2021 FDI MOOT COURT COMPETITION

ARBITRATORS' BRIEF

1 INTRODUCTION

1.1. This brief outlines the principal issues and sub-issues that teams are expected to address in course of their written and oral pleadings for the 2021 FDI Moot Court Competition.

1.2. The arguments advanced in this brief in respect of such issues are merely indicative of possible paths that teams may take; this brief does not purport to exhaustively envisage all the persuasive arguments that teams may present in relation to any issue. Arbitrators should be open to other arguments presented by teams with sufficient legal and factual support. Further, the case law discussed in the brief is merely suggested reading for arbitrators to help them understand the issues at hand. Any case laws mentioned in this brief are not *ipso facto* relevant for the parties' arguments. Teams may cite any number of cases in addition to/apart from the ones identified in this brief in support of their contentions.

1.3. This brief is confidential and is only meant to facilitate the arbitrators' review of oral and written pleadings. It is not meant to be shared with the participants at any point during the competition.

2 OVERVIEW OF THE CASE

2.1. The case for the 2021 FDI Moot Court Competition concerns an investment by Vemma Holdings Inc. (Vemma or the Claimant), a company incorporated in Bonooru, in Caeli Airways JSC, an airline based in Mekar (the Respondent). Following severe losses to its investment between 2017 to 2020, Vemma sells its stake in Caeli Airways to Mekar in 2020. Vemma considers Mekar responsible for its losses and files a notice of arbitration seeking USD 700 Million in damages.

Table I: Factual Background

Claimant	Vemma Holdings Inc is an airline holding company incorporated in the Commonwealth of Bonooru. Vemma has 100% ownership in Royal Narnian, the flag-carrier of Bonooru.
Respondent	The Republic of Mekar is a State in Greater Narnian Region that has historically seen prolonged political instability and slow economic reforms. The capital of Mekar is Phenac, which is home to the Phenac International Airport. Mekar's currency is the MON.
Investment	As part of a privatisation program, Mekar decided to sell a controlling stake in the State-owned national carrier, Caeli Airways. Mekar set up a competitive bidding process for this purpose, securing bids from various airlines. Vemma acquired an 85% stake in Caeli Airways. As part of its purchase, Vemma inherited existing discounts on airport services and landing and navigation fees enjoyed by Caeli Airways at Phenac International Airport, along with twelve relatively young A340 aircraft. Mekar maintained a 15% ownership in Caeli Airways through Mekar Airservices Ltd.
Treaty	In April 2014, Mekar and Bonooru signed the Comprehensive Economic Partnership and Trade Agreement (CEPTA). The agreement entered into force on 15 October 2014. Mekar and Bonooru agreed to terminate the pre-existing BIT on 15 October 2014. Article 1.6 of the Treaty provides that investments made under the 1994 Bilateral Investment Treaty between Bonooru and Mekar shall be governed by the CEPTA starting from the date of entry of its into force.

2.2. A tribunal has been established under Chapter 9 of the Bonooru-Mekar Comprehensive Economic Partnership and Trade Agreement (the CEPTA) and Article 2 of the ICSID Additional Facility Rules (ICSID AF Rules) to adjudicate this dispute.

2.3. There are four issues that teams must address in the course of their submissions:

a. Whether the claimant is a state-owned or state-controlled enterprise precluded from initiating arbitration under the ICSID AF Rules?

b. Whether the tribunal should grant the applications for leave to file *amicus curiae* briefs?

c. Whether the respondent State has breached Article 9.9 of the CEPTA?

d. If the respondent State has breached Article 9.9 of the CEPTA, what is the appropriate standard for calculating compensation?

2.4. We expect teams to argue these issues in the order presented in paragraph 2.3 above. This order follows logically: if the tribunal has no jurisdiction, it need not hear the objections relating to the admissibility of the *amici* applications. Further, arguments on issues concerning jurisdiction and admissibility should precede arguments on the merits of the case and the consequent compensation, if any. If teams deviate from this order in their oral pleadings, arbitrators may question them and ask them to justify such deviation. Teams that do not follow this order in their written pleadings may also be appropriately penalized by the reviewers.

3 JURISDICTION OF THE TRIBUNAL

Key facts

- Bonooru, Vemma's home State, is an archipelago. Its courts and constitution guarantee special mobility rights to Bonoori citizens residing in remote areas, both to and from Bonooru's many islands. The duty to guarantee this right of the population is discharged by Bonooru's government.
- Bonooru previously held a 100% stake in its national carrier, Bonooru Air.
- Bonooru Air was privatized in 1984 and inherited by Vemma, which now operates it under the name "Royal Narnian".
- Bonooru owns a significant, but not a majority, stake in Vemma that has historically ranged between 31% to 38%.
- Vemma's Memorandum of Association states that the company is established to *inter alia* assist in developing the aviation industry as well as civil aviation infrastructure in Bonooru for the benefit of its population in accordance with Bonooru's constitution. This memorandum also clarifies that Vemma's various commercial objectives are not subsidiary to the aforestated objective.
- According to Vemma's Articles of Association, Vemma's Board of Directors comprises 8 directors, of which one is a non-executive director. Bonooru's Ministry of Transport and Tourism nominates one of its officials for

	the non-executive director position on Vemma's Board of Directors. Vemma's Board of Directors passes decisions by a majority vote. ▪ Vemma's articles of incorporation require 50 per cent of voting shares for a quorum at regular meetings, which includes meetings for electing directors. Bonooru's representatives on Vemma's board are present for every meeting. ▪ Bonooru is the leading economic power in the Greater Narnian region, which also houses Mekar, and has been seeking to expand connections with neighbouring countries to increase economic integration and further bolster its regional power. It has launched the Caspian Project for this purpose. ▪ Vemma has received subsidies from Bonooru under the Caspian Project for its investment in Mekar. ▪ As part of the Caspian Project, Bonooru intended to update Mekar's port and the Phenac International Airport. Work on these projects was halted after Vemma commenced its arbitration against Mekar. Both projects remain incomplete to this day. ▪ Once the present arbitration began, Bonooru increased its stake in Vemma and appointed government lawyers to assist Vemma with the arbitration.
Relevant legal instruments	**Article 9.1 of the CEPTA** 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; For the purposes of this definition, an enterprise of a Party is: (a) an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party; or (b) an enterprise that is constituted or organised under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under paragraph (a); **Article 2 of the ICSID Additional Facility Rules** The Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rules,

	proceedings *between a Additional Facility Rules State* (or a constituent subdivision or agency of 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; **Article 5 of the ILC Articles on State Responsibility** The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance. **Article 8 of the ILC Articles on State Responsibility** 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.
Suggested case law readings	1. *BUCG v Yemen*: BUCG is a 100% State-owned enterprise from China involved in the construction of an airport in Yemen. BUCG initiated a case against Yemen under the ICSID arbitration rules. Yemen objected to the tribunal's jurisdiction on the grounds that the ICSID arbitration rules did not allow State-owned enterprises such as BUCG to bring claims. The tribunal agreed that under the ICSID rules, certain State-owned enterprises cannot act as claimants but disagreed that BUCG was "acting as an agent" or "discharging an essentially governmental function". 2. *Bayindir Insaat v Pakistan*: a case relevant for the analysis under Article 8 of the 2001 ILC *Articles on State Responsibility*. The tribunal made a novel finding that the "effective control" test, which is a widely accepted legal standard in international law, may not be appropriate in the context of investor-State disputes. CSOB v The Slovak Republic: CSOB was a state-owned bank that was privatized around the time the Czech Republic and Slovakia split. CSOB became a Czech company and brought an ICSID claim seeking compensation from

Slovakia for violation of a Consolidation Agreement. Slovakia objected to the tribunal's jurisdiction on the ground that CSOB did not satisfy Article 25 of the ICSID convention because either CSOB was an agent for the Czech Republic or the Czech Republic was the real party in interest. The Tribunal concluded *inter alia* that it did have jurisdiction and that the Czech Republic's 65% shareholding was not sufficient to preclude the same.

3. *Maffezini v Spain:* a case relevant to the analysis under Article 5 of the 2001 ILC *Articles on States Responsibility.* Maffezini, an Argentine investor, entered into various contracts with a private corporation (SODIGA) established according to private law but owned by various state entities of Spain. These contracts purported to establish a project to produce chemical products. Based on the fact that SODIGA was not only owned by various state entities but also allegedly operated for the purposes of economic development of the State, Maffezini claimed that Spain was responsible for any breach of a contract signed by SODIGA. The tribunal emphasized that a State's responsibility would only be engaged when specific acts performed by SODIGA are "essentially governmental rather than commercial". The tribunal then found that SODIGA was not performing any governmental functions and accordingly, its conduct could not be attributed to Spain.

3.1 Do the ICSID Additional Facility Rules allow a State-owned or State-controlled enterprise to institute investor-State arbitration proceedings?

3.1. The ICSID AF Rules do not explicitly address whether State-owned or State-controlled enterprises can act as potential claimants in investor-State arbitration. However, Aron Broches, one of the principal drafters of the ICSID *Convention* noted the following during the drafting of the Convention: "a mixed economy company or government-owned corporation should not be disqualified as a national of another Contracting State unless it is acting as an agent for the government or is discharging an essentially governmental function". This statement has now become known as the *Broches Test* and is often deployed by arbitral tribunals to assess whether SOEs have standing to bring claims before *ad hoc* investment tribunals [Note however that teams may also argue other portions of the *travaux* in support of their work and arbitrators should be receptive to novel arguments raised by teams if they are persuasive and backed by law].

3.2. The first question for teams is whether the *Broches Test* applies to arbitrations under the ICSID AF Rules. The *Broches Test* was developed in relation to the ICSID Convention. Article 3 of the ICSID AF Rules provides that "none of the provisions of the [ICSID] Convention" shall be applicable to ICSID AF arbitrations. Claimant teams may argue on this basis that the preparatory work relevant to the Convention, including the Broches Test, should not apply to restrict their standing in this arbitration. On the other hand, Respondent teams must try to establish using tools of interpretation that the preparatory work of the ICSID Convention is relevant for and informs the interpretation of Article 2 of the ICSID AF Rules. For example, they may argue that the purpose of both the ICSID Convention and ICSID AF Rules is the same – to facilitate arbitration between *an investor and a State*, and not arbitrations between two States – and to this extent, the preparatory work of the Convention is equally relevant for assessing the standing of claimants in ICSID AF arbitrations.

3.3. Arbitrators should note that this issue is not essential to the Claimant's case. Even if the *Broches Test* applies to ICSID AF arbitrations, Claimant teams may nevertheless argue that Vemma does not fulfill either criteria under that test. Hence, teams may choose to reserve arguments on the applicability of the Broches Test to ICSID AF arbitrations for written submissions and should not be penalized for doing so. During oral pleadings, arbitrators should nudge teams to move towards the second part of this issue, which deals with the characterization of Vemma based on the facts of this case.

3.4. NOTE: The text of the investment treaty in this case (*see* Article 9.1 of the CEPTA) has been drafted in a way so as to not restrict the standing of State-owned or controlled enterprises. We do not expect teams to focus on Article 9.1 in their argumentation. Claimant teams may try to argue that, if the ICSID AF Rules do restrict the standing of certain enterprises, the broader language of Article 9.1 of the CEPTA amounts to a *lex specialis* derogation from the ICSID AF Rules. However, arbitrators should be mindful of accepting this argument, given that Article 2 of the ICSID AF Rules does not provide any room for parties to negotiate out of its requirements by an agreement. Arbitrators may also question teams on whether the jurisdictional requirements under the CEPTA and the ICSID Additional Facility Rules apply cumulatively.

3.5. **POTENTIAL QUESTIONS:**

a. Counsel, are you relying upon a prohibition on the standing of state-linked enterprises in the treaty or the arbitration rules?

b. Can this tribunal use preparatory work relevant to the ICSID Convention for the interpretation of the ICSID Additional Facility Rules?

c. Can tools of "treaty" interpretation be used to interpret the terms of the ICSID AF Rules? Are the ICSID AF Rules in the nature of a treaty?

d. What is the relationship between the drafting of the ICSID Convention and Rules and the ICSID's Additional Facility rules?

e. If there is a prohibition on the standing of state-owned enterprises to bring investor-State claims, is this prohibition applicable to all of them? Or is it applicable to some enterprises, based on the functions they exercise?

3.2 If the *Broches Test* does apply, is Vemma Holdings Inc. disqualified from acting as a claimant in these proceedings?

3.6. If the *Broches Test*, or some other similar prohibition on the standing of claimants (such as one derived from principles of public international law), applies to ICSID AF arbitrations, Vemma could be disqualified from acting as a claimant on two bases: (a) if Vemma is acting as an agent of Bonooru or (b) if Vemma is discharging essentially governmental functions. With respect to the relevant legal standards for each of these criteria, we expect teams to refer to existing jurisprudence in investor-State arbitration and draw inspiration from the ILC's 2001 Articles on State Responsibility. Teams must use facts relating to Vemma's shareholding, objectives, operations, history, and management, among others to argue their respective positions (*see* Key Facts outlined above).

3.7. The two parts of the *Broches Test* closely mimic Articles 5 and 8 of the 2001 *ILC Articles on State Responsibility for Internationally Wrongful Acts*. Notably, these articles were prepared with inter-State relations in mind. Arbitrators may question teams about the relevance of these articles in the unique setting of investor-State arbitration. Moreover, these articles purport to evaluate the attribution of responsibility for "internationally wrongful acts" to a State. Arbitrators may also question teams on whether these articles and the tests thereunder can be appropriately applied in the context of jurisdictional questions such as the standing of an investor to bring claims.

3.8. To argue whether Vemma can or cannot be characterized as an "agent" of Bonooru, teams should refer to jurisprudence and scholarly writing on Article 8 of the ILC Articles. Various facts in the case file indicate Bonooru's ties with Vemma. On balance, it will be difficult for Respondent teams to prove that Bonooru controls Vemma; nevertheless, arbitrators should be open to well-crafted arguments and not penalize Respondent

teams for failing to meet the high threshold of this Article. It will be easier for Claimant teams to establish that Vemma is not Bonooru's agent and rely on the strict tests developed by courts and tribunals in this regard – i.e., effective control or overall control by the State.

3.9. With respect to the assessment of whether or not Vemma exercises governmental functions, teams should refer to scholarly writings and decisions on Article 5 of the ILC Articles. Respondent teams may take one or more of multiple routes here: *first*, they may argue that the functions exercised by airlines in Bonooru due to its unique geographic characteristics as an archipelago means that Vemma also exercises governmental functions; *second,* they may argue that the Caspian Project (which is akin to the real-world Belt and Road Initiative and under which Vemma received subsidies for its investment in Caeli) indicates that Vemma's investment serves Bonooru's governmental agenda. Claimant teams, on the other hand, should be able to adduce facts from the case to argue that specifically in relation to its investment in Mekar, Vemma is acting as a commercial enterprise and not a government functionary. They may try to establish two key propositions here: *first*, that the nature of functions performed by Vemma in Bonooru is irrelevant for the determination of the nature of its activities in relation to its investment; and second, that Vemma is not deploying funds received from Bonooru under the Caspian Project towards its investment-related activities in Mekar or to perform an "essentially governmental function".

3.10. In addition to the foregoing, teams should also advance arguments concerning the *critical date* at which Vemma's status as an agent or functionary of Bonooru should be assessed. Arbitrators may pose questions to teams on this issue if teams do not proffer submissions in this respect on their own initiative. Teams may, depending on the position more favourable to them argue that the critical date is (a) the date of acquisition of the investment; (b) the date on which the cause of action arose; (c) or the date on which the notice of arbitration was filed. Respondent teams may even suggest that the Claimant must continuously be free from ties to its home government to qualify as a potential claimant in ICSID AF arbitration since arbitration under the ICSID AF Rules is available only for investor-State disputes and not State-State disputes. They may recall that Bonooru increased its shares in Vemma once the arbitration commenced and appointed State lawyers to Vemma's legal team.

3.11. To support their arguments on the critical date, teams may draw analogies from the notion of "critical date" that is contemplated by arbitral tribunals in determining the nationality of an investor, including the notion of "continuous nationality". Arbitrators may ask teams to justify how those considerations are relevant in determining the status of State-linked investors.

3.12. **POTENTIAL QUESTIONS:**

. What is the appropriate legal test for determining whether Vemma is a State agent?

a. What is the appropriate legal test for determining whether Vemma discharges essentially governmental functions?

b. Can the tribunal find that Vemma is State-owned when Bonooru does not even have a majority stake in Vemma?

c. At what point in time should the tribunal determine the degree of control Bonooru has over Vemma?

d. Can the tribunal use case-laws or tests concerning the ILC *Articles on State Responsibility* when those Articles have a different wording compared with the *travaux* to the ICSID Convention?

e. What is the consequence of the different contexts in which the ILC *Articles on State Responsibility* (i.e., for inter-State relations) and ICSID AF Rules (i.e., for investor-State relations) were drafted?

4 APPLICATIONS FOR LEAVE TO FILE AMICUS BRIEFS

Key facts

The tribunal has received two applications for leave to file *amicus curiae* submissions. Mekar has requested that the UNCITRAL rules on transparency in treaty-based investor-State arbitration be applied to these proceedings.

1. An application from the Consortium of Bonoori Foreign Investors (CBFI):

- The CBFI is a non-profit industry association in Bonooru that represents the interests of Bonoori business in Greater Narnia and internationally.
- The CBFI seeks to present its views on why State-linked entities from Bonooru act with complete commercial independence and compete on free-market principles, irrespective of their ownership structure.
- Lapras Legal Capital, a member of the CBFI, is advising Vemma on funding strategies for its claim against Mekar.
- CBFI's Executive Committee decided that Executive Committee member Horatio Velveteen, CFO of Lapras Legal Capital, could vote in respect of the CBFI's *amicus* submission in these proceedings.

	2. An application from the external advisors to Mekar's Committee on Reform of Public Utilities (CRPU): ▪ The CRPU is a Mekari public body that was responsible for screening bids invited during the privatization of Caeli Airways. ▪ The CRPU engaged two external advisors to advise on the privatization, liquidation, and/or restructuring of Caeli Airways. ▪ In their application for leave to file an *amicus* brief, these advisors allege that Vemma acquired its stake in Caeli Airways by means of bribes paid to Mr. Dorian Umbridge, the chairperson of the CRPU. ▪ Since this application became public, the Constitutional Court of Bonooru has taken cognizance of the allegations against Mr. Dorian Umbridge. ▪ Corruption has been a persistent problem in Mekar whose public considers bribery as "a friendly custom that is a part and parcel of doing business."
Relevant legal instruments	**Article 9.19 of the CEPTA** 3. After consultation with the disputing parties, the tribunal may accept and consider written amicus curiae submissions regarding a matter of fact or law within the scope of the dispute that may assist the tribunal in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party but has a significant interest in the arbitral proceedings. **Article 9.20.6 of the CEPTA** The UNCITRAL rules on transparency in treaty-based investor-State arbitration shall apply to any international arbitration proceedings initiated against the Commonwealth of Bonooru pursuant to this Agreement. The Federal Republic of Mekar shall duly consider the application of the UNCITRAL rules on transparency in treaty-based investor-State arbitration to any international arbitration proceedings initiated against the Federal Republic of Mekar pursuant to this Agreement. **Article 41(3) of the ICSID AF Rules** After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this

Article called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding.

Preamble and Article 1(4)(a) of the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration

Recognizing the need for provisions on transparency in the settlement of such treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,
…

4. Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral 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; and

Article 4 of the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration

1. After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty ("third person(s)"), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.

3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant: (a) Whether the third person has a significant interest in the arbitral proceedings; and (b) The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a

	perspective, particular knowledge or insight that is different from that of the disputing parties
Suggested case law readings	1. *Philip Morris v Uruguay*, Procedural Order No. 4: Decision on the Amicus Curiae Submission of the Pan American Health Organization (PAHO). Philip Morris argued that the submissions by the PAHO would fail to bring a new perspective because they were too alike the submissions of another amicus: the WHO. The tribunal disagreed and found that because the PAHO could speak to the specific health context in South America that the PAHO submissions were not duplicative of the WHO. 2. *Apotex v the United States*, Procedural Order on the Application of Mr. Barry Appleton: Mr. Appleton, an international investment law lawyer from Toronto, filed amicus curiae submissions that were denied by the tribunal. Among many reasons, the tribunal concluded that the parties had already made submissions as to the proper interpretation of NAFTA provisions and that Mr. Appleton's submissions would thus not bring a perspective unique from the parties. 3. *Resolute Forest v Canada*, Procedural Order No. 6. The tribunal was faced with an *amicus curiae* submission jointly from Professor Robert Howse and Mr. Barry Appleton. Canada objected to the submission. Notably, the tribunal required that the applicants show a link as to how their submission would further the public interest. While the tribunal accepted that the interpretation of NAFTA provisions would affect the public interest, it did not accept that there was a link between the applicants' submission and furthering that interest. 4. *Biwater Gauff v Tanzania*, Procedural Order No. 5. Several amicus curiae submissions were filed by public interest groups like the LEAT, IISD, and CIEL. The tribunal cited the *Methanex* decision to find that accepting amicus curiae submissions *ipso facto* furthered public interest by increasing transparency. 5. *UPS v Canada*, Decision on Amici Curiae*:* the tribunal refused to allow amicus submissions on questions of jurisdiction or procedure, including the place of arbitration. The tribunal reasoned that "it was for the respondent to take jurisdictional points". 6. *Apotex v USA,* Procedural Order No. 2: the tribunal held that it was perfectly conceivable that issues of jurisdiction might raise matters of public interest on

which non-disputing parties might be well-placed to provide assistance.

7. *Gran Colombia Gold v Colombia,* Procedural Order No. 10*:* the tribunal accepted (in part) an *amicus curiae* application submitted on behalf of the El Cognote Association, whose mission is to "defend the possession of the El Cogote mine by traditional and ancestral miners". The tribunal briefly noted that Association had a significant interest in the proceedings since a part of the claim revolved around the miners, their rights and the government's alleged inaction in failing to evict them. Moreover, despite there being no corruption allegations by either party in the dispute, the tribunal allowed the *amicus curiae* to submit a brief on alleged corruption in acquiring the investment, noting that the tribunal cannot turn a blind eye to such issues simply because the parties have not made any arguments related to it.
8. *Infinito Gold v Costa Rica:* the tribunal addressed the corruption allegations advanced by the amicus curiae but not raised by the parties, noting that these allegations "raise an issue of international public policy, which the Tribunal must address ex officio".
9. *Von Pezold v Zimbabwe,* Procedural Order No. 2: The tribunal agreed with the claimant's observation that an *amicus curiae* should also be independent of the Parties. The tribunal found this requirement to be implicit in Rule 37(2)(a) of the ICSID arbitration rules, which require a perspective, particular knowledge or insight that is different from that of the disputing parties.
10. *Koua Poirrez v France*, App no 40892/98 (ECHR, 30 September 2003); the Court held that the requirement of impartiality was "outdated" and rejected the idea that a friend of court cannot also be a friend to a disputing party as contrary to the fundamental assumption of our adversary system.

NOTE: The issue before the tribunal is whether it should grant leave to these two applicants to file *amicus curiae* submissions. Procedural Order 2, available at p. 25 of the case file, expressly explains to teams that they should not advance arguments based on the merits/substantive content of these applications. Arbitrators should not ask questions or entertain arguments from participants concerning the same. Reviewers may appropriately

penalize teams that dedicate significant portions of their written pleadings to arguments in this regard.

4.1. The applicable treaty and the rules governing the arbitration clearly recognise the tribunal's authority to accept amicus submissions. This issue concerns the *admissibility* of such amicus submissions made by the aforementioned persons. Arbitrators may question teams about the difference between their "competence" to entertain non-disputing party submissions and "admissibility" of such briefs.

4.1 Application by the CBFI

4.2. The Respondent State opposes the CBFI's application, whereas the Claimant supports it.

4.3. Respondent teams may oppose the CBFI's application on several different grounds. Please note that teams are not expected to raise all possible arguments in their submissions. Respondent teams should be evaluated, among other things, on how well they prioritise their objections and the strategic choices they make in their written or oral pleadings. In oral pleadings, Claimant teams should be expected to respond to the specific objections raised by a Respondent as it is likely the Respondent will speak first on this issue. In their written pleadings, Claimants teams are expected to address (at the very least) the most salient of the potential objections based on the facts of the case.

4.4. Respondent teams may argue that there is a conflict of interest connected with the CBFI's application. A threshold question here is whether there is a requirement for *amici* to be free of conflicts: such a requirement finds no mention in the ICSID AF Rules. Respondent teams may argue that this requirement applies nevertheless (for example, due to the non-exhaustive language of the applicable rules in the ICSID AF Rules/CEPTA) or that the requirement of impartiality/independence of *amici* is implicit in one or more of the criteria in the applicable rules (the approach in *von Pezold v Zimbabwe*). Claimant teams may counter that it is counterintuitive to expect impartiality or independence from *amici* since the applicable legal rules compel that non-disputing party submissions be made by persons with "significant interest" in the proceedings.

4.5. Lapras Legal Capital, a member of the CBFI, is advising the Claimant on funding strategies. Respondent teams may argue this is a conflict of interest and refer to standards for assessing the independence and impartiality of *amici*. They may draw guidance from standards on conflict of interest applied in the case of arbitrator appointments. To draw any analogies successfully, Respondent teams should be able to establish that those standards are transposable to the context of *amici* applications. Conversely, Claimant teams may respond that simply advising on funding

strategies is not sufficient to raise a conflict of interest, using the same or different standards as proposed by the Respondent. Claimant teams may further note that it is inappropriate to use the same, absolute standards of independence or impartiality for *amici* as are used in relation to the disqualification of arbitrators since *amici* must necessarily have a "significant" interest in the proceedings. Claimants may also cite jurisprudence from other courts and tribunals (especially the ECHR) to suggest that the requirement of complete independence of *amici* is outdated and that a "friend of a court" may also be a friend of a party.

4.6. Respondent teams may argue that the CBFI's submission is not in furtherance of public interest because the CBFI protects commercial interests alone. Arbitrators should note here that neither the CEPTA nor the ICSID AF Rules explicitly require that an *amicus* serve a public interest – public interest, however, is a relevant consideration for proceedings subject to the UNCITRAL Rules on Transparency in all matters where a tribunal exercises discretion. Due to an asymmetrical clause in Article 9.20.6 of the CEPTA (see above), Mekar has asked the Tribunal to apply the UNCITRAL Rules on Transparency in these proceedings. This clause (which mimics the language in the Iran-Slovakia BIT) was invoked by Mekar after the CBFI made its application. In oral pleadings, arbitrators may ask Respondent teams whether this clause was invoked in bad faith or as a potential abuse of process. Arbitrators may also reward teams that have spotted this issue and addressed it persuasively in the written pleadings.

4.7. If Respondent can prove that the UNCITRAL Transparency Rules apply, then it may use this legal basis to argue that CBFI's submission does not serve a public purpose [however, arbitrators should also be receptive to any other legal basis that teams persuasively advance to argue that the requirement of "public interest" applies to the admissibility of *amici* submissions]. Claimant teams can respond in one of several ways: *first,* by arguing that the UNCITRAL Transparency Rules do not apply, or do not *compel* the consideration of public interest in relation to the admission of *amicus* submissions; *second,* by suggesting that any submission by an *amicus* serves a public purpose by increasing transparency in investor-State arbitration (an argument increasingly cited in both academic literature and jurisprudence); or *third,* by arguing that since the CBFI's application purports to protect the access of investors of all sizes to independent and impartial adjudicatory mechanisms, it advances a public interest.

4.8. The issue of public interest in the CBFI's *amicus* submission requires several steps of argumentation; teams should not be faulted if arguments relating to this issue are reserved for written submissions.

4.9. Finally, Respondent teams may also argue that the Claimant cannot use the CBFI submission to shirk its burden of proof to establish the

tribunal's jurisdiction. As part of this argument, Respondent teams may contend that the CBFI application does not raise a novel perspective in addition to what can and should be argued by Vemma in relation to the standing of State-owned or controlled enterprises. Conversely, Claimant teams may contend using the facts of the case that due to its varied membership and vast industrial representation, the CBFI can supplement the tribunal's understanding of how state-linked enterprises operate with complete commercial freedom in Bonooru, notwithstanding their ties to State machinery.

4.10. **POTENTIAL QUESTIONS:**

a. What is the legal basis that requires *amici* to be impartial and independent?

b. Can the standards for assessing the impartiality and independence of *amici* be the same as those for arbitrators?

c. Is simply advising a claimant as to funding strategies sufficient to establish a conflict of interest?

d. Does the participation of Lapras Legal's CFO in the presentation of the *amicus* by CBFI not raise credible doubts about the CBFI's independence?

e. Is there a requirement in the rules applicable to this arbitration that an *amicus* must advance a "public interest"?

f. Can the requirement of "significant interest" be read to mean public interest?

g. Is Mekar's request for the tribunal to apply the UNCITRAL Rules on Transparency in this case in good faith?

h. Should *amici* be allowed to make submissions towards jurisdictional questions in respect of which the burden of proof lies on the claimant?

4.2 Application by the CRPU external advisors

4.11. The Claimant opposes the application by the CRPU external advisors, whereas the Respondent State supports it.

4.12. The principal objection that Claimant teams may raise in respect of this application is that it seeks to agitate matters that are not "within the scope of the dispute". Arbitrators may recall that both the CEPTA and the ICSID AF Rules guide tribunals to admit *amicus* briefs that deal with matters within the scope of the dispute. Article 4 of the UNCITRAL Transparency Rules also contains similar language.

4.13. Claimant teams can argue that the application by the CRPU external advisors fails this test as it seeks to raise a new jurisdictional question – the legality of the claimant's investment – which has not been raised by the respondent State in its submissions to the Tribunal. Claimant teams may further note in this regard that the CEPTA does not require that an investment be "made in accordance with the law" of the host State; hence, the alleged bribes offered by the Claimant to procure the investment could be irrelevant for determining the tribunal's jurisdiction. On the other hand, Respondent teams may refer to the tribunal's competence, and arguably the duty, to assess and ascertain its jurisdiction on its own initiative and argue that any jurisdictional question is therefore always within the scope of the dispute.

4.14. Claimant teams may also object to this application on the grounds that the CRPU external advisors do not have any "significant interest" in the proceedings. To recall, the CRPU external advisors argue that they "possess a *general* interest in promoting fair business practices in Mekar. ... stagnation in anti-corruption efforts in Mekar also i*mpacts the financial operations of the Amici*, who regularly advise potential investors prospecting opportunities in Mekar." There are tenable arguments based on the facts of the case available to both sides as to whether the CRPU external advisors have a 'concrete' interest in the subject matter of this dispute as opposed to simply a 'general interest'. In the interest of time, teams should ideally not raise this argument in their oral submissions and could reserve it for written pleadings – arbitrators, however, need not penalise teams who do make this argument convincingly in oral pleadings.

4.15. Both teams may address the tribunal on whether it should exercise its margin to discretion to grant leave in respect of one or both the *amici* applications, irrespective of whether they meet the conditions of the CEPTA/ ICSID AF Rules/ UNCITRAL Transparency Rules, based on the nature and significance of the issues raised in these applications. If this contention is not raised by teams of their own initiative, arbitrators may pose questions to teams during oral pleadings about whether their inherent powers can and should be exercised to allow the *amicus* applications or, alternatively, whether the requirements of the CEPTA/ICSID AF Rules/UNCITRAL Transparency Rules are mandatory.

4.16. **POTENTIAL QUESTIONS:**

a. Would an amicus submission about a jurisdictional question always fall "within the scope of the dispute" given an arbitral tribunal's competence to determine its own jurisdiction?

b. Can the application by the CRPU external advisors be admitted if the tribunal simply refers to the allegations therein as facts informing its assessment on the merits/compensation?

c. Could this tribunal disregard the requirements of the CEPTA/ICSID AF Rules/UNCITRAL Transparency Rules in relation to admitting *amicus* briefs and exercise its inherent powers in this regard?

5 BREACH OF ARTICLE 9.9 OF THE CEPTA

Key facts

- **5 March 2011**: the Competition Commission of Mekar (CCM) approves Vemma's investment in Caeli Airways. It notes that Vemma's Moon Alliance membership would enable Caeli to offer improved and low-cost services in Mekar. The CCM sought an undertaking from Vemma that it would not engage in high-level cooperation on competition parameters such as prices, schedules, capacity, facilities, and other sensitive information with Moon Alliance members, which it submitted.

- **9 September 2016**: CCM launches its first investigation into Caeli Airways. The focus of the investigation is Caeli's alleged predatory pricing strategy. The CCM opens this investigation despite Caeli's market share in Mekar being below 50%, noting that when considered in conjunction with its Moon Alliance partners, its market share in Mekar exceeded 54%. The Monopoly and Restrictive Trade Practices Act of Mekar allows the CCM to exercise discretion in industries that require special attention to open an investigation where a corporation owns less than 50% market share. As an interim measure, the CCM places airfare caps on Caeli Airways.

- **December 2016:** CCM launches its second investigation into Caeli Airways. The focus of this investigation is whether Caeli had squeezed out concessions from Phenac International Airport in Mekar by threatening to shift its traffic out of the airport. Caeli already enjoyed benefits at Phenac International Airport, which it inherited from its predecessor upon privatisation.

- **March 2017:** A currency crisis ensues in Mekar.

- **30 January 2018:** In the context of the economic crisis, Mekar revokes a short-lived exemption that it had granted to airlines to denominate flight fare in

USD (July 2017 to January 2018) and mandates all companies to offer goods and services only in the local currency, MON.

- **March 2018:** The CCM rejects Caeli's request to lift the interim airfare caps in the wake of the economic crisis. Caeli seeks judicial review of the interim airfare caps imposed by the CCM. Caeli's claim is registered on 27 March 2018, but a hearing is scheduled only in April 2019. Its request for an immediate hearing is denied by the court registrar, citing judicial delays and priority to criminal matters.

- **August 2018:** CCM concludes its first investigation into Caeli and imposes a penalty of MON 150 Million. The CCM also decides to keep the airline caps in place pending the Second Investigation.

- **25 September 2018:** Mekar passes Executive Order 9-2018 to bail out airlines struggling due to the economic crises. Airline companies from Arrakis received subsidies under this Order, despite having received subsidies from their home State. Caeli did not receive any subsidies under this Order. The only other foreign airline operating in Mekar with state interest (fully state-owned Larry Air) also did not receive subsidies under the Order.

- **October 2018:** Mekar decides to ground all Boeing 737 MAX aircraft in its airspace. This decision is taken following a 737 MAX crash that killed all 189 on board. No other country grounded Boeing 737 MAX aircraft until March 2019, following a second crash which was confirmed to be based on the same technical failures as the first crash. Mekar's decision grounds significant parts of Caeli's fleet.

- **1 January 2019:** CCM completes its second investigation into Caeli. It decides to maintain the airfare caps until Caeli Airways' market share, with its fellow Moon Alliance member factored in falls below 40%.

- **20 January 2019:** Caeli appeals both CCM decisions. Its request that these appeals be joined to the hearings on the interim airfare caps is denied.

- **8 February 2019:** Caeli obtains a credit line to assist with its liabilities but at a high interest rate. The Chairman of First Phenac National Bank explains that the state's credit-rating agency has assigned a low rating to Caeli based on its risky business strategies, long-standing debts, and outstanding fines. Caeli refuses this loan.

- **15 June 2019:** Justice VanDuzer dismisses Caeli's claim against the imposition of the interim airfare caps by the CCM. In the same decision, Justice VanDuzer simultaneously dismisses Caeli's case on the merits by way of summary judgment. This summary decision was passed under Executive Order 5-2014, which grants Mekari courts the ability to dismiss without appeal a case by way of summary judgment where the judge finds there is very little chance of success on the merits. Under Mekari Law, Caeli has no further appeal.

- **October 2019:** CCM lifts the airfare caps on Caeli as its market share in conjunction with Moon Alliance members drops below 40%.

- **9 December 2019:** Vemma notifies Mekar Airservices that it has received an offer for its stake in Caeli Airways from Hawthorne Group LLC. Vemma offers Mekar Airservices the right of first refusal.

- **11 February 2020**: Mekar Airservices files for arbitration requesting the arbitrator to find that Vemma has not procured a *bona fide* third party offer in accordance with the terms of the Shareholder's Agreement. Mekar Airservices argues Vemma is tied to the Hawthorne Group through the Moon Alliance, in which they are both members.

- **9 May 2020**: Sole arbitrator Mr Rett Eichel Cavannaugh decides in favour of Mekar Airservices.

- **14 June 2020**: The Centre for Integrity in Legal Services releases a report suggesting that Mr Cavannaugh received bribes from representatives of Mekar Airservices.

	▪ **1 August 2020**: The court at the seat of arbitration sets aside the sole arbitrator's award, deeming it to be contrary to public policy. ▪ **23 August 2020**: Mekar Airservices is successful in enforcing the sole arbitrator's award in Mekar, despite the award having been set aside at the seat of arbitration. The decision of Mekar's High Commercial Court is upheld by the highest court in Mekar.
Relevant legal instruments	**Article 9.9 of the CEPTA** 1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7. 2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or measures constitute: (a) denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; (c) arbitrary or discriminatory conduct; (d) abusive treatment of investors, such as coercion, duress, and harassment; (e) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with Article 9.22. 3. When applying the above fair and equitable treatment obligation, a Tribunal may consider whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated. 4. For greater certainty, "full protection and security" refers to the Party's obligations relating to the physical security of investors and covered investments. **Article 9.8 of the CEPTA** 1. For the purpose of this Chapter, the Parties recognise their right to regulate in their territories in order to achieve legitimate public policy objectives, such as national security, the protection of public health, safety, the

	environment, public morals, social and consumer protection, or the promotion and protection of cultural diversity. 2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.
Suggested case law reading	***Review of administrative action*** *Waste Management II v Mexico:* the tribunal held that the kind of administrative action disciplined by the FET standard included arbitrary, grossly unfair, unjust or idiosyncratic conduct, conduct that is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. *AES v Hungary:* the tribunal pointed out that the standard of due process or transparent treatment "is not one of perfection" and stated that "[i]t is only when a state's acts or procedural omissions are … manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of judicial propriety) … that the standard can be said to have been infringed". *Cargill v Mexico:* according to the tribunal, arbitrariness may lead to a violation of a State's duties but only when the State's actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an unexpected and shocking repudiation of a policy's very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive. ***Denial of justice*** *Chevron v Ecuador II*: Enforcement of a corruptly obtained domestic court judgment abroad. *White Industries v India:* Denial of justice arising from *inter alia* a nine-year delay in judicial proceedings. ***Creeping violation of the FET***

El Paso v Argentina: Although no breaches were found under any BIT clause for each of Argentina's measures individually, the tribunal then moved to consider their cumulative effect and found that Argentina's actions cumulatively constituted an FET violation. *See also* Decision of the Ad Hoc Committee on the application for annulment of the Argentine Republic (where the Annulment Committee held that the notion of creeping FET violations was not a judicial creation and was well-grounded in the treaty text).

NOTE: **In Procedural Order No. 1 of 25 March 2021, available at p. 10 of the case file, the Claimant has agreed to limit its substantive claim to the alleged violation of Article 9.9 of the CEPTA. Arbitrators should not entertain submissions from teams, either in written or in oral pleadings, on an alleged violation of Article 9.12 of the CEPTA concerning expropriation.**

5.1 Has the Respondent committed discrete violations of Article 9.9 of the CEPTA?

5.1. Arbitrators should note that the problem has deliberately been drafted in a manner to nudge teams towards arguing for or defending against a "creeping" violation of the FET standard (*see* section 4.2 below). In this light, arbitrators should not penalise teams that are unable to convincingly argue that certain discrete acts of the Respondent amount to FET violations in and of themselves.

5.2. Certain facts in the case *may* serve as the basis for a standalone FET violation, specifically those related to the enforcement of the arbitral award annulled at the seat. Mekar is a party to the 1958 New York Convention and is a Model Law country. In light of Article V(1)(e) of the New York Convention and Article 36(1)(a)(v) of the UNCITRAL Model Law, Claimant teams may argue that a denial of justice results from the decision of the Mekari state courts upholding an award annulled at the seat. Conversely, Respondent teams may argue that the Mekari courts have acted within their margin of discretion. The key question is whether recognition and enforcement of an award that was set aside at the seat reaches the necessary level of gravity required for a denial of justice violation. The usual tests for denial of justice require the Claimant to meet a high threshold: it must demonstrate "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety", "administer[ation] justice in a seriously inadequate way", "fundamentally unfair proceedings and outrageously wrong, final and binding decisions", a fundamental "failure of a national system as a whole" or an "extremely gross" misconduct.

5.3. Teams may resort to decisions of national courts in relation to enforcement of awards set aside at the seat to argue whether the actions of Mekari courts reach the level of gravity required for a denial of justice claim. The approach of the French courts to the enforcement of awards annulled at the seat is of particular interest for this issue. A well-known feature of French arbitration law is that the annulment of a foreign award at the seat of arbitration has no impact on the parties' ability to have the award recognized and enforced in France. This could be cited to suggest that the acts of Mekari courts are not sufficiently grave or egregious to amount to a denial of justice (France is not a Model Law country but is a party to the New York Convention). Consider the following domestic court decisions here:

1. *Yukos Capital SARL v OJSC Rosneft Oil Company [2014] EWHC 2188 (Comm)*: Yukos attempted to enforce four arbitral awards which it had obtained against Rosneft and which were subsequently set aside by the court of the seat, the Russian courts. Yukos argued that the set-aside decisions of the Russian courts "*should not be recognised by the English court on the basis that they were (a) tainted by bias, (b) contrary to natural justice, in that the Russian courts deliberately misapplied the law, (c) procured in circumstances violating Article 6 of the ECHR (lack of fair trial), and (d) formed part of an illegitimate campaign of commercial harassment waged against the Claimant*". The defendant relied on the principle *ex nihilo nil fit*, or, 'nothing comes of nothing', to argue that the annulled awards should not be enforced. The Court did not rely on the Model Law (as England is not a Model Law country) and stated that the awards were *prima facie* enforceable: pursuant to common law conflict of law principles, no effect could be given to the Russian judgments if they were obtained by fraud (contrary to public policy) or contrary to the principles of natural justice. The Court ruled that no principle of *ex nihilo nil fit* in English law such as to prevent the English court giving effect to the Awards existed and the awards could be enforced, but the interests under the awards could not be recovered.

2. *Amsterdam Court of Appeal, 28 April 2009, case No. 200.005.269/01, LJN BI2451, JOR 2009/208, TvA 2010/5*: The Dutch court enforced an award set aside in Russia on the ground that the set-aside proceedings were biased and lacking independence.

3. *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat [2017] EWHC 1911 (Comm)*: Mr Maximov, the Claimant, obtained an arbitral award in Russia against the Respondent, a company controlled by Mr Lisin, in the dispute over the calculation of the price of shares in a Russian metallurgical company. The award was rendered in favour of the Claimant, Mr Maximov, but was set aside in Russia (the arbitral seat) by the defendant. Mr Maximov failed to appeal the decision to

set aside and later sought to enforce the annulled award in multiple jurisdictions. In 2014, the Paris Court of Appeal agreed that the Award should be enforced in favour of Maximov without inquiring into the Russian set-aside proceedings themselves. The Amsterdam Court of Appeal refused to enforce the Award in 2016, holding that there were not "sufficiently specific indications" that the setting aside procedure was unfair. The English High Court stated that the test for enforcing an annulled award was whether the court of the seat did not act in good faith, with the actual bias to be proven (and apparent bias being insufficient). The judge criticized the legal reasoning of the Russian court in strong terms (non-disclosure, violation of public policy and non-arbitrability) but ultimately did not agree to enforce an award because the decision of the Russian court that set aside the award could be explained by reasons other than the apparent bias.

4. *Hilmarton v. OTV, Cass. Civ 1st, 23 March 1994, n° 92-15137*: The award was rendered in a dispute between an English Company that was engaged (Hilmarton) which was engaged by the French company (OTV) for consulting and coordination on a bid to perform a contract for works in Algeria. Hilmarton filed a claim against OTV to recover the remaining amount of the fee. The award was rendered in favour of the defendant, but was later set aside by the court of the seat (in Switzerland). OTV still managed to enforce the award in France. Hilmarton appealed the decision of the Paris Court of Appeal with a reference to Article V(1)(e) NYC.

5. *Putrabali v. Rena Holding, Cass. Civ 1st, 29 June 2007, n° 05-18053*: Following an award in favour of Rena Holding, Putrabali appealed to the High Court in London at the seat, which partially annulled the award. Subsequently, the Arbitral Tribunal issued a second award in favour of Putrabali. Rena Holding then sought enforcement in France of the first award, and the President of the Paris Court granted enforcement of the award. The Paris Court of Appeal also denied Putrabali's appeal from the enforcement decision. In confirming the Court of Appeal's decision, the French Court of Cassation reasoned that an international arbitral award is independent of any national legal order and its validity was to be ascertained by the laws of the country where enforcement is sought, in this case France.

5.4. Another fact that may serve as a basis for a standalone FET violation is that concerning the airfare caps imposed by the competition authority in the aftermath of its first investigation. To recall, following the initiation of its investigation into Caeli, Mekar's competition authority imposed airfare caps on Caeli to prevent it from exploiting its dominant market share and earning excessive profits. However, the competition authority maintained these airfare caps even when an economic crisis hit Mekar and its currency

faced a sharp decline. At the same time, Mekar mandated that all goods and services provided in its territory be denominated in the local currency.

5.5. Claimant teams may argue that maintaining the airfare caps in times when the currency in which airfare caps were denominated was deteriorating is unreasonable or "arbitrary" treatment. In this regard, Claimant teams may advance that the airfare caps could have served no other purpose except hurting Caeli's profitability, since Caeli could not have possibly earned excessive profits or exploited its market dominance in times of financial crisis. Moreover, Claimant teams may additionally point to the fact that the competition authority maintained airfare caps denominated in MON, the depreciating local currency, without adjusting these caps for the loss in the value of the currency, further indicating its unreasonable behaviour. Respondent teams may argue that Mekar mandated denomination in the local currency for all goods and services and did not arbitrarily single out the Claimant. Respondent teams may also contend that the airfare caps were implemented "only to the extent necessary to bring the infringement effectively to an end", in accordance with Mekar's domestic competition law, and revoked as soon as Caeli was found in compliance with these laws (i.e. when it was no longer found to be capable of abusing its dominant position).

5.6. **Arbitrators should note that there are several other facts in the problem that might, on their face, seem fertile for FET claims pertaining to discrimination, arbitrariness, abusive treatment of investors or denial of justice. However, the thresholds for such violations under the FET standard are *very high* and the Case Committee has deliberately drafted the facts to deter Claimant teams from successfully arguing multiple discrete violations.** For example:

i. Mekar's competition authority initiated an investigation against Caeli's allegedly anti-competitive practices, including preferential slot trading with its Moon Alliance partners. Mekar's competition laws stipulate that a *suo moto* investigation may be initiated into entities with over 50% market share, but Caeli's market share fell below this threshold at the time. The competition authority nevertheless commenced its investigation on the premise that when considered in conjunction with its Moon Alliance partner, Caeli's market share exceeded 50%. The competition authority's decision to take into account the share of an alliance partner in commencing its investigation may suggest arbitrariness or a lack of transparency in its actions – especially considering that the competition authority was aware of and approved the Claimant's membership in the Moon Alliance at the time of the investment. However,

according to the case file, Mekar's competition laws allow the competition authority the " discretion in industries that require special attention to open an investigation where a corporation owns a lower [than 50%] market share". Further, the CEPTA in paragraph 6 of Article 9.9 recognises that "the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article". Finally, the competition authority has also indicated that the reason for its investigation into Caeli include coordination on high-level competition parameters (between Caeli and its Moon Alliance partner) of the kind that it had outlawed while authorising the Claimant's investment. Taken together, the facts on record make it difficult for Claimant teams to allege that the CCM has acted in disregard of its mandate such that its actions violate the FET standard.

ii. That Mekar financially bails out certain airlines during the economic crisis but not Caeli might suggest that it has acted discriminatorily, especially when considered in conjunction with the fact that the foreign airlines that received subsidies from Mekar also received subsidies from their home State. However, the facts of the case also indicate that Vemma received subsidies for *at least* a five-year period from its home State whereas the recipients of Mekari subsidies only received a one-time payment from their respective home States. Moreover, Mekar has also denied subsidies to other prominent State-owned enterprises operating in its territory based on the rationale that State-owned enterprises enjoy special privileges and continuous support from their country of origin. Hence, on balance, it may be difficult to consider Mekar's actions to be "discriminatory" within the sense of the FET standard. Arbitrators may also be mindful here that non-discrimination standard that forms part of the FET clause is not the same as the treaty obligation to grant the most favourable treatment to the investor and its investment. While the national treatment and MFN standards deal with nationality-based discrimination, the non-discrimination requirement as part of the FET standard appears to prohibit discrimination in the sense of specific targeting of a foreign investor on other manifestly wrongful grounds such as gender, race or religious belief, or the types of conduct that amount to a deliberate conspiracy to destroy or frustrate the investment.

iii. In October 2018, Mekar decided to ground Boeing 737 MAX aircraft in its airspace following a 737 MAX crash that killed all 189 on board. No other country grounded Boeing 737 MAX

aircraft until March 2019, following a second crash which was confirmed to be based on the same technical failures as the first crash. Mekar's decision grounded significant parts of Caeli's fleet. While Claimant teams may attempt to characterize Mekar's actions in this regard as capricious (for example, arbitrary or abusive treatment), they have the difficult task of explaining how this act meets the very high threshold of those standards. The grounding of fleet operational in its airspace may very well be within the rights of a sovereign and, as Article 9.8 of the CEPTA recognizes, "the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section".

iv. When faced with imminent insolvency, Caeli Airways applied for a loan to a State-controlled bank of Mekar in order to service its debts. The bank offered a credit line at an inflated interest rate, explaining that Mekar's governmental credit rating agency, the IICRA, had assigned it a low CCC+ rating. In turn, the IICRA memorandum explaining the rating decision noted that it had taken into consideration "risky investment choices by Caeli, long-standing debts that Caeli has failed to service since its privatisation, and large fines payable to the CCM". Claimant teams may try to argue that the IICRA's decision to take into account fines imposed by the competition authority – which were the subject of ongoing litigation at the time – artificially downgraded Caeli's creditworthiness. This argument may also not withstand detailed scrutiny, since independent rating agencies such as Fitch have assigned Caeli's majority stakeholder, the Claimant, a low 'BB' Long-Term Issuer Default Rating citing a looming liquidity crunch, risky investments, and exposure to external risks. Respondent teams may defend persuasively the decision of the IICRA to assign a lower rating to the distressed Caeli than its (relatively) globally successful majority shareholder.

v. The delay in judicial proceedings instituted by Vemma against the interim airfare caps (~13 months) may seemingly form the basis of a denial of justice claim. However, the "denial of justice" standard only outlaws the gravest instances of injustice. A delay of 13 months is par for course in several developing countries with burdened judiciaries. Tribunals that have accepted claims of denial of justice resulting from excessive delays have done so in far more

severe circumstances (for example, a nine-year delay in *White Industries v India*). Moreover, at the time of making its investment, the Claimant was aware of the judicial backlogs in the Mekari court system. All in all, a discrete violation of the FET standard resulting from a delay in judicial proceedings is difficult to argue persuasively.

vi. On 15 June 2019, a Mekari judge denied Caeli's motion for injunctive relief in respect of the removal of the interim airfare caps imposed by Mekar's competition authority. At the same hearing, the judge simultaneously dismissed Caeli's case on the merits against the competition authority by way of summary judgment. Caeli did not have a further right of appeal against this decision. Claimant teams may suggest that the summary dismissal of Vemma's claims against the competition authority by Mekari courts amounts to a denial of justice. Two key facts on record assist Respondent teams in defending against this claim. First, the Mekari judge's summary decision was passed under Executive Order 5-2014, enacted by the Mekari president to alleviate judicial backlogs, which grants a court the ability to dismiss without appeal a case by way of summary judgment where the judge finds there is very little chance of success on the merits. Second, the Mekari judge duly considered Caeli's "*prima facie* case on the merits in its examination of this request for temporary injunction" and on balance concluded that he did not foresee the possibility of arriving at a different final decision.

5.7. **Hence, while arbitrators should be open and receptive to well-crafted arguments from Claimant teams, they should encourage teams to move to the cumulative violation aspect, as this is where the focus of the case rests. In the case of written pleadings, reviewers may penalize teams that have dedicated an inordinate portion of their submissions to arguing numerous discrete FET violations without consideration for the strength of these arguments. Reviewers may similarly reward teams that have grasped that the crux of the matter is the composite FET violation and prepared their written pleadings accordingly**.

5.8. **POTENTIAL QUESTIONS:**

a. Is the enforcement of an arbitral award, which was previously annulled at the seat, by Mekari courts an egregious enough violation to amount to a denial of justice?

b. Are the dismissal of the Claimant's case on the merits in a summary judgment and a delay in scheduling hearings for the urgent injunction application sufficiently grave to amount to denial of justice on their own? In the alternative, could they amount to a denial of justice if taken together with the enforcement of the award annulled at the seat?

5.2 Alternatively, do the Respondent's actions amount cumulatively to a violation of Article 9.9 of the CEPTA?

5.9. The CEPTA is unique in that it potentially speaks to acts taken together constituting a violation of FET ("A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure *or measures constitute...")*. Similar wording is also employed in modern investment treaties such as the CETA. Some scholars refer to the notion of several acts cumulatively constituting a FET violation as a "creeping FET" violation, akin to the notion of creeping expropriation. Whether the notion of a creeping FET violation has any basis in investment treaties or customary international law is heavily contested. Arbitrators should question teams on what the basis for such a concept is. Reviewers evaluating written memorials should similarly assess if teams have persuasively established the existence of a legal basis for a composite FET or creeping FET violation claim.

5.10. Claimant teams may argue, based on any number of actions and omissions of the Respondent discussed above, that the Respondent has committed a creeping violation of the FET standard. In support of their arguments, they may rely on Article 15 of the 2001 *ILC Articles on State Responsibility,* which recognizes that the breach of an international obligation by a State may occur through a series of actions or omissions defined in aggregate as wrongful. Claimant teams can also argue that the ordinary meaning of fair and equitable "treatment" does not necessarily imply a discrete act or omission but may consist in a pattern of conduct by the State. They could advance that if the FET standard is not read in this manner, the Respondent could frustrate the purpose of the FET standard by fragmenting its treatment of the investment into discrete acts or omissions that individually appear innocuous.

5.11. Here, arbitrators or memorial reviewers should not expect Claimant teams to address every single act or omission of the Respondent in relation to the creeping FET violations in their oral or written pleadings. They should instead evaluate Claimant teams based on whether they use only the most compelling facts to strategically mount their creeping/composite FET violation claim. Some facts that Claimant teams may raise for their creeping FET claim are:

- Respondent's subsidies to airlines except for State-owned airlines like the Claimant's. Claimant teams may argue that this either constitutes discrimination or arbitrariness since subsidies were given to airlines that had received funds from their home State in excess of what Vemma received from its home State under the Caspian Project over a two-year period. Respondent teams may argue that state-owned enterprises present special challenges in a market economy and thus are not in like circumstances as other enterprises (*see* the treatment of state-owned enterprises in the recent white paper by the European Union). They may also argue that it is a State's sovereign prerogative to decide how to allocate its resources.

- The investigations of the Claimant by Mekar's competition authority which considered the Claimant's rights in Phenac International airport and membership in the Moon Alliance as material, despite these facts being known at the time the Claimant acquired its investment in Caeli Airways with the approval of the competition authority. Respondent teams may argue that these facts only became relevant in the CCM's investigation due to the rapid expansion of the Claimant. They may further point to the wide discretion available to the competition authority under domestic law and advance that the exercise of this discretion in the present case was both reasonable and warranted.

- Mekar's requirement that airfares be denoted in the local MON despite the ongoing currency crisis in the nation. This fact can be coupled with the fact that the competition authority maintained its airfare caps against Caeli, despite the precipitating currency crisis. Respondent teams may argue that Mekar mandated denomination in the local currency for all goods and services and did not arbitrarily single out the Claimant. Respondent teams may also contend that the airfare caps were implemented "only to the extent necessary to bring the infringement effectively to an end", in accordance with Mekar's domestic competition law, and revoked as soon as Caeli was found in compliance with these laws.

- The enforcement by Mekari courts of an award that was set aside at the seat of the arbitration, despite the award being tainted by corruption. Respondent teams may try to establish that the enforcing courts in Mekar have acted within the margin of discretion available to them.

5.12. Respondent teams may argue that there is no legal basis in the CEPTA or customary international law to find a creeping FET violation. They may argue that the reference to "measures" in Article 9.9 of the CEPTA in plural only indicates that multiple measures may each lead to individual or discrete violations of the FET standard committed by the State towards the same investor. In support of their position, Respondent teams may further

try to prove that independent acts that conform to principles of transparency, due process and good faith cannot be inflated to the level of an FET violation by inferring a plan or policy that does not exist. They may remind the tribunal that the FET obligation is not one that requires the host State to achieve and maintain an impossible programme of good governance at all times. Respondent teams may further object to the reference to Article 15 of the 2001 *ILC Articles on State Responsibility* on the grounds that Article 15 was intended to address breaches of obligations which could *only* be breached through a series of actions (this is not true for the FET obligation, which can in principle be breached through a single act). They may also refer to the negotiating materials of the ILC Articles to argue that the ILC rejected the inclusion of the concept of "complex acts" (a series of acts which constitute a joint unit due to their pursued intention) in its articles, indicating that Article 15 deals with a very different situation.

5.13. **POTENTIAL QUESTIONS:**

a. What is the legal basis for finding a violation of the FET standard based on a cumulation of all /multiple acts and/or omissions of the Respondent State?

b. Can individual actions which do not themselves meet the threshold of arbitrariness, discrimination, or lack of transparency together amount to a violation of one or more of these standards?

c. What do the ILC's Articles on State Responsibility say about composite acts as violations? Are these different from "complex" acts?

5.3 Whether the Respondent's actions were taken in legitimate exercise of its right to regulate?

5.14. Article 9.8 of the CEPTA recognizes the right of CEPTA parties to regulate in order to achieve legitimate public policy objectives. We expect Respondent teams to argue that even if the tribunal finds a *prima facie* violation of Article 9.9 of the CEPTA, their actions were in legitimate exercise of their right to regulate their internal affairs in an economic crisis. In this regard, Respondent teams may refer to: (i) the non-exhaustive list of legitimate public policy objectives that Article 9.8 seeks to protect; and (ii) the absence in Article 9.8 of any requirement that the right to regulate be exercised in a proportionate, non-discriminatory, or transparent manner. On this basis, Respondent teams may try to establish that insofar as their actions can be characterized as actions in pursuit of legitimate policy objectives, no internationally wrongful act exists. To support their assertion, Respondent teams may also attempt to establish that in Article 9.8 of the CEPTA, treaty parties have intentionally contracted out the customary police powers doctrine and conferred a broader right upon host States of investments.

5.15. Claimant teams should oppose the Respondent's assertions on a number of grounds such as:

i. the lack of a causal link between Mekar's actions and the alleged public policy objectives it sought to achieve: for example, Claimant teams may rely on the fact that the CCM investigations were in excess of the competition authority's powers and hence cannot be said to be protecting any public policy objectives;

ii. the disproportionate response of Mekar: for instance, Claimant teams may refer to the fact that Mekar maintains airfare caps on the Caeli even when Caeli can no longer use its dominant market position to earn supra-competitive profits during the economic downturn;

iii. Mekar's discriminatory approach towards foreign investors during the economic crisis: Claimant teams may emphasize that Mekar selectively bails out certain foreign enterprises but not others from the effects of the economic crisis.

5.16. To successfully advance any of these arguments, Claimant teams should be able to establish that Article 9.9 of the CEPTA embodies the customary police powers doctrine. They may refer here to Article 1.3 of the CEPTA, requiring that the CEPTA be interpreted "in accordance with applicable rules of international law" and argue that the right to regulate under Article 9.8 of the CEPTA should thus be understood by reference to customary international law.

5.17. Arbitrators may question both teams on whether the right to regulate recognized under Article 9.8 of the CEPTA comports with the police powers doctrine of customary international law and is therefore similarly limited to regulation that is non-discriminatory, proportionate and in accordance with due process.

5.18. **Note:** Respondent teams are not expected to raise arguments on the defence of necessity under customary international law for two primary reasons: (i) the facts of the case do not indicate that all of the Respondent State's allegedly wrongful actions were prompted by a state of necessity and (ii) the threshold for the defence of necessity is extremely high (the action should be the *only way* for the State to safeguard an *essential interest* against *grave and imminent* peril – see Article 25 of the ILC Articles on State Responsibility). If Respondent teams do try to raise arguments on the defence of necessity, arbitrators should question them on whether the high threshold to invoke this defence has been met in the present case. Arbitrators may also question them on whether the defence of necessity would excuse all the alleged breaches by the Respondent and, if not, how a partial defence would impact the Respondent's case. Arbitrators may also

test the conceptual clarity of Claimant teams by asking their views on whether this customary defence is applicable in the circumstances of this case. Reviewers evaluating written memorials should be similarly cautious about arguments on the defence of necessity.

5.19. POTENTIAL QUESTIONS:

a. How can we understand the scope of the Respondent's right to regulate under Article 9.8 of the CEPTA? Is it unfettered? Is it informed by customary international law?

b. Were all actions by the Respondent state taken in the appropriate exercise of its right to regulate? Could the tribunal find that some of them were internationally wrongful acts? How would that impact the assessment on merits and compensation?

c. Can the Respondent claim the defence of necessity under customary international law in this case?

6 COMPENSATION TO THE CLAIMANT

Key facts	▪ Vemma rapidly expanded Caeli Airways' operations between 2011 and 2016, reaching a peak valuation of USD 1.1 Billion in November 2016. ▪ The representatives of Mekar Airservices Ltd. on Caeli's board cautioned Vemma against this rapid expansion and its risky business strategies during this period. ▪ Due to the burgeoning liabilities of Caeli Airways, Vemma decided to sell its stake in this enterprise in 2019. To this end, it procured an offer valued at USD 600 million from Hawthorne Group LLP. Both Vemma and the Hawthorne Group are members of the Moon Alliance of airlines. ▪ Under the Shareholders' agreement between Vemma and Mekar Airservices Ltd., Vemma was required to offer Mekar Airservices Ltd. the first right to purchase its shares at the price offered by a *bona fide* third party. ▪ Mekar Airservices disputed the validity of the Hawthorne Group's offer. A sole arbitrator found that the Hawthorne Group's offer was not a *bona fide* third-party offer, since Hawthorne Group was also a member of the Moon Alliance. This award was upheld by the courts in Mekar (*see* Section 5 above). ▪ Vemma could not find another buyer for its stake in Caeli Airways. Ultimately, Vemma sold its stake in Caeli Airways to Mekar Airservices for USD 400 Million.

	▪ Vemma estimates the fair market value of its investment in Mekar to be USD 1.1 billion. According to Vemma, since it has received only USD 400 million from Mekar upon the sale of its assets, it is claiming the remaining USD 700 million as compensation in this arbitration.
Relevant legal instruments	**Article 9.21 of the CEPTA** 1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination: (a) monetary damages at a market value, except as otherwise provided for in Article 9.12; and (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages at a market value and any applicable interest in lieu of restitution. **Article 9.7 of the CEPTA** 1. Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords in like situations, to investors of a third country and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory. 2. For greater certainty, the treatment referred to in paragraph 1 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations. **Article 13 of the Arrakis – Mekar BIT** If the Tribunal makes a Final Award in favour of the investor, the Tribunal may award compensation. Such compensation shall be equivalent to the fair market value of the investment immediately on the day before the measures inconsistent with the provisions herein were taken by the host State.

Suggested case law reading	1. *Ickale v. Turkmenistan*: the tribunal held that the MFN clause of the Turkey-Turkmenistan BIT did not allow arbitrators to import substantive standards of protections from treaties concluded with third states since it expressly referred to investors "in similar situations". 2. *Guris v. Syria*: the majority held that the MFN clause in the Turkey-Syria BIT allows the claimant to import a more favourable war-losses clause from another treaty since the MFN clause referred to "treatment", a term whose ordinary meaning "encompasses not only treatment that has in fact been accorded but also treatment that is legally required to be accorded". 3. *AAPL v Sri Lanka:* the tribunal rejected the claimant's attempt to use an MFN clause to circumvent provisions in the basic treaty relating to compensation for losses caused by war or civil disturbance, finding that it had failed to demonstrate that the absence of such provisions in a third-party treaty constituted more favourable treatment. The tribunal, however, accepted in principle the role of the MFN clause in this context as an "implied incorporation method[]" that may lead to an "extension of the applicable legal system." 4. *Chorzow Factory*: this PCIJ case is generally cited as the authority for 'fair market value' being the standard for compensation in customary international law. 5. *CME v Czech Republic:* this award is often cited in support of the recognition of the Claimant's duty to mitigate losses as a general principle of law.

NOTE: Participants are not expected to present arguments concerning the exact amount of compensation to be awarded. Procedural Order No. 2, available at p. 25, expressly states this. They should limit their arguments to the appropriate legal standards and principles applicable to questions of compensation.

6.1 Is the Claimant entitled to compensation at fair market value?

6.1. Under the MFN standard in Article 9.7 of the CEPTA, Mekar cannot treat one foreign investor less favourably than it treats a foreign investor from a third country in like situations. The key issue in this dispute is whether Vemma can use this MFN clause to import a standard of compensation (the "fair market value" standard) from another treaty i.e., the 2006 Arrakis-Mekar BIT. To recall, Vemma considers the fair market value of its investment in Mekar to be USD 1.1 billion. However, upon the sale of its loss-making investment to Mekar, Vemma received USD 400

million. Vemma seeks USD 700 Million over and above the USD 400 Million it has already received from Mekar for the sale of its investment as compensation.

6.2. Claimant teams will try to argue that the appropriate standard for compensation is the "fair market value" standard. Since the CEPTA does not provide for this standard (and instead refers to the "market value" standard of compensation for FET violations), they must explain how the MFN clause in the CEPTA allows them to import this standard from the Arrakis-Mekar BIT. To do so, they may argue that the CEPTA requires foreign investors of all origins to be treated equally in respect of the "sale" and "disposal" of their investment, both of which may include treatment in respect of compensation. In addition, Claimant teams must be able to establish that in importing the "fair market value" standard, they do not seek to import a "[s]ubstantive obligation[]" *per se* from the Arrakis-Mekar BIT – this is carved out from the scope of the MFN clause by Article 9.7, paragraph 2. To do so, they may rely on the principles of State responsibility, which characterise compensation as a *secondary duty* arising from the breach of a substantive obligation. They may further argue that since tribunals established under 2006 Arrakis-Mekar BIT have consistently awarded compensation for FET violations under Article 13 of the BIT at "fair market value", the more favourable "treatment" they seek to avail is not a "[s]ubstantive obligation[]" *per se* but instead based on measures adopted or maintained by a Party pursuant to that obligation.

6.3. Respondent teams will try to establish that compensation, if any, should be awarded at the "market value" standard as recognised in Article 9.21 of the CEPTA. They should be able to explain that since they have already paid the "market value" for the Claimant's investment by purchasing its stake in Caeli Airways for USD 400 million, the Claimant is not owed any further compensation. In addition, they must establish using principles of treaty interpretation and case-laws that the MFN clause in Article 9.7 of the CEPTA cannot be used to import the "fair market value" standard from the Arrakis-Mekar BIT. They may argue this in several ways: (i) they may refer to paragraph 2 of Article 9.7 of the CEPTA to argue that a "[s]ubstantive obligation[]" in other investment treaties cannot be imported *ipso facto* into the CEPTA, and that the compensation standard in the Arrakis-Mekar BIT is one such substantive obligation; (ii) they may argue that an obligation on or the practice of *tribunals* established under the Arrakis-Mekar BIT to grant fair market value compensation cannot be considered "treatment" by a *treaty party* for the purposes of Article 9.7.1 of the CEPTA;(iii) they may point to the tribunal that the provision on compensation in the CEPTA is housed under the broader section on "Settlement of Disputes" and, as a result, the CEPTA parties consider compensation to be a matter of procedure which cannot be subject to the MFN obligation; and finally, (iv) they may indicate that since the CEPTA parties recognise limited derogation from the "market value" standard (i.e.,

only in cases of Article 9.12 of the CEPTA concerning expropriation), the CEPTA parties have clearly indicated their intention to adhere to the compensation standard in the treaty and impliedly excluded the application of the MFN clause in this respect.

6.4. Teams should further present arguments on whether MFN clauses such as the one in Article 9.7 of the CEPTA can be applied retroactively to import a standard from an older treaty (here, the Arrakis-Mekar BIT). While Respondent teams should oppose such application, Claimant teams must argue in favour of the same. Jurisprudence and scholarly writings in this respect remain divided and arbitrators should be receptive to a broad set of persuasive sources.

6.5. The teams may disagree about whether the "market value" standard in the CEPTA is "less favourable" than the "fair market value" in the Arrakis-Mekar BIT. Arbitrators should encourage teams to explore this question as only more favourable treatment from the Arrakis-Mekar BIT can be potentially imported using the MFN clause in the CEPTA. Reviewers may reward teams that have explained why one of these standards is more/less favourable in their written pleadings instead of assuming that one is more/less favourable than the other.

6.6. <u>POTENTIAL QUESTIONS:</u>

a. What is the difference between the "fair market value" and "market value" standards? Is the former more favourable than the latter?

b. Can the MFN clause in the CEPTA be used to import a standard of compensation from an older treaty? Does this amount to retroactive application of the CEPTA and if yes, is such retroactive application permitted?

c. Why should the tribunal ignore the intention of the parties to contract out of the "fair market value" standard?

d. Does the "fair market value" standard reflect customary international law? Could the CEPTA parties have contracted out of a customary standard?

e. How can the tribunal best characterise the award of compensation? Is it a procedural aspect of arbitration, a substantive obligation of the losing host State, or something entirely different?

6.2 Should the Claimant's compensation be reduced due to its failure to mitigate its losses?

6.7. Article 39 of the 2001 *ILC Articles on State Responsibility* provides that in the determination of compensation, due consideration must be given and compensation must be adjusted based on whether the injured party has contributed to its injury through willful action, negligent action, or omission. This is widely considered reflective of customary international law.

6.8. Respondent teams may argue that any award of compensation to the Claimant should be reduced on account of its contributory fault. They may refer to facts from the case file indicating that the Claimant made rash business decisions and did not attempt to consolidate its precarious financial health during the course of its investment. They should be able to explain with reference to the tests for evaluating contributory fault that the Claimant's unsound business decisions indicate a "manifest lack of due care" which increased the risks associated with its investment and "materially" impacted its profitability.

6.9. On the other hand, Claimant teams may argue that their conduct *vis-a-vis* their investment could not have resulted in any "material" injury to their investment. In support of this contention, Claimant teams may refer to facts from the case file indicating that Vemma's business decisions actually increased the profits from its investment. They may also compare Vemma's actions to the actions of other successful commercial airliners to argue that their conduct was not out-of-the-ordinary. They may advance that even if the Claimant made risky business decisions, its actions do not indicate a "manifest lack of due care" or willful negligence since it could not have foreseen the oil price hike or the economic crisis in Mekar.

6.10. <u>POTENTIAL QUESTIONS:</u>

a. What is the legal basis to reduce the compensation to be awarded to the Claimant? Is this legal basis reflected in the CEPTA?

b. Does the Claimant bear some responsibility for expanding too rapidly in the Mekari market?

c. What methods did the Claimant apply to hedge its risks in Mekar? If none, should it be held accountable for its negligence?

d. Were the Claimant's actions in line with the strategies adopted by commercial airlines generally?

e. Counsel, was Vemma not warned by Mekar not to adopt risky strategies and instead focus on making sure Caeli was successful in the long term?

6.3 Should the tribunal take into account the ongoing economic crisis in Mekar in awarding compensation?

6.11. Respondent teams may direct the tribunal's attention to the economic crisis in Mekar, the consecutive quarters of negative growth in the country, the steep decline in its GDP and the skyrocketing inflation. They may argue, based on recent scholarly writings, jurisprudence from international courts and tribunals (such as the Eritrea-Ethiopia Claims Commission), and by reference to the object and purpose of the treaty, that any compensation awarded to the Claimant should take into account this crisis in Mekar. Here, they may also refer to the preamble of the CEPTA, which states that the CEPTA contracting parties recognize the differences in their levels of development and diversity of economies.

6.12. Claimant teams can counter that there is no basis in the applicable treaty or international law to reduce compensation to an injured claimant based on the financial condition of the injuring State. They may point to the commentaries to the 2001 ILC Articles on State Responsibility, which require "full reparation" for an internationally wrongful act. In earlier versions, these Articles did have a general rule against crippling reparation, stating that reparation must not "result in depriving the population of a State of its own means of subsistence". In its subsequent deliberations, the ILC considered and rejected proposals to limit compensation due to an injured party based on the crippling effects of such compensation on the responsible State. According to the Special Rapporteur, concerns about crippling compensation were exaggerated – amounts in compensation sought in inter-State disputes had been relatively small, cases of very large compensation were exceptional, and States routinely settled greater amounts in sovereign debt than they were ever granted in compensation. He further considered that States could limit liability regimes for particular fields in the applicable legal instruments if they so desired.

6.13. Arbitrators may note here that this issue is skewed in favour of Claimant teams since the concept of adjusting such "crippling" compensation awards based on the financial situation of the host State rests on tenuous legal grounds.

6.14. **POTENTIAL QUESTIONS:**

a. What is the legal basis for the tribunal to take Mekar's financial situation into account?

b. Can the tribunal decide to lower the compensation based on equitable considerations?

c. How have international courts and tribunals adjusted compensation, if at all, when the injuring State is in dire financial crises?