INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

Vemma Holdings Inc. **CLAIMANT**

VERSUS

The Federal Republic of Mekar **RESPONDENT**

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

Members of the Tribunal

Ms. Twyla Sands (President)

Mr. Long Feng

Professor Jaqen H'ghar

MEMORIAL FOR THE RESPONDENT

OCTOBER 31ST, 2021

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III. LIST OF ABBREVIATIONS

BIT	Bilateral Investment Treaty
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	Bonooru – Mekar Comprehensive Economic Partnership and Trade Agreement
CILS	Centre for Integrity in Legal Services
Facts	Statement of Uncontested Facts
FET	Fair and Equitable Treatment
FMV	Fair Market Value
ICSID	International Centre for Settlement of Investment Disputes
ILC Article	International Law Commission's Articles on State Responsibility
LLC	Lapras Legal Capital
MRTP Act	Monopoly and Restrictive Trade Practice Act, as Amended in 2009
MV	Market Value
NYC	New York Convention
SOE	State-Owned Enterprise
UN	United Nations
UNICTRAL Transparency Rules	UNCITRAL Rules on Transparency in Treaty- based Investor-State Arbitration
VCLT	Vienna Convention on the Law of Treaties

WHO	World Health Organisation
WTO	World Trade Organisation

IV. STATEMENT OF FACTS

The Federal Republic of Mekar has faced a tumultuous path to economic recovery. Since the mid-1920s, the colonial Pevensian administration in Mekar concentrated its industrial- development efforts in this under-populated and resource-rich province, resulting in a considerable influx of people into the territory from neighbouring agrarian provinces. However, since the decline of the Pevensian empire, Mekar's economy has suffered as both people and resources have left the nation.

When the Claimant made its investment in the territory of Mekar in 2011, it also inherited debt liabilities associated with Caeli Airways. Given the Claimant's experience with the airline industry in its home State and globally, it could not have been blind to the volatility thereof. Despite this, the Claimant took an extravagant approach to its investment activities, funnelling funds towards rapid expansion and ill-strategized business plans instead of tending to long-term financial health. It did so against the clear warnings of the representatives of Mekar present on Caeli Airways' board. It is this risky strategy that precipitated into a precarious financial situation for the Claimant when the economic downturn hit Mekar.

The rapid expansion of Caeli Airways naturally drew the attention of the Competition Commission of Mekar ("CCM") and Caeli's competitors. As an interim measure, and in the rightful and legitimate use of its faculties, the CCM placed caps on Caeli Airways' airfare to prevent it from earning supra-competitive profits. Caeli never protested the airfare caps, and there is no evidence the caps hurt its profitability in 2016. The airfare was only kept in place until 2019 due to clear evidence of anti-competitive behaviour by Caeli, including abuse of dominant position, predatory pricing, and unfair subsidization. As indicated, Mekar lifted the airfare caps as soon as Caeli's market share fell below 40%.

A decision was taken by Mekaŕs government on 30 January 2018, requiring all companies operating in the country to offer goods and services denominated exclusively in MON. Trust in the MON has been fragile ever since the beginning of the economic crises. A State's right to reduce reliance on foreign currencies, in order to mitigate against capital outflows and secure its macroeconomic situation, cannot be put on trial before this tribunal. Neither can its framework for inflation targeting.

Finally, despite being overwhelmed by cases, Mekari courts gave the Claimant every opportunity to voice its grievances before the appropriate judicial authority. The courts even managed to dispense justice speedily, as compared to the time it usually takes Mekari courts to render decisions in commercial matters. Importantly, the courts enjoy the discretion to recognize and enforce an arbitral award that is set aside in the country, or under the law of which the award was made. They appropriately exercised this discretion, considering the evidence on record and the public policy of Mekar.

At the time the Claimant decided to sell off its stake in Caeli Airways, it still enjoyed a considerable market share in Mekar. Not only did the Claimant run Caeli Airways into the ground, but it also abandoned the enterprise at its own volition. During the course of the Claimant's investment, government officials from Bonooru have often exerted pressure on Mekar to treat the Claimant favourably. They have threatened to hold back funds promised to rebuild Phenac's port as part of the Caspian Project.

V. SUMMARY OF ARGUMENTS

Jurisdiction

The Tribunal does not have Jurisdiction *ratione personae* since Claimant does not qualify as a "national of another State". Claimant is a State-owned entity, with State exercising a controlling influence that was used to guide and direct its activities. Accordingly, it is a State instrumentality. ICSID Additional Facility Rules do not extend towards a State-to-State dispute. Correspondingly, Claimant does not have an autonomous standing in the proceeding, separate from the State. Finally, the State substituting the investor would effectively render a subrogation situation.

Amicus Submissions

Tribunal should grant leave to submissions by External Advisors to CRPU, for they fulfill the threefold criteria. First, they offer insight different from both the parties. Second, the submission includes public interest alongside their specific interest. Lastly, the matter inherently affecting jurisdiction, falls within the scope of the dispute. Additionally, submission by CBFI should not be allowed for they don't fulfill the criteria; by not offering any novel perspective. Moreover, the interest represented by them is general rather than specific, and lacks any public interest. Lastly, CBFI's submission suffers from lack of independence.

Merits

Arbitrariness

CCM did not act in an arbitrary and unreasonable manner and did not violate Article 9.9(2) of the CEPTA. Nevertheless, it is submitted that Tribunal’s has a restricted scope to enquire as it’s is not an appeal procedure. The first investigation was not arbitrarily initiated; subsequent imposition and non-revision of interim caps were correct application of domestic laws. The Second investigation was not arbitrary. Additionally, Respondent did not violate any legitimate expectation. Arguendo, it had the Right to Regulate which was exercised reasonably.

Discriminatory Conduct

The ministry of Civil aviation did not act in bad faith. Claimant was treated similar to similarly situated SOEs. Arguendo, there were justified reasons for the differential treatment.

Denial of Justice

Claimant was not denied justice as *firstly*, there was no unreasonable delay in the judicial proceedings which could constitute Denial of Justice; *secondly*, Mekar did not violate due process by dismissing claimants' case on merits by a way of a summary judgment without conducting a hearing for the same. *Lastly*, the enforcement of the award which was set aside at the seat did not constitute denial of justice.

Duress

CCM was exercising its legitimate executive power granted by the MRTP Act and in accordance with the Right to Regulate stated in Article 9.8. Furthermore, the Judiciary was also working in accordance with laws established by Mekar and under the directions of the Executive Order 5-2014. Lastly, the Claimant was not forced by any physical or economic threats to dispose off it's investments.

Compensation

Respondent's conduct towards the investment in no way amount to any injury caused to the Claimant under article 9.9 of the CEPTA. Claimant themselves are liable for the losses. Even if this Tribunal aggress that compensation is owed, it must be in accordance with the "market value" standard. This standard has been expressly mentioned in article 9.21 of the CEPTA. *Secondly*, the standard of fair market value can't be imported from Mekar-Arrakis BIT 2006. Furthermore, compensation is not a treatment covered under the terms of provision in article 9.7.1. Being a substantive obligation, compensation can't be swapped from other treaties. *Lastly*, compensation must be reduced on grounds of contributory negligence and the on-going economic crisis in Mekar.

PART I - JURISDICTION

¶1 The present contention is extended towards personal jurisdiction of this Tribunal.

¶2 Pursuant to Article 9.16(2)(b) CEPTA, the applicable provision is Article 2(a) of the ICSID Additional Facility Rules, to administer *proceeding between a State and "national of another State"*. Respondent assert Claimant enterprise does not qualify as "national of another State", to which *ratione voluntatis* is extended.

I. The tribunal does not have Jurisdiction ratione personae

¶3 Notably, clear wording of Article 25(1) ICSID Convention and correspondingly Article 2(a) ICSID AF Rules cannot be interpreted to cover disputes involving States, State agencies or international organizations on the investor's side. Accordingly, it is advanced that the Claimant is a State instrumentality **[A]**; ICISD AF Rules do not extend towards a state-to-state dispute **[B]**; Claimant does not have autonomous *jus standi* in the present proceeding **[C]**; and that the state-of-affairs are *effectively* similar to subrogation **[D]**.

A. Claimant is a State instrumentality

¶4 It is submitted that the reality is that Claimants' existence is perpetuated as "vehicles" or "instrumentalities" of the State, in order to abuse the ICSID arbitration mechanism and evade its clear jurisdictional requirements.

¶5 For the purposes of the Convention, a government owned corporation is disqualified as a 'national of another State' when *acting as an agent for the government* **or** *discharging an essentially governmental function.*[1]

¶6 In extension of the same, a comprehensive test referred by Tribunals in *Maffezini*, *LESI*, and *Salini* is expounded upon by the Respondent – devising factors, such as *ownership* and influence or control of an enterprise alongside its *nature*, *purposes* and *objectives*, in deciding whether such entity is a state body, and accordingly, the State. The test has two pronged considerations – "**structural**", related to the structure of the company and, its shareholders; and "**functional**", related to the objectives of the company.[2]

[1] Broches (1972), pp.331-335.
[2] Maffezini, ¶79; Salini, ¶31; LESI, ¶105.

¶7 The same is substantiated on the premise that a determination as to the character of state-owned enterprises in the context of whether it is a "State", is relevant in determining whether a state enterprise may be subsumed within the definition of the term "National of another State".[3] Correspondingly, it is submitted that Claimant is a State-owned Enterprise **[1]**; State exercises controlling influence over the Claimant **[2]**; and ultimately, the functional conduct of Claimant is governmental **[3]**.

1. Claimant is a State-owned Enterprise

¶8 Enterprises in which government has *controlling interest* – either a full, majority *or significant minority ownership* – can be defined as a State-owned entity, whether or not listed on a stock exchange.[4] Significant minority is between 25 and 50 per cent of ownership where government is still typically the largest single shareholder and can influence corporate strategies.[5]

¶9 A controlling interest has contextual definition, but UNCTAD defines control as 'a stake of 10 per cent or more of the voting power, or where the government is the largest single shareholder'.[6]

¶10 The State of Bonooru has a right to retain, and in fact, retains a controlling stake in Claimant with around 40% shareholding;[7] corresponding such share of voting power.[8] It is also the principal or largest single shareholder.[9] Therefore, Claimant is a State-owned enterprise with the State having a controlling stake.

¶11 *Arguendo*, Claimant is a State-owned enterprise throughout the proceeding, having restructured its ownership to 55% being that of the State.[10]

[3] Maffezini, ¶79.
[4] UNCTAD (2011), p.28.
[5] Fry & O'Brien (2011), p. 107.
[6] UNCTAD (2011), p.28.
[7] Record, p.29, ¶10.
[8] Record, p.86, ¶3.
[9] Record, p.89, ¶2.
[10] Record, p.41, ¶65.

2. State exercises controlling influence over Claimant

¶12 An enterprise could be under *significant influence* or *control* of its State through a "controlling minority structure".[11]

2.1. Relative shareholding of State

¶13 Non-majority shareholding in an SOE does not necessarily equate to a decreased government's ability to wield influence over these enterprises. The relationship between State ownership and State control, can be established *de facto*, as level of ownership does not always serve as a reliable indicator of level of control; various mechanisms may confer, factually, a disproportionate amount of decision-making power to minority shareholders.[12]

¶14 Relative shareholding can indicate certainty of control,[13] because of targeted ownership dispersion where the ownership structure is pyramid.[14] Control is conferred and established in cases of significant minority shareholding where the **government is the largest shareholder**;[15] or where the distribution of remaining shares leaves the government with *effective control*,[16] which includes the ability and power to appoint members of the Board.[17]

¶15 In the present case, the State is not only the largest shareholder in Vemma, but also has effective control over enterprise by virtue of fragmentation of ownership, where, no other shareholder owns more than 7% stake.[18] Consequently, there have been numerous situations where the State has been the ultimate decision maker, even when appointing the Board of directors, due to such dispersion of shares and voting power.[19]

2.2. A revolving door scenario

¶16 A broader examination of State control is extended through a demonstrable "revolving door scenario" between the management of the SOE and incumbent government.[20]

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[11] Kang (2014), p.848.
[12] Kang (2014), p.843.
[13] McLaughlin (2020), p.19.
[14] La Porta (1999), pp.471-517.
[15] McLaughlin (2020), p.11.
[16] World Bank (1995), p.26.
[17] McLaughlin (2020), p.10.
[18] Record, p.89, ¶2.
[19] Record, p.86, ¶3.
[20] McLaughlin (2020), p.20.

¶17 "Revolving door" refers to the interchange and movement of personnel between positions in business or relevant industries and government.[21] Former business personnel becoming officials exemplifies the same, and such close nexus between the government and business may allow them to reciprocate privileges to the detriment of the society.[22]

¶18 A similar state-of-affairs exists with the Claimant and its Home State. Notably, appointment of the erstwhile head of Vemma's board of directors as the Secretary of Transport and Tourism;[23] and continued intervention of Ministry therefrom, in context of Bonooru's strategic plans.

¶19 Revelation by a former high-ranking official at the Ministry, regarding non-independence of the enterprise from the State, indicates likewise.[24] Thus, Claimant meet the "structural" test.

3. Functional conduct of Claimant is governmental

¶20 It has been recommended to look to customary international law attribution principles to distinguish between claims brought by SOEs in commercial and one in governmental capacity, where the latter cannot be submitted against a State under ICSID Convention.[25] Corresponding to such principles, not only the nature, but the purposes of an SOE's activities should be considered.[26]

3.1. Claimant performs public functions on behalf of the State

¶21 The *participation of government bodies in the creation* of an enterprise points to the fact that it was established to carry out governmental functions.[27] In *Maffezini*, the Tribunal held that one of the purposes of creation the entity by government bodies, was to promote regional development of an industry. Such an *objective* was held to be of typically governmental nature, not usually carried out by private entities and as such, could not be considered to have a "commercial nature".[28]

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[21] Min (2011), p.2.
[22] ibid.
[23] Record, p.31, ¶22.
[24] Annex VII, p.55.
[25] Feldman (2016), p.24.
[26] ibid.
[27] Maffezini, ¶85.
[28] ibid, ¶86.

¶22 Even where an enterprise is not officially empowered by law to exercise elements of governmental authority, its actions could be attributable to the State, if it is an active operator in an industry on behalf of the government (in the case, within tourism industry).[29]

¶23 In primary determination of an enterprise functioning as an "agency", what matters is that it performs public functions on behalf of the Contracting State.[30]

¶24 In the present case, *firstly*, Claimant was created to pursue objectives of its State-owned predecessor, Bonooru Air.[31] Its scheme, planning and approval for creation were in the hands of government bodies.[32] *Secondly*, as per Article 5 ILC, the nature of an activity, to be governmental or commercial, is to be ascertained as pet the history, tradition and context of the country.[33]

¶25 Given the archipelagic geography of Bonooru, air travel serves a unique purpose and has been acknowledged as a positive obligation on the State by its own judicial bodies.[34] An activity that forms part of core considerations of a State cannot be of commercial nature.[35] Objective 3(h) of Claimant, as per its MoA, renders it the Constitutional positive obligations of the State.[36] Thus, making Claimant **a *functional equivalent* of the State** for carrying out such obligation.

¶26 In *Tatneft*, the Tribunal observed that public purpose, pursued in the context of the company's activities, were legally imposed on every company incorporated in the State, or are policies that any major company might pursue anywhere in the world in terms of social responsibility. And thus, it denied *functional control* of the State.[37] *In casu*, the activity pursued in obligation of mobility rights have not been extended to every company in the State, and would not be pursued by private entities anywhere in the world; *indicating* governmental conduct.

[29] SPP, ¶¶81-85.
[30] Schreuer (2001), pp.150-152, ¶¶145-149.
[31] Record, p.89, ¶6.
[32] Record, pp.28-29, ¶6-8.
[33] ILC Commentary (2001), p.43.
[34] Annex III, p.43.
[35] Flughafen, ¶¶280-285.
[36] Annex IV, p.44, ¶3(h).
[37] Tatneft, ¶¶136-150.

3.2. Purpose of the activities in question

¶27 Respondent assert that Claimant operates as an arm of the State for the purposes of the economic development of its airline and tourism industry.[38]

¶28 Purpose of carrying out an activity, notwithstanding any commercial aspect, is important for jurisdictional question.[39] Tribunal's lack of reasoning in *CSOB* decision for mere determination of nature of the activities and not its purpose is not well received by the scholars.[40]

¶29 In fact, the rationale for state ownership of commercial enterprises comprises a mix of social, economic and strategic interests, including furtherance of industrial policy, regional development, etc.[41] Non-commercial SOEs ***fulfilling essentially special public policy purposes, is a governmental function,*** since it isn't predominantly commercial **having to be operated notwithstanding profitability or losses.**[42]

¶30 Claimant's interest overlaps with State's twofold interest. *First*, the strategic interest extended as part of Caspian Project. Caeli operative decisions regarding routes between Bonooru and Mekar didn't change despite incurring significant losses.[43] It is corroborated by the depiction that these routes **benefitted Bonooru more** than Vemma or Caeli.[44] Moreover, the State launched and halted infrastructural project at Phenac Airport as per the investment situation of Claimant.[45] Such contextualization of Claimant's investment, in light of Caspian Project and Horizon 2020 scheme, had been revealed by one former high ranking official of the Ministry.[46]

¶31 *Second*, fulfillment of State's purpose and public obligation of mobility rights of Bonoori citizen being extended through Claimant's investment performance.[47] The infrastructure and performance was not intended for commercial use only, demonstrating its partially public purpose.

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[38] Record, p.89, ¶1.
[39] McLaughlin (2020), p.20.
[40] Blyschak (2011), p.45.
[41] OECD guidelines (2015), pp.15-17.
[42] OECD ownership (2018), p.49.
[43] Record, p.33, ¶33.
[44] Annex VII, p.55.
[45] Record, p.89, ¶1.
[46] Annex VII, p.55.
[47] Record, p.89, ¶6.

¶32 There lies an overwhelming governmental purpose, where a State-owned commercial corporation has been assigned considerable non-commercial functions, such that the commercial activities can be seen essentially or simply *as a way to fund the non-commercial ones*, it maybe arguable that the corporation is no more than an arm of the State.[48]

¶33 Clearly, Claimant's operations in Bonooru, pursuing a public function, left it with insufficient

funds and financial flexibility.[49] Even if its investment in Mekar was a source of alternative financing, as evident from the pressure to conclude sale of its airline operations in Mekar,[50] Claimant would still qualify as an arm of the State.

¶34 As observed, governments intervene in markets with SOEs as an available policy instrument. To preside over competitive market pressure, the state **can expand the range of potential policy objectives through subsidies,** such that potential SOE profits can be exchanged for policy objectives. [51]

¶35 Claimant were provided with subsidies under the Horizon 2020 scheme, as it went on pursuing its national interest.[52]

¶36 Therefore, claimant's activities in Caeli Airways were mere "instrument" of implementation of projects and policies as upheld by the Ministry of Transport and Tourism and Bonooru's classically sovereign objectives, alongside operating in public interest. Empowerment to exercise authority normally reserved to the State, because a State cannot avoid its obligations by delegating its authority to bodies outside the core Government.[53]

3.3. State utilized its ownership interest to direct Claimant's activities

¶37 It is essential to acknowledge, that participation of State representatives in Claimant's shareholding, was in capacity of State officials and not independent, commercially-interested shareholders. The intention behind such shareholding was to ensure that Claimant's activities could be directed towards public interest, as asserted by the PM

[48] Petrochilos (2010), p.297.
[49] Record, p.89, ¶5.
[50] ibid.
[51] Lardy (2014), pp.22-23.
[52] Record, p.32, ¶28.
[53] UPS, ¶17.

himself.[54] There is no reason to believe why such capacity would not have been exercised during Claimant's investment decision-making.

¶38 SOEs that are tasked with delivering some public policy objectives are often overseen by line ministries or public authorities.[55] Post privatization, political agents retain substantial control rights through excessive fragmentation of ownership, that hinders corporate governance by dispersing governance rights among heterogeneous groups, thereby being the principal and ultimate decision maker itself.[56]

¶39 By virtue of being the principal shareholder where the rest of the ownership of Vemma had been extremely fragmented, the State was *ipso facto* the ultimate decision maker. Furthermore, management of a strategic State asset like Phenac international airport, could not possibly take place without the exercise of governmental authority, sanctioned by State authorization.[57]

¶40 When control rights are taken away, politicians can direct government resources to subsidize the firms and continue to get their way even after privatization.[58] A corollary follows, that political loyalty of the personnel becomes more important than technical competence, and thus, commercial rationality is compromised.

¶41 Concomitantly, subsidies offered to the Claimant through Horizon 2020 scheme depict control. Compromise on technical reasonableness in operative decisions of Caeli had been recognized and warned against at numerous instances.[59]

¶42 In *Flemingo*, the Tribunal concluded performance being governmental being carried under close Ministerial supervision, relying on the public comments of Secretary of State of the Ministry of Transport confirming its participation in the particular infrastructure through the enterprise.[60]

¶43 In the present case, the State ministry not only acknowledged a standard objective of enhancement of Bonooru's tourism infrastructure on Claimant,[61] but restraining the deployed

[54] Record, p.29, ¶8.
[55] OECD ownership (2018), p.23.
[56] Milhaupt (1998), p.1154.
[57] EBO, ¶274.
[58] ibid.
[59] Record, p.33, ¶29.
[60] Flemingo, ¶434.
[61] Record, p.89, ¶5.

funds toward the Phenac International Airport at the time of investment dispute arising, indicates that the Ministry participated in the infrastructural project through the Claimant.[62]

¶44 Notably, Claimant restructuring reasserts that the losses from the investment are being ultimately borne by the State.

B. ICSID AF Rules do not extend towards State-to-State arbitration

¶45 Provisions in the ICSID Convention addresses specifically disputes opposing a private investor to a State,[63] thereby excluding those between private parties as well as State to State disputes from Centre's jurisdiction. [64] The Convention's jurisdictional requirements aren't subject to the parties' disposition, and the Tribunal cannot rely on the parties' understanding when it comes to the Convention's *objective requirement*.[65]

¶46 The Preamble of ICSID elicits that it was established for the promotion of private international investment.[66] Concomitantly, it is substantiated that the language of the Preamble indicates that the investor must be a private individual or corporation and States acting as investors have no access to the Centre in such capacity.[67]

¶47 Therefore, for every claim brought by SOEs to ICSID, a failure by tribunals to consider the distinction between private international investment and public international investment would constitute a failure to adhere to customary international law rules on treaty interpretation.[68]

¶48 Importantly, one of the Convention's objectives is to depoliticize disputes.[69] Investment treaties are intended to depoliticize investment disputes and States may apply special rules to foreign investors that are owned, controlled, or even "influenced" by a State.[70]

[62] Record, p.89, ¶1.
[63] Broches (1966), pp.263,265.
[64] Broches (1995), p.162.
[65] Schreuer (2013), p.530.
[66] Dolzer and Schreuer (2012), p.250.
[67] Schreuer (2013), p.161.
[68] Feldman (2016), p.30.
[69] Rumeli, ¶287.
[70] Schreuer (2013), p.187.

C. Claimant does not have autonomous *jus standi*

¶49 It should be recognized that when the "interest" pursued isn't that of the State company, but, rather, one of the State, the company lacks autonomous *jus standi*.[71] It has been suggested that principles of attribution be used to ascertain *jus standi in judicio* of State-owned companies.[72]

¶50 Post restructuring of Claimant, the Board interest consists of government functionaries' and the legal interest in this arbitration lies with the Justice department of the State.[73] *Ipso facto*, in the present case, it isn't possible to identify Claimant's autonomous standing, when an interest is lacking. Even if the Claimant had a *standi* as such, the same has been transposed to the State post restructuring.

¶51 Along with other identified unity of interest between the State and the State company, in terms of policies and strategic preferences, the tribunal may apply the *veil-piercing doctrine*, to ascertain the situation, if need be.[74] In *Barcelona Traction*, it has observed that under international law, it is allowed to pierce the corporate veil, to prevent the evasion of legal requirements or obligations.[75] The same has been practiced by Tribunals in determination of Jurisdiction *ratione personae*.[76]

D. The state-of-affairs are *effectively* similar to subrogation

¶52 It is important to note that a proposed exception to the *bar on State-to-State disputes under the ICSID Convention*, which could have permitted, in a subrogation context, a State substituting an investor in ICSID proceedings, faced stern opposition during ICSID Convention negotiations and was dropped.[77]

¶53 The Respondent do not assert the present case to *conclusively* be one of subrogation. However, the proposed exception was dropped out of the Convention not because of particulars of subrogation but due to *effective participation* of the State in the proceeding, asserting claims **on behalf of the investor** and seeking similar remedies. *In casu*, with the

[71] Visscher (1966), p.107.
[72] Feldman (2016), pp.27-28.
[73] Record, p.40, ¶65.
[74] Badia (2014), pp.201-202.
[75] Barcelona Traction, ¶58.
[76] Spectrum, ¶153.
[77] Broches (1995), p.167.

restructuring of Claimant, the arbitration proceeding has involvement of the Justice department of the Claimant's State, substituting the investor.[78] The situation rendered is effectively one which the negotiators sought to avoid.

[78] Record, p.40, ¶65.

PART II – AMICUS SUBMISSIONS

¶55 Pursuant to Procedural Order 1, request for amicus curiae submissions by "non-disputing parties" is to be assessed by the Tribunal in the exercise of its powers under Article 41 of the ICSID AF Rules.[79] As enumerated in Article 41(3) of the ICSID AF Rules:

> ¶56 ...In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
>
> (a) the non-disputing party 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;
> (b) the non-disputing party submission would address a matter within the scope of the dispute;
> (c) the non-disputing party has a significant interest in the proceeding.
>
> ¶57 The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

¶58 Additionally, the criteria laid in Article 9.19(3) of CEPTA for the Tribunal to evaluate the admission of non-disputing party submissions is *in pari materia* to Article 41(3) of ICSID AF Rules.

¶59 Respondent submits that external advisors to the Committee on Reforms of Public Utilities ("External advisors'') fulfills the stated criteria [**I**]; whereas the Consortium of Bonoori Foreign Investors ("CBFI") does not [**II**]. Additionally, the Respondent contends that CBFI suffers from a clear lack of independence [**III**].

I. External Advisors fulfill the criteria for acceptance of amicus submissions

¶60 External advisors advance particular knowledge different from the disputing parties', that would assist the Tribunal in determining a factual or legal issue pertaining to the issue [**A]**. Furthermore, it carries ''significant interest'' in the proceeding **[B]**; and deals with a matter within the scope of the dispute **[C]**.

[79] Proc. Order 1, ¶19.

A. Different perspective

¶61 Following *Methanex,*[80] the criteria of a submission providing a novel perspective to resolve a factual or legal issue, is one of the foremost questions in front of the tribunal while admitting amicus submissions.[81]

¶62 It is submitted that the External Advisors brings in *particular knowledge and perspective, different from both the disputing parties* – by presenting evidence regarding the illegitimate procurement of the rights received by Vemma Holdings Inc.[82]

¶63 Tribunals, while deciding over issues of jurisdiction have considered evidences pertaining to corruption allegations or illegal methods of procurement. Reason being, that if the tribunal *chooses to adjudicate on a dispute where the investment itself was illegal*, it will essentially help the investor claim *more illegitimate gains* additional to anything the investor has already illegitimately gained up till point of dispute. The general principle that is based on this reasoning is called **'*clean hands*' principle**.

¶64 For instance, among many other similar cases, in *WDF*[83] and *Metal-Tech*[84], the court held that evidence of corruption and illegitimate activities are extremely pertinent, especially in matters of jurisdiction and compensation.

¶65 The external advisors as independent advisors involved in the entirety of the privatization process, are in the unique position to adduce unbiased facts and credible evidence for the purpose of establishing bribery in the bid procurement process before the Tribunal that may not be obtained from either disputing party.

¶66 Therefore, Respondent submits that External Advisors possess a novel perspective which will be crucially helpful for the tribunal in adjudicating this dispute.

B. Matter within the scope of the dispute

¶67 The perspective offered is pertinent in concluding on questions of jurisdiction, specifically whether the tribunal can exercise jurisdiction if the investment is proven to have illegitimate origins.

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[80] Methanex.
[81] UPS (Amicus Decision), ¶51.
[82] Record, p.19, ¶4.
[83] WDF, ¶157.
[84] Metal-Tech, ¶374.

¶68 Several tribunals have adjudicated on this question to conclude that evidence pertaining to matters of corruption, cheating, fraud and other such illegal activities are crucial in adjudicating on jurisdiction.

¶69 For instance, in *WDF*, the Tribunal on concluding corruption perpetrated by the claimant investor, chose *not to exercise jurisdiction* in the dispute while stating that corruption is against public policy of, if not all, most countries and **effectively against transnational public policy** and exercising jurisdiction in the dispute would be contrary to such transnational public policy. [85]

¶70 Additionally, in *Metal Tech*, the Tribunal concluded that there were several instances of corruption as per Uzbek law, and that the tribunal didn't have jurisdiction to adjudicate a dispute of such kind.[86] It further stated that *illegal activities, on the part of the investor, denies them of protection under the investment treaty* and state doesn't incur any liability.

¶71 Thus, we submit that the External Advisors are addressing a matter within the scope of dispute as the evidence presented will help tribunal determine the issue of jurisdiction.

C. Significant interest

¶72 It is submitted that the subject-matter of an arbitration proceeding is of public interest when the decisions to be issued in that arbitration are likely to affect individuals or entities beyond the disputing Parties.[87]

¶73 The subject matter of the present dispute is related to the aviation industry - an industry inherently carrying immense public interest, due to Bonooru's geological position and archipelagic existence.[88] This is further substantiated by the existence of positive obligations of transportation enshrined under the Bonoori Constitution.[89] Additionally, Caeli carried out 35% of the citizens of Mekar[90] and had 43% market share in the airline industry.[91] Therefore, it is submitted that there exists public interest in the dispute owing to the industry involved in the dispute and the volume of customers served by Caeli.

[85] WDF, ¶157.
[86] Metal-Tech, ¶374.
[87] Apotex (BNM Decision), ¶35.
[88] Record, p.28, ¶5.
[89] ibid pp.41-43.
[90] ibid p.34, ¶34.
[91] ibid p.34, ¶36.

¶74 In continuation of this mass impact of this dispute, the evidence presented by the applicant deals with matters of corruption, which as previously stated, is against transnational public policy and the preamble of the CEPTA[92]. Thus, it can be clearly concluded that 'public interest' is inherent in the dispute.

¶75 The question of *interest* involved assesses whether the petitioner has "significant interest" in the *outcome of the dispute*.[93]

¶76 Importantly, the Tribunal in *Apotex* elaborated that significant interest is present when the rights and principles that an organization/individual represents or defends are directly or indirectly affected by specific issue the non-disputing party intends to submit on.[94]

¶77 The applicants were engaged as external advisors to the Committee on Reform on Public Utilities set up under the Law on Privatisation of State Property ("Law on Privatisation") to advise on the privatisation, liquidation, and/or restructuring of Caeli Airways. They were selected for this role through a transparent and competitive process approved by the Cabinet of Ministers of Mekar and based on criteria of competence as identified in the Law on Privatisation. The applicants had actively participated in the deliberations of the Committee in the process leading up to the acquisition of an 85% stake in Caeli Airways JSC by Vemma Holdings Inc.[95]

¶78 Moreover, the applicants have regularly acted as interveners before federal courts in Mekar in relation to judicial proceedings concerning approval for privatisation projects. Finally, stagnation in anti-corruption efforts in Mekar also impacts the financial operations of the external advisors, who regularly advise potential investors prospecting opportunities in Mekar.[96]

¶79 Thus, we submit that 'public interest' is inherent in the dispute and the applicants have a 'significant interest' in the dispute.

[92] CEPTA, p.71.
[93] UPS (Amicus Decision), ¶51.
[94] Apotex (BNM Decision), ¶ 35.
[95] Record, p.19, ¶3.
[96] Record, p.19, ¶5.

II. The CBFI submission does not fulfill the criteria and therefore should not be accepted

¶80 Owing to the fact that the matter advanced by CBFI doesn't bring any novel perspective that would assist the tribunal [**A**], and that it lacks "significant interest" in the proceeding [**B**], Claimant assert that submission furthered by it should not be accepted.

A. No Novel Perspective

¶81 As previously submitted, the criteria of a submission providing a novel perspective to resolve a factual or legal issue, is one of the foremost questions in front of the tribunal while admitting amicus submissions.[97]

¶82 This criterion is not fulfilled by CBFI as the submission presented is not distinguishable from the submissions of the disputing party and therefore, brings nothing novel to the dispute that would help the tribunal in determining a question presented before it.

B. Lack of "significant interest"

¶83 The second criterion of "significant interest" is not fulfilled as CBFI only shows "general interest" as against "specific interest".

¶84 In *Apotex*, the Tribunal opined that general interest in preserving or application of a legal framework is not capable of satiating the requirement of 'significant interest'; and the applicant has a greater burden to show the same by establishing a link between the outcome of the dispute and the applicant's interests.[98]

¶85 In *Resolute Forest*, the Tribunal utilized principles laid down in *Apotex* to conclude that an interest in sustenance of principles of international law only represents 'general interest' and not 'significant interest'.[99]

¶86 The applicants have submitted similar interests as they submit an interest in 'impartial and independent' judicial systems for foreign investors and impact of the decision on the larger investor population of the Greater Narnian region, which can only qualify as "general

[97] UPS (Amicus Decision), ¶51.
[98] Apotex (Barry Appleton Decision), ¶40.
[99] Resolute Forest (Proc. Order 6), ¶4.6.

interests' and not "significant interest". [100] Therefore, the submission fails to fulfill the criterion and should be denied the leave sought.

III. CBFI's submission suffers from lack of independence

¶87 *Firstly,* it is an essential criterion inherent in the applicable provisions that the amicus is impartial and independent from the disputing parties so that the applicant remains an amicus of the court and doesn't turn into an amicus of the disputing party.

¶88 In *Vivendi,* the same criteria of independence and impartiality were laid down to adjudicate on admission of amicus submissions.[101]

¶89 For instance, in *Border Timbers*, the submission of the indigenous communities was analyzed and rejected on the ground that the chiefs of these communities were appointed by the respondent-state and they performed duties attributable to the state.[102]

¶90 The relation of the applicant to the disputing party, through Lapras Legal Capital, is the cause of lack of independence, as LLC is assisting the claimant on funding strategies for litigation.[103] Thus, CBFI stands to gain financially or otherwise from the outcome of the dispute directly or indirectly and this overlap of interest of LLC can prejudice the whole Consortium, given that CBFI itself stands to gain from progress of its members from the pathway of the membership fees that it charges[104].

¶91 Moreover, CBFI's executive committee unanimously decided that there was no conflict of interest and allowed Executive Committee member Horatio Velveteen, CFO of Lapras Legal Capital to vote and participate in discussions of amicus briefs.[105] This clearly shows that a senior member of LLC was actively involved in the making of the amicus submission and thus substantiates on the lack of impartiality.

¶92 Lastly, two other members of CBFI are pursuing claims against the state of Mekar, namely SRB Infrastructure and Wiig Wealth Management Group, which adds to the overlap of interests present between CBFI and its members.

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[100] Record, p.16, ¶9.
[101] Vivendi (Amicus Decision), ¶13.
[102] Border Timbers (Proc. Order 2), ¶62.
[103] Record, p.16, ¶7.
[104] Record, p.87, ¶3.
[105] ibid p.87, ¶12.

¶93 Therefore, it is submitted that the matter of submission is prejudiced due to the links present with Lapras Legal Capital and other members. The applicant suffers from clear lack of independence and accepting their submission would unfairly prejudice the respondent.

¶94 Thus, it is submitted that CBFI's submission is not appropriate to be granted leave.

PART III – MERITS

¶96 The Respondent did not violate the FET standard under Article 9.9 of the CEPTA as it did not engage in: arbitrariness, discrimination, violation of legitimate expectations**,** denial of justice, fundamental breach of due process including transparency and coercion.

¶97 Article 9.9 of CEPTA stipulates:

> Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7.

¶98 It is submitted that no acts of the Respondent were in violation of the FET standards. Correspondingly, it is put forth that the acts of the Respondent **shall be considered individually/discretely** while evaluating the FET breaches. This is so because neither CIL nor the CEPTA substantiates otherwise.

¶99 FET can be breached through discrete violations and hence reliance could not be placed on Article 15 of ILC Draft, as it allows the tribunal to consider the cumulative effect of individual acts in **only those cases** where *even the gravest of the individual acts cannot translate into breach.* CEPTA signed by the parties wherein it is mentioned that "a measure **or** measures constitute", should be taken to mean that multiple measures can lead to individual violations.

¶100 It is put forth that the proceedings before this tribunal are **not that of appeal court** and hence it has a very limited scope of inquiry.[106] The **scope is even more restricted** when the Tribunal is reviewing the actions of administrative bodies.[107] Accordingly, Tribunal are not empowered to check the conformity of domestic court judgment with domestic law[108].

¶101 Moreover, an error in the interpretation of the facts or the law does not impair the plausibility of the analysis by itself[109], and thus, a mere disagreement[110] in respect of quality, reasoning or persuasiveness of the judgement does not amount to FET violations.[111]

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[106] Krederi, ¶488
[107] ADF, ¶ 190
[108] Philip Morris, ¶500; Waste Management, ¶129.
[109] Salem, p.1202.
[110] Liman, ¶377.
[111] Iberdrola (I), ¶¶491, 502, 507.

¶102 However, if the tribunal chooses to evaluate compliance with domestic law, we submit that the conduct of the CCM was in accordance with the domestic law.

I. Arbitrariness

¶103 The dictionary meaning of the term arbitrary as sought to by various tribunals[112] says it is an act "depending on individual discretion; founded on prejudice or preference rather than on reason or fact"[113].

¶104 However, a more specific definition of arbitrariness was recognized in the *ELSI*, wherein it was observed that arbitrariness is referred as ***willful disregard of due process***.[114] It shall also be noted that the test is whether the ***act shocks or surprises the judicial propriety*** occasioned to an impartial.

¶105 A more elaborated test to ascertain what constitutes an arbitrary measure was laid down in *EDF* which encompasses of four alternative bases and classifies an act to be arbitrary if:[115] It inflicts damage on the investor without serving any apparent legitimate purpose;[116] it is not based on legal standards but on discretion, prejudice or personal preference.[117] it is taken for reasons that are different from those put forward by the decision maker; and it is taken in willful disregard of due process and proper procedure.

A. Initiation of *suo-motu* investigation was not arbitrary

¶106 Accordingly, the Claimant submits that *firstly,* Initiation of suo-motu investigation was not arbitrary **[A],** *secondly,* arguendo the subsequent imposition of interim airfare caps was not arbitrary **[B]** and *thirdly*, maintenance of airfare caps was not arbitrary and did not breach the justified legitimate expectations of the Claimant **[C]**.

[112] Occidental, ¶162.
[113] Black's Law Dictionary, p.134.
[114] ELSI, ¶128.
[115] EDF, ¶303.
[116] Waste Management, ¶98; Crystallex, ¶380; Lemire, ¶262, Electrabel, ¶132.
[117] Crystallex, ¶578.

1. Initiation of *suo-motu* investigation was not arbitrary

¶107 It is submitted that the *suo-motu* investigation, better referred as the *first investigation* was properly instigated against the Caeli Airways. This was so because Caeli Airways did fall under the criteria laid down under Section 2 (a), (b) and (c) of the MRTP act[118].

1.1 Section 2(a) of MRTP act

¶108 It is submitted that CCM earlier did approve the alliance membership of the Claimant, however, the anti-competitive conduct was never approved and was rather explicitly barred. It shall be noted that when Vemma was about to enter the market of Caeli, CCM sought an ***undertaking from Caeli that it would not engage in high level cooperation*** on competition parameter such as **capacity, etc**[119] with Moon Alliance members. This was a reflection of the CCM's very legitimate apprehension[120] regarding anti-comp behaviour arising out of Caeli's alliance membership. Thus, secondary preferential slot trading (or ***cooperation of capacity***), which is an essential facility[121], was barred, however, the claimants themselves in their Notice agreed to have been engaged in the same[122]. Anti-competitive slot trading is also not warranted by the international/ prevalent market practices[123]. Even else, they are not persuasive as are not customary international laws.

¶109 Moreover, Caeli Airways and Royal Narnian were both subsidiary companies of Vemma Holdings[124] and formed a Single Economic Entity.[125]

¶110 Furthermore, the alliance membership and privileges of the Phenac Airport allowed Caeli to affect the abuse its dominant position in the market by anti-competitively affecting the other market players[126]. Also, the balancing of efficiency gains depicts that Caeli's alliance was not producing public benefits that could override the anti-competitive harms.[127]

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[118] Annex V, p.47.
[119] Record, p.32, ¶25.
[120] Skyteam, ¶12.
[121] Sea Containers, p.79.
[122] Notice, p.3, ¶14.
[123] OECD (Airline), ¶¶31-32.
[124] Record, p.29, ¶10.
[125] Durkan, ¶15, 22; Commercial Solvents, ¶9.
[126] Aéroports de Paris, ¶ 147; BPB Industries and British Gypsum, ¶120
[127] Skyteam (Notice) ¶6, Lufthansa/AuA.

¶111 Accordingly, the cumulating of the market share of the Caeli Airways and Royal Narnian was justified. Subsequently, the *suo-motu* investigation against an entity with more than 50% market share was not arbitrary.

1.2 Section 2(b) and (c) of the MRTP act

¶112 The requirements of Section 2(b) and 2(c) of the MRTP act[128] were fulfilled. As there was evidence to the effect that Caeli posed a unique threat to competition in the market of Mekar and/or it was pushing the competitors out of the market. This can be substantiated from the fact that in 3 months from the initiation of *First Investigation,* other market players instigated the *Second Investigation,* claiming entry barriers owing to Caeli's predatory conduct.

¶113 *Ergo*, the CCM investigations occurred in light of Claimant's anti-competitive behaviour. It was based on legal standards, served a legitimate purpose and was not in wilful disregard of due process of law.

2. The subsequent imposition of interim airfare caps was not arbitrary

¶114 There were apprehensions of predatory conduct.[129] Therefore, to correct the situation, the MRTP Act of the country allowed imposition of interim measure. Accordingly, airfare caps which resulted into price ceiling was necessary, so as to prevent Caeli from earning supra-competitive profits[130] by allowing it to exploit the already captured market with unjust increase in prices specifically in the times of financial crisis. Moreover, Claimant's did not have problem with the caps earlier.[131]

¶115 Even otherwise, irrespective of the measures being good or bad[132], they were not taken lightly or without due consideration and were well reasoned, bring it out of the domain of arbitrariness.[133]

[128] Annex V, p.47.
[129] Record, p.34, ¶36.
[130] Record, p.7, ¶13.
[131] Notice, ¶15.
[132] Enron, ¶281.
[133] LG&E, ¶162.

¶116 Hence, the penalties were not arbitrary and were additionally in consonance with the legal standards[134] and did not lack due process.[135]

3. Maintenance of airfare caps was neither arbitrary nor breached the justified legitimate expectations of Claimant.

¶117 It is put forth that the interim caps were automatically revised when market share fell below the threshold.[136] Thus, they were adequately monitored, temporary, behavioural and proportionate in nature.[137] Moreover, the caps were pegged with inflation rate as per the standard fiscal policy of the country.[138]

¶118 Caeli had an adequate opportunity to demand revision, but a mere disagreement in respect of the reasoning or quality of the judgment does not amount to breach.[139] Moreover, maintenance of airfare caps did not violate the legitimate expectations of the claimant as elaborated below in Argument III.

B. Conduct of the CCM was not arbitrary at the time of Second Investigation

¶119 The relevant market comprises of market of all the flights from and to the Phenac International Airport. Other transport services could not be an alternative for the business passengers travelling from the Phenac airport.[140]

¶120 Caeli with 43% market share in this relevant market was dominant and was abusing its dominant position by engaging in predatory conduct. Hence the second investigation and subsequent imposition of fines was not arbitrary.

II. Legitimate Expectations

¶121 The concept of 'legitimate expectations'[141], as propounded in the *Thunderbird case*[142], refers to:

[134] ELSI, ¶128.
[135] EDF, ¶303.
[136] Record, p.38, ¶55.
[137] Ford, ¶13.
[138] Record, p.36, p43.
[139] Liman, ¶377.
[140] COMP/A.38284/D2, ¶ 11; Air France / KLM, ¶10-12.
[141] EDF, ¶219; Tecmed, ¶154.
[142] Thunderbird, ¶147.

¶122 a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act on reliance on said conduct, such that a failure by the [State] to honour those expectations could cause the investor (or the investment) to suffer damages.

¶123 As per Article 9.9 (3) of the CEPTA[143], only specific representations made to an investor to induce a covered investment is believed to create legitimate expectations. Accordingly, expectations would be legitimate if they are based on specific representations[144] which are unambiguous[145].

¶124 We submit that Respondent **did not violate the legitimate expectations of a diligent investor**, **arguendo**, the **Respondent had the right to regulate** to ensure public interest which was **exercised proportionately.**

A. Claimant should have been diligent

¶125 A diligent investor shall base its expectations keeping in consideration the specificities of host state[146] and the context of investment. This includes considering the level of development of the country[147], political volatility[148] and the climate at the time of previous crisis.

¶126 This is to say that Mekar was a developing country with a volatile political environment[149]. Moreover, during the crisis of 2008[150] also, the very same airline, Caeli airways so much so that it had to be sold to the Claimant's and thus the legitimate expectations of the Claimant shall be based in accordance with the aforementioned circumstances.

B. Executive's decree to use MON instead of USD

¶127 It shall be noted that a ***perpetual stability and predictability of regulatory framework*** cannot be expected. Claimant can't absurdly expect that the Legal System will not evolve at all

[143] CEPTA, p.76.
[144] Parkerings, ¶331.
[145] Siemens AG, ¶198.
[146] Toto, ¶165; El Paso, ¶360.
[147] Parkerings, ¶335; Mobil, ¶933.
[148] Bayindir, ¶195.
[149] Record, p.29, ¶12.
[150] Record, p.30, ¶17.

during the life of investment.[151] Additionally, as recognised in the case of *National Grid*[152], the changes to legal system are ***specifically accepted when motivated by*** a specific circumstance in a host State like **Economic Crisis**.

¶128 In *El Paso*, it was held that the trade agreement does not protect foreign investors and their investments against devaluation. Similarly, in *Continental*[153], it was held that such monetary policies:

> ¶129 do not render the State liable to the burden or losses that may be suffered by those affected, provided there is no discrimination or unfairness in their application

¶130 Till CMP government's policy decision that was in October, 2017 everyone including the airline businesses were supposed to denominate their ticket prices in MON and not USD. Thus, at the time of investment, regulatory framework was to use MON. Moreover, the subsequent executive order was not arbitrary as it was a policy decision enacted to generate trust in MON, as also suggested by IMF.

C. Legislations can't create legitimate expectations[154]

¶131 The Respondent submits that in *Total*,[155] it was held that legislations can't create legitimate expectations.[156] Accordingly, claims of MRTP act ensuring investor protection was not specifically addressed to the Claimants and as a legislation can't be a source to legitimate expectations. Hence, Mekar was not obliged to ensure reasonable returns on the investment.

D. Arguendo, Respondent had the Right to Regulate

¶132 Under Article 9.8 (2) of the CEPTA, the Respondent had the right to regulate its territory in order to safeguard public interest[157] which includes consumer protection[158] wherein it is mentioned that:

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[151] El Paso, ¶376.
[152] National Grid, ¶100.
[153] Continental, ¶278.
[154] Duke Energy, ¶340.
[155] Total, ¶¶117, 118, 119.
[156] El Paso, ¶350; Mobil, ¶928; Lidercón, ¶206.
[157] Total, ¶¶123, 167; Electrabel, ¶7.77; ADC, ¶¶423, 424.
[158] LG&E (Decision on Liability), ¶¶162-163; Parkerings, ¶¶332-333.

¶133 the mere fact that the party regulates, including through modifications of its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, **including the expectations of profit,** does not amount to breach

E. Right to Regulate was exercised Proportionately

¶134 This right was exercised proportionately[159] as the policy was rational, then there was a rational link or correlation between the policies of the Respondent, measures adopted to achieve it and the objectives they sought to achieve.[160] Moreover, there were no sudden or drastic changes to any essential features. Changes were also not discriminatory in nature.

III. Discriminatory Conduct

¶135 In the landmark case of *Saluka Investment*[161], a test was laid to check discriminatory conduct, the test includes ascertainment of whether similarly situated investors[162] and were unequally treated **[A]**; without any justified reasons.[163]**[B]**

¶136 *In casu*, Claimants were treated equally to that of similarly placed investors. And there were justified reasons for the discrimination, if at all agreed.

A. Claimant was not similarly situated to that of other investors and received treatment accordingly

¶137 Taking precedence from the attributes of "like circumstances" identified in the case of *UPS*,[164] it is submitted that the Claimant was not similarly situated as was **State-owned enterprise**, which are predominantly, believed to have ***Deep pockets.*** Thus, cannot be accepted to be similarly placed like that of other foreign airlines who were merely receiving subsidies from their home state.

¶138 Pursuant to the aforementioned reason, Larry Air, another state-owned enterprise was also denied subsidies.

[159] ADC, ¶¶ 423-424; Infinito Gold, ¶ 34.
[160] AES Summit, ¶¶10.3.7, 10.3.9; El Paso, ¶ 374; Mamidoil, ¶¶ 625, 629.
[161] Saluka, ¶331; Parkerings, ¶332.
[162] South Silver, ¶710.
[163] Crstallex, ¶616.
[164] UPS, ¶87.

B. Arguendo, there existed justified reasons for the treatment.

¶139 Even otherwise, Claimant could be denied subsidies as the when the order for subsidies was passed, the final investigation report against the Claimant already claimed its involvement in anti-competitive activities, so it was only fair that the state don't give them more funds to continue such activities.

¶140 Moreover, there is no evidence that failure to give subsidies would have thrown Claimant out of the market that is to say that dispersal of subsidies to others did not worsen Claimant's situation.

IV. Denial of Justice and Due Process

¶141 There has been no Denial of Justice violating Article 9.9 of the CEPTA. Claimant was not denied justice as there was no unreasonable delay in the judicial proceedings which could constitute Denial of Justice **[A]**; Mekar did not violate due process by dismissing claimants' case on merits by a way of a summary judgment without conducting a hearing for the same **[B]**; and the enforcement of the award which was set aside at the seat did not constitute denial of justice **[C]**.

A. There was no unreasonable delay which could constitute denial of justice

¶142 The test for establishing denial of justice in international law is a *particularly serious short coming* and *egregious conduct by the host state and its judicial organs* that *shocks, or at least surprises, a sense of judicial propriety*.[165]

¶143 Unreasonable delay can constitute denial of justice, however, what is "unreasonable" in such delays is highly fact sensitive.[166] While specific circumstances might not form an excuse, the assessment whether the alleged delay was unreasonable or not is carried out in light of existing circumstances, which includes the reasonable expectations of the investors given the knowledge of the Municipal Court system they have to work within and the consequential limitations of such a regime.[167] The assessment of the reasonableness must take into account all circumstances, including not only the facts surrounding the investment, but also the

[165] Lowen, ¶312.
[166] Paullson, p.177.
[167] Chevron, ¶263.

political, socio economic, cultural and historical conditions prevailing in the host State.[168] Every prudent investor is expected to analyse and provide for such risks when entering the market.

¶144 In the present case, there was a pendency of 27 months in civil suits and further criminal cases were being prioritised over civil cases.[169] This representation was already available to the claimants before it made investment in Mekar. The same reason was given by the Court Registrar to the claimants when its lawyers demanded for an expeditious hearing.[170] Hence, it could not expect Mekar to treat it in any special manner. Mekar treated the claimants in the same manner as it treated other investments and therefore cannot 'shock or even surprise a sense of judicial propriety'.

¶145 Further the test for establishing a denial of justice **sets a high threshold**. While the standard is objective, it does however require the Claimant to show a ***manifest or gross unfairness***; a ***flagrant and inexcusable violation***; a ***palpable violation exposing bad faith*** (and crucially, not mere judicial error) at its core; or an ***undoubted mistake of substantive or procedural law prejudicing the investor***.[171]

¶146 This has been further illustrated in *Mondev*, where denial of justice was said to be demonstrable through: refusal by a relevant court to entertain a suit; subjection to undue delay by a court; administration of justice in a seriously inadequate manner; or a clearly malicious application of the law by the courts. All these conditions are to be viewed in totality for the Tribunal to decide denial.[172] This gets supported by the decision of the Tribunal in *Jan de Nul*, which held that duration of the proceedings alone do not rise up to the level of justice.[173]

¶147 In the case at hand there was delay by the High Court. However, such delay had not reached a stage where it could be counted as egregious or unfair and inequitable this is the same delay undergone by all such cases in the Judicial System of Mekar due to unavoidable constraints.[174]

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[168] Duke, ¶340.
[169] Record, p.29-30, ¶13.
[170] Record, p.36, ¶44.
[171] Lowen, ¶130.
[172] Mondev, ¶126-127; Azinian, ¶102-103.
[173] Jan de Nul, ¶196.
[174] Supra 169.

B. Mekar did not violate due process by dismissing Claimant's case on merits

¶148 The principle of *audi alteram partem* is not absolute. It can be restricted where an obligation to give notice would obstruct the taking of action especially of preventive or remedial nature. It is equally excluded where having regard to the nature of the action to be taken, its object, purpose and scheme of the relevant statutory provision, fairness in action does not demand its implication.[175]

¶149 In the present case, the Executive Order 5-2014, under which this summary decision was given, had an object to timely dispense cases so as to assuage the pendency of law suits in the country.[176] With this **object,** it provided a judge with the power to dismiss a case with a summary decision where he/she opines that there is no or little chance of success on merits.[177] Thus, the conduct exercised by the Mekari judge was well within the applicable restriction on *audi alteram partem*.

¶150 Further, in the case at hand, by challenging ignorance of hearing under denial of justice, the claimant actually challenges a decision of a judge. As denial of justice carries a high threshold with itself and such conduct can only amount to denial of justice if there is a **"manifest" violation of natural justice,**[178] unless the Claimant furnishes strong evidence which shows a *malicious conduct of the judge* or *an intent* for the same, the act could not reach up to a level of denial of justice.

C. Enforcement of the award set aside at the seat did not constitute denial of justice

¶151 Mekar is a signatory to the New York Convention on Recognition and Enforcement of Foreign Award which in Article V(1)(e) provides for a **discretion** to refuse the enforcement of an award which has been set aside at the aside.[179] Its domestic law in this regard is based on UNCITRAL Model Law,[180] which provides for similar obligation in Article 36.[181] The discretionary language of the Conventions enables the enforcing court to refuse the request

[175] S.A. Smith, p.174.
[176] Record, p.86, ¶9.
[177] ibid.
[178] Waste Management, ¶98.
[179] NYC, Article V(1)(e).
[180] Record, p.39, ¶61.
[181] UNCITRAL, Article 36(1)(v).

of the party resisting enforcement of a foreign award even if one or more of the grounds of setting aside are established.[182]

¶152 In case at hand, the evidence presented by the Claimant was **circumstantial at best**.[183] The source of the evidence was an organization against which a proceeding was ongoing in the Mekarian courts.[184] In a context that the source of an evidence plays a crucial role in the determination of its weight, a bar on its admissibility should be viewed as *reasonable*.

¶153 In the enforcement proceedings, the courts minimally indulge to the merits.[185] In respect of such a practice, the decision where it balanced the reasoning of the arbitrator with the presented claims was reasonable.

¶154 Further, the decision at the seat was also viewed to be unreasonable by the Mekar Supreme Court.[186] In such a scenario, denying enforcement on the basis of such a decision would have affected the judicial propriety of the Mekar Judiciary.[187]

¶155 Additionally, even if it is construed that such enforcement was not reasonable, **misapplication of law does not constitute denial of justice**.[188] In fact, noted scholar Jan Paulsson, mentions a similar illustration, and concluded that such a conduct might be a violation of international law but cannot be a denial of justice.[189] Therefore, the present conduct cannot be denial of justice which could further violate Article 9.9 of the CEPTA.

V. Duress

¶156 Article 9.9 of the CEPTA protects the investors from any *abusive treatment by the Host State* –

> ¶157 A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or measures constitute…. (d) Abusive treatment of investors, such as coercion, duress, and harassment...

[182] Chromalloy, p.909-910.
[183] Annex XIV, p.66, ¶ 10.
[184] Annex XIV, p.66, ¶ 13.
[185] Gaillard & Pietro (2007), p.793; Kronke & Nacimiento, p.259.
[186] Record, p.68, ¶18.
[187] Yukos, p.15, ¶3.10.
[188] Krederi, ¶451-454.
[189] Paullson, p.85.

¶158 Various Tribunals have also awarded protection to foreign investors from abusive treatment, such as harassment, coercion, intimidation, duress and/or abuse of power by the host State.[190] Though, the principle of harassment has not been well defined under general rules of international law, various Tribunals have interpreted such violations in accordance with facts of the concerned cases.[191]

¶159 The *Desert Line* Tribunal was of the view that the unwarranted arrest or imprisonment of business personnel or executives of the investment.[192] While the *Tabot* Tribunal, was of the view that issuing of burdensome and disproportionate demands for information and threats of criminal prosecution[193] amounts to coercion.

¶160 Similarly, the *Bitwater* Tribunal opined that deportation from the host State, or rescinding work or residence permits entitling foreign investors/personnel to work and live in the host State[194] while the *Tecmed* Tribunal held that obstruction of daily business operations and activities[195] amounts to harassment. However, not all actions causing distress or prejudice to an investor will engage state responsibility under the fair and equitable treatment. *Mere "bureaucratic officiousness[196]" or overzealous enforcement action will not be equated with harassment*.[197]

¶161 Moreover, it has been stated by Tribunals that **a State has broad latitude** to interrogate, conduct raids, demand information, seize assets, and even imprison suspects, where there are legitimate grounds for doing so under the criminal law and regulatory codes[198]. In the backdrop of these principles, it is imperative of the Tribunal to note that the Respondent's actions whether that of the CCM or the judiciary *were all done in good faith*.

¶162 The CCM was **exercising its legitimate executive power** granted by the MRTP Act and in accordance with the Right to Regulate stated in Article 9.8. Furthermore, the judiciary was also working in accordance with laws established by Mekar and under the directions of the Executive Order 5-2014.

[190] Saluka, ¶308; Lemire, ¶284; Bayindir, ¶178.
[191] Lemire, ¶284; Indian Metals, ¶228.
[192] Desert Line, ¶146.
[193] Talbot, ¶68.
[194] Biwater, ¶223.
[195] Tecmed, ¶163.
[196] Krederi, ¶638.
[197] AES Corp., ¶318.
[198] Teinver, ¶190; Lemire, ¶285.

¶163 Additionally, the Claimant was not forced by any physical or economic threats to dispose of its investments. Though there was a dispute in which led to arbitration, but that suit was under the legitimate rights under the Shareholders Agreement. Even when the Claimant was unable to find a suitable buyer of the assets for Caeli, the Respondents paid them more than a reasonable price.

¶164 Therefore, it is submitted that there was no abusive treatment accorded to the Claimant on any instance.

PART IV – COMPENSATION

¶165 Respondent have established how it had neither violated any provision of article 9.9 of the CEPTA nor caused any injury to the investor concerned. It has also been advanced that the losses in question were the sole responsibility of the investor themselves and their gross mismanagement of the resources of Caeli.

¶166 Firstly, it is appropriate to point out that much of the profits generated by Caeli were due to the steep decline in fuel prices;[199] the business model of Vemma that was based around undercutting competition with low prices[200] and the overall subsidies it received from Bonooru under the Caspian Project and the Horizon 2020 scheme.[201] Secondly, on accusations of impropriety by the CCM and the Judiciary, legitimacy has already been established in the arguments advanced. Moreover, these acts did not lead to any losses to the investor.

¶167 Noticeably, before the drop in oil prices, Caeli was barely able to produce profits. Much of the profits from summer months were used to cushion the losses of the winter months. It was only after the global oil market crash that the company was able to generate huge profits and reach its peak evaluation at $1.1 billion in 2016[202]. The imposition of air caps was an interim measure to regulate the anti-competitive activities of Caeli. The **real reason for the losses therefore becomes the business model of Vemma** against which the Respondent had on more than one occasion objected[203] added with a spike in oil prices and fluctuating currency crisis. None of these were under the control of the Respondent.

I. Interpretation of CEPTA does not give compensation at "Fair Market Value"

¶168 It is important to observe, that assessment of the compensation due under international law, for the breach of an international obligation consists of three steps "the establishment of the breach, followed by the ascertainment of the injury caused by the breach, followed by the determination of the appropriate compensation for that injury".[204]

[199] Record, p.33, ¶33.
[200] Annex VII, p.44.
[201] ibid.
[202] Proc. Order 4, p.89.
[203] Record, p.33, ¶31; Record, p.34, ¶35.

[204] Pey Casado, ¶217.

¶169 Respondent assert that "under general international law, the existence of a causal link between the alleged infringement of obligations and the damage ensuing from it[205], is an indispensable prerequisite for a compensation claim".[206] It has clearly shown that **the causal link** between "the injury resulting from and ascribable to the wrongful act[207]" **is absent in the present case** and thus no compensation is owed to the Claimant in the first place.

¶170 It is also submitted that there existed an obligation on the Claimant to mitigate its losses. The Commentary to Article 31 of ILC Articles notes that the question of mitigation of damages is "*[a] further element affecting the scope of reparation"* and that *"a failure to mitigate by the injured party may preclude recovery to that extent"*. The same has been reiterated in the *Middle East Cement* case[208] where it was held:

> ¶171 The duty to mitigate damages is not expressly mentioned in the BIT. However, this duty can be considered to be part of the General Principles of Law which, in turn, are part of the rules of international law which are applicable in this dispute according to Art. 42 of the ICSID Convention.

¶172 Other Tribunals have expressed similar views that it would be unfair to allow Claimants to recover damages for loss that could have been avoided by taking reasonable steps[209]. Given Claimant's business model, its rapid expansion policies, to which the Respondent was opposed to, employed the resources of the company that could have been used to improving the financial health.[210] Even experts have demarked such an act to be ill-advised[211] and rash.

¶173 The BITs are not insurance policies against bad business judgments[212] and the Claimants should bear the consequences of their own actions. Pursuant to these claims, even if the Tribunal does agree that any compensation is owed to the Claimant, it is asserted that the "market value" standard contained in Article 9.21 of the CEPTA should be applied **[A]**; most-favoured nation clause in the CEPTA does **not** allow importing of the standard of

[205] Biwater, ¶785; El Paso, ¶263.
[206] Myers, ¶316; Silver Ridge, ¶513.
[207] ILC Commentary (2001), p.91; MNSS, ¶356.
[208] Cement, ¶167.
[209] AIG Capital, ¶10.6.4*;* Bridas, ¶53 EDF, ¶1301.
[210] Record, p.34, ¶35.
[211] Annex IX, p. 57.
[212] MTD, ¶243; Maffezini, ¶64.

compensation **[B]**. Furthermore, any compensation awarded should be reduced, considering Claimant's contributory fault **[C]** and the on-going economic crisis in Mekar **[D]**.

A. The "market value" standard should be applied

¶174 The Tribunal must note that any dispute arising out of the CEPTA are addressed in the treaty itself. Subsequently any award from such a settlement gives rise to an award under Article 9.21 of the CEPTA. Article 9.21 stipulates that –

¶175 Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination:
(a) monetary damages at a market value, except as otherwise provided for in Article 9.12; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages at a market value and any applicable interest in lieu of restitution…

¶176 Emphasis must be placed on the use of the word "may" in this provision. On ordinary interpretation (under article 31 of VCLT), it grants discretionary power to the Tribunal, to either award the compensation with separate head of monetary damage and restitution of property (if any) or under a single head.

¶177 Article 31 of VCLT states that any provision must be read in accordance with ordinary interpretation, relying on good faith, i.e., "treaty terms are not drafted in isolation, and their meaning can only be determined by considering the entire treaty text".[213] Moreover, as stipulated Article 31 avoids any extreme functional interpretation which may lead to "legislation" or the revision of a treaty[214] and thus any other interpretation should be void.

¶178 Furthermore, Article 9.21 awards monetary damages at "a market value", as the established compensation standard for disputes arising out of CEPTA. Importantly, CEPTA only allows for the "fair market value" **for expropriatory breaches** as stipulated therein Article 9.12. For any other treaty breaches reliance must be placed on Article 9.21, implying the general rules of interpretation.

¶179 Article 31 VCLT embodies the contextual or systematic means of interpretation which aims at avoiding inconsistencies of the individual term with its surroundings i.e. the remaining terms of the sentence and of the paragraph; the entire article at issue; and the remainder of

[213] Villager (2009), p.427.
[214] Villager (2009), p.428.

the treaty, i.e., its text, including its preamble[215]. Evidently, the new BIT was created to deal with FET violations and other treaty breaches which the earlier BIT could not.

¶180 Therefore, the appropriate standard of compensation must be "a market value". It is also submitted here that since the Respondent has paid $400 million for the buying the assets of Caeli from the Claimant, this Tribunal must find that it has paid the Claimant "at market value" and herby no further claim for compensation should lie.

¶181 *Arguendo,* if the Claimants relies on 'fair market value' as a standard under general rules of international law, read along the provisions of CEPTA in correspondence with Article31(3)(c) VCLT, the assertion must not be found true. Wherever the measure of FMV standard is applicable, the Tribunals have noted that the BITs at issue, refer to fair market value *as the measure of compensation for expropriation* and **do not prescribe a measure applicable where other guarantees[216]** have been breached.[217] Furthermore, as observed by *LG&E* Tribunal[218]:

¶182 There may be a difference between "compensation" as the consequence of a legal act and "damages" as the consequence of the committing of a wrongful act. This distinction has been noticed by various tribunals.[219] If FMV is *not the proper measure of compensation* for unlawful expropriation, it is *a fortiori* **not appropriate for breaches of other Treaty standards**.

B. MFN clause in CEPTA does not allow importing of the standard of compensation.

¶183 Article 9.7 of CEPTA propounds that –

¶184 Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable 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.

¶185 For greater certainty, the treatment referred to in paragraph 1 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a

[215] ibid.
[216] BG Group, ¶419.
[217] CMS, ¶409; LG&E, ¶30.
[218] LG&E, ¶38.
[219] ADC, ¶481; AGIP, ¶95.

breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.

¶186 *Firstly*, relying on the general rules of interpretation, no express provision lies in clause (1) of the MFN clause, referring to similar treatment being awarded to compensation. *Arguendo*, if the Claimants argues that the sale or disposal of investments refers to the standard of compensation, then such an interpretation would be an extreme functional interpretation which may lead to "legislation" or the revision of a treaty[220].

¶187 Furthermore, under Article 9.7.2 of CEPTA, which aims to avoid treaty shopping, a sort of *pick and choose situation* among all treaty provisions concluded with third States would be rendered, importing preferred clauses into the basic treaty.[221] It is also important to consider that MFN clauses should not be used to create a *completely new consent to arbitration,* that is, to take advantage of only one aspect of a mechanism provided for in a third treaty and to apply it to the other mechanism provided in the basic treaty.

¶188 *Secondly*, the final award is covered within the scope of "procedures for resolution of investment disputes". A clear reading of the Treaty states that the Articles starting from 9.16 and continuing up to article 9.22 (including article 9.21), form a part of Section-E of CEPTA – dealing with "Settlement of Disputes". Pursuant to Article 31 of VCLT it must be noted that:

¶189 the ordinary meaning to be given to the terms of the treaty in their context. Treaty terms are not drafted in isolation, and their meaning can only be determined by considering the entire treaty text. The context will include the remaining terms of the sentence and of the paragraph; the entire article at issue; and the remainder of the treaty[222].

¶190 Since the determination of final award is a part of the dispute settlement mechanism and by applying Article (2), such mechanisms do not form a part of treatment; thus the provisions of compensation can't be imported from the Arrakis-Mekar Bit 2006.

¶191 Compensations or reparations, as discussed under Article 9.21 of CEPTA, are "substantive obligations". The obligation of States to provide full reparation for internationally wrongful acts, including by compensation, is one of the bedrock principles of international law. The

[220] Villager (2009), p.428.
[221] Faya (2008), p.91.
[222] Villager (2009), p.428.

ILC Draft Commentaries discuss compensation "as a general obligation"[223] and an immediate corollary of a state's responsibility, i.e., as an obligation of the responsible State resulting from the breach. Therefore, the obligations to compensation are substantive obligation of the Host State in accordance with CIL and cannot be imported from the Arrakis-Mekar BIT.

C. Any compensation awarded should be reduced considering Claimant's contributory fault

¶192 Respondent believes that the losses incurred by the Claimant are arising due to its own faults. The Claimant had on many occasions turned a deaf ear to the advice given by the Respondent; and its advices. Claimant did not heed to these advices and continued expansion, which in the longer run proved to be hazardous for Caeli.

¶193 The rate of interest on loan was increased because of these massive debts Claimant landed itself into, so much so that it had to sell of its stake in Caeli. Moreover, it continued flights to Bonooru on unprofitable routes[224] and did not strategize for the post-oil crash market. Therefore, reliance is placed on Article 39 of the ILC Draft, which states that:

¶194 In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to which reparation is sought.[225]

¶195 In order to exclude or reduce compensation due to the investor's contributory fault i*t is necessary not only to prove said omission or fault, but also to establish a causal link between the omission or fault and the harm suffered*.[226] Furthermore, the Commentary on Article 39 reads that:

¶196 but where the injured State, or the individual victim of the breach, has materially contributed to the damage by some wilful or negligent act or omission.....only those actions or omissions which can be considered as wilful or negligent, i.e. which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights.....and that the negligence

[223] ILC Commentary (2001), p.91.
[224] Annex VII, p.44.
[225] ILC, art 39.
[226] Abengoa, ¶670; Bear Creek, ¶410.

should have reached the level of being "serious" or "gross", the relevance of any negligence to reparation will depend upon the degree to which it has contributed to the damage[227]

¶197 It has been shown that the losses in the subsequent years were manifested due to the **Claimants gross mismanagement** of Caeli. Various arbitration tribunals have reduced the amount of damages awarded to investors by a percentage as a result of their contributory fault to reflect investors' role in the events leading to a loss.[228] Therefore any compensation must be reduced due to Claimant's contributory fault.

D. Any compensation awarded should be reduced considering the on-going economic crisis

¶198 Given the economic crisis in Mekar, the consecutive quarters of negative growth in the country, the steep decline in its GDP and the skyrocketing inflation, it is pertinent for the Tribunal to consider the same while rendering compensation[229]. Reliance is placed on the preamble of CEPTA which "RECOGNISES ***the differences in their levels of development*** and diversity of economies".

¶199 Moreover, pursuant to the Final Awards on (both States') Damages Claims (Awards) by the Eritrea-Ethiopia Claims Commission (EECC), which squarely addressed the challenge of crippling compensation by referring to customary law of State responsibility. The EECC was concerned that:

¶200 Huge awards of compensation by their nature would require large diversions of national resources from the paying country - and its citizens needing health care, education and other public services - to the recipient country[230].

¶201 The same can be held true for the Respondents in the present case. To pay the USD 700 million that Vemma demands, Mekar would have to transfer about twice its consolidated annual public spending to Vemma.[231] Many prominent scholars have opined against such compensations[232] that would cripple the daily lives of the common citizenry of a state.

[227] ILC Commentary (2001), p.110.
[228] UAB, ¶1144; Yukos, ¶1601; MTD, ¶243.
[229] Proc. Order 3, p. 86.
[230] EECC, ¶21.
[231] Proc. Order 3, p.86.
[232] Marzal (2021), p. 3; Paparinskis (2020), p.1.

Therefore, such amount of compensation must be reduced in the backdrop of the on-going economic crisis.

VI. PRAYER FOR RELIEF

In light of the above, the Claimant hereby respectfully requests the Arbitral Tribunal to:

A. Accept the challenge to jurisdiction requested by the Respondent;

B. Find that it has no jurisdiction over the present dispute;

C. Accept submissions advanced by External Advisors to the Committee on Reform of Public Utilities;

D. Reject the submissions advanced by CBFI as amicus submission;

E. Find that Respondent has not treated the Claimant's investment unfairly and inequitably and thereby has not breached its obligations under Article 9.9 of the CEPTA;

F. Order Respondent to pay no compensation to the Claimant;

G. Order Claimant to reimburse the Respondent for all costs and expenses associated with this arbitration.

Submitted on 31 October, 2021 by TEAM Tarassov

On behalf of Respondent

FDEDERAL REPUBLIC OF MEKAR