TEAM 1582 AMOR G

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

VEMMA HOLDINGS INC.

(Claimant)

V.

THE FEDERAL REPUBLIC OF MEKAR

(Respondent)

MEMORIAL FOR RESPONDENT

23rd September 2021

TABLE OF CONTENTS

LIST OF AUTHORITIES

ABBREVIATION	FULL CITATION
ARBITRAL DECISIONS	
AAPL	*AAPL v. Sri Lanka*, ICSID Case No. ARB/87/3, Dissenting Opinion of Samuel K.B. Asante, 27 June 1990.
ABCI Investments	*ABCI Investments v. Tunisia,* CIRDI, Décision sur la compétence, 18 February 2011.
ADC	*ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2006).
ADM	*ADM v. Mexico,* ICSID Case No. ARB (AF)/04/5, Award, 21 November 2007.
Agility	*Agility v. Iraq*, ICSID Case No. ARB/17/7, Final Award, 22 February 2021.
Aguas	*Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, 17 March 2006.
AIG	*AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award (2003).

Al-Bahloul	*Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. 064/2008, Final Award, 8 June 2010.
Apotex	*Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1 Procedural Order No. 2 on the Participation of a Non-Disputing Party, 11 October 2011.
Bahgat	*Bahgat v. Egypt (I)*, PCA, Final Award, 23 December 2019.
Bear Creek	*Bear Creek Mining v. Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017.
Binder	*Binder v. Czech Republic*, Ad hoc Arbitration, Final Award, 15 July 2011.
Biwater	*Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Petition for Amicus Curiae Status, 27 November 2006.
BUCG	*Beijing Urban Construction Group Co. Ltd. v Republic of Yemen* ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017.
Burlington	*Burlington v. Ecuador* ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012.
Busta	*Busta v. Czech Republic*, SCC, Final Award, 10 March 2017.
Cargill	*Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009.

Cengiz	*Cengiz v. Libya*, ICC, Award, 7 November 2018.
CMS Gas	*CMS Gas Transmission Company v Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005.
Chevron	*Chevron and TexPet v. Ecuador (I)*, PCA, Partial Award on the Merits, 30 March 2010.
Continental Casualty	*Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008.
Copper	*Copper Mesa v. Ecuador* PCA, Award, 15 March 2016.
CSOB	*Ceskoslovenska Obchodni Banka v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, 1 December 2000.
Duke Energy	*Duke Energy Electroquil Partners & Electroquil SA v. Ecuador*, ICSID Case No. ARB/04/19, 18 August 2008.
EBO Invest	*EBO Invest and others v. Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020.
ECE	ECE Projektmanagement v. Czech Republic, UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013.
Eli	*Eli Lilly v. Canada*, ICSID Case No. UNCT/14/2, Procedural Order No. 4, 23 February 2016.
El Paso	*El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011.
Enron	*Enron Corp et al v The Argentine Republic*, ICSID Case No.ARB/01/3, Award (2007).

Flughafen	*Flughafen Zürich A.G. and Gestión e Ingenería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014.
Foresight	*Foresight and Greentech v. Spain* SCC, Final Award, 14 November 2018.
Gabriel	*Gabriel Resources Ltd and Gabriel Resources (Jersey) Ltd v Romania*, ICSID Case No ARB/15/31, Procedural Order No 19, 7 December 2018.
Gas Natural	*Gas Natural v. Colombia* ICSID Case No. UNCT/18/1, Award, 12 March 2021.
Gas Natural 2	*Gas Natural SDG, S.A. and The Republic of Argentina*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005.
García Armas	*García Armas and García Gruber v. Venezuela*, PCA Case No. 2013-3, 15 December 2014.
Glamis	*Glamis Gold Ltd v United States*, Award, IIC 380 (2009), 14th May 2009, despatched 8th June 2009, Ad Hoc Tribunal (UNCITRAL).
Genin	*Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2 , Award, 25 June 2001.
Global Telecom	*Global Telecom Holding v. Canada*, ICSID Case No. ARB/16/16 , Award, 27 March 2020.
Heemsen	*Enrique Heemsen and Jorge Heemsen v.Venezuela*, PCA Case No. 2017-18, 29 October 2019.

HOCHTIEF	*HOCHTIEF v. Argentina,* ICSID Case No ARB 07/31,Separate and Dissenting Opinion of J. Christopher Thomas, Q.C. (Decision on Jurisdiction), 24 October 2011.
Salini	*Salini Impregilo SpA v Argentina,* Decision on Jurisdiction and Admissibility, ICSID ARB/15/39, 23 February 2018 .
Jan De Nul	*Jan de Nul v. Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008.
Joshua	*Joshua Dean Nelson v. Mexico,* ICSID Case No. UNCT/17/1, Final Award, 5 June 2020.
Juvel	*Juvel and Bithell v. Poland,* ICC, Partial Final Award, 26 February 2019.
Kardassopoulos	*Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No ARB/05/18, Award, March 3, 2010.
Krederi	*Krederi Ltd. v. Ukraine,* ICSID Case No. ARB/14/17, Award, 2 July 2018.
Lee-Chin	*Lee-Chin v. Dominican Republic,* ICSID Case No. UNCT/18/3, Dissenting Opinion of Professor Marcelo Kohen, 15 July 2020.
Loewen	*Loewen Group, Inc. and Raymond L. Loewen v. United States of America,* ICSID Case No. ARB(AF)/98/3, Award, June 26, 2003.
Maffezini	*Emilio Agustín Maffezini v The Kingdom Of Spain*, Case No. Arb/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000.
Metalpar	*Metalpar S.A. and Buen Aire S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/5, Award, 6 June 2008.

Mihaly	*Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002.
MTD	*MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004.
Occidental I	*Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012.
Occidental II	*Occidental Exploration and Production Company v. Ecuador*, UNCITRAL LCIA Case UN3467, Award, 1 July 2004.
OEG	*OEG v. Ukraine*, PCA, Award, 15 April 2021.
Parkerings	*Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8 Award, 11 Sep 2007.
Pezold	*Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2, 26 June 2012.
Philip-Morris	*Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016.
Plama	*Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Order, 6 September 2005.
RDC	*RDC v. Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012.

Resolute	*Resolute Forest Products Inc. v Government of Canada*, PCA Case No. 2016-13, Procedural No. 6, Decision on Amicus Application, 29 Jun 2017.
RosInvestCo	*RosInvestCo UK Ltd. v. The Russian Federation* (SCC Arbitration V 079/2005), Final Award of 12 September 2010.
Roussalis	*Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, 7 December 2011.
Saluka	*Saluka Investments BV v Czech Republic*, *Saluka Investments BV v Czech Republic*, Partial Award, ICGJ 368 (PCA 2006), 17 March 2006.
Servier	*Servier v. Poland, PCA,* Award, 14 February 2012.
Suez	*Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to Petition for Transparency and Participation as Amicus Curiae, 19 May 2005, Order in Response to a Petition by five non-governmental organizations for permission to make an amicus curiae submission, 12 February 2007.
Southern	*Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992.
Teinver	*Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentina*, ICSID Case No. ARB/09/1, Award, 21 July 2017.

Telenor	*Telenor Mobile Communications A.S. and The Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006.
Tokios	*Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004.
Total I	*Total S.A. v. Argentina* ICSID ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010.
Total II	*Total S.A. v. Argentine Republic,* ICSID Case No. ARB/04/1, Decision on Argentine Republic's Proposal to Disqualify Ms. Teresa Cheng, 26August 2015.
UPS I	*United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Decision on Amici Curiae, 17 October 2001.
UPS II	*UPS v. Canada*, ICSID Case No. UNCT/02/1, Award on the Merits, 24 May 2007.
Vannessa	*Vannessa Ventures v. Venezuela*, ICSID Case No. ARB(AF)04/6, Award, 16 January 2013.
Vento	*Vento Motorcycles v. Mexico,* ICSID Case No. ARB(AF)/17/3, Award, 6 July 2020.
Waste Management	*Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3 Award, 30 April 2004.
White Industries	*White Industries Australia Limited v The Republic of India*, UNCITRAL Award 30 November 2011.
Wintershall	*Wintershall v. Argentina*, ICSID Case No. ARB/04/14, Award, 8 December 2008.

BOOKS	
Born 1	Gary B. Born (2014). *International Commercial Arbitration,* 2nd edition. Kluwer International.
Dolzer & Schreuer	Dolzer,R & Schreuer, C, (2008) *Principles of International Investment Law.* Oxford University Press.
Maurer	Maurer, A.G. (2013). *The Public Policy Exception under the New York Convention.* JurisNet, LLC.
Mitchell et.al	Mitchell, A. D., Heaton, D. & Henckels C., *Nondiscrimination and the Role of Regulatory Purpose in International Trade and Investment Law* (Edward Elgar Publishing 2016).
Rubins & Kinsella	Rubins, N. D. & Kinsella. (2005*). International Investment, Political Risk, and Dispute Resolution A Practitioner's Guide,* Oceana Publications, Inc.
Reinisch	Reinisch, A. (Ed.). (2008). *Standards of Investment Protection*. Oxford University Press.
JOURNAL ARTICLES	
Astrid	Astrid, W., Amicus Curiae before International Courts and Tribunals, Volume 4, Hart Publishing and Nomos Verlagsgesellschaft mbH & Co. KG, (2018).
Born & Forrest	Born, G & Forrest, S, Amicus Curiae Participation in Investment Arbitration, *ICSID Review*, (2019).
Babic et.al	Babic et.al, "Market Share Modeling in Airline Industry: An Emerging Market Economies Application" *Transportation Research Procedia 3* (2014) 384 – 392

Beharry & Bräutigam	Beharry, Christina L., and Bräutigam, Elisa Méndez, "Damages and Valuation in International Investment Arbitration" in Chaisse J. et al (eds) *Handbook of International Investment Law and Policy* (Springer Nature Singapore Pte Ltd 2020).
Benzing	Benzing, M., Community interests in the procedure of international courts and tribunals, 5 The Law and Practice of International Courts and Tribunals (2006).
Broches	Aron Broches, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Recueil des cours. t. 136, pp. 331, 351-361 (1973).
Buckley & Paul	Buckley & Paul Blyschak, "Guarding the Open Door: Non-party Participation Before the International Centre for Settlement of Investment Disputes", UNSW Law Research Paper No. 2007–33, Banking and Finance Law Review, Forthcoming, (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_ id=989264, 2.
Cortesi	Cortesi, G.. "ICSID Jurisdiction with Regard to State-Owned Enterprises – Moving Toward an Approach Based on General International Law." *The Law and Practice of International Courts and Tribunals* 16 (2017): 108-138.
Crawford	J Crawford, State responsibility: The General Part (Cambridge University Press, 2013) 113.
Dempsery	Paul Stephen Dempsey, Predation, Competition and Antitrust Law: Turbulence in the Airline Industry, 67 *Journal of Air Law. & Commerce* 685 (2002).

Epaminontas	Epaminontas E. Triantafilou, "Is a Connection to the 'Public Interest' a Meaningful Prerequisite of Third Party Participation in Investment Arbitration?", 5 *Berkeley Journal of International Law* (2010) 38–46, 44.
Ian	Ian Brownlie, System of the Law of Nations. State Responsibility. Part I, 1983.
Johnson & Tuerk	Johnson, L. and Tuerk, E., CIEL's experience in WTO dispute settlement: challenges and complexities from a practical point of view, in: T. Treves et al. (Eds.), Civil society, international courts and compliance bodies, TMC Asser Press, The Hague 2005, pp. 244, 249.
Katia	Katia, F, Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest, *Fordham International Law Journal*, Volume 35, Issue 2 2012 Article 3.
Mourre	Mourre, A., "Are Amici Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?" 5 *The Law and Practice of International Courts and Tribunals* (2006).
Muchlinski	Muchlinski, P., "State Owned Transnational Corporations and the UN Guiding Principles", 2011.
Nalbandian	Nalbandian, B, State Capitalists as Claimants in International Investor-State Arbitration, QIL 81 (2021) 5-29.
Newcombe & Lemaire	Andrew Newcombe & Axelle Lemaire, "Should Amici Curiae Participate in Investment Treaty Arbitrations?" 5

	Vindobona *Journal of International Commercial Law and Arbitration* 1 (2001), 22–40, 36–37.
Newcombe & Lluís	Newcombe, Andrew and Lluís Paradell. *Law and Practice of Investment Treaties* (Austin: Kluwer, 2009).
Paulsson	Paulsson, J., Arbitration and State enterprises: Survey on the National and International State of Law and Practice by Böckstiegel Karl-Heinz, *Arbitration International*, 1984.
Potestà	Potestà, Michele. "Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept" (2013) 28 *ICSID Review* 88.
PwC	PricewaterhouseCoopers , "State-Owned Enterprises Catalysts for Public Value Creation?" (2015). Avaliable at https://www.pwc.com/gx/en/psrc/publications/assets/pwc-state-owned-enterprise-psrc.pdf.
Robenalt	Robenalt, J.L, "Predatory Pricing in the Low-Fare Airline Market: Targeted, Discriminatory, and Achieved with Impunity" Ohio State Law Journal, 2002.
Ruthemeyer	Ruthemeyer, T., "Der Amicus Curiae Brief Im Internationalen Investitionsrecht", Diss. *University of Cologne*, Baden-Baden 2014.
Sabahi et al	Sabahi, B., Duggal, K. and Birch, N., Chapter 12 – Principles Limiting the Amount of Compensation, in Beharry, C.L. (ed.), Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration, *Nijhoff International Investment Law Series*, Volume 11.

Schliemann	Schliemann, C, "Requirements for Amicus Curiae Participation in International Investment, Arbitration A Deconstruction of the Procedural Wall Erected in Joint ICSID Case ARB/10/25 and ARB/10/151", 12 Law and Prac. Int'l Cts & Tribunals 265 (2013).
Schreuer	Schreuer, C. (2005). "Fair and Equitable Treatment in Arbitral Practice". *The Journal of World Investment & Trade*, 6(3), vii-386.
Schreuer II	Schreuer, The ICSID Convention: A Commentary, (2001), p. 312, para. 548.
Schreuer III	C. Schreuer, L. Malintoppi, A. Reinisch and A. Sinclair, "The ICSID Convention: A Commentary", Cambridge University Press, (2nd edition, 2009), 161 (RL-003).
Vandevelde	Vandevelde, K. J., "A Unified Theory of Fair and Equitable Treatment, International Law and Politics", *International Law and Politics*, Vol. 43, 2010.
Viñuales	J. Viñuales, Foreign Investment and the Environment in International Law", *Cambridge* 2012.
Wehland	Wehland, H, "Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules", Chapter 8, (2017).
Weiler	Todd Weiler, The Interpretation Of International Investment Law: Equality, Discrimination, and Minimum Standards Of Treatment In Historical Context (Leiden: Martinus Nijhoff Publishers, *American Journal of International Law*, 2013.

Wolff	Wolff, R. (ed.), New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 19 June 1958 – Commentary, C.H. Beck - Hart - Nomos, 2012.
COURTS DECISIONS	
Ambatielos	*Greece v United Kingdom* (1952) ICJ Rep 10
Amoco	*Amoco v Iran*, 15 Iran-US CTR 189, (1989).
Congo	*Armed Activities on the Territory of the Congo* (New Application: 2002) (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. (Feb. 3).
Nicole	*Nicole Bu¨rli*, Third-Party Interventions before the European Court of Human Rights (Intersentia 2017) 20.
Northcon I	*Northcon I, Oregon Partnership v. Mansei Kôgyô Co Ltd*, 51 Minshu 2573, Japan, 11 July 1997.
Pacheco	*Pacheco Santamarina de Bustillo, Susana v. Café Paulista*, the Second Section of the National Court of Appeals on Civil Matters, Argentina, 24 December 1948.
STATUTES AND TREATIES	
ARSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, in Report of the International Law Commission on the Work of its Fifty-third Session, UN Doc. A/56/10 (2001) ('ILC Draft Articles').
KORUS	United States–Korea Free Trade Agreement

New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted on 10 June 1958.
VCLT	Vienna Convention on the Law of Treaties. 23 May 1969 (1155 U.N.T.S. 331).
MISCELLANEOUS	
IVS	International Valuation Standard, Exposure Draft, 7 April 2016.
UN	Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, UN Doc. A/CN.4/L.682, 13 April 2006.
UNCITRAL I	UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
UNCITRAL II	Report of the UNCITRAL Working Group II (Arbitration and Conciliation on the Work of its fifty-fifth session), 55th Session, UN Doc. A/CN.9/736 (2011).
UNCTAD I	UNCTAD, Dispute Settlement, ICSID, 2.2 Selecting the Appropriate Forum, 5. ICSID Additional Facility, a) Additional Facility Jurisdiction, Additional Facility cases in NAFTA.
UNCTAD II	UNCTAD, Investor-state dispute settlement: A sequel - UNCTAD Series on Issues in International Investment

	Agreements II, UNCTAD/DIAE/IA/2013/2 (23 July 2014).

LIST OF ABBREVIATIONS

Art.	Article(s)
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Act
BIT	Bilateral Investment Treaty
Caeli	Caeli Airways
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	Comprehensive Economic Partnership and Trade Agreement
CIL	Customary International Law
CILS	Centre for Integrity in Legal Services
CMP	Mekar's Common Man Party
CRPU	Committee on Public Utilities Reform
FET	Fair and equitable treatment
FMV	Fair Market Value
ILC	International Law Commission
LPM	Labourer's Party of Mekar

MFN	Most-Favoured Nation
MRTPA	The Monopoly and Restrictive Trade Practice Act, amended 2009
Notice	Notice of Arbitration
p.	Page
pp.	Pages
PO	Procedural Order
¶/¶¶	Paragraph/paragraphs
Record	The Problem of FDI International Arbitration Moot 2021
Response	Response to Notice of Arbitration
SOE	State-owned Enterprise
SUF	Statement of Uncontested Facts
VCLT	Vienna Convention on the Law of Treaties

BRIEF STATEMENT OF FACTS

Parties to the Dispute

1. The Claimant is Vemma Holdings Inc. which operates as an airline holding company incorporated in the Commonwealth of Bonooru ("Bonooru"). It is the successor to the state-owned BA Holdings and it has 100% ownership in the Royal Narnian, the leading global airline as well as the flag carrier of Bonooru. From the Share and Purchase Agreement signed on 29 March 2011, the Claimant acquired 85% stake in Caeli, an airline belonging to the Respondent.

2. The Respondent is the Federal Republic of Mekar. It experienced a period of prolonged political instability, characteristed by mass migration from the country and the exploitation of resource deposits by intermediate occupying powers. In its civil aviation industry, privatisation of the Caeli was done under the Emergency Recovery Act 2009 to ease the precarious financial condition, which later attracted the Claimant to submit its bid to purchase Caeli. The Respondent and Bonooru has signed the CEPTA in April 2014 which it entered into force on 15 October 2014.

Procedural Matters

3. The Tribunal lacks jurisdiction to hear Claimant's case due to absence of consent. The present situation has displayed a State-State dispute, as the Claimant is deemed to be a State-owned enterprise due to the sizeable stake of Bonooru in the company and its governmental function. Observing the 2014 Bonooru-Mekar CEPTA, Art 9.17 has required consent of each party before going for arbitration, which the Claimant has failed to do so. Respondent's standing consent as per Art 9 of the CEPTA is insufficient to mount Respondent's expressed consent to arbitration. On top of that, the ICSID Additional Facility Rules only contemplate proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State, pursuant to Art 2 of ICSID Additional Facility Rules.

4. On April 19 2021, the CBFI applied for leave to file a non-disputing party submission in the CEPTA Chapter 9 between Claimant and Respondent. Whereas on May 28 2021, Amici, members of Respondent's civil society whose professional focus is investment banking, had also filed a request leave to submit an amicus curiae brief. On 15 and 18 June 2021, both Claimant and Respondent applied to Tribunal for leave to bar each party's amicus submissions respectively.

Origin of the Dispute

5. To inspire investors' confidence, the Respondent created the CCM under the MRTPA. When CCM approved the Claimant's acquisition of the Caeli, it also approved the airline's participation in the Moon Alliance, consisting of nearly 4800 aircrafts.

6. The strength of Caeli rest on the geographic positioning of Phenac International Airport and the benefits gained from its cooperation with other Moon Alliance members. In 2012, natural formations from the volcanic eruption attracted the tourists to visit the Respondent's country. The Claimant took an extravagant approach to investment activities, funnelling funds towards rapid expansion and ill-strategized business plans despite being opposed by the Respondent's representatives present in Caeli's board.

7. Caeli became the only consistently profitable carrier in June 2016. This led the CCM to investigate whether Caeli had adopted pricing strategies to hinder competition on the domestic market. As a result, CCM imposed caps on Caeli's airfare as an interim measure. There is no evidence to show that the imposition of caps hurts its profitability. When the investigation was completed, a penalty of MON 150 million was imposed on the Claimant for the implementation of predatory pricing.

8. The CCM later launched a second investigation on the Claimant, which showed that the Claimant had abused its dominant position to extract additional privileges and had

engaged in an anti-competitive behaviour. Caeli began to face the risk of insolvency in February 2019.

9. In December 2019, the Claimant decided to sell their stake in Caeli. When it secured an offer from Hawthorne Group LLP, the Claimant communicated to the representatives of Mekar Airservices Ltd, pursuant to the right of first refusal under Art 39 of the Shareholders Agreement. It was rejected since this right does not extend to offering them at a price proposed by the Hawthorne Group which is affiliated to the Claimant.

10. The dispute was brought to the Sinnoh Chamber of Commerce's ("SCC") Arbitration Institute and the arbitral award, presided by Mr. Cavanaugh was in favour of Mekar Airservices Ltd. However, on 14 June 2020, the CILS released a report that the representatives of the Respondent bribed Mr. Cavanaugh. The Claimant applied to set aside the award on 1 August 2020 at the Supreme Arbitrazh Court of Sinnograd. Nevertheless, the High Commercial Court of Mekar enforced the award on 23 August 2020.

11. As a result, the Claimant brought an action for the series of acts and omissions done by the Respondent through its state organs and claim for compensation.

SUMMARY OF PLEADINGS

JURISDICTION

12. The Tribunal does not have the jurisdiction to hear claimant's claims on the grounds of lacking personal jurisdiction under Art 25 ICSID. The Respondent asserts that Claimant is a SOE of Bonooru, and despite under international law a SOE would not be barred from brining claims before ICSID, the Claimant nevertheless has fulfilled the requirement as an agent of Bonooru and was discharging governmental functions on behalf of the State. Consequently, it has rendered this dispute, as a State-State arbitration, which is not an avenue made avail under ICSID. Therefore, the Tribunal does not have jurisdiction to hear Claimant's case.

PROCEDURAL MATTER

13. **Respondent's amicus submission**: The External Advisors of CPUR has establish all the legal requirements for the Tribunal to accept its amicus curiae brief. The facts have shown that the External Advisor should be allowed to participate as an amicus curiae to the proceeding given that they will be of a great assistance for the Tribunal to better evaluate and understand the facts of the dispute in arriving to a just decision.

14. **Respondent's application to bar Claimant's amicus submission**: The CBFI has down 3 fundamental factors to negate their position to participate as a non-disputing party to the proceeding. CBFI's amicus submission is not of any public interest, they lack independency to the extent it raises a conflict of interest as a non-disputing party and they provided no new or different point of view from disputing parties.

MERITS

15. **FET standard**: The Respondent's acts and omissions did not amount to a breach of the FET standard under Art 9.9 of the CEPTA. *Firstly*, the Respondent did not deprive of the Claimant's legitimate expectations because there is no legitimate expectation on the regulatory stability of Caeli and alternatively, the legitimate expectation has not been frustrated due to the foreseeable changes. *Secondly*, the Respondent has

afforded due process of law to the Claimant when the CCM launched investigations against Caeli. Next, the Respondent did not deny the Claimant of justice. Furthermore, the Mekari court had validly exercised its discretion to enforce the award that has been set aside. *Thirdly,* the Respondent did not discriminate the Claimant in implementing their measures. *Lastly,* the Claimant did not meet the threshold of creeping FET violation.

COMPENSATION

16. **Quantification of damages**: In case the Tribunal finds the Respondent did violate the FET standard, the Respondent requests the Tribunal to conclude that the appropriate compensation standard is the 'market value'. This is because *firstly,* the Respondent had paid the market value to the Claimant's investment. *Secondly,* the Claimant cannot refer to the FMV standard under the Arrakis-Mekar BIT. *Alternatively,* the Tribunal in awarding damages should consider the Claimant's contributory fault and the economic situation in the Respondent's state.

PLEADINGS

ARGUMENTS ON JURISDICTION

I. THE TRIBUNAL DOES NOT HAVE THE JURISDICTION TO HEAR THE CLAIMS SUBMITTED BY THE CLAIMANT

17. The ICSID Centre was designed to be a forum of direct investor-State dispute resolution system created by the Washington Convention.[1] This is because the fundamental object and purpose of the ICSID revolves around the encouragement of private international investment as reflected in the preamble of the ICSID Convention and the Report of the Executive Directors.[2] The jurisdiction of ICSID is embedded in Art 2 of AFR where it provides the outer limits which the Centre can act or exercise its power to arbitrate.[3] It is conditional to establish the jurisdictional rights to arbitrate before ICSID Tribunal, the Respondent shall contemplate on the requirement of ratione personae to object the tribunal's jurisdiction to hear Claimant's case.

A. The Tribunal does have the personal jurisdiction to hear the claims.

18. The jurisdictional requirement of the Centre shall be analysed under the purview of AFR as the Respondent is not an ICSID Contracting State.[4] Any dispute that falls outside of the Convention's jurisdiction shall be procedurally recourse under the AFR.[5] For example, AFR has been significant in NAFTA as only the USA is a party to Convention but not Canada and Mexico.[6] Art 2 of AFR requires the proceeding

[1] Rubins & Kinsella.
[2] Feldman, pp. 24–35.
[3] Broche, pp.331, 351-361.
[4] Wehland, p.238.
[5] ICSID AFR, Art 2.
[6] UNCTAD II, p.20.

before the Centre to be between a State (or a constituent subdivision or agency of a State) and a national of another State.[7]

19. The Respondent acknowledges the Claimant being a SOE per se wouldn't deny them the rights to bring claims to the Tribunal based on the Broches Test,[8] where a 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 is also known as the "structural – functional test" to determine whether a SOE may enjoy the personal jurisdiction as required under Art 2 of AFR. These two factors resemble CIL attribution rules in the ARSIWA.[9] *C.S.O.B* affirmed that the Broches Tests are indeed the mirror image of the attribution rules in Art 5 and 8 of the ILC's ARSIWA.[10]

20. In fulfilling the Broches test, the Claimant will fall beyond the ambit of Art 2 of AFR and render the Tribunal to have no jurisdiction to preside over the claims brought. The Respondent will establish that not only the Claimant is a SOE of Bonooru, but they have also acted as an agent the State and has been discharging its governmental function.

a) Claimant is a SOE of Bonooru

21. A SOEs are undertakings owned or controlled by States designated to pursue financial objectives via commercial means.[11] It is also perceived as a business enterprise in which the government or State holds significant control through full, majority or significant minority ownership.[12] In fact, SOE is also deemed as a legal entity where State possess full ownership and control, or has controlling interest that allows State to take part in commercial activities separately from its public administrative functions.[13]

[7] Note 5.
[8] Note 3.
[9] ARSIWA.
[10] AFR, Art 5 & 8; BUCG, ¶ 34.
[11] Paulsson.
[12] PwC.
[13] Muchlinski, p.3.

22. The Claimant carries a nature of a SOE of Bonooru. Claimant has been historically known to be beholden to Bonooru whereby it holds a significant stake in Claimant.[14] In fact, Bonooru is the only governmental shareholder in Vemma Holdings Inc. Additionally, no other shareholder holds more than a 7% stake in Claimant.[15] Bonooru's control or significant interest over Claimant is reflected in the fact that the they retained a minority shareholding in Claimant from its date of incorporation until May 2020, ranged between 31%-38% and its right to hold such a stake is recognised in Claimant's Memorandum of Association (MOA).[16]

23. However, Bonooru's sizeable stake has been upscaled in March 2021, where the State had increased its shareholding in Claimant up to 55% which reflect a majority of shares of the company.[17] In fact, Claimant's power to to increase or reduce the capital and to issue any part of its capital, original or increased is inherently subjected to conditions prescribed in AOA and laws and regulations in force in Bonooru. In its entirety, this shows that the nature of Claimant is a SOE of Bonooru.

24. Nevertheless, as established in *C.S.O.B*, the sole examination of ownership of the entity is not conclusive, the tribunals must also examine whether the Claimant had acted as an agent for the government or had been discharging governmental functions.[18]

b) Claimant is an agent of Bonooru, not an investor under the CEPTA

25. Generally, the meaning of investor is expressly prescribed in BIT or arbitration treaty. For example, in the South Korea–US BIT, an "investor of a Party" is "a Party or state enterprise thereof, or a national or an enterprise of a Party". It is foundational to have an express term that explicitly defines what an investor entails as it affects the legal

[14] Record, Notice, p.6, ¶ 3.
[15] Record, PO 4, p.89, ¶ 2.
[16] Record, SUF, p.29, ¶ 10.
[17] Record, SUF, p.40, ¶ 65.
[18] C.S.O.B

position in bringing an action before the tribunal. Likewise, many investment treaties expressly or specifically allow SOEs to bring claims as investors by including "government-owned" or "State" enterprises within the applicable or rather, statutory definition of "investor".[19]

26. According to Art 31 of VCLT, a treaty shall be interpreted in good faith with the ordinary meaning to be given to the terms of the treaty in their context and its object and purpose.[20] This is relevant in reading a statutory definition of an "investor" in a treaty, whereby it ought to be read in its ordinary meaning. In *Tokios*, it emphasized on reading the BIT based on the ordinary meaning of the express term of the treaty.[21]

27. According to Art 9.1 of the CEPTA, an "investor" is defined as 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.[22] In reading this in its ordinary meaning, the Claimant has fallen outside the prescribed definition of an "investor", it did not expressly include a SOE as an investor under the CEPTA.

28. Instead, the Claimant was an agent of Bonooru. Drawing from *Maffezini* which used the Broches test,[23] whether a SOE is an agent of a State, it must be examined first from a formal or structural point of view. Structurally, entity that is owned by the State, directly or indirectly, gives rise to rebuttable presumption that it is a State entity. *Maffezini* stated that this is equivalent if the entity is controlled by the State, directly or indirectly on top of the fact if the entity's purpose or objectives is carrying out of functions which are governmental in nature or otherwise normally reserved State, or by their nature are not usually carried out by private businesses.

29. In this first limb of the Broches Test, agency reflect Art 8 of ARSIWA on conduct directed or controlled by a State whereby it provides a test under PIL whether a State

[19] KORUS, Art 11.28.
[20] VCLT, Art 31.
[21] Tokios, p.11 ¶ 28.
[22] Record, CEPTA, Art 9.1, p.73.
[23] Maffezini, p.30, ¶ 79.

controls, directs or instructs the actions or omissions of a group of persons is set extremely high.[24] Several facts can be drawn from the record to show that Claimant is an agent of Bonooru.

30. Firstly, majority ownership is an element of the structural test.[25] Initially, Bonooru holds a minority shareholding in Vemma, 31%-38% and its right to hold such a stake is prescribed in Claimant's MOA (Annex IV). Subsequently, Bonooru increased its shareholding to 55% which reflect a majority of shares of the company in March 2021. The minority and majority shareholdings are evident to the fact that Bonooru has significant ownership over Claimant.

31. A contrary relevant example is seen in *Flughafen*,[26] Tribunal held it was not an agent because it didn't act on behalf/for the benefit of Switzerland, more than 60% of Flughafen was owned by private shareholders and the Canton did not have control over the board of directors. Unlike in our case, Bonooru holds the majority share in Claimant and based on the structural test, at this point it can be said that Claimant is an agent of Bonooru.

32. To further substantiate that Claimant is an agent of Bonooru, according to the Szeto Times, it was reported that Ms Sabrina, erstwhile head of Claimant's board of directors, was appointed as the Secretary of Transport and Tourism in a cabinet reshuffle in Bonooru.[27] Claimant's former head of board of director appointed as a minister in Bonooru's cabinet expound the fact that Claimant has a compelling structural nexus with Bonooru. In fact, Art 152.4. provides Bonoori Ministry of Transport and Tourism, to nominate one of its officials for the non-executive director position.[28] These facts display an integral control and participation of Bonooru in Claimant's structures and its operations.

[24] White Industries, p.54, ¶ 5.1.25.
[25] Cortesi, pp.108-138.
[26] Flughafen.
[27] Record, SUF, p.31, ¶ 22.
[28] Record, Annex IV, AOA, Art 152.4, p.46.

33. Besides that, when Bonooru Air was split into three airlines, Royal Narnian was chosen as the flag carrier of Bonooru, owned and operated by Claimant, which they became BA Holdings' successor.[29] This facts prima facie shows that Claimant had become a part of Bonooru's governmental aviation industry, placing them in a fundamental position as a governmental agent.

34. The creation of Claimant and how it operates resonates in the best interest of citizens of Bonooru. Therefore, based on the factual matrix drawn, the Respondent submits Claimant is an agent of Bonooru.

35. Nevertheless, Maffezini highlighted that, due to many forms of SOE which may shape manners of State action, structural test is not a conclusive determination to establish a SOE as an agent of a State. This requires another test, known as the functionality test which looks to the functions of or role to be performed by the entity.[30]

c) Claimant carries out governmental functions of Bonooru

36. The functional test as used in *C.S.O.B* stressed that the focus must be on the nature of the activities and not the purpose. This test verifies whether the function carried out by a SOE can be deemed "public in nature".[31] This test mirrors the attribution technique of Art 5 of ARSIWA as it focuses on the conduct of a person delegated with governmental function.[32] An activity is usually seen as an essentially governmental function if it is under the sovereign's exclusive competence, or of governmental units or state agencies.

37. In *Maffezini*, the participation of government bodies in creation of SODIGA shows it was established to carry out governmental functions and one of the purposes for its creation is the promotion of regional industrial development. Furthermore, the

[29] Record, SUF, p.29, ¶ 9.
[30] Ian, p.136.
[31] Note 25.
[32] Crawford, p.113.

Government intended to utilize SODIGA as an instrument of State action because one of its functions was the undertaking of studies for the introduction of new industries into Galicia, seeking and soliciting such new industries, investing in new enterprises, processing loan applications with official sources of financing, providing guarantees for such loans, and providing technical assistance. These objectives and functions are by their very nature governmental and therefore, cannot normally be considered to have a commercial nature.

38. Claimant was structurally created to benefit Bonooru, its operations vastly reflect discharging governmental function of the State. It is traditionally known that Bonooru attracts business travellers from Mekar and other neighbouring countries.[33] Claimant's involvement was essentially governmental in nature to benefit Bonooru via aviation industry.

39. In 2011, Bonooru's Minister of Transportation and Tourism unveiled the "Horizon 2020" Scheme as part of the Caspian Project to enhance the tourism sector of the State. A key part of this Scheme was to offer subsidies to companies investing in tourism-related infrastructure in Bonooru and Claimant received the first subsidy under this Scheme.[34] This shows that Claimant is fundamental in being a part of the effort to carry out activities that are rather governmental in nature as to commercial to boost Bonooru's tourism sectors.

40. This was affirmed by Ms. Sabrina in June 2011 that, "…Vemma has credibly outlined how its investment in Caeli would draw more travellers 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. This will boost the tourism infrastructure at our disposal."[35]

[33] Record, SUF, p.32, ¶ 28.
[34] *Ibid.*
[35] *Ibid.*

41. In a press conference in 2016, she lauded Claimant's "contribution to the enhancement of Bonooru's tourism infrastructure, which has, in turn, enhanced the mobility rights of our population within the Greater Narnian region. Vemma has certainly lived up to the standards set by its predecessor in Bonooru.[36] In its entirety, Claimant's involvement in Bonooru's effort to elevate their tourism sectors reflect discharging governmental functions via aviation industry.

42. The Claimant is also constitutionally bound to safeguard the mobility rights of the citizens of Bonooru as enshrined in Art 70.[37] In the decision of the Bonooru Constitutional Court, the government ensured that there are protections for Bonoori citizens' access to mobility. The provisional MOA of Claimant is the primary successor to BA Holdings, ensures that Royal Narnian will continue to operate routes to remote communities. Combined with Bonooru's continued, although minority, participation through Claimant, we are sufficiently convinced that Bonooru will be able to ensure the utilisation of the Royal Narnian for public benefit.[38]

43. The decision amplified the clear intention that Claimant's aviation investment is fundamentally to safeguard and enhance the mobility of Bonoori citizens. Under this particular context, it ought to be deemed as a form of governmental function, rather than commercial as the central of their operation focuses on the constitutional rights of Bonoori citizens.

44. One of Claimant's prescribed objectives in their MOA is to developed Bonooru's aviation industry and infrastructure for the benefit of its citizens in accordance with Art 70 of Constitution Act of Bonooru 1947 that ensures mobility rights.[39] This reflects their integral functionaries is to facilitate the mobilization of Bonoori citizens via aviation.

[36] Record, PO No.4, p.89, ¶ 6.
[37] Record, Annex 1, Constitution Act of Bonooru, 1947, p.41.
[38] Record, Annex III, CCB Case No. 1981-17, p.43, ¶ 59.
[39] Record, Annex IV, MOA, p.44, ¶ h.

45. Besides that, upon Bonooru's implementation of the bail-in program through the Airways Infrastructure Rescue Act on 2 March 2021, it allows Bonooru to purchase increased shares in Claimant which had subsequently increased to 55%, the Claimant underwent a large-scale restructuring that involves its board of directors being replaced with government functionaries, its functions expanded to include paramilitary activities, and its legal team was equipped with lawyers from Bonooru's justice department to assist in its arbitration against Respondent.[40] Again, these are evident to the fact that Claimant is discharging essential governmental function on behalf of Bonooru.

46. Lastly, several compelling inferences that can be made out of the Podcast Transcript[41] to further prove Claimant was discharging governmental functions. According to the former high-ranking employee within Bonooru's Ministry of Tourism, Ms. Misty, Claimant's investment benefits Bonooru more than it benefit the Caeli and Claimant itself. She pointed out that, many sources are put into flights between Mekar and Bonooru despite the routes are not profitable. She also asserts that this could be some sort of closed-door deal, arrangement…. with Bonooru where Claimant ensures that Caeli flies these routes to benefit Bonooru.

47. This implies that the core operation of Caeli's flight does not prioritize commercial profits, they sustain of many state aid that Royal Narnian receives.[42] They instead prioritize the mobilization of Bonoori citizens to its neighbouring country which is an essential governmental function.

48. Lastly, according to Aviation Analytics,[43] the Claimant has near assurances that Bonooru would step in if anything bad were to happen to its prized national-carrier's owner. The analysis state that this is the reason why Claimant is able to fly at losses and make investments in distressed airlines worldwide. This could only be achieved Claimant is a SOE and an agent of Bonooru that carries out governmental functions.

[40] Note 17.
[41] Record, Annex VII, Phenac Business Today Podcast Transcript, p.54.
[42] Note 39, p.55.
[43] Record, p.57, Annex IX.

According to the analysis, it has been reported widely that behind-the scenes, Bonoori officials are preussuring Respondent, especially by holding the Caspian Project related expansion hostage.

49. The facts above displayed the integral functionaries of Claimant centralizes on discharging governmental functions of Bonooru. Claimant's aviation investment does not operate on a profit and loss basis, they prioritize mobilization of Bonoori citizens and anything that could benefit Bonooru as a whole. This ought to be deemed as governmental functions, rather than commercial.

50. When a sovereign investor is not distinguishable from the state in terms of operational management, or it is performing a governmental function, arbitral tribunals should not principally equate such actor to investor but, instead, to a state.[44] If either of these limbs are satisfied, the ICSID Convention will presumably not apply to protect the relevant SOE, meaning that the tribunal must decline jurisdiction.[45] With that, the Claimant does not fulfil Art 2 ICSID as they are an agent of Bonooru that carries out governmental functionaries.

[44] Nalbandian, p.12.

ARGUMENTS ON PROCEDURAL MATTER

II. THE TRIBUNAL SHOULD GRANT THE LEAVE SOUGHT TO FILE AMICUS SUBMISSION BY THE EXTERNAL ADVISORS TO THE COMMITTEE ON REFORM OF PUBLIC UTILITIES. ("CPUR")

51. The External Advisor of CRPU (The External Advisor), as the member of Mekari civil society whose professional focus is investment banking, request leave from the Tribunal to submit an amicus curiae brief pertaining to the present dispute. "Amici curiae" means "*friends of the court*" as third parties or non-disputing parties to the dispute.[46] The Tribunal, based on ICSID Arbitration Rules, do not use 'amicus curiae' but rather 'non-disputing party', and a "non-disputing party" does not become a party to the arbitration by virtue of Rule 37, but is afforded a specific and defined opportunity to make a particular submission'.[47]

52. The External Advisor intends to play its traditional role as a non-disputing party to assist the Tribunal to arrive at a decision by providing arguments, perspective and expertise that the litigating parties may not provide. Generally, individuals, NGO, industry representatives and other parties with an interest in the dispute, such as the External Advisor of CRPU itself, can request to participate as amici curiae.

53. The External Advisor requested the Tribunal to grant them as non-disputing parties to present legal arguments by way of submission of amicus curiae brief. This is empowered by Art 41(3) of AFR, where upon consultation of both parties, Tribunal may allow to file a written submission pertaining to the scope of the dispute. However, submission must (a) assist the Tribunal on a factual or legal issue of the proceeding by providing a different perspective, knowledge or insight from the disputing parties, (b) address matter within the scope of dispute and (c) has significant interest in the proceeding. Art 41 also includes the Tribunal must ensure that such submission does

[46] Astrid, p.25.
[47] Biwater.

not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

54. This is parallel to Art 9.19 of the CEPTA, whereby a non-disputing Party may make oral and written submission to the Tribunal in regards of interpretation of this Agreement.[48] Upon consultation of both parties, the Tribunal may accept and consider the written amicus curiae submissions on the 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.[49]

A. The Tribunal should allow the participation of External Advisors of CRPU in the arbitral proceeding as they have fulfilled all the requirements.

a) The External Advisors of CRPU will bring new and special legal or factual perspective to the proceeding

55. Apotex highlighted that amici may provide insights on the issues disputed, either substantive knowledge or relevant expertise or experience that goes beyond, or differs in some respect from disputing parties.[50] It is appropriate for an entity such as an organization with their membership or grass roots activity, to provide salient information about the actual public impact of company activities or regulatory State action that is rarely obtain to participate.[51] The External Advisors are members of Mekari civil society whose professional focus is on investment banking,[52] they are a body of persons whom are well-versed in the line investment businesses. They ought

[48] Record, CEPTA, Art 9.19, p.80, ¶ 2.
[49] *Ibid*, ¶ 3.
[50] Apotex, ¶ 23.
[51] Epaminontas, pp.38–46, 44.
[52] Record, the External Advisors of CRPU, p.19.

to be considered credible where they can provide information in regards of sophisticated investment made in Caeli, which clearly is beyond the present legal discussion of the dispute.

56. Procedurally, ICSID do not investigate and rely entirely on information the parties provide, having an CRPU could offer an additional factual information that may become essential for the Tribunal to evaluate the facts of the dispute.[53] The External Advisors having being created under "Law on Privatisation" of Caeli, can provide the Tribunal critical insight as to Caeli's privatisation, liquidation, and/or restructures.[54]

57. It is understood that additional information must be different in terms of providing arguments, perspectives, and expertise that the litigating parties may not provide to help the Tribunal arrive at its decision.[55] The External Advisors can provide a profound insight on privatisation, liquidation, and/or restructures of Caeli as they have been involved in performing audit, analysis of the economic, technical and financial performance of Caeli, accounting standard of financial statements, preparation of a financing model, determination of the attractiveness of the enterprise for investors and ways to improve it, setting of the initial price and the preparation of an information package on the airlines, as well as identification of potential investors.[56] The information that External Advisors intends to provide is certainly beyond the sphere of knowledge and expertise of both Claimant and Respondent. With this special and credible insight, it will assist the Tribunal to truly evaluate the facts of the present dispute.

58. Knowing that the perspective must be new and special, different from, rather than a repetition of, what the parties have argued,[57] The External Advisors is more than ready to provide a fresh perspective on the financial matters for the Tribunal to consider where they will assess the legality of Claimant's investment that could

[53] Buckley & Paul.
[54] Note 52.
[55] Suez, ¶ 13.
[56] Note 52.
[57] Newcombe & Lemaire.

fundamentally determine Tribunal's competence-competance.[58] In totality, the External Advisors' offer of assistance to submit amicus curiae is not a repetition of the present dispute, it offers the Tribunal a rather sound information and perspective on the financial nature of the dispute, which is crucial for the Tribunal to take into account in this proceeding to arrive at a decision of higher quality.[59]

b) The External Advisors of CRPU has significant and public interest in the present dispute

59. In this particular dispute, The External Advisors has both interests to submit an amicus curiae brief. The interest here refers to something that is more than a mere general interest, it has to be significant that the petitioner must demonstrate that its interest may be affected by the issue on which it intends to make submissions or by the decision of the Tribunal.[60] In *Apotex*, the Tribunal will rule out amicus petitioner if they fail to explain how the rights and principles it may represent or defend might be directly or indirectly affect by the outcome of the proceedings.[61] This indicates that, amici whom are directly or indirectly affected by Tribunal's decision shall be deemed to have significant interest in the case.

60. The External Advisors holds a significant interest in the dispute, they have actively participated in the deliberations of the Committee in the process leading up to the acquisition of an 85% stake in Caeli,[62] this reflect how much is at stake for the External Advisors in the event the Tribunal are not provided the special and new perspective and insight the amici intends to offer. They possess a significant stake in Caeli where the outcome of the Tribunal, whichever direction it may go, will directly affect them.

[58] Note 52.
[59] Johnson and Tuerk, pp.244, 249.
[60] Born & Forrest, pp.1–40.
[61] Apotex, ¶ 28.
[62] Note 52.

61. Whereas for public interest, as seen in *Gabriel*, public interest is a key requirement that derives from the nature of the investment and dispute involve, in this case, dispute concerning the people, environment, culture and history necessarily implicates public interest and the outcome of these proceedings may impact upon it.[63] Amicus curiae complements the voluntarist and bilateral origins of international law with public interest-based normative structures.[64] This indicates that, a matter of public interest is when decision by a court might affect more people than just the parties to the proceedings.[65]

62. This amicus submission is also made in the presence of a matter of public interest, in light of the aforesaid evidence that the rights received by Claimant were procured by means of bribes paid to Mr. Dorian, Chairperson of the Committee,[66] it could potentially affect not only the disputing parties and the amici itself, it goes beyond atmosphere of the Tribunal where it could taint and be detrimental to the entire Mekari civil society. This allegation poses a threat of public confidence in the Committee and the State as well in the privatisation of Caeli and the outcome of the Tribunal can have a deep impact on the public sphere. Thus, it be outrageous for the tribunal to bluntly ignore any offer of assistance made by third parties claiming to voice the interest of the public.[67]

c) The External Advisors of CRPU submission of amicus curiae brief is within the scope of the dispute

63. An amicus curiae brief must address matter that is within and not beyond the scope of the dispute. In *UPS*, amici cannot be permitted to 'turn the dispute the subject of the arbitration into a different dispute', instead, amici must assist the tribunal in resolving

[63] Gabriel, ¶ 65.
[64] Benzing, p.371.
[65] Nicole.
[66] Note 52.
[67] Mourre, p.266.

the dispute submitted by parties.[68] This requirement is to ensure that the special perspective adduced by amicus curiae is in line with the course of discussion in the proceedings, the arguments venture must be related and relevant to the substantive legal questions to be resolved in the arbitration. This requirement limits the information in a brief for the Tribunal to consider without risking the validity of an award.[69] The External Advisors' offer of assistance is well within the scope of the dispute in the present case, the technical financial assistance and insights are all relevant for the Tribunal to consider to better evaluate the facts and to an extent may be helpful the address the financial, investment and economic issue in this dispute.

64. Issues of jurisdiction is allowed in amicus curiae brief, *Apotex* highlighted that there is not hard and fast rule that excludes jurisdiction from amicus submissions, it is perfectly conceivable that issues of jurisdiction might raise matters of public interest on which non-disputing parties might be in the position to provide assistance and perspective or insights beyond those disputing parties.[70]

65. This is in line with the External Advisors' assessment of the legality of Claimant's investment to determine the Tribunal's competence-competence, the Tribunal is dealt with the ability of investor-State dispute settlement to address public policy issues fairly and in an unbiased manner, taking the regulatory interests of the State into account.[71] The External Advisors intends to cautiously assess Claimant's claims that is tainted with allegations of corruption so as to provide a different approach in regards to the Claimant's legal standing before the Tribunal.

[68] UPS, ¶ 60.
[69] Ruthemeyer, p.261.
[70] Apotex,¶ 33.
[71] Note 52.

d) The External Advisors of CRPU is experienced, independent and an expert

66. A petitioner must show the tribunal with specific information on the nature and size of its membership, the qualifications of its leadership, the expertise of its staff, and its activities. Likewise, in *Suez*, the tribunal will only accept amicus submissions from persons who establish to the tribunal's satisfaction that they have the expertise, experience and independence to be of assistance.[72] It is not enough for an NGO to justify an amicus submission on the general grounds that it represents civil society or that it is devoted to humanitarian concerns.[73]

67. The amici are members of Mekari civil society whose professional focus is investment banking, they were engaged as external advisors to the CRPU set up under the Law of Privatisation to specifically advise on the privatisation, liquidation, and/or restructuring of Caeli.[74] This denotes that they are individuals whom are experience and expert in regards to the field of investment and privatisation given the position they hold. Thus, they can assist judges in navigating the vast amount of material available on an issue.[75]

68. Besides that, being experience entails the prospective amici to have an established area of work, with a clear focus on a legal, political or social subject matter and that their engagement in this work has to be presented to the tribunal in the petition, by describing the aforementioned characteristics of the organization or individual.[76] The External Advisors have an established area of work, they have been performing audit, analysis of the economic, technical and financial performance of Caeli, bringing indicators in the financial statements in line with accounting standards, preparing financing model, the determination of the attractiveness of the enterprise for investors

[72] Suez, ¶ 23.
[73] UN Report, ¶ 33.
[74] Note 52.
[75] Viñuales, p.115.
[76] Vivendi ¶15.

and ways to improve it, setting of the initial price and the preparation of an information package on the airlines, as well as identification of potential investors.[77]

69. Apart from that, they have also regularly acted as interveners before federal courts in Mekar in relation to judicial proceedings concerning approval for privatisation projects.[78] This again shows their vast experience in this field which will be an assistance to the Tribunal.

70. Pertaining to independency of amici, despite this is not explicitly required in Art 41(3) or Rule 37(2), it is a consideration that the court would make to admit an amicus curiae brief. To allow an informed decision of the tribunal on the petitioners' independence, prospective amici should provide in their application letter information, the identity of the petitioner, including, where relevant, its membership and legal status, its general objectives, the nature of its activities, and any parent organization, whether or not they have any affiliation, direct or indirect, with any disputing party and information on any government, person or organization that has provided any financial or other assistance in preparing the submission.[79]

71. The External Advisors were selected for this role through a transparent and competitive process approved by the Cabinet of Ministers of Mekar and based on criteria of competence as identified in the Law on Privatisation.[80] They were specifically engaged as independent external advisors to the Committee in regards to the privatisation process. In fact, none of the amici has received any financial or other support from any of the contending parties in relation to the elaboration of this submission.[81]

72. However, having a mere relationship with the disputing parties does not automatically discredit one's independence. For example, collaboration with one of the parties on a non-material level, is not grounds for rejecting amicus curiae, as seen in *Biwater,* joint

[77] Note 52.
[78] *Ibid.*
[79] UNCITRAL II, Art. 5(2), ¶ 35; Aguas, ¶ 24, 29, 32.
[80] Note 52.
[81] Note 52.

amicus was accepted although the petitioners explicitly stated that they seek to work with the government and governmental agencies in the area of their expertise.[82] To assess whether an amicus petitioner remains independent is, therefore, whether a relationship of control or the determinative influence of a party to the dispute on the writing of an amicus brief and therefore on its content can be ascertained.[83]

73. The role of External Advisors is independent in nature, while their duty generally revolves around advising the Respondent on financial matters, they remain impartial so as to achieve the genuine responsibility of an external advisor and also due to the fact that they possess a general interest in promoting fair business practices in Mekar.[84] The position of External Advisors is therefore independent from the Respondent.

74. In conclusion, the Tribunal ought to consider all above facts to find that the External Advisors be allowed to submit their amicus curiae brief. The admissibility of its amicus curiae brief will assist the Tribunal to arrive at a sound and propound decision.

B. The Tribunal should bar the CBFI's amicus submission

75. The Respondent is aware and support the openness and transparency in arbitration proceedings as prescribed under Chapter 9 of the CEPTA, which entails the appropriate participation of amici curiae.[85] However, it is in the Respondent's position that the Claimant has negated the privilege to participate as a non-disputing party to this proceeding.

76. The Respondent raises 3 objections with respect to the application by CBFI to submit their amicus submission;

[82] Biwater, pp. 365-390.
[83] Schliemann, pp. 365-390.
[84] Note 52.
[85] *Ibid.*

a) CBFI's amicus submission lacks public interest

77. It is in the Respondent position that CBFI's amicus submission was not applied in pursuit of any public interest.[86] Despite the criteria of public interest is not expressly included in ICSID Arbitration Rules, investment tribunals have always considered whether applicant of amicus submission has demonstrated there is a public interest in the subject-matter in the dispute.[87]

78. However, presence of public interest in a dispute would not simply justify an admission of an amicus curiae. In *Resolute Forest*, it emphasized on the fact that public interest factor requires a demanding approach and amicus submission must be in furtherance of the public interest, in this case, the Tribunal agreed that there was a matter of public interest however the applicant failed to show any link between their application and furtherance of the public interest.[88]

79. CBFI's application to participate as a non-disputing parties was not made in pursuit of public interest, despite it stressed that the brief is intended to provide context on the business climate of Bonooru which could affect all the future investors, their entire involvement as a non-disputing parties are steered to ensure that the Claimant are presented in the best possible way in the outcome of this Tribunal. It is true that the outcome of this case may affect not just the Claimant but CBFI itself, however it does not seem to be in relation to anyone beyond these 2 parties. This is because, the intervention of the civil society in the area of investment arbitration has to be justified by the peculiarities of a case that exceed the interests of specific parties.[89]

b) CBFI's amicus submission lacks independency

[86] *Ibid.*
[87] Note 58.
[88] Resolute, ¶ 4.7.
[89] Katia.

80. The requirement of independent is not expressly included in Art 41(3) of AFR nor Rule 37(1)(2), however, ICSID tribunals have considered it as a requirement to admit an amicus curiae submission. For example, in *Pezold,* it highlighted that independency is an implicit in Rule 37(2)(a).[90] The CBFI must be in a standing where they are independent from Claimant. The CBFI's amicus submission must not be admitted as it raises a concern of independency in participation of LLC in arbitration through CBFI.[91]

81. LLC is specifically assigned to advise Claimant on funding strategies with respect to its claim against the Respondent.[92] In a meeting on 29 March 2021, the CBFI resolved unanimously that Executive Committee member Horatio Velveteen, CFO of LLC, could vote in respect of the amicus submission in Claimant's claim against the Respondent since LLC activities in relation to this dispute were restricted to advising Vemma in respect of potential litigation funding and funders.[93] This poses a serious issue of conflict of interest and it is even stated in the CBFI's "Amicus Brief Submission Guidelines," where members of the CBFI's Executive Committee cannot participate in discussions or votes in relation to a dispute in which they have a conflict of interest.[94]

82. Particularly in *Pezold,* the involvement of government officials and the power it holds raised a legitimate doubt as to the independence and neutrality of the petitioners and it is a sufficient ground to deny the amicus submission. The Tribunal considered that "*the circumstances of their application give rise to legitimate doubts as to the independence or neutrality of the petitioners*", and thus, the test is the "*apparent lack of independence or neutrality of the petitioners*."[95] The participation of LLC in CBFI raises a serious doubt as to CBFI's independency and impartiality as a non-disputing parties due to its existing interest the Claimant.

[90] Pezold, p.20, ¶ 62.
[91] Record, Mekar's Application to Bar the CBFI, p.23.
[92] Record, Amicus Submission by the CBFI, Disclosure, p. 17, ¶ 6.
[93] Record, PO 3, p. 87, ¶ 12.
[94] *Ibid.*
[95] Pezold, ¶ 56.

83. The fact that both Claimant and LLC are members of CBFI,[96] it should be a compelling indicator that CBFI participation as a non-disputing parties are in doubt as they are closely link to the Claimant. Nevertheless, as established in Eli, the Tribunal explained that membership of disputing party does not mean lack of independence per se, however, it must be assessed to what extent the non-disputing party submission would assist the Tribunal to determine factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties,[97] to which the Respondent also finds that Claimant fails to do so.

84. In conclusion, despite the CBFI's claim to represent firms of vastly different sizes that play different roles in the Mekari economy, their intrinsic role revolves around the benefit of the Claimant, they are tainted with a questionable independency and impartiality.

c) CBFI's amicus submission did not provide a different perspective, knowledge or insight from the disputing parties

85. As expressly required in Art 41(3)(a) of AFR and Rule 37(2)(a) of Arbitration Rules, both requires the amicus submission to provide factual or legal issue pertaining to the proceeding by bringing perspective, knowledge or insight that is different from the disputing parties. The CBFI's amicus submission did not advance any novel arguments from the disputing parties nor it offered a different point of view from that of the disputing parties.[98]

86. CBFI's brief centres around the standing of a SOE and the deviation from international norms facilitating participation of State-linked enterprises in commercial activities will have negative consequences on exchange of capital in Greater Narnia by

[96] Note 90, ¶ 7.
[97] Eli, ¶ 6.
[98] Note 89.

introducing uncertainty into the business framework. Among others, the specific issues of fact or law intended to discuss was Bonooru's business landscape of which it competes based on free market principles without the instruction of the Bonoori government despite their ownership structure, the nature of the enterprises and not their purpose should guide the Tribunal's decision and the invalidation of the standing of a SOE to voice their grievances before a free and fair judicial system.

87. These matters are the existing central issues of the dispute, under the jurisdictional stage, the disputing parties has extensively discussed the structural and functional nature of SOE such as the Claimant itself to determine the standing of Claimant before the Tribunal and its legal status. This, in its entirety reflect all the issues that CBFI intended to submit in the amicus curiae brief.

88. The Respondent do not contest on the fact that CBFI's knowledge and skill in their area of expertise, however, what they intended to submit will not bring new perspective, particular knowledge or insight that is different than the disputing parties. The amicus brief will not be of an assistance for the Tribunal to determine the factual or legal issues in this present case, because it will not bring a unique perspective, knowledge or insight, as the information it proposed to provide has already been addressed by the disputing parties.

89. Likewise, in *Apotex,* despite the Tribunal acknowledges the expertise the petitioner holds, it could not equal the experience and insights possessed by the disputing parties and it was most unlikely that the petitioner would provide the Tribunal with any particular perspective or insight different from the disputing parties.[99]

90. CBFI has not shown any distinguished or different material fact that it could offer other than what has been provided by the disputing parties, in *Pezold,* the term different in this context is interpreted as providing different approach to arguments that already been submitted in the dispute.[100] Here, the approach to the arguments by

[99] Apotex, p.9, ¶ 32, 33.
[100] Pezold, ¶ 57.

CBFI, which is on the standing of SOE and the business framework of Claimant does not seem to be unique or distinguish than what the disputing parties have contended.

91. In conclusion, the CBFI's amicus submission must be deemed to have not provided new arguments from the disputing parties nor it offered a different point of view from that of the disputing parties. By admitting such brief would be a duplication and not of a real assistance to the Tribunal.

ARGUMENTS ON MERITS

III. THE SERIES OF ACTS AND OMISSIONS BY THE RESPONDENT DID NOT VIOLATE THE FET STANDARD UNDER ART 9.9 OF THE CEPTA

92. Under Art 9.9 of the CEPTA, each party shall accord FET and full protection and security to covered investments of the other party and investors. Art 9.9(2) further elaborates on the measures that constitute a breach of FET. In this regard, it is established that the provision shall be interpreted according to the ordinary canons of treaty interpretation.[101]

93. In reference to the rules of international law, the standard of FET that will be covered are **(A)** the protection of the Claimant's legitimate expectations, **(B)** the Respondent's compliance to due process of law and **(C)** non-discriminatory conduct, **(D)** creeping FET violation, none of which is compromised by the Respondent.

A. The Respondent did not deprive the Claimant's legitimate expectations.

94. In the arbitral jurisprudence, the doctrine of legitimate expectations is recognized as the dominant element of the FET standard.[102] Art 9.9 of the CEPTA also mentions that in applying the FET standard, the Tribunal may consider whether a party made a specific representation to an investor to induce a covered investment that created a legitimate expectation.[103] Therefore, it is submitted that the Respondent did not deprive the Claimant's legitimate expectations because *(a)* there are no legitimate expectations on the regulatory stability of Caeli and *(b)* alternatively, the Respondent did not frustrate the legitimate expectations of the Claimant.

[101] VCLT, Art 31 & 32.
[102] Saluka, ¶302.
[103] Record, p. 76.

a) There are no legitimate expectations on the regulatory stability of Caeli

95. The legitimate expectations of the investors is viewed at the time when the investment was made and by looking at the assurances offered by the host-State and the State's regulatory regime.[104]. As explained by the Tribunals, general statements cannot give rise to legal expectations.[105] When the Claimant submitted its proposal, the Chairperson of Mekar's Committee on Reform of Public Utilities merely stressed that the Claimant's ties to Bonooru were an asset.[106] He also expressed his hope that the Claimant's imminent success would encourage more investors from Bonooru to consider the Respondent as an investment destination.[107] Hence, the general statement made by the Chairperson of the committee gives no basis to create legitimate expectations.

96. If the Tribunal finds that such representations amount to the creation of legitimate expectation, it is unreasonable for the Claimant to rely on the representations made. The test to determine the reasonableness is an objective test on whether a third party would interpret the representation made as a promise to regulatory stability.[108] Moreover, a holistic approach must be undertaken and the Tribunal must consider the condition of the host-State.[109] When the Claimant made its investment, it should have considered the understood the economic instability of the Respondent's state, and the volatility of the investment as it also inherited the debt liabilities associated with Caeli.[110] Therefore, it is unreasonable for the Claimant to rely on the representations made to give rise to legitimate expectation.

[104] Southern ¶13, Schreuer I, p.373.
[105] Continental Casualty, ¶261.
[106] Record, p.31, SUF ¶24.
[107] *Ibid.*
[108] Saluka, ¶304.
[109] Duke Energy ¶; Potesta,p.119.
[110] Record, p.7, Response,¶11.

b) Alternatively, the Respondent did not frustrate the legitimate expectations of the Claimant

97. Under investment law, it would be unconscionable for any host-State to promise not to change its legislation as time and needs change.[111] The Tribunals have also agreed that when a host-State regulates to address a fundamental change of circumstances, these do not amount to the frustration of the legitimate expectations.[112] When the Claimant made its investment, the Respondent had never guaranteed to the Claimant that no interference would take place on the stability of Caeli. Therefore, the Respondent asserts that the legitimate expectation is not frustrated due to economic downturn and political changes.

98. In late 2016, the Respondent's MON currency began to rapidly decline in value and a currency crisis finally ensued in the Respondent's country in March 2017. [113] This has caused the Respondent to pass a decree requiring all companies operating in the country to offer goods and services denominated exclusively in MON.[114] This shows that the Respondent has no choice but to shift its economic policies.

99. Apart from the economic downturn, political changes have also affected the investment's environment. The political party that initially controlled the government, the LPM was re-elected.[115] The LPM blamed the privatisation program by the CMP and as the new government, they approved various acts authorizing bailouts to State-owned or controlled corporations.[116] They also shelved large parts of its ongoing privatisation programmes and re-nationalized multiple enterprises in the tourism sector.[117] This situation does not only affect the Claimant, but other foreign investors as well.[118] Since the Tribunals have established that it would be unreasonable for any investor to expect that circumstances existed at time of investment to remain

[111] Continental Casualty ¶49.
[112] Continental Casualty ¶262; Salini ¶291.
[113] Record, p. 35,SUF ¶39.
[114] Record, p. 35,SUF ¶42.
[115] Record, SUF, p 35, ¶41.
[116] *Ibid.*
[117] *Ibid.*
[118] *Ibid.*

unchanged,[119] it follows that the foreseeable change of policies by the Respondent did not frustrate the legitimate expectation.

100. Accordingly, the Claimant cannot argue that the legitimate expectations are frustrated due to the change in policies because the law has confirmed that any law is at all times liable to changes.[120] A reasonably informed investor such as the Claimant should be aware and ready to contemplate any changes. Therefore, there is no frustration of legitimate expectation to raise a breach of the FET standard.

B. The Respondent has complied with due process of law.

101. Art 9.9 (2)(b) of the CEPTA provides that *"fundamental breach of due process including a fundamental breach of transparency in judicial and administrative proceedings"* will amount to a breach of FET standard.[121] This principle of due process forms the procedural dimension of the FET standard,[122] hence the failure of the Respondent to accord fairness to the Claimant will amount to a violation. The Respondent submits that due process is heeded as *(a)* the launching of investigations by the CCM are lawful, *(b)* the Mekari courts did not deny the Claimant of justice and *(c)* the High Commercial Court of Mekar has validly enforced the award that has been set aside.

a) The launching of the investigations by the CCM is lawful

102. The *AIG* Tribunal established that due process of law is respected when the measures taken follow the State's domestic legislation.[123] The Respondent contends that both investigations conducted by the CCM into Caeli are proper application of the Respondent's domestic laws. The MRTPA exhibits a conjunctive set of requirements

[119] Philip-Morris, ¶425; Saluka ¶¶305, 351; El-Paso, ¶374.
[120] El-Paso, ¶350; Teinver, ¶668.
[121] Record, p.76, CEPTA.
[122] Schreuer & Dolzer at pg 142-143; Garcia Armas ¶347; Al-Bahloul ¶221; Vandevelde at p. 89.
[123] AIG, ¶10.5.1.

for the Respondent to fulfil due to the word "and",[124] hence the Respondent submits that the CCM has met all the requirements to launch the investigations.

103. The CCM launched the First Investigation in September 2016. Under the MRTPA, *firstly*, the CCM may initiate a *suo moto* investigation if the corporation obtains a market share greater than 50%.[125] At the time of the investigation, Caeli only enjoyed 43% market share. However, it is appropriate to consider the composite market share between Caeli and Royal Narnian which amounted to 54%. This is justified having regard to the evidence of preferential secondary slot-trading between the two airlines, where Caeli benefited from Royal Narnian in respect of lounge access, terminals, IT platforms, check-in operations and code-sharing.[126]

104. If the Claimant argues that the CCM should consider the market share independently, the investigation is still lawful. The law reads: *"The CCM may exercise discretion in industries that require special attention to open an investigation where a corporation owns a lower market share(...)"*[127] The discretion is validly exercised as the CCM is concerned with Caeli's rapid expansion coupled with predatory pricing strategies implemented by them.[128]

105. *Secondly*, there must be a unique threat posed by Caeli. This existed when it adopted predatory pricing strategies, focusing on low fares. In the airline industry, rational businesses do not sell their goods or services below costs unless in the hope to stifle the competition.[129] For instance in the United States, the established airlines focused on the impact of low fares, which is considered to be predatory in nature.[130] As a result, this method caused other airlines to suffer losses and went into bankruptcy or liquidation.[131]

[124] Kumar and Beech, p.4.
[125] Record, p. 47, Annex V, Chapter III(2)(a).
[126] Record, p. 32, SUF ¶27.
[127] *Ibid.*
[128] Record, p. 34, SUF ¶36.
[129] Dempsey,p.704.
[130] *Ibid.*
[131] *Ibid.*

106. *Thirdly,* there must be evidence that the corporation's actions have or are likely to push competitors out of the market in the near future.[132] The CCM was concerned with the subsidies received by the Claimant under the 2020 Horizon Programme,[133] hence no regulative body can be reasonably expected to wait for Caeli to drive out smaller competitors out of the market. [134]

107. For the Second Investigation, it was launched based on the complaint made, alleging Caeli to push other competitors off the specific routes, capitalising on its undercutting polices and privileges it enjoyed.[135] This concludes that there is no misapplication of the law by the Respondent to justify a violation of due process.

b) The Mekari courts did not deny the Claimant of justice

108. Investor-state Tribunals interpreted that the standard used in determining a breach of due process in the administration of justice is "*the manifest injustice that leads to an outcome which offends a sense of judicial propriety*".[136] Examples of manifest injustice includes undue delays or excessive lengths of the proceedings.[137] The Claimant might argue that there exists denial of justice as there was a significant delay in Mekari courts and the premature dismissal of the claims brought.[138] However, the Respondent maintains that these do not amount to a denial of justice but merely reflects a problem of efficiency in the performance of courts, which the Tribunal cannot consider to violate due process.[139]

109. The Respondent has satisfied due process as the Mekari courts gave the Claimant every opportunity to voice its grievances before the appropriate judicial authority.[140] This is consistent with the Tribunals' decisions where due process is afforded when

[132] Record, p. 47, Annex V, Chapter III (2)(c).
[133] Robenalt at p. 642.
[134] Record, p. 34, SUF ¶36.
[135] Record, p. 35, SUF ¶38.
[136] Joshua ¶358; Eli Lilly ¶219; MTD ¶109.
[137] Al-Bahloul ¶221; Krederi ¶455-459.
[138] Record, p. 4,Notice, ¶20.
[139] Global Telecom ¶608; Vannessa ¶227; Cargill ¶292-293.
[140] Record, p. 8, Response, ¶16.

the host-State provides the investor with the opportunity to contest the measures in question.[141] The Mekari courts had never denied the right of the Claimant to file a claim. Despite the backlog of cases, the Claimant was able to get their claims registered on 27 March 2018 and received a hearing date.[142] This shows that the Claimant was not denied the access to justice.

110. For the dismissal of the request for a separate hearing on interim measures, the Respondent asserts that it does not satisfy the high threshold of denial of justice[143] that requires extremely gross misconduct.[144] The Tribunals have also regularly found that the conducts of the local courts do not meet the threshold for denial of justice.[145] When Caeli's lawyers urged for an immediate hearing to secure a stay on the airfare caps, the Court Registrar reasonably rejected the request. This is because the court does not have the resources to make that possible. They also must continue giving priority to the criminal matters.[146] Hence, the mere rejection by the Court Registrar does not establish a denial of justice.

111. Other than the rejection for a separate hearing on interim measures, the court has dismissed the the Claimant's merits claim on the airfare caps. This was taken in pursuant to the Executive Order 5-2014 which allows the judge to dismiss without appeal a case if there is very little chance of success on the merits.[147] Hence, a proper exercise of powers by the court does not give rise to a denial of justice.

112. For the significant delays, the Tribunal should consider the situation in the Respondent's country. The Respondent's citizen population have grew from 6 million to 10.8 million but the judicial system has failed to expand simultaneously. This resulted in delays in the average time that rose between 9 months to 22 months.[148] The time taken to resolve commercial matters are longer which may take up to 27 months

[141] ADC, ¶435; Kardassopoulos, ¶¶395,396,404.
[142] Record, p. 36, SUF ¶44.
[143] Agility ¶210& 216; EBO Invest ¶472.
[144] Chevron ¶142.
[145] Genin ¶357; Agility ¶242; Binder ¶467.
[146] Record, p. 36, SUF ¶44.
[147] Record, p.86, PO3, ¶8.
[148] Record, p. 29, SUF ¶13.

as the Respondent prioritized criminal cases.[149] For the Claimant, the time taken to resolve the claims was 13 months. While the Claimant might argue that this amounted to an undue delay, *Jan de Nul* Tribunal held that even if the court took ten years to give a first instance judgement, this is "certainly unsatisfactory" but not a denial of justice.[150] Accordingly, the time taken in the judicial proceeding is not sufficient to give rise to a breach of due process under FET standard.

c) The High Commercial Court of Mekar has validly enforced the award that has been set aside

113. The relevant facts to this issue are on 9 May 2020, Mr Cavannaugh released an award in favour of the Respondent but the Claimant set it aside on 1 August 2020 at the Supreme Abitrazh Court of Sinnograd.[151] The Claimant relied on the report produced by CILS, which contained bribery allegations.[152] Nevertheless, Mekar Airservices later enforced the award at the High Commercial Court of Mekar.[153] To prove violation, the threshold of abuse of due process requires a manifest injustice[154] or a sufficiently serious action.[155] The Respondent submits that enforcing an award that had been set aside falls short of the threshold required.

114. According to Art V(i)(e) of the New York Convention, an enforcement of an award may be refused if the party furnished that an award has been set aside or suspended by a competent authority of the country in which that award was made. In interpreting the provision in its natural and ordinary meaning,[156] the word "may" connotes that the enforcement and nullity of awards are under the court's discretion. As a general rule, the High Commercial Court of Mekar has the discretion whether to enforce the award or otherwise.

[149] *Ibid.*
[150] Jan De Nul,¶204.
[151] Record, p. 39, SUF ¶61.
[152] Record, p. 39, SUF ¶60.
[153] Record, p. 39, SUF ¶62.
[154] Loewen, ¶132.
[155] ECE, ¶3.805; Waste Management, ¶98.
[156] VCLT, Art 31.

115. The scope of the discretion to enforce the award is subjected to the exceptions of public policy.[157] This is consistent with the Respondent's domestic law under Section 36(2)(b) of the Commercial Arbitration Act.[158] However, the New York Convention does not define the term "public policy" and consequently; the states have the freedom to define it.[159] Based on the state practise, "public policy" refers to the foundation of the state's legal system.[160] Therefore, although the Supreme Arbitrazh Court of Sinnograd in the primary jurisdiction has set aside the award, the Mekari court retained the discretion to recognize the 2020 award as the enforcement is not in contradiction with the Respondent's public policy.

116. Under the Respondent's legislation, the public policy defence must be construed narrowly and it must meet a high standard to refuse enforcement of an arbitral award on this basis.[161] This is accordant with the arbitral jurisdictions that apply a narrow interpretation.[162] In the present case, the High Commercial Court of Mekar observed that the Claimant was heavily relying on the report made by CILS regarding the alleged bribery. However, it is against the Respondent's public policy to give credence to the reports prepared by CILS.

117. Based on the Respondent's record of public policy, the CILS is an entity funded by foreign donations to interfere with the Respondent's domestic affairs. [163] Other than the CILS report, there is a lack of inconsistency with public policy. While the Respondent admits that solicitation of a bribe would violate the FET standard, it must be backed with clear and substantiated evidence, which is lacking in this case.[164] Consequently, there is no sufficiently serious and specific indication of corruption for the court to refuse in enforcing the award.

[157] Wolff at p. 489.
[158] Record, p. 65, Annex XIV, ¶4.
[159] Born, at pp. 3422, 3652; UNCITRAL I, p. 258 ¶54-56.
[160] Northcon I, ¶ 2.2.3.; Pacheco.
[161] Record, p. 65,Annex XIV, ¶5.
[162] Maurer, p. 64-66; Born,p 409.
[163] Record, p. 65,Annex XIV, ¶13.
[164] EDF, ¶221.

C. The Respondent did not discriminate against the Claimant in implementing their measures.

118. The breach of FET standard under Art 9.9 of the CEPTA also encompasses discriminatory conducts.[165] To establish discrimination, the entities must be in like circumstances, being treated differently and the differential treatment is unjustified.[166]

119. The relevant facts are when the Claimant alleges that Caeli was denied subsidies, unlike other foreign airlines such as Star Wings and JetGreen.[167] Since the elements of discrimination must exist conjunctively, the Respondent submits that this claim is unfounded due to the lack of the first requirement.

a) The Claimant is not in like circumstance as JetGreen and Star Wings

120. The element of "like circumstance" requires a competitive relationship between the investors.[168] In the airline industry, the corporation's market share plays a crucial role to gain revenue, to satisfy the customers and to sustain a profitable growth.[169] As a profitable airline, Caeli has enjoyed a considerable market share in the industry, consistently above 40%.[170] Unlike Caeli, the predominant recipients of subsidies under the Executive Order were airlines with less than 5% of market share.[171] JetGreen and Star Wings, despite having already received subsidies from their home-States, the subsidies were aimed to alleviate the effects of an economic downturn in the region.[172]

121. Furthermore, the Tribunals have also refused to qualify the situation as similar if the entities are competing in the same industry but their scope of operation is different.[173] JetGreen and Star Wings are privately owned enterprises, unlike Caeli. It would be

[165] Record, p. 76.
[166] Reinisch, p.88; Rubins & Kinsella, p,177 ; El Paso, ¶315; Enron, ¶ 280, 282, Amoco, ¶142;
[167] Record, p. 36, SUF ¶46.
[168] Total II, ¶210; Occidental II, ¶173; Mitchell et al, p.50
[169] Babic et.al, p. 385.
[170] Record, p.37, SUF ¶49.
[171] Record, p. 89, PO 4, ¶7.
[172] *Ibid.*
[173] Vento, ¶¶251-252; RDC ,¶153.

unfair to grant subsidies to the state-owned companies when they already enjoy unique advantages over other companies that enable them to outcompete privately owned enterprises.[174] Larry Air, a wholly government-owned airline also did not receive subsidies. This indicates that the Respondent did not intend to discriminate against the Claimant and is consistent with its policy.

122. As the Claimant failed to discharge to burden of proving the "like circumstance,"[175] no discrimination is present in the situation.

D. The Claimant did not meet the threshold of creeping FET violation.

123. The Claimant argued that the Respondent's actions, when taken together have breached the FET standard.[176] However, the CEPTA only provides for measures that individually constitute a breach,[177] hence the Claimant bears the burden of proving the cumulative effect of a breach under CIL on the balance of probabilities.[178] This concept of creeping violation of the FET standard has a limited application,[179] and was first raised in *El Paso* where the correct test to apply is the effects of the host State's actions on the legal and business framework, rather than on the investment itself.[180]

124. Under this concept, it does not only concerned to protect the investors from being unjustly treated but must have regard to all surrounding circumstances.[181] In the present dispute, the alleged actions that constitute the breach of the FET standard were implemented by the Respondent in response to the Claimant's conduct, together with the economic environment in the Respondent's state. Therefore, the Claimant cannot use the creeping FET violation to punish the Respondent's "bad governance" where the cumulative effect of the measures were taken strictly in pursuance of public policy

[174] *Ibid.*
[175] Cengiz, ¶526; UPS, ¶83-84.
[176] Record, p.5, NOA, ¶29.
[177] Record, p.76, CEPTA, Art 9.9(2).
[178] Khan, ¶375.
[179] Vesel, p.563.
[180] El Paso, ¶ 517.
[181] *Ibid*, at ¶¶ 364,373, GAMI¶97;RosInvestCo,¶599.

objectives.[182] Hence, the Claimant failed to meet the threshold of creeping FET violation.

[182] Newcombe and Paradell, p. 279.

IV. IN CASE THE TRIBUNAL FINDS THE RESPONDENT DID VIOLATE ART 9.9 OF THE CEPTA, THE APPROPRIATE COMPENSATION STANDARD IS MARKET VALUE UNDER ART 9.21 OF THE CEPTA.

125. The Respondent submits that the Claimant cannot avail the FMV compensation standard in respect of any alleged damage because **A)** the Respondent has already paid the "market value" for the Claimant's investment **B)** the Claimant cannot refer to the FMV standard in the Arrakis-Mekar BIT and **C)** alternatively, the Tribunal should reduce the amount of damages.

A. The Respondent has already paid the "market value" for the Claimant's investment.

126. On 8 October 2020, the Respondent has paid 400 million USD to the Claimant to purchase the stakes in Caeli.[183] According to the market value's conceptual framework under the IVS, the value must be paid after proper marketing is done and without compulsion on the part of the parties.[184] The period for proper marketing is not fixed but there must be sufficient time to allow the asset to be brought to the attention of adequate market participants.[185] When the Respondent rejected the Claimant's offer under the Right of the First Refusal, the Claimant had time from December 2019 until September 2020 to yield other buyers[186] hence this is reasonably a proper length of exposure to the market. There is also no fact to suggest that the Claimant was under compulsion to sell to the Respondent. Hence, the "market value" standard should prevail and the Respondent had paid to the Claimant.

[183] Record, p. 40, ¶63.
[184] IVS.
[185] *Ibid.*
[186] Note 180.

B. The Claimant cannot refer to the FMV standard in the Arrakis-Mekar BIT.

127. The most-favoured nation clause is a treaty-based requirement,[187] which requires the host State not to subject investors to treatment less favourable than the other states. The Claimant may submit that the Tribunal should apply the FMV standard based on the evidence of the 2006 Arrakis-Mekar BIT which provides for FMV standard of compensation.[188] Nevertheless, the Tribunal should reject this claim based on two reasons:

a) The Tribunal should apply the doctrine of lex specialis over lex generalis to avail the "market value" standard

128. Under investment law, the narrow clauses will ultimately prevail over general law clauses in case of a conflict between those two, as they are more specific.[189] In Art 9.21 of the CEPTA, both parties have agreed that where a Tribunal makes a final award against the Respondent, the monetary damages is to be awarded at a market value.[190] The Claimant cannot derogate from this standard unless it can prove that the exception under Art 9.21 which reads *"except as otherwise provided for in Art 9.12"* applies. Art 9.12 provides for FMV standard of compensation in cases of lawful expropriation.[191] Nevertheless, both parties have established that the Tribunal will not hear submissions on the alleged violation of Art 9.12 of the CEPTA.[192] The only way the Claimant can refer to FMV standard is by invoking the general provision in Article 13 of Arrakis-Mekar BIT. As the Tribunal should apply the doctrine of *lex specialis* over *lex generalis*, it prohibits the Claimant from raising the applicability of the FMV standard.

[187] AAPL,¶40.
[188] Record, p. 86, 2006 Arrakis-Mekar BIT, Art 13.
[189] ADM, ¶117.
[190] Record, p. 82, CEPTA, IVS, p.8.
[191] Record, p. 77, CEPTA.
[192] *Ibid.*

b) Invoking the MFN clause to avail the FMV standard will go beyond the treaty provision

129. When concluding investment treaties, the parties cannot be expected to leave those provisions for future replacement. [193] Although the Claimant is entitled under the law to enjoy the benefit of the MFN clause in an investment treaty, the Claimant cannot use the clause to bypass a limitation contained in the same treaty.[194] The CEPTA has made it clear that the FMV standard will only apply in lawful expropriation claims, hence the Tribunal must interpret the treaty in light of the ordinary canons of interpretation,[195] not to displace it by reference to general policy considerations relating to investor's protection.[196] If the Tribunal agrees that the MFN clause is to give effect to the FMV standard, this will lead to a broad interpretation that generates instability and uncertainty in the investment treaty.[197]

130. While the Respondent agrees the purpose of the MFN clause is to extend the protection and equality offered to the foreign investors,[198] it can only apply to what the parties have specifically agreed. The *Salini* case has cautioned that the Tribunal must not allow the risk of "treaty shopping" where the Claimant simply picks the provision in another treaty to apply in the present situation.[199] Most Tribunals have also agreed that in the absence of an express wording that the MFN clause applies to the dispute settlement mechanisms, such application must be rejected.[200] In the CEPTA, the MFN clause did not mention its applicability to the standard of compensation; hence, it gives no room for the Claimant to avail the FMV standard.

[193] Plama, ¶209.
[194] Telenor, ¶¶92-95.
[195] VCLT, Art 31 & 32.
[196] Note 191.
[197] *Ibid.*
[198] RosInvestCo,¶131; Weiler, pp. 415-416.
[199] Salini, ¶119.
[200] Lee-Chin, ¶101; Servier,¶511; Salini, ¶116; Plama,¶118; Wintershall,¶167; HOCHTIEF, ¶74; ICS, ¶309; Juvel, ¶443; Busta, ¶138.

C. Alternatively, the Tribunal should reduce the amount of damages.

131. To award damages, the duty of reparation must be considered together with other factors. The Respondent maintains that the amount of damages should be reduced because *(a)* the Claimant's contributory fault led to the situation of Caeli and *(b)* the Tribunal should consider the economic situation in the Respondent's territory.

a) The Claimant's contributory fault led to the situation of Caeli

132. The Tribunal must take into consideration the investor's conduct because the law does not protect a foreign investor from its own bad business judgements.[201] For instance, the *Occidental* Tribunal has deliberated that the damages may be reduced if the Claimant also committed a fault, which contributed to the prejudice or harm it suffered.[202] It does not have to be serious or gross but must materially contribute to the damage. [203] In the present situation, the Claimant should have considered the debt liabilities associated with Caeli that it inherited when the investment was made. As an experienced investor in the airline industry,[204] the Claimant must not be blind of this industry's volatility. Nevertheless, the Claimant pushed for risky strategies and aimed for rapid expansion.

133. For example, when Caeli started making big profits, instead of relieving the outstanding debt and improving the financial health as suggested by the Respondent's representatives, the Claimant preferred fleet expansion and slashed airfares. [205] Therefore, the Tribunal should consider that the Claimant has partially contributed to its own losses.

[201] Total I,¶309; Sabahi et al, pp. 326-327.
[202] Occidental I.
[203] Burlington ¶576, Beharry & Bräutigam,p.23.
[204] Record, p. 29, SUF ¶10.
[205] Record, p. 34, SUF ¶35.

b) The Tribunal should consider the economic situation in the Respondent's territory

134. Other than the Claimant's contributory fault, the Tribunal must also consider the economic situation in the Respondent's territory. The *CMS Gas* Tribunal held that although an economic crisis does not exclude liability or preclude wrongfulness, it ought to be considered while determining the compensation.[206] Since the Claimant requested for USD 700 million, this requires the Respondent to transfer about twice of its consolidated annual public spending to the Claimant.[207] The Respondent suffers from a dire economic situation and an IMF report predicted four consecutive quarters of negative growth, an 8% fall in GDP and a 2600% average inflation rate in 2020.[208]

135. Considering the economic situation that the Respondent currently faces, the Tribunal should reduce the amount of damages that the Respondent must pay to the Claimant.

[206] CMS Gas¶¶353-356.
[207] Record, p. 86, PO 3, ¶4.
[208] *Ibid.*

PRAYERS FOR RELIEF

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

a. Decline to exercise jurisdiction due to the Claimant's status as a SOE;
b. Find that the Respondent did not violate Article 9.9 of the CEPTA; and
c. In case the Tribunal finds the Respondent did violate Article 9.9, then the tribunal should conclude that the Respondent has already purchased the Claimant's investment at "market value" and award the Claimant no compensation; in the alternative, the Tribunal should reduce any compensation awarded considering the Claimant's contributory fault and the ongoing economic crisis in the Respondent's country.

On behalf of the Respondent