Team Ammoun

INTERNATIONAL CENTER FOR SETTLEMENT OF INCESTMENT DISPUTES
ICISID Case No ARB(AF)/20/78

MEMORIAL FOR RESPONDENT

Vemma Holdings Inc.
Claimant

v.

The Federal Republic of Mekar
Respondent

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Treaties

Abbreviation	Citation
CETA	The EU-Canada Comprehensive Economic and Trade Agreement
ICSID AFR	ICSID Additional Facility Rules; Rules Governing the Additional Facility for the Administration of Proceedings by the secretariat of the International Centre for Settlement of Investment disputes (Additional Facility Rules) (2006)
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (2006)
Rules on Transparency	The UNCITRAL rules on transparency in treaty-based investor-State arbitration (2013)
Vienna Convention	Vienna Convention on the Law of Treaties (1969)

Commentaries/Articles

Abbreviation	Citation
Baitfort & Heath	*Simon Batifort and J. Benton Heath* *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization* *Published online by Cambridge University Press:13 February 2018* *Avairable at:* *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization | American Journal of International Law | Cambridge Core*
Born & Forrest	Gary Born and Stephanie Forrest *"Amicus Curiae Participation in Investment Arbitration",* ICSID Review, Vol. 34, No. 3 (2019)
Dolzer & Schreuer	*Rudolf Dolzer and Christoph Schreuer: 'Principle of International Investment Arbitration', 2nd edition, (Oxford, 2012)*
Feldman	*Mark Feldman,State-Owned Enterprises as Claimants in International Investment Arbitration*
I.C.J Reports	*I.C.J. Reports 1970, Judgment of 5 Feb. 1970)*
Pienda	*Ms Jessica Pienda "Investor Conduct (Damages)"* *Published online by JUS MUNDI : last updated 5 July 2021* *Available at:* Investor Conduct (Damages) (jusmundi.com)
Separate Opinion of Judge Ago	*Nicaragua v. United States of America, ICJ Reports 1986, Separate Opinion of Judge Ago*

Shirlow	*Dr Esmé Shirlow, Most favoured Nation treatment, Updated : 30 July 2021* *Available at :* Most Favoured Nation Treatment (jusmundi.com)
United Nation: 'Fair and Equitable Treatment'	United Nation: '*Fair and Equitable treatment'*, UNCTAD Series on Issues in International Investment Agreements II ,(2012), available at:https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf

Awards/Cases

Abbreviation	**Citation**
Amco-Asia case	*Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, II, Award (1990)
Apotex v. US	*Apotex Inc. v. The Government of the United States of America, ICSID Case No. UNCT/10/2 (2011) Procedural Order No.2*
Azinian case	*Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, award (1, NOV 1999)
Glaims case	*Glamis Gold, Ltd. v. The United States of America*, *UNCITRAL, Award (8, JUN 2009)*
Hilmarton case	*Hilmarton Ltd* v. *Ominium de Traitement et de Valorisation, 92-15.137, France ,23 March 1994, French Court of Cassation*
InterAguas	*InterAguas Servicios Integrales v The Argentine Republic*, *ICSID Case No ARB/03/17*
Jan de Nul case	*Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13,6, NOV 2008*
Pacific Rim Cayman v. El Salvador	*Pacific Rim Cayman LLC v Republic of El Salvador, ICSID Case No ARB/09/12, Award (14 October 2016)*
Lowen case	*Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Award (2003)*
Foresti and others v. South Africa	*Piero Foresti, Laura de Carli and others v The Republic of South Africa, ICSID Case No ARB(AF)/07/01, Letter regarding Non-Disputing Parties (5 October 2009)*
Sempra case	*Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, 28, SEP 2007*
UPS v. Canada	*UPS v. Canada, Decision of the Tribunal on Petition for Intervention and Participation as Amicus Curiae, ICSID Case No. UNCR/02/1*
Von Pezold	*Bernhard von Pezold and Others v. Republic of Zimbabwe*, *ICSID Case No. ARB/10/15*

LIST OF ABBREVATION

Abbreviation	Term
¶ / ¶¶	Paragraph / Paragraphs
No.	Number
p. / pp.	page / pages
Parties	CLAIMANT and RESPONDENT
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
PO3	Procedural Order No. 3
PO4	Procedural Order No. 4
CLAIMANT	Vemma Holdings Inc.
RESPONDENT	The Federal Republic of Mekar
CEPTA	Mekar Comprehensive Economic Partnership and Trade Agreement
CBFI	The Consortium of Bonoori Foreign Investors
The External Advisors to the CRPU	The External Advisors to the Committee on Reform of Public Utilities
Amicus CBFI	Amicus Submission by the Cosortium of Bonoori Foreign Investors
Amicus CRPU	Amicus Submission by the External Advisors to the Committee on Reform of Public Utilities
FET	Fair and Equitable Treatment
Tribunal	The present Tribunal
MFN	Most Favored Nation
FMV	Fair Market Value
MV	Market Value

STATEMENT OF FACTS

Parties of this dispute

1. **The Commonwealth of Bonooru ("Bonooru"),** a developing country, sits at the northern tip of Greater Narnia. Bonooru consists of 109 islands, of which only four are 'major islands' spanning over 5000 square kilometres, and thus, the government assigns special importance to aviation for saving the mobility rights of its populations. **Vemma Holdings Inc.** ("**Vemma",** or "**CLAIMANT"**) is incorporated under the law of **Bonooru**. Vemma emerged after the State-owned enterprise, Bonooru Air, had privatized **on 19 December 1984.**

2. **The Republic of Mekar** ("**Mekar"** or "**RESPONDNET"**) sits approximately 1,600 km to Bonooru's south. Mekar's currency is the Mekari Mon ("MON"). The economics of Mekar have been unstable, and Mekar conducted privatization of Caeli to resist its precarious financial condition. **The Kingdom of Arrakis** ("***Arrakis"***) singed Bit in 2006 (***"Mekar-Arrakis Bit 2006"***).

Tender process of Caeli Airway

3. **On 23 November 2010**, the same day as Vemma submitted its bid for the purchase of Caeli, Vemma has entered the tender process of the management of Caeli Airway JSC ("**Caeli Airway**" or "**Caeli**"). **On 29 March 2011**, Vemma Holdings entered into a Share Purchase Agreement with Mekar Airservices Ltd. to purchase an 85% stake in the company. The remaining 15% shares were beneficially owned by the Mekari State through Mekar Airservices Ltd.

Horizon 2020 programme

4. **On 28 October 2011**, Vemma received the first subsidy under "**Horizon 2020 programme**".

Conclusion of CEPTA

5. **In April 2014,** Mekar and Bonooru signed the Comprehensive Economic Partnership and Trade Agreement (**CEPTA**) after a decade had passed from the beginning of negotiations between Mekar and Bonooru. The agreement entered into force **on 15 October 2014**. Mekar and Bonooru agreed to terminate the **1994 Bonooru-Mekar Bit** ("***1994 Bit***") on 15 October 2014. Though CEPTA has expected to accede to the ICSID Convention, Mekar does not ratify ICSID Convention so far.

First Investigation and Airfare caps was imposed toward Caeli

6. **On 9 September 2016,** The CCM released its press release initiating to start *"The First investigation"* against Caeli at the time when Caeli enjoyed only 43% market share in Mekar. As an interim measure, the CCM placed caps on Caeli Airways' airfare to prevent it from earning supra-competitive profits in the future, and Caeli obeyed to this measure.

Second Investigation

7. **In December 2016**, a consortium of small regional airlines in Greater Narnia, led by one of their Mekari members, brought another complaint before the CCM, alleging that Caeli abused their privilege at Phenac International Airport. Following this compliant, CCM launched *'The Second Investigation'* into Caeli's business activities focusing specifically on price undercutting on certain routes to and from Phenac International.

8. **On 1 January 2019**, CCM completed its Second Investigation into Caeli. Consequently, a fine in the number of MON 200 million was imposed on Caeli Airways. The CCM also decided to continue to impose airfare caps until Caeli Airways' market share, with its fellow Moon Alliance member factored in, were to fall below 40%.

Mekar's economic crisis and Monetary change

9. Meanwhile, **starting in late 2016,** the MON began to nosedive. **As of July 2017**, Caeli requested meetings with Mekar's Secretary of Civil Aviation to seek permission to denominate its airfare in US Dollars instead of the MON till the crisis abated. Having received several similar requests, Mekari authorities approved the denomination of airfare in US Dollars for all airlines operating in its territory **in October 2017**.

10. However, **on 30 January 2018**, Mekar's new government passed a decree requiring all companies operating in the country to offer goods and services denominated exclusively in MON.

No distribution of financial aid toward Caeli Airway

11. **On 25 September 2018**, the President passed Executive Order 9-2018, granting subsidies to airlines for each Mekari citizen travelling on board. The Order vested discretion with respect to grant of subsidies to the Secretary of Civil Aviation. Caeli Airways' application for subsidies under this Order was rejected by the Secretary, though Foreign airlines from Arrakis, received subsidies under this program despite having received subsidies from their home States greater than Vemma received under the Horizon 2020 programme.

Litigation between Caeli and Mekar Aviation

12. **On 20 January 2019**, representatives of Caeli appealed both orders of the CCM in the Mekari courts. Caeli asked to connect this appeal with the **April 2019 hearing** on the airfare caps. The registrar denied this request **on 26 January 2019,** and scheduled an initial hearing on the Competition Authority's fines for **May 2020**.

13. **From 25 April 2019 to 27 April 2019**, Mekar's High Court heard submissions from Caeli Airways and the CCM concerning a stay on the imposition of airfare caps. Justice VanDuzer reserved his judgment for a written decision to be delivered on a subsequent date. **On 15 June 2019**, Justice VanDuzer released his interim decision on the airfare caps, declining to remove them. A passage from the decision explaining this conclusion read:

Lifting of Airfare caps

14. **By the third quarter of 2019,** Caeli's market share in Mekar dropped below 40%, with its operations on most routes generating deep losses. The CCM immediately lifted the applicable airfare caps in **October 2019.**

Mekar Aviation has exercise discretion to reject third party's purchase offer.

15. **At the November 2019** meeting of Caeli Airways' board, representatives of Vemma announced their intention to sell their stake in Caeli Airways, given the burgeoning liabilities of the enterprise. Vemma secured an offer from Hawthorne Group LLP, a Sinnoh-based private equity firm with stakes in numerous low-cost airlines, for Vemma's entire stake in Caeli Airways. In a notice **dated 9 December 2019**, Vemma communicated the terms of this offer to representatives of Mekar Airservices.

Arbitration between Mekar Airservices and Vemma

16. **In its response dated 17 December 2019**, Mekar Airservices rejected the offer, deeming the price offered to be artificially inflated and not an arm's length commercial price. After failed negotiations between the two parties, Mekar Airservices filed a request for arbitration **on 11 February 2020** with the Sinnoh Chamber of Commerce's ("**SCC**") Arbitration Institute under the SCC Arbitration Rules and Article 48 of the Shareholders' Agreement. The sole arbitrator rendered an award in favour of Mekar Airservices **on 9 May 2020**.

Award was set-aside

17. A report released **on 14 June 2020** by the Centre for Integrity in Legal Services ("**CILS**") alleged that Mr. Cavannaugh had received bribes from representatives of Mekar Airservices to render a favourable decision. CILS leaked several sensitive case materials and an audio-recording which uncovers this fact. Considering this release, Vemma filed for the set aside the award of **9 May 2020** at the court in Sinnoh.

18. **On 1 August 2020**, the Supreme Arbitrazh Court of Sinnograd set aside the award due to Vemma's application. The Supreme Arbitrazh Court is the first and only instance in relation to the set-aside proceedings.

Mekar's domestic court enforced the award

19. **On 23 August 2020**, Mekar requested the domestic court to recognize the 9 May 2020 award in Mekar. Though Vemma appealed the judgment before the Superior Court of Mekar, the Superior Court dismissed Vemma's appeal, and enforced the 9 May 2020 award **on 25 September 2020**.

CLAIMANT launched this arbitration against Mekar

20. Vemma's efforts **between February and September 2020** failed to yield another buyer for its shares. As a result, Vemma sold its stake in Caeli to Mekar Airservices **on 8 October 2020** for 400 million USD. Simultaneously, it filed a notice of arbitration against Mekar **on 15 November 2020** to seek compensation for its losses under the CEPTA.
21. Under civil and political pressure, Bonooru implemented a bail-in program through the Airways Infrastructure Rescue Act on **2 March 2021**, allowing it to purchase increased shares in Vemma. Bonooru increased its shareholding in Vemma to 55%.

After the consolidation of both parties, Tribunal released the procedure order No.1 and offer Amicus Curiae.

22. **On 25, March 2021**, the tribunal released the first procedure order and invite a request for the submission of *amicus curiae.*

On 19, April 2021, the Consoritum of Bonoori Foreign Investors ("**CBFI**") applies for leave to file a non-disputing party submission to this arbitration.

On 28, May 2021, Committee in Reform of Public Utilities ("**CRPU**") submit an amicus curiae brief in present case.

On 1, July 2021, the Tribunal has received observation from both disputing parties concerning tow applicants for leave to file amici submissions before it.

ARGUMENTS ON PROCEDURES

ISSUE I. THE TRIBUNAL DOES NOT HAVE JURISICTION UNDER CHAPTER 9 CEPTA

1. The RESPONDENT respectfully submit that the Tribunal does not have the jurisdiction under Chapter CEPTA from the following reasons.

(1) The CLAIMANT acts not as an enterprise but substantially as a State.

(2) The CLAIMANT in this arbitration is substantially a State-party while State-party is not granted to submit an arbitration under Chapter 9 of CEPTA as well as in ICSID Additional Facility Rules.

(3) During the investment, The CLAIMANT acts for governmental purpose and is discharging essential governmental function.

(1) The operation of CLAIMANT on organization is under extravagant governmental control.

2. 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. Consequently, for some meetings, Bonooru's representatives form a majority of members present and voting when not all other shareholders attend[1]. Therefore, Bonooru has quiet number of the shareholders' meeting and has quiet influence on decion-making.

3. Under civil and political pressure, Bonooru implemented a bail-in program through the

[1] *PROCEDRAL ORDER NO.3, p.86*

Airways Infrastructure Rescue Act on 2 March 2021, allowing it to purchase increased shares in Vemma. Bonooru increased its shareholding in Vemma to 55%, following which Vemma underwent large-scale restructuring: its board of directors was replaced with government functionaries, its functions were expanded to include paramilitary activities, and its legal team was equipped with lawyers from Bonooru's justice department to assist in its arbitration against Mekar[2].

4. Therefore, Vemma is totally a company that is administrated by Bonooru government and the aim of this arbitration is not for private dispute resolution but for national interest.

(2). The CLAIMANT act as an agent of State and should be applied to the doctrine of Piercing Corporate Veil.

5. From the facts in (1), The CLAIMANT is a vehicle to running State functions rather than commercial purpose, which could say the CLAIMANT is an agency of the State. Veil-piercing is a principle of international law enforceable against states. in the 1970s, veil-piercing was recognized by the International Court of Justice. In Barcelona Traction, Light and Power Company, Ltd., Second Phase. Crawford says: "… international law acknowledges the general separateness of corporate entities at the national level except in those cases where the 'corporate veil' is a mere device or a vehicle for fraud or evasion[3]."
6. Although in this dispute, there is no fraud or evasion behavior, the large-scale reconstructing in the organization and functions of CLAIMANT could be assured that the doctrine of piercing corporate veil is applied to CLAIMANT.

(3). During the investment, The CLAIMANT acts for governmental purpose and is discharging essential governmental function.

1. Even if an investor is a state-owned enterprise, it could be seen as a State for certain scenes.

[2] *STATEMENT OF UNCONSTESTED FACTS, p.40*
[3] *I.C.J. Reports*

Aron Broches—who has been recognized as the ICSID Convention's 'principal architect'— expressed the view that SOE claims against States under the ICSID Convention should be permissible unless the SOE was 'acting as an agent for the government' or 'discharging an essentially governmental function[4]'.

2. As for meaning of 'agent for the government', more specifically, Acts by state agents are, under international law, "acts performed by persons or groups directly belonging to the State apparatus[5]. There are significant facts that could explain the relationship between the CLAIMANT and Bonooru is unusual and CLAIMANT discharge essential governmental functions.

3. In memorandum of Vemma, one of its fuction is to assist in developing the aviation industry as well as the civil aviation infrastructure in Bonooru for the benefit of its population in accordance with Article 70 of the Constitution Act, 1947 including servicing remote communities[6]; In additional, in the speech made about the privatization of BA Holdings, the officer from Bonooru government said:

   'Our government plans to maintain a significant interest in Bonooru Air and always will. Bonooru Air's intended successor will be directed to ensure that it operates routes to our most remote islands, regardless of profitability. In fact, the planned privatisation will allow these routes, and others, to become more efficient and offer better services to our citizens than ever before'[7].

4. Furthermore, Ms Sabrina Blue, erstwhile head of Vemma's board of directors, had been appointed as the Secretary of Transport and Tourism in a cabinet reshuffle in Bonooru[8]. It is doubtful that the strategy on expansion of flight routes made by Vemma is not related to the policy of Bonooru government.

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[4] *Feldman, p.2*
[5] *Separate Opinion of Judge Ago*
[6] *Memorandum of Association of Vemma Holdings Inc, p.44*
[7] *STATEMENT OF UNCONSTESTED FACTS, p.29*
[8] *STATEMENT OF UNCONSTESTED FACTS, p.31*

5. It is a well-known fact that even Royal Narnian receives quite a lot of State aid, which is part of the reason it is so profitable. If you look at Caeli Airways' flight patterns, significant resources are put into flights between Mekar and Bonooru.it certainly makes going home to see family easy. But these routes are actually not profitable for Caeli Airways. You need to contextualize Vemma's investment in the context of Bonooru's Caspian Project and the Horizon 2020 scheme. but these routes seem to more benefit Bonooru than Vemma or Caeli[9]. Therefore, the flight pattern is Bonooru-oriented and the benefit from these flight is much more profitable to Bonooru not to CLAIMANT itself.
6. Another statement related to the subsidy which was granted by Vemma, In its application, Vemma has credibly outlined how its investment in Caeli Airways would draw more travelers from Mekar and the Greater Narnian Region to Bonooru's emerging tourism markets. Vemma's expansion into Mekar will offer substantial benefits not only to Vemma but to all of Bonooru by enhancing the aviation network available to prospective tourists[10]. Hence, it could say that the purpose receiving subsidy conducted from Bonooru is to promote Bonooru's interest much conveniently.
7. Besides, it has been reported widely that behind the scenes, Bonooru officials are putting pressure on Mekar, especially by holding the Caspian Project-related expansion hostage[11].
8. Above all, collectively, the purpose of activity is heavily governmental and it could be seen that Vemma is discharging fundamental governmental function related to Bonooru.
9. In conclusion, in this arbitration, the CLAIMANT actually acts as a State party. According to Article 9.16 – Submission of a Claim to Arbitration. Only an investor of a Party is able to submit arbitration not Party itself. Therefore, the CLAIMANT is not able to submit arbitration. As for the jurisdiction in ICSID Additional Facility Rules, in article 2, it indicates that ICSID Additional Facility Rules only deals with disputes between a State and

[9] *Phenac Business Today Podcast Transcript, 17 November 2014, p.55*
[10] *STATEMENT OF UNCONSTESTED FACTS, pp. 32 - 33*
[11] *Aviation Analytics June 7, 2019, p.57*

a national of another State. Because the CLAIMANT could not be seen as a national but a State party, ICSID Additional Facility Rules could not be applied to the dispute.

CONCLUSION

As the conclusion for this issue, the Tribunal does not have the jurisdiction under Chapter 9 of CEPTA.

ISSUE II. THE TRIBUNAL SHOULD ADMIT THE AMICUS SUBMISSION BY THE EXTERNAL ADVISORS TO THE CRPU AND SHOULD REJECT THE WRTTEN SUBMISSION BY THE CBFI

10. RESPONDNT respectfully submits that the Tribunal should grant the leave sought for the written submission only by the External Advisors to the Committee on Reform on Public Utilities (hereinafter, "the External Advisors to the CRPU") (A) and should not admit the written submission by the Consortium of Bonoori Foreign Investors (hereinafter, "CBFI") (B).

The requirements in determining the admissibility of written submissions a non-disputing party

11. This arbitration is conducted under the arbitration agreement clause in Art. 9.16 and Art. 9.17 CEPTA and these provisions refer to ICSID AFR and Rules on Transparency. Thus, these three rules are applicable in the present case.

12. The present arbitral proceeding is being conducted under Art. 9.16 and 9.17 CEPTA[12] and these provisions refer to ICSID Additional Facility Rule (hereinafter, "ICSID AFR")[13] and UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (hereinafter, "Rules on Transparency")[14]. Thus, these above-mentioned treaty and rules are applicable in the present case.

13. Under the applicable laws in the present case, there are six main criteria that the Tribunal should consider when deciding on the admission of the amicus curiae briefs;

(i) applicant's ability to assist the Tribunal,

(ii) applicant's submission addresses matters within the scope of the dispute,

(iii) applicant's significant interest in the arbitration,

(iv) public interest in the subject matter of the arbitration,

(v) fairness and efficiency of arbitral proceedings,

(vi) independence and impartiality of the applicants.

(i) Applicant's Ability to Assist the Tribunal

14. Firstly, applicants who request to submit the written submissions are required to assist the Tribunal in the determination of the submissions and the arguments of the disputing parties[15]. ICSID AFR and Rules on Transparency require the non-disputing parties to bring a perspective, particular knowledge or insight that is different from that of the disputing parties, while CEPTA only provides that the written submissions "may assist the tribunal in evaluating the submissions and arguments of the disputing parties". However, these provisions are not conflicting, rather they are supplementing each other, thus, the Tribunal should follow the stricter standard that the Amici submissions may assist the Tribunal **by bringing the different perspectives than parties** [emphasis

[12] *Arts. 9.16 & 9.17 CEPTA*
[13] *Art. 9.16 CEPTA*
[14] *Art. 9.20 CEPTA*
[15] *Art. 9.19.3 CEPTA; Art. 41(3)(a) ICSID AFR; Art. 4(3)(a) Rules on Transparency*

added].

(ii) Applicant's submissions address matter within the scope of the dispute

15. Second, amicus curiae submission must address the dispute within the scope of the dispute[16]. In this regard, the question whether the applicants can address the jurisdictional issues[17]. For instance, in *Apotex v. the US*[18], the Tribunal decided that the issues of jurisdiction may raise the issues related to public interest and thus, non-disputing parties may be better assisting the Tribunal to decide on that issue. In addition, the Tribunal included the definition of the "*investor*" and "*investment"* under NAFTA into "*the matter within the scope of the dispute*".
16. In contrast, CL may allege that the question of the jurisdiction is outside the scope of the matter that non-disputing parties can address by referring to the case of *UPS v. Canada,*[19] for example. However, this should not be considered as the precedent of the present case because in *UPS v. Canada,* what the applicants would raise objections was that the place of arbitration which the parties already consented. Thus, the situation was quite different from the one in the present case where the parties are not agreed on the jurisdictional issues.
17. Therefore, the question of the jurisdiction can be addressed by on-disputing parties.

(iii) Applicant's Significant Interest in the Arbitration

18. Applicants are also required to have significant interest in the arbitral proceedings[20]. However, this criteria of "significant interest" are often ignored or not considered in determining the admission of written submissions by non-disputing parties[21].

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[16] *Art. 9.13. 3 CEPTA, Art. 41(3)(b) ICSID AFR*
[17] *Born & Forrest, p. 649*
[18] *Apotex Inc. v. the US , Procedural Order No.2, ¶¶32-33*
[19] *UPS v. Canada, ¶71*
[20] *Art. 9.19.3 CEPTA; Art. 41 (3)(c) ICSID AFR; Art. 4 (3)(a) Rules on Transparency*
[21] *Born and Forrest, p. 651, Pacific Rim Cayman v. El Salvador; Foresti and others v South Africa,*

(iv) Public Interest in the Subject-Matter of the Arbitration

19. In general, in investment arbitrations, the Tribunal must consider the public interest in the subject-matter of the arbitration in relation to the transparency. Among the laws and rules applicable to the present case, only the Rules on Transparency has the explicit provision as to the public interest in the subject-matter of the arbitration[22].

(v) Fairness and Efficiency of Arbitral Proceedings

20. Furthermore, the amicus participation must not undermine the fairness and efficiency of arbitral proceedings[23]. This requirement is mandatory provision which the Tribunal must ensure for the parties to the arbitration[24].

(vi) Independence and Impartiality of Applicant

21. Finally, the last requirement as to the amicus participation is independence and impartiality of the applicants. Most instruments do not put this requirement explicitly, however, some Tribunal required that the applicant to be "independent"[25].

(A)The Tribunal should admit the amicus submission by the External Advisors to the CRPU

(i) Applicant's Ability to Assist the Tribunal

22. The amicus submission by the External Advisors to the CRPU obviously satisfies this requirement by bringing information as to the bribe involved in this current investment which is different perspective than the parties.

(ii)Applicant's Submission Addresses Matter within the Scope of the Dispute

23. CLAIMANT may allege that that the written submission by the External Advisors to the

[22] *Art. 1(4) Rules on Transparency*
[23] *Art. 9.19.3 CEPTA, Art. 41 (3) ICSID AFR, Art. 4.5 Rules on Transparency*
[24] *Born and Forrest, p. 653*
[25] *Von Pezold; InterAguas*

CRPU satisfies this requirement because the applicants brought new issues outside the scope of the dispute. However, RESPONDNET argues that the written submission by the External Advisors to the CRPU are fallen within the scope of the dispute of the present arbitral proceeding.

24. The amici pointed out that the Vemma's success of the bid of the Caeli Airways were involved the bribes paid to Mr. Dorian Umbridge, the Chairperson of the CRPU. It may seem that the amici brought the new different issues without the scope of the present case, nonetheless, the fact that the investment in question were procured by means of the bribes entail the issues of the validity of the investment and in turn, the jurisdiction of the Tribunal. This is because if the investment by Vemma is invalid and not considered as investment, then Vemma is disqualified as investor as in Art.9.16 CEPTA and will no longer be able to submit a claim under that provision. In addition, the ICSID AFR limit the scope of the application of the rules to the disputes arising directly or indirectly out of an investment. Thus, if the investment in question is not admitted as investment, then the current dispute is outside the scope of the application of the ICSID AFR. Therefore, the issue of the bribe is strongly connected to the question of the jurisdiction and thus is a matter within the scope of the dispute. In conclusion, the amici successfully satisfied this requirement.

(iii) Applicant's Significant Interest in the Arbitration

25. CLAIMANT may allege that the External Advisors to the CRPU does not have the significant interest in the present arbitral proceeding. In addition, the amici themselves admit that they have general interest in the present arbitration. It is true that the Applicant lacks the significant interest but has the general interest. Considering that many Tribunal are not considering this criteria and the submission by the amici will definitely have public interest in regard to the disclosure of the information as to the bribe, the Tribunal

should not reject the submission by the External Advisors to the CRPU just because this requirement may not be satisfied.

(iv) Public Interest in the Subject-Matter of the Arbitration

26. The External Advisors to the CRPU clearly demonstrated that there is public interest in the subject-matter of the arbitration. Especially because the fact that the foreign investment in Mekar was conducted though the means of the bribes, the present arbitration is highly related to the public interest.

(v) Fairness and Efficiency of Arbitral Proceedings

27. The submission by the amici does not undermine fairness and efficiency of the present arbitration proceedings. CLAIMANT may allege that the amici participation of the External Advisors to the CRPU are would underscore the efficiency of the proceeding because of the newly brought fact of bribe, however, pointing out that the parties used the means of bribes should be considered comprehensively, so that the fairness of the proceedings. Thus, the amici satisfies this requirement as well.

(vi) Independence and Impartiality of Applicant

28. There is no problem regarding this requirement of Independence and Impartiality of Applicant. The amici are members of Mekari civil society and just the external advisors to the CRPU without any further relationship between the government of Mekar.
29. In conclusion of the issue (A), the Tribunal should admit the amicus submission by the External Advisors to the CRPU.

(B) The Tribunal should reject the written submissions by CBFI

30. RESPONDENT submits that the written submission by the CBFI is not admissible because it does not satisfy the requirements of (i)applicant's ability to assist the Tribunal,

(v)fairness and efficiency of arbitral proceedings and (vi)independence and impartiality of applicant.

(i)Applicant's Ability to Assist the Tribunal

31. The written submission by the CBFI does not successfully satisfy this requirement. Since the amici does not bring the different perspective from the parties, rather argues almost same things as the CLAIMANT, the CBFI does not have the ability to assist the Tribunal.

(v) Fairness and Efficiency of Arbitral Proceedings

32. The written submission by the CBFI does not bring the new perspective to assist the Tribunal to deicide the case, thus the participation of the CBFI will undermine the efficiency pf the Arbitral Proceeding. If the Tribunal admit the amici participation of the applicant, it will take longer than they don't.

(vi) Independence and Impartiality of Applicant

33. The applicant critically failed to satisfy this requirement of Independence and impartiality of applicant. Not only CLAIMANT is the member of the CBFI, but also the CBFI includes Lapras Legal Capital which is advisor to Vemma on funding strategies with respect to its claim against the Federal Republic of Mekar. It is impossible to ignore this fact that there is clear relationship between the applicant and CLAIMANT, and the amici participation of the CBFI will cause unfairness for RESPONDNET.
34. From the reasons above, the amicus submission by the CBFI should not be admitted by the Tribunal.

CONCLUSION

35. In conclusion of the issue of amicus submission, RESPONDNT believes that the Tribunal should only grant the leave sought for filing of the amicus submission by the External

Advisors to the CPUR and should not admit the written submission by the CBFI.

ARGUMENTS ON SUBSTANCE

ISSUE III: RESPONDENT HAS NOT BREACHED FAIR AND EQUITABLE TREATMENT UNDER ARTICLE 9.9 OF CEPTA.

A. RESPONDNET submits that Mekar had not breached Fair and Equitable treatment under CEPTA.

36. Contrary to CLAIMANT's submission, RESPONDNET will ask the tribunal to refuse the CLAIMANT's request for admitting the breach of FET standard regarding; (1) the enforcement of the award that was set aside by the competent authority[26]; (2) disregard of material evidence submitted by Caeli Airway during the proceeding in Mekari court[27]; (3) the significant undue delay in Mekari court proceeding[28]; (4) the investigations conducted by the CCM; (5)the rejection of financial subsidies[29]; (6) the instant change of currency[30].
37. The measure taken by Mekar are reasonable and necessary for the protection of the economy and lives of national. Even though there is a slit possibility that Mekar's treatment impaired the investment of CLAIMANT, the treatment did not reach a level of breach of FET.

B. Interpretation of Article 9.9 of CEPTA and the purpose of FET standard

[26] Annex XV of the problem, ¶ 370

[27] Annex XIV of the problem ¶ 10~14

[28] Undisputed facts of the problem¶44

[29] *ibid*, ¶46

[30] *ibid*, ¶42

38. Article 9.9.1 of CEPTA stipulates that "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", and Article 9.9.2 of CEPTA provides the material situation which will constitutes the violation of Article 9.9[31]. As obvious form the wording itself, this FET standard is not expressly linked to a minimum standard of treatment of aliens under international customary law. Therefore, it can be interpreted as an autonomous, or self standing one. Instead of deriving the content of the standard from its original source (customary international law), the literal meaning of the provision becomes the content of FET itself[32].

39. The purpose of FET is to protect the foreign investors from host state's unfair behavior such as, an arbitrary cancellation of licences, harassment of an investor through unjustified fines and penalties or creating other hurdles with a view to disrupting a business[33]. However, too broad interpretation of the scope of this standard should be avoided, because expansive interpretation may lead to the undermining of legitimate State intervention for economic, social, environmental and other developmental ends[34].

40. Therefore, it is not enough that State has a slight appearance of arbitrariness or discrimination against foreign investor to allege the breach of FET standard. To say that host State's act is amounted to a breach of FET standard, the act of State to be "*sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons*" to take a balance of interest between Investor and host State[35]. Thus, to declare the breach of Article 9.9 of CEPTA, the State's act must be "*sufficiently egregious and*

[31] Article 9.9 of CEPTA
[32] United Nation: '*Fair and Equitable treatment'*, p29
[33] *ibid*, p6
[34] *ibid*, p2
[35] *Glamis case*, ¶22

shocking".

C. Mekar did not impair the CLAIMANT's investment by unfair and unequitable treatment.

1. The enforcement of the nullified award cannot be regarded as a denial of justice.

41. CLAIMANT might submit that the enforcement of the nullified award shall be regarded as a denial of justice which constitutes breach of Article 9.9 of CEPTA, because of malicious intention of Mekar and misapplication of Mekar's Commercial Arbitration Act. Regarding this point, **Amco-Asia case**[36] stated that the denial of justice is constituted by unlawful decision stands on procedural irregularities with lack of serious consideration of procedure and other background factors established by tainted background or bad faith. Though the ***Loewen*** tribunal[37] stated that bad faith is not necessary for the breach of the FET, whether there is bad faith or not will be one of the factor to consider the breach of this provision.
42. In present case, the domestic court of Mekar has enforced the award which had been set aside by the Supreme Arbitration Court of Sinnograd[38] in accordance with the Section 36 (1) (e) of the Commercial Arbitration Act, based on Article UNCITRAL Model Law[39]. Contrary to CLAIMANT's allegation, Mekar's decision is seriously considered, and there are no tainted background factors based on malicious intention or bad faith.
43. Moreover, like ***Hilmarton*** *c*ase[40], the enforcement of nullified award is admitted in several tribunals. Therefore, it is international understanding that court should not be bound to follow the decision of the court of the seat of arbitration. Thus, the enforcement of nullified award is not a misapplication of law, this could not be seen as the denial of justice. This is

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[36] *Amco-Asia* case, ¶138
[37] *Loewen* case, ¶132
[38] Annex XIII of the problem, ¶12~15
[39] Annex XV of the problem, ¶ 18
[40] *Hilmarton* case

also obvious form the actual wording of the provisions, the court has discretion on the enforcement of award which was set-aside by a competent authority. The present wording of the provision remains "may be refused", and this is the clear evidence of granting a discretion toward the enforcing court. Thus, the courts enjoy the discretion to enforce the nullified award with the reasoned consideration based on the all the circumstantial evidence.

44. To sum up, the decision of Mekari as to the nullified award did not contradict to Article V(1)(e) of the New York Convention and Arbitration Act of Mekar and there is no bad faith in their recognition. Hence, it won't constitute a denial of justice in sense of Article 9.9 of CEPTA.

2. During the proceeding of ruling-23 August 2020, the Mekari court had sufficiently examined the material evidence submitted by Caeli and does not disregarded the due process of Caeli.

45. Before conducting analysis as for the international authenticity of the CILS as CLAIMANT's suggests, the Tribunal must consider the reasonableness of the judgement. As the Court of Sinnograd renders, CLAIMANT failed to meet its burden of proof[41]. CLAIMANT relies only on the CILS REPORT and its relevant evidence without clearly proving that the evidence submitted is not biased. Additionally, CILS is a non-profit organization, which indicates that it is suspicious that CILS affiliated and backed up by the foreign patrons that interferes Mekar[42]. Thus, the High Commercial Court of Mekar cannot find that the evidence based on the CILS REPORT is unreliable and sufficiently credible.

46. Moreover, looking at the judgement, they deal with the circumstantial evidence, and they make a decision in a reasonable manner[43]. Though the High Commercial Court of Mekar

[41] Annex XII of the problem, ¶¶12~14

[42] Annex XIV of the problem, ¶ 10

[43] *ibid*

sufficiently examined the evidence of CILS, the evidence was not adopted because the material was circumstantial and hearsay evidence which includes bias[44].

47. Therefore, the High Commercial Court of Mekar takes all relevant evidence into account from unbiased point of view, and, therefore, there is no lack of the due process during the proceeding. Consequently, Mekari Court's decision is based on the serious consideration and all the circumstantial evidence impartially.

3. There is no undue dealy of proceedings in Mekari court

48. As the Tribunal in the ***Azinian*** case in 1999 noted, a denial of justice could be pleaded if they subject to undue delay[45]. However here in the instant case, contrary to CLAIMANT's allegation, the one year of the court proceeding is not undue delay.
49. Mekar's economic has been in the context of a deteriorating situation and the currency crisis ensued in Mekar. In this background, Mekari Court made every effort to provide every opportunity the CLAIMANT's argument to be heard before and in the course of the court proceeding. The mere extension of the duration appears to be inevitable regardless every effort made by Mekari judiciary.
50. Therefore, the extension for the duration of court proceedings is not established undue delay "in terms of efficient administration of justice"[46], it does not amount to a denial of justice.

4. Mekar has sovereignty for the monetary change, and thus, the measures does

[44] *ibid*
[45] *Azinian case, ¶102*
[46] *Jan de Nul* case, ¶204

not constitutes a breach of FET standard.

51. On 30 January, with a view to stabilize its currency, Mekar's government passed a decree requiring all companies operating in the country to offer goods and services denominated exclusively in MON[47]. However, as to this point, Mekar merely enjoyed the monetary sovereignty to change the currency, purposed to reduce the reliance on foreign currencies and make domestic currency stable. As the ICSID review suggests, Mekar also considered that the balance between investor's right to enjoy benefit and Mekar's monetary sovereignty[48].
52. As the Tribunal in ***Sempra*** case, it is does not constitute arbitrary or discriminatory conduct when "remedy introduced is proportional to the emergency, and its time frame is reasonable and related to the causes of the emergency"[49].
53. In the light of long-term emergent situation in Mekar's economy, Mekar's government have been taking measures to refinance and the currency change is one of the measures introduced. Mekar presumes that stable of domestic currency makes the Mekar's economy growthful and eventually translate into attractive expectations by foreign investors. Protection of foreign investors will be well-performed with the domestic resources when Mekari economy is stabilized. Currency change enables to stabilize Mekar's economy with huge effect of business, international transaction, inflation and so on. Thus, the monetary change is proportional and reasonable to build the Mekar's stable economical regime.
54. Within the monetary sovereignty, Mekari changed its currency because its measure is proportional to the Mekar's emergent economic situation. Therefore, it does not constitutes the breach of FET[50].

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[47] Undisputed fact of the problem, ¶ 42
[48] Omar E. García-Bolívar, *Sovereignty vs. Investment Protection: Back to Calvo?*: p. 482
[49] *Sempra* case ¶328
[50] Article 9.9 of CEPTA

5. The investigation against Mekar meets a conditions of Mekar's Act and is not considered as administrative injustice

55. CLAIMANT may argue that RESPONDNET's organization, CCM launched the investigation under the undue situation that breaches Chapter III(2)(a) of Monopoly and Restrictive Trade Practice Act[51]. Therefore, this investigation is a gross denial of justice in administrative proceedings, and this amounts to a breach of Article 9.9 of CEPTA, especially a denial of justice in administrative proceedings.

56. RESPONDNET won't argue that administrative injustice could be the element of Article 9.9 of CEPTA. However, contrary to CLAIMANT's allegation, RESPONDNET argues that there is no denial of justice in administrative proceeding due to following two reasons. First, (a) CCM is not a government organization, and thus their actions are not administrative proceedings. Second, even if the Tribunal recognize CCM as a government organization, their investigation has not violated Article 9.9 of CEPTA because (b) they had conducted the investigation in a manner of Chapter III(2)(a) of Monopoly and Restrictive Trade Practice Act.

(a) CCM is not a government function and their acts can not be identical to a State's measures

57. To declare the administrative injustice, the injustice measures must be conducted by the government organization of which action could be regarded as government's act. However, As CCM's director states, CCM is "*an autonomous body independent of government*

[51] Annex V of the problem, ¶1600

influence"[52]. Moreover, there is no specific fact that CCM has functioned as a state organ. Therefore, CCM is non-state entity, and their conduct won't be identified with a conduct of State itself.

(b) CCM conducted the investigation in a manner of Chapter III(2)(a) of Monopoly and Restrictive Trade Practice Act.

58. Even if the tribunal consider the investigation of CCM as a State's act, RESPONDNET denies that their investigation had been conducted in manner of Chapter III(2)(a) of Monopoly and Restrictive Trade Practice Act[53]. It is true that this investigation was commenced when Caeli's market share was only 43%, and this rate was lower than the 50% set forth in Chapter III(2)(a) of Monopoly and Restrictive Trade Practice Act[54]. Therefore, on the CLAIMANT's view, CCM has started their examinations far from Mekar's Monopoly and Restrictive Trade Practice Act.
59. However, this understanding of Monopoly Act is incorrect. Chapter III(2)(a) states *"The CCM may exercise discretion in industries that require special attention to open an investigation where a corporation owns a lower market share."*[55], and the Article does not prohibit CCM form exercising discretion at a lower market share than 50%, if the target company require special attention to start investigation.
60. In present case, Caeli Airway is an aviation company which plays a material role to support a free transportation of nationals and foreign visitors. Though the market share of Caeli was lower than 50%[56], Aviation company like Caeli Airway is industries that requires

[52] Undisputed fact of the problem, ¶19
[53] Annex V of the problem, ¶1600
[54] *ibid*, ¶1610
[55] *ibid*
[56] Undisputed fact of the problem, ¶ 36

special attention, and thus the investigation of CCM literally meets the requirements of ChapterIII(2)(a) of Monopoly and Restrictive Trade Practice Act.

61. In conclusion, CCM's investigation is not identified as a state's act and, because the investigation was launched in the right situation that meets the standard of Chapter III(2)(a) is not amounted to a denial of justice.

6. The rejection of Financial aid toward CLAIMANT is not a discriminatory conduct.

62. CLAIMANT alleges that the fact that Mekar did not give financial aid to Caeli Airway was unfair and unequitable treatment, because other foreign airlines such as Star Wings and Jet Green both owned by holding groups from other state received subsides, despite having received subsides from their home States greater than Vemma received under the Horizon 2020 programme[57]. This is a discrimination which breaches Article 9.7 of CEPTA, the breach of MFN clause could be the breach of FET standard, because the discrimination is also the element of FET standard. Therefore, the fact that could be regarded as a breach of MFN clause can simultaneously establish the breach of FET standard. Thus, there is a discrimination against CLAIMANT which amounts to a breach of Article 9.7[58], and it will also establish a breach of Article 9.9 of CEPTA.

63. In contrast, RESPONDNET confronts to this point by showing two reasons. Firstly, (a) the dismissal of financial aid to Caeli Airways under the Executive Order 9-2018 was not a discrimination which leads to a breach of Article 9.7 of CEPTA. Secondly, (b) even if there is a breach of MFN clause, it could not constitute a breach of Article 9.9 of CEPTA, pursuant to Article 9.9.5 of CEPTA.

[57] Undisputed facts of the problem, ¶46
[58] Article 9.7 of CEPTA

(a) The dismissal of financial aid to Caeli Airways was not a discrimination regulated in Article 9.7 of CEPTA.

64. RESPONDNET emphasize that the mere one treatment that Mekar did not give financial aid to CLAIMANT is not enough to declare the breach of MFN clause[59]. The Several tribunals have traced a line to differentiate between MFN clause and FET standard as to the discrimination[60]. Whereas national treatment and MFN clause are relative standards that apply a nationality-based test comparing treatment granted to nationals and foreigners in order to ensure a level playing field, according to this line of case law, the FET presents a different criterion to determine the breach of its non-discrimination component. Following this latter approach, tribunals have determined that discrimination must specifically target the foreign investor on "other manifestly wrongful grounds such as gender, race or religious belief", or the type of conduct that amount to a "deliberate conspiracy […] to destroy or frustrate the investment by improper means"[61].

65. In present case, the decision of not giving financial aid to CLAIMANT is justifiable decision. CLAIMANT has advantage compared to other private companies, because they are state-owned and have been supported by their home State[62]. Hence, this was a legitimate treatment to keep the balance of Aviation companies in Mekar.

66. Therefore, if Mekar had allowed CLAIMANT to gain the financial aid, it would have been discrimination against other companies. Thus, the fact of not providing financial aid to CLAIMANT cannot be seen as a discrimination regulated in MFN clause.

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[59] Article 9.7 of CEPTA

[60] M. Padlo Nilio Donoso and Docteur Kabir Duggal, "*Discrimination in FET*"

[61] *Glamis* case, footnote 1087 to ¶542

[62] Undisputed fact of the problem, ¶28

(b) Even if there is a breach of MFN clause, it could not constitute a breach of Article 9.9 of CEPTA, pursuant to Article 9.9.5 of CEPTA.

67. Even if the Tribunal consider the disposal of financial aid to Caeli Airway to be a violation of Article 9.7 of CEPTA, it could not simultaneously constitute a breach of Article9.9 of CEPTA, pursuant to Article 9.9.5 of CEPTA. Article 9.9.5 stipulates that a breach of another provision of CEPTA cannot give rise to a violation of FET standard. Therefore, even if disallowance of the financial aid is regarded as discrimination prohibited in MFN, it cannot establish the infringement of FET.
68. In conclusion, this disallowance of aid to CLAIMANT is neither a breach of Article 9.7 nor an infringement of Article 9.9.

COCLUSION

69. Based on the above reasons, Mekar has not breached Article 9.9 of CEPTA, because there is no arbitrary and discriminatory conduct, denial of justice, and fundamental breach of due process attributed to the violation of FET standard.

ISSUE IV: THIS TRIBUNAL SHOULD GRANT THE 'MARKET VALUE' COMPENSATION STANDARD

70. RESPONDENT hereby requests this Tribunal to find the appropriate compensation standard; **Market Value** .

71. This Tribunal should determine the appropriate compensation standard for damage should be **the Market Value** since (A) the default compensation standard for monetary damages is **the Market Value**. In addition, (B) CEPTA has excluded the importation of standards of treatment through MFN clause. Furthermore, regardless of the Tribunal's decision on its compensation standard, (C) any compensation paid to CLAIMANT should be reduced considering the presence of mitigating factors.

A. The Default Compensation Standard for Monetary Damages is the Market Value

72. Art. 9.21.1(a) of the CEPTA states that the Tribunal may award monetary damages for RESPONDENT's breaches at **the Market Value** of the investments with the exception of expropriation.

73. This Tribunal should follow above set forth provision as CLAIMANT seeks monetary damages as compensation for FET violation by Mekar. Furthermore, the Parties have not expressed any derogation from the default compensation standard for FET violation at the time of conclusion of the CEPTA. Thus, this Tribunal should apply the market value in accordance with Art. 9.21 of the CEPTA.

B. CEPTA has excluded the importation of standards of treatment through MFN clause

74. Contrary to the established provision, CLAIMANT may seek to import more favorable compensation standard: FMV prescribed in the investment treaty between Arrakis and Mekar via MFN clause as in Art. 9.7 CEPTA.

75. However, MFN clause cannot be invoked by CLAIMANT in order to import more

favorable compensation standard from Arrakis-Mekar BIT since the CEPTA has precluded the importation of standards of treatment through MFN clause on its wording of provision.

76. In recent practice, some host-states have sought to place limitations for the use of MFN provisions to import standards of treatment in treaties, drafts, and model clauses[63]. It is realized by introducing a wording that is clearly designed to overcome any presumption in favor of importation, or by clarifying certain basic terms of the MFN clause such as "treatment" and "like circumstances" in ways that explicitly or implicitly exclude importation[64].

77. For example, MFN clause in the investment chapter of the EU-Canada Comprehensive Economic and Trade Agreement[65] (hereinafter, CETA) provides as below ;

Article 8.7: Most-favoured-nation treatment of **CETA**
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.
4. For greater certainty, the "treatment" referred to in paragraphs 1 and 2 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

[63] *Baitfort & Heath, p.905*
[64] *ibid, p. 905*
[65] *the EU-Canada Comprehensive Economic and Trade Agreement, Section C- Non-discriminatory treatment, Art. 8.7 Most-favoured-nation treatment*

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

78. Art.8.7.4 of CETA is construed that it explicitly provides **the MFN clause may not be used to import either dispute settlement provisions or standards of treatment**[66]. It still has not clarified whether this CETA provision may alter the essential nature of MFN clause, however, is construed as a specialized deviation from standard practice by treaty parties.
79. The wording of MFN clause in CEPTA is completely identical to that clause of CETA. In addition, MFN is not a customary international law standard and effected only through specific treaty provisions[67]. And Its wording is established by respective treaty party and reflects party's intention, in other words, specialized derogation from standard practice. Thus, this tribunal should not determine to import compensation standard merely based upon the conventional nature of MFN and past investment arbitration cases, rather it should refer to the party' s implicit intention for the wording.
80. Therefore, CLAIMANT cannot invoke to import either dispute settlement provision or substantive obligations through MFN clause.

C. Any Compensation Paid to CLAIMANT Should be Reduced by Considering the Presence of Mitigating Factors.

81. Even if this Tribunal were to find FMV compensation standard is appropriate, it still has to assess whether CLAIMANT's contributory faults reduce the awarded compensation.
82. International law recognises the relevance of the conduct of the party suffered when determining reparation, and even in the investment arbitral disputes as well[68]. Investment

[66] *Baitfort & Heath, p. 905*
[67] *ibid, p. 878*
[68] *Pienda, ¶1*

arbitration tribunals have reduced the amount of damages awarded to investors by a percentage as a consequence of their contributory fault to reflect investors' role in the events leading to a loss[69].

83. In 2011, CLAIMANT inherited debt liabilities related to Caeli Airways without considering the volatility thereof. In addition, CLAIMANT had led a profligate approach to its investment and continued to project optimism based on the airline's 2013 earnings despite the warnings by representatives of Mekar, which pointed out the revenues declined[70]. These acts by CLAIMANT jeopardized itself when the economic crisis occurred.

84. Therefore, this tribunal can reduce the awarded compensation by taking into account of CLAIMANT's contributory faults.

CONCLUSION

85. In case where this Tribunal finds a FET violation by Mekar, it should apply the Market Value to the compensation standard in accordance with Art. 9.21 CEPTA and RESPONDENT owes no compensation for CLAIMANT. CLAIMANT cannot invoke MFN clause to import more favorable compensation standard from Arrakis-Mekar BIT since CEPTA has excluded the importation either dispute settlement or substantive obligation from other treaties. In alternative, this Tribunal should reduce any compensation awarded by considering CLAIMANT's contributory fault.

[69] *ibid, ¶5*
[70] *p. 30, ¶¶30-31, problem*