**TEAM 1544 TOMKA**

**INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES**
**ICSID Case No. ARB(AF)/20/78**

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# MEMORIAL FOR RESPONDENT

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**Vemma Holdings Inc.**
(Claimant)
v
**The Federal Republic of Mekar**
(Respondent)

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| Aviation Analytics | Aviation Analytics June 7, 2019 |
| BIT | Bilateral Investment Treaty |
| Bonooru | The Commonwealth of Bonooru |
| Caeli | Caeli Airways |
| CBFI | Consortium of Bonoori Foreign Investors |
| CBFI's Submissions | Amicus Submission by the Consortium of Bonoori Foreign Investors |
| CCM | Competition Commission of Mekar |
| CEPTA | 2014 Bonooru-Mekar Comprehensive Economic Partnership and Trade Agreement |
| CILS | Centre for Integrity in Legal Services |

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|---|---|
| CAA | Commercial Arbitration Act |
| CRPU | External Advisers to Mekar's Committee on Reform of Public Utilities |
| CRPU's Submissions | Amicus Submission by the External Advisors to Mekar's Committee on Reform of Public Utilities |
| Facts | Statement of Uncontested Facts |
| Hawthorne | Hawthorne Group LLP |
| IICRA | Investment Information and Credit Rating Agency |
| LLC | Lapras Legal Capital |
| Mekar / The Respondent | Federal Republic of Mekar |
| Mekar's Application | Mekar's Application to Bar the Amicus Submission by the Consortium of Bonoori Foreign Investors |
| MRTPA | Monopoly and Restrictive Trade Practice Act |
| Notice | Notice of Arbitration |
| PO1 | Procedural Order No 1 |
| PO2 | Procedural Order No 2 |
| PO3 | Procedural Order No 3 |
| PO4 | Procedural Order No 4 |
| Response | Response to Notice of Arbitration |
| SCC | Sinnoh Chamber of Commerce |
| Sinnoh Court | Supreme Arbitrazh Court of Sinnograd |
| Vemma / The Claimant | Vemma Holdings Inc. |
| Vemma's Application | Vemma's Application to Bar the Amicus Submission by the External Advisors to the Committee on Reform of Public Utilities |

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| *ELSI* | *Elettronica Sicula S.p.A. (ELSI),* Judgment (1989), I.C.J. Reports 1989. |
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# STATEMENT OF FACTS

## Parties to the Dispute

1. Mekar, the Respondent, is a country consisting of 10.8 million people. It experienced tumultuous growth throughout the past century. To date, Mekar still faces economic and political instability, worsened by the volatility of its currency, the MON.

2. Vemma, the Claimant, is an airline holding company incorporated in Bonooru, an archipelagic State of 109 islands. Vemma owns Royal Narnian, Bonooru's national flag carrier. Bonooru always held a 31-38% stake in the Claimant, which later increased to 55% in March 2021.

3. A previous BIT between Bonooru and the Mekar, signed in 1994, was not well-received. This led to negotiations for a more comprehensive agreement that better balanced the rights of both parties, which culminated in the 2014 CEPTA. To date, the Respondent has not acceded to the ICSID Convention.

## Vemma Invests in Caeli

4. In 2011, through a tendering process, Vemma successfully acquired an 85% stake in Caeli, an airline previously owned in significant part by Mekar. Mekar beneficially owned the remaining 15% of Caeli's shares.

5. Prior to Vemma's acquisition, members of Mekar's selection committee raised concerns over Vemma's proposal which relied on overly optimistic forecasts for Caeli. Nonetheless, the chairperson of the committee insisted on selecting Vemma's proposal, citing how its ties to Bonooru were an asset.

6. In 3 years, Caeli became profitable through its aggressive expansion and price undercutting strategies. Although Mekari officials cautioned Caeli against pursuing its risky expansion so as to reduce its outstanding debt, Caeli ignored these warnings and instead doubled down on its risky expansion.

## Caeli Undergoes Investigations

7. In 2016, Caeli's aggressive expansion drew the attention of the CCM, who launched an investigation into Caeli for anti-competitive behaviour in relation to their pricing strategies.

The CCM considered the market share of both Caeli and Royal Narnian in totality when justifying this investigation, due to evidence of preferential slot-trading between them. The CCM also imposed airfare caps on Caeli during the investigation, which was not protested.

8. In December 2016, several regional airlines issued a complaint to the CCM, alleging that Caeli's predatory pricing strategies on specific regional routes effectively pushed them off the airline market. This prompted the CCM to launch another investigation into Caeli.

9. The CCM concluded its first and second investigation in August 2018 and January 2019 respectively. Both investigations revealed that Caeli had breached Mekar's antitrust legislation by engaging in predatory pricing and anti-competitive behaviour. This justified the subsequent imposing of fines and the maintenance of airfare caps on Caeli.

**Mekar Plunges Into Financial Crisis**

10. In March 2017, Mekar experienced a currency crisis. Caeli was unable to maintain its profitability, and obtained permission from the Mekari government to denominate its airfare in USD instead of MON. However, in November 2017, stabilising the MON became a priority, which led to a decree mandating all Mekari companies to denominate their goods and services exclusively in MON.

**Caeli Seeks Judicial Review of the Airfare Caps**

11. On 8 March 2018, Caeli sought judicial review of the airfare caps imposed by the CCM. Although a hearing was scheduled in April 2019, a year after Caeli's claim was registered, this was already faster than the average time taken for Mekari courts to process a claim, which took 22 months in 2015.

12. After Mekar's High Court heard Caeli's claims, Justice VanDuzer dismissed it by way of summary judgment. This was made pursuant to Executive Order 5-2014, which grants Mekari courts the discretion to dismiss without appeal a case by way of summary judgment if a judge finds that there is very little chance of success on the merits.

**Vemma Sells its Stake in Caeli**

13. With Caeli on the brink of insolvency, Vemma announced its decision to sell its stake in Caeli in November 2019. After receiving an offer from Hawthorne Group LLP, Vemma

conveyed the terms of the offer to Mekar Airservices which enjoyed the Right of First Refusal.

14. Subsequently, Mekar Airservices rejected the Hawthorne offer, deeming it to be artificially inflated and not an arms' length price. After negotiations broke down between the parties, the dispute over the validity of the offer was submitted to arbitration in the Sinnoh courts. A renowned arbitration scholar, Mr Cavannaugh, was appointed to adjudicate this dispute and he found in Mekar's favour on 9 May 2020.

15. On 14 June 2020, CILS, a non-profit organisation, alleged that Mekar Airservices had bribed Mr Cavannaugh to render a favourable decision. It released an audio-recording of an alleged conversation between Mr Cavannaugh and an official from Mekar Airservices, where the former had accepted a bribe offered by the latter. However, Mekar denied these allegations and questioned the recording's authenticity.

16. Vemma then applied to the Sinnoh courts to set aside the award of 9 May 2020, which was granted. Subsequently, the High Commercial Court of Mekar enforced the 9 May 2020 award, which was a legitimate exercise of its discretion pursuant to Article V(1)(e) of the New York Convention.

17. Having found no alternative buyer for its shares, Vemma sold its stake in Caeli to Mekar Airservices on 8 October 2020 for 400 million USD, the "market value" of Caeli's shares.

**Vemma Submits a Claim to Arbitration**

18. Vemma now claims a further 700 million USD from Mekar for its alleged breach of Article 9.9 of the CEPTA. However, the amount claimed by Vemma would be equivalent to twice of Mekar's consolidated annual public funding.

## SUMMARY OF ARGUMENTS

1. **JURISDICTION: NATIONALITY.** This Tribunal does not have jurisdiction over the dispute as Vemma does not qualify as a "national" of Bonooru. Vemma submitted this dispute to arbitration under the ICSID Additional Facility Rules, which contemplates proceedings between a State and a "national" of another State. Since Vemma functions as a State entity, it is precluded from submitting a claim against Mekar.

2. **ADMISSIBILITY OF *AMICUS* SUBMISSIONS: CRPU AND CBFI.** This Tribunal should grant leave for the filing of CRPU's *amicus* submissions, as their submissions comply with Article 9.19 of the CEPTA and Article 41(3) of the ICSID Schedule C Arbitration (Additional Facility) Rules. Conversely, this Tribunal should not grant leave for the filing of CBFI's *amicus* submissions. CBFI's submissions do not provide a different perspective from the disputing parties; are not made in furtherance of a public interest; and would unduly burden the arbitral proceedings.

3. **MERITS: FAIR AND EQUITABLE TREATMENT.** Mekar provided fair and equitable treatment to Vemma's investment in accordance with Article 9.9 of the CEPTA. First, Mekar did not deny justice to Vemma as the enforcement of the arbitral award was not patently unjust. Second, Mekar complied with due process as it heard Vemma's application on the removal of airfare caps. Third, Mekar did not treat Vemma's investment arbitrarily or discriminatorily as there were reasonable justifications for any differential treatment. Fourth, Mekar did not treat Vemma's investment abusively as coercive measures were not implemented against Vemma. Finally, Mekar did not frustrate Vemma's legitimate expectations as Mekar made no specific representations to Vemma.

4. **COMPENSATION: THE APPROPRIATE STANDARD.** This Tribunal should award the "market value" standard of compensation as it aligns with both parties' express intentions under Article 9.21 of the CEPTA. Consequently, Mekar owes Vemma no further compensation. Alternatively, any compensation payable should be reduced as Vemma bears responsibility for its own losses.

# PLEADINGS

## JURISDICTION

### I. This Tribunal has no jurisdiction under Chapter 9 of the CEPTA to hear the claim

1. The scope of this Tribunal's jurisdiction is determined by the consent of the Contracting Parties,[1] as expressed in the treaty's dispute settlement clause.[2] Tribunals interpret dispute settlement clauses in good faith.[3]

2. Applying a good faith interpretation to Article 9.16 of the CEPTA, there are three cumulative requirements for jurisdiction to arise:[4]

   (a) a dispute must exist (*ratione materiae*);

   (b) an investor of a Contracting Party has brought the claim (*ratione personae*); and

   (c) the submission is made in accordance with the ICSID Additional Facility Rules.[5]

3. The Respondent neither challenges the existence of a dispute, nor the Claimant's status as an investor under the CEPTA as it is seated in the territory of Bonooru. However, this Tribunal does not have jurisdiction because the Claimant's submission was not made in accordance with the ICSID Additional Facility Rules.

4. This Tribunal only has jurisdiction over the proceedings between a State and a "national" of another State under Article 2 of the ICSID Additional Facility Rules, when either State is not party to the ICSID Convention.[6] The Claimant, in relying on the Additional Facility Rules, bears the burden of proving that it is a national of Bonooru.[7]

5. There are two cumulative tests in determining whether a company is a national of the State.[8]

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1 *Abaclat* ¶7; *Parkerings* ¶¶235-236, 246; *Garanti* ¶21.
2 Dolzer, p. 259; Sasson, p. 64; Amro, p. 16; Schreuer (2014), p. 6.
3 *Southern* ¶8; *Amco* ¶14.
4 *Millicom* ¶89.
5 CEPTA, Article 9.16(2)(b); *Standard Chartered Bank* ¶109.
6 ICSID AFR, Article 2; International Centre for Settlement of Investment Disputes, p. 19.
7 Mehren, p. 123; *Hussein* ¶58; *Oil* ¶57.
8 *Maffezini* ¶89.

6. First, tribunals have applied the "nature" test which assesses whether the company's activities were governmental in nature.[9] This test was formulated based on the *Broches* test laid down by Aron Broches, one of the principal drafters of the ICSID Convention.[10] The *Broches* test consists of two disjunctive limbs, namely whether the company acted as an agent for the government or discharged an essentially governmental function.[11] Both limbs are addressed by focusing on the nature of the company's activities.[12]

7. Second, the tribunal in *Maffezini* also laid down the "structural" test, which examines whether the company was controlled or influenced by the State.[13] This test should be considered together with the nature test to determine if the company is a national.[14]

8. Applying these tests, the Claimant would not qualify as a "national" as: (**A**) the Claimant's activities were governmental in nature; and (**B**) the Claimant was structurally controlled by Bonooru.

### *A. The Claimant's activities were governmental in nature*

9. The "nature" test illustrated in *CSOB* examines whether the company's activities were essentially governmental in nature.[15] The test considers whether the company had acted as an agent of the State,[16] or had undertaken governmental activities.[17]

10. The Claimant's activities were governmental in nature as: (**1**) the Claimant acted as an agent of Bonooru; and (**2**) the Claimant undertook governmental activities.

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9 *CSOB* ¶20; *BUCG* ¶35; Christiansen, p. 6.
10 *BUCG* ¶33.
11 *CSOB* ¶20; *Maffezini* ¶80; *Rumeli* ¶212; Schreuer, Malintoppi, Reinisch and Sinclair, p. 161.
12 *CSOB* ¶20; *BUCG* ¶35.
13 *Maffezini* ¶77; *Salini* ¶31; UNCTAD Impact on Investment Rulemaking, p. 18.
14 *Id*, ¶79.
15 *CSOB* ¶20; Christiansen, p. 6; *BUCG* ¶35.
16 *BUCG* ¶31.
17 *Maffezini* ¶80; *BUCG* ¶42.

*(1) The Claimant acted as an agent of Bonooru*

11. A company that performs public functions on behalf of the State qualifies as an agent of the State.[18] Public functions are normally reserved to the State,[19] and not ordinarily carried out by private entities.[20]

12. The Claimant undertook public functions as: (**a**) the Claimant's Memorandum of Association obligates it to assist Bonooru in giving effect to the constitutional right of mobility; and (**b**) the Claimant's operations assist Bonooru in giving effect to the constitutional right of mobility.

a. The Claimant's Memorandum of Association obligates it to assist Bonooru in giving effect to the constitutional right of mobility

13. The tribunal in *OAO* emphasised that where an investor undertakes activities that are deemed to be unusual as compared to other companies in the same industry, this would support the finding that it is likely a governmental entity.[21]

14. Article 3(h) of the Claimant's Memorandum of Association entrusts the Claimant with:

> "*developing the aviation industry and civil aviation infrastructure in Bonooru for the benefit of its population in accordance with Article 70 of the Constitution Act, 1947 including servicing remote communities*."[22] (emphasis added)

This is an atypical clause not ordinarily found in the constitutions of private airline holding groups,[23] but rather, in State entities.[24]

15. Article 70 of the Constitution Act bestows a positive obligation on Bonooru to guarantee mobility rights for all its citizens travelling to and from its many islands.[25] This is significant as Bonooru is an especially large country spanning 109 islands,[26] of which only four are home to its major healthcare and educational institutions.[27] Air travel thus

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18 *BUCG* ¶42.
19 *Maffezini* ¶77.
20 *Id*, ¶86.
21 *OAO* Jurisdiction ¶148.
22 Annex IV, Line 1520.
23 Lufthansa Group AOA; SAS AB AOA.
24 *Salini* ¶33; Air China AOA.
25 Annex III, Line 1480; Annex I, Line 1429.
26 Facts, Line 895.
27 Facts, Line 897.

serves as an indispensable means for Bonoori citizens to move between islands or even leave the islands for another nation.[28]

16. Accordingly, Article 3(h) highlights the Claimant's unique role in assisting the State with giving effect to the constitutional right of mobility. Hence, the Claimant was acting as an agent of the State.[29]

b. The Claimant's operations assist Bonooru in giving effect to the constitutional right of mobility

17. The Claimant gave effect to Article 3(h) through its contributions to Bonooru's aviation industry in two ways. First, the Claimant managed Royal Narnian, Bonooru's flag carrier which operated flights to disparate communities, in accordance with Article 70 of the Constitution Act.[30] This public function was supported by consistent subsidies offered by Bonooru to Royal Narnian.[31]

18. Second, the Claimant contributed to Article 70 through its investment in Caeli. Article 70 has been recognised to encompass both domestic and international air travel.[32] Bonooru's Caspian Project would fulfil this objective as it was designed to "facilitate the movement of goods, people, services and knowledge among its neighbours".[33] The Claimant's decision to invest in Caeli would have aided in facilitating the movement of people,[34] through Caeli's assets such as its technical base and slots at Phenac International.

19. Accordingly, the Claimant had furthered the constitutional right of mobility through its management of Royal Narnian and its participation in the Caspian Project.

*(2) The Claimant undertook governmental activities*

20. Public functions of the State include expending resources to develop public infrastructure.[35] In *Salini*, the tribunal concluded that ADM was a state company as it

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28 Annex III, Lines 1486-1487.
29 Sasso, p. 26; ARSIWA, Article 5.
30 Facts, Line 930; Annex III, Lines 1491-1493.
31 Annex III, Lines 1494, 1497.
32 Annex II, Lines 1457.
33 Facts, Line 890.
34 Facts, Lines 1084-1089.
35 *Salini*, ¶33.

was tasked with constructing public amenities such as highways and communication routes.[36] Since ADM was undertaking activities granted by governmental authority,[37] the tribunal determined that ADM's activities were governmental in nature.

21. Similarly, the Claimant undertook governmental activities as: (**a**) the Claimant's investment in Caeli was in furtherance of expanding the aviation network; and (**b**) the Claimant only undertook risky expansion plans with the assurance of State support.

a. The Claimant's investment in Caeli was in furtherance of expanding the aviation network

22. The Claimant's investment in Caeli was to develop Bonooru's aviation network and tourism infrastructure.[38] This was highlighted by Ms Sabrina Blue, Bonooru's Secretary of Transport and Tourism, when explaining the rationale for the government offering recurring subsidies to companies under the "Horizon 2020" scheme as part of the Caspian Project.[39] Ms Blue commended the Claimant for:

> "*contribution to the enhancement of Bonooru's tourism infrastructure, which has, in turn, enhanced the mobility rights of our population within the Greater Narnian region*."[40] (emphasis added)

23. Ms Misty Kasumi, a former high-ranking employee in Bonooru's Ministry of Tourism,[41] further commented that Caeli's flight patterns reflect that significant resources have been invested into flights between Bonooru and Mekar.[42] These reflect how the Claimant's investment was made on behalf of the State for a public purpose, namely to enhance Bonooru's aviation network.

24. Accordingly, the Claimant's investment in Caeli was undertaken to develop aviation infrastructure for Bonoori citizens.

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36 *Ibid*.
37 *Id*, ¶35.
38 Annex IV, Lines 1519-1521.
39 Facts, Line 1086.
40 PO4, Lines 3295-3296.
41 Annex VII, Lines 1817-1818.
42 Annex VII, Lines 1862-1863.

b. The Claimant only undertook risky expansion plans with the assurance of State support

25. The Claimant's risky expansion plans for Caeli were undertaken with assurances that Bonooru would step in if anything bad were to happen.[43] While Bonooru did not directly intervene to save Caeli when its expansion strategies turned sour,[44] it has been widely reported that Bonoori officials have placed pressure on Mekar by holding the Caspian Project-related expansion hostage.[45] This further underscores Bonooru's interest in the Claimant's ability to continue developing aviation networks.

26. Bonooru has also provided funding to the Claimant to aid in developing the aviation industry. Bonooru dedicated a USD 30 billion fund as part of the Caspian Project,[46] a part of which was deployed to update Mekar's port and the Phenac International Airport, to be implemented through the Claimant.[47] Bonooru's interest in the Claimant exists so long as it remains active. Accordingly, once the Claimant sold its stake in Caeli, Bonooru withdrew funding for all construction projects which remain incomplete to this date.[48]

27. Accordingly, the Claimant's activities were governmental in nature, which points to it being a governmental entity.

### *B. The Claimant is structurally controlled by Bonooru*

28. The structural test assesses whether the company is owned or controlled by the State.[49] Applying this test, the Claimant would qualify as a state entity as: (**1**) Bonooru maintains a significant shareholding in the Claimant; and (**2**) Bonooru exerts significant influence over the Claimant's board.

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43 Aviation Analytics, Line 1948.
44 Aviation Analytics, Lines 1951-1952.
45 Aviation Analytics, Lines 1952-1954.
46 PO4, Line 3266.
47 PO4, Line 3268.
48 PO4, Lines 3270-3271.
49 *Maffezini* ¶77; Gaillard, Jennifer Younan, p. 83.

*(1) Bonooru maintains a significant shareholding in the Claimant*

29. Tribunals have found that the percentage of governmental shareholding is a factor for finding governmental control.[50] This is assessed on the date of consent to arbitration,[51] when the Claimant filed its notice of arbitration.[52]

30. Bonooru held a 31-38% stake in the Claimant since its inception,[53] which subsequently increased to 55% in March 2021.[54] A 31-38% stake is typically sufficient for the State to block crucial resolutions requiring unanimous consent or special resolutions requiring more than a general majority.[55] This highlights the State's capacity to influence and control decisions made by the Claimant's shareholders.[56]

31. Bonooru is also the only governmental shareholder, with no other shareholder holding more than a 7% stake in the Claimant.[57] This suggests that even if Bonooru does not hold an absolute majority, it nevertheless possesses the greatest stake relative to other shareholders, which supports its ability to influence voting decisions in the Claimant.

32. Hence, the percentage of governmental shareholding in the Claimant indicates that Bonooru exercised a significant degree of control over the Claimant's operations and affairs.

*(2) Bonooru exerts significant influence over the Claimant's board*

33. This Tribunal may also consider the extent to which the State can influence a company's board decisions as a factor in the structural test.[58]

34. The Claimant is structured in a manner that enables Bonooru to influence its decisions. The Claimant's Articles of Association stipulate that one non-executive director shall be a representative from Bonooru's Ministry of Transport and Tourism.[59] Moreover,

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50 *Salini* ¶32; *Aguas* ¶264.
51 ICSID Convention, Article 25(2)(b); Schreuer, Malintoppi, Reinisch, Sinclair, pp. 294-296; Reed and Davis, p. 632.
52 Facts, Lines 1392-1393.
53 Facts, Line 934.
54 Facts, Line 1411.
55 Companies Act (Singapore), s 184(1); Companies Act (UK), s 283(1); Tencent, Interpretation; Tesla, Article IX; Dur Hospitality Co, Article 35; Unilever, Article 43; OECD, p. 8.
56 *Aguas* ¶243.
57 PO4, Lines 3273-3274.
58 *Salini*, ¶32.
59 Annex IV, Line 1575.

Bonooru's representatives are present for every board meeting, and have occasionally formed a majority of members present and voting when not all other shareholders attend.[60] This implies that the State is able to exert influence over crucial decisions made by the Claimant, including the appointment of other directors.

35. Accordingly, Bonooru's presence and influence on the Claimant's board point in favour of the Claimant being a governmental entity. Hence, this Tribunal does not have jurisdiction to hear this claim under the Additional Facility Rules.

[60] PO3, Line 3160.

## II. This Tribunal should grant leave for the filing of amicus submissions by CRPU

36. This Tribunal may decide whether to admit *amicus* submissions in accordance with Article 9.19 Paragraph 3 of the CEPTA,[61] read together with Article 41(3) of the ICSID Schedule C Arbitration (Additional Facility) Rules.[62] There are several non-exhaustive factors to aid in this Tribunal's decision on *amicus* applications: [63]

(a) whether the submissions address a matter within the scope of the dispute;

(b) whether the submissions have a reasonable potential to bring a different perspective from the disputing parties; and

(c) whether the *amicus* has a significant interest in the proceedings.[64]

37. Tribunals are also permitted to consider other relevant factors such as public interest,[65] which ensures that wider public concerns are accounted for.[66]

38. Accordingly, this Tribunal should grant leave for CRPU's submissions because: (**A**) CRPU's submissions address matters within the scope of the dispute; (**B**) CRPU has a reasonable potential to bring a different perspective from the disputing parties; (**C**) CRPU has a significant interest in these proceedings; and (**D**) CRPU's submissions would advance the public interest.

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61 CEPTA, Article 9.19(3); PO1, Lines 445-446.
62 ICSID AFR, Schedule C, Article 41(3); Lamb, Harrison, Jonathan, p. 72.
63 *Biwater* ¶23; *Bernard* ¶48.
64 CEPTA, Article 9.19(3).
65 Rules on Transparency, Article 4(3); ICSID AFR, Article 41(3); *Alicia* ¶53; *Suez* ¶18; *Apotex* ¶43; *Biwater* ¶51.
66 *Biwater* ¶53; *Vivendi* ¶¶19-20; Choudhury, p. 827; Footer, pp. 46-47.

### *A. CRPU's submissions address matters within the scope of the dispute*

39. *Amicus* submissions fall within the scope of the dispute if it facilitates this Tribunal's resolution of the dispute which has been submitted to it.[67]

40. CRPU's submissions address a matter within the scope of the dispute as: (**1**) tribunals have a duty to consider evidence of corruption; and (**2**) CRPU's allegations of corruption would impact this Tribunal's finding on jurisdiction.

#### *(1) Tribunals have a duty to consider evidence of corruption*

41. Tribunals have the power to determine the scope of the dispute before it, even if an issue has not been pleaded by either disputing party.[68] For example, the tribunal in *Infinito Gold* allowed *amicus* submissions concerning allegations of corruption in the claimant's investment.[69] Although neither disputing party raised this issue, the tribunal admitted the *amicus* submission as allegations of corruption impacted the validity of the investment under the BIT.[70]

42. Similarly, CRPU seeks to adduce evidence of corruption which would impact the protection of the Claimant's investment under the CEPTA. It is trite that tribunals "have a pro-active role and cannot simply ignore evidence of corruption".[71] Thus, this Tribunal should consider CRPU's evidence of corruption.

#### *(2) CRPU's allegations of corruption would impact this Tribunal's finding on jurisdiction*

43. Jurisdiction under Article 9.16 of the CEPTA arises when there is a valid investment.[72] However, an investment tainted by corruption will not be protected.[73] This is because such protection runs contrary to the principle of good faith in international law,[74] and is against this Tribunal's mission to prevent abuse of the system of international investment protection.[75] Bribery is contrary to the public policy of most States and transnational

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67 *UPS* ¶60; Dimsey, p. 164.
68 ICSID AFR, Article 36(3); *AES* ¶5.2; Levine, E, p. 217; Born ¶7.
69 *Infinito Gold* ¶33.
70 *Ibid*.
71 *Lao* ¶153.
72 CEPTA, Article 9.1, Line 2574 and 9.16(1)(a).
73 *Gustav* ¶¶123-124.
74 *Phoenix* ¶106; Born ¶15.
75 *Phoenix* ¶113.

public policy.[76] Therefore, investments obtained by corruption should not be upheld by this Tribunal.[77]

44. Furthermore, States cannot have consented to arbitration when the investment is tainted by corruption.[78] A tainted investment ought to remove any protection accorded to it under the CEPTA as it was not made in good faith.[79] Accordingly, the Respondent could not have consented to arbitration with regard to the Claimant's investment under Article 9.17 of the CEPTA, if it was tainted by corruption.[80] Hence, CRPU's submissions will aid this Tribunal in determining whether a valid investment was made, in turn affecting this Tribunal's finding on jurisdiction.

### *B. CRPU has a reasonable potential to bring a different perspective from the disputing parties*

45. *Amicus* submissions should provide knowledge, perspectives, or assistance that would otherwise not be available to the tribunal.[81] Tribunals are primarily concerned with whether the applicant can contribute specialised knowledge or expertise.[82]

46. CRPU brings a different perspective to this Tribunal as: (**1**) CRPU's specialised knowledge would provide a unique perspective; and (**2**) CRPU is independent of the disputing parties.

#### *(1) CRPU's specialised knowledge would provide a unique perspective*

47. CRPU can provide specialised knowledge of Caeli's operations in Mekar as they have been engaged to advise on the privatisation, liquidation and restructuring of Caeli.[83] Their expertise is evident from their regular participation as interveners in judicial proceedings concerning approval for privatisation projects.[84] Furthermore, CRPU's

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76 *WDF* ¶157.
77 ICC Case No. 1110 ¶¶19-20; ICC Case No. 3916, p. 590; ICC Case No. 8891, p. 1083.
78 *Malicorp* ¶119; *Metal-Tech* ¶373.
79 *Malicorp* ¶116.
80 CEPTA, Article 9.17.
81 *Methanex* Amicus Curiae ¶48; Dimsey, p. 183; Bartholomeusz, p. 211.
82 *Philip Morris* PO3 ¶28; *Methanex* Amicus Curiae ¶48; Brabandere, p. 106.
83 CRPU's Submissions, Line 619.
84 CRPU's Submissions, Lines 643-644.

professional focus is on investment banking,[85] and would therefore possess knowledge concerning the privatisation programme that may not be shared by the disputing parties.

48. More pertinently, CRPU can adduce unique evidence not obtainable from either disputing party, such as whether the Chairperson of the Committee was bribed.[86] Support for the existence of such evidence is highlighted by the Chairperson's insistence on approving the Claimant's bid for Caeli, despite concerns raised by other Committee members regarding the Claimant's overly optimistic forecasts.[87]

*(2) CRPU is independent of the disputing parties*

49. Tribunals place great weight on independent *amicus* submissions that provide reliable and objective insight,[88] to the extent that the applicant can bring a different perspective by virtue of their impartial knowledge and expertise.[89]

50. CRPU is an independent party as it was engaged to act as external advisors to Caeli's privatisation process through a transparent and competitive process, based on a criterion of competence.[90] While CRPU received remuneration for the advice it provided,[91] this occurred before the Claimant acquired Caeli in 2011, nine years before the present dispute. Moreover, CRPU's remuneration was duly disclosed.[92]

51. Accordingly, CRPU is an independent non-disputing party who provides a different perspective from disputing parties.

### *C. CRPU has a significant interest in these proceedings*

52. Non-disputing parties have a significant interest in the proceedings where the outcome of the arbitration has an impact on the rights or principles they defend.[93] Accordingly, non-disputing parties are required to show more than a general interest in the dispute.[94]

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85 CRPU's Submissions, Line 616.
86 CRPU's Submissions, Lines 638-640.
87 Facts, Line 1036.
88 *Bernard* ¶49; Bastin, p. 218.
89 *Eli* ¶(E); Lamb, Harrison, Jonathan, p. 83; Dimsey, p. 183.
90 CRPU's Submissions, Lines 620-621.
91 CRPU's Submissions, Lines 630-631.
92 CRPU's Submissions, Line 631.
93 *Apotex* ¶38; *Banka*, ¶¶28,52.
94 *Resolute Forest* ¶4.6; *Apotex* ¶38; *Gabriel* ¶63.

53. CRPU has a significant interest in these proceedings as this Tribunal's decision would impact potential investors and anti-corruption efforts in Mekar.[95] CRPU has more than a general interest in the proceedings as they are advocates of fair business practices in Mekar. This is reflected through their efforts to act as interveners in proceedings for privatisation projects.[96] Any decision on whether an investment tainted by corruption is protected under the CEPTA would directly impact the anti-corruption principles that CRPU defends.

54. Additionally, the outcome of the current proceedings would impact the rights of potential investors and their decision to invest in Mekar. CRPU's professional focus is on investment banking,[97] and advising investors on prospective opportunities in Mekar.[98] This Tribunal's decision on corruption would directly impact the level of scrutiny that are taken by potential investors to ensure their investments are not tainted by corruption.[99]

55. Therefore, CRPU clearly has a significant interest in the proceedings as its principles and operations are affected by the outcome of the present dispute.

### *D. CRPU's submissions would advance the public interest*

56. Public interest arises where the tribunal's decision is likely to affect entities beyond the disputing parties.[100] The tribunal in *Glamis* accepted *amicus* submissions by non-disputing parties as it would be important to account for the potential impact of a decision on society.[101]

57. This Tribunal's decision would impact parties beyond the disputing parties as CRPU seeks to submit on the possibility of bribery tainting the privatisation of Caeli.[102] These submissions would impact the protections afforded to other investors because a decision on the issue of bribery could prevent future abuse of investor-state arbitration from

95 CRPU's Submissions, Line 644.
96 CRPU's Submissions, Line 643.
97 CRPU's Submissions, Line 616.
98 CRPU's Submissions, Line 645.
99 CRPU's Submissions, Line 645.
100 *Apotex* ¶42; Gomez, p. 535.
101 *Glamis* ¶286.
102 CRPU's Submissions, Line 636.

parties involved in acts of corruption.[103] This Tribunal's decision on this matter would therefore have a wider impact on entities beyond the disputing parties.

58. Preventing the admission of evidence pertaining to corruption may embolden future investors and be a significant setback to the anti-corruption efforts in Mekar.[104] The effect of increased corruption goes beyond mere economic impact and would also erode the trust that citizens have placed in the Respondent's public services.[105] Thus, CRPU's submissions could impact the validity of future investments and impact the integrity of public services in Mekar.

103 CRPU's Submissions, Line 654.
104 CRPU's Submissions, Line 644.
105 Štefan Šumah, p. 67.

## III. This Tribunal should not grant leave for the filing of amicus submissions by CBFI

59. For any *amicus* application, this Tribunal may consider the aforementioned factors established in Article 9.19 Paragraph 3 of the CEPTA, read with Article 41(3) of the ICSID Schedule C Arbitration (Additional Facility) Rules.[106] Tribunals also consider public interest as a factor in their determination.[107] Further, *amicus* submissions should not unduly burden the arbitral proceedings.[108]

60. This Tribunal ought to reject leave sought for filing *amicus* submissions by CBFI because: (**A**) CBFI's submissions do not bring a different perspective from the disputing parties; (**B**) CBFI's submissions are not made in the furtherance of a public interest; and (**C**) CBFI's submissions will unduly burden the proceedings.

### *A. CBFI's submissions do not bring a different perspective from the disputing parties*

61. CBFI's submissions do not assist this Tribunal by bringing a different perspective as: (**1**) CBFI's submissions mirror that of the Claimant; and (**2**) CBFI lacks impartiality.

#### *(1) CBFI's submissions mirror that of the Claimant*

62. An *amicus* submission must provide a perspective that goes beyond or differs in some respect from the disputing parties themselves.[109] This is premised on the basis that the different perspective offered can assist this Tribunal in deciding this dispute.[110]

63. However, CBFI's *amicus* submissions mirror that of the Claimant's submissions and do not provide a different perspective. CBFI purports to submit on the legal test for the Claimant's standing under investor-state dispute settlement.[111] Specifically, CBFI

106 CEPTA, Article 9.19(3); ICSID AFR, Schedule C, Article 41(3).
107 *Biwater* ¶51; Rules on Transparency, Article 4(3); ICSID AFR, Article 41(3); *Alicia* ¶53; *Suez* ¶18; *Apotex* ¶43.
108 CEPTA, Article 9.9(3).
109 *Apotex* ¶31; *Methanex* Amicus Curiae ¶48; Dimsey, p. 183; *Biwater* ¶18.
110 *Methanex* Amicus Curiae ¶48.
111 CBFI's Submissions, Line 539.

argues that the nature of the Claimant's activities should be decisive for the determination of nationality.[112]

64. The Claimant would address this issue in its own submissions, as jurisdiction under the ICSID Additional Facility Rules is one of the pleaded issues.[113] The Claimant's legal team includes lawyers from Bonooru's justice department,[114] who would likely have the necessary expertise on issues of standing, thereby obviating the need for CBFI's submissions. Hence, CBFI's submissions would be duplicative of the Claimant's arguments and would not assist this Tribunal by bringing a different perspective.

*(2) CBFI lacks impartiality*

65. Tribunals place great weight on independent *amicus* submissions that provide insight free of biased opinion.[115] Tribunals have found that non-independent *amicus* parties who have a conflict of interest would not provide the Tribunal with a different perspective or insight.[116]

66. CBFI is not independent from the Claimant due to the Claimant's membership in CBFI.[117] Two other members of CBFI are also currently pursuing claims against the Respondent under Chapter 9 of the CEPTA.[118] CBFI's constituent members concurrent legal proceedings against the Respondent further suggests CBFI's close involvement in any case concerning the Respondent.

67. Moreover, the Claimant is closely associated with LLC, a member of CBFI, who is directly advising the Claimant on funding strategies regarding this claim.[119] The close ties between the Claimant and LLC through CBFI brings into doubt CBFI's supposed neutrality. Accordingly, CBFI's lack of impartiality would be akin to the Claimants being brought through the back door of *amicus* submissions.

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112 CBFI's Submissions, Lines 539-555.
113 Response, Line 183; PO2, Line 851.
114 Facts, Line 1413.
115 *Bernhard* ¶49; Bastin, p. 218.
116 *Suez* ¶23; *Bernhard* ¶49.
117 CBFI's Submissions, Line 520.
118 CBFI's Submissions, Line 517.
119 CBFI's Submissions, Line 520.

### *B. CBFI's submissions are not made in furtherance of a public interest*

68. Public interest arises where the tribunal's decision is likely to affect entities beyond the disputing parties.[120] Additionally, the application must be in furtherance of the proposed public interest and not a private interest.[121] A private interest would be one that solely benefits the applicant or the party that appointed it.[122]

69. CBFI's submission only benefits its private interest and no wider public interest. Two constituent members of CBFI are pursing claims against the Respondent under Chapter 9 of the CEPTA.[123] This supports the motive of CBFI's submission to have this Tribunal adopt a beneficial interpretation of the CEPTA, that would be favourable for its other members engaged in litigation.

70. The adoption of a favourable interpretation that solely benefits one side is merely a private interest which would create an advantage for the claims of its constituent members.[124] Hence, CBFI's application is not in furtherance of a public interest, but rather of its own private interest.

### *C. CBFI's submissions will unduly burden the proceedings*

71. *Amicus* submissions must not disrupt or unduly burden the arbitral proceedings.[125] This is a procedural safeguard to ensure that proceedings are conducted with minimum delay and costs.[126] The tribunal in *Resolute Forest* rejected an *amicus* application on the very basis that the submission imposed an unnecessary burden on the disputing parties by imposing further expense, work, and time on them.[127]

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120 *Apotex* ¶42.
121 *Resolute Forest* ¶4.7.
122 *Apotex* ¶¶40,43.
123 CBFI's Submissions, Lines 517-518.
124 *Apotex* ¶40.
125 CEPTA, Article 9.9(3), Lines 2939-2940.
126 *Methanex* Amicus Curiae ¶50; Dimsey, p. 189.
127 *Resolute Forest* ¶4.8; Apotex ¶44; Born and Forrest, p. 653.

72. CBFI's submissions would unduly burden proceedings. CBFI purports to provide context on Bonooru's regulatory framework, business landscape, and the legal test for standing under investor-state dispute settlement provisions.[128] In particular, CBFI posits that standing in investor-state disputes is tied to a Claimant's commercial activities alone, and that the nature of activities of such enterprises should guide a tribunal's decision.[129]

73. However, the Respondent would have to expend additional time and resources to address CBFI's submissions. First, the regulatory framework and business landscape of Bonooru would neither affect the issue of jurisdiction nor the fair and equitable treatment standard. This suggests that the Respondent is required to reply to evidence that does not affect the merits of the case.[130] Second, the nature of the activities of the enterprise would have already been addressed by the Claimant's legal team, and this Tribunal should not expend work on determining a repetitive issue.[131] Finally, the scope of the submissions would require this Tribunal to expend time to verify the veracity of the evidence.[132]

74. The cumulative effect of these processes would result in a lengthened proceeding that would unduly burden the Respondent.

128 CBFI's Submissions, Lines 544-555.
129 CBFI's Submissions, Lines 550-551.
130 Waincymer, pp. 866-67.
131 *ADF* ¶¶3-4.
132 Ashford, p. 72; Sourgens, ¶9.48.

## FAIR AND EQUITABLE TREATMENT

### IV. The Respondent has treated the Claimant's investment fairly and equitably

75. Fair and equitable treatment is the cornerstone of international investment law which ensures that investors are granted a degree of protection for their investment.[133] Article 9.9 of the CEPTA obligates Contracting Parties to provide fair and equitable treatment by requiring that:

(a) the Contracting Party must not deny the administration of justice;

(b) the Contracting Party must ensure that there is no fundamental breach of due process;

(c) the Contracting Party must not treat the investment arbitrarily or discriminatorily;

(d) the Contracting Party must not treat investors abusively;

(e) the Contracting Party must not frustrate any legitimate expectations; and

(f) the Contracting Party must ensure that the investment is granted full protection and security.[134]

76. The Respondent has not breached its obligations under Article 9.9 because: (**A**) the Claimant is subject to a higher standard of proof for obligations under Article 9.9; (**B**) the Respondent did not deny the administration of justice; (**C**) the Respondent complied with fundamental due process; (**D**) the Respondent did not treat the Claimant's investment arbitrarily or discriminatorily; (**E**) the Respondent did not treat the Claimant's investment abusively; (**F**) the Respondent did not frustrate the Claimant's legitimate expectations; and (**G**) the Respondent provided full protection and security to the Claimant's investment.

133 Rubins, p. 632.
134 CEPTA, Article 9.9(2).

### *A. The Claimant is subject to a higher standard of proof for obligations under Article 9.9*

77. The minimum standard of treatment is a general international law principle that grants States a greater degree of deference which raises the Claimant's standard of proof.[135] Article 9.9 of the CEPTA is expressly titled "Minimum Standard of Treatment".[136] Additionally, Article 1(3) requires that provisions be interpreted in accordance with international law which recognises Minimum Standard of Treatment.[137]

78. Based on a plain textual interpretation,[138] this indicates that parties intended for the customary international law principle of minimum standard of treatment to be applied to all the obligations under Article 9.9.[139] Therefore, the Claimant is held to a higher standard of proof when alleging that the Respondent has breached its obligations under Article 9.9.[140]

79. This Tribunal should adhere to parties' intentions by interpreting clauses strictly in accordance with the plain wording the parties have chosen.[141] Tribunals recognise that States have a degree of flexibility to regulate matters within their own borders.[142]

80. Furthermore, adhering to the terms chosen by the parties ensures a consistent standard of review. Consistency is the cornerstone of legal disputes as it ensures that the final decision is based on an objective criterion.[143] Consequently, adopting the minimum standard of treatment standard in accordance with the parties' intentions strikes the right balance between investment protection and the preservation of the freedom of legitimate state action.[144] This ensures that the Respondent is subject to a consistent legal standard for all obligations.

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135 Guakrodger 2017/03, p. 38; Borchard, p. 3.
136 CEPTA, Article 9.9, Line 2734.
137 CETPA, Article 1(3)
138 VCLT, Article 31(1); *Competence*, p. 8; Crawford, p. 379.
139 *S.D. Myers* ¶¶258, 262.
140 Rubins, p. 635; *Saluka* ¶¶292-293.
141 VCLT, Article 31(1); *Azurix* ¶359.
142 *S.D. Myers* ¶263.
143 Menaker, p. 614.
144 Mortimer and Nyombi, p. 12.

### *B. The Respondent did not deny the administration of justice*

81. Article 9.9 Paragraph 2(a) of the CEPTA obligates each Contracting Party to ensure that an investor is not denied justice.[145] A denial of justice occurs when justice is administered in a seriously inadequate way,[146] such that it is patently unjust.[147]

82. The Respondent has not denied the Claimant justice as: (**1**) the Respondent's courts duly considered the Sinnoh court's finding of corruption; and (**2**) the Respondent's courts' enforcement of the arbitral award was not patently unjust.

#### *(1) The Respondent's courts duly considered the Sinnoh court's finding of corruption*

83. A court's consideration of a pleaded issue is an adequate dispensation of justice.[148] Justice is only administered in a patently unjust way if there has been a gross defect in the substance of a court judgment.[149] A party's mere disagreement with judicial reasoning would not suffice as a violation.[150]

84. There was no gross defect in the Respondent's courts' decisions as they adequately considered the Sinnoh court's finding of corruption.[151] The Respondent's courts analysed the circumstantial and hearsay evidence put forth by CILS,[152] even though CILS was found to have received suspicious foreign funding.[153] Allegations concerning Mr Cavannaugh's strong language have also been addressed.[154] The Respondent's courts found that there was insufficient evidence to prove a serious allegation of corruption.[155] Although the Claimant disagreed with the Respondent's courts' reasoning, mere disagreement is not the basis for a denial of justice claim.

85. Since, the Respondent's courts duly considered the Sinnoh court's finding of corruption and justice was not administered in a patently unjust way.

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145 CEPTA, Article 9.9(2)(a).
146 *Robert* ¶102; *Rumeli* ¶624; *Mondev* ¶126; *Spyridon* ¶315.
147 *Rumeli* ¶652; Paulsson, pp. 57–99.
148 *Philip Morris* Award ¶557; *Bridgestone* ¶¶516-517.
149 Alwyn, p. 309.
150 *Agility* ¶212.
151 Annex XIV, Line 2302; Annex XIII, Line 2215.
152 Annex XIV, Line 2271.
153 Annex XIV, Line 2288.
154 Annex XIV, Line 2278.
155 Annex XIV, Line 2291.

*(2) The Respondent's courts' enforcement of the arbitral award was not patently unjust*

86. Justice is also administered in a patently unjust way if there is a malicious misapplication of the law.[156] The level of arbitrariness and egregiousness must be so evident that the decision could not have been rendered by an honest and competent court.[157] The threshold is high as tribunals do not act as ultimate appellate courts and require compelling evidence before taking any action.[158]

87. The Respondent's courts' decision to enforce the arbitral award was not a malicious misapplication of the law. Both Section 36 of the CAA and Article V(1)(e) of the NYC allow the enforcement of an award that has been set aside.[159] Therefore, the Respondent's courts' decision to enforce the arbitral award was made in accordance with its rights under the CAA and the NYC. Accordingly, justice was not administered in a patently unjust way.

### *C. The Respondent complied with fundamental due process*

88. Article 9.9 Paragraph 2(b) of the CEPTA obligates each Contracting Party to comply with fundamental due process.[160] The Respondent has complied with fundamental due process as: (**1**) the dismissal of Caeli's claim for injunctive relief was made pursuant to Executive Order 5-2014; and (**2**) the Respondent's courts' delay in hearing Caeli's case did not offend procedural propriety.

*(1) The dismissal of Caeli's claim for injunctive relief was made pursuant to Executive Order 5-2014*

89. A State complies with fundamental due process when acting in accordance with its own procedures in proceedings.[161] Moreover, a State acts fairly when its judicial proceedings are conducted transparently.[162]

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156 *Jan de Nul* ¶180; *OAO* Award ¶475.
157 *Franck* ¶442.
158 *Franck* ¶260; *Iberdrola* ¶492.
159 Annex XIV, Line 2252; NYC, Article V(1)(e); NYC Guide, pp. 221; *Hilmarton* ¶5; *Chromalloy* ¶914.
160 CEPTA, Article 9.9(2)(b).
161 *Genin* ¶¶363-364; Rubins, at p. 673.
162 *Joshua* ¶¶358-359; *Tecmed* ¶154.

90. The dismissal of Caeli's claim for injunctive relief by way of summary judgment was made transparently and in accordance with Executive Order 5-2014. Executive Order 5-2014 empowers the courts to dismiss a case by way of summary judgment when a judge finds that there is very little chance of success on the merits.[163]

91. In compliance with Executive Order 5-2014, Justice VanDuzer had considered the merits of the injunctive relief sought by Caeli. He had considered the facts put forth by the Claimant, and the policy consideration behind the CCM's imposition of the airfare caps, before he arrived at the reasonable conclusion that Caeli's claim had very little chance of success on the merits.[164]

92. Hence, Justice VanDuzer *prima facie* considered the merits of the case and issued a short judgment in accordance with his powers under Executive Order 5-2014.[165] Since a short judgment alone does not constitute a denial of justice,[166] the Respondent has complied with fundamental due process.

*(2) The Respondent's courts' delay in hearing Caeli's case did not offend procedural propriety*

93. Fundamental due process is also breached if there is such a delay in proceedings that amounts to "a particularly serious shortcoming".[167] This is a high threshold, and minor lapses in the efficiency of court proceedings are not violations of due process.[168]

94. The Respondent has not breached due process with regard to the hearing on the interim airfare caps as the 15-month delay was reasonable in the circumstances.

95. Court congestions and backlogs are relevant factors to be considered in determining whether the period of delay is reasonable in the circumstances.[169] Given that the Respondent's courts faced significant congestion and backlog, the Respondent had to prioritise criminal cases over civil cases to avoid prolonged detention for the accused.[170]

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163 PO3, Line 3183.
164 Facts, Lines 1323-1334.
165 Facts, Lines 1323-1334.
166 *Bridgestone* ¶¶516-517.
167 *Chevron* ¶¶244, 250; *Frontier* ¶¶329–331; *Toto* Jurisdiction ¶160; *Metalclad* ¶91; *Middle East* ¶143; *Petrobart*, ¶82.
168 *Telecon* ¶¶608, 612.
169 *Chevron* ¶263; *ELSI* ¶128; *Crystallex* ¶577.
170 Facts, Line 953.

96. Furthermore, the 15 months' duration before Caeli's claim received a final decision in the Mekari courts was already substantially faster than the average time taken for Mekari courts to issue a final decision in 2015, which was 22 months.[171] For commercial matters, the average time for Mekari courts to issue a final decision could go up to 27 months.[172] This reflects that the Respondent's courts had in fact processed Caeli's claim faster than its average pace, which could not have amounted to a serious delay.

97. Moreover, according to international standards, the duration taken by the Respondent's courts to hear Caeli's claim falls within the acceptable range of 22 months for a civil case at first instance.[173] Thus, the Respondent's courts' delay was reasonable in the circumstances at hand and could not be deemed as a serious shortcoming. Accordingly, the Respondent did not breach fundamental due process.

### *D. The Respondent did not treat the Claimant's investment arbitrarily or discriminatorily*

98. Article 9.9 Paragraph 2(c) of the CEPTA obligates each Contracting Party not to treat investments arbitrarily or discriminatorily.[174] The Respondent has not treated the Claimant's investment arbitrarily or discriminatorily as: (**1**) the CCM's investigations were not arbitrarily conducted; and (**2**) the Respondent's denial of subsidies to Caeli was not discriminatory.

#### *(1) The CCM's investigations were not arbitrarily conducted*

99. Arbitrary action is the wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.[175] However, tribunals recognise that a certain degree of deference is to be given to states,[176] and only measures undertaken without reason would be arbitrary.[177] The CCM's investigations were not launched arbitrarily as: (**a**) the CCM's first investigation was initiated with good reason; and (**b**) the CCM's second investigation was launched with a legal basis.

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171 Facts, Line 952.
172 Facts, Line 952.
173 CEPEJ, p. 74.
174 CEPTA, Article 9.9(2)(c).
175 *ELSI* ¶128; *Cargill* ¶291; *Crystallex* ¶577; *Duke* ¶¶378, 381; Rubins, p. 648.
176 *S.D. Myers* ¶263; *Glamis* ¶617; *Micula* ¶494; UNCTAD Series, A Review, p. 38.
177 *Siemens* ¶¶318-319.

a. The CCM's first investigation was initiated with good reason

100. The CCM has the discretion to commence investigations into a corporation with a market share below 50% under the powers granted to it under Chapter III(2) of the MRTPA.[178] The airline industry is vital to the Respondent as an important economic sector for growth,[179] and the CCM should be entitled to exercise its discretion to regulate said sector.

101. Although Caeli individually held a 43% market share,[180] the combined market share of Caeli and its Moon Alliance partner, Royal Narnian, amounted to 54%.[181] The rationale for combining the market shares of Caeli and Royal Narnian was due to evidence of preferential secondary slot-trading between them.[182] Preferential secondary slot-trading makes it challenging for new airlines to access the market as new airlines would not receive these slots.[183]

102. Moreover, the CCM had concerns of Caeli's predatory pricing strategies, which were bolstered by the recurring subsidies received by the Claimant under the Horizon 2020 programme.[184]

103. For this reason, the CCM was justified in exercising its discretion and commencing its first investigation.

b. The CCM's second investigation was launched with a legal basis

104. The CCM's second investigation was initiated with a legal basis. The CCM is obliged to open an investigation into a corporation with at least 10% market share if a complaint, with sufficient evidence, is brought to the CCM by a direct competitor in the market.[185] All the aforementioned requirements have been satisfied.

105. First, Caeli is a corporation with a 43% market share,[186] well above the 10% requirement. Second, a consortium of small regional airlines brought a complaint against Caeli to the

178 MRTPA, Chapter III(2)(a).
179 Facts, Lines 905-910.
180 Facts, Line 1151.
181 Facts, Line 1153.
182 Facts, Line 1154;
183 Abeyratne, p. 24.
184 Facts, Line 1155.
185 MRTPA, Chapter III(3).
186 Facts, Line 1151.

CCM in 2016.[187] These regional airlines were Caeli's direct competitors as they also provided regional flights.[188] Third, the acts complained of included launching flights on specific regional routes in order to push competitors off those routes.[189] Pre-empting scarce facilities and resources to withhold them from the market is an act explicitly deemed to be anti-competitive,[190] and therefore justified the CCM's investigation.

106. Lastly, the CCM has the discretion to determine whether the direct competitor brings sufficient evidence before it.[191] While the specific evidence submitted to the CCM remains unclear, the consortium of regional airlines would likely be aware of the prices of the flights that Caeli was offering. This allows a direct comparison to be made to determine if Caeli was indeed capitalising on its undercutting policies to push its competitors off the market.[192] Considering that the requirements of the MRTPA were satisfied, the CCM was not only justified, but obliged by the MRTPA to commence the second investigation.

107. Accordingly, since both investigations were commenced with good reason, the CCM's investigations were not arbitrary and did not shock juridical propriety.

*(2) The Respondent's denial of subsidies to Caeli was not discriminatory*

108. The test for discrimination is encapsulated by the most-favoured-nation principle.[193] This test requires States to accord an investor no less favourable treatment than the treatment accorded in "like situations" to investors of a third country.[194] Discrimination is generally found where an investment has been specifically targeted as compared to other investments.[195]

109. The Respondent did not treat the Claimant discriminatorily as: (**a**) Caeli was not in a like situation with other privately-owned airlines; (**b**) the Respondent did not treat Caeli

187 Facts, Line 1170.
188 Facts, Lines 1179, 1074.
189 Facts, Lines 1172-1173.
190 MRTPA, Chapter IV, Definition of anti-competitive act, (h).
191 MRTPA, Chapter III(3)(c).
192 Facts, Line 1173.
193 F. A. Mann, p. 243; *Parkerings* ¶291; *Saluka* ¶313; *Sergei* ¶266.
194 CEPTA, Article 9.7(1); *Total S.A.* ¶210; *AES* ¶10.3.53; ILC Draft on MFN Clauses, Article 5.
195 Black's Law, p. 393; *Ronald* ¶270; *Lemire* ¶261; *Plama* ¶184.

differently from other state-owned airlines in "like situations"; and in the alternative, (**c**) the Respondent had a reasonable justification for denying subsidies to Caeli.

a. The Claimant was not in a like situation with privately-owned airlines

110. The term "like situation" requires a comparison of the factual situation of the investments with investors from different countries.[196] Caeli, held by the Claimant as a state-owned entity, was not in a like situation with other airlines such as Star Wings and JetGreen, which were held by private holding groups in Arrakis.[197] Instead, Caeli was in a like situation with Larry Air, as they were the only two state-owned airlines in Mekar,[198] which makes Larry Air a suitable comparator.

b. The Respondent did not treat Caeli differently from other state-owned airlines in "like situations"

111. Differential treatment is made out if the measure imposed causes disadvantageous consequences that unfairly affect the entity as compared to other entities in like circumstances.[199]

112. However, Caeli was not subject to any measures that unfairly affected it. Both Larry Air and Caeli were state-owned airlines which did not receive subsidies under Executive Order 9-2018.[200] Thus, the Respondent treated Caeli similarly to other state-owned airlines.

c. The Respondent had a reasonable justification for denying subsidies to Caeli

113. Alternatively, even if Caeli was in a like situation as Star Wings and JetGreen, the Respondent had reasonable justifications for any differential treatment.[201] A justified differentiation with a legal or objective standard is permitted as it ensures a fair outcome.[202] The conduct of the State must be "evidently" discriminatory, amounting to "sufficiently egregious and shocking" treatment.[203]

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196 *İçkale* ¶326; *Parkerings* ¶¶369-371.
197 Facts, Line 1257.
198 Facts, Line 1266.
199 *Canada – Autos* ¶¶78.
200 Facts, Lines 1266-1268.
201 *Parkerings* ¶371.
202 *Enron* ¶282; *Sempra* ¶319; *National Grid* Award ¶200; Schreuer (2009), pp. 183-198.
203 *Glamis* ¶616.

114. The Respondent's refusal to grant subsidies to Caeli under Executive Order 9-2018 was not "sufficiently egregious and shocking". Executive Order 9-2018 grants the Secretary of Civil Aviation the discretion to decide on applications for subsidies, considering whether the subsidy would skew market conditions in favour of one or more enterprises.[204]

115. Indeed, the Respondent reasoned that granting subsidies to state-owned companies would skew market conditions in favour of these companies as state-owned companies already possess unique advantages that enable them to outcompete privately-owned firms.[205] This rationale provided was reasonable, as it is an accepted notion that state-owned entities have the benefit of State funding.[206] Furthermore, the Claimant had already received recurring payments under the Horizon 2020 scheme,[207] indicating that any further subsidies granted by the Respondent would skew market conditions in favour of Caeli.

116. Accordingly, the Respondent's refusal to grant subsidies had a reasonable basis and did not meet the high threshold required for discrimination.

### *E. The Respondent did not treat the Claimant abusively*

117. Article 9.9 Paragraph 2(d) of the CEPTA obligates each Contracting Party not to treat investors abusively.[208] Abusive treatment occurs when coercion, duress or harassment is exercised against an investment.[209] The treatment must be repeated and sustained, amounting to a deliberate conspiracy that removes legitimately acquired rights.[210] Such treatment includes unwarranted and improper pressure, abuse of power, threats and use of force.[211]

118. The Respondent did not treat the Claimant abusively as: (**1**) the CCM's airfare caps were justifiable interim measures; (**2**) the CCM's maintenance of airfare caps was proportionate in preventing the abuse of the Claimant's dominant position; (**3**) the

204 Annex VIII, Chapter 31, Sec. 3101.
205 Facts, Line 1263.
206 Nielsen, pp. 57-59.
207 PO4, Lines 3492-3493.
208 CEPTA, Article 9.9(2)(d).
209 CEPTA, Article 9.9(2)(d).
210 *Waste Management* ¶138.
211 *CME* ¶¶480, 490, 517.

Respondent's rejection of the Hawthorne Group offer was a proper exercise of their Right of first Refusal; and (**4**) the Claimant's allegations of corruption is based on weak evidence.

*(1) The CCM's airfare caps were justified interim measures*

119. The CCM's imposition of airfare caps was a reasonable interim measure that can be taken when investigating anti-competitive behaviour in order to prevent an abuse of a company's dominant position.[212] Caeli also did not protest the airfare caps, recognising that it was reasonable.[213] Hence, the CCM's imposition of airfare caps was not an improper use of power amounting to abusive treatment.

*(2) The CCM's maintenance of the airfare caps was proportionate in preventing the abuse of the Claimant's dominant position*

120. Under the MRTPA, the CCM is empowered to impose any proportionate measure in preventing practices which have an adverse effect on competition.[214] Measures are proportionate if they are backed by factual evidence that can attain a desired objective.[215]

121. The maintenance of the airfare caps was proportionate in preventing Caeli's abuse of its dominant position. Since a market share of 40% typically constitutes a dominant position,[216] Caeli occupied a dominant position in light of its combined market share of 42% with Royal Narnian.[217] It was appropriate to combine the market share of both airlines as Caeli has benefitted from its alliance with Royal Narnian when it faced deep financial losses.[218] Accordingly, the maintenance of airfare caps was a proportionate measure.

212 Facts, Lines 1137-1138.
213 Facts, Lines 1161, 1168.
214 MRTPA, Chapter III(4)(d).
215 *Valeri* ¶¶232, 243.
216 Khemani and Shapiro, p. 38.
217 Facts, Line 1289.
218 Facts, Lines 1068-1072.

*(3) The Respondent's rejection of the Hawthorne Group's offer was a proper exercise of their Right of First Refusal*

122. Mekar Airservices' rejection of the Hawthorne Group's offer did not constitute abusive treatment. The Respondent was entitled to protect its interests by exercising its Right of First Refusal,[219] a term consented to by all parties to Caeli's shareholder agreement.[220]

123. The presence of an arm's length transaction is an explicit requirement under Article 39 of Caeli's shareholder agreement relating to the Right of First Refusal.[221] This protects the Respondent from having to match an inflated price for the Claimant's shares, offered by a potential buyer with ties to the Claimant.

124. Since the Hawthorne Group also possessed ties to the Claimant through owning stakes in numerous low-cost airlines which were part of the Moon Alliance,[222] this raised a conflict of interest that would not constitute an arm's length transaction.[223] Thus, the rejection of the Hawthorne Group offer was merely a justified exercise of the Respondent's rights under Caeli's shareholder agreement.

*(4) The Claimant's allegation of corruption was based on weak evidence*

125. Abusive treatment requires that the Claimant furnish cogent or clear evidence to prevent an excess of frivolous claims.[224] Mere unsubstantiated insinuations of corruption should be disregarded.[225]

126. The Claimant's allegation of corruption lacks cogent evidence. The allegation of corruption was premised on a CILS report that bribes were received by the arbitrator, Mr Cavannaugh, during the SCC arbitration.[226] The CILS report only included a transcript of an audio recording between Mr Cavannaugh and an unidentified representative of Mekar Airservices,[227] which can easily be manipulated. Further, CILS

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219 Annex X, Line 2006.
220 Annex VI, Section V, Article 39.
221 Annex VI, Section V, Article 39(1)(a).
222 Facts, Line 1342.
223 "Arm's Length Transaction" *CFI*; Sabahi and Guzman ¶49.
224 *Waste Management* ¶139; *Tokios* ¶¶124, 126.
225 *Siag* ¶326; *Saba* ¶131; *EDF* ¶221.
226 Facts, Lines 1366-1375.
227 Annex XII, Line 2076.

has been investigated for suspicious foreign funding which would undermine the veracity of its report.[228]

127. Accordingly, the Claimant's allegation of corruption was not supported by substantial evidence,[229] and would not contribute to a finding of abusive treatment.

### *F. The Respondent did not frustrate the Claimant's legitimate expectations*

128. Article 9.9 Paragraph 3 of the CEPTA states that tribunals may consider whether there are any legitimate expectations made by specific representations in inducing the investment, whether the investor relies on any expectation in inducing or maintaining the investment, and whether the Contracting Party frustrates those expectations.[230]

129. The Respondent has not frustrated any legitimate expectation as: (**1**) the Respondent has not made any specific representations that the Claimant subsequently relied on in deciding to invest in Caeli; and (**2**) even if specific representations were made, the Respondent had legally exercised its right to regulate.

#### *(1) The Respondent made no specific representations that the Claimant relied on when investing in Caeli*

130. The Respondent has not created a legitimate expectation because: (**a**) the Respondent did not induce the Claimant to invest in Caeli; and (**b**) the Respondent did not create an expectation that the Claimant's expansion plans were allowed.

a. The Respondent did not induce the Claimant to invest in Caeli

131. The State must have undertaken an affirmative action or given specific assurance to the investor to create a legitimate expectation.[231]

132. The Respondent did not make any specific representation or take any affirmative action to induce the Claimant to invest before the Claimant submitted its bid for the purchase

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228 Annex XIV, Line 2288.
229 *Fraport* ¶¶469-481; Sourgens, p. 150.
230 CEPTA, Article 9.9(3).
231 UNCTAD FET, p. 69; *Enron* ¶262; *Antin* ¶538; *Methanex* Jurisdiction at Part IV, Chapter D, p. 5; Krajewski and Hoffman, p. 182

of Caeli on 23 November 2010. The Respondent marketed Caeli's assets through a public, open, and fair tendering process accessible to any interested party.[232]

133. Additionally, the Respondent merely promoted Caeli's assets to potential investors, such as its brand and logo,[233] its profitable ground handling company as well as its well-equipped technical base at Phenac.[234] The Claimant itself explained that it was attracted by the extensive access that this investment opportunity provided to the Respondent's airline market.[235] Hence, no specific representation made to the Claimant can be identified.

b. The Respondent did not create an expectation that the Claimant's expansion plans were allowed

134. A legitimate expectation is not formed unless the State has proposed a clear and specific representation or regime that the investor has relied on.[236]

135. The Respondent did not make any express commitment that the Claimant's expansion plans would be endorsed. While there might be an implicit approval of the Claimant's expansion plans and association in the Moon Alliance,[237] the Respondent did not expressly highlight that its regulatory bodies would endorse any expansion plans.[238] The supposed approval of the Claimant's association in the Moon Alliance was only endorsed by the Chairperson of the Committee.[239] However, the endorsement did not go as far as to encourage any expansion plan.

136. Accordingly, the Respondent did not make any representations that the Claimant's expansion plans were allowed.

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232 Facts, Lines 1013, 1018.
233 Facts, Line 1014.
234 Facts, Line 1015.
235 Facts, Line 1029.
236 *Antin* ¶538; *Antaris* ¶360.
237 Facts, Lines 1032-33, 1045.
238 Facts, Line 1046.
239 Facts, Lines 1037-1038.

*(2) Even if a specific representation was made, the Respondent had legally exercised its right to regulate*

137. Even if a specific representation was made to the Claimant, the Respondent did not frustrate it as States have the right to exercise its sovereign legislative power and modify laws at their own discretion.[240]

138. Tribunals recognise that there are limits to the protection of an investor's legitimate expectations.[241] Tribunals are cognizant of the developing status of the host State, and developing countries would be granted a greater flexibility to regulate in the public interest.[242] In fact, the Respondent's right to regulate is protected under Article 9.8 of the CEPTA.[243] Such conduct by the State is permissible if it does not "manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination".[244]

139. The Respondent has merely exercised its right to modify its regulatory regime in furtherance of economic stability. For example, the Respondent had implemented several regulatory changes in a short span of time, such as the denomination of airfares in USD in October 2017,[245] followed by the reversion to denominating airfares in MON in January 2018.[246]

140. Additionally, the Respondent has experienced a history of political instability, most recently marked by a change in the ruling governmental party in November 2017.[247] After the Labourers' Party of Mekar was elected to form a parliamentary majority,[248] there was a subsequent change in legislation required all companies operating in Mekar to denominate its goods and services in MON. This was made in the interest of stabilising the currency and improving the country's macroeconomic situation.[249] Such conduct falls within the Respondent's right to regulate.

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240 *Parkerings* ¶332.
241 *Saluka* ¶304; *Enron* ¶261.
242 *Saluka* ¶305; *S.D. Myers* ¶263; *Mobil* ¶933; *Toto* ¶165.
243 CEPTA, Article 9.8.
244 *Saluka* ¶307.
245 Facts, Lines 1198-1199.
246 Facts, Lines 1209-1210.
247 Facts, Line 1200.
248 Facts, Line 1200.
249 Facts, Line 1208.

141. Thus, the changes in the regulatory environment cannot be deemed to frustrate the Claimant's legitimate expectations as they were implemented in the public interest.

### *G. The Respondent provided full protection and security for the Claimant's investment*

142. Article 9.9 Paragraph 1 of the CEPTA obligates each Contracting Party to provide full protection and security for investments.[250] Article 9.9 Paragraph 4 confines the scope of full protection and security to physical security in accordance with the traditional approach in international investment arbitration.[251] Physical security is primarily concerned with whether the investment has been harmed by activities such as civil strife or direct physical violence.[252]

143. Although tribunals have sought to expand the scope of full protection and security to include legal and regulatory stability,[253] this should not be applicable as parties have expressly intended to confine the scope to physical security.[254]

144. No evidence suggests that the Claimant's investment was threatened or harmed by physical violence or civil strife. Although it suffered economic losses, the physical security of the Claimant's investment was never threatened.[255] Since there was no threat to the physical integrity of the Claimant or its investment, the Respondent has not breached its obligation to provide full protection and security under Article 9.9.

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250 CEPTA, Article 9.9(1).
251 *Wena* ¶80; *Crystallex* ¶¶632, 634.
252 *Saluka* ¶483.
253 *Occidental* ¶183; *Azurix* ¶408.
254 VCLT, Article 31(1); CEPTA, Article 9.9(4); Krajewski and Hoffman, p. 186.
255 Facts, Line 1314.

## COMPENSATION

## V. The Claimant is owed no further compensation by the Respondent

145. This Tribunal has the discretion to award monetary damages at market value in accordance with Article 9.21 of the CEPTA.[256] However, the Claimant seeks to claim an additional USD 700 million at the "fair market value" compensation standard.[257]

146. Fair market value refers to the intrinsic price of an investment that would be offered by a willing buyer on the date before the treaty was breached.[258] In contrast, market value refers to the current price of an asset in the marketplace.[259]

147. The Respondent ought to pay compensation at market value as: (**A**) the market value standard gives effect to parties' intentions; (**B**) the Claimant should not be allowed to rely on the full reparation standard in customary international law; (**C**) the most-favoured-nation principle would not entitle the Claimant to the fair market value standard; and (**D**) even if compensation is payable at fair market value, the compensation paid to the Claimant should be reduced due to their contributory fault.

### *A. The market value standard gives effect to parties' intentions*

148. Treaties are binding on parties who signed them.[260] Accordingly, parties are bound by the express treaty wording, which indicates the scope of their obligations.[261] Tribunals should adopt a textual interpretation of the treaty and apply its plain and ordinary meaning.[262]

149. Article 9.21 of the CEPTA expressly states that monetary damages are to be awarded at market value, except as otherwise provided for in Article 9.12 of the CEPTA.[263] This reflects that parties have expressly indicated an intention to only pay compensation at the market value standard. While Article 9.21 appears to grant this Tribunal discretion in accordance with the word "may",[264] this discretion refers only to the type of award

256 CEPTA, Article 9.21(1)(a).
257 Vemma's Application, Line 154.
258 *Enron* ¶361; AMBIT, Article 13, Line 3093.
259 James Chen "Market Value"; Kantor, p. 31; Walde and Sabahi, p. 1063.
260 VCLT, Article 11 and 26; Crawford, p. 377.
261 VCLT, Article 31(1).
262 VCLT, Article 31(1); *Competence*, p. 8.
263 CEPTA, Article 9.21(1).
264 CEPTA, Article 9.21(1).

that may be given by this Tribunal. Accordingly, the discretion only extends to this Tribunal's ability to choose to award monetary damages and restitution but not amend the compensation standard itself.[265]

150. Hence, this Tribunal should only award the market value standard of compensation in accordance with parties' intentions as reflected in Article 9.21.

### *B. The Claimant cannot rely on the full reparation standard in customary international law*

151. The full reparation standard states that reparation "must, as far as possible" wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[266] The full reparation standard would have a similar effect of awarding compensation at fair market value to the Claimant.

152. However, the full reparation standard has only been applied by various tribunals in their assessment of compensation when the treaties themselves were *silent* on the standard of compensation to be applied in the event of a breach.[267] This is consistent with the principle of interpretation that if the "relevant words in their natural and ordinary meaning make sense in their context, that is the end of the matter".[268]

153. Instead, Article 9.21 of the CEPTA's clear standard on compensation clearly indicates that parties did not intend to leave it open to this Tribunal to determine an appropriate standard of compensation, which in effect precludes the full reparation standard.

154. While Article 1.3 of the CEPTA requires parties to interpret and apply Article 9.21 of the CEPTA in accordance with the applicable rules of international law,[269] tribunals should only resort to this if the wording of the treaty itself is unclear.[270] Considering that the Contracting Parties have expressly delineated the standard of compensation, this Tribunal should not intervene to apply the full reparation standard.

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265 VCLT, Article 31(1).
266 *Enron* ¶359; *Burlington* ¶160; *Quiborax* ¶326.
267 *Unión* ¶10.95; *CMS* ¶¶409-410; *Azurix* ¶¶421-424.
268 *Competence*, p. 8; ILC Draft on Treaties, p. 221.
269 CEPTA, Article 1.3.
270 *Enron* ¶359; *Burlington* ¶160; *Quiborax* ¶326.

### *C. The most-favoured-nation principle would not entitle the Claimant to the fair market value standard*

155. The Claimant should not be awarded fair market value compensation under the most-favoured-nation principle in Article 9.7 of the CEPTA.[271] Article 9.7 entitles the Claimant to receive no less favourable treatment than that accorded to an investor of a third country in like situations, with respect to any dealings with its investments.[272]

156. However, the Claimant cannot rely on the most-favoured-nation clause to amend the market value compensation standard as: (**1**) compensation does not relate to the treatment of an investment; and (**2**) even if the Respondent had treated the Claimant differently from Arrakis investors, the Respondent had a reasonable justification for doing so.

#### *(1) Compensation does not relate to the treatment of an investment*

157. According to the *ejusdem generis* principle, the most-favoured-nation clause only attracts matters belonging to the same subject matter or the same category of subject which the clause relates.[273] Article 9.7 expressly limits this subject matter to an investor's dealings with their investments, including the maintenance, use, enjoyment and sale or disposal of their investments in the Respondent's territory.[274]

158. The Claimant cannot rely on Article 9.7 to invoke the "fair market value" standard of compensation laid out in Article 13 of the AMBIT as the subject of compensation is not within the scope of an investor's dealings with its investment.[275] The issue of compensation is not one of sale or disposal of the investment as compensation solely addresses the consequences of a breach.[276] The question of the appropriate compensation standard arises only when this Tribunal has made a Final Award against the Respondent,[277] which does not relate to the Claimant's dealings with its investment in any manner.

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271 Vemma's Application, Line 156.
272 Houde 2004, p. 2; CEPTA, Article 9.7(1); *National Grid* Jurisdiction ¶92; *Bayindir* ¶387.
273 Houde 2004, p. 9; *Muhammet* ¶¶786-787; *Dawood* ¶187; *Christian* ¶217.
274 Facts, Line 2714.
275 AMBIT, Article 13.
276 *EDF* ¶103; *Duke* ¶377.
277 CEPTA, Article 9.21(1).

159. Rather, compensation ought to be viewed as part of the procedures for dispute resolution between investors and states.[278] Issues of compensation do not go to the merits of the case and only go as far as to repair the damage inflicted by errant state actions.[279] Instead, compensation contributes to a definite resolution of the dispute in a juridified procedure.[280] Article 9.7 Paragraph 2 states that procedures for resolution are not within the scope of the most-favoured-nation obligation.[281] Considering that compensation is a procedural issue, it would not fall within the scope of Article 9.7.

160. Hence, the scope of Article 9.7 prevents the Claimant from importing the protection accorded to Arrakis investors regarding the appropriate standard of compensation.

*(2) Even if the Respondent treated the Claimant differently from Arrakis investors, the Respondent had a reasonable justification for doing so*

161. Differential treatment is allowed where there is a reasonable nexus between the differential treatment and a rational governmental policy that does not distinguish between foreign-owned and domestic companies.[282] States apply policies in a rational manner when they are consistently implemented for all States.[283]

162. The Claimant had a rational policy that was applied without distinction between foreign-owned and domestic companies. The Respondent's Model BIT indicates that "market value" is the consistent standard to be applied in investment treaties signed with Mekar.[284] A Model BIT reflects the States' default position with regard to investor-State treaties.[285]

163. While the AMBIT offers fair market value as the applicable compensation standard, it is an outlier as Mekar's Model BIT states the Respondent's intention to consistently apply market value.[286] The different standard in the AMBIT is merely a reflection of the process of negotiation during the drafting of a treaty.[287] The Claimant should not rely on

278 Walde and Sabahi, p. 1052.
279 Wittich ¶¶10-11; *Factory* ¶47.
280 Walde and Sabahi, p. 1052.
281 CEPTA, Article 9.2(2)
282 *Pope & Talbot* ¶¶78-79.
283 *Morocco*, p. 192; Kurtz, p. 873.
284 PO3, Line 3223.
285 Houde 2006, p. 175; USCBC, p. 3.
286 Facts, Line 3230.
287 VCLT, Article 31(1); Crawford, p. 379.

treaties that are exceptions to the standard practice of the Respondent. Additionally, the Respondent's decision to grant market value to investors in Bonooru under the CEPTA was a mutually agreed decision and consistent with the general practice under the Respondent's Model BIT.

164. Thus, the Respondent had a reasonable justification for maintaining the standard established in the Model BIT.

### *D. In any event, any compensation payable to the Claimant should be reduced due to their contributory fault*

165. Under international law, where there is contributory fault, compensation awarded should be reduced accordingly.[288] The tribunal in *MTD* held that damages payable to the Claimant should be reduced due to their lack of business judgment, since they made unwise decisions that increased business risks, consequently contributing to their own misfortune.[289]

166. Similarly, the Claimant should bear responsibility for their losses due to its risky decisions that exacerbated its financial situation. First, the Claimant ignored the Respondent's warning that Caeli's expansion should be controlled to avoid exorbitant costs associated with maintaining its fleet during seasons of low demand.[290] Instead, the Claimant's representatives aggressively increased the number of Caeli's international routes.[291] It is telling that Aviation Analytics has also reported that almost any industry expert would agree that Caeli's rapid expansion was ill-advised,[292] especially since Caeli still had ballooning debts.[293]

167. Second, the Claimant's rash expansion plans were recognised to be risky. The CCC+ rating assigned to Caeli by the IICRA in 2019 indicated that Caeli's creditworthiness was abysmal.[294] IICRA explained its rating decision after considering the:

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288 Ripinsky and Williams, p. 314; Kantor, p. 106; ARSIWA, Article 39.
289 *MTD* ¶¶242-243.
290 Facts, Lines 1108-1110.
291 Facts, Lines 1112-1113.
292 Annex IX, Line 1956.
293 Annex IX, Line 1958.
294 Facts, Lines 1303-1304.

> "*risky investment choices by Caeli, long-standing debts that Caeli has failed to service since its privatisation, as well as large fines payable to the CCM*."[295]

168. Finally, the Claimant breached Mekar's antitrust legislation by choosing to pursue predatory pricing strategies and abusing its dominant position in the industry.[296] These facts further corroborate how Caeli had ruthlessly pursued expansion to the peril of theirs own financial health.

169. Accordingly, any compensation awarded should be reduced to account for the Claimant's risky expansion of Caeli that contributed to its losses.

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295 Facts, Lines 1305-1307.

296 Facts, Lines 1244, 1279.

## PRAYERS FOR RELIEF

The Respondent respectfully requests this Tribunal to adjudicate and declare that:

I. This Tribunal lacks jurisdiction over this dispute;

II. CRPU's *amicus* submissions should be admitted;

III. CBFI's *amicus* submissions should not be admitted;

IV. The Respondent did not violate Article 9.9 of the CEPTA; and

V. The appropriate compensation standard is "market value" and no further compensation is payable.