factual or legal issues related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties. The tribunal in *AS PNB Banka v. Latvia*, has confirmed this approach.[59]

61. Respondent submits that CBFI submission could not provide the Tribunal with any assistance in examining the present proceeding.

62. In *Methanex v. USA*, the tribunal established that the assessment as to the likely utility of a non-disputing party's 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.[60]

63. The determination of the utility or assistance of *amicus* submission should be pin-pointed on whether an *amici* is in possession of knowledge, experience or expertise as a basis to provide the tribunal with a particular perspective or insight beyond that of the disputing parties.[61]

64. *In casu*, CBFI does not have any experience nor expertise, which has been required by other tribunals when accepting an *amicus* submission.[62]

65. Furthermore, in its application, CBFI states that its brief would contain certain factual and legal knowledge. However, it would not provide any new perspective or insight that would assist the Tribunal because the relevant part of Bonoori Law,[63] the business climate in Bonooru,[64] the existing corporate framework in which enterprises operate[65] and the nature of aviation industry[66] in Bonooru has been made privy to the Tribunal in the present dispute.

66. In *Grace v. Mexico*, the tribunal had rejected an *amicus curiae* because it only contained facts that have already been made privy to the tribunal.[67]

---

[59] Banka, ¶ 51.
[60] Methanex Amicus, ¶ 48.
[61] Apotex PO 2, ¶ 23.
[62] Infinito Gold, ¶ 31; Morris PO 3, ¶ 25; Morris PO 4, ¶ 26; Electrabel, ¶ 24.
[63] Facts, ¶ 7.
[64] ibid, ¶¶ 2-4.
[65] Annex IV; PO 3, ¶ 3.
[66] Facts, ¶ 5-10.
[67] Grace, ¶ 50.

67. Furthermore, CBFI's submission on the corporate governance framework and standing under ISDS provisions was a mere legal analysis of previous arbitral decisions, undistinguished and uncolored by any particular background or experience.[68]

68. Thus, as CBFI is unable to assist the Tribunal by providing a particular perspective or insight beyond that of the disputing parties, the Tribunal should deny CBFI *amicus* submission. The tribunal in *Bear Creek Mining v. Peru* has established that if an *amicus* is unable to provide a particular perspective or insight that would assist the tribunal, there would be no criteria that could provide a reasoning for the tribunal to accept that *amicus*.[69]

iii. *CBFI does not have significant interest in these proceedings*

69. In accordance with Article 41(3)(c) of ICSID AF Rules and Article 4(2)(d) of UNCITRAL Transparency Rules, CBFI must clearly describe its interest for its submission to this arbitration.

70. CBFI did not explain how the rights of investors whom it represents or defend might be affected by the outcome of these proceedings. Alternatively, CBFI's interest in this proceeding is a mere general interest.

71. In its application, CBFI states that the rights of Bonoori foreign investors in regards to their standing in future proceedings would be impacted by the outcome of these proceedings, specifically on the issue of State-owned enterprise's eligibility to bring a claim.[70]

72. However, CBFI did not explain how exactly that right would be impacted. In *Apotex v. USA*, the tribunal established that an *amicus* does not have a significant interest when the *amicus* has not explained how its interest would be affected by the outcome of the proceeding.[71]

73. Furthermore, it is unlikely that this concern advocated by CBFI would manifest, as the issue of attribution would necessarily require a case-to-case assessment as every case would entail different factual circumstances.[72]

74. Alternatively, although Respondent concedes that CBFI might have an interest in requesting the Tribunal to adopt a particular legal interpretation in regards to company

[68] Apotex PO 2, ¶ 23.
[69] Bear Creek, ¶ 39.
[70] Amicus Submission by the CBFI, Line 530-535.
[71] Apotex PO 4, ¶ 28.
[72] ARSIWA Commentary Art. 4, ¶ 11; ARSIWA Commentary Art. 5, ¶ 6; ARSIWA Commentary Art. 8, ¶ 1.

standing before an arbitral tribunal.[73] However, such interest which merely tailors to the preferences of the *amicus*[74] should not be considered as a significant interest as understood by the tribunal in *Apotex v. USA* and *RFP v. Canada*.[75]

iv. *CBFI does not file its amicus brief in pursuit of public interest*

75. In establishing the existence of a furtherance of public interest, it has to be determined whether the *amicus* submission was made to protect the rights and interest of individuals and entities in a wider scope[76] beyond the disputing parties.[77]

76. *In casu*, the interest that CBFI has in submitting its brief is a mere professional interest. This is because two of CBFI members, SRB Infrastructure and Wiig Wealth Management Group are currently pursuing claims against Respondent under Article 9 of CEPTA, the same dispute settlement provision with the present case.[78] The tribunal in *Apotex v. USA* has established that a professional interest should not be governed as a public interest.[79]

77. Hence, CBFI's submission should not be said to be in pursuit of public interest.

B. The *amicus* submission by the External Advisors to the CRPU should be accepted

i. *The External Advisors to the CRPU amicus submission is a matter within the scope of the dispute*

78. The issue on the legality of Claimant's investment, as brought by the External Advisors of the CRPU, should fall within the matter in the present dispute as it falls within the jurisdiction *ratione legis* requirements governed under CEPTA.[80]

79. In *Apotex v. USA*, the tribunal acknowledged that non-disputing parties may provide assistances and perspectives or insights on the issues of jurisdiction beyond those of the disputing parties and that submission would still be a matter within the scope of the dispute.[81]

80. Furthermore, the tribunal in *Infinito Gold v. Costa Rica*, which shares a similar factual complex to the case before this Tribunal, has stated that:

[73] Amicus Submission by the CBFI, Line 560.
[74] ibid, Line 535.
[75] Apotex PO 4, ¶ 40; RFP, ¶ 4.6
[76] Biwater, ¶ 53.
[77] RFP, ¶ 4.7.
[78] Amicus Submission by the CBFI, ¶ 6.
[79] Apotex PO 4, ¶ 43.
[80] CEPTA, Line 2495.
[81] Apotex PO 2, ¶ 33.

> While neither Party has made any allegations of corruption, the BIT defines investment as 'any kind of asset […] *in accordance with the latter's laws* […].' In that context, the Tribunal cannot rule out at this early stage and without having heard the Parties that these matters may play some role in its assessment of this dispute.[82]

Subsequently, it was established that the *amicus* submission on jurisdiction *ratione legis* would still fall within the scope of the dispute.[83]

81. *In casu*, the Preamble of CEPTA does provide the objective of eliminating bribery and corruption[84] constituting the existence of jurisdictional *ratione legis* requirements.[85] Thus, in light of all the circumstances above, External Advisors to CRPU *amicus* submission should fall within the scope of the present dispute.

82. Additionally, in assessing the present proceeding, the Tribunal must be made available to all relevant facts.[86] It would be impossible for this Tribunal to have knowledge about the alleged bribery and corruption unless it were to accept the *amicus* application made by the External Advisors to the CRPU as Respondent did not have any knowledge of such events. Had it been aware of this matter, it would have been brought as one of the jurisdictional challenges. Claimant, while potentially having some understanding of such a situation did not submit any information in the present proceedings.[87]

[82] Infinito Gold, ¶ 33.
[83] ibid, ¶ 35.
[84] CEPTA, Line 2495.
[85] VCLT, Art. 31(2).
[86] Infinito Gold, ¶ 33.
[87] Claimant's Application to Bar the Amicus Submission by the External Advisors to the CRPU, Line 710-725.

III. THE RESPONDENT HAS NOT VIOLATED ITS OBLIGATION TO ACCORD FAIR AND EQUITABLE TREATMENT UNDER ARTICLE 9.9 OF THE CEPTA

83. Presently, Claimant alleges that Respondent had denied it justice. To establish this claim, Claimant must convince the Tribunal that the Mekari Court had acted in such a gross manner that no competent and honest court would;[88] such as acting improperly in shocking disregard of national law,[89] in bad faith,[90] or in an egregious[91] and manifestly erroneous manner.[92] Such tests, consistently adopted by tribunals, indicate the high liability threshold of this claim which must ultimately shocks and offends a sense of judicial propriety.[93]

84. It is generally insufficient for singular actions acting in isolation to satisfy such a high threshold.[94] This is due to the fact that a denial of justice necessarily implies a failure of the Mekari Courts to administer justice as a systemic whole;[95] the sort of failure which deprives Claimant of access to national courts,[96] excessive and undue delays,[97] fundamental procedural defects,[98] or a blatantly erroneous departure from national law which is irrational or abusive.[99]

85. In addition to this high liability threshold, the evidentiary standard required to establish such unlawful conduct is equally demanding. Tribunals generally adopt a stance of reluctance in admitting that a denial of justice has occurred.[100] Claimant cannot rely upon circumstantial evidence or anything short of conclusive evidence;[101] What is required is evidence of the most convincing nature.[102]

86. It is Respondent's position that (A) the scheduling of the April 2019 proceeding did not amount to a denial of justice and that in any event, (B) the Tribunal cannot act as a

[88] Arif, ¶¶ 448, 453; Reinhard, ¶ 273.
[89] Mamidoil, ¶ 769.
[90] Arif , ¶ 482; White Industries, ¶ 10.4.18.
[91] ibid, ¶ 260.
[92] Vanessa Ventures, ¶ 227.
[93] Mondev, ¶ 127.
[94] Bridgestone, ¶¶ 221-222.
[95] ibid.
[96] Azinian, ¶102; Krederi, ¶¶ 451-454; Iberdrola, ¶ 432; Amto, ¶ 75.
[97] ibid.; Krederi, ¶¶ 455-458; Oostergetel, ¶ 290; Roussalis, ¶ 602; Toto, ¶¶ 156-163.
[98] Krederi, ¶¶ 461-467; Arif, ¶¶ 445,447, 473-497; Morris Award, ¶ 501; Genin, ¶¶ 357-364.
[99] ibid, ¶ 449; Arif, ¶ 445; Rumeli, ¶¶ 652-653; Azinian, ¶¶ 102-103.
[100] Rompetrol, ¶ 182.
[101] Oostergetel, ¶¶ 283, 296-297.
[102] White Industries, ¶ 10.4.8; Bahgat, ¶250.

body of appeal in ruling over the Mekari Court's decision to apply Mekari law in dismissing the Claimant's case with a summary judgement.

A. The April 2019 proceeding by the Mekari High Court did not amount to a denial of justice

i. *The Claimant had not experienced undue delay*

87. Arbitral tribunals are often hesitant to impose its own views regarding what constitutes an undue delay[103] especially when there exist no strict standards for its assessment.[104] However, the general assessment undertaken by tribunals are highly fact sensitive; it requires consideration for the complexity of the proceedings, the need for swiftness, the behavior of the litigants, and the behavior of the courts themselves.[105]

a. There was no need for swiftness in Caeli Airways' case

88. While Claimant may argue that the need for celerity in resolving the dispute is especially compelling due to the time sensitive nature of its investment in relation the airfare caps and volatile exchange rate,[106] it is important to recall that the tribunal in *White Industries v. India* clearly noted that it is the criminal proceedings that are particularly urgent in nature due to their long reaching consequences (*i.e.* in regards to the statute of limitation, periods of detention, etc.) compared to purely commercial disputes.[107] Furthermore, the fact that Claimant had not pursued its claim with sufficient diligence, as later explained in section (b), simply undermines the picture of urgency that Claimant seeks to make.[108]

b. The Claimant did not pursue its claim with sufficient diligence

89. The Tribunal must consider the diligence of the Claimant in prosecuting its case. Respondent cannot be held liable for delays that arose from Caeli Airways' lack and insufficiency of action.[109] Similar to how the tribunal in *Roussalis v. Romania* considered the Claimant's lack of action which could have resolved the dispute sooner,[110] Claimant in the present dispute could have acted more diligently in pursuing

[103] Krederi, ¶ 457.
[104] Toto, ¶ 155; White Industries, ¶ 10.4.9.
[105] White Industries, ¶ 10.4.10.
[106] Facts, ¶ 42.
[107] White Industries, ¶ 10.4.14.
[108] Frontier Petroleum, ¶ 330.
[109] Roussalis, ¶ 510; Krederi, ¶ 455; Chevron, ¶ 269.
[110] ibid.

its appeal earlier. Listed below are indicators that Claimant should have taken as a sign to seek its appeal:

Date	Event	Paragraph
2016	Airfare caps first imposed	37
December 2016	2nd CCM investigation initiated	38
Late 2016	MON currency nosedives*	39
March 2017	Currency crisis manifests	39
July 2017	Caeli Airways unable to secure steady revenue stream	40
27 March 2018	Caeli Airways registered its claim to the Mekar's High Court.	44

Note: the section marked with an asterisk indicates the earliest that Caeli Airways could/should have filed for an appeal either to the Mekar's High Court.

90. In conclusion, Caeli Airways could have saved itself almost 2 years-worth of time, potentially allowing it to avoid the increased difficulties faced by Mekar's High Court in light of the influx of cases resulting from the currency crisis.[111]

c. Mekar's High Court has behaved appropriately in light of its circumstances

91. It is important for this Tribunal to consider the behavior of Mekar's High Court in light of the unconducive circumstances which may affect its proper functioning.[112] In this regard, the tribunal in *White Industries v. India* considered the fact that the Indian judiciary was overstretched compared to its massive population in justifying an overall 9 year delay.[113] Similarly, the tribunal in *Toto Costruzioni v. Lebanon* also considered the political and social circumstances of the state in assessing the delays of the Lebanese court.[114]

[111] Facts, ¶ 44.
[112] Toto, ¶ 165.
[113] White Industries, ¶ 10.4.18.
[114] ibid.

92. Respondent has been facing a currency crisis since March 2017 due to significant foreign currency debt,[115] political turbulence resulting with the re-election of the LPM,[116] and a surging amount of cases being raised before the Mekari Court due to the aforementioned crisis.[117] The fact that Respondent is a State struggling with court congestion due to its overstretched judiciary is also of relevant concern to the Tribunal.[118]

93. Respondent understands that prolonged and unabated court backlogs cannot justify excessively long delays.[119] In adopting this stance, the tribunal in *Chevron v. Ecuador* held that delays arising out of the decade long court congestion in Ecuador cannot be excused. However, this was only due to the fact that the judicial reforms undertaken by Ecuador had found little to no success. Yet, the tribunal still excused certain periods of delay as it was occasioned by the political upheaval faced by the State which is similar to the currency crisis suffered by the Respondent.[120] The fact that Respondent had successfully reduced the average time for resolution from 27 months in 2015[121] to 15 months in 2019[122] as seen in the case with Caeli Airways clearly shows that it had made progress in resolving its court congestion issue.

94. In light of these facts, the delay sustained by Claimant is incomparable to the delays experienced in *Chevron v. Ecuador* in which 7 cases remained pending due to court inactivity for 4-8 years; ultimately a period of court inactivity of more than 13 years had occurred since the original notification letter and the notice of arbitration for the case.[123] As opposed to delays which arose from such insufficiency of action, the delays experienced by the Mekari Courts were not a result of unnecessary or avoidable languish. Hence, the existence of such unavoidable circumstances taken together with those discussed under section (a) and (b) above had rendered the 13 months delay unsurprising within the Mekari context.[124] Hence, it ultimately falls short of denying Claimant justice.[125]

---

[115] Facts, ¶ 39.
[116] ibid, ¶ 41.
[117] ibid, ¶ 44.
[118] White Industries, ¶ 10.4.18.
[119] Chevron, ¶¶ 264-265.
[120] ibid.; Facts, ¶¶ 39, 44.
[121] Facts, ¶ 13.
[122] ibid, ¶¶ 44, 54.
[123] Chevron, ¶¶ 256, 257, 259.
[124] White Industries, ¶ 10.4.12.
[125] Jan de Nul Award, ¶ 204; White Industries, ¶ 11.4.5.

ii. *The Tribunal does not have the competence to act as an appellate body over the summary judgement by Mekar's High Court*

95. The Tribunal should not rule on the legal reasoning and application of national law by Mekar's High Court in rejecting Claimant's request for interim injunction or dismissing the merits of its claim by way of summary judgement. It is not for this Tribunal to rectify or substitute its own reasoning for that of Mekar's High Court even if it was to disagree with the latter's legal reasoning as it is not an international appellate body for national courts.[126] An award favoring Claimant can only be rendered where the actions of the Mekar's High Court had failed as a systematic whole to afford FET.[127]

96. Respondent understands that it must not deprive Caeli Airways of an opportunity to defend its position.[128] While Claimant may argue that the summary judgement achieves exactly this effect, Respondent submits the opposite. Justice VanDuzer's decision to dismiss the Claimant's submissions was only made after hearing Caeli Airways' *prima facie* arguments on the merits throughout 25 April 2019 - 27 April 2019.[129] As such, Claimant had their opportunity to defend their position before Mekar's High Court; it was never denied complete access.[130]

97. Justice VanDuzer's decision to issue the summary judgement was grounded upon Executive Order 5-2014; a legal instrument specifically tailored to the purpose of alleviating the Court's backlog. [131] Furthermore, his decision was cogent and reasoned[132] as opposed to being baseless in law and logic.[133] It is these elements that distinguish the conduct of Mekar's High Court from other courts which has amounted to a denial of justice.

98. Ultimately, national Courts are never required to address each and every argument presented to it by the parties; what is required from these Courts is to not disregard material arguments which may affect the outcome of the judicial proceedings or is relevant to the resolution of other material arguments to the extent that this behavior can be equated with the Court never having addressed the Claimant's arguments at

[126] Mamidoil, ¶ 764; Mondev, ¶¶ 126-127.
[127] ibid.
[128] Dan Cake, ¶ 145.
[129] Facts, ¶¶ 52, 54.
[130] Dan Cake, ¶ 145.
[131] PO 3, ¶ 8.
[132] Mamidoil, ¶ 769.
[133] Dan Cake, ¶ 117.

all.[134] The brevity by which a national court achieves its conclusion is not indicative of a denial of justice on its own.[135]

iii. *The Enforcement Decision did not deny Claimant justice*

99. The Enforcement Decision of the HCCM to enforce the 9 May 2020 Cavannaugh Award does not constitute a denial of justice as (a) the HCCM has the discretion to refuse recognizing the Sinnograd Award under the NYC and that (b) the Cavannaugh Award does not contradict Mekari public policy.

a. The HCCM has discretion in regards to the recognition and enforcement of foreign arbitral awards

100. It is a recurring practice that national courts may enforce arbitral awards that have been set aside under a different jurisdiction. Article V(1)(e) of the NYC expressly provides that recognition of an award 'may' be refused in the event that the award has been set aside by a competent authority of the Country in which or under the law of the State in which it was made. The express use of the term 'may' provide enforcing courts with discretion in determining the question of enforcement.

101. The decision of the Supreme Arbitrazh Court of Sinnograd (in this, Court of origin) is not binding in nature against Respondent. The fact that the NYC provides that it is optional rather than obligatory for enforcing Courts to stay a proceeding pending an award from the State of origin further supports this notion; had the decision of the Court been binding, then such a stay would have been necessary under the NYC to prevent conflicting decisions.[136]

102. Equally, if the drafters of the NYC had intended for the Court of origin to be the sole authority to review the award, then enforcing Courts would have to strictly adhere to the decision of the Court of origin irrespective of the latter's validity. The fact that such a stance had not been adopted, but that there had merely been some limitations to the right for refusing enforcement speaks for the non-binding nature of such decisions from the court of origin.[137] In the end, it becomes apparent that the NYC intended some degree of freedom for enforcing States in considering the recognition of foreign awards.

---

[134] Morris Award, ¶ 557; Wena Hotels, ¶¶ 101,105.
[135] Krederi, ¶ 535; Vöcklinghaus, ¶ 180.
[136] Gaillard, ¶ 29.
[137] ibid, ¶¶ 27, 30; Paulsson, p. 344.

103. To this end, it is important to recall amongst others, the jurisprudence of French national Courts. In *Société Hilmarton Ltd v. Société Omnium de traitement et de valorisation*, the Paris Court of Appeal recognized an award despite it having been set aside in Switzerland. This was later affirmed by the *Cour de Cassation*; noting that an international award is not integrated to the Swiss legal system and as such continues to exist despite having been set aside.[138] Similarly, this approach was also taken by the Paris Court of Appeal in *République arabe d'egypte v. Société Chromalloy Aéro Services*.[139] Furthermore, the US and Belgian Courts follow similar approaches.[140]

104. The term "international award" refers to all awards rendered in regards to international matters as opposed to internal matters between parties domiciled in that State, concerning subjects that affect commerce exclusively within that State.[141] The Cavannaugh award, which addresses matters of foreign investment located outside of Sinnoh between parties not associated with Sinnoh satisfies this definition. Hence, the existence of the Cavannaugh award transcends the Sinnoh legal system; its nullification does not translate to its demise within the Mekari legal system.

105. Claimant may argue that this would discourage State confidence in international arbitration as a set-aside decision may not be recognized in another State. This concern however is unfounded, as the non-recognition of foreign awards do not have any implication upon the territory of the set-aside court. The non-recognition of the Sinnograd award within Mekari soil does not render the said award lifeless within the bounds of Sinnoh soil. This co-exists perfectly with the principle of private international law; that in the absence of an international treaty on the subject, a matter should be resolved in accordance with the views of the place of enforcement.[142] Where the NYC does not govern Court decisions regarding matters of arbitration,[143] Respondent may apply its own laws within the confines of its border where enforcement is sought by the Respondent.

b. The Cavannaugh Award does not contradict Respondent's public policy

106. Nothing within the Cavannaugh Award suggests that it would contradict the international public policy of Respondent; defined as the narrowly applied Mekari

[138] Hilmarton, ¶ 5.
[139] Gaillard, ¶ 139.
[140] ibid, ¶ 24.
[141] ibid, ¶ 23.
[142] ibid, ¶ 40.
[143] ibid; NYC, Art. I(1).

domestic public policy to foreign awards with some degree of reference to a universal conception of public policy.[144] While Respondent is aware that the matter of corruption is increasingly recognized as contradicting the said international public policy on a universal sense,[145] This must be balanced against the pro-arbitration bias that is ingrained into NYC.[146]

107. It is a common ground for States to apply the public policy exception more restrictively in the context of foreign awards.[147] It is only under exceptional circumstances that enforcement should be refused.[148] The sort of circumstance that would violate the most fundamental notions of moral and justice to an unacceptable degree; so much so that it would be impossible for the enforcing Court to recognize the award without denying the very basis upon which the Court stands.[149]

108. The establishment of corruption must only be made when sufficient evidence has been adduced. Claimant may argue that the balance of probabilities or preponderance of evidence is the applicable standard of proof[150] and that circumstantial evidence may suffice for the purposes of satisfying this standard of proof. However, Respondent submits that the evidence in the present case is insufficient to satisfy the appropriate standard of proof.

109. It is commonly accepted that it would be difficult to prove cases of bribery through direct and conclusive evidence.[151] However, it is not the submission of Respondent that the Tribunal must be satisfied that every single evidence and fact brought before it must satisfy a heightened standard of proof such as one of clear and convincing evidence.[152] Rather, there must exist some form of evidence that is pointing towards bribery in a clear and convincing manner; it is from this clear and convincing evidence that the Tribunal assesses which elements of the bribery was proven and which elements can be proven through inference.[153]

---

[144] World Duty Free, ¶ 138-140
[145] ibid, ¶ 141-148, 157; Krederi, ¶ 386.
[146] BCB, ¶ 19.
[147] BCB, ¶ 24.
[148] ibid, ¶ 26; Enron Nigeria, ¶ 23.
[149] ibid, ¶ 2; Ascom Group, ¶ 170.
[150] Glencore, ¶¶ 669-670.
[151] Fraport, ¶ 479.
[152] Sanum, ¶ 108; Lao Holding, ¶ 110.
[153] ibid.

110. Hence, the standard of proof is necessarily higher than a balance of probabilities but less than one of beyond reasonable doubt.[154] This satisfies the general proposition that, "the graver the charge, the more confidence there must be in the evidence relied on."[155]

111. The sort of circumstantial evidence that arbitral tribunals had relied upon *inter alia* failure to prove the source of suspicious funds,[156] multiple investigations by law enforcement authorities from 3 different States through mutual legal assistance,[157] discovery of forged signatures and licenses at different 3 government levels,[158] substantial payments made for unexplained services[159] and other such similar anomalies in addressing a claim of corruption.

112. The aforementioned evidence was taken into consideration due to their credibility and value to inferences that can be made by the tribunal. However, no evidence of such quality and certainty existed in the present case. The contents and credibility of the recording provided by CILS was never confirmed, hence the use of the phrase 'allegedly' in describing its content.[160]

113. Furthermore, the fact that Mr. Cavannaugh did not directly address 45 evidentiary documents made by Claimant is not indicative of corruption. Courts and tribunals are not under an obligation to consider each and every argument brought before them but instead are required not to disregard arguments that would have been material and significant to the success of the claim.[161]

114. The Tribunal should be vigilant towards the fact that the grounds of public policy may be misused by the losing party to have a second chance at securing its victory.[162] Hence, as there was insufficient evidence for a finding of bribery, the Cavannaugh Award has not been proven to be contrary to the public policy of Respondent; there is no reason to refuse the enforcement of this award.

---

[154] ibid.
[155] ibid.; Libananco, ¶ 125; Rompetrol, ¶ 182.
[156] Fynerdale, ¶¶ 572-574.
[157] Niko Resources, ¶ 809.
[158] Curchill, ¶¶ 468-472.
[159] Krederi, ¶ 388.
[160] Facts, ¶ 60.
[161] Wena Hotels, ¶¶ 101,105.
[162] BCB, ¶ 25.

B. The Respondent has not failed to accord Claimant with fundamental due process

115. The fact that Claimant was not able to secure meetings with the CCM enforcement directorate[163] or the general manner by which the CCM investigations were carried out does not amount to a fundamental breach of due process. The term 'fundamental' necessarily qualifies the due process clause as requiring a higher threshold; it is not every procedural unfairness in dealing with such administrative bearings would amount to a failure to accord fundamental due process;[164] but only those which offends a sense of judicial propriety or demonstrates a complete lack of transparency and candor.[165]

116. The CCM had not acted in such a manner; it had not failed entirely to provide a rationale for its decisions nor had it disregarded its own rules.[166] In regards to the former, the CCM had consistently provided rationales for the initiation, interim measures and findings associated with its investigations.[167] The Claimant may place particular emphasis on the initiation of the First Investigation, stressing the fact that it had been initiated even when Claimant's market share had not reached the required 50% market share in accordance with Chapter III Article (2)(a) of the MRTPA.

117. However, the MRTPA equally provides the CCM with the discretion to initiate an investigation even when the corporation owns a lower market share.[168] Noting the fact that Caeli Airways maintains dominant market shares of all flights within Respondent that is twice the size of its closest competitor,[169] its particularly aggressive strategy,[170] and the uncontested evidence regarding secondary slotting for Moon Alliance members,[171] Claimant clearly poses a unique threat to fair competition within the Mekari market.

118. The Tribunal should keep in mind that national agencies such as CCM, possess a certain degree of deference in the application of its competence under national law.[172] With the foregoing considerations in mind, Respondent had not repudiated the

[163] Facts, ¶ 45.
[164] Tallinn, ¶ 889.
[165] Nelson, ¶ 358; Waste Management, ¶ 98.
[166] ibid, ¶ 361; TECO, ¶¶ 457, 664.
[167] Facts, ¶¶ 36, 37, 38, 43, 45, 49.
[168] Annex V, Chapter III Art. (2)(a).
[169] PO 3, ¶ 6.
[170] Facts, ¶¶ 29, 31, 34, 35.
[171] Facts, ¶ 36.
[172] B3, ¶ 944; TECO, ¶ 493.

fundamental norms of the MRTPA, which is to maintain fair competition on the basis of prudence.[173]

119. To aid the Tribunal, the Respondent highlights the dissimilarities of the CCM's conduct when compared to that of the Regulator in *TECO v. Guatemala* which similarly addresses the exercise of special discretion in VAD calculations. The tribunal in that case found a breach of due process due to the Regulator's decision to substitute the VAD calculations made by the TECO's experts for that of its own. In exercising this discretion, the Regulator had falsely limited, in contradiction to Guatemalan law, the role of an expert commission when the latter clearly had an advisory role that must be duly considered by the Regulator in exercising its discretion.[174] The Regulator had also attempted to justify its decision with reference to an insufficiency of time; this however was later disproven as Guatemalan law clearly provides that it still had 9 months worth of time.[175]

120. The Regulator had contradicted Guatemalan law without providing any reasoning for this blatant departure;[176] ultimately defeating the fundamental pillars of its own laws.[177] To the contrary however, CCM had consistently applied its laws with proper reasoning.[178] The fact that Claimant was the first subject of Respondent's discretion fulfills the spirit of Chapter III Article 2(a); that the exercise of this discretion was exceptionally rare.[179]

C. The Respondent had not discriminated the Claimant

121. The Respondent had not discriminated against Claimant when it did not provide the latter with subsidies. A breach of discrimination necessarily requires the existence of a comparator in similar situations which was treated more favorably without a reasonable or objective justification.[180] The burden lies with Claimant to establish these conditions, which it fails to satisfy.[181]

122. It is insufficient that Claimant shares the same business sector as StarWings, JetGreen, or other recipients of the subsidy under Order 9-2018;[182] further consideration must be

[173] TECO, ¶ 665.
[174] ibid, ¶¶ 676-678.
[175] ibid, ¶¶ 685, 688.
[176] ibid, ¶ 672.
[177] ibid, ¶ 665.
[178] Facts, ¶ 54.
[179] Annex V, Lines 1602-1603.
[180] Cengiz, ¶ 525; Gavalum, ¶ 416, 448; Crystallex, ¶ 616.
[181] ibid, ¶ 526.
[182] ibid, ¶¶ 528, 534, 537; Facts, ¶ 46.

made to the individual circumstances of each corporation. In this regard, the predominant recipients of the subsidies run important domestic routes within Respondent with no more than a 5% market share[183] whereas the Claimant does not run such routes. The fact that the beneficiaries of the subsidies assist important travel for the Respondent state separates it from Claimant which does not serve the same purpose for Respondent nor does the two operate within the same sphere, as recognized by the tribunal in *Cengiz v. Libya*.[184]

123. Furthermore, the subsidies received by StarWings and JetGreen from Arrakis were only greater than that received by Claimant from 2015-2016; the former subsidies do not exceed the full amount received by Claimant since 2011.[185] Ultimately, Claimant has access to a greater degree of support from its home State compared to its competitors. Furthermore, Bonooru had threatened to withdraw funds from the Caspian Project in order to secure favorable treatment for Claimant[186] as later proven by its withdrawal of funds which ultimately halted the projects updating the Respondent's ports and the Phenac International Airport.[187] No other airline received such support from their home country. Ultimately, Claimant and the other airlines within the Mekari market cannot be said to be in like circumstances as they are not in an interchangeable position.[188]

124. As held by the tribunal in *Crystallex v. Venezuela*, a finding of discrimination must rely on conclusive evidence[189] that the differential treatment was so capricious, irrational, or absurd.[190] The mere fact that the LPM does not favor foreign investors is insufficient to establish the existence of discrimination.

D. The entirety of the Respondent's actions did not constitute coercion through a series of creeping violations

125. Claimant had alleged that Respondent had coerced it into selling its investment through a series of actions which are not unlawful in themselves, but when taken together would nonetheless breach Article 9.9 of the CEPTA.[191] While arbitral tribunals have accepted the possibility of such creeping violations to occur in principle, this would

[183] PO 4, ¶ 7.
[184] Cengiz, ¶¶ 532, 534.
[185] PO 4, ¶ 6,7.
[186] Annex IX Line 1953-1954; PO3, ¶ 7.
[187] PO4, ¶ 1.
[188] Corn Products, ¶ 120.
[189] Crystallex, ¶ 616.
[190] Enron, ¶ 282.
[191] NOA, ¶ 19.

only be the case where the actions in question are proven, through positive evidence, to be linked by an **underlying purpose**.[192]

i. *The Respondent's actions were not driven by a common underlying goal*

126. The events which became the subject of Claimant's complaint were not driven by an underlying goal to coerce it into selling its investment. These are individual actions taken by Respondent in the management of its state, economy, and fair competition within its territory. Claimant must establish the precise extent by which these actions have gone beyond the intrinsic nuisance factor of such governance to offend international standards.[193] A mere "bureaucratic officiousness" or overzealous enforcement of the law should not be mistaken as a breach of the BIT.[194]

127. The tribunal in the case of *Rompetrol v. Romania*, Romania had initiated investigations, detentions, extensive efforts to secure incriminating evidence and the freezing of assets for certain shareholders of Rompetrol's investment due to suspicions of corruption. These actions were similarly challenged by Rompetrol as a breach of the BIT. In assessing this claim, the tribunal clearly ruled out the possibility of relying on pure probability or circumstantial inference.[195] Even when the tribunal readily accepted the hypothesis that there existed tension, rivalries, and even political hostility between the parties, it nonetheless concluded that this was insufficient to sustain Rompetrol's argument.[196]

128. Applying this analysis to the facts at hand, it is clear that Claimant cannot establish such intent on Respondent's behalf by mere virtue that the re-elected LPM[197] has an adverse orientation towards foreign investors.[198] It cannot be argued that the LPM had orchestrated a series of events to drive Claimant out of business. Such a political stance would only establish motive. The gap between motive and action is not one that can be satisfied by conjecture rather than evidence.[199] This is especially true considering that the first CCM investigation was appropriately reasoned[200] and that the 2nd investigation was a response to complaints filed by smaller competitors.[201] Rather the

[192] Rompetrol, ¶¶ 271, 273.
[193] Krederi, ¶ 637.
[194] McLachlan, p. 7.127.
[195] Rompetrol, ¶ 273.
[196] ibid, ¶ 273.
[197] Facts, ¶ 41.
[198] ibid.
[199] Rompetrol, ¶ 273.
[200] Facts, ¶ 36.
[201] ibid, ¶ 38.

Tribunal should be aware of the fact that Claimant was already so much distress that it was under pressure to conclude sales of its shares in Caeli Airways due to a looming liquidity crunch, numerous risky investments, and the exposure to external risks.[202]

ii. *The Respondent's actions did not achieve such a degree of severity amounting to a breach of the FET standard*

129. Claimant may nonetheless rely on the aforementioned *Rompetrol v. Romania* case to fault Respondent for the losses it has sustained even when the group of actions were not underlined by a particular purpose. However, the tribunal in that case only found such a breach as Romania had not duly avoided unnecessary risks associated with Rompetrol's interests.[203]

130. The Respondent however, had consistently pursued the regulation of its market with due consideration for Claimant's interests. For instance, the airfare caps resulting from the CCM investigations were applied reasonably above the rates charged by Caeli Airways so as to prevent unnecessary losses.[204] Furthermore, the fines associated with these investigations would only come into effect after Court review to ascertain its legitimacy with the potential of later being overturned.[205]

131. Hence, where the Respondent had consistently advised against the Claimant's ravenous tendency of expansion in fear for the investment's safety[206] and later even attempted to assist the Claimant in facing the risk of insolvency by providing a credit line,[207] it becomes obvious that the Respondent had always kept the Claimant's best interests in mind to the best extent of its capacity.

[202] PO 4, ¶ 5.
[203] Rompetrol, ¶ 278.
[204] Facts, ¶ 37.
[205] ibid, ¶ 50.
[206] ibid, ¶¶ 29, 31, Response to NOA, ¶ 22.
[207] ibid, ¶ 51.

IV. THE CLAIMANT'S COMPENSATION REQUEST MUST BE REJECTED

132. The Respondent's challenge lies on two points: (A) Claimant cannot rely upon the MFN principle to import the compensation clause under the Arrakis-Mekar BIT and (B) Claimant's contributory negligence warrants a reduction on the amount of compensation awarded.

A. Claimant cannot rely upon the MFN clause to import the compensation clause under the Arrakis-Mekar BIT

133. The Claimant attempts to rely upon the MFN clause under Article 9.7 of the CEPTA to import a fair market value compensation clause under Article 13 of the Arrakis-Mekar BIT.[208] The former article reads as follows:

> Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favorable than the treatment it accords **in like situations**, to investors of a third country and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.

134. The Respondent does not contest that it is principally possible to import substantive norms through an MFN clause.[209] Equally, Respondent concedes that the norm which Claimant seeks to import does not violate the *ejusdem generis* principle which limits such importation treatment of the same category or nature to those already found on the base treaty.[210]

135. Furthermore, no concerns regarding the limitations of the MFN clause under Article 9.7 (2) will be raised in light of paragraph 15 of Procedural Order 3.[211] However, the Claimant's argument on importation should nonetheless be rejected as (i) it is not in like situation to investors from Arrakis, (ii) the fair market value compensation clause in the Arrakis-Mekar BIT is not more favorable than the market value compensation clause under Article 9.21 of the CEPTA, (iii) and that the Respondent never intended to permit the importation of compensatory clauses in drafting the CEPTA.

i. *The Claimant and Arrakis Investors are not in similar situations*

136. In assessing Claimant's argument, due regard must be paid for the phrase 'in like situations.' The tribunal in *İçkale v. Turkmenistan* placed particular weight on this issue

[208] NOA, ¶ 30.
[209] Berschader, ¶ 179; Asian Agricultural Products, ¶ 54.
[210] Muhammet Çap, ¶¶ 786, 787; Doutremepuich, ¶¶ 217, 218, 229; Garanti, ¶ 54.
[211] PO 3, ¶ 15.

as it addressed whether an MFN clause may be used to import substantive standards (the standard of valuation in this case) from a comparator BIT.[212] This phrase necessarily requires a comparison between the circumstances of Claimant and those investors from third state BITs[213] which cannot be accomplished in good faith by the mere fact that Claimant has invested in the same State as a third party.[214] Such an interpretation effectively denies the phraseology of Article 9.7 redundant and in contradiction to the canons of treaty interpretation under Article 31 of the VCLT and the principle of effectiveness.[215] This approach was then later affirmed by Arbitrator Nassib G. Ziadé in his partial dissenting opinion in *Güriş v. Syria.*[216] The tribunal in *Sehil Insaat v. Turkmenistan* later further affirmed this position in its 2021 May award.[217]

137. The Claimant may attempt to rely on jurisprudence predating *Ickale v. Turkmenistan*. However, the very possibility of norm importation is rooted upon rigorous textual analysis. This was reflected by the approach undertaken by the tribunal in the 1952 *Ambatielos* case which marked the initial recognition of MFN importation. Where Claimant seeks to justify its approach with reference to past case law, it has ironically departed from this jurisprudence and had chosen to satisfy itself with mere reference to successful applications of the past.[218] Numerous States such as Canada, Mexico, and the United States has raised concerns regarding this approach[219] with an equally increasing number of States has opted to substantively and temporally limit the scope of its MFN clause.[220]

ii. *Article 13 of the Arrakis-Mekar BIT does not provide treatment more favorable than that under Article 9.21 of the CEPTA*

138. The "fair market value" clause under Article 13 of the Arrakis-Mekar BIT is not more favorable than the "market value" clause provided under Article 9.21 of the CEPTA. The Claimant stands on an erroneous understanding that any differential treatment accorded to it in comparison to its Arrakis counterpart necessarily renders the CEPTA's compensation clause less favorable.

---

[212] Ickale, ¶ 328.
[213] Parkerings, ¶ 369; Goetz, ¶ 121.
[214] Ickale, ¶ 329.
[215] ibid, ¶¶ 329, 332; Conoco, ¶ 309.
[216] Güriş Dis.Op, ¶¶ 12, 21, 23, 24.
[217] MuhammetÇap, ¶¶ 788-789.
[218] Bayindir, ¶¶ 158-159; White Industries, ¶¶ 11.2.3-11.2.9.
[219] Bilcon, ¶ 312; Mesa Power, ¶¶ 400-403, 413.
[220] Batifort.

139. If Claimant seeks equality through identical treatment, it crosses the slippery slope which demands extensive caution as rightly identified by the ILC; identical treatment does not necessarily achieve equality.[221] The true purpose of the MFN clause was never to secure identical treatment for all investors, but to ensure equality even if it is achieved through differential treatment.[222] Presently, the Claimant must establish how the Arrakis-Mekar BIT affords an objectively more favorable compensation standard; the Claimant's assertion alone is insufficient.[223]

140. Compensation valued at a fair market value has been defined as the hypothetical price a willing buyer would be willing to pay for a particular purchase in light of all relevant circumstances.[224] On the other hand, compensation valued at a market value refers to the agreed upon price between parties at a particular given time.[225] In light of the financial crisis within the Respondent State,[226] the fluctuating oil prices,[227] and the ban of some parts of Claimant's air fleet due to repetitive crashes[228] may further depreciate the value of the Claimant's investment even further. Hence, it is more favorable for the Claimant to settle for the fixed amount offered by the market value approach.

iii. *The Respondent never intended to permit the importation of compensation clauses in drafting the CEPTA*

141. The chronological order by which the Respondent had negotiated its BITs is indicative of its intent in restricting the scope of its MFN clause as established by the tribunal in *Bayindir v. Pakistan*.[229] Respondent's decision to restrict the MFN clause for the 2014 CEPTA compared to its 1994 predecessor and its recent incorporation of the compensation clause at a "market value" as opposed to the "fair market value" of the preceding 2006 Arrakis-Mekar BIT are both indicative of its intent to leave compensatory norms out of the scope of its MFN clause.

142. This was further bolstered by the fact that the Respondent's Model BIT leading up to the conclusion of the Arrakis-Mekar BIT had consistently referred to compensation at a "market value" consolidated its adamant stance on maintaining this standard. As such,

---

[221] Daimler, ¶ 242.
[222] ibid.
[223] Daimler, ¶¶ 243, 246.
[224] CMS, ¶ 402.
[225] Motorola, ¶ 69.
[226] Facts, ¶ 39.
[227] ibid, ¶ 48.
[228] ibid.
[229] Bayindir, ¶ 166.

in accordance with the VCLT, the MFN Clause found under Article 9.7 of the CEPTA cannot be interpreted so as to betray this particular intent.

143. Even if this intent of delimiting the scope of the MFN clause for the CEPTA was primarily endorsed by the Respondent, this in itself is sufficient to establish that it is highly unlikely that the contracting parties had intended to allow the importation of such compensatory norms.[230] In light of Respondent's insistence on providing compensation valued at a "market value" leading up to the conclusion of the CEPTA, it would have had a strong incentive to clearly indicate otherwise in the wording the MFN clause.[231]

B. The Claimant's contributory negligence warrants a reduction on the amount of compensation awarded

144. Claimant is not entitled to the full 700 million USD it has sought as compensation due to its contributory negligence. Caeli Airways' brash decision making, its predatory strategies, and lack of diligence in pursuing its claim all played a material role in the causal chain that had led to its losses.

145. In order for the Claimant to succeed in its claim for compensation, it must establish a causal connection that is not too remote between its losses and the Respondent's breach of the CEPTA.[232] In essence, Respondent is only required to compensate for the direct consequences of its wrongful act instead of all consequences flowing from it.[233] Where the injury is severable in causal terms, reparation to that extent is precluded.[234] Such severability may arise from Caeli Airways' own actions as consolidated by the general principle of contributory negligence which is consonant to the customary full reparation standard.[235]

146. In establishing such severability, tribunals assess whether Caeli Airways' conduct provoked the manifestation of the wrongful act.[236] The tribunal in *Burlington v. Ecuador* ruled that Burlington's failure to pay taxes under a particular law had not amounted to contributory negligence as the losses it sustained was **directly and**

[230] Berschader, ¶¶ 198-199.
[231] ibid, ¶ 202.
[232] ARSIWA Commentary, art. 31 [9].
[233] ibid, art. 31 [9, 13].
[234] ARSIWA Commentary, art. 31 [13].
[235] ibid, art. 39 [2]; ARSIWA, art. 39.
[236] Burlington, ¶¶ 579-580.

decisively a consequence of Ecuador's permanent physical takeover of the investment.[237]

147. The treatment accorded to Caeli Airways, upon which it has grounded its claims arose out of its own conduct. The first and second CCM investigations were a result of Claimant's extravagant approach in pursuing low fares to secure market share despite warnings from Mekar Air services[238] and abusing its dominant position to extract significant additional benefits which allowed significant undercut its ticket fares (predatory pricing) respectively.[239] These conducts ultimately triggered the fines and airfare caps imposed against it by the CCM. Additionally, Caeli Airways continued with its risky approach despite repetitive warnings from numerous sources.[240]

148. Furthermore, the credit line extended to the Claimant at an inflated interest rate was premised on the CCC+ rating assigned to it by the IICRA to its risky investment choices, long-standing debts that the Claimant has failed to service since its privatization, and large fines payable to the CCM.[241] Finally, the delays it had experienced was to a certain extent a result of its languish in pursuing its claim before the Mekari Courts. As such, any damages arising out of these factual circumstances must be excluded from compensation.

[237] Burlington, ¶¶ 579-580.
[238] Facts, ¶¶ 29, 31, 36.
[239] ibid, ¶ 49; PO 3, ¶ 7; Response to NOA, ¶ 18.
[240] ibid, ¶¶ 24, 31; Annex VII, Lines 1846-1847, 1890-1893.
[241] ibid, ¶ 51.

PRAYER FOR RELIEF

Respondent respectfully requests the Tribunal to adjudicate and declare that:

1. Find that Claimant has not fulfilled the jurisdictional requirements under the CEPTA and the ICSID AF Rules;
2. Accept the *amicus curiae* submission by the External Advisors to the CRPU and reject the submission from the CBFI;
3. Find that Respondent had not breached Article 9.9 of the CEPTA as it had not treated the Claimant unfairly and inequitably; and
4. Find that even if Respondent is required to compensate Claimant, it shall do so on the basis of market value and that this amount shall be reduced in light of Claimant's contributory negligence.

On behalf of Respondent,

Team Tanaka