TEAM VALTICOS

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

BETWEEN:

Vemma Holdings Inc.

Claimant

AND

The Federal Republic of Mekar

Respondent

MEMORIAL FOR RESPONDENT

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LIST OF ABBREVIATIONS AND DEFINED TERMS

¶.	paragraph
Arbitration AF Rules	Schedule C to the ICSID Additional Facility Rules
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
Art.	Article
AIRA	Airways Infrastructure Rescue Act
Bonooru	Commonwealth of Bonooru
CAA	Civil Aviation Authority
Caeli	Caeli Airways
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	Comprehensive Economic Partnership and Trade Agreement
CILS	Centre for Integrity in Legal Service
Claimant	Vemma Holdings
CRPU	Committee on Reform of Public Utilities
ejusdem generis	"of the same kind"
Facts	Statement of Uncontested Facts
FET	Fair And Equitable Treatment
FMV	Fair Market Value
ICJ	International Court of Justice

ICSID AF Rules	Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the ICSID
ICSID Rules	ICSID Arbitration Rules
ILC	International Law Commission
Airservices	Mekar Airservices
MFN	Most Favored Nation
MRTPA	Monopoly and Restrictive Trade Practice Act
MTT	Bonooru Ministry of Transport and Tourism
MV	Market Value
NoA	Notice of Arbitration
NYC	New York Convention
p.	page
Parties	Claimant and Respondent
PO	Procedural Order
Record	2021 FDI Moot Case
Respondent	Federal Republic of Mekar
RNoA	Response to the Notice of Arbitration
Rules on Transparency	UNCITRAL Rules on Transparency
SCC	Sinnoh Chamber of Commerce
SOE	State-owned enterprises
VCLT	Vienna Convention of the Law of Treaties

STATEMENT OF FACTS

1. Vemma ("Claimant") is an airline holding company located in Bonooru. Claimant retains 100% ownership of a global airline, Royal Narnian, a member of the Moon Alliance. MTT retained more than 30% shareholding in Claimant.

2. Respondent is the Federal Republic of Mekar ("Mekar"). Bonooru-Mekar BIT had been in force since 1994, until both countries signed the CEPTA, which came into effect on 15 October 2014.

3. Caeli is an airline company that was acquired by Claimant with an 85% stake on 29 March 2011. Caeli, previously a Mekari national carrier, became available for purchase in a bidding process as part of Mekar's effort to privatize SOEs in 2009. CCM approved the Claimant's acquisition.

4. While Caeli generated profit thanks to its growth in the global market, increasing tourist demand, low fuel prices and depreciation of MON, Claimant decided to offer low-fare, long-distance flights as well as additional cross-continental routes into Respondent.

5. Representatives of Airservices expressed concerns in annual shareholders' meetings based on demand volatility during the fall and winter months, but Claimant continued to provide lower fares and expand the fleets and captured larger Mekari market share despite continuing losses in the fall-winter season.

6. CCM launched its first investigation in September 2016 into Caeli due to its predatory pricing strategies and its then 54% market share in the Respondent state in conjunction with fellow Moon Alliance partner, Royal Narnian. CCM considered that the Horizon 2020 subsidy provided by Bonooru to Claimant in 2011 enabled Caeli to continue its predatory pricing strategies and imposed reasonable interim airfare caps on Caeli. It was later concluded in 2018 that Caeli breached Respondent's antitrust legislation. CCM continued to impose airfare caps on Caeli along with a penalty of MON 150 million.

7. CCM launched its second investigation after allegations were made by its competitors in Greater Narnia that Caeli was abusing its privileges in Phenac International, Respondent's largest airport, to chase away regional airlines. It was later concluded in 2019 that Caeli

had engaged in anti-competitive behavior in conducting its business in Phenac International. CCM continued to impose airfare caps on Caeli along with MON 200 million penalty. The caps were lifted in October 2019.

8. After the currency crisis that greatly depreciated Respondent's local currency value in 2017, the newly elected government decreed all domestic companies including Caeli to denominate their prices in MON in its effort to stabilize the currency.

9. Caeli requested 1) CCM to lift the airfare caps before completion of the investigation and 2) the Central Bank to revise the inflation rate to reduce the airfare caps that were pegged to the rate. Both institutions respectively refused Caeli's requests.

10. Caeli urged for an immediate hearing on interim airfare caps, which the Court Registrar rejected due to its limited resources and prioritization of criminal matters. The Court also rejected an additional appeal made on 20 January 2019 by Caeli concerning the conclusion of the second investigation by CCM.

11. On 25 September 2018, the President passed Executive Order 9-2018 that subsidized airlines. Caeli's application for the subsidy was denied on grounds that Claimant had already received one under the Horizon 2020 program.

12. When Caeli's market share in Mekar dropped below 40%, and Claimant decided to sell their entire stake in Caeli to Hawthorne. Airservices rejected the offer due to Claimant's association with Hawthorne through the Moon Alliance.

13. Airservices filed an arbitration on 11 February 2020 against Claimant under the SCC. Mr. Cavanaugh, the appointed arbitrator by the SCC Secretariat, rendered an award in favor of Airservices. The Airservices sought to enforce the ruling and the High Commercial Court of Mekar enforced the award as such.

14. Claimant failed to secure another buyer for its shares. resulting in selling its stakes to Airservices on 8 October 2020 for 400 million USD.

15. Claimant filed this arbitration after notifying Respondent of the dispute on 15 November 2020. Claimant seeks compensation of 700 million USD for alleged breach of Respondent's commitment to FET in the CEPTA.

SUMMARY

16. The Tribunal lacks jurisdiction for the following reasons. First, ICSID AF Rules and CEPTA do not cover state-to-state arbitration. Second, Claimant can be identified as an SOE under Bonooru's control, which also discharged governmental functions. Lastly, Claimant fails to satisfy the jurisdiction ratione temporis **[ISSUE 1]**.

17. Tribunal should allow amicus submission of external advisors to CRPU, but not CBFI. CBFI should be barred because they neither represent public interest nor maintain independence. Members of the CBFI which includes the Claimant, demonstrate particular and professional interests as they hold investment rights in Mekar. In contrast, the external advisors to CRPU not only provide different perspectives by focusing on the transparency of public utilities but also demonstrate public interest in corruption. **[ISSUE 2]**.

18. Claimant alleges that measures taken by the Respondent's administrative or judicial body violate Article 9.9 of the CEPTA. The challenged measures include the two investigations, subsequent fines and airfare caps imposed by the CCM; requirement of a denomination in MON; issuance of subsidies to airline companies; and judicial proceedings initiated by or against Claimant. However, none of the challenged measures individually or collectively violate the FET standard of CEPTA, because they were in accordance with the Claimant's legitimate expectations **[ISSUE 3]**.

19. Respondent owes no compensation to Claimant since Respondent has already paid for Claimant's investment in MV. MV is the appropriate compensation standard for this case according to Article 9.21 of the CEPTA; no other source of international law exists for deciding compensation standards. If the Tribunal accepts the Claimant's argument and utilizes FMV as the standard, there should be a reduction of compensation in consideration of contributory fault and the ongoing economic crisis **[ISSUE 4]**.

ISSUE 1. TRIBUNAL LACKS JURISDICTION

20. Tribunal has been constituted pursuant to Art. 9.16 of the CEPTA. Specifically, paragraph 2(b) of Art. 9.16 applies:

> "2. A claim may be submitted under the following rules: (a) the ICSID Convention and Rules of Procedure for Arbitration Proceedings; (b) the ICSID AF Rules if the conditions for proceedings pursuant to paragraph (a) do not apply"

21. However, the Tribunal lacks jurisdiction for the following reasons. First, ICSID AF rules do not extend the jurisdiction of ICSID **[I].** Second, Claimant can be identified as an SOE **[II].** Third, Bonooru exercised effective control over the Claimant's operation **[III]**, Fourth, Claimant discharged governmental functions **[IV].** Lastly, Claimant fails to satisfy jurisdiction ratione temporis **[V].**

I. ICSID AF Rules Do Not Extend the Jurisdiction of ICSID

22. Article 2 of ICSID AF Rules states that:

> "The Secretariat of the Centre is hereby authorized to administer … proceedings between a State and a national of another State, falling within the following categories: (a) conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State"

23. Since Bonooru has ratified the ICSID Convention and Respondent has not, ICSID AF Rules are in effect.

24. It is important to note that the AF Rules do not extend the jurisdiction of ICSID. They allow the additional types of claims listed above to be administered by the Secretariat of the Centre.[1]

[1] Sicard-Mirabal, p.82

25. As will be discussed later, the ICSID Convention does not endorse jurisdiction over State-to-state disputes. Therefore, the Tribunal lacks jurisdiction because Claimant is a State-owned Enterprise.

II. Claimant Can Be Identified as an SOE

26. ICSID Convention and CEPTA do not specify criteria for a corporation to be defined as an SOE **[a]**, Claimant satisfies general criteria to be defined as an SOE **[b].**

a. The ICSID Convention and CEPTA Does Not Specify Criteria For SOE

27. According to Art. 25 of the ICSID Convention,

> "Jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State and a national of another Contracting State."

28. The language of Article 25(1) of the Convention makes clear that the Centre lacks jurisdiction over disputes between two or more Contracting States. Also, it indicates that the term "juridical persons" as employed in Article 25 and, hence, the concept of "national," was not intended to be limited to privately-owned companies, but to embrace also wholly or partially government-owned companies.[2]

29. However, the ICSID Convention does not offer detailed guidance on how to distinguish investor-State from State-to-State disputes, how to determine the boundaries of sovereign conduct[3], or if an SOE can be "a national of another Contracting State" of Article 25. Furthermore, while Chapter 9 of CEPTA states that "investor means a natural person with the nationality of a Party or an enterprise with the nationality of a Party or seated in the territory of a Party that seeks to make, is making or has made an investment in the territory of the other Party", it does not explain how to distinguish investor-State from State-to-State disputes.

b. Claimant Satisfy General Criteria to Be Defined as an SOE

30. Since the CEPTA and ICSID Convention does not offer clear guidance to define SOE, the Tribunal can first refer to the definition by the World Bank and the OECD Guidelines

[2] CSOB, p.257
[3] Feldman, p.34

on Corporate Governance. The two prominent leading international economic organizations both emphasize the concept of control.

31. World Bank, which the organization ICSID operates under, defines SOEs as "government-owned or government-controlled economic entities that generate the bulk of their revenues from selling goods and services". [4] It provides that control will be established where the government controls management through majority ownership of shares, or a significant minority shareholding where the distribution of the remaining shares leaves the government with effective control. This includes a consideration of the power to appoint members to the board.[5]

32. The definition of SOE provided by the OECD Guidelines on Corporate Governance is centered around "ownership," which concept is defined in terms of control, with full or majority voting rights or an equivalent degree of control. It states that: "any corporate entity recognized by law as an enterprise ... in which the state exercises ownership". Minority shareholding could confer control when the corporate or shareholding structures result in an 'effective controlling influence' from the State.[6]

33. Furthermore, ILC Articles 5 and 8, along with the Commentaries to the ILC Draft Articles make it clear that for a State to be held responsible, the SOE must either be acting in a governmental capacity, or the State must have "effective control" over the actions considered to be internationally wrongful. In particular, ILC Article 8 states that "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct." ILC Draft Articles were often referred to in different Tribunals, including *EDF v. Romania*[7] and *Bayindir v. Pakistan*.[8]

34. Also, in *Maffezini*, the tribunal first noted that the ICSID Convention itself provided no "guiding principles" on this issue. As such, the tribunal held there was no other recourse

[4] Mclaughlin, p.604
[5] Mclaughlin, p.604
[6] Mclaughlin, p.603
[7] EDF, p.54
[8] Bayindir, p.32

but to consult "the applicable rules of international law." These, it noted, "have evolved and been applied in the context of the law of State responsibility," and required consideration of "various factors," including both "ownership" and "control."[9]

35. Meanwhile, in *Salini,* the tribunal referred favorably to the *Maffezini* decision and held that "generally, any commercial entity dominated or predominantly controlled by the State or by State institutions, whether it has legal personality or not, is considered to be a State-owned company."[10] In this regard, the presence of state control is fundamentally necessary in determining whether an entity is acting either on behalf of a state or in place of a state at the direction of that state.[11]

36. Taken together, it can be inferred that 'effective control', and 'functions' are the key elements of defining an SOE. From this basis, Respondent would like to demonstrate how Bonooru government had effective control over Claimant and Claimant performed governmental functions.

III. Bonooru Had Effective Control Over the Claimant's Operation

37. First, it is Respondent's position that Bonooru had effective control over the Claimant's operation considering the fact that Bonooru has had de facto majority voting powers over Claimant **[a],** and exerted the influence through the management structure **[b]**.

38. The drafters of the ICSID Convention recognized that "minority holding of as little as 25 or even 15% might amount to control through a capacity to block major changes or otherwise."[12] Therefore, participation in the company's stock or share ownership, while relatively simple to ascertain, is not necessarily a reliable indicator of control.[13] Schreuer explains the existence of adequate control for the purpose of Article 25 "is a complex question requiring examination of several factors" and that, "for purposes of ICSID's jurisdiction, the concept of control should be treated with some flexibility."[14]

[9] Maffezini1, p.22
[10] Salini, p.616
[11] Blyschak, p.44
[12] Schreuer, pp.447-448, 538
[13] Schreuer, p.850
[14] Schreuer, pp.864-865

39. In *Vacuum Salt*, the tribunal confirmed that there is no strict "formula" for determining control and that "foreign control within the meaning of the second clause of Article 25(2)(b) does not require, or imply, any particular percentage of share ownership. Each case arising under that clause must be viewed in its own context, on the basis of all facts and circumstances."[15] The tribunal further reasoned how "enough" control could not be "determined abstractly" and that "interests sufficiently important to be able to block major changes in the company" could amount to a "controlling interest" [16] Lastly, it recommended, in addition to ownership, criteria such as voting rights and management powers.[17]

a. Bonooru Had De Facto Majority Voting Powers Over Claimant

40. Claimant might argue that, from 5 January 2011 to 8 October 2020, Bonooru retained minority shareholding in Vemma, which ranged between 31% to 38%,[18] and thus Claimant was not an SOE throughout its investment. However, considering the actual capacity for its shareholding, Bonooru has had de facto majority rights over Claimant. The quorum for general meetings is only 50%, which means 38 can certainly exercise de facto majority rights in the absence of other shareholders. Considering how the average turnout rate for general meetings are set around 60% in Europe[19] and in the 70s in the U.S.,[20] the regions where minor shareholders are active, this would mean that shareholdings of Vemma would be enough to exercise majority control in general meetings.[21] Above all, other shareholders hold at most a 7% stake in Claimant.[22] This exhibits how Bonooru alone would have been able to retain the "capacity to block major changes" in Vemma through voting rights.

b. Bonooru Exerted Influence Through the Management Structure

41. Bonooru has also exercised management powers in Claimant. It is the general meetings that elect the directors for the board, company's decision-making authority by a majority

[15] Vacuum Salt, p.94
[16] Vacuum Salt, p.94
[17] Blyschak p.46
[18] Facts, p.29, ¶.10
[19] Lafarre, p.40
[20] Zachariadis, p.9
[21] PO3, p.86
[22] PO4, p.89, ¶.2

vote within it.[23] MTT of Bonooru is set to nominate one of its officials for the director position on the board.[24] Thus, along with the capacity to exercise control in electing the five executive members of the board, it can be concluded that Bonooru could have exercised direct management powers over the Claimant.

42. Furthermore, according to Vemma's Memorandum of Association, MTT takes 222,048,006 shares out of Vemma's total 740,160,020 shares, which amounts to one-third of total shares in the capital of Claimant.[25]

43. Moreover, the management powers are further shown by the nomination of the head of Claimant's board of directors, Ms. Sabrina Blue, as the Secretary of Transport and Tourism in Bonooru.[26] This act of revolving door is also obvious evidence of control acknowledged in corporate standards.

44. In conclusion, since Bonooru has had de facto majority voting powers over Claimant and exerted its influence through Claimant's management powers, it is Respondent's position that Bonooru has had effective control over the Claimant.

III. Claimant Discharged Governmental Functions

45. In *Maffezini*, the "functional test" offers an appropriate standard to determine whether a private corporation can be considered to be an organ of the state. In this case, the Tribunal stated that "private corporation operating for profit while discharging essentially governmental functions delegated to it by the State could, under the functional test, be considered as an organ of the State and thus engage the State's international responsibility for wrongful acts." [27] It further noted that: "In view of the fact that SODIGA meets both the structural test of State creation and capital ownership, functional test of performing activities of a public nature, the Tribunal concludes that the Claimant has made out a prima facie case that SODIGA is a State entity acting on behalf of the Kingdom of Spain."[28]

[23] Record, p.45
[24] Record, p.46
[25] Record, p.45
[26] Record, p.31
[27] Maffezini, p.30
[28] Maffezini, p.33

46. This "functional test" standard can also be found in one of the two criteria of the Broches test, which is "discharging an essentially governmental function." Thus, it is the Respondent's position that the purpose of the activities must be considered **[a]**, and Claimant has performed essentially governmental functions **[b]**.

a. The Purpose of Activities Must Be Considered

47. In *CSOB*, which adopted the Broches test, the tribunal stated that:

> "In determining whether CSOB, in discharging these functions, exercised governmental functions, the focus must be on the nature of these activities and not their purpose. While it cannot be doubted that in performing the above-mentioned activities, CSOB was promoting the governmental policies or purposes of the State, the activities themselves were essentially commercial rather than governmental in nature."[29]

48. In *BUCG*, the tribunal referred to the *CSOB* case, stating "the important point about the CSOB case is the focus on a context-specific analysis of the commercial function of the investment, a focus with which the present Tribunal agrees." While it has previously been customary for courts to solely consider the nature of a state-controlled entity's activities when applying the "commercial transaction" test, it has more recently become the norm to consider the purpose along with the nature of the entity's activities where appropriate.[30]

49. This follows the approach of many notable domestic courts in recent decades, which have increasingly recognized that consideration of the greater context in which activities take place, including their purpose, may be necessary to accurately determine their sovereign or non-sovereign nature.[31] As held by the Supreme Court of Canada, "an antiseptic distillation of a 'once-and-for-all' characterization of the activity in question, entirely divorced from its purpose," is "to attempt the impossible."[32] In the same context, according to the U.S. Court of Appeals, in *De Sanchez*, "unless we can inquire into the purpose of [certain] acts, we cannot determine their nature.[33]"

[29] CSOB, pp.258-259
[30] Blyschak, p.30
[31] Shaw, pp.710-712
[32] USA v. PSA
[33] De Sanchez

b. Claimant Has Performed Essentially Governmental Functions

50. On the surface, Claimant's business is commercial in nature. However, considering the purpose of its business, it is closely related to the Bonooru government. It is obvious when referring to 1) the article of Bonooru Constitution, 2) the ruling of Bonooru Constitutional Court, 3) the Memorandum of Association of Claimant, 4) Bonooru government's AIRA, 5) and Bonooru's attempt to exert influence over Respondent using Caspian project as a hostage.

51. First, Article 70 of the Bonooru Constitution stipulates the 'mobility rights' of Bonooru citizens. It states that "(1) Every citizen of Bonooru has the right to enter, remain in, and leave its territory; (2) Bonooru shall ensure that every citizen is guaranteed travel to and from its many islands"[34] In this way, the Bonooru Constitution makes clear that it is the government's responsibility to ensure the 'mobility rights' of every citizen.

52. Second, in the case of The National Ferry Workers Union v. Bonooru, the Constitutional Court stated that:

    "By including the words "shall ensure" in the Constitution, the drafters signaled their intention not only to protect citizens of Bonooru from government interference but also to have the government provide them a right that is easily denied by our country's unique geography."

53. Similarly, in *The People's Council of the Island of Kyoshi v. Bonooru* case, the Constitutional Court held that:

    "Air travel serves a unique purpose in Bonooru compared to other nations around the globe. Without modern air travel, most of our citizens could not move between our islands or even leave the islands for another nation.[35]"

    Taken together, the ruling of the Constitutional Court reemphasized the constitutional importance of mobility rights in Bonooru, thus making clear that it is one of the most essential governmental functions to ensure mobility rights of every Bonooru citizen.

[34] Record, p.41
[35] Record, p.42

54. Third, the Memorandum of Association of Vemma shows that Claimant exists to serve this one of the most essential governmental functions. It regulates that:

"h) To assist in developing the aviation industry as well as the civil aviation infrastructure in Bonooru for the benefit of its population in accordance with Article 70 of the Constitution Act, including servicing remote communities".[36]

It is evident in this document that Claimant is discharging an essentially governmental (constitutional) function. Furthermore, the fact that Ms. Sabrina Blue, erstwhile head of Vemma's board of directors, had been appointed as the Secretary of Transport and Tourism, strengthens Respondent's position that Claimant discharges an essentially governmental function.[37]

55. On March 1, 2021, Bonooru implemented a bail-in program through AIRA, which pinned the governmental roles of the Claimant. Bonooru not just increased its shareholding in Vemma to 55%, but also restructured Vemma on a large scale. Its board of directors was replaced with government functionaries, its functions expanded to include paramilitary activities, and its legal team equipped with lawyers from Bonooru's justice department to assist in its arbitration against Respondent.[38]

56. Lastly, Bonooru's attempt to exert influence over Respondent, taking the Caspian Project as a hostage, is a clear sign that the Claimant is discharging an essentially governmental function. In 2010, soon after Bonooru and Mekar entered into CEPTA negotiations, Bonooru announced USD 30 Billion funds as part of the Caspian Project. In January 2012, Bonooru unveiled that part of this fund would be deployed to update Respondent's port and the Phenac International Airport over the next decade. On 8 January 2019, the Bonoori construction firms working on these projects halted all work due to the withdrawal of funding by Bonooru. Both projects remain incomplete.[39]

57. Therefore, considering Bonooru's Constitution, the decision of the Constitutional Court, and Vemma's Memorandum of Association, along with other circumstances, the

[36] Record, p.44
[37] Record, p.31
[38] Record, p.40
[39] PO4, p.89, ¶.1

Claimant's business is governmental when considering both its nature and purpose.

IV. Claimant Fails to Satisfy Jurisdiction Ratione Personae

58. Even if the Claimant has not been an SOE from the beginning, Claimant undeniably failed to maintain its investor status until the date of the resolution of the claims, which brings up the question of jurisdiction ratione personae.

59. The arbitrators in the *Loewen* case required that Claimant maintain the relevant nationality "through the date of the resolution of the claims", which is until the date of the award, deciding under general principles of 'customary international law'.[40] This 'continuous nationality' requirement is applicable to this case for the following reasons.

60. In *Loewen*, the corporate claimant lost its Canadian nationality as a consequence of bankruptcy proceedings induced by the very acts that were the basis of the complaint. Its business operations were reorganized as a US Corporation.[41] The tribunal held that "once the diversity of nationality has come to an end so that the tribunal cannot continue with the resolution of the original dispute, there being no dispute left to resolve."[42]

61. The requirements of "diversity of nationality" can also be found in the ICSID Convention. According to Article 25 (b) of the ICSID Convention, "a national of another Contracting State" means:

> "any juridical person which had the nationality of a *Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation* or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

62. In the present case, since Claimant sold its stake in Caeli to Airservices on 8 October 2020, followed by its NoA against Respondent on 15 November 2020, and Respondent has

[40] Paulsson, p.214; Rubins, p.23
[41] Loewen, p.62
[42] Loewen, p.66

agreed to accept that all actions taken by Airservices were attributable to Respondent,[43] Claimant failed to maintain "the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation."

[43] Record, p.13

ISSUE 2. TRIBUNAL SHOULD ALLOW AMICUS SUBMISSION OF EXTERNAL ADVISORS TO CRPU, BUT NOT CBFI

63. CBFI and external advisors to the CRPU have requested amicus submissions. Respondent submits that amicus submission should be allowed to the external advisors to CRPU, but not CBFI.

64. Article 41(3) of Arbitration AF Rules lays out standards for amicus curiae. It is the tribunal's authority to permit an amicus curiae, and the assessment of the weight of these factors is left to the tribunal's judgment.[44] In the present case, Parties have no agreement on the two amicus submissions. However, since Article 41(3) states that "the Tribunal *may* allow (emphasis added)", it is in the tribunal's discretion to decide on this issue on a case-by-case basis.[45]

65. The considerations by a tribunal include perspective different from the disputing parties (Article 41(3)a), the matter within the scope of the dispute (Article 41(3)b), significant interest (Article 41(3)c), parties' consent (*InterAguas*[46]), and public interest.[47] External advisors of the CRPU meet these standards, whereas CBFI does not.

66. Respondent will elaborate why CBFI should be barred **[I]**, and why the external advisors to CRPU should be accepted **[II]**, based on the above-mentioned considerations.

I. Tribunal Should Not Allow Amicus Submission By CBFI

67. This request is that CBFI should be barred because they do not represent public interest **[a]** and do not provide different perspectives **[b]**.

a. CBFI Does Not Represent Public Interest

68. Respondent submits that the Rules on Transparency should apply. Art.9.20(6) of CEPTA means that while Mekar should consider the application of Rules to the current Arbitration, and that its decision will be binding, unlike Bonooru to which party the Rules automatically

[44] Born2, p.644
[45] Knahr, pp.327-355
[46] InterAguas, ¶¶.5-8
[47] Vivendi, ¶.19; Apotex, ¶¶.41-43; Resolute Forest, ¶.4.7; Methanex, ¶.22; Biwater Gauff, ¶.54; InterAguas, ¶¶.18-21; Born2, p.651

applies. Since the Respondent has already asked Tribunal to apply the Rules on June 18,[48] and no provision poses a time limit to file such a request, the Rules on Transparency have been in effect.

69. Art.1.3(a) of Rules on Transparency reads: "The disputing parties may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty". In the present case, CEPTA does not have other provisions that would allow parties to derogate from the Rules.

70. Under the Rules and ICSID case law, this Tribunal should consider "public interest" in amicus submissions. Art.1.4 of Rules on Transparency reads:

    "Tribunal in exercising such discretion shall take into account: (a) The public interest in transparency in treaty-based investor-state arbitration and in the particular arbitral proceedings".

71. Even if the Rules on Transparency do not apply, case law suggests that investment tribunals have considered public interest, notwithstanding the fact that no such criterion is expressly included in the ICSID and other rules. ICSID Tribunals that considered public interest include *Vivendi, Apotex, Resolute Forest, Methanex, Biwater Gauff,* and *InterAguas*.[49] Some tribunals adopted a more demanding approach and required that the amicus submission be in "furtherance of the public interest".[50] Moreover, the tribunal in the *Apotex* case considered whether 'asserted public interest' was a 'particular and professional interest' instead.[51]

72. CBFI's submission cannot be granted because it does not represent the public interest. They do not demonstrate that there is a "public interest" in the subject matter of the arbitration.

73. The CBFI explains that the interpretation of investor-State dispute settlement provisions of current and future investment agreements in Mekar holds significant interest for Bonoori

[48] Record, p.23-24
[49] Born2, p.651
[50] Resolute Forest, ¶.4.7.
[51] Apotex, ¶¶.42-43

businesses. However, it is not sufficient to be "public interest", since it would be a relatively unusual case where the outcome of an investment arbitration would have no effect on individuals and entities beyond the disputing parties.

74. Moreover, the nature of CBFI's 'asserted interest' can be better portrayed as a 'particular and professional interest' of its members, rather than being 'public'. Considering the fact that CBFI is a gathering of Bonoori investors investing in the Greater Narnian region, protection of the rights of foreign investors and prosperity of Bonoori businesses, above all, would enhance the interest of the members of CBFI who hold investment rights.

75. The public interest that they allegedly uphold, in summary, is only transparency of investment arbitration. Transparency itself could be in the public interest, considering how the *Methanex* and *Biwater Gauff* tribunals accepted amicus participation for the reason of it enhancing transparency. However, this approach is also unjustified for two reasons. 1) The third parties past Tribunals allowed amicus submission represented public interest additional to transparency. In the case of *Biwater Gauff*, their accepted third parties were sustainable development advocacy groups. 2) Adopting such an approach would make other criteria (such as different perspectives) seem irrelevant.[52] 3) Transparency is already promoted under the ICSID system and by the adoption of the Rules on Transparency. Thus, CBFI's participation as an addition would simply be redundant.

b. CBFI Does Not Provide Different Perspective

76. Article 41(3)(a) requires a different perspective. This is also in line with the requirements of transparency and public interest; amici have to be independent. Since Claimant is a member of CBFI, the perspectives of Claimant and CBFI are interchangeable. No new exclusive perspective can be gained from CBFI, due to a lack of independence of the applicant.

77. Tribunals have required that the amicus applicant be "independent".[53] This was the approach taken in *von Pezold* and *Border Timbers*[54]. In *von Pezold*, the tribunal stated that:

[52] Born2, p.652
[53] Ibid, p.654.
[54] von Pezold, ¶.49

"Tribunals agree that [an amicus curiae] should be independent of the Parties. This is implicit in Article 37(2)(a), which requires … a perspective, particular knowledge or insight that is different from that of the Parties."

The apparent lack of independence or new perspective was sufficient ground to deny the application. This implicates that Article 41(3)(a) of Arbitration AF Rules also requires consideration of an amicus applicant's independence or impartiality, based on its similarity with Article 37(2)(a) of ICSID Arbitration Rules.

78. In the present case, CBFI is dependent. Claimant is not just a member that comprises CBFI, pays membership fees, and enjoys the benefits of services including collective advocacy, but even one that stations the headquarters in the Claimant's home state, Bonooru.[55]

79. Two members of CBFI: SRB and Wiig, are currently pursuing claims against Respondent under the CEPTA.[56] Their involvement in the present case is unnecessary, and they should not be allowed to utilize privileged information obtained from this Arbitration in their own claims against Respondent.

80. Furthermore, Lapras, yet another member, is advising Claimant on funding strategies with respect to its claim against Respondent.[57] Lapras shares legal strategies and direct financial profit with CBFI.

81. In conclusion, CBFI's participation should be barred because it does not meet the necessary standards, especially public interest and different perspectives.

II. Tribunal Should Allow Amicus Submission by External Advisors To CRPU

82. Amicus submission by the external advisors to CRPU should be granted because they meet all standards presented above. They provide new perspectives to the Tribunal **[a]**, represent public interest **[b]**, and their submission addresses matters within the scope of the dispute **[c]**.

[55] Record, p.87
[56] Record, p.16
[57] Record, p.16

a. External Advisors to CRPU Provide New Perspectives

83. External advisors to CRPU engaged in the entire privatization process of Caeli in which Claimant procured investment rights by means of bribery. Nonetheless, they are independent advisors selected through a transparent and competitive process. Being experienced and independent at the same time, this unique position enables external advisors of CRPU to adduce unbiased facts and new perspectives that may not be obtained from either disputing party. Additionally, none of the advisors has received any financial or other support from the Parties on the preparation of this submission. Leveraging this unique position, external advisors of CRPU would be able to sufficiently assist Tribunal with further information and different views.

b. External Advisors of CRPU Represent Public Interest

84. External advisors of CRPU represent public interest against corruption and bribery. As they possess a general interest in promoting fair business practice, they are focused on the transparency of public utilities and provide expertise in corruption.

85. Especially, the unique position of the applicant would contribute to enhancing fairness and anti-corruption efforts which is a clear public interest. This arbitration raises important issues regarding the ability of investor-State dispute settlement to address public policy issues fairly and in an unbiased manner. Thus, the assessment of the legality of the Claimant's investment is crucial to this arbitration. The external advisors can satisfy this requirement and as they can verify the cleanliness of Claimant, who was in this investment with "unclean hands".

c. External Advisors of CRPU's Submission Addresses Matters Within The Scope Of The Dispute

86. Claimant submitted that according to Art.9.19 of CEPTA, amicus submission should be limited to the "matter within the scope of the dispute", which means only the merits. Respondent submits that the "matter" should be interpreted to include jurisdictional questions **[i]**. Even if the "matter" has limited meaning, Bribery is not limited to jurisdictional issues **[ii]** and is a legitimate defense **[iii]**.

i) Amicus Submissions Can Include Jurisdictional Issues

87. ICSID Tribunals including *Apotex, Electrabel*[58], and *Infinito Gold*[59] historically concluded that questions of jurisdiction are among the "matters" for receiving amicus submissions.[60] *Apotex* emphasized that this factor is intended to 'avoid the unnatural broadening' of the scope of the dispute.[61] *PacRim*[62] even restricted the amicus submission to jurisdictional issues.

88. If amici bring a new perspective that aids Tribunal's decision and meets other standards, there is no ground to bar its admission only on the ground that it does not relate to the "merits" of the case. Moreover, neither the CEPTA and ICSID regime rule out the possibility of jurisdictional questions, and parties have not made agreements otherwise.

ii) Bribery Is Not Limited to Jurisdictional Issues

89. Illegality and corruption not only can serve as a basis to jurisdictional issues but also can deal with the question on merits and enforcement.[63] Arbitral practice is well developed on issues of illegality and corruption in cases like *Fiona*.[64] *Soleimany*[65] case provides for the unenforceability of an award based upon an illegal contract. Therefore, even if amicus submission on jurisdictional issues cannot be allowed, the external advisors' amicus submission should be granted because bribery can be dispositive of claims on the merits and be grounds for denying enforcement.

iii) Bribery Is a Legitimate Defense

90. Corruption was accepted as defense since the ICC Case No.1110, in which the tribunal maintained that parties who entered into an agreement by bribery have forfeited any right to ask for justice in settling disputes.[66] When corruption is successfully proven, an investor

[58] Electrabel, ¶.5.32
[59] Infinito Gold, ¶¶.31–4
[60] Born2, p.649
[61] Apotex, ¶.27
[62] PacRim
[63] Pereira, ¶.2
[64] Fiona
[65] Soleimany
[66] Sicard-Mirabal, p. 182

may lose substantial investments.[67] The tribunal of *World Duty Free* declined jurisdiction because Claimant acquired its investment by bribery.[68] The same should apply to the current case, and investor protection should be denied.

91. Claimant may argue that a state, as one of the guilty parties making defense of corruption, can be seen as unfair and can also create moral hazard. However, Respondent submits that the actions of Mr. Umbridge cannot be attributed to the state; it was an individual corruption, and no moral hazard has been incentivized to the government. The profits of bribery did not benefit Respondent. Even if Claimant did not bribe Mr. Umbridge, Caeli would have been acquired by another company under the circumstance where Caeli was marketed to potential bidders. Mekari public would have enjoyed the fruits of foreign investment anyway.

92. Claimant may propose case laws that did not recognize the state's defense of corruption, such as *EDF* and *Wena Hotels* tribunal. In *EDF*, the claimant argued that the state requested bribes.[69] In the present case, Respondent did not request bribes. In both *EDF* and *Wena*, the defense was not recognized because evidence and proof were insufficient, not because the tribunal barred the state from making the defense[70]. In *Vantage*[71], the tribunal did not accept the respondent's defense because Petrobras conducted a bribery audit, so it knew or could have known of the bribery beforehand. In the present case, 1) Respondent was unaware of Mr. Umbridge's receipt of a bribe, and 2) *Vantage* was a US domestic arbitration. Therefore, those cases are not relevant to the present case.

93. Bribery falls within the scope of the dispute, which is directly related to the legality of Claimant's investment. Therefore, the external advisors to CRPU should be granted.

[67] Ibid., p.181
[68] World Duty Free
[69] EDF, ¶.221
[70] Wena, ¶.132
[71] Vantage, ¶¶.288-290

ISSUE 3. RESPONDENT'S ACTIONS DOES NOT VIOLATE THE FAIR AND EQUITABLE STANDARD UNDER ARTICLE 9.9 OF CEPTA

94. Respondent contests Claimant's allegation that Respondent has violated Article 9.9 of the CEPTA which has to do with fair and equitable treatment. Claimant's allegation deals with actions undertaken by the Mekari government, administrative bodies, and the courts.

95. Respondent submits that there has been no violation of FET obligation as CCM's investigation and measures amount to a legitimate exercise of sovereign powers **[I]**. Respondent's decree to denominate airfares in MON is within Respondent's legitimate right to regulate domestic matters for public interest **[II]**. Furthermore, Claimant's exclusion from subsidies is consistent with FET **[III]** and Claimant was treated fairly and equitably in judicial proceedings **[IV]**. Finally, challenged measures taken cumulatively do not violate FET **[V]**.

I. CCM's Investigation And Interim Measures Amount To A Legitimate Exercise Of Sovereign Powers Aimed At Regulating Anti-Competitive Behavior

a. CCM Was Authorized To Open *Suo Moto* Investigation Pursuant To MRTPA

96. Article 9.8 of the CEPTA grants Respondent the right to regulate in its territory to achieve legitimate public policy objectives, including consumer protection. [72] The two investigations and the consequent fines were properly imposed by CCM, pursuant to MRTPA.

97. Chapter III(2) of MRTPA states that CCM may open an investigation into behavior it deems anti-competitive, *suo moto* under specific conditions.[73] Chapter IV of MRTPA stipulates the definition of the anti-competitive act, including "selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor". The Chapter also defines abuse of dominant position as collaboratively engaging in the practice of anti-competitive acts or engaging in a practice that may prevent competition substantially in a market.[74]

[72] CEPTA, Article 9.8(1), p.76
[73] MRTPA, Chapter III (2), p.47
[74] MRTPA, Chapter IV (2), p.48

98. CCM's first investigation on Caeli was on whether it had adopted predatory pricing strategies with the aim of hindering competition.[75] Caeli and Royal Narnian had been engaging in preferential secondary slot-trading, which can facilitate market concentration and slot hoarding of dominant airlines, and is a form of strategic behavior, suppressing competition within the market.[76] Therefore, Respondent had to consider Royal Narnian's market share in conjunction with Caeli's as they had the liability of hoarding slots as if they were one entity. Under such circumstances, Caeli's market share exceeded 50%,[77] posing a threat to fair competition in the domestic market.

99. It is true that CCM has approved Caeli's participation in the Moon Alliance in 2011, but it must be noted that CCM also received an undertaking from Caeli that it would not engage in high-level cooperation on competition parameters especially regarding information with Moon Alliance Members.[78] Claimant could not rely on CCM's approval, because Claimant broke the condition of the approval by engaging in preferential secondary slot-trading with Royal Narnian[79], which is considered to have effects of market concentration[80].

100. Furthermore, considering the subsidies that Claimant received under Horizon 2020 program, Caeli was in a favorable position to adopt a predatory pricing strategy.[81] After thorough investigation, CCM found Caeli to have indeed adopted such measures resulting in a threat to competition in the market.[82] After the second investigation, CCM also concluded that Caeli was engaging in anti-competitive behaviors.[83]

101. Pursuant to Chapter III (4) (d) of MRTPA, the Tribunal shall have the power to impose fines which it deems just under Mekari law and proportionate to the infringement committed.[84] As the fines were based on reasonable investigations aiming to bring Respondent in line with MRTPA, they do not breach Article 9.9(2) of the CEPTA and do

[75] Facts, p.34, line 1150
[76] Noto, p.3
[77] Facts, p.34, line 1150
[78] Facts, p.32, line 1045
[79] Facts, p.34, line 1155
[80] Noto, p.3
[81] Facts, p.34, line 1155
[82] Facts, p.36, line 1240
[83] Facts, p.37, line 1285
[84] MRTPA, Chapter III (4), p.47

not constitute arbitrary or discriminatory action.[85]

b. CCM's Investigation Cannot Be Considered As A Frustration Of Claimant's Legitimate Expectations

102. Investment tribunals adopted the concept of legitimate expectation of the investor in assessing the violation of the FET standard since *CME* and *Tecmed*.[86] *Tecmed* tribunal clarified that the foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor.[87] The tribunal especially highlighted that the state authority must provide an "*explicit, transparent and clear warning*" to the investor.[88]

103. Even before the Claimant's investment was approved, Claimant was sufficiently notified that any anti-competitive behavior would be subject to investigation.[89] Mekari representatives in Caeli's board consistently warned Claimant about its extravagant approach.[90] Thus, Claimant cannot contend its frustration of legitimate expectation.

104. Even if Claimant were to argue that such explicit assurance is not always necessary, as was mentioned in *Saluka*[91] and *Electrabel*[92] tribunal, Claimant's expectation that it would not be subject to any kind of domestic investigation is unfounded. Claimant could have reasonably expected that it would be subject to the investigation should the need arise, based on Article 9.8 of the CEPTA and Chapter III and IV of the MRTPA as was elaborated in detail above.

c. Interim Measures Imposed On Claimant Were Reasonable

105. Pursuant to Chapter III (4) (d) of MRTPA, Mekar's tribunal has the power to impose any interim and final remedy it deems just under Mekari law to bring a corporation in line with this act.[93] The airfare caps imposed on Claimant were temporary measures resulting

[85] CEPTA, Article 9.9(2), p.76
[86] Levashova, p.118
[87] Tecmed, ¶.154
[88] Tecmed, ¶.160
[89] RNoA, p.7, line 235
[90] Facts, p.33, line 1105
[91] Saluka, ¶.329
[92] Electrabel, ¶.7.78
[93] MRTPA, Chapter III (4), p.47

from clear evidence of Caeli's anticompetitive behavior and as soon as Caeli's market share fell below 40%, the cap was lifted.[94]

106. Moreover, Caeli never protested the airfare caps at the time.[95] In fact, Claimant conceded that the airfare caps were reasonable.[96] Accordingly, it was reasonable to assume that such caps were proportionate to the infringement committed and only to the extent necessary to bring the infringement effectively to an end.[97]

II. Requirement Of Goods And Services To Be Denominated In MON Is Within Respondent's Legitimate Right To Regulate Domestic Matters In The Public Interest.

107. Respondent's decision requiring all companies operating in the country to offer goods and services denominated exclusively in MON is within its legitimate right, thus it does not constitute a breach of Article 9.9 of the CEPTA. As mentioned in the *Tecmed* tribunal, a host state has the inherent right to regulate in the interest of the public.[98]

108. Claimant argues that the denomination has carelessly unaccounted for the foreign investor, but *Glamis Gold* Tribunal agreed with the premise that governments would be "bound and useless" if they were obliged "to please every constituent and address every harm with each piece of legislation".[99]

109. Numerous investment tribunals found that a *bona fide* non-discriminatory regulatory measure in the purpose of the common good and in accordance with due process is not construed as expropriation.[100] Respondent's decree satisfies the conditions for lawfully exercising a state's right to regulate under the FET standard as its objective is considered legitimate **[a]** and the decision itself and its implementation can be assessed lawful under the principles of 1) reasonableness, proportionality, and the prohibition of arbitrariness; 2) non-discrimination; and 3) transparency **[b]**.[101]

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[94] Facts, p.38, line 1335
[95] RNoA, p.7, ¶.13, line 240
[96] NoA, p.3, ¶.15
[97] MRTPA, Chapter III (4), p.47
[98] Tecmed, ¶.119
[99] Glamis, ¶.804
[100] El Paso, ¶¶.234, 240; Chemtura, ¶.266; Feldman, ¶.103
[101] Levashova, p.174

a. Respondent's Measures Were Enacted In Furtherance Of A Legitimate Objective

110. Respondent's decision to denominate market prices in MON was, as a legitimate public policy objective, to achieve a stable economy during an economic crisis. The *Saluka* tribunal stated two elements concerning the objective of the state's measure; first, the measure should strive to address the public interest, and second, the public interest has to be reasonably justifiable by public policies.[102] In specifying the public interest, *Mamidoil* tribunal considered the inevitable changes in the social, economic environment.[103]

111. As the Decree's stated objective was to stabilize MON there is no doubt that the objective was to address the public interest. Due to the currency collapse, high foreign-currency debt, and increasing inflation, Respondent was suffering from a severe economic crisis.[104] The public interest was also justifiable in that the IMF emphasized Mekar is in "need to establish credibility in the [local] currency to avoid a debilitating economic situation."[105]

b. Respondent's Measure Is Lawful Under The FET Standard According To International Law Principles

112. Respondent's measure is lawful under the FET standard according to the international law principles of **[i]** reasonableness, proportionality, and the prohibition of arbitrariness, **[ii]** non-discrimination, and **[iii]** transparency.[106]

i) Respondent's Measure Was Reasonable And Proportionate To The Aim Sought

113. In assessing reasonableness or proportionality of state's measures, Ortino explains that Tribunals employ three-pronged tests, which are suitability test, necessity test, and proportionality *stricto sensu* test.[107]

114. Denominating market prices in MON was both a suitable and necessary option in stabilizing the Mekari market, as it reaffirmed the credibility of the currency in a

[102] Ibid, ¶.175
[103] Mamidoil, ¶.617
[104] Facts, p.35, line 1185
[105] Facts, p.35, line 1190
[106] Levashova, p.204
[107] Ortino, p.87

deteriorating market. The denomination decree might have put a burden on Claimant. However, the benefit of restoring the credibility of MON outweighed the disadvantages for an investor then, passing the proportionality *stricto sensu* test. Even if it were not the case, tribunals often rely only on suitability and necessity tests in assessing the reasonableness or proportionality of state's measures as they found the third test to be intrusive.[108]

115. Moreover, it is difficult to argue that there was an excessive or disproportionate impact on the Claimant's interests. Claimant's risky strategies and the pandemic precipitated the airline's downfall, not the policy decisions made from necessity by Respondent. Even before the Respondent's measure in January 2018, Claimant was suffering from its inability to secure a steady revenue as of July 2017.[109]

ii) Respondent's Measures Were Enacted In A Non-Discriminatory Manner

116. A regulatory measure is deemed discriminatory only when the investor proves the existence of different treatment for different parties in "like circumstances", the parties being defined as investors in the same economic or business sector.[110] Furthermore, the absence of a "reasonable justification" is another criterion underlined to determine discriminatory treatment.[111]

117. In the present case, Respondent's decree was applied to all companies including airlines to stabilize the economy and restore credibility in MON, meaning there was reasonable justification and no discrimination.[112] However, if Respondent acceded to Claimant's requests[113], it would have been discriminatory to other companies. Thus, the Respondent's decree itself, its implementation on all companies, and the refusal of Claimant's requests are all non-discriminatory.

[108] Levashova, p.206
[109] Facts, p.35, line 1195
[110] Parkerings, ¶371
[111] Saluka, ¶.313, Elactrabel, ¶.175
[112] Facts, p.35, line 1210
[113] Facts, p.36, line 1215

iii) Respondent's Implementation Of Its Measure Did Not Violate The Principle Of Transparency

118. The requirement of transparency is fulfilled when the foreign investor may know beforehand any and all rules that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.[114]

119. In fact, the decree falls within Article 9.8(2) of the CEPTA. The article provides that the state has the right to regulate to achieve such objectives and clarifies that the regulation can include modification to its laws, "in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits".[115] Therefore, Respondent had the right to shift the economic policy to deal with the urgent crisis with no issue of transparency.

III. Claimant's Exclusion From Executive Order 9-2018 Is Consistent With FET.

120. Claimant asserts that the exclusion of Caeli from subsidies under Executive Order 9-2018 constitutes arbitrary discrimination.[116] However, an investor treated differently in comparison to another investor is insufficient to establish a breach of the FET standard.[117] The *Saluka* tribunal held that state assistance violates the FET standard if "(i) similar cases (ii) are treated differently and (iii) without reasonable justification".[118] Similarly, the *Electrabel* tribunal held that "*comparators must be materially similar; and there must then be no reasonable justification for differential treatment*".[119]

121. In short, Claimant's application for subsidies was denied because Caeli was not similar to other airlines **[a]**; there was reasonable justification for its exclusion **[b]**; and could not have legitimately expected the subsidies **[c]**.

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[114] Tecmed, ¶154
[115] CEPTA, Article 9.8(2), p.76
[116] NoA, ¶18.
[117] Levashova, p.215
[118] Saluka, ¶.313
[119] Electrabel, ¶.175

a. Claimant's Position Was Not Comparable To Other Airlines

122. Claimant draws false equivalences with Star Wings and JetGreen, which received subsidies under Executive Order 9-2018, in addition to separate subsidies provided by their home jurisdictions.[120] The important factor was not whether airlines had a record of receiving subsidies, but whether they were state-owned airlines that possessed "unique advantages over other companies that enable them to outcompete privately owned firms".[121]

123. In this regard, Respondent was consistent in denying subsidies to state-owned airlines. Caeli and Larry Air were the only two airlines owned in any significant part by a foreign government operating in the Respondent's market.[122] Facts show that neither airline received subsidies under Executive Order 9-2018.[123]

b. There Was Reasonable Justification For Claimant's Exclusion

124. States have a "*wide scope of discretion to determine the exact contours of a measure*" if a reasonable measure is related to a rational policy.[124] In this case, such a measure cannot be deemed arbitrary.[125] A rational policy requires a logical explanation and the purpose of addressing a matter of public interest.[126]

125. As stated in Executive Order 9-2018, the Secretary of Civil Aviation is granted discretion to approve the subsidies if it determined, *inter alia*, that "necessary credit is not reasonably available" and that the subsidies would "not skew market conditions in favor of one or more enterprises".[127]

126. Claimant had "near assurances" that its home country "would step in if anything bad were to happen".[128] Indeed, Bonooru eventually initiated a bail-in program through the

[120] NoA, ¶.18; Facts, p.36, ¶.46
[121] Facts, p.36, ¶.46
[122] Facts, p.37, ¶.47
[123] Ibid.
[124] Electrabel, ¶¶.179-180
[125] Saluka ¶.307; Micula, ¶.525
[126] AES, ¶.10.3.7-10.3.9
[127] Record, p.56
[128] ANNEX IX, p.57, line 1950

AIRA to provide assistance to Claimant.[129] Moreover, given that Claimant later rejected a loan offer by the bank First National Phenac,[130] it is questionable whether Claimant did not have the necessary credit available. While the offered interest rate may have been "inflated", it was not unreasonable considering Claimant's CCC+ rating and long-standing debts.[131]

127. Moreover, given Claimant's business practices, it was evident that granting subsidies under Executive Order 9-2018 would have skewed the airline market. The CCM's investigation made it clear that Claimant had previously taken advantage of government-issued subsidies to increase its market cap by undercutting the local competition.[132]

c. Claimant Could Not Have Legitimately Expected To Receive The Subsidies

128. Legitimate expectations are to be evaluated at the time the investment is made.[133] When Claimant acquired Caeli, there had been no clear assurances from Respondent that it would be acquitted of its own irresponsible business strategy and receive subsidies.

129. Given Claimant's close ties with its home country, there was no reason for Claimant to have expected a bailout specifically from Respondent. As noted earlier, Bonooru eventually initiated a bail-in program to provide financial assistance to Claimant.[134]

IV. Claimant Was Treated Fairly And Equitably In Judicial Proceedings

130. Article 9.9 of the Agreement lists "denial of justice" and "fundamental breach of due process" as sub-categories of the FET standard. Tribunals have recognized the relevance of the two sub-categories,[135] viewing denial of justice as an aspect of due process[136] or vice versa.[137]

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[129] Facts, ¶64
[130] Facts, ¶51
[131] Ibid.
[132] Facts, p.34
[133] AES, ¶.9.3.8; CMS, ¶.275; Enron, ¶.264; Mamidoil, ¶.695; Tecmed, ¶.157
[134] Facts, p.40 ¶.65
[135] Radi, p.95
[136] Spyridon, ¶.315
[137] ITGC, ¶.197

131. Commentators and tribunals agree that the legal test for establishing denial of justice or breach of due process under the FET standard has a high threshold.[138] The *Chevron* tribunal held that it would "require shock and surprise amounting to discreditable improprieties and the failure of the whole national system",[139] and other tribunals have used terms such as "manifest injustice",[140] "an act which shocks, or at least surprises, a sense of judicial propriety",[141] or "fundamentally unfair proceedings and outrageously wrong, final and binding decisions".[142]

132. Claimant's submissions regarding judicial proceedings can be categorized into three broad claims: there was unreasonable delay **[a]**; cases were dismissed prematurely **[b]**, and an annulled award was unjustly enforced **[c]**. While Claimant may have been unsatisfied with the final verdict, there was no breach of the FET standard.

a. Claimant Did Not Suffer Unreasonable Delays In Court

133. Claimant contends that its cases had "significant delays in hearing urgent matters".[143] However, as held by the *Jan de Nul* tribunal, being "unsatisfactory in terms of efficient administration of justice" does not equate to a violation of the FET standard.[144] Moreover, developing countries with "overstretched judiciaries" must also be given special consideration when determining a breach of the FET standard for judicial proceedings.[145]

134. Claimant was involved in three legal cases in Respondent's courts. All three cases took far less than the national average of 27 months for commercial cases.[146]

135. Claimant also cannot argue that its legitimate expectations were frustrated due to the delay. Claimant should have known that the domestic court structure was "overburdened".[147] The average time to receive a final decision in the Respondent's courts

[138] O'Connell, p.948; Liman Caspian, ¶.274; Rumeli, ¶¶.651-653; RosinvestCo, ¶.279; Biwater Gauff, ¶.597
[139] Chevron, ¶.8.40
[140] Loewen, ¶¶.57-58
[141] ELSI, ¶.128
[142] Arif, ¶.537
[143] NoA, ¶.20
[144] Jan de Nul, ¶.204
[145] White Industries, ¶.10.4.18
[146] Facts, ¶.13
[147] White Industries, ¶10.3.13

was on the rise since 1980.[148] Claimant entered the domestic airways industry in 2014,[149]so Claimant should have been aware of the predicament.

b. Claimant's Case Was Appropriately Dismissed

136. Claimant further contends that its case was "dismissed prematurely",[150] seemingly referring to the fact that its motion for a stay on airfare caps in 2018 was denied, and the fact that the appeal regarding CCM decisions was dismissed by a way of summary judgment.[151]

137. First, given that hearings on the merits were already scheduled, denying Claimant's request for a separate hearing cannot be seen as "manifestly unfair or unreasonable".[152] Even though other parties also made similar requests seeking for immediate redressal, they were similarly denied due to the limited resources available to the courts.[153] Although Respondent concedes that it was not the most desirable outcome, state judiciaries are entitled to some measure of inefficiency, trial, and error, or imperfection.[154]

138. Second, Executive Order 5-2014 explicitly granted courts the ability to dismiss without appeal a case by way of summary judgment if the judge finds there is very little chance of success.[155] Therefore, there was no "breach of municipal law" which was "discriminatory against the foreign litigant".[156]

c. Courts Appropriately Exercised Discretion To Enforce A Set-Aside Arbitral Award

139. Claimant contends that enforcing an award that is set aside at the seat "grossly violates international conventions" and the Respondent's domestic law.[157] However, neither of these claims are sufficiently substantiated.

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[148] Facts, ¶13
[149] Facts
[150] NoA, ¶.20
[151] Facts, ¶.44; PO3, ¶.8
[152] AES, ¶.9.3.40
[153] Facts, ¶.44
[154] Eastern Sugar, ¶.272
[155] PO3, ¶.8
[156] Loewen, ¶.135
[157] NoA, ¶.27

140. First, the permissive language of Article V(1)(e) of the NYC, resulting from the term "may", grants domestic courts the power to *deny* or *approve* enforcement of an award that has been annulled at the arbitral seat or primary jurisdiction. As a result, courts have reached varying conclusions; i.e. French courts have noted that "an award which has been annulled in the seat may be recognized".[158] The Belgian court in *Hydrocarbures*[159] and the Austrian Supreme Court in *Radenska*[160] have reached similar conclusions.

141. The bottom line is that there is no set jurisprudence on whether annulled awards may be enforced, and therefore the enforcement of an annulled award by Respondent cannot amount to a shock to "a sense of judicial propriety".[161]

142. Second, the Commercial Arbitration Act is stipulated so that courts can determine whether to enforce arbitral awards. Section 36 states that (emphasis added):

> *(1) Enforcement of a foreign award **may** be refused […]*
>
> *(2) Enforcement of an arbitral award **may** also be refused if the court finds that […]*

143. Given the operative word '*may*' in the articles of Section 36, much like Article V(1)(e) of the NYC, the decision to enforce an annulled award is consistent with domestic laws.

V. The Challenged Measures Do Not Violate The FET Standard Even If They Are Taken Cumulatively

144. Respondent has so far demonstrated that its actions taken individually do not violate the FET standard. Claimant, however, attempts to make the final argument that the Respondent's actions "taken together" violate the FET standard.

145. In any event, Claimant's position lacks merit even if the theory of the *creeping violations* of FET[162] were to apply, because there is neither proof of systematic policy **[a]** nor common intent or purpose **[b]**.

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[158] Born1, p.3975
[159] Hydrocarbures, ¶.370
[160] Radenska, p.92
[161] ELSI, ¶.128
[162] El Paso, ¶.518

a. There Is No Evidence Of A Systematic Policy

146. For Claimant's position to stand, Claimant must establish that the challenged measures were a part of *systematic* state practice. The *Rompetrol* tribunal held that a "scattered collection of disjointed harms" cannot constitute a breach of FET by a cumulative act.[163] In order to determine whether a cumulative breach existed, tribunals have analyzed whether the "respondent conceived and then executed a plan",[164] or if there was "a clear link" between "series of events".[165] Notably, the *Rusuro* tribunal held that there must be a linkage to "justify that the totality of acts be considered as a unity". [166]

147. Such a requirement of systematic policy is supported by the interpretation of ARSIWA Article 15. The ILC has interchangeably used the terms 'systematic' and 'composite' while drafting ARISWA.[167] It further noted that a systematic violation "would have to be carried out in an organized and deliberate way".[168]

148. In this regard, Claimant failed to show any link or presence of systematic policy among the challenged measures, other than the fact that Claimant was affected by them. The challenged measures were implemented independently by different governmental agencies based on different policy agendas.

b. There Is No Evidence Of Collective Purpose Or Intent

149. Specifically, tribunals have held that a cumulative breach would require challenged measures to form a pattern of conduct with common intent. The *Rompetrol* tribunal explicitly held that "different actions pursued on different paths by different actors" must be "linked together by a common and coordinated purpose".[169] Similarly, the *Gavrilovic* tribunal dismissed a composite breach argument by Claimant, because there was no

[163] Rompetrol, ¶.271
[164] Marfin, ¶.864
[165] Tatneft, ¶.330
[166] Rusuro, ¶.229
[167] Crawford, p.39
[168] ILC1, p.113
[169] Rompetrol, ¶.147

"deliberate campaign on the part of respondent". [170] The ILC also emphasized that composite acts require "same purpose, content and effect". [171]

150. The facts do not support Claimant's narrative that the challenged measures were part of a deliberate action intended to frustrate Claimant's expectations. Claimant ignores the fact that departments, committees, and other state organs have different mandates and roles.

151. In conclusion, there is no evidence beyond "pure probability or circumstantial inference"[172] that Respondent formed a cumulative breach of the FET standard.

[170] Gavrilovic, ¶.1135
[171] ILC2, p.93
[172] Rompetrol, ¶.273

ISSUE 4. MV IS THE APPROPRIATE COMPENSATION STANDARD; IN ALTERNATIVE, REDUCTION OF COMPENSATION SHOULD BE CONSIDERED

152. Respondent submits that the "MV" is the appropriate compensation standard based on the agreement in the CEPTA, and Tribunal should find that Respondent had already purchased the Claimant's investment at an appropriate amount.[173] Should Tribunal find otherwise, Respondent requests for a reduction of the compensation based on the Claimant's contributory fault.[174]

I. Respondent Has Already Purchased The Claimant's Investment At "MV" And Tribunal Should Award Claimant No Compensation

153. Claimant asserts that the Tribunal should apply FMV compensation standards according to both principles of international law and the MFN obligation contained in CEPTA.[175]

154. Nevertheless, Respondent rejects that such international law exists for appropriate compensation. Further, MFN is not applied for the valuation of compensation based on *ejusdem generis* and CEPTA. Hence, Respondent serves no obligation to pay the USD 700 million as Respondent had already paid USD 400 million upon sale of the assets.[176]

a. Customary International Law Does Not Exist For Valuation Of Compensation

155. The Claimant's contention of utilizing FMV as compensation standard lacks logical basis in international law.[177] In fact, Respondent submits that a standardized principle for "appropriate compensation" does not exist.[178]

156. FMV has been widely used as the compensation standard for many cases of breach of treaties.[179] Despite several instances of investment treaties, ILC is the accepted customary

[173] Record, p.9, ¶21
[174] Ibid., p.9, ¶22
[175] Ibid., p.5, ¶30
[176] Ibid., p.87, ¶15
[177] Ibid., p.5, ¶30
[178] Ibid., p.13, ¶18
[179] Sabahi, p.730; Sicard-Mirabal, p.144; Sicard-Mirabal, p.84

international law that provides rules on reparation when the primary rules of international law are breached.[180] Article 31 of the ILC Articles on State Responsibility states:

"The responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act."[181]

This customary international law standard of '*full reparation*' does not necessarily determine valuation methodology and calculation methods.[182] Rather, quantification of damages and valuation may vary according to each tribunal.[183]

157. Thus, while FMV may have been used as a 'prompt, adequate, and effective' method for compensation, it is not settled to be customary international law.[184] Consequently, CEPTA should be the sole source of international law, and according to Article 9.21(1) of the CEPTA, MV should be the standard of compensation.[185]

b. MFN Cannot Be Applied For Valuation Of Compensation

158. Article 9.7 of the CEPTA illustrates MFN treatment for the parties.[186] Based on this clause, Claimant demands compensation in FMV in a similar fashion under which Arrakis was granted compensation according to FMV under Arrakis-Mekar BIT.[187]

159. Nonetheless, Respondent submits that the MFN clause of the CEPTA does not grant Claimant excuses to adopt substantive protection from the third-party treaty **[i]** and its application should be narrowly interpreted based on CEPTA **[ii]**.[188]

i) The MFN clause of the CEPTA does not grant Claimant excuses to adopt substantive protection from third-party treaty

160. Claimant's argument for the application of FMV is similar to the unaccepted argument made by the Claimant in *Muhammet Çap & Sehil* tribunal in that both tried to refer to a

[180] Sicard-Mirabal, p.223
[181] Ibid., p.223-224
[182] Sicard-Mirabal, p.145; Murphy, ¶481
[183] Sabahi, p.730
[184] Sicard-Mirabal, p.222.
[185] Record, p.82
[186] Ibid., p.76
[187] Ibid., p.84
[188] Sicard-Mirabal, pp.153-154; Plama, ¶118

third-party treaty for seemingly "more favorable" investor protection under MFN clause and *ejusdem generis* principle.[189]

161. In the context of MFN clauses, *ejusdem generis* means that only rights falling within the limits of the subject matter of the clause can be claimed under MFN clause.[190] *Muhammet Çap & Sehil* tribunal clarified the *ejusdem generis* principle by stating that Claimant cannot refer to MFN clauses and the principle as an excuse to "import substantive guarantees from a third party treaty," just because they look more favorable and different treaties contain similar subject matter.[191] In other words, the Tribunal saw that *ejusdem generis* is necessary only when MFN provisions are broadly articulated, and there is no need to refer to the principle when there is already the definite scope of the subject matter.[192]

162. Article 9.7 of the CEPTA narrows the scope of the subject matter of the MFN clause and excludes expropriation and compensation.[193] This means that Claimant's argument that the Tribunal should accept FMV instead of MV under MFN clause is unreasonable under the strict interpretation of *ejusdem generis.*

ii) MFN should be restrictively interpreted based on the CEPTA

163. Claimant may argue that *ejusdem generis* is not a matter of mandatory rule, rather it is a matter of appropriate interpretative discretion.[194] The ILC explained the rule to be 'an autonomous set of legal rules relating to MFN clauses', hence some parties have attempted to extend the treatment of MFN.[195] However, Respondent argues these attempts have not been persuasive and precedent cases do not reveal any new general principles to guide this dispute.[196]

[189] Muhammet Çap & Sehil, ¶.550
[190] Ibid.
[191] Muhammet Çap & Sehil, ¶ ¶.786, 788
[192] Muhammet Çap & Sehil, ¶.785
[193] Record, p.76
[194] Calamita, p.405
[195] Calamita, p.408
[196] Ibid.

164. In *Plama*, the tribunal ruled that the MFN clause cannot replace the dispute settlement system that had already been agreed to.[197] *Plama* tribunal emphasized that the States could not have intended that dispute resolution provisions in the BIT may be substituted by others imported by operation of the MFN clause unless it is explicitly provided for in the treaty itself.[198] It specifically stated:

'[t]he intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed' to propose restrictive interpretation for MFN.[199]

165. In sum, the *Plama* tribunal implies (i) MFN clause is not to be extended and applied broadly, and (ii) the precedent is non-binding in international investment law. Further, this case shares more similarities with *Plama* since the CEPTA includes specific areas for application of MFN in contrast to *Maffezini*'s "all matters."[200] Hence narrow interpretation based on the MFN clause in the CEPTA is reasonable.

c. Parties Have Consented To Apply MV Standard And Respondent Has Already Paid The MV By Purchasing Its Stake In Caeli

166. As MFN is not applied, parties should execute Article 9.21 of the CEPTA and use MV as the compensation standard.[201] While Claimant suggests a possibility of interpreting MV in Article 9.21 as FMV, this argument lacks justification. Unlike how the 2006 Arrakis-Mekar BIT clearly agreed to and mentioned "FMV" in Article 13,[202] the CEPTA explicitly outlines "MV."[203] Further, there is no room for extensive interpretation since both parties distinguish situations that FMV – instead of MV- should be utilized in Article 9.12 in the CEPTA.[204]

167. Tribunal should assess market value based on the CEPTA. Applying MV, compensation value is USD 400 million which had already been provided through the

[197] Sicard-Mirabal, p.153; Plama, ¶.240(c)
[198] Sicard-Mirabal, p.58; Plama, ¶.212
[199] Plama, ¶.204
[200] Calamita, p.409; Record, p.76
[201] Record, p.82
[202] Record, p.87
[203] Ibid., p.82,
[204] Ibid., p.78.

purchase of the Claimant's investment.[205] Thus, Respondent owes no compensation to Claimant.

d. Claimant's estimation of Caeli's value does not meet the standards of FMV

168. Even if the award is to be assessed in FMV, Claimant's estimation of Caeli's value does not conform to general understandings of FMV. Tribunals such as *El Paso* Tribunal adopted the definition of FMV provided by the International Glossary of Business Valuation Terms, which defines the term as the price when neither buyer nor seller is under compulsion to buy or sell.[206] As Caeli was experiencing a drastic decline of market share with burgeoning liabilities, Claimant was eager to get rid of its investment, which pointed towards Claimant's "compulsion to sell".[207]

169. For an offer to be considered FMV of the investment the parties must also not act at an arm's length when negotiating the price.[208] However, the potential buyer, the Hawthorne Group, was presumed to have been in association with Claimant, suggesting the negotiated price was inflated.[209]

II. Tribunal Should Reduce Any Compensation Awarded Considering The Claimant's Contributory Fault And The Ongoing Economic Crisis In Mekar

170. In case Claimant's contention of applying FMV for compensation is accepted, Respondent requests the Tribunal to reduce any compensation awarded considering the Claimant's contributory fault and the ongoing economic crisis in Mekar.[210]

171. There is no direct agreement on the possibility of reducing compensation. However, Respondent contends that general law exists to mitigate damages based on contributory fault and that the doctrine of abuse of rights includes consideration of financial condition of Respondent.

[205] Ibid., p.9, p.26, p.87.
[206] El Paso, ¶.702
[207] Facts, p.38
[208] Tenaris and Talta, ¶.557
[209] Facts, p.39
[210] Ibid., p.9.

a. Tribunal Should Consider Contributory Fault To Reduce Compensation Awarded To Claimant

i) Consideration Of Contributory Fault When Valuing Compensation Is Accepted Under General Law

172. There exists a broad acceptance that a victim's willful or negligent conduct that has materially contributed to the injury caused by an internationally wrongful act should be considered when determining compensation.[211] Even though the principle of 'contribution to the injury' initially emerged in the context of inter-State relation, tribunals have increasingly relied upon a contributory fault in investor-State dispute settlement.[212]

173. Article 39 of the ILC's Draft on Responsibility of States for Internationally Wrongful Act ('ILC Articles') recognizes that the conduct of the injured State, or of any person or entity in relation to whom reparation is sought, should be considered in assessing the form and extent of reparation.[213]

174. Article 7.4.7 (Harm due in part to aggrieved party) of the UNIDROIT Principles also stipulates that where the harm is due in part to an act or omission of the aggrieved party, or to another event for which that party bears the risk, the number of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties.[214]

175. Many tribunals have also relied upon it to address investor misconduct and have reduced the compensation to be paid to Claimant accordingly.[215] Hence, Respondent contends that the Claimant's actions fulfill the conditions for contributory negligence, and the negligence should be considered for reduction of compensation.

ii) Claimant's Risky Business Choices Can Be Held As A Contributory Fault

176. There are generally no accepted principles for the calculation of damages,[216] but risky business decisions are frequently considered as a contributory fault.[217]

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[211] Glamis, ¶.8; Marcoux, p.878
[212] Marcoux, p.883
[213] García Cueto, p.616
[214] Komarov, p.52
[215] MTD; Occidental; Hulley; Veteran; Yukos2; Copper
[216] García Cueto, p.614
[217] Marcoux, p.884

177. *MTD* represents the largest damages reduction for an investor's fault, at a rate of 50%.[218] In this case, decisions made by the investors were addressed under the rubric of contributory fault.[219] While the tribunal recognized that there is no 'exact explanation' of the calculation for damages, the tribunal explained the "contribution must be material and significant*".*[220]

178. Tribunals after *MTD* mentioned '*material* and *significant*' injury as a standard for contributory fault, but they did not necessarily require thorough verification of 'unclean hands'.[221] Rather, proving a broad spectrum of contributory negligence and signs of failure to mitigate damages that are within a reasonable projection of risk was enough.[222]

179. In the present case, Claimant took an extravagant approach, funneling funds towards rapid expansion and ill-strategized plans instead of tending to financial health.[223] Claimant pursued this risky strategy while it was or should have been aware of market volatility and against clear warnings of Respondent.[224] This approach to rapid expansion put Claimant in a precarious situation when Respondent had to denominate prices in MON.[225] As a result, Caeli experienced an economic downturn and the enterprise was abandoned at its own volition.[226] In sum, Claimant has clearly had a broad spectrum of *material* and *significant* contribution to the losses and should be held accountable for their negligence.[227]

b. Tribunal Should Consider Economic Crisis To Reduce Compensation Awarded To Claimant

180. The doctrine of abuse of right denotes circumstances whereby an actor is prohibited from improperly exercising otherwise legitimate legal rights.[228] The judicial basis for application of the doctrine is found either in the general principle of law recognized by

[218] García Cueto, p.621; MTD, p.41, ¶.101
[219] Marcoux, p.884
[220] MTD, p.41
[221] Occidental, ¶670; García Cueto, p.624
[222] Yukos2; García Cueto, p.624; Burlington
[223] Record, p.7, ¶.11
[224] Ibid.
[225] Ibid., p.8, ¶.14
[226] Ibid., p.8, ¶.18
[227] Ibid, p.9, ¶.22
[228] Jagusch, p.182; Briggs, p.164

civilized nations under Article 38(1)(c) of the ICJ Statute,[229] or in customary international law.[230] Others view the doctrine of abuse of rights as a manifestation of the broader principle of good faith which is considered a 'fundamental principle of every legal system.'[231]

181. Tribunals further took account of the potential impact on the host, especially when the compensation was 'likely to entail catastrophic repercussions for the economic well-being of the population.'[232] Since the abuse of rights takes account of situations in which the exercise of a legally protected right by one party may result in unacceptable injury to an adverse party or to broader societal interests,[233] the potential economic impact on the host government is an obvious factor.[234]

182. Respondent has faced a tumultuous path to economic recovery since the decline of the Pevensian empire.[235] Mekar has maintained a cautious approach to economic governance for this reason, even when the CEPTA was concluded in 2014.[236] Trust in MON has been fragile ever since the beginning of the economic crises, and inflation was catastrophic.[237] Based on this economic situation, Mekar would have to transfer about twice its consolidated annual public spending to Claimant to pay the USD 700 million that Claimant demands.[238] Thus, the Claimant's request of USD 700 million plus interest is considered as an abuse of rights, leaving the Respondent's ongoing economic crisis out of consideration.[239]

[229] Statute of the ICJ; Lauterpacht, p.38
[230] Jagusch, p.183
[231] Jagusch, p.182; Australia, ¶.46; New Zealand, ¶.49
[232] CME, ¶¶.77,79
[233] Petrova, p.463
[234] Weisburg, p.178
[235] Record, p.7, ¶8
[236] Ibid., p.7, ¶9
[237] Ibid., p.8, ¶14
[238] Ibid., p.86, ¶4
[239] Ibid., p.5, ¶31

REQUEST FOR RELIEF

183. Respondent respectfully requests Tribunal to adjudicate and declare that:

1. Tribunal lacks jurisdiction under the CEPTA;

2. Amicus submission by the external advisors to CRPU is allowed;

3. Amicus submission by CBFI is barred;

4. Respondent has complied with the CEPTA;

5. In case Tribunal finds Respondent violated the CEPTA, any compensation awarded should be reduced considering Claimant's contributory fault and the ongoing economic crisis.

Respectfully submitted on 22 September 2021

On behalf of the Respondent

The Federal Republic of Mekar