INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

VEMMA HOLDINGS INC.

(Claimant)

v.

THE FEDERAL REPUBLIC OF MEKAR

(Respondent)

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

Members of the Tribunal

Ms. Twyla Sands (President)

Mr. Long Feng

Professor Jaqen H'ghar

Secretary of the Tribunal

Ms. Kaushiki Agarwal

MEMORIAL ON BEHALF OF THE RESPONDENT

SEPTEMBER 23, 2021

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	British Gypsum Ltd v Commission of the European Communities.
Brooke	Brooke Group Ltd v Brown & Williamson Tobacco Corp, 509 US 209 (1993).
Chromalloy	Chromalloy Aeroservices v The Arab Republic of Egypt 939 F. Supp. 907 (D.D.C. 1996).
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Matushita	Matsushita v Zenith Radio Corporation, 475 U.S. 574 (1986).
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Minnesota	Minnesota Bearing Co. v White Motor Corp., 470 F.2d 1323 (8th Cir. 1973).
National Iranian	National Iranian Oil Co. v Crescent Petroleum Co [2016] EWHC 510 (Comm).
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R Alpharma	R Alpharma v Council [1999] ECR II-2027.
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Wood	Wood v Capita [2017] UKSC 24.

MISCELLENOUS	
Abbreviation	**Citation**
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DAF/COMP	DAF/COMP (2014) 14. Available here: <https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2014)14&docLanguage=En> (Last accessed on 14 September 2021).
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	05/antitrust_procedures_102_en.pdf_> (Last accessed on 10 September 2021).
ICSID AFR	ICSID Additional Facility Rules.
ICSID AR	ICSID Arbitration Rules.
ICSID, Preamble	ICSID Convention preamble.
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ILC Draft	International Law Commission Articles on State Responsibility.
IVS	IVS 104: Bases of value exposure draft (7 April 2016) Available here: <https://www.ivsc.org/files/file/view/id/646> (Last accessed on 10 September 2021).
NAFTA	Statement of the Free Trade Commission on non-disputing party participation. Available here: <http://www.sice.oas.org/tpd/nafta/commission/nondispute_e.pdf> (Last accessed on 14 September 2021).
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.
OECD	OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition.
UN Study	UN Study Group on the Fragmentation of International Law II.
UNCITRAL Arbitration	UNCITRAL Arbitration Rules 2010.
UNCITRAL Transparency	UNCITRAL Rules on Transparency.
UNCTAD	UNCTAD, Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements IIA (United Nations Publication 2012). Available here: <https://unctad.org/system/files/official-

	document/unctaddiaeia2011d5_en.pdf> (Last accessed on 14 September 2021).
United Nations Convention	United Nations Convention on Jurisdictional Immunities of States and Their Property 2004.
VCLT	Vienna Convention on the Law of Treaties.
World Bank Guidelines	World Bank Guidelines on Treatment of Foreign Investment.

LIST OF ABBREVIATIONS

Abbreviation	Terms
§ (§§)	Article (Articles)
¶ (¶¶)	Paragraph (Paragraphs)
Amicus Submission	Amicus Submission by external advisors to the CRPU
Amicus Submission by CBFI	Amicus Submission by the CBFI
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
BIT	Bilateral Investment Treaty
CBFI	The Consortium of Bonoori Foreign Investors
CCM	The Competition Commission of Mekar
CEPTA	Comprehensive Economic Partnership and Trade Agreement
CILS	The Centre for Integrity in Legal Service
CRPU	Committee on Reform of Public Utilities
Facts	Statement of Uncontested Facts
FET	Fair and Equitable Treatment
FMV	Fair Market Value
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
ILC	International Law Commission
ISDS	Investor-State Dispute Settlement
MRTP	Monopoly and Restrictive Trade Practice Act
MST	Minimum Standard of Treatment
MV	Market Value
Notice	Response to the Notice of Arbitration
OECD	Organisation for Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
p. (pp.)	Page (Pages)
PO3	Procedural Order No. 3, 1 September 2021
PO4	Procedural Order No. 4, 16 July 2021

STATEMENT OF FACTS

THE PARTIES TO THE DISPUTE

¶1. Vemma Holdings Inc. ("**Vemma**" or "**Claimant**") is an airline holding company incorporated in Bonooru with 100% ownership in Royal Narnian, a leading global airline. Its shareholders of Vemma included private and institutional shareholders from Bonooru and Goponga, a central-Aslanian nation. The Government of Bonooru held 31% to 38% shares until March 2020, and the same stands to 55% at present.

¶2. The Federal Republic of Mekar ("**Mekar**" or "**Respondent**"), is situated approximately 1,600 km to Bonooru's south, characterized for its prolonged political instability, mass migration from the country as well as exploitation of resource deposits by intermediate occupying powers. Caeli Airways ("**Caeli**") was a part of Mekar's civil aviation industry until 2003 as an SOE for national routes. The 2008 financial crisis pushed Caeli into great distress.

VEMMA INVESTS INTO CAELI

¶3. As part of a privatisation program, Mekar decided to sell a controlling stake in Caeli Airways. Emerging as a successful bidder, Vemma acquired an 85% stake in Caeli on 5 January 2011, whereas Mekar maintained 15% ownership through Mekar Airservices Ltd. ("**Mekar Airservices**"). The Competition Commission of Mekar (the "**CCM**") approved Vemma's acquisition on 5 March 2011, and subsequently on 29 March 2011 a Share Purchase Agreement was entered into.

¶4. Vemma also inherited existing discounts on airport services and landing and navigation fees enjoyed by Caeli Airways at Phenac International Airport. Despite rising fuel prices between 2011 and 2013, it continued fleet expansion, avoiding the deep losses faced by its competitors. Caeli also benefited from its co-operation with other Moon Alliance members.

¶5. Caeli's business model was heavily dependent on catering to customers travelling from Mekar to Bonooru. In 2011, Bonooru unveiled the 'Horizon 2020' scheme, a key part of which was to offer recurring subsidies to companies investing in tourism-related infrastructure in Bonooru. On 28 October 2011, Vemma received the first subsidy under this Scheme.

VEMMA'S EXTRAVAGANT APPROACHES LAND CAELI INTO DEEP TROUBLES

¶6. Over the course of 2012, Vemma decided to offer low-fare, long-distance flights into Mekar. Against the advice of Mekar Airservices, it concentrated efforts on expanding routes for cross-continental travel to Mekar, based on the airline's earnings from 2013.

¶7. In April 2014, Mekar and Bonooru signed the Comprehensive Economic Partnership and Trade Agreement ("**CEPTA**"). The agreement entered into force on 15 October 2014. Mekar and Bonooru agreed to terminate the pre-existing BIT on 15 October 2014.

¶8. In June 2014, when the oil prices around the globe crashed to a five-year low, Vemma's representatives preferred fleet expansion and slashed airfares, to benefit from the same. It invested its earnings, as well as a new credit line, into strategic programmes, viz, frequent-flyer programme and a corporate-discount scheme, to consolidate its consumer base. By June 2016, Caeli became the only consistently profitable carrier on over half the routes to and from its base airport, Phenac International.

THE DUBIOUS EXPANSION CATCHES THE EYE OF CCM

¶9. Owing to Caeli's rapid expansion, the CCM launched a *suo moto* investigation into its activities ('*the First Investigation*') in light of predatory pricing strategies by Vemma. As an interim measure, the CCM placed caps on Caeli Airways' airfare to prevent it from earning supra-competitive profits in the future. Vemma did not protest the airfare caps, nor did the caps hurt its profitability in 2016.

¶10. Pursuant to a complaint from a consortium of small regional airlines in Greater Narnian, in December 2016, the CCM launched another investigation into Caeli's business activities focusing specifically on price undercutting on certain routes to and from Phenac International ('*The Second Investigation*'). As part of these investigations, the CCM placed airfare caps on Caeli Airways.

MEKAR'S ECONOMIC SITUATION DETERIORATES

¶11. In late 2016, the Mekari MON began to rapidly decline in value. Pursuant to IMF's advice, on 30 January 2018, Mekar's government mandated MON as exclusive denomination.

¶12. On September 25, 2018, Mekar's President passed Executive Order 9-2018 which granted subsidies for airlines operating in Mekar. Nevertheless, it denied subsidies to Caeli Airways because Bonooru owned a significant stake in Vemma.

¶13. On 27 March 2018**,** Caeli's claim against the CCM was registered in the Mekari Court and the hearing on interim measures was scheduled in April 2019. By the end of August 2018,

the CCM concluded its *First Investigation*, finding predatory pricing. It also noted that the Horizon 2020 scheme helped Caeli drastically reduce its airfare. Accordingly, the CCM imposed a total penalty of MON 150 Million on Caeli.

¶14. On 1 January 2019, the CCM completed its *Second Investigation*, finding Caeli engaged in anti-competitive behaviour in conducting its business activities at Phenac International Airport, imposing a fine of MON 200 million and continuing the airfare caps.

¶15. On 20 January 2019, representatives of Caeli appealed both orders of the CCM in the Mekari courts. On 15 June 2019, Justice VanDuzer released his interim decision on the airfare caps, declining to remove them.

VEMMA EXITS CAELI FOLLOWING ITS DOWNFALL

¶16. In October 2019, when Caeli's market share in Mekar dropped below 40%, the CCM lifted the applicable airfare caps. Despite this decision, in November 2019, representatives of Vemma announced their intention to sell their stake in Caeli Airways, and consequently Vemma secured an offer from Hawthorne Group LLP.

¶17. However, exercising its right to purchase the shares at the price offered, Mekar rejected the offer, as the price was artificially inflated and not an arm's length commercial price because of its association with the Moon Alliance. The dispute over the validity of the Hawthorne offer was submitted to arbitration under the rules of the SCC seated in Sinnoh with Mr. Rett Eichel Cavannaugh as the sole arbitrator.

¶18. On 9 May 2020, Mr. Cavannaugh released the award in favour of Mekar Airservices which was subsequently set aside by the Supreme Arbitrazh Court of Sinnograd on the grounds of corruption. Nonetheless, on 23 August 2020, the Mekari Court recognized and enforced the award in Mekar in pursuance of the New York Convention.

INITIATION OF THE ARBITRAL PROCEEDINGS

¶19. Vemma sold its stake in Caeli to Mekar Airservices on 8 October 2020 for 400 million USD and has simultaneously, filed a notice of arbitration against Mekar on 15 November 2020 to seek compensation for its losses under the CEPTA.

¶20. Subsequent to this, Bonooru has increased its shareholding in Vemma to 55%, with the board of directors replaced with government functionaries, expanding its functions to include paramilitary activities, and equipping its legal team with lawyers from Bonooru's justice department to assist in this arbitration against Mekar.

ARGUMENTS

PHASE I: JURISDICTION AND ADMISSIBILITY

A. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE PRESENT CLAIMS UNDER ARTICLE 9 OF THE CEPTA AND THE ICSID ADDITIONAL FACILITY RULES

¶1. The jurisdiction of the tribunal is based on the investor-state consent contained in the provisions of the investment treaties.[1] The parties' consent is often articulated in the investment treaty's dispute settlement clause. Thus, the tribunal should define its jurisdiction by reference to the dispute settlement clause in question.

¶2. Article 2 of ICSID Additional Facility Rules provides,

> "*The Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rules, proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State…*"

¶3. The Respondent submits that the Claimant does not have standing before this tribunal on two grounds, *first*, the inclusion of SOEs under ICSID runs contrary to the rules of Customary International Law **[1]**; and *second*, the Claimant does not qualify as a 'national of the state' for the purpose of ICSID Additional Facility Rules **[2]**.

1. Inclusion of SOEs under ICSID would override Customary International Law

¶4. The inclusion of State or State-owned Enterprises within the ambit of ICSID overrides the Customary International Law Rules of Treaty Interpretation, which provides that the text of the treaty should be interpreted in the light of treaty's object and purpose.[2] Here, Article 2 of ICSID Additional Facility Rules[3] restricts the scope of the convention to the disputes between 'States' and 'nationals' of other states and should accordingly be interpreted.

¶5. Article 2, being unambiguous in its language, cannot be re-interpreted to cover disputes involving State or State Agencies as investors. ICSID is a forum for investor-state dispute settlement and not inter-state disputes. From the outset of the convention negotiations, there

[1] Casinos, ¶39.
[2] VCLT, §31(1).
[3] ICSID AFR, §2.

was a general agreement that private *versus* private and state *versus* state disputes should be excluded from the jurisdiction of the Centre.[4]

¶6. The object and purpose of ICSID Convention plainly includes the encouragement of private, as distinguished from public, international investment as reflected in the preamble and *travaux preparatories*.[5] The official records of the convention show unambiguously that a conscious decision was made to exclude state, state agencies or international organizations. The ICSID Convention is meant to consider the need for international co-operation for economic development, and the role of private international investment therein.[6]

¶7. An additional policy goal supporting the exclusion was the depoliticization of investment disputes, clearly highlighted by the prohibition of diplomatic protection under Article 27 of the Convention.[7]

¶8. The drafters of the convention were keen on emphasizing that ICSID is not meant to be used for the settlement of inter-state disputes which could be adjudicated[8] through other suitable methods of settlement under international law'.[9]

¶9. It is submitted by the Respondent that the tribunal should adopt a narrow interpretation, rejecting the participation of bodies that cooperate with states,[10] thereby justifying the aim of the drafters of the Convention of not involving any additional state in arbitration proceedings.[11] Accordingly, ICSID arbitration may not be available to states themselves and their subdivisions even if they are protected investors for purposes of an applicable investment treaty.[12]

¶10. An investor state and its sub-divisions, therefore, lack standing to arbitrate investment disputes in an ICSID tribunal even if relevant treaty provides otherwise. An SOE intending to arbitrate under the ICSID Convention has to show that it is a non-state investor. For claims submitted by SOEs to ICSID arbitration, a failure by tribunals to consider the distinction between public and private international investment would constitute a failure to adhere to customary international law rules on treaty interpretation.[13]

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[4] Broches, p. 167.
[5] Feldman, pp. 24-35.
[6] ICSID, Preamble.
[7] Schreuer, p. 187.
[8] Schreuer, p. 160.
[9] Aron Broches, p. 354.
[10] Hirsh, pp. 55–6; Hamida, p. 26.
[11] Hamida, p. 26.
[12] Bernardini, pp. 17–24.
[13] Feldman, pp. 24–35.

¶11. Here, since its inception, Claimant has been an SOE as Bonooru has always maintained a sizable stake in the company which ranged from 31% to 38%.[14] Bonooru's increased interest in Claimant to a controlling 55% stake, along with its existing ties with the company, indicates that Claimant successfully qualified as a State-owned Enterprise.[15]

¶12. In conclusion, the tribunal does not have jurisdiction to hear the Claimant's case as the dispute constitutes a state-to-state arbitration.

2. The Claimant is not an 'Investor' for the purpose of ICSID Additional Facility Rules

¶13. To assert the capacity in which a state-owned enterprise is acting, Broches has put forward a test. A State-owned entity is not qualified to bring claims under ICSID if either SOE acts as an agent for the government or discharges an essentially governmental function.[16] The Broches factors are remarkably similar to the attribution rules engraved in Articles 5 and 8 of the ILC's Articles on State Responsibility.[17]

¶14. Since, neither the Convention nor the CEPTA establish guiding principles for deciding here the relevant issue, therefore, the tribunal may look into the applicable rules of international law in deciding whether a particular entity is a state body. These standards have evolved and been applied in the context of the law of State responsibility.

¶15. In order to determine whether a particular entity was in fact a governmental entity engaged in carrying out governmental functions, the prerequisite is satisfaction of the structural and functional tests.[18] The Respondent submits that the acts of the airline are attributable to Bonooru considering both structural analysis **[a];** and functional analysis **[b]**.

(a) Structural Analysis

¶16. According to the OECD, a state-owned enterprise is any corporate entity recognized by law as an enterprise in which state exercises ownership.[19] Ownership is defined in terms of control with full or majority voting rights or an equivalent degree of control. Equivalent control

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[14] Facts, ¶10.
[15] Notice, ¶¶4-5.
[16] Aron Broches, p. 202.
[17] Beijing Urban, ¶34.
[18] Maffezini (J), ¶79.
[19] OECD, p. 14.

can be demonstrated by significant minority ownership accompanied by Articles of Association that guarantee continued state control over the enterprise and its board of directors.[20]

¶17. Here, from the Claimant's date of incorporation until March 2020, Bonooru retained minority shareholding ranging between 31% to 38%, a right recognised in the Memorandum of Association. The Prime Minister had assured that Bonooru Air's intended successor will be directed to ensure that it operates routes to our most remote islands, regardless of profitability.[21]

¶18. Further, the Constitutional Court of Bonooru on Privatisation of BA Holdings also observed that combined with Bonooru's continued, although minority, participation through Vemma, it is convincing that Bonooru will be able to ensure the utilisation of the Royal Narnian for public benefit.[22]

¶19. Evidently, Bonooru's representatives on Vemma's board were present for every meeting. In addition to Bonooru being the single largest shareholder,[23] its representatives formed a majority of members present and voting when not all other shareholders attend, for some of the meetings.[24]

¶20. Hence, apart from the significant minority shareholding, the government of Boonoru also had continued state control which demonstrates that Claimant had been a State-owned Enterprise since its inception.

(b) Functional Analysis

¶21. In addition to the structural analysis, the tribunals also consider control of the company by the state or state entities and the objectives and functions for which the company was established.[25] The Respondent submits before this tribunal that while making an investment Vemma was acting in exercise of governmental authority **[i]**; and working under the direction and control of the Government of Bonooru **[ii]**.

(i) *The act in question was in exercise of governmental authority*

¶22. Article 5 of ARSIWA represents a functional test of attribution. For an act to fall under Article 5 ILC, two conditions must be fulfilled, first, the act must be performed by an entity

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[20] McLaughlin, pp. 595-625.
[21] Facts, ¶8.
[22] Annex III, ¶59.
[23] PO4, ¶2.
[24] PO3, ¶3.
[25] Maffezini, ¶76.

empowered to exercise elements of governmental authority, second, the act in question must be performed in the exercise of that delegated authority.[26]

¶23. Here, the Claimant was empowered to exercise elements of governmental authority as it was entitled to act as a national airline of the State of Bonooru and was also authorized to carry on any other trade or business which was calculated to facilitate or was auxiliary to or associated with such business.[27]

¶24. The Respondent submits that there exists a positive obligation on the State of Bonooru enshrined under Article 70 of the Constitution to assist and ensure essential transportation to the population living in remote areas.[28]

¶25. The protection of the mobility rights was not limited to the territory of Bonooru but also beyond it as substantiated by both Article 70(1) which states that 'Every citizen of Bonooru has the right to enter, remain in, and leave its territory' and its interpretation by the constitutional court of Bonooru.[29] The court stated that without modern air travel, most of our citizens could not move between our islands or even leave the islands for another nation.[30]

¶26. The intention to ensure mobility rights of the population was also engraved in Vemma's Memorandum of Association which provided that Vemma has to assist in developing the aviation industry as well the infrastructure in Bonooru for the benefit of its population in accordance with Article 70 of the Constitution Act, 1947.[31]

(ii) ***Vemma meets the nature - purpose test to qualify as an SOE***

¶27. Article 2(2) of the United Nations Convention on Jurisdictional Immunities of States and their Property provides that, in determining whether a contract or transaction is a 'commercial transaction', reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.[32]

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[26] EDF, ¶191.
[27] Annex IV, Clause 3 (a).
[28] Facts, ¶5.
[29] Annex I, Article 70 (1).
[30] Annex III, ¶56.
[31] Annex IV, Clause 3 (h).
[32] United Nations Convention, §2(2).

¶28. The test that has been developed takes into consideration various factors, such as ownership, control, the nature, purposes and objectives of the entity whose actions are under scrutiny, and to the character of the actions taken.

¶29. Here, the foreign subsidies received by the Claimant under the 'Horizon 2020' programme enabled it to create market dominance over the Greater Narnian region. In December 2016, a consortium of small regional airlines in Greater Narnia complained that Caeli launched flights on specific regional routes making it nearly impossible for other competitors to penetrate the market, and hence, it was capitalising on its undercutting policies and the privileges enjoyed at Phenac International Airport.[33] It adopted predatory pricing strategies with the aim of hindering competition on the domestic market.

¶30. Additionally, the 2018 report of CCM found a breach of Mekar's antitrust legislation in the form of predatory pricing resulting from low airfares and loyalty programmes. It also noted that the subsidies received by the Claimant under the scheme helped Caeli to drastically reduce its airfare below its average avoidable costs.[34]

¶31. Therefore, the State-sponsored violation of competition law is the issue from where the claim is arising and hence, the tribunal should consider both nature and purpose of the act while determining its jurisdiction.

(iii) ***The chronological factual matrix paints a clearer picture of Vemma's association with Bonooru***

¶32. The Respondent submits that the intention of the government of Bonooru was to create an entity to carry out governmental functions and further its national interest. Article 1.3 of CEPTA[35] provides that the objective of the agreement was to eliminate barriers to trade-in, to facilitate the cross-border movement of, goods and services, and increase substantially investment opportunities in the territories of parties etc. During the acquisition, Vemma proposed the most financially attracted business model,[36] and one of the pillars of Caeli Airways' model was to cater to the customers travelling from Mekar to Bonooru[37], this would have ultimately helped in achieving the objective engraved under CEPTA.

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[33] Facts, ¶38.
[34] Facts, ¶45.
[35] CEPTA, §1.3.
[36] Facts, ¶24.
[37] Facts, ¶28.

¶33. In 2010, Bonooru launched the Caspian Project, an initiative to facilitate the movement of goods, people, services, and knowledge amongst its neighbours. It intended to spend an estimated 100 Billion BAK between 2010 and 2030 to build infrastructure in Narnian States, with the long-term goal of redefining trade patterns.[38]

¶34. Additionally, it announced that a USD 30 Billion fund as a part of this Project was to be dedicated to developing regional infrastructure in Greater Narnia. Later, Bonooru unveiled that part of this fund would also be deployed to update Mekar's Port and the Phenac International Airport.[39]

¶35. Subsequently, in 2011, 'Horizon 2020' scheme was unveiled under 'Caspian Project' by Sabrina Blue, the Minister of Transportation and Tourism, to optimally tap Bonooru's tourism infrastructure.[40] A key part of the scheme was to offer recurring subsidies to the companies investing in tourism-related infrastructure in Bonooru and Vemma received the first subsidy under it.[41] This is evident from the fact that Bonooru's Ministry of Transport and Tourism recorded payments being made to Vemma under the scheme between 2011 to 2016.[42]

¶36. Furthermore, in 2011, Vemma through its application credibly outlined how its investment would draw more travellers from Mekar and Great Narnian Region to Bonooru's emerging tourism markets. The expansion into Mekar will offer substantial benefits not only to Vemma but all of Bonooru by enhancing the aviation network available to prospective tourists. This will boost the tourism infrastructure at their disposal.[43]

¶37. The bid proposal for Caeli Airways also stated that it would refinance for the remainder of Caeli debts liability from PJSC Bonoorian People's Bank (BPB) which was a nationalized bank in Bonooru in which the government held 58.96% stake. During 2011-2013, Vemma was able to refinance its liability from the same at more favourable rates than available on the market. The inclusion of a nationalized bank in the bid proposal highlights the strong support from the State which is absent in the scenario where a private corporation is involved.[44]

¶38. Moreover, Ms. Misty Kasumi, a former high-ranking employee within Bonooru's Ministry of Tourism, suspected that these routes are not profitable for Caeli Airways and Vemma's investment was in the context of Bonooru's Caspian Project and the Horizon 2020

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[38] Facts, ¶4.
[39] PO4, ¶1.
[40] Facts, ¶28.
[41] Facts, ¶28.
[42] PO4, ¶6.
[43] Ibid.
[44] Facts, ¶23.

scheme as these routes benefit Bonooru more than they do to Vemma or Caeli. She also hinted towards a closed-door deal with Bonooru where Vemma ensured that Caeli Airways flew these routes to benefit Bonooru.[45]

¶39. In a press conference on 31 May 2016, Sabrina Blue lauded Vemma's contribution to the enhancement of Bonooru tourism related infrastructure which in turn has enhanced the mobility rights of our population within the Greater Narnian Region. They believed that Vemma certainly lived up to the standards set by its predecessor.[46]

¶40. Hence, the course of action clearly suggests that the investment was governmental in nature rather than commercial as the object was to enhance the tourism related infrastructure in Bonooru. The tribunal should conclude that it is the public-function related aspect of Bonooru which predominated Claimant's operations and thus it is not entitled to bring claim as an investor under the CEPTA or the ICSID AF Rules.

(iv) ***Vemma was both under the direction and control of the government of Bonooru***

¶41. The word 'agent' has not been unanimously defined, however in the words of ICJ, an entity that is directly a part of State Apparatus is an agent.[47] If, in any particular instance, it turns out that State-owned enterprise is acting in the capacity of the state, then they should be treated as such.

¶42. In other words, where they act as the *alter ego* of the State, they should therefore be deprived of all the treaty-based benefits that are otherwise available to *nationals.* Some ICC arbitral tribunals have relied on the theory of Alter Ego. In their awards, these tribunals have concluded that, although the signatory to the agreement was a legally separate entity distinct from the State, it had acted for the State, which was Signatory's disclosed or undisclosed principal.[48]

¶43. A vital question to be asked while examining the control of an enterprise is whether it is functioning as an agent of the state.[49] The official commentary to Article 8 of ILC provides that 'some conduct is attributable to State because there exists a specific factual relationship between the entity engaging in the conduct and State.[50]

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[45] Annex VII, p. 54.
[46] PO4, ¶6.
[47] Nicaragua case, p. 188.
[48] Romero, p. 49.
[49] ILC Commentary, §§ 5, 8, pp. 42-43, 47-49.
[50] ILC Commentary, §8, p. 47, ¶1.

¶44. It further stipulates that article 8 applies to those situations in which the conduct results from 'instructions', 'direction', or 'control' from the State. An enterprise will therefore be acting as an agent where the conduct complained of forms an integral part of the operation controlled by state.

¶45. The jurisdiction should be abandoned when it is clear that there is significant State influence on the State-owned enterprise.[51] An exception is only made in the event that if it is manifest that the entity involved has no link whatsoever with the State.[52] A private corporation operating for profit while discharging essentially governmental function delegated to it by the state, could under functional test, be considered as an organ of the state, and thus engage the state's international responsibility for its acts.[53]

¶46. Here, it is clear through the above submissions that the Claimant, throughout the subsistence of this investment, has furthered the objectives of Bonooru and has received financial aids for the same as well.

¶47. In conclusion, the Claimant was an SOE as it was discharging an essentially governmental function and was also working under the direction and control of the government of Bonooru and should accordingly be denied jurisdiction under the ICSID AF Rules.

B. THE TRIBUNAL SHOULD GRANT THE LEAVE SOUGHT FOR FILING *AMICI* SUBMISSION BY THE EXTERNAL ADVISORS TO CRPU

¶48. The legal standard applicable to *amicus* participation is explicitly included under Article 9.19 of CEPTA, Article 41(3) of ICISD AF Rules and UNCITRAL Rules on Transparency.[54] The applicant submits that the tribunal should grant the leave sought for filing *amici* submission by external advisors to CRPU **[1]** and reject the *amicus* submission by the CBFI **[2]**.

1. The external advisors to CRPU should be granted the leave to submit its *amicus* brief

¶49. It is submitted that external advisors to CRPU's submission should be admitted as it, *first,* assists the tribunal by offering a different perspective **[a];** *second,* addresses a matter

[51] Consorzio, ¶19(1).
[52] Jan de Nul, ¶85.
[53] Maffezini, ¶80.
[54] CEPTA, §9.19; ICSID AFR, §41(3)(a); CEPTA, §9.20(6).

within the scope of the dispute **[b];** *third,* involves a significant interest in the proceeding **[c];** and *fourth*, is in furtherance of a considerable public interest **[d].**

(a) CRPU is bringing a new legal and factual perspective

¶50. According to Article 41(3)(a) of ICSID AF Rules, the NDP should 'assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from the disputing parties'.[55] In general, the applicant must demonstrate that its submissions would be sufficiently 'different' in content and perspective from those of parties.[56] This inquiry focuses on applicant's potential 'contribution of particular knowledge and expertise' and 'likely utility' to the tribunal.[57]

¶51. The *amicus curiae* participation through submission should be allowed in cases of appropriate subject matter by a suitable independent non-party which has the necessary experience, expertise and independence to bring before the Tribunal new perspectives and arguments.[58] Here, the Amicus, as independent advisors involved in the entirety of the privatization process, are in the unique position to adduce unbiased facts to this effect before the Tribunal that may not be obtained from either disputing party.[59]

¶52. Further, this arbitration raises important issues regarding 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. The nature of investor-State relations provides fertile ground for acts of corruption and to prevent this 'insidious plague' from upending investor-State arbitration, caution must be exercised in assessing the Claimant's claims that remain tainted by allegations of corruption.

¶53. Therefore, the external advisors to CRPU brings before the tribunal latent concerns relating to the illegality of Vemma's investment which neither of the party has addressed before the tribunal.

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[55] ICSID AFR, §41(3)(a).
[56] Bernhard, ¶57.
[57] Methanex, ¶48; Morris, ¶¶28, 30–1; Biwater, ¶¶49-0; Aguas, ¶23.
[58] Aguas, ¶29.
[59] Amicus submission, p. 19.

(b) The Submission will address matters within the scope of the dispute

¶54. The assessment of the legality of Vemma's investment is crucial for the determination of tribunal's competence-competence and the same falls within the scope of the dispute.[60] There exists evidence that the rights received by Vemma Holdings were procured by means of bribes paid to Mr. Dorian Umbridge, the Chairperson of the Committee.[61]

¶55. The Respondent submits that the *amicus* submission will address the matter within the scope of the dispute[62] as, *first*, corruption defence shall act as a jurisdictional bar **[i];** and *second*, there is an implicit requirement of legality of the investment in the ICSID mechanism **[ii]**.

(i) *Corruption defense acts as a jurisdictional bar*

¶56. A distinction has to be drawn between legality as at the initiation of the investment made and legality during the performance of the investment. An investment will not be protected if it has been created in the violation of the national or international principles of good faith; by way of corruption, fraud or deceitful conduct.[63]

¶57. Indeed, the arbitral tribunals have acknowledged the emerging international consensus that all forms of corruption must be prevented, noting that bribery is contrary to the international public policy of most, if not all, states or, to use another formula, to transnational public policy.[64] The rights of the investor against the host state including the right of access to arbitration could not be protected because the investment was tainted by illegal activities, specifically corruption.[65]

(ii) *Implicit Reading of Legality Requirement under ICSID Convention*

¶58. The purpose of international mechanism of investment protection through ICSID arbitration is not to protect investments made in violation of host state law or investments not made in good faith, obtained for example through misrepresentation, corruption etc. In other words, the purpose is to protect legal and bona fide investments. Hence, the tribunal will lack

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[60] Ibid.
[61] Ibid.
[62] ICSID AR, §37(2)(b); ICSID AFR, §41(3)(b); NAFTA, ¶3,6; UNCITRAL Transparency, §41(1).
[63] Gustav, ¶127.
[64] World duty free, ¶156.
[65] Metal-Tech, ¶¶1, 55.

jurisdiction over all claims where the purported investment does not qualify as a protected investment under the ICSID convention and the applicable BIT.[66]

¶59. The legality of the investment is a premise for the tribunal's jurisdiction, the determination of such legality can only be made by the Tribunal hearing the case. Consequently, any resolutions or decisions made by the State parties to the Agreement concerning the legality or illegality of the investment are not valid or important in order to decide whether or not the Arbitral Tribunal is competent to hear the dispute brought before it.[67] Even in the absence of a legality requirement, the legality of the investment is essential for protection under the applicable investment treaties as illegality of the investment may nonetheless bar the tribunal's jurisdiction.[68]

¶60. Furthermore, even if the disputing parties fail to raise such concerns, the suspicions of corruption raised at a later stage after new facts have emerged, then also the respondent state is not necessarily precluded from raising them before the tribunal. The UNCITRAL Rules specify that 'the arbitral tribunal may, in either case, admit a later plea if it considers the delay justified'[69] and the discovery of 'new facts' is generally regarded as a justification for failure to raise an objection to the jurisdiction of the tribunal at the time normally required.[70]

¶61. Therefore, the Claimant's conduct in making the investment violated not only the Mekari law, but also applicable rules and principles of international law. Hence, the assessment of the legality of investment is of the essence as this will have a significant bearing on the jurisdiction of the tribunal.

(c) There exists a significant interest of the applicants

¶62. It is submitted before this tribunal that the Applicants have significant interest in the arbitral proceeding in line with Article 41 of ICSID AF Rules and Article 9.19 of CEPTA.[71] Here, the *amicus* submissions are directly related to the core legal and other factual issues that are moot points in this arbitration. The Amici has actively participated in the deliberations of the Committee in the process leading up to the acquisition of an 85% stake in Caeli by Vemma.

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[66] Phoenix, ¶¶100.
[67] Inceysa, ¶209.
[68] Plama, ¶138-40.
[69] UNCITRAL Arbitration, §23(2).
[70] Caron, Caplan and Pellonpää, pp. 448–49.
[71] ICSID AF Rules, §41; CEPTA, §9.19.

¶63. Their tasks in this process included performing an audit, an analysis of the economic, technical and financial performance of Caeli Airways, bringing indicators in the financial statements in line with accounting standards, the preparation of a financing model, the 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. For their work, Amici were remunerated with both a set fee and a success fee as a percentage of the sales price.

¶64. Additionally, stagnation in anti-corruption efforts in Mekar also impacts the financial operations of the *Amici,* who regularly advise potential investors prospecting opportunities in Mekar. Therefore, the interest of the advisors in the proceeding is significant in nature.

(d) The submission is in furtherance of public interest

¶65. Investment tribunals have considered whether an *amicus* applicant as demonstrated that there is a public interest in the subject matter of the arbitration, notwithstanding the fact that there is no such criterion is expressly included in ICSID arbitration rules or other instruments.[72] The Respondent submits that the applicants demonstrate a public interest in the subject matter[73] as required by the ICSID AF Rules[74] and the UNCITRAL Transparency Rules.[75]

¶66. Irrespective whether the outcome of a dispute will affect persons other than the disputing parties, a public interest exists because allowing *amicus* participation enhances the transparency of investment arbitration.[76] The Tribunal's willingness to receive *amicus* submissions would assist the question of jurisdiction in particular, whereas a blanket refusal could do positive harm.[77]

¶67. Here, external advisors to the Committee on Reform on Public Utilities ("Committee") are highlighting the existence of corruption in pre-investment phase. Hence, there is a clear public interest involved in the subject matter of this arbitration, especially in light of the evidence that the rights received by Vemma were procured by means of bribes paid to Mr. Dorian Umbridge, the Chairperson of the Committee.

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[72] Apotex (BNM), ¶¶35–6, Apotex (Appleton) ¶¶41–3; Resolute Forest, PO6, ¶4.7; Methanax (AC), ¶22.
[73] Vivendi, ¶19; Apotex (BNM), ¶35–6; Apotex (Appleton), ¶41–3; Methanex, ¶22.
[74] ICSID AF Rules, §41(3)(c).
[75] UNCITRAL Transparency, §1(4)(a).
[76] Biwater, ¶54.
[77] Methanex, ¶49.

¶68. The allegations of Bribery can have serious effect on a lot of businesses that have been in transactions with Vemma in Mekar, thereby making it a broader question requiring deliberation of the Tribunal. Additionally, the Amici possess a general interest in promoting fair business practices in Mekar. It has regularly acted as interveners before federal courts in Mekar in relation to judicial proceedings concerning approval for privatization projects.

¶69. Permitting participation of a civil society, the Committee here, in such arbitration provides the public an opportunity to protect their interests by illuminating legal arguments and facts not addressed by the parties as well.

¶70. In conclusion, the interest of the petitioner in such public concern is genuine and supported by their well-recognized expertise in the area.

2. The submission of CBFI should be rejected by the tribunal

¶71. The Respondent submits that the tribunal should bar the *Amicus* submission by the CBFI on three major grounds, *first*, the application fails to raise any novel argument before this tribunal **[a]**; *second*, the *amicus* application is not in furtherance of any public interest **[b]**; and *third*, the participation of Lapras Legal Capital in this arbitration through the applicant raises a conflict of interest**.**

(a) CBFI fails to present any novel arguments

¶72. Amici *curiae* should assist the tribunal by offering a different point of view from that of the disputing parties, which the CBFI's application fails to do. In *Resolute Forest*, the Tribunal acknowledged that the applicants were experienced and knowledgeable, it nevertheless held that they would not provide views that differed from the parties' experienced counsel.[78]

¶73. Here, the large tracts of parties pleading are already devoted to draw conclusions about the relationship between corporate governance framework and standing under ISDS provisions. This issue has been closely identified by the parties and it will be addressed under the first phase.

¶74. The considerations regarding the independence of the Amici equally bear on whether these organizations would assist the Tribunal with a different perspective, particular knowledge

[78] Resolute Forest, ¶4.4.

or insight than Claimant's. The available information indicates that CBFI and Claimant are closely aligned in each of these respects, and that the applicants would not offer the Tribunal a different perspective. The members of CBFI comprise of foreign investors, highly similar in profile to Claimant. The role of these organizations is to be the national voice of foreign investors of Bonooru.

¶75. The application of CBFI only proposes to repeat disputing parties' arguments without any distinguishing or distinctive perspective. It has failed to further any novel additions as an *Amici*; therefore, the submission should not be allowed.

(b) CBFI does not file its *amicus* application in pursuit of any "public interest"

¶76. The Amicus must demonstrate that its submissions are in the 'furtherance of the public interest'.[79] An applicant's failure to identify the public interest that its submissions would advance was a sufficient ground to reject the application.[80]

¶77. Here, there is no greater public interest involved as the issue is limited to the economic activities in Bonooru. The CBFI is an organization that represents the interest of Bonoori businesses which are frequent investors and have already made sizable contributions in the Greater Narnian Region.[81] The submission of the applicant is primarily limited to the commercial interest of the investors rather than public interest.

(c) The participation of Lapras Legal Capital in this arbitration through CBFI raises a conflict of interest

¶78. An essential attribute of *amici curiae* is independence from the disputing parties. The apparent lack of independence or neutrality of the petitioners is considered to be a ground for rejection.[82] Such requirement is needed to avoid manipulations that could be detrimental to the fairness and transparency of the process. The friend of the court should not be the friend of one of the parties.[83]

¶79. It has been established that one of the requirements for admitting *amicus curiae* is that they have sufficient "independence".[84] An *amicus* should nevertheless be expected to put

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[79] Ibid, ¶4.7.
[80] Apotex (Appleton), ¶¶42–3; Apotex (BNM), ¶¶34–6.
[81] Amicus submission by CBFI, ¶9.
[82] Bernhard (PO), ¶56.
[83] Mourre, pp. 257-271.
[84] Vivendi, ¶1.

forward his point of view in a way which is independent from the parties' procedural strategies.[85] He should not have been invited to do so by one of the parties, and even less financed by one of them.

¶80. The submissions from persons who establish to the tribunal's satisfaction that they have the expertise, experience and independence to be of assistance in the case are only accepted.[86] Petitioners must comment on their financial relationship with either party.[87]

¶81. The *Philip Morris* tribunal denied request for leave to the Inter-American Association of Intellectual Property for lack of independence from the claimants, after the respondent notified the tribunal that claimants' lawyers served on the petitioners' board of management and other committees.[88] Similarly, in *Eli Lilly*, two *amicus curiae* petitions were rejected because the claimant's Canadian subsidiary was a member of common associations. In addition to paying membership fees and publicly acknowledging to having relied on their services for lobbying purposes in respect of one of the disputed issues, several senior employees served on the associations' board of directors. The role of *amici* in international arbitration proceedings is to assist the Tribunal, not to support a disputing party.[89]

¶82. Here, even if there was no involvement by Vemma in the applicants' decision to file an *amicus* submission in this matter, it may nevertheless have influenced the applicants' position through previous activities and deliberations.

¶83. There could also be a direct effect of outcome of the case on Lapras Legal as they are designated to strategize Vemma's third party funding.[90] The application fails to disclose the extent of financial contributions Claimant offers to CBFI and how Lapras Legal is remunerated. For the foregoing reasons, the submission of CBFI should be rejected as the participation of Lapras Legal Capital in this arbitration raises a conflict of interest.

¶84. In conclusion, the application by the CBFI fails to meet the criteria for accepting an *amicus* submission and accordingly they should be barred from filing an *amicus* application, whereas, external advisors to CRPU has satisfied all the requirements for filing an *amicus* application and should be granted leave for the same.

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[85] Methanex, ¶38.
[86] Vivendi, ¶24.
[87] Vivendi, ¶32, 34.
[88] Philip, ¶55.
[89] Eli Lilly, p. 2.
[90] Amicus Submission by CBFI, ¶7.

PHASE II: MERITS

C. THE RESPONDENT HAS NOT VIOLATED ARTICLE 9.9 OF THE CEPTA

¶85. The Respondent submits that it has always adhered to the 'fair and equitable treatment' ('FET') provision laid down under Article 9.9 of the CEPTA. In furtherance of the same, it is submitted that *first,* the interpretation of Article 9.9 is based on the shopping list approach with a high threshold of liability in light of its reference to the minimum standard of treatment **[1]**; *second,* the Respondent has not breached any element of the FET clause **[2]**; *third,* the Respondent's actions are justified in light of 'Right to Regulate' under Article 9.8 of the CEPTA **[3]** and *last,* there is no creeping violation of the FET **[4]**.

1. Article 9.9 is based on the shopping list approach requiring a high threshold of liability

¶86. FET clause mentions the elements of obligations as well reference to minimum standard treatment ("MST"). Additionally, it is also preceded by Article 9.8 i.e., the right to regulate clause. The Respondent submits, *first,* the FET clause should be assessed only on the grounds of the elements explicitly mentioned **[a]**; *second,* a high threshold of liability would lie on the Respondent due to the reference of MST **[b]**; and *third,* FET clause has to be interpreted in light of states' right to regulate **[c]**.

(a) FET clause should be assessed only on the grounds of the elements explicitly mentioned

¶87. In order to determine the interpretation of the FET clause, reference should be made to Article 31 to 33 of the VCLT.[91] The treaty is to be interpreted according to its ordinary meaning, which provides the most authentic expression of the intention of the parties.[92] Therefore, until the contrary is established, the ordinary meaning is most likely to reflect what the parties intended.[93] Moreover, the concept of *pari materia* clauses can be used to refer to treaty clauses of similar or identical text.[94]

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[91] Pulp mills, ¶65; Waibel, p. 571; Weeramantry, p. 25.
[92] Lauterpacht and Bethlehem, p.104; Sinclair, p. 115.
[93] Aust, p. 188.
[94] Martins Paparinskis, p. 101

¶88. Here, the clause reads as "Investors and their covered investments will be accorded fair and equitable treatment and full and protection and security *in accordance with* paragraphs 2 through 7". Paragraphs 2 to 7 few elements have been mentioned. In ordinary meaning, the phrase '*in accordance with'* has been specified as "in a way that agrees with or follows" indicating that the FET clause constitutes only those elements given under the stipulated paragraphs.[95] Similar reference can also be drawn from CETA.[96]

(b) A high threshold of liability would lie on the Respondent owing to the MST

¶89. The threshold of liability under MST provides that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.[97]

¶90. For constituting the violation of FET, in reference to MST, an act should be sufficiently egregious and shocking so as to fall below accepted international standards.[98]

(c) FET clause should be interpreted in light of states' right to regulate

¶91. The object, purpose, and the contextual factors such as the circumstances and background of treaty formation should be taken into consideration while interpreting the FET.[99] This, in turn, should be interpreted with reference to the preamble.[100]

¶92. Here, the preamble of the CEPTA emphasizes on the economic cooperation and growth in the partner countries.[101] Accordingly, when the goal of the treaty also includes the stimulation of economic development in the partner countries, the FET standard should be interpreted in a balanced manner with due regard being given to the state's right to regulate.[102]

¶93. The background and contextual interpretation of the treaty would yield a similar outcome. Mekar's move to replace the 1994 Bonooru – Mekar BIT, with the present CEPTA was motivated from the loss of several high-profile investment arbitrations against the investors

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[95] Waste Management II, ¶8; National Grid, ¶82.
[96] Rubina Islam, pp. 66-67; CETA.
[97] Neer case, pp. 61-62.
[98] Glamis, ¶616; UNCTAD, p. 13, 28, 22.
[99] Asian Agricultural, ¶21; Aguas del Tunari ¶241; Sempra (J), ¶145.
[100] ADF, ¶14.
[101] CEPTA, preamble.
[102] Mamidoil, ¶611.

from Bonooru.[103] The inclusion of the right to regulate in the CEPTA, in contrast with the earlier BIT, establishes Mekar's emphasis on the importance of the same. Moreover, the placement of the right to regulate under Section D of the treaty, dealing with investment protection along with several rights to the investors for their investment protection[104], stipulates an equal weightage of the right to regulate required to givewhile interpreting the FET in the present case.[105]

2. Respondent has not breached any element of the FET clause

¶94. It is the Respondent's submission that none of the measures adopted by the Respondent violate the FET clause, in particular, *first*, the conduct of the judiciary did not violate the denial of justice element of FET **[a]**; *second*, the CCM's actions were in line with the FET standards **[b]**; and *last*, the government measures did not violate the FET clause either **[c]**.

(a) Conduct of the Judiciary has violated the denial of justice element of 'FET'

¶95. Denial of justice can be pleaded if the relevant courts refuse to entertain a suit, subjecting it to undue delay, or administering justice in an inadequate way or where there exists a clear and malicious misapplication of the law.[106] The test for establishing a denial of justice sets a higher threshold.[107]

¶96. The possibility of holding a State internationally liable for judicial decisions does not entitle a claimant to seek international review of the national court decisions.[108]

¶97. The Respondent submits that *first,* there is no undue delay in hearing the application of interim relief **[i]**; *second,* the rejection of the interim relief and delivery of the summary judgment was the result of the right course of justice **[ii]**; and *last*, the enforcement of the arbitral award by Mekari Courts was a well-reasoned decision **[iii]**.

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[103] PO3, ¶14.
[104] CEPTA, p. 76.
[105] SGS, ¶¶169–70; SGS (2008), ¶12; Plama (J) ¶192; Salini, ¶77; and Lanco, ¶27.
[106] Azinian, ¶102.
[107] Chevron, ¶244.
[108] Azinian, ¶99.

(i) ***The Respondent has not caused undue delay in hearing the application of the interim relief***

¶98. While addressing judicial delays, factors such as complexity of the case, the development status and size of the population of the particular States,[109] 'the volume of the work involved by a thorough examination of the case,[110] the amount at issue in the particular case,[111] and the legal nature of the case[112] are considered. Further, the business risk that an investor takes also covers the possible deficiencies of the local justice system.[113]

¶99. Here, it was apparent to the Claimant that the host country was in the transition stage with the lack of resources which was further worsening with the rapid increase in the population of the country.[114] It was also a well-known fact that the Mekari courts took at least 27 months for disposing of civil cases.[115]

(ii) ***The rejection of the interim relief and delivery of the summary judgment was the result of the right course of justice***

¶100. A party seeking injunctive relief has to show: (i) a substantial likelihood of success on the merits (ii) irreparable injury (iii) balance of interest; and that (iv) injunction is not adverse to the public interest.[116] A prima facie breach[117] did not require the CCM to demonstrate a clear breach of competition rules; rather it was enough to establish the probable existence of infringement.[118]

¶101. In the airline industry, predatory pricing can be established only when three essential conditions are fulfilled: lowering the ticket price; increasing the frequency or capacity, with the intention to expel the other competitors; and subsequently recoup their market share.[119]

¶102. Here, despite certain accorded privileges and the lower price of oil, the Claimant was facing losses owing to the high concentration in routes between Mekar and Bonooru.[120]

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[109] White Industries, ¶10.4.18.
[110] El Oro, ¶9; Clyde Dyches, pp. 458, 460–61.
[111] Interoceanic Railway, p. 186, ¶13.
[112] BE Chattin, p.290, ¶15.
[113] Electrabel, ¶7.78.
[114] Facts, ¶12.
[115] Facts, ¶13.
[116] Minnesota, p.1326; R De Nicola, ¶12; R Bianchi, ¶20; SCK, ¶30.
[117] MRTP, Section 4(e).
[118] La Cinq SA, ¶¶ 61-63.
[119] Brooke, pp. 219-30.
[120] Facts, ¶33.

Regardless of these losses in 2013,[121] it continued the high frequency in the subsequent year, raising suspicion towards its intentions.[122] The sudden emergence of regional flights with low-cost carriers also strengthens our concerns.[123]

¶103. Further, the winter season was accustomed to business travelers,[124] who generally prefer good services airlines rather than the low-cost price offering carriers.[125]Therefore, in 2013, when the Claimant had confronted loss already there was no explanation which was financially fitting for them to complete the high concentration in this routes as the accustomed travelers had preferred it any day. Thus, establishing a prima facie case on the merits.

¶104. Furthermore, such damage cannot be regarded as irreparable, if it may be the subject of subsequent financial compensation.[126] Further, there was also the real possibility of irreparable harm to airlines that could have been expelled due to the predatory pricing practice of the Claimant thus would have been against the public interest.

¶105. Therefore, the court was right in course of rejecting the interim relief application of the Claimant.

The Summary Judgment is not a premature dismissal of the injunctive relief claim

¶106. The court can grant the summary judgment if a party fails to put enough facts to state a claim to relief that is plausible on its face.[127] Further, antitrust law limits the range of permissible inferences from ambiguous evidence.[128]

¶107. Here, as discussed above, the prima facie discussion cleared it out that the action of the CCM was completely justified in nature and there was no possibility of any other decision in the case than against the Claimant. Therefore, considering this the court simultaneously gave the summary judgment to save its time and resources.

¶108. It has also been observed that the tribunal has no competence to control the application of domestic law by the domestic courts even if the supervisory court might have performed a

[121] Facts, ¶30.
[122] Facts, ¶31.
[123] Facts, ¶33.
[124] Facts, ¶30.
[125] Kociubinski, pp. 18-19.
[126] R Abertal, ¶24; R Alpharma, ¶128.
[127] Bell, pp.18-24; Northern Pacific, p. 7, 9.
[128] Matsushita, p. 588.

rather cursory review of the lower court decisions. The fact that reasons were succinctly expressed does not entail that the underlying arguments were not considered.[129]

(iii) *Enforcement of the arbitral award by Mekari Courts was a well-reasoned decision*

¶109. The wording of the New York Convention ("**NYC**")[130], 'may be refused' permits a court to exercise its discretion to recognize and enforce an award.[131] The courts can enforce a foreign award notwithstanding that one or more of the specified grounds of Article V have been established.[132]

¶110. The public policy exception in Article V has been defined narrowly, in line with the Convention's pro-enforcement approach. The concerned violation must therefore be considered sufficiently serious to warrant the refusal of enforcement.[133] Further, if the enforcement of the award favours the domestic policy of the state more, then the state can enforce it.[134]

¶111. Here, the Supreme Arbitrazh Court of Sinnograd recognized that the evidence was not strong enough to be considered as a conclusive rule to give its final judgment.[135] Thus, it was nothing but a mere allegation. The court can enforce the award if it favours its own country's public policy. The admission of the evidence produced by the CILS would have been against the public policy of the Mekar.

¶112. Therefore, the High Court, as well as the Supreme Court of Mekar, validly recognized and enforced the arbitral award.

(b) CCM's conduct has not violated the various elements of 'FET'

¶113. It is the Respondent's submission that the conduct of the CCM did not violate the elements of the FET, including due process and legitimate expectations, nor was it arbitrary or discriminatory in conduct.

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[129] Liman, ¶383.
[130] NYC, §V(1)(e).
[131] Jan Paulsson, pp. 227-30; Sampliner, p. 23; Junita, pp. 59-60.
[132] Chromalloy, pp. 909-10.
[133] Kolel Beth, p. 11; *Sinocore*, ¶¶35-47; *National Iranian*, ¶¶46-47.
[134] Chromalloy, p. 913.
[135] Facts, ¶11.

¶114. Due process of law is associated with the notions of denial of fairness in the administration of justice and procedural fairness in the application[136] of administrative procedures by the host State.[137] It prohibits arbitrary and discriminatory conduct by governmental agencies.[138]

¶115. Further, a high threshold of liability for finding a breach of arbitrary conduct has been settled out.[139] Therefore, the mere alleged illegality of a governmental measure??? would not amount to arbitrariness. Moreover, the tribunal has a restricted scope of inquiry while reviewing administrative bodies' actions.[140]

¶116. Accordingly, the Respondent submits that the first investigation **[i];** as well as the second investigation **[ii]** was legally initiated by the CCM; in addition, the continuation of the interim measures has not violated the FET standard **[iii].**

(i) *The first investigation*

¶117. The CCM rightly initiated the first investigation by following due process of law. The provision under which the investigation was started required the threshold of 50% of the market share to be met by 'a corporation'. Further, the exercise of discretionary power to start the investigation required the occurrence of rare exceptional circumstances.[141]

¶118. For obtaining the threshold of 50% of the market share, the CCM validly took the composite market share of the Royal Narnian and the Caeli Airways since they both constituted a single economic entity, both being in decisive influence of the Vemma.[142] Moreover, slots are considered as an essential facility,[143] and by preferring slot trading both the airlines were paving the way for excluding other competitors.

¶119. The CCM had the discretion to start the investigation since the Claimant's case was a rare exceptional circumstance as the Caeli airways was the only national air carrier of the Mekar. Further, it held the largest market share of the aviation market, while the money inflow

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[136] Lidercón, ¶167; Petrobart, ¶133.
[137] Corona Materials, ¶248.
[138] ELSI, ¶¶124, 128; Szwabowicz, p. 535.
[139] Thunderbird, ¶194; Glamis, ¶616, 627.
[140] ADF, ¶190.
[141] MRTP, Section 2(a).
[142] Durkhan, ¶15, 22.
[143] DAF/COMP, ¶148.

from Boonoru.[144] Thus, it had the capability of affecting the whole market. Cumulatively, it demonstrates that a rare exceptional circumstance existed.

¶120. Moreover, in the present case, no formal assurances were given by the Respondent to the Claimant with respect to the MRTP Act. Further, the legitimate expectations from the general law did not meet the threshold of the state purposely and specifically inducing the investment either.[145]

(ii) *The second investigation*

¶121. The MRTP Act required a complaint from the direct competitor, more than 10% of the market share, and sufficient evidence of anticompetitive practice to start the second investigation.[146] It is the Respondent's submission that all of these requirements were fulfilled.

¶122. The dominant position refers to a position of economic strength enjoyed by an undertaking that enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently.[147]

¶123. Here, the complaint was brought up by a consortium of small regional airlines in Greater Narnia, led by one of their Mekari members.[148] All these airlines were managing on the same regional routes as Caeli airways.[149] Therefore, it was ostensibly clear that the complaint was brought by the direct competitor, whereas it is an indisputable fact that Caeli airways had more than 10% of the market share.[150]

¶124. The Ceali airways was mainly dealing with the business travelers at the Phenac airport.[151] Business passengers are more time and service-oriented, and their required services cannot be substituted with alternatives.[152] Even among the alternatives, Caeli had an upper hand considering its association with Moon alliance and access to other privileges at the Phenac Airport.[153] As Caeli was in a position to behave independently, it acquired the dominant

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[144] Facts, ¶36.
[145] Glamis, ¶766; Charanne, ¶499; Venezuela, ¶256.
[146] MRTP Act, section 3(c).
[147] Aéroports, ¶147; EU, p. 1; Hoffmann, ¶¶5, 38.
[148] Facts, ¶38.
[149] Facts, ¶27, 38.
[150] PO3, ¶6.
[151] Facts, ¶27.
[152] Kociubinski, pp. 18-19; Air France/Alitalia, ¶11.
[153] Facts, ¶21.

position. Moreover, in the oligopolistic market when one company holds the share equivalent to the next two nearest rivals, it gives a strong indication of dominance.[154]

¶125. Further, schemes that produce loyalty effects, tying consumers to one supplier by offering benefits that trigger extensive behavioural loyalty, should be considered as abuse of the dominant position.[155] In order to establish that a rebate scheme is exclusionary, all facts and circumstances must be taken into consideration.[156]

¶126. Here, the Claimant introduced the two programs[157] which if seen in a joined feature highlight that firstly, through the discount scheme the Caeli airways was tempting the new business travelers (which were the major contributor) and then through the second schemes it was consolidating them to choose it exclusively.

¶127. Hence, it is concluded that CCM's acts were not arbitrary and illegal.

(iii) *The continuation of the interim measures did not violate the 'FET' Standard*

¶128. Lastly, CCM was also justified in continuing with the interim measures as the past conduct of the Claimant vouches for the fact that despite the imposition of interim measures the Claimant was continuously engaged in the anti-competitive act[158] which highlights their tendency to disregard market regulations. Considering this, the removal of airfare caps would have made unsalvageable harms to other competitors since they might have been removed from the market.

(c) The government measures have also not violated the FET clause

¶129. The Respondent submits that the measures taken up by the Mekari government have also not violated the FET standard on the following three grounds, *first*, the government measures were neither discriminatory nor lacked transparency **[i]**; *second*, the measures adopted have not frustrated the legitimate expectations of the Claimant **[ii]**; *last*, the refusal of the *bona fide* third-party offer along with all other measures constitutes abusive treatment **[iii]**.

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[154] Hoffman, ¶¶39, 48.
[155] BPB Industries, ¶120; Hoffmann, ¶¶89-0; Michelin, ¶¶71, 86; DAF/COMP, pp. 41-47.
[156] Post Danmark II, ¶50.
[157] Facts, ¶35.
[158] Facts, ¶38.

(i) ***The government measures were neither discriminatory nor lacked transparency***

¶130. State actions are considered discriminatory where similar cases are treated differently and without reasonable justification.[159] Transparency means that the legal framework for the investor's operations is readily apparent and that any decisions affecting investments can be traced to that legal framework and be known to the investor.[160]

¶131. Here, the Respondent declined the subsidy to those airlines in which a significant part was owned by the foreign government and in Mekar there were two such airlines i.e Larry Air and Caeli airways.[161] Therefore, while assessing the discriminatory conduct, the similar case here would be of Larry Air and the Caeli Airways and it is apparently clear that they both were treated in the similar manner. Further, the subsidy was denied to Claimant for the benefit of the public.[162] Thus, declination of the subsidy cannot be considered a discriminatory conduct.

¶132. Moreover, the subsidy was introduced through the proper legal framework of the executive order[163] which was readily available to the Claimant, and the reason for the denial was specifically mentioned.[164]

(ii) ***The measures adopted by the government has not frustrated the legitimate expectations of the Claimant***

¶133. The socio-political and economical background of a country has been considered as relevant to the FET obligation, especially for the obligation to provide a stable and transparent legal framework and the investor bears the risk if he knowingly invests in a country with down infrastructure and problematic legal and regulatory framework.[165]

¶134. The legitimate expectations cannot mean the virtual freezing of the legal regulation of economic activities, except where specific promises or representations are made by the State to the investor, the latter may not rely on the legitimate expectations[166], in contrast with the State's normal regulatory power in the public interest and the evolutionary character of economic life.[167]

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[159] Saluka, ¶¶312-13.
[160] Dolzer and Schreuer, p. 171; Vandevelde, pp. 83-84.
[161] Facts, ¶47
[162] EDF, ¶294.
[163] Annex VIII, ¶56.
[164] Facts, ¶46.
[165] Mamidoil, ¶625; Duke Energy, ¶¶339-340; Saluka, ¶304; Generation, ¶20.37; Bayindir, ¶193.
[166] EDF, ¶217; Frontier, ¶468; Total, ¶121; El Paso, ¶375; White Industries, ¶10.3.17; Unglaube, ¶270.
[167] ELECTRABEL, ¶7.77.

¶135. Here, the socio-economic background of Mekar was known to the Claimant[168] and the Respondent never made any specific representations to it. Moreover, the measures taken up by the government were in the public interest. Thus, they do not frustrate the legitimate expectations of the Claimant.

(iii) *Refusal of the bona fide third-party offer, among other measures, constitutes abusive treatment*

¶136. Abusive conduct can occur in the form of coercion, duress,[169] and harassment[170] involving unwarranted and improper pressure, abuse of power, persecution, threats, and intimidation.[171] The conduct of the State will be abusive where there are manifestly no lawful grounds for the relevant actions and the harm is inflicted upon the investment for improper reasons, such as national prejudice or political revenge.[172]

¶137. Here, all actions of the Respondent were well-founded on legal grounds, therefore; the question about abusive conduct fails to arise. The refusal of the third-party bona fide offer by the Respondent was validly exercised as per its right to the first refusal.[173] Here, the Claimant had a direct relation with the Moon alliance members and Hawthrone Group LLP, being the member of this alliance was in direct relation with it.[174]

3. The Respondent's actions are justified as 'Right to Regulate'

¶138. International tribunals do not sit as courts of appellate jurisdiction with authority to review the legal validity of domestic measures.[175] The determination of the breach of FET Clause depends on high measure of deference that international law generally extends to the domestic authorities to regulate matters within their own borders.[176]

¶139. Article 9.8 of the CEPTA recognizes the right to regulate in order to achieve legitimate public policy objectives.[177] Further, Article 9.8 (2) specifically provides that the mere fact that

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[168] Facts, ¶¶12-3.
[169] Desert line, ¶¶179, 185–187, 190, 193.
[170] Pope & Talbot (D), ¶¶156–181.
[171] Eureko, ¶237; Waste Management, ¶138.
[172] UNCTAD, p. 83.
[173] Annex VI, §39(1)(a); Rusal Plc, ¶145; Wood, ¶10.
[174] Facts, ¶23.
[175] ADF, ¶190; IThunderbird, Award, ¶160; Saluka, ¶273; BG Group, ¶344.
[176] SD Myers, ¶261, 263.
[177] CEPTA, §9.8(1).

a party regulates, in a manner that negatively affects an investor does not amount to a breach of FET.[178]

¶140. Furthermore, to determine the legitimate public policy state's objectives, the socio, political and economic background of the country should be considered.[179] The tribunal, in this regard, expects a higher threshold to be met for the policy to be illegitimate.[180]

¶141. Here, the measures were taken due to the economic crisis in Mekar and the purpose was to eliminate the crisis which is a legitimate public policy objective.[181] The deteriorating value of the currency needed to be stabilized. The IMF had also emphasized the need to establish credibility in the local currency to avoid a debilitating economic situation.[182] To ensure the same, the government passed a decree, requiring all companies operating in the country to deal exclusively on MON.

¶142. Further, the subsidy was also denied maintaining effective competition in the market. Thus, it also had a legitimate public policy objective.

4. There is no creeping violation of the FET

¶143. Creeping violation of FET has evolved from creeping expropriation.[183] It has been recognized that reasonable governmental regulations cannot result in creeping expropriation.[184] Similarly, it can be inferred that reasonable governmental measures will not result in the creeping violation of the FET.

¶144. Here, as argued above, all the measures adopted by the Respondent were reasonable regulations. In conclusion, there is no creeping violation of the FET.

D. THE COMPENSATION REQUESTED BY THE CLAIMANT IS NOT THE APPROPRIATE STANDARD FOR THE BREACH OF ARTICLE 9.9 OF CEPTA

¶145. The Respondent submits that there is no breach of Article 9.9 of CEPTA it has accorded the Fair and Equitable Treatment to the Claimant. The requested compensation is only payable

[178] CEPTA, §9.8(2).
[179] Mamidoil, ¶¶612, 617, 625, 657-658.
[180] Philip, ¶399.
[181] Antin, ¶555; Charanne, ¶¶500, 536; Eiser, ¶371; Total, ¶167 ; AES Summit, ¶10.3.24. Electrabel, ¶8.23.
[182] Facts, ¶39.
[183] El Paso, ¶518.
[184] Feldman, ¶105.

in the instance of the breach of the international obligation, whereas, in the instant case, the Respondent has not breached the same.[185]

¶146. Without prejudice to the previous submission, it is submitted that even if the Hon'ble Tribunal is to find the breach of Article 9.9 of CEPTA, no compensation is payable for the losses to the investment in the absence of a causation **[1]**; Market Value becomes the appropriate compensation standard **[2];** Fair Market Value standard cannot be imported from the 2006 Arrakis-Mekar BIT **[3]**, and even if the Tribunal is to award the compensation at FMV, compensation should be mitigated in the presence of contributory actions of the Claimant, and the dire economic situation for the Respondent **[4]**.

1. Causation does not exist between the actions of the Respondent and the injury Caused

¶147. It is submitted that the International Law Commission Draft Articles on State Responsibility only address the principles of causation in general terms, whereby defining an 'injury' for which a State is obliged to make reparation, Article 32(2)[186] provides that injury includes any damage 'caused' by the internationally wrongful act of a State. The principle of causation becomes of prime importance, wherein, in the absence of the causal link between the act of the State and the injury caused, no compensation can be awarded.

¶148. Tribunals have awarded compensation for the injury caused only when such losses are reasonably certain and ascertainable with a fair degree of accuracy. They do not allow compensation for indirect damages if they are conjectural or speculative or not reasonably certain or susceptible of accurate determination.[187] It can thus be seen that a test has been defined by international scholars and tribunals.

¶149. In *El Paso*[188], the Tribunal stated that it shares the view expressed by other investment treaty tribunals that the test of causation is whether there is a sufficient link between the damage and the treaty violation.

¶150. In *Maffezini*, an ICSID arbitration arising out of a BIT, the Tribunal rejected a claim for damage caused by the allegedly bad information contained in a feasibility study carried out by a Spanish public body. This body had carried out an economic evaluation prior to the

[185] ILC Draft, §12.
[186] ILC Draft, §31(2).
[187] Dorner Claim, pp. 164–5.
[188] El Paso, ¶682.

investor making his investment. The Tribunal held that nevertheless the investor was responsible for his losses on the basis that Bilateral Investment Treaties are not insurance policies against bad business judgments.[189]

¶151. Here, there is little to no evidence to show that the actions of the state have caused any injury to the investment of the Claimant, let alone be the responsibility for a compensation being claimed. The actions of the Claimant have been risky and dangerous from the business point of view, which was pointed out by the Respondent on multiple occasions.[190] The Respondent also made significant efforts to bring the issue of outstanding debts and injecting the earlier profits of the Caeli Airways into the business model for sustenance, but none of these requests were paid heed to. The Claimant has time and again pursued their pre-determined agenda of furthering the Horizon 2020.

¶152. Hence, it is clear that no action of the Respondent, albeit internationally wrongful, has caused any direct injury to the investment of the Claimant, which can be ascertained to an accurate certainty. In conclusion, compensation requested by the Claimant should not be entertained.

2. Market Value is the appropriate compensation standard

¶153. Without prejudice to the above made submissions, if the Hon'ble Tribunal is to find the breach of Article 9.9 of CEPTA and finds the causation link between the actions of the Respondent and the alleged injury caused to the investment, it is submitted that the compensation should be awarded at Market Value, as discerned under Article 9.21 of CEPTA.

¶154. It is submitted that there is an inherent difference in the International Valuation Standards Council[191] which defines 'Market Value' as:

> *"Market Value is the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion."*

[189] Maffezini, ¶64.
[190] Facts, ¶31.
[191] IVS, section 30.1.

¶155. The said definition is structurally distinguishable from the Fair Market Value definition as envisaged in The World Bank Guidelines on the Treatment of Foreign Direct Investment[192] which defines 'Fair Market Value' as:

> *"(…) the fair market value will be acceptable if determined by the State according to reasonable criteria related to the market value of the investment, i.e., in an amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the period in which it has been in existence, -he proportion of tangible assets in the total investment and other relevant factors pertinent to the specific circumstances of each case."*

¶156. The Fair Market Value, used as a standard by various tribunals, is used to compensate the determinable damages for the lost profits. The valuation date for the same is set to be right before the occurrence of the wrongful action by the Respondent. In cases, where the determinability of losses is in question, and the certainty is lacking for the most part, Fair Market Value does not provide the appropriate standard. [193]

(a) Article 9.21 of CEPTA is applicable as *lex specialis*

¶157. Here, Article 9.21 of CEPTA is applicable as *lex specialis* for the following reasons, *first*, *lex specialis* overrides *lex generalis* **[i]**; and *second*, Article 9.21 of CEPTA is *lex specialis* regarding the subject matter of the case **[ii]**.

(i) *Lex specialis overrides lex generalis*

¶158. It is submitted that the idea that special overrides general has a long pedigree in international law jurisprudence.[194] A special rule regulates the matters more effectively than general rules and is best able to take account of particular circumstances.[195]

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[192] World Bank Guidelines, §IV, Section 5.
[193] Bear, ¶604.
[194] UN Study, p. 4.
[195] Ibid.

¶159. In cases of conflict of norms, preference should be given to the rule which is most specific and approaches most nearly to the subject in hand, and special provisions are ordinarily more effective than those that are general, as stated by *Grotius*.[196]

¶160. According to the *Micula* tribunal, the BIT prevailed over the EU law as *lex specialis,* because it was the treaty with a more precise delimited scope application.[197] The relationality to determine whether a rule is special covers an essential factor: subject matter and the actors who are bound by the special law.[198]

(ii) *Article 9.21 of CEPTA is lex specialis regarding the subject matter of the case*

¶161. It is submitted that Article 9.21 of CEPTA clearly mentions any damage awarded as a final award, shall be evaluated on the standard of Market Value, except for the cases brought under Article 9.12 of CEPTA. Article 9.12 of CEPTA envisages compensation for the act of expropriation, which shall be evaluated at the standard of Fair Market Value. There is no mention of derivation of the standard for the non-expropriatory breaches of the treaty as well.

¶162. Since here, the claim is strictly limited to the breach of Article 9.9 of CEPTA, and no claim has been proposed for the breach of Article 9.12 of CEPTA, such claim will be covered under Article 9.21 of CEPTA.

¶163. Moreover, the treaty drafters have made a conscious effort to distinguish the Market Value standard for the non-expropriatory breaches of the treaty as against to the Fair Market Value standard envisaged for the expropriatory breach of the treaty.

¶164. If the Tribunal finds that such conflict exists, Article 9.21 of CEPTA would be applicable. The *AES* tribunal[199] concluded that, if there were conflict between the applicable investment treaty (ECT) and EU law, it would in any event need to be resolved in favor of the investment treaty. In other words, the Tribunal must simply apply the provisions of the B-C BIT and must disregard any potential conflict with EU law (TFEU).

¶165. Moreover, the *lex posteriori derogat legi priori* principle does not apply in the present case, Article 9.21 of CEPTA constitutes a *lex specialis*, and as a consequence prevails over general law, according to the principle that *lex posterior generalis non derogat legi priori*

[196] Grotius, p. 880.
[197] Micula, ¶291.
[198] Merkouris, p. 215.
[199] AES, ¶80.

speciali. A general law does not annul an earlier special law. The *lex specialis*, even if it is the earlier one, overrides a later, more general rule.[200]

¶166. Article 9.21 of the CEPTA envisages monetary damages at 'Market Value', displaying the intention of the parties to give special meaning to this provision.[201] The *AAPL* tribunal concluded that both parties had agreed to the applicability of the Sri Lanka/United Kingdom bilateral investment treaty as *lex specialis* and of the international or domestic legal relevant rules referred to as a supplementary source by virtue of the provisions of the treaty itself.[202]

¶167. Therefore, here, any possible conflict that may occur between the international customary law and the provisions of the treaty, the Hon'ble Tribunal should give preference to the provisions of the treaty, and the compensation standard envisaged in the treaty provision applicable for the subject matter at hand.

3. FMV standard cannot be imported from the 2006 Arrakis-Mekar BIT

¶168. Article 9.7 of CEPTA characterizes Minimum Standard Treatment in a peculiar way. Article 9.7(2) clearly states that the procedural obligations of dispute settlement of the parties shall not constitute treatment, so as to stand in breach of the Article 9.7 of CEPTA. Compensation, in the more nuanced form of a damage stems as a result of the dispute settlement procedure adopted by the parties. The *CME* tribunal, held that the compensation provisions of the Dutch Treaty in order to incorporate the substantially different formulation in the US Treaty is an unattractive hypothesis, as it involves a strange view of the intention of the parties.[203]

¶169. The presumption of this Tribunal must be that the clause promises MFN treatment only in matters of treatment of an investment and not to the process of dispute settlement. [204] It is imperative for the like situations to exist in order to attract the MFN obligation, which include, *inter alia*, being in the same regulatory regime[205], or same sector[206] and in competition with the Claimant.[207]

¶170. It is submitted that Caeli Airways was a Regional and a Cross-Regional Airline, with the route expansion ranging the entire sub-continent. There is little to no evidence suggesting

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[200] Villiger, p. 36.
[201] VCLT, §31(4).
[202] Asian Agricultural, ¶21.
[203] CME, ¶11.
[204] Ibid.
[205] Apotex, ¶¶8.54-55.
[206] Pope & Talbot, ¶78.
[207] Corn Prod, ¶120.

that any like situations existed between the participants covered under the 2006 Arrakis-Mekar BIT, with that of the Claimant's.

¶171. Hence, the forceful importing of the compensation standard substantially different from the standard envisaged in CEPTA from a third-party treaty will violate the international law.[208]

4. Compensation should be mitigated in the presence of contributory actions of the Claimant, and the dire economic situation for the Respondent

¶172. Without prejudice to the previous arguments, it is submitted that the international law recognizes the relevance of the conduct of the injured party in the determination of compensation. It is pertinent to consider that the investor-state dispute mechanism does not protect the investor from its own "bad business judgments".[209]

¶173. The consideration of the contributory actions has been envisaged in the ILC Articles on State Responsibility,[210] which state that the determination of the compensation should be coupled with the consideration of the contribution to the injury by willful or negligent action or omission of the injured state or any person or entity in relation to whom reparation is sought.

¶174. Many tribunals have interpreted Article 39 of the ILC Articles in the sense of requiring that the Claimant's conduct be taken into account in determining compensation.[211]

¶175. The *MTD* tribunal considered that the Claimants contributed to their losses; as a result, they should bear part of the damages suffered and awarded only 50% of the damages they had suffered.[212]

¶176. The principle that claimants must take reasonable steps to mitigate their losses is a well-established principle in investment arbitration.[213] It can be considered to be part of the General Principles of Law which, in turn, are part of the rules of international law.[214]

¶177. Here, various instances clearly demonstrate that the Respondent has, on multiple occasions, cautioned the Claimant from taking extravagant measures and drastic steps, which have been acknowledged to be extremely risky business decisions by various experts. Nonetheless, through rapid mindless expansion, furthering the agenda of the Horizon 2020,

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[208] VCLT, §34.
[209] Maffezini, ¶64.
[210] ILC Draft, §39.
[211] Perenco, ¶359.
[212] MTD, ¶243.
[213] CME, ¶482.
[214] Middle east**,** ¶167

and adopting various anti-competitive actions, the Claimant has landed themselves in the current situation, and the Respondent should not be held liable for the same.

¶178. It is submitted that the amount of compensation should be mitigated considering the economic crisis in Mekar. Even if the tribunal acknowledges the FET violation, the compensation should diminish owing to the dire economic crisis in Mekar [215]

¶179. As is evident from the current situation, the Claimant is suffering from severe, dire economic crisis, as the 2019 IMF report predicted four consecutive quarters of negative growth for Mekar, an 8 per cent fall in GDP, and a 2600 per cent average inflation rate in 2020. The report also noted that Mekar was facing a potential third debt default in as many decades. In order to pay the USD 700 million, Respondent would have to transfer about twice its consolidated annual public spending to the Claimant. It is important to note that various tribunals have taken into account the economic crisis to have an incident value on compensation and valuation.[216]

¶180. Hence, it is submitted that the compensation, if were to be awarded at Fair Market Value, needs to be mitigated for the contributory actions of the Claimant and the economic crisis that prevails in the state of Mekar.

[215] LG & E, ¶ 139; National Grid, ¶¶179-180.
[216] Sempra, ¶417.

PRAYER FOR RELIEF

For the foregoing reasons, Respondent respectfully requests this Tribunal to render an award in favour of Respondents, as follows:

(1) To declare that it does not have jurisdiction over the present dispute;
(2) To grant leave sought by the external advisors to the CRPU to file *amicus* submission;
(3) To bar the *amicus* submission by the CBFI;
(4) To declare that Respondent has not violated Article 9.9 of CEPTA;
(5) To find that the Respondent's liability is precluded by way of Article 9.8 of CEPTA;
(6) To declare that the Respondent does not owe any compensation to the Claimant;
(7) To declare that the appropriate standard of compensation is Market Value;
(8) To declare that the compensation should be reduced owing to the mitigating factors and contribution;
(9) To award any other remedy that the Hon'ble Tribunal may deem fit.

Respectfully submitted on September 23, 2021

By:

Team Crawford

On Behalf of Respondent

The Federal Republic of Mekar