TEAM ODA G

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

RESPONDENT'S MEMORIAL

Vemma Holdings Inc.

(Claimant)

v

The Federal Republic of Mekar

(Respondent)

TABLE OF AUTHORITIES

LEGAL INSTRUMENTS

Final Report on MFN	Final Report of the Study Group on the Most-Favoured-Nation clause, Report of the International Law Commission, Sixty-seventh session, A/70/10, 2015.
Harvard's 1929 Draft on State Responsibility	Harvard Draft Convention on the Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigner, 1929.
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965.
ICSID AFR	ICSID Additional Facility Rules, 1978.
ICSID Rules	ICSID Arbitration Rules, 1968.
ILC Articles	International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, (A/56/10), vol. II, Part Two, 2001.
NAFTA	North American Free Trade Agreement, 1994.
NY Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.
Statute ICJ	Statute of the International Court of Justice (ICJ).
UNCITRAL Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2014.
VCLT	Vienna Convention on the Law of Treaties, 1980.

AWARDS

AAPL	Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award (27 June 1990).
Achmea	Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13, Award (7 September 2012).

ADF	ADF Group Inc. v. USA, ICSID Case No. ARB (AF)/00/1, Award (9 January 2003).
AES	AES Corporation, Tau Power B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/10/16, Award (1 November 2013).
AIG	AIG Capital Partners, Inc., CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan, ICSID Case No. ARB/01/6, Award (7 October 2003).
Al-Bahloul	Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan, SCC Case No. V 064/2008, Partial Award on Jurisdiction and Liability (2 September 2009).
AMTO	Limited Liability Company Amto v. Ukraine, SCC Case No. 080/2005, Final Award (26 March 2008).
Antaris	Antaris Solar GmbH, Dr. Michael Göde v. Czech Republic, PCA Case No. 2014-01, Award (2 May 2018).
Apotex (AF/12/1), PO Mr. Barry Appleton	Apotex Holdings Inc., Apotex Inc. v. USA, ICSID Case No ARB (AF)/12/1, Procedural Order on the Participation of the Applicant Mr. Barry Appleton as a Non-Disputing Party (4 March 2013).
Apotex (AF/12/1), PO on the Participation of the Applicant, BNM, as a Non-Disputing Party	Apotex Holdings Inc., Apotex Inc. v. USA, ICSID Case No ARB (AF)/12/1, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party (4 March 2013).
Apotex (UNCT/10/2), Award	Apotex Inc. v. USA, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility (14 June 2013).
Apotex (UNCT/10/2), PO2	Apotex Inc. v. USA, ICSID Case No. UNCT/10/2, Procedural Order 2 (11 October 2011).
Arif	Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award (8 April 2013).
Azinian	Robert Azinian, Kenneth Davitian, Ellen Baca v. The United Mexican States, ICSID Case No. ARB(AF)/97/2, Award (1 November 1999).
Azurix	Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award (14 July 2006).
Bayindir	Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award (27 August 2009).
Bear Creek, PO5	Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Procedural Order 5 (21 July 2016).

Bear Creek, PO6	Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Procedural Order 6 (21 July 2016).
BG	BG Group Plc. v. The Republic of Argentina, UNCITRAL, Final Award (24 December 2007).
Binder	Rupert Joseph Binder v. Czech Republic, UNCITRAL, Award (15 July 2011).
Biwater, PO5	Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order 5 (2 February 2007).
Bosh	Bosh International, Inc, B&P Ltd Foreign Investments Enterprise v. Ukraine, ICSID Case No. ARB/08/11, Award (25 October 2012).
BUCG	Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction (31 May 2017).
Burlington Resources	Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award (7 February 2017).
Cargill	Cargill, Incorporated v. The United Mexican States, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009).
Churchill	Churchill Mining PLC, Planet Mining Pty Ltd v. Republic of Indonesia, ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction on Churchill Mining PLC (24 February 2014).
Corona	Corona Materials LLC v. Dominican Republic, ICSID Case No. ARB(AF)/14/3, Award (31 May 2016).
Crystallex	Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016).
CSOB	Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objection to Jurisdiction (24 May 1999).
Daimler	Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award (22 August 2012).
Dan Cake	Dan Cake S.A. v. Hungary, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability (24 August 2015).
Desert Line	Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17, Award (6 February 2008).

Devas	CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, Telcom Devas Mauritius Limited v. Republic of India, PCA Case No. 2013-09, Award on Jurisdiction and Merits (25 July 2016).
Duke	Duke Energy Electroquil Partners, Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award (18 August 2008).
Duty Free	World Duty Free Company v. Republic of Kenya, Award (4 October 2006).
Eco Oro	Eco Oro Minerals Corp. v. Republic of Colombia, ICSID Case No. ARB/16/41, Procedural Order 6 (Decision on Non-Disputing Parties' Application) (18 February 2019).
El Paso, Award	El Paso Energy International Company v. Argentine Republic, ICSID Case No ARB/03/15, Award (31 October 2011).
Electrabel	Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Award (25 November 2015).
Eli Lilly	Eli Lilly and Company v. Government of Canada, UNCITRAL, ICSID Case No. UNCT/14/2, Final Award (16 March 2017).
Enron	Enron Corporation, Ponderosa Assets, LP v. Argentine Republic, ICSID Case No. ARB/01/3, Award (22 May 2007).
Feldman	Marvin Roy Feldman Karpa v. The United Mexican States, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002).
Flemingo DutyFree	Flemingo DutyFree Shop Private Limited v the Republic of Poland, UNCITRAL, Award (12 August 2016).
Fraport	Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Award (16 August 2007).
Frontier	Frontier Petroleum Services Ltd. v. The Czech Republic, Final Award (12 November 2010).
Gavrilovic	Georg Gavrilovic, Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39, Award (25 July 2018).
Generation Ukraine	Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award (16 September 2003).
Genin	Alex Genin, Eastern Credit Limited, Inc., A.S Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2, Award (25 June 2001).
Glamis Gold	Glamis Gold, Ltd. v. USA, UNCITRAL, Award (8 June 2009).

Hamester	Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award (18 June 2010).
Helnan Hotels	Helnan International Hotels A/S v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objections to Jurisdiction (17 October 2006).
Hochtief	Hochtief AG v. The Argentine Republic, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 October 2011).
HydroEnergy	Hydro Energy S.à.r.l., Hydroxana Sweden AB v. Kingdom of Spain, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Direction on Quantum (9 March 2020).
Iberdrola	Iberdrola Energía S.A. v. Republic of Guatemala, ICSID Case No. ARB/09/5, Award (17 August 2012).
ICS	ICS Inspection and Control Services Limited (United Kingdom) v. Argentine Republic, UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction (10 February 2012).
Impregilo	Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Award (21 June 2011).
Inceysa	Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award (2 August 2006).
Italy v. Cuba	Italian Republic v. Republic of Cuba, ad hoc state-state arbitration, Final Award (1 January 2008).
Jan de Nul	Jan de Nul N.V., Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award (6 November 2008).
Joshua Dean	Joshua Dean Nelson, Jorge Blanco v. The United Mexican States, ICSID Case No. UNCT/17/1, Award (5 June 2020).
Kiliç	Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Award (2 July 2013).
Koch	Koch Minerals Sàrl, Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/19, Award (30 October 2017).
Krederi	Krederi Ltd. v. Ukraine, ICSID Case No. ARB/14/17, Award (2 July 2018).
Lemire, Award	Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award (28 March 2011).
Lemire, Decision on Jurisdiction	Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010).

LESI	L.E.S.I. S.p.A., ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire, ICSID Case No. ARB/05/3, Award (12 November 2008).
LG&E	LG&E Energy Corp., LG&E Capital Corp., LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Award (25 July 2007).
Lidercón	Lidercón, S.L. v. Republic of Peru, ICSID Case No. ARB/17/9, Award on Merits (6 March 2020).
Loewen	Loewen Group, Inc., Raymond L. Loewen v. USA, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003).
M.C.I	M.C.I. Power Group L.C., New Urbine, Inc. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Award (31 July 2007).
Maffezini, Award	Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Award (13 November 2000).
Maffezini, Decision on Jurisdiction	Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000).
MAKAE	MAKAE Europe SARL v. Kingdom of Saudi Arabia (ICSID Case No. ARB/17/42), Award (30 August 2021).
Mamidoil	Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award (30 March 2015).
Masdar	Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award (16 May 2018).
Metalclad	Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000).
Methanex, Decision on Amici Curiae	Methanex Corporation v. USA, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "amici curiae" (15 January 2001).
Methanex, Final Award	Methanex Corporation v. USA, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005).
Methanex, Part IV	Methanex Corporation v. USA, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, Part IV, Ch. D. (3 August 2005).
Mobil	Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award on Merits (9 October 2014).

Mondev	Mondev International Ltd. v. USA, ICSID Case No. ARB(AF)/99/2, Award, (11 October 2002).
MTD	MTD Equity Sdn. Bhd., MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award (25 May 2004).
Noble Ventures	Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award (12 October 2005).
Occidental	Occidental Petroleum Corporation, Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award (5 October 2012).
Oostergetel	Jan Oostergetel, Theodora Laurentius v. The Slovak Republic, UNCITRAL, Final Award (23 April 2012).
Parkerings	Parkerings Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (11 September 2007).
Philip Morris, Award	Philip Morris Brands Sàrl, Philip Morris Products S.A., Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (8 July 2016).
Philip Morris, PO3	Philip Morris Brands Sàrl, Philip Morris Products S.A., Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Procedural Order 3 (17 February 2015).
Philip Morris, PO4	Philip Morris Brands Sàrl, Philip Morris Products S.A., Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Procedural Order 4 (24 March 2015).
Phoenix Action	Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Award (15 April 2009).
Plama, Award	Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award (27 August 2008).
Plama, Decision on Jurisdiction	Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005).
Resolute Forest	Resolute Forest Products Inc. v. Government of Canada, PCA Case No. 2016-13, Procedural Order 6 – Decision on Amicus Application (29 June 2017).
RFCC	Consortium RFCC v. Royaume du Maroc, ICSID Case No. ARB/00/6, Decision on Jurisdiction (16 July 2001).
RosInvest	RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. V079/2005, Decision on Jurisdiction (1 October 2007).

Roussalis	Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award (7 December 2011).
Rumeli	Rumeli Telekom A.S., Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award (29 July 2008).
S.D. Myers	S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award (13 November 2000).
Saipem, Award	Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Award (30 June 2009).
Saipem, Decision on Jurisdiction	Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007).
Salini	Salini Costruttori S.p.A., Italstrade S.p.A. v. Kingdom of Morocco [I], ICSID Case No. ARB/00/4, Decision on Jurisdiction (31 July 2001).
Saluka	Saluka Investments BV v. The Czech Republic UNCITRAL, Partial Award (17 March 2006).
SAUR	EDF International S.A., SAUR International S.A., León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Award (11 June 2012).
Sempra	Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award (28 September 2007).
South American Silver	South American Silver Limited v. Bolivia, PCA Case No. 2013-15, Award (22 November 2018).
Stati	Anatolie Stati, Gabriel Stati, Ascom Group SA, Terra Raf Trans Traiding Ltd v. Republic of Kazakhstan, SCC Case No. 116/2010, Award (19 December 2013).
Suez	Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A., InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae (17 March 2006).
Tatneft	OAO Tatneft v. Ukraine, PCA Case No. 2008-8, Partial Award on Jurisdiction (28 September 2010).
Tecmed	Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003).

Telenor	Telenor Mobile Communications A.S. v. The Republic of Hungary, ICSID Case No. ARB/04/15, Award (13 September 2006).
Thunderbird, Award	International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award (26 January 2006).
Thunderbird, Separate Opinion of Thomas Walde	International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Separate Opinion of Thomas Walde (1 December 2005).
Toto, Award	Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction (7 June 2012).
Toto, Decision on Jurisdiction	Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction (11 September 2009).
UAB	UAB E energija (Lithuania) v. Republic of Latvia, ICSID Case No. ARB/12/33, Award of the Tribunal (22 December 2017).
UPS, Award	United Parcel Service of America, Inc. (UPS) v. Government of Canada, ICSID Case No. UNCT/02/1, Award (24 May 2007).
UPS, Decision on Amici Curiae	United Parcel Service of America, Inc. (UPS) v. Government of Canada, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (17 October 2001).
Victor Pey	Victor Pey Casado, President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Award (13 September 2016).
Vladimir Berschader	Vladimir Berschader, Moïse Berschader v. The Russian Federation, SCC Case No. 080/2004, Award (21 April 2006).
Vladislav Kim	Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Decision on Jurisdiction (8 March 2017).
Von Pezold, PO2	Bernhard von Pezold v. Republic of Zimbabwe (ICSID Case No ARB/10/15), Procedural Order No. 2 (26 June 2012).
Waste Management	Waste Management, Inc. v. The United Mexican States (2), ICSID Case No. ARB(AF)/00/3, Award (30 April 2004).
Wena Hotels	Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award (8 December 2000).
White Industries	White Industries Australia Limited v. The Republic of India, UNCITRAL, Final Award (30 November 2011).

Yukos	Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award (18 July 2014).

INTERNATIONAL JURISPRUDENCE

Chorzów	Factory at Chorzów (Merits), PCIJ Series A. No 17, Judgment (13 September 1928).
Hilmarton	Société Hilmarton Ltd v. Société Omnium de Traitement et de Valorisation (OTV)/ 92-15.137, France, Cour de Cassation (23 March 1994).
Legality of Use of Force/ICJ	Legality of Use of Force (Serbia and Montenegro v. Belgium), I.C.J Reports, Judgement (15 December 2004).
Military and Paramilitary Activities in and against Nicaragua	Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA), Judgement, I.C.J. Reports 420 (1984).
Putrabali	Societe PT Putrabali Adyamulia v. Rena Holding, French, Cour of Cassation (29 June 2007).
Tadic	Prosecutor v. Duško Tadic, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, Case IT-94-1-A (1999), Judgement (15 July 1999).

BOOKS

Badia (2014)	Albert Badia (2014). Piercing the Veil of State Enterprises in International Arbitration, vol. 29, Kluwer Law International.
Crawford (2002)	James Crawford (2002). The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries, Cambridge University Press.
Crawford (2013)	James Crawford (2013). State Responsibility: The General Part. Cambridge Studies in International and Comparative Law, Cambridge University Press.
Dörr and Schmalenbach (2012)	Oliver Dorr, Kirsten Schmalenbach (2012). Vienna Convention on the Law of Treaties, A Commentary, Springer.

Kovács (2018)	Csaba Kovács (2018). Attribution in International Investment Law, Kluwer Law International.
Marboe (2017)	Irmgard Marboe (2017). Calculation of Compensation and Damages in International Investment Law, Oxford International Arbitration Series.
Marike Paulsson (2016)	Marike R. P. Paulsson (2016). The 1958 New York Convention in Action, Kluwer Law International.
McLachlan, Shore, and Weiniger (2018)	Campbell McLachlan, Laurence Shore, and Matthew Weiniger (2018). International Investment Arbitration: Substantive Principles, 1st ed., Oxford University Press.
Romesh (2012)	Romesh Weeramantry (2012). Treaty Interpretation in Investment Arbitration, Oxford International Arbitration Series, Oxford University Press.
Sauvant, Sachs and Jongbloed (2012)	Karl P Sauvant, Lisa E. Sachs and Wouter P.F Schmit Jongbloed (2012). Sovereign Investment: Concerns and Policy Reactions Oxford University Press.
Schreuer, Malintoppi, Reinisch and Sinclair (2009)	Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (2009). The ICSID Convention: A Commentary, Cambridge University Press.
Schwenzer, Hachem and Kee (2012)	Ingeborg Schwenzer, Pascal Hachem, and Christopher Kee (2012). Global Sales and Contract Law, Oxford University Press.
Woss, Rivera, Spiller and Dellepiane (2014)	Herfried Woss, Adriana San Román Rivera, Pablo T. Spiller, Santiago Dellepiane (2014). Damages in International Arbitration Under Complex Long-Term Contracts, Oxford University Press.

CHAPTERS IN BOOKS

Banifatemi (2009)	Yas Banifatemi, (2009). The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration, in A. Bjorklund, I. Laird and S. Ripinsky (eds), Investment Treaty Law: Current Issues III, British Institute of International and Comparative Law (BIICL).
Lalive (1986)	Pierre Lalive (1986). Transnational (or Truly International) Public Policy and International Arbitration in Pieter Sanders (ed), Comparative Arbitration Practice and Public Policy in Arbitration, ICCA Congress Series, 1986 New York Volume, Kluwer Law International.
Petrochilos (2010)	Georgios Petrochilos (2010). Attribution: State Organs and Entities Exercising Elements of Governmental Authority in Katia Yannaca-Small (ed.), Arbitration Under International Investment

	Agreements: A Guide to the Key Issues, Oxford University Press.
Petrochilos (2015)	Georgios Petrochilos (2015). Attribution of Conduct of Non-State Organ Entities: An Introduction in Shaheeza Lalani and Rodrigo Polanco Lazo (ed.), The role of the State in Investor-State Arbitration, Koninklijke Brill NV.
Sabahi, Duggal and Birch (2018)	Borzu Sabahi, Kabir Duggal, and Nicholas Birch (2018). Principles Limiting the Amount of Compensation (Chapter 12), in Christina L. Beharry(ed.), Contemporary and Emerging Issues on the Law of Damages and Valuation, in International Investment Arbitration, Nijhoff International Investment Law Series, Volume 11.
Senn and Hewett (2017)	Mara Senn and Dawn Yamane Hewett, (2017). Damages in International Arbitration: Understanding the Theories and Methods of Damages Valuation and Compensation in Laurence Shore, Tai-Heng Cheng, Jenelle E. La Chiusa, Lawrence Schaner, Mara V. J. Senn (eds), International Arbitration in the United States, Kluwer Law International.

ARTICLES

Azar, Schmalz, and Tecu (2018).	José Azar, Martin C. Schmalz, and Isabel Tecu (2018). Anti-Competitive Effects of Common Ownership, Journal of Finance, 73 (4), IESE Business School, University of Navarra.
Born and Forrest (2019)	Gary B. Born and Stephanie Forrest (2019). Amicus Curiae Participation in Investment Arbitration, Foreign Investment Law Journal, vol. 34, Issue 3, ICSID Review.
Briggs (1968)	Herbert W. Briggs (1968). Reflections on Non-Retroactivity of Treaties, Revista Española de Derecho Internacional, vol. 21, No. 2, Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales.
Broches (1972)	Aron Broches (1972). The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 135 Hague Rec. d. Cours 331.
Cremades and Cairns (2004)	Bernardo M. Cremades, David J.A. Cairns (2004). Trans-national Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering and Fraud. Dispute Resolution Journal, vol. 58, Issue 4.
Elhauge (2016)	Einer Elhauge (2016). Essay Horizontal Shareholding, Harvard Law Review, vol. 129, 5.
Elhauge (2017)	Einer Elhauge (2017). Tackling Horizontal Shareholding: An Update and Extension to the Sherman Act and EU Competition Law, OECD.

Kreindler (2006)	Richard Kreindler (2006). Public Policy and Corruption in International Arbitration: A perspective for Russian Related Disputes, 2006, 72, Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Issue 3.
Kriebaum (2007)	Ursula Kriebaum (2007). "Partial Expropriation", 8(1) Journal. of World Investment. and Trade, Vol. 8.
McLaughlin (2019)	Mark McLaughlin (2019). Defining a State-Owned Enterprise in International Investment Agreements, ICSID Review - Foreign Investment Law Journal, vol. 34, Issue 3. Oxford University Press.
Ostrowsky (1998)	Stephen T. Ostrowsky and Yuval Shany (1998). United States Law and International Arbitration at the Crossroads, New York University Law Review, Vol. 73, Number 5.
Vandevelde (2010)	Kenneth J. Vandevelde (2010). A Unified Theory of Fair and Equitable Treatment, New York University Journal of International Law and Politics (JILP), vol. 43, No. 1., Thomas Jefferson School of Law Research Paper No. 2357642.
Viñuales (2009)	Pierre-Yves Tschanz and Jorge E. Viñuales (2009). Compensation for Non-expropiatory Breaches of International Investment Law, Journal of International Arbitration, vol. 26 Issue 5, Kluwer Law International.

MISCELLANEOUS

IMF (2020)	International Monetary Fund (IMF) 2020. Fiscal Monitor: Policies to Support People During the COVID-19 Pandemic. Washington, April.
OECD Guidelines (2015)	Organization for Economic Co-operation and Development (OECD) (2015). Guidelines on the Corporate Governance of State-Owned Enterprises, OECD Publishing.
World Bank Group (2014)	World Bank Group (2014). Corporate Governance of State-Owned Enterprises: A Toolkit, Washington, DC

LIST OF ABBREVIATIONS

§ (§§)	Paragraph (Paragraphs)
BIT	Bilateral Investment Treaty
Board	Vemma's Board of Directors
BPB	PJSC Bonoorian People's Banck
Caeli	Caeli Airways JSC
CBFI	Consortium of Bonoori Foreign Investors
CEPTA	Bonooru - Mekar Comprehensive Economic Partnership and Trade Agreement
CILS	Centre for Integrity in Legal Services
CRPU	Committee on Reform of Public Utilities
EO 5-2014	Executive Order 5-2014
EO 9-2018	Executive Order 9-2018
Facts	Statement of Uncontested Facts
FET	Fair and Equitable Treatment
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ISDS	Investor-State Dispute Settlement
Mekari High Court	High Commercial Court of Mekar
MFN	Most Favored Nation
Notice	Notice of Arbitration dated 15 November 2020
p. (pp.)	Page (Pages)
Response	Response to the Notice of Arbitration
SOE	State-Owned Enterprise

STATEMENT OF FACTS

Dramatis personae

[1] Vemma Holdings Inc. (***Claimant***) is a company incorporated in Bonooru in the context of the privatization of the airline sector in that State. In a nutshell, as a result of the privatization, Claimant became the single shareholder Royal Narnian, the new company chosen as the flag carrier of Bonooru. Currently, Bonooru holds 55% of Claimant's shares.

[2] Until March 2020, Bonooru had held around 38% of Claimant's shares, being the shareholder with the biggest stake at Claimant. Since the beginning of this dispute, Bonooru increased its participation to 55% of Claimant's shares.

[3] In January 2011, Claimant acquired an 85% stake in Caeli, one of the leading airline companies in Mekar.

[4] The Republic of Mekar (***Respondent***) is a State situated nearly 1,600 km south of Bonooru, with a population above 10.8 million. Respondent is not a signatory to the ICSID Convention.

The Relevant Treaty

[5] In April 2014, Respondent and Bonooru executed CEPTA. The Treaty entered into force on 15 October 2014, replacing the 1994 BIT between both States.

[6] Chapter 9 of CEPTA contains the Contracting Parties' obligations in regard to foreign investors, which are defined pursuant to Article 9.1. Chapter 9, Section E of CEPTA provides an ISDS mechanism for disputes arising out of the Treaty.

Facts of the Investment

[7] The facts leading to this dispute date to **2011**, when Claimant's offer to acquire Caeli was selected by Respondent's Committee on Reform of Public Utilities (***Committee)***.

Despite concerns raised by the Committee in regard to Claimant's overly optimistic business plan for Caeli, Claimant's offer was ultimately accepted by the Chairperson of the Committee, Mr Dorian Umbridge. What follows is an evidence that the Committee's concerns became true.

Rise and Fall of Caeli

[8] The acquisition of Caeli by Claimant on **29 March 2011** was followed by a quick handover of Caeli's business. In charge of Caeli's management, Claimant took several measures that proved fruitful at first. From **2011 to 2013**, Caeli increased its domestic and international demand by around 20%. Caeli would benefit further from a five-year low of oil prices caused by the rising supply in the market in **2014**. Claimant held Caeli on a string, and all Respondent's prudent suggestions for Caeli were rejected.

[9] However, Claimant's measures and reliance on favorable market conditions would soon cross the lines of legality and economic reasonableness.

[10] In **September 2016**, CCM opened two investigations against Caeli based on predatory pricing strategies adopted by the company in the context of its rapid expansion plan and anti-trust practices on certain routes to and from Phenac International. As a protective measure, CCM placed an airfare caps on Caeli, which had no immediate economic effect and were not contested by Caeli.

[11] By **March 2017**, an economic crisis arose in Mekar and the value of the MON nosedived. Relying on the advice from the IMF, Respondent took measures to reestablish the confidence in its currency, such as requiring all companies operating in its territory to price their services in MON. The currency devaluation hit particularly hard on Caeli's business plan. As of **July 2017**, Caeli's revenues were meagre and instable. In 2018, Caeli's dire situation was aggravated by peak in oil prices.

[12] Claimant's overly optimistic measures left it with no alternatives but to start blaming Respondent for Caeli's fate. On **8 March 2018**, Caeli initiated a judicial proceeding against Claimant seeking the review of interim measures taken by CCM. These claims were lately dismissed on merits.

[13] By the end of **August 2018**, the CCM concluded its first investigation and determined in a voluminous report that Caeli was indeed guilty of engaging in predatory pricing resulting from low airfares and loyalty programs. The second investigation was concluded in **January 2019**, finding that Caeli also abused its dominant position in the Phenac Airport.

[14] In the meantime, in **September 2018**, Respondent passed the EO 9-2018 aiming at financially assisting airlines operating in Mekar. Under the EO 9-2018, Respondent subsidized mainly airlines operating relevant domestic routes in Mekar and with less then 5% market share on these routes. Claimant's application to receive subsidies was denied.

[15] In **November 2019**, Claimant purposely received an offer from Hawthorne Group to acquire Caeli. However, Respondent rightfully invoked its right of first refusal seeing as this was not an "arm's length" offer, since Hawthorne Group in fact was a Member of the Moon Alliance, as well as Claimant.

[16] In **May 2020**, Respondent obtained a favorable award in the arbitration initiated against Claimant seeking to invalidate Hawthorne Group's offer. The award was later arbitrarily annulled by courts of Sinnoh based on manufactured evidence that it was procured by corruption. This evidence was rejected by Mekari courts, which recognize and enforce the award on **23 August 2020**.

[17] After months seeking another buyer for Caeli, on **8 October 2020** Claimant accepted Respondent's offer to acquire Caeli for USD 400 million.

[18] However, for Respondent's surprise, on **17 November 2020**, ICISD's Secretariat registered Claimant's request for arbitration.

SUMMARY OF ARGUMENTS

JURISDICTION: CLAIMANT DOES NOT QUALIFY AS AN INVESTOR. Claimant does not qualify as an investor under Article 9.1 of CEPTA, as it does not have business activities in Bonooru.

JURISDICTION: ATTRIBUTION. Claimant's acts in regard to its investment in Caeli are attributable to Bonooru. Therefore, the current dispute is a State-to-State arbitration, to which Claimant has not consented to.

***AMICI CURAE* SUBMISSIONS**: CRPU's application for leave to file an amicus curiae brief should be granted, since it has the capacity to assist the Tribunal in clarifying a relevant topic to this arbitration – Claimant's investment was procured by corruption –, and it meets the remaining requirements under CEPTA and ICSID AFR. Conversely, CBFI's application shall be dismissed.

MERITS: BREACH OF FET. Claimant was afforded fair and equitable treatment, because:

- **Respondent did not breach Claimant's legitimate expectations** by investigating Claimant's anti-competitive practices in Mekar and refusing the denomination of airfare in USD during the currency crisis;
- **Respondent had legitimate purposes** in selecting the beneficiaries of subsidies under EO 9-2018;
- **Claimant was afforded due process at all times,** including in regard to transparency of the decision to deny the subsidies under EO 9-2017 and Mekari courts' decision to enforce the commercial award;
- **Respondent did not deny Claimant justice,** since Claimant had reasonable access to Mekari courts;
- **Respondent did not treat Claimant abusively.**

DAMAGES:

- **If any, Claimant is entitled to compensation based on Market Value**. Article 9.21 of CEPTA provides that any compensation awarded under CEPTA must be in Market Value. Customary international law or the MFN provision in CEPTA does not warranty Claimant a distinct standard.
- **No causation or contributory fault.** Respondent bore no fault in Caeli's downfall, therefore, compensation equals the amount Respondent paid to acquire the investment – USD 400 million.
- **Alternatively, mitigating factors should be considered**. Claimant is the only responsible for the downfall of Caeli.

I. THE TRIBUNAL LACKS JURISDICTION *RATIONE PERSONAE*

[19] Chapter 9, Section E of CEPTA provides the dispute settlement mechanism for disputes arising out of CEPTA. According to Articles 9.16 and 9.17, the Contracting Parties consented to arbitrate disputes initiated by investors – as qualified in Article 9.1. – pursuant to the ICSID Convention and ICSID AFR.

[20] Claimant, however, does not meet these requirements. In the three sections below, Respondent shows that **(A)** Claimant does not qualify as an investor under Article 9.1. of CEPTA because it does not hold business activities in Bonooru; and **(B)** even if Claimant does qualify as an investor, Claimant's acts as a shareholder of Caeli are attributable to Bonooru, therefore this dispute is a State-to-State arbitration to which Respondent has not consented under CEPTA.

A. Claimant does not qualify as an investor under CEPTA

[21] Article 9.1 of CEPTA defines investors as, *inter alia*, enterprises or nationals of a Contracting Party holding investments in the territory of the other Contracting Party.[1] An enterprise is a national of Contracting Party if it has been constituted under the laws of such Contracting Party and it holds substantial business activities in the territory of such Contracting Party.[2]

[22] It is consented in international law that activities carried out on behalf of States – even if exercised by private enterprises – are not business activities.[3] Some examples of what constitute governmental authority were listed by the Contracting Parties in Article 9.13 of CEPTA, which attributes to a Contracting Party the conduct of private entities exercising *"governmental authority that the Party has delegated to it."*[4]

[23] *In casu*, Claimant does not meet the definition of investor under CEPTA. The only activity that Claimant has in Bonooru is exercised by its wholly subsidiary, Royal

[1] L.2590.
[2] L.2593-2594.
[3] *Salini*, §§33-35; *Maffezzini, Decision on Jurisdiction*, §§80; *Tatneft*, §137.
[4] L.2819-2824.

Narnian. As a successor of Bonooru Air,[5] Royal Narnian was incorporated to secure the rights of transport of Bonoori citizens, "*regardless of profitability.*"[6]

[24] In this regard, the decision of the Constitutional Court of Bonooru on the privatization of BA Holdings emphasized that Bonooru's participation in Claimant would *"ensure the utilization of the Royal Narnian for public benefit."*[7] This expectation was later confirmed by Bonoori officials, who stated that Claimant was "*liv[ing] up to the standards set by its predecessor in Bonooru*".[8]

[25] Claimant and Royal Narnian are instruments for Bonooru's public policies and, as such, exercise Bonooru's governmental influence to secure interests that are not commercial in nature. Therefore, Claimant does not qualify as an investor under Article 9.1 of CEPTA.

B. The dispute is a State-to-State arbitration: Claimant's acts in regard to its investments in Mekar are attributable to Bonooru

[26] Even if the Tribunal concludes that Claimant qualifies as an investor under CEPTA, Claimant's acts as a shareholder of Caeli are attributable to Bonooru. Therefore, this is a State-to-State arbitration, to which Respondent has not consented under CEPTA.

[27] Under international law, private entities may not qualify as investors when "*acting as an agent for the government or discharging an essentially governmental function*."[9] These rules are crystalized in Articles 5 and 8 of the ILC Articles.[10]

[28] In international investment law, this concept has been referred to as the *Broches test.*[11] When applying these rules for establishing the jurisdiction of the Centre over investor-state disputes, ICSID tribunals have generally reviewed, on a case-by-case basis, whether

[5] L.930.
[6] L.925.
[7] L.1497.
[8] L.3297.
[9] Schreuer, Malintoppi, Reinisch and Sinclair (2009), §271 (p.161); Crawford (2002), p.100; Badia (2014), pp.23-24.
[10] *Masdar,* §§167-170; *Noble Ventures,* §70; *Jan de Nul,* §163.
[11] Broches (1972), pp.354-355.

the acts of private entities are attributable to a State. Attribution has been found where an entity is a SOE exercising governmental functions or acting on behalf of the State.[12]

[29] Claimant's meet these exact criteria, since **(1)** Claimant has at all times been a SOE **(2)** acting as an agent of Bonooru and **(3)** performing governmental functions.

1. Claimant has always been a SOE

[30] CEPTA and the ICSID AFR do not provide a definition of SOEs. However, a consistent definition may be extracted from several sources of international law and international investment authorities.[13]

[31] The definition of SOE under international law is fundamentally based on an analysis of ownership, control, the entity's foundation, the purpose of the activities it develops, and its accountability to the civil society.[14]

[32] State's ownership and control over a private entity exists where a State holds a majority of or a significant minority of an entity's shares, to the extent it enables the State to exercise considerable influence over the entity's management.[15] Considerable influence is found where corporate structures secure seats for State officials in the entity's management bodies, or the State's ability to elect members of management bodies.[16]

[33] A significant importance is also given to the foundation of the enterprise, as strong connections between an enterprise and a State are deemed to exist where the former was created by the latter.[17] These connections are confirmed if the private entity develops an activity typical to the State.[18]

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[12] *Maffezzini*, Decision on Jurisdiction, §§75-79; *Waste Management*, §75; *Noble Ventures*, §§63-64; *Salini*, §§31-35; *Jan de Nul*, §§163-168,172; *Tatneft*, §109; *Bosh*, §§164-176; *Rumeli*, §§211-212; *Devas*, §§269,275-278,287-288; *Flemingo DutyFree*, §426; *Italy v. Cuba*, §§160-163; *Bayindir*, §§120-125; *Toto*, §§52-53; *Helnan Hotels*, §92; *Saipem*, Decision on Jurisdiction, §148.

[13] L.2530-2535; Wälde (2004), p.159; Romesh (2012), §5.13; *Saipem*, *Award*, §90; *Duke*, §117; Statute ICJ, Art.38.

[14] McLaughlin (2019), pp.600-609; Badia (2014), pp.4-5; OECD Guidelines (2015), p.14, *Maffezzini*, *Decision on Jurisdiction*, §76; *LESI*, §108; *Salini*, §§32-33; *Tatneft*, §§127-133,135-137.

[15] World Bank (2014), pp.70-73; Sauvant, Sachs and Jongbloed (2012); *Salini*, §31.

[16] Badia (2014), p.11; *LESI*, §107.

[17] *Maffezzini*, §83; *Toto*, §§52-53; *LESI*, §§106-107.

[18] *Maffezzini*, §85; *LESI*, §§107-108; *Helnan Hotels*, §92.

[34] An entity may also be a SOE if the purpose of the activities it develops is directly related to their States' public policies.[19] Historically, SOE's are more commonly found in industries key for the development of these policies, such as infrastructure and transport.[20]

[35] In pursuing public policies, SOEs are generally oriented by the society needs rather than the maximization of its own profits.[21] As a direct consequence, the accountability of SOEs to the civil society often has an important impact in its business plan and financial results.[22]

[36] On this basis, ICSID tribunals have concluded that a SOE exists where it is found that a State has a strong influence over an enterprise, be it direct or indirect. For instance, in *Salini*, the tribunal emphasized that the State's capacity to elect most of the entity's board members, along with the consequent governmental influence, were extremely relevant factors when characterizing the entity as a SOE.[23] While the State's majority ownership of the entity's shares is considered, it has not been decisive.[24]

[37] *In casu*, there is no doubt Claimant is controlled directly or indirectly by Bonooru. During the period Claimant was a shareholder at Caeli, Bonooru owned up to 38% of Claimant's shares. [25] While being a minority shareholder, Bonooru was the shareholder with the largest number of shares by a wide margin. The remaining shares were publicly traded in the market,[26] highly dispersed, with the second largest shareholder holding only 7% of the shares.[27]

[38] This means that unless a significant number of shareholders attended the meeting for the election of Claimant's Board, Bonooru was entitled to elect all the available seats. Since Bonoori representatives were present in every shareholders' meeting, Bonooru has

[19] McLaughlin (2019), p.608; Badia (2014), p.4.
[20] IMF (2020), pp.48-49.
[21] OECD Guidelines (2015), p.15.
[22] McLaughlin (2019), pp.602-603,608.
[23] Salini, §§32-33.
[24] Schreuer, Malintoppi, Reinisch and Sinclair (2009), §850; *RFCC*, §36; *Salini*, §32.
[25] L.935.
[26] L.1540-1555.
[27] L.3274.

always had strong influence in every election of Claimant's Board, if not the right to elect all of them. [28]

[39] But that's not all. According to Claimant's Articles of Association, Bonooru is also entitled to appoint a non-independent director to Claimant's board. The non-independent director represented Bonooru interests at the heart of Claimant's management body.[29]

[40] The incorporation of Claimant and the nature of its activities also highlights the influence of Bonooru. Claimant was incorporated by Bonooru to act as the single shareholder of Royal Narnian. As a successor of the SOE Air Bonooru, Royal Narnian bears responsibility to develop an extremely important activity in Bonooru, given its unique geography.[30]

[41] It has been recognized by the Constitutional Court of Bonooru that Article 70 of The Constitution Act "*imposes positive obligations*" on Bonooru to guarantee mobility through the archipelago by air.[31] Accordingly, one of Claimant's objectives under its Articles of Association is to develop the aviation industry and civil aviation infrastructure in Bonooru "*for the benefit of its populations in accordance with Article 70 (…)*", going as far as "*including servicing remote communities*", which have been less (or not) lucrative.[32]

[42] The Tribunal must not lose sight of the forest for the trees. Considering all the facts above, it is clear that Bonooru has always had direct or indirect control of Claimant's activities as a shareholder of Caeli, Claimant, therefore, is a SOE.

2. Claimant was acting under Bonooru's instructions or control

[43] Article 8 of the ILC Articles sets forth that conducts of private entities are attributable to a State where these entities act on instructions of or under direction or control of the State

[28] L.3155-3160.
[29] L.1575.
[30] L.1425-1430.
[31] L.1480-1487.
[32] L.1519-1521.

in carrying out the activity.[33] As established *Tadic*, a relation of control exists when a State "*has a role in organising, coordinating or planning"* as well as "*financing, training and equipping or providing operational support*" to the entity that is under said control.[34]

[44] In the same vein, legal scholars[35] and ICSID tribunals[36] alike have found that, for an act of a private entity to be attributed to a State, a "*strong control by the State*" and a "*direct involvement*" must be established with relation to the concerned acts.

[45] *In casu*, even if the Tribunal finds that Claimant's corporate structure does not warrant the conclusion that Claimant is a SOE, it is unequivocal that Claimant's acts as a shareholder of Caeli were the result of a strong control and influence of Bonooru.[37] This is grounded on several facts.

[46] The first evidence of the close relationship between Claimant and Bonooru relates to the establishment of Claimant's investment in Mekar. Following Claimant's successful bid for Caeli in the tendering process for acquiring Caeli, Ms. Sabrina Blue, at the time head of Claimant's Board, was appointed as the Secretary of Transport and Tourism of Bonooru, a position closely related to the activities Claimant would soon develop at Caeli.[38]

[47] Second, throughout the period of its investment on Caeli, Claimant has heavily relied on Bonooru's financial assistance. Claimant received subsidies from Bonooru under the Caspian project [39] – directed by Ms. Blue – who would later congratulate Claimant's capacity of "*drawing more travellers from Mekar and the Greater Narnian region to Bonooru's emerging tourism markets*."[40] In addition to receiving subsidies from Bonooru, Claimant was able to renegotiate Caeli's debt liabilities, under unique rates, with the Bonoori state-owned bank BPB.[41]

[33] Crawford (2002), pp.110-113.
[34] *Tadic*, §137.
[35] Kovács (2018), p.211.
[36] *Hamester*, §199; *White Industries*, §8.1.18; *Thunderbird, Award*, §107; *MAKAE*, §135.
[37] L.1550-1555.
[38] L.1018-1021.
[39] L.1080-1081.
[40] L.1084-1088.
[41] L.1103-1104.

[48] Third, Claimant's business model at Caeli was clearly designed to serve Bonooru's interests. This strategy found its highest expression in Caeli's flight pattern and the substantial resources sunk into risky cross-continental and unprofitable routes.[42] Even after experiencing financial losses and unfavorable market conditions, Claimant refused to cut back the operation of routes between Bonooru and Mekar.[43] This strategy ultimately dragged Caeli into an unprecedent financial crisis that Claimant now attributes to Respondent.

[49] Bonooru long-term plans to consolidate itself as the main economy of the Greater Narnian are well-known. The use of its economic leverage to achieve such goal does not go unnoticed.[44] As stated by Bonooru's former high-ranking official, Bonoori corporations tend not to be independent from the government, and other companies fully owned by Claimant also have relied on state-aid from Bonooru.[45]

[50] Claimant has acted on Bonooru's behalf in pursuing Bonooru's economic goals. Therefore, Claimant's acts as an investor at Caeli are all attributable to Bonooru.

3. Claimant was exercising governmental authority

[51] Article 5 of the ILC Articles provides that acts of an entity are attributable to a State if the following requisites are met:[46]

- The enterprise was empowered by the law of that State: as specialized doctrine states, this provision requires "*that the entity in question must have been empowered pursuant to some legal provision of the state*".[47] ICSID tribunals have also followed these terms.[48]

[42] L.1090-1099,1107.
[43] L.1122-1124,1870-1871.
[44] L.893-894.
[45] L.1860-1864.
[46] ILC Articles, Art.5.
[47] Crawford (2013), p.132
[48] *Bosh*, §173; *Noble Ventures,* §70.

- The enterprise was exercising elements of the governmental authority*:* the nature of the activity and the circumstances it is performed – "*the particular society, its history and traditions*"[49] – are indicative of whether a specific conduct is bestowed with elements of governmental authority.[50]

- Acting in that capacity in the particular instance*:* conduct is not attributable to a State if the acts which are governmental in nature are not related to the investment.[51]

[52] Finally, as described by the tribunal in *Tatneft*, acts "*undertaken on behalf of the State for the accomplishment of its public objectives*" are likely to be attributed to the State, even if the elements described above are not all present.[52]

[53] *In casu*, there is no doubt that Claimant is empowered by the law of Bonooru to exercise governmental functions and pursue Bonoori public objectives, obligations and goals. Claimant was incorporated by Bonooru. Claimant's Memorandum of Association expressly states that one of Claimant's objectives is to endorse Bonooru's positive obligations to provide transport for Bonoori citizens.[53]

[54] Claimant also discharges governmental functions. This was evidenced when, in a political rally in 1980, the Prime Minister of Bonooru stated that BA holdings successor, *i.e.* Claimant,[54] *"regardless of profitability,"*[55] would be *directed* to improve the civil aviation structure of Bonooru.[56]

[55] Moreover, Claimant's actions in Caeli were not business oriented, but rather policy driven. The former chair of Claimant's Board and current Secretary of Transport and Tourism of Bonooru, Ms. Sabrina Blue, has stated that Claimant's investment in Caeli would be "*enhancing the aviation network"* of Bonooru. [57] This was also pointed out

[49] Crawford (2002), pp.106-109; ILC Articles, pp.42-43.
[50] Petrochilos (2010), p.302; Kovács (2018), p. 133; *CSOB*, §20; *BUCG*, §42.
[51] Petrochilos (2015), p.359.
[52] *Tatneft*, §137.
[53] L.1519-1521.
[54] L.937-941.
[55] L.924-925.
[56] L.922-926.
[57] L.1084-1088.

when a former high-ranking official of Bonooru stated that Caeli's routes operated by Claimant seemed "*to more benefit Bonooru than Vemma or Caeli.*"[58] These declarations highlight that Claimant's acts were aimed at performing specific governmental functions of Bonooru, related to the mobility rights of its citizens, and not commercially oriented.

[56] In conclusion, these facts show beyond doubt that Claimant was acting on Bonooru's behalf and exercising its *"puissance publique"* when acquiring or managing its investment in Caeli, which was notably aimed to help the developing of the Bonoori Civil Aviation Industry. Therefore, Claimant's acts in Caeli are all attributable to Bonooru.

C. Conclusion Part I

[57] Claimant is an instrument of Bonooru's goals within its territory and in the Great Narnian Region. On one hand, because Claimant's activities in Bonooru are not business activities, Claimant does not qualify as an investor under Article 9.1. of CEPTA. On the other hand, because Claimant is an SOE exercising governmental activities under direct or indirect control of Bonooru, Claimant's acts in Mekar are all attributable to Bonooru, turning this dispute into a State-to-State arbitration. For all means, the Tribunal does not have jurisdiction *ratione personae* to hear the dispute.

[58] L.1870-1871.

II. THE *AMICI CURIAE* APPLICATIONS

[58] The Tribunal has received two applications for leave to file *amici* submissions, one from The Consortium of Bonoori Foreign Investors (***CBFI***), and another from the External Advisors to the Committee on Reform of Public Utilities (***CRPU***). The Tribunal should accept CRPU's application and dismiss CBFI's for the following reasons.

[59] The Tribunal has discretion under Article 41(3) of the ICSID AFR and Article 9.19(3) of CEPTA to grant leave to a non-disputing party to make a submission. This discretion, however, is limited.

[60] In conjunction, the articles above establish that the Tribunal may allow a non-disputing party to submit a written submission which "*may assist the tribunal in evaluating the submissions and arguments of the disputing parties,"*[59] addressing *"a matter of fact or law within the scope of the dispute."*[60] Moreover, the *amici* must have *"a significant interest in the arbitral proceedings*,"[61] and the submissions shall *"not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party."*[62]

[47] These rules are in line with the UNCITRAL Rules on Transparency, which are binding upon both Parties by virtue of Article 9.20(6) of CEPTA and Respondent's consent to its application.[63]

[61] In interpreting the rules above, ICSID tribunals have held that:

- *Amici* submissions shall not unnaturally broaden the matters within the scope of the dispute.[64] Submissions intending to introduce novel issues or to comment on matters not directly related to the scope of the dispute have been consistently rejected.[65]

[59] L.2931-2932; ICSID AFR, Article 41(3)(a).
[60] L.2931; ICSID AFR, Article 41(3)(b).
[61] L.2933; ICSID AFR, Article 41(3)(c).
[62] L.2939-2940; ICSID AFR, Article 41(3).
[63] L.771-772.
[64] *UPS,* Direction on the Participation of Amici Curiae, §5.
[65] *Von Pezold,* PO2, §57; *Eco Oro*, §§27–30; *UPS,* Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, §69.

- Applicants must demonstrate how their submissions advance a specific public interest and how the outcome of the dispute may impact the rights of entities represented by them. [66]

- An *amicus* must have *"substantive knowledge or relevant expertise or experience"*[67] and their submissions must contribute with knowledge and expertise to *"provide assistance beyond that provided by the disputing parties."*[68]

- Applicants must be impartial and independent.[69] Explicit lack of neutrality is enough to dismiss *amici* submissions.[70]

[62] Taking into consideration the rules that apply to the present case, it becomes rather clear that **(A)** CRPU's submission should be granted; and **(B)** CBFI's submission should be dismissed.

A. CRPU's submissions should be granted

[63] CRPU's application complies with all the requirements set out above.

[64] The facts brought to light by CRPU are extremely serious and relevant to unveil the details of the establishment of Claimant's investment in Mekar. The allegations that Claimant bribed the former chairperson of Mekar's Committee on Reform of Public Utilities (***Committee***) for him to select Claimant's bid in the acquisition of Caeli is within the scope of the dispute as it would greatly benefit the understanding of the rotted origins of Claimant's business plan and their financial consequences to Caeli.[71]

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[66] *Methanex*, Decision on Amici Curiae, §§49-50; *UPS*, Decision on Amici Curiae, §§51-52; *Resolute Forest*, §§4.5-4.7. *Apotex (UNCT/10/2)*, PO2, §§27-288; *Apotex (AF/12/1)*, PO Mr. Barry Appleton, §§37-38; *Resolute Forest*, §4.6; *Bear Creek Mining*, PO6, §19; *Eco Oro*, §§34–35.
[67] *Apotex (ARB (AF)/12/1)*, §31; Philip Morris, PO3, §28; Philip Morris, PO4, §§30-31.
[68] *UPS*, Decision on Petitions for Amici Curiae, §70; *Methanex*, §48; *Biwater*, §§49-50; *InterAguas*, §23; *Apotex (UNCT/10/2)*, §21; *Bear Creek*, PO5, §38.
[69] *Suez*, §§23,29; *Von Pezold*, PO2, §49; *Philip Morris*, Award, §55; *Bear Creek Mining*, PO6, §23.
[70] *Von Pezold*, PO2, §§54-56.
[71] L.635-637.

[65] It is consented that arbitral tribunals must not turn a blind eye to allegations of corruption.[72] This is particularly important in investment arbitration cases, as illegality in the establishment of investments may lead to a deny of investors' protection under the a treaty.[73] In the context of Mekar, which has unfortunately struggled, with corruption of its officials, the fight against corruption practices are of specific interest of the Mekari citizens.

[66] The knowledge and experience brought forth by CRPU in this regard would be of great assistance to the Tribunal.[74] CRPU's members are professionals specialized in Mekari economy who were engaged as external and independent advisors to assist the committee in charge reviewing Claimant's bid to acquire Caeli's shares.[75] The expertise of CRPU's members and their direct involvement in the facts underlying the allegations of corruption against the chair of the Committee would certain be of great benefit to this dispute. CRPU have regularly assisted judicial trials before Mekari courts in cases involving approval for privatization process,[76] which further highlight their capacity and experience in matters of dispute resolution.

[67] Finally, nothing can undermine CRPU's independence and impartiality. CRPU is not directly involved with Claimant nor Respondent in any relevant manner.[77]

B. CBFI's submission should be dismissed

[68] Contrary to CRPU's application, CBFI fails to meet the requirements for filing an *amici* submission.

[69] Foremost, CBFI's connections to Claimant brings serious concerns into CBFI's impartiality and independence. Several CBFI's members have a direct interest in the facts underlying this case, including Claimant itself and Lapras Legal Capital

[72] Cremades and Cairns (2004), p.15. Lalive (1986), p.62.
[73] Kreindler (2006), pp.245–246; *Duty Free,* §157; *Wena Hotels,* §111; *Inceysa,* §249; *Plama, Award,* §143; *Vladislav Kim,* §543.
[74] L.615-625.
[75] L.616-619.
[76] L.643-646.
[77] L.617-619.

(Claimant's funder).[78] In light of this, CBFI's submission, much like in *Von Pezold*,[79] clearly lacks neutrality and thus cannot to serve to assist the tribunal in any regard.

[70] In line with that, CBFI's interests in the current proceedings are neither significant nor public, but rather private. In addition to Claimant, two other CBFI's members are pursuing arbitrations against Respondent,[80] which means that this case could set precedents for their cases. Similar to the facts in *Apotex*,[81] CBFI's submission is not intended to assist the tribunal, but to help CBFI's members in their own endeavors against Mekar.

[71] CBFI also fails to disclose the new perspective, fact, or legal argument that has been advanced by the parties or is unknown to the tribunal.[82] Instead, CBFI's *amicus* submission is merely endorses Claimant's position in this dispute.[83] Being unable to add new information or even a different perspective to the facts underlying the dispute, CBFI's *amicus* submission would unduly burden the parties and the tribunal.[84]

[72] For the reasons above, CBFI's application shall be dismissed.

C. Conclusion Part II

[73] In light of the rules established under Article 41(3) of the ICSID AFR and Article 9.19(3) of CEPTA, as well as the several decisions rendered by arbitral tribunals, the Tribunal should grant leave to the *amicus* submission of the CRPU and dismiss the *amicus* submission of the CBFI.

[78] L.520-523.
[79] *Von Pezold, PO2,* §§54-56.
[80] L.517-519.
[81] *Apotex (AF/12/1),* PO Mr. Barry Appleton, §40.
[82] L.780-781.
[83] Born and Forrest (2019), p.21.
[84] *Resolute Forest,* §4.8.

III. CLAIMANT WAS AFFORDED FAIR AND EQUITABLE TREATMENT

[74] Contrary to what Claimant submits in its Notice, Respondent has not violated, either individually or cumulatively, the FET as established in article 9.9 of CEPTA. Respondent is sure that the Tribunal will find that there was no violation of the FET standard under CEPTA or customary international law.

[75] Throughout this chapter, Respondent will demonstrate that there has been no violation of the FET since **(A)** Respondent did not breach Claimant's legitimate expectations by exercising its right to regulate; **(B)** Respondent had legitimate purposes in selecting the beneficiaries of subsidies under EO 9-2018; **(C)** Claimant was afforded due process at all times; **(D)** Respondent did not deny Claimant justice; **(E)** Respondent did not treat Claimant abusively.

A. Respondent did not breach Claimant's legitimate expectations

[76] Claimant alludes throughout its Notice that Respondent breached Claimant's legitimate expectations in a violation of Article 9.9(3) of CEPTA.[85] However, the Tribunal should find that Claimant's submissions are unfounded.

[77] In the sections below, Respondent demonstrates that the events described by Claimant do not by any means constitute a reasonable and justifiable expectation on part of the investor.

1. The CCM was within its rights to combine Caeli's and Royal Narnian market shares

[78] In spite of Claimant's allegations, CCM was justified when it combined Claimant's market share with Royal Narnian's market share when it initiated the anti-trust investigations.

[85] L.66-89.

[79] The concept of legitimate expectations relates to a situation where a State creates reasonable and justifiable expectations on an investor to act on reliance on said conduct, such that a failure by the State to honor those expectations could cause the investor (or the investment) to suffer damages.[86]

[80] In any event, investors are expected to perform a diligent inquiry into the regulatory framework applicable to their investments.[87] Investors' expectations are not legitimate if based on an expectation to act against the law or within a regulation gap. A State has a right to regulate in the public interest and investors must abide by the applicable regulatory framework.[88]

[81] Expectations should also be grounded in a definitive, unambiguous, and repeated manner, and not in a vague and unspecific way.[89] Thomas Wälde, in his dissenting opinion in *Thunderbird*, where the majority of the tribunal found that Mexico had not created a legitimate expectation, conceded that:

> *"legitimate expectation is assumed more readily if an individual investor receives specifically formal assurances that display visibly an official character". **The threshold is thus 'quite high'.***[90]

[82] In addition to the abovementioned, the Tribunal should also take into consideration the widespread understanding that horizontal shareholdings create an anticompetitive environment. In the case of since sister companies owned by a holding company, it is only reasonable that they be regarded as the same by anti-trust agencies. [91]

[83] *In casu*, both Claimant and Royal Narnian cooperate on a frequent basis[92] when it comes to their business in Mekar. Also, they both are controlled and operated by Claimant and part of the Moon Alliance. It would be disingenuous not to combine the market share of

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[86] *Thunderbird, Award,* §§138,147; *Antaris,* §360; *Tecmed,* §154; *Duke Energy*, §340; *Bayindir*, §179; *El Paso*, Award, §348; *Parkerings*, §331; *Mobil*, §256.
[87] *ADF, §189; MTD, §§168-178,242-246*. (The Tribunal reduced by 50 per cent the damages awarded based on the fact that the investor should have made an independent assessment of the legal/regulatory framework of the host nation); Potestà (2013), p.38.
[88] *Achmea,* §294; *SAUR*, §398; *AIG*, §10.4.1; *Feldman*, §103; *Saluka*, §264; *Koch*, §7.19; *Philip Morris, Award*, §305.
[89] *Feldman*, §148.
[90] *Thunderbird,* Separate Opinion of Thomas Walde, §*32.*
[91] Elhauge (2016), pp.1269-1270; Elhauge (2017), p.2; Azar, Schmalz, and Tecu (2018), p.1.
[92] L.1069-1072.

these closely-related companies. To exemplify, this would be akin to regarding two widely known cereal companies, Fruit Loops and Corn Flakes, as separate entities when in fact they have the same parent company (i.e., Kelloggs) and share a very similar market.

[84] Thus, CCM's decision to combine Caeli's and Royal Narnian's was not only reasonable but also right. It cannot be argued in good faith that Claimant expected CCM to disregard Mekari law and simply let Caeli break Respondent's antitrust law because of loose declarations made by the CCM and other Mekari officials. Respondent was just exercising its right to regulate, as protected by international law and CEPTA.

[85] Therefore, it is clear that Claimant could not have reasonably expected that CCM would have acted differently than it did, be it because of the non-binding declarations made by Respondent, or because of its legal and regulatory framework.

2. Respondent did not breach Claimant's legitimate expectations when it reversed course on their concession to let Caeli use USD

[86] In the context of Mekar's economic crisis, the newly elected government decided to change many of the monetary policies of the old administration to overcome the severe ongoing crisis. One of the decisions made was to oblige all companies in Mekar to use the MON,[93] the Mekari official currency. Claimant wrongfully alleges that such action was a breach of its legitimate expectations.

[87] The formation of a legitimate expectation depends on its reasonableness, which it is assessed taking into account all of the circumstances surrounding the case. It not only includes the facts surrounding the investment, but also the political, socioeconomic, cultural, and historical conditions prevailing in the host State.[94]

[88] It is also important to note that, although developing countries may yield a higher return on capital than other nations, this augmented return comes with greater risk. Instability

[93] L.1208-1210.
[94] *Toto, Award,* §*165; El Paso, Award,* §*360; Parkerings,* §*33; South American Silver,* §*648; Duke,* §*340; White Industries,* §§*10.3.14-10.3.16; Gavrilovic,* §*1011; Bayindir,* §*195.*

is indeed part of that risk, and an inquiry into the reasonableness of an investor's expectations should not fail to assess this element.[95]

[89] In practice, a country in transition susceptible to political volatility cannot justify legitimate expectation as regards the stability of the investment environment.[96]

[90] Even in developing countries, the regulatory climate must also be studied by potential investors. In other words, if a foreign investor enters into a business in which there is close supervision from various interest groups, this is done at the investor's own risk.[97]

[91] In the present case, Claimant knew that Respondent was a developing nation in the midst of a crisis.[98] It comes as no surprise that during critical times new governments often take power, so it would not be reasonable for Claimant to expect that a more interventionist government (that was the main opposition of the time) would continue with the lenient currency policy of the past. Also, the aviation sector, as evidenced by direct involvement of Bonooru in Claimant activities, is susceptible to a high level of public interest.

[92] Although it may seem at first glance that Respondent failed to provide a stable regulatory framework by reversing course in its currency policy, after taking into account the regulatory and political context of Respondent it becomes clear that it would not be reasonable or even possible for Respondent to provide a stable regulatory climate, much less for Claimant to expect one.

[93] Finally, had Respondent gave special treatment to the aviation sector, it could have seen itself forced to give one to every sector, so as to not risk breaching the FET with regard to other foreign investors, as goes the laconic age-old adage: if everyone is special, no one is.

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[95] *Parkerings*, §335.
[96] *Generation Ukraine*, §*20.37.*
[97] *Methanex, Part IV,* §§*9-10; Glamis Gold,* §*767;* Potestà (2013), p.37.
[98] L.1183-1190.

B. Respondent had legitimate purposes in selecting the beneficiaries of subsidies under EO 9-2018

[94] In the Notice, Claimant alleges that Respondent acted in a discriminatory manner by not granting subsidies to Claimant under EO 9-2018 while accepting application from airlines in similar situations.[99]

[95] However, according to the preamble and chapter 31 of EO 9-2018, Mekari's Secretary of Civil Aviation (***SCA***) had ample discretionary powers to grant subsidies to airlines operating in Respondent's territory.[100]

[96] Respondent asserts that, in accepting or rejecting investors' applications for subsidies (i) it did not treat Claimant in a discriminatory manner and (ii) it did so under its right to regulate, a right provided for in CEPTA.

[97] Discriminatory conduct is found when there is different treatment of investors in comparable situations without reasonable or justifiable grounds.[101] However, the mere treatment of aliens in different manner is not enough to constitute a breach of the FET standard.[102]

[98] Tribunals usually look for the presence of three main factors when faced with discriminatory treatment: (i) the existence of another person/investor in the same circumstance; (ii) differential treatment of the parties and (iii) the absence of reasonable justification for different treatment.[103]

[99] Article 9.8 of CEPTA is specific in establishing the legitimacy of both parties' right to regulate in their own territory. Further, consolidating this idea, the preamble of the treaty recognizes the preservation of the right to regulate as one of its objectives. CEPTA lists public policies objectives of both parties in Article 9.8(1), which include, specifically, *"social and consumer protection."*[104] Additionally, throughout the agreement, Claimant

[99] L.90-96.
[100] L.1917-1925.
[101] *Plama*, §184; *Cristallex*, § 616; *UPS*, § 87; *Lidercón*, §169; *Micula*, §523.
[102] *Genin*, §368; *Electrabel*, §175.
[103] *South American Silver*, §711; *BG*, §356; *Thunderbird*, Award, §170.
[104] L.2724-2732.

expressly recognizes the differences between development of the countries.[105] Such differences incur in alternate approaches to public policy and governance.

[100] As presented in Part 1, Respondent submits that Claimant is a SOE, which has unique advantages over privately owned companies.[106] In that sense, Claimant was not discriminated by Respondent, since the only other airline company owned by a State, Larry Air, did not receive subsidies under EO 9-2018.[107] Thus, one of the fundamental requirements of the discrimination test is not present.

[101] Even if the Tribunal finds that Claimant is not a SOE, the choice not to grant Claimant subsidies is still lawful, as it was made within Respondent's sovereign power and right to regulate under Article 9.8 of CEPTA. Consumer protection is recognized as legitimate public policy in CEPTA and preventing the creation of unnatural monopolies is a part of the protection of consumers.[108]

[102] Claimant is partially owned by Bonooru[109] and had already received incentives from its home state under the Horizon 2020 program.[110] Mekar, a country engulfed in economic crisis had no reason to give away taxpayers' money to Claimant, an enterprise which already had a constant influx of money.

[103] Considering the foregoing, Respondent contends that its refusal to grant Claimant subsidies did not breach the FET standard, as it was made within its right to regulate.

C. Claimant was afforded due process at all times

[104] Respondent contends that it afforded Claimant due process at all times and in all instances, pursuant to Article 9.9(2)(b) of CEPTA. Both the decision of the SCA and the enforcement of the arbitral award by Respondent's courts followed due process as established under international law and CEPTA.

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[105] L.2502.
[106] L.1261-1265.
[107] L.1266-1268.
[108] L.1183-1190.
[109] L.933-934.
[110] L.1079-1081.

1. Mekari public policies were transparent

[105] Pursuant to Article 9.9(2)(b) of CEPTA, Respondent has an obligation to grant Bonoori investors due process in administrative proceedings. This article specifically mentions transparency as one of the criteria for establishing due process.[111]

[106] Usually, a breach of due process and transparency is found where States' organs fail to disclose legitimate public policy objective to investors.[112] This so that investors may know beforehand all the rules and regulatory issues concerning its investment and are able to plan accordingly.[113]

[107] Respondent did not breach Claimant's right to due process, specifically in the form of transparency. EO 9-2018 was explicit as to what its objectives were as well as the requirements for eligibility for the enterprises to receive subsidies.[114]

[108] In all its administrative and legislative actions, Respondent was transparent, providing a stable legal framework so that Claimant could properly plan its investment. In that sense, Claimant's allegations of breach of due process do not apply to the facts of the case at hand.

2. Respondent's courts lawfully enforced the commercial arbitral award

[109] Respondent's court's decision to enforce the commercial arbitral award issued in the commercial arbitration between Claimant and Respondent represents a rightful exercise of the discretionary powers of the judiciary system.

[110] Article III of the NY Convention sets forth as one of its main objectives the recognition and enforcement of arbitral awards without the need for *double exequatur*. Even if an award may have been set aside at the seat of arbitration, such award remains valid, and

[111] L.2741-2742.
[112] *Waste Management*, §98; *HydroEnergy*, §575; *Tecmed*, §154.
[113] *Metalclad*, §76; *Al-Bahloul*, §183.
[114] L.1916-1925.

the burden of proof to demonstrate the non-enforceability of the award under one of Article V's exemptions lies on the party resisting enforcement.[115]

[111] Following this principle, an increasing number of national tribunals that have enforced arbitral award despite their annulment at the seat of arbitration.[116] Most of them relied on the view that, once final, an award is deemed to take an international existence, separated from the judicial system of the State in which it was rendered.[117]

[112] Tribunals dealing with enforceability of arbitral awards have considered that the choice to enforce an award is a matter of national law,[118] and it is not the place of arbitral tribunals to serve as appellate tiers for the national judiciary system.[119]

[113] In the present case, there is no such egregious misapplication of the law or conduct of the parties that would justify a review of the decisions that granted enforcement to the award set aside, as it was taken within the courts' discretionary power as granted by the NY Convention.

[114] Furthermore, the sole evidence relied upon by Claimant is the CILS report.[120] But this evidence is admittedly circumstantial. Even the courts of Sinnoh found that the evidence presented by Claimant was not enough for it to rule on whether or not bribery had occurred.[121]

[115] Further, historically, CILS has not a reliable source, as it is an internationally funded institution whose sole purpose is to interfere with domestic affairs.[122]

[116] Thus, Respondent submits that the enforcement of the commercial arbitral award was made in accordance with the law of Mekar and with the discretionary powers granted by the NY Convention to national courts, being in accordance with due process.

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[115] Marike Paulsson (2016), p.215.
[116] Hilmarton, §§327-328; Putrabali p.5.
[117] Ostrowsky (1998), p.1998.
[118] *Lidercon*, §229.
[119] *Eli Lilly*, §224; *Joshua Dean*, §376.
[120] L.2271-2279.
[121] L.2182-2186.
[122] L.2286-2290.

D. Respondent did not deny Claimant justice

[117] Respondent submits that its courts did not deny justice to Claimant. The decisions issued by Mekari courts were all issued within reasonable time considering the particularities of the socioeconomic situation in Mekar.

[118] A number of factors can be an indicative of denial of justice, such as unwarranted delay in proceedings, obstruction of access to courts and failure to provide the guarantees indispensable to administration of justice.[123] Those elements were consolidated on Harvard's 1929 Draft on State Responsibility, which have been used by investment tribunals seeking to determine whether State courts' actions constitute denial of justice.[124]

[119] A high threshold must be met in order for a denial of justice claim to succeed.[125] Expressions such as *"egregiously wrong"* and *"outrageous failure [of the system]"* have been often used to describe the gravity of a behavior for it to amount to a breach of denial of justice under FET standard.[126]

[120] Specifically, tribunals have found that a State is liable when its courts refuse to address a claim or subject it to undue delay.[127] Nonetheless, minor breaches of national law or errors in interpretation by adjudicatory bodies are not enough to amount to denial of justice.[128]

[121] Furthermore, any deficiencies or delays of a States' courts must be assessed in light of the particular circumstances of each case.[129] Tribunal's should take into consideration factors such as the socioeconomic situation of a state as well as the complexity of the matters and the need for celerity in the decision.[130]

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[123] Harvard's 1929 Draft on State Responsibility.
[124] *Azinian,* §102; *Binder*, §448; *Loewen,* §135.
[125] *Arif*, §442; *AMTO*, §80; *Waste Management*, §130; *Iberdrola*, §432; *Lidercon*, §264; *Glamis Gold*, §627.
[126] *Phillip Morris,* Award, §500.
[127] *Krederi*, §449; *Philip Morris, Award,* §500; Azinian, §§102-103; *Dan Cake*, §146; *Roussalis,* §602.
[128] *Krederi*, §444; *Iberdrola,* §432.
[129] *Oostergetel*, §290; *Krederi*, §457; *Toto,* §160.
[130] *Toto,* §160; *Krederi*, §457; *Jan de Nul*, §204.

[122] It should be noted that a decision unfavorable to an investor does not *per se* amount to a denial of justice. It is submitted that arbitral tribunals are not courts of appeal and do not ensue a review of the national courts' decision.[131] Even if a claim is dismissed *in limine,* such decision does not reach the threshold for denial of justice if the investor has had the possibility of accessing the whole of the judicial system.[132]

[123] *In casu,* both the delay in hearings and the dismissal of the merits of the claim were due to (i) the overcrowding in Respondent's courts;[133] and (ii) the complexity of the case.[134]

[124] Foremost, it should be noted that the preamble of CEPTA establishes that the Contracting Parties recognize the difference in development between their respective countries.[135] Such social and economic gap has undeniable effects in the performance of State's organs, especially in the judicial system. In that sense, it should be of no surprise for Claimant that a decision in Mekari courts would not be rendered within the same amount of time as it would be in Bonoori courts.

[125] Furthermore, the devastating economic crisis that started in late 2016[136] and continued to deteriorate Respondent's macroeconomic situation in 2017[137] caused an even greater number of cases submitted to Mekari courts, overflowing the court dockets with claims from several national and foreign investors.[138] It is also important to stress that, due to the far-reaching consequences of criminal matters, Respondent prioritize the trial of criminal proceedings.[139]

[126] It is surprising that Claimant feels prejudiced by the conducted of Mekari courts. In fact, even in a dire situation, Mekari courts decided Claimant's claim in a timeframe shorter than usual. The average time between the filing of a claim in Mekari courts and the final

[131] *Loewen,* §51; *Krederi,* §471; *AMTO,* §76; Mondev §127.
[132] *Iberdola,* §476; *Corona,* §254; *Apotex (UNCT/10/2),* Award, §282.
[133] L.949-953.
[134] L.1242-1243.
[135] L.2502.
[136] L.1183.
[137] L.1200-1207.
[138] L.1233-1235.
[139] L.1239-1241.

award is two years and three months,[140] while Claimant's claim was resolved in little over a year.[141]

[127] The complexity of the case is also one of the factors that contributed to what Claimant alleges to be an undue delay on the part of the national courts. The results of CCM's first investigation were voluminous, consisting of two extensive volumes,[142] making it so the courts had many documents to analyze.

[128] As per the interim measure sought by Claimant, it follows that it was hardly as urgent as Claimant would make it seem. Under national law, the fines contested by Claimant in its second claim could not be enforced pending court review.[143] In that sense, there was no imminent danger at the time that the claim was made.

[129] In addition, the dismissal of claims under EO 5-2014 constitute a legitimate application of procedural law. Such provision legally allows for the dismissal of a claim without appeal by the way of summary judgement and does so in order to expedite proceedings due to the backlog of the courts.

[130] Claimant was allowed to present its case on the hearings concerning the imposition of the airfare caps.[144] By that time, the first investigation on Caeli had already been concluded[145] and no new facts could have been presented by Claimant on the merits that would award for a different decision to be taken.

[131] In conclusion, Respondent's judiciary worked to provide satisfactory decisions within reasonable time, considering the socioeconomic situation of the state as well as the complexity of the claims. Respondent is certain that the Tribunal will find that there has been no denial of justice.

[140] L.949-953.
[141] L.1232,1321-1334.
[142] L.1242-1250.
[143] L.1290-1299.
[144] L.1309-1311.
[145] L.1242-1250.

E. Respondent did not treat Claimant abusively

[132] Contrary to what Claimant argues in its Notice, the regulations entered by Respondent or Respondent's agencies, such as the airfare caps and the mandatory usage of the MON, were adopted in accordance with Mekari law and without any malicious intent. The same applies to Mekari Airways' right of first refusal[146] against an offer of a Moon Alliance member to buy Caeli. No abusive treatment can be found in relation to Respondent's acts affecting Caeli.

[133] Under international law, abusive treatment consists in harassing or coercing a foreign investor.[147] In order to prove violation of international law by harassment or undue coercion, an investor must prove that the State's acts affecting the investor were part of a conspiracy against the investment by the State.[148] Mere *"bureaucratic officiousness"* or overzealous enforcement action is not to be equated with abusive treatment.[149]

[134] Tribunals are generally very weary of labeling States that are dully exercising their right to regulate as bad faith actors exercising undue coercion. The law necessitates that individuals be forced to abide by the law. A State does not violate the FET standard merely by enforcing its law.[150]

[135] Tribunals must also distinguish between (i) ordinary commercial pressure, such as may arise in any commercial relationship, and (ii) *"the kind of compulsion that can be created by a superior force in a hostile environment."*[151]

[136] In light of the facts, Claimant's arguments make very little sense. Respondent had nothing to gain from one of the biggest airline companies in Mekar going bankrupt in the midst of one of the worst currency crises in Mekari history. Respondent was a shareholder of Caeli. Therefore, there would be no business logic in abusing or harassing Claimant by draining all of Caeli's resources.

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[146] L.1345-1349,1749-1781.
[147] L.2744; Article 9.9(d), CEPTA; *Saluka*, §308; *Bayindir*, §178; *Lemire, Decision on Jurisdiction*, §284; *Binder*, §447; *Oostergetel*, §221.
[148] *Frontier*, §§300-301; *Cargill*, §§296-298; *Waste Management*, §138; *Bayindir*, §§200,336.
[149] McLachlan, Shore, and Weiniger (2018), §7.127; *Krederi*, §§637-638; *Mamidoil*, §§748-749; AES, §319.
[150] Vandevelde (2010), Footnote 283, pp.97-98.
[151] McLachlan, Shore, and Weiniger (2018), §§7.127,7.225.

[137] Furthermore, the enforcement of Mekari law by the CCM should not constitute undue coercion. As previously mentioned, even if an exagerated bureaucratic zeal was to be observed, this cannot be used to configure the presence of abusive treatment. Actions taken by the CCM also cannot be constituted an extrapolation of the agency's functions since the CCM is the proper governmental authority to deal with breaches of Mekari anti-trust law.

[138] Finally, Mekari Airlines' invocation of its right of first refusal was legitimate and raised on commercial standards as agreed in the shareholders agreement of Caeli.

[139] Therefore, in light of the above, the investigation and subsequent sanctions against Claimant were legitimate and did not constitute abusive treatment. To not sanction an investor who is engaging in notoriously illegal activities, such as the ones observed by the CCM, would give a statement to the entire greater Narnian region that foreign investors are above the law in Mekar, which by no means should be the case.

F. Conclusion Part III

[140] Taking into account the applicable rules and facts above, Respondent submits that it has not engaged, individually or cumulatively, in a violation of the FET clause in Article 9.9 of CEPTA. All actions of CCM and other government officials relating to Claimants investment were taken in a reasonable and justifiable manner.

[141] As such, Respondent respectfully requests the Tribunal to reject Claimant's allegation of a breach of the FET standard.

IV. DAMAGES

[142] Respondent has not violated CEPTA and it is confident that the Tribunal will reach the same conclusion. In such case, there is no need for the Tribunal to review this section.

[143] Nevertheless, in case the Tribunal concludes otherwise, Respondent vehemently contests Claimant's contentions on the appropriate compensation amount. Respondent submits below that, if the Tribunal concludes that Respondent breached CEPTA, **(A)** Claimant's compensation is based on the MV of Claimant's investment, as determined in Article 9.21 of CEPTA; **(B)** the alleged breach of FET did not cause any financial harm to Caeli, therefore compensation equals the amount Respondent paid to acquire the investment – USD 400 million. Finally, **(C)** if the Tribunal concludes otherwise, any compensation awarded to Claimant must be reduced to the extent Claimant gave cause to it.

A. If any, Claimant would be entitled to compensation based on MV

[144] Claimant argues it is entitled to be compensated based on the fair market value (***FMV***) of its investment in Caeli, equivalent to USD 1.1 billion of compensation. Claimant relies on the MFN clause in Article 9.7 of CEPTA and the principle of full reparation under international law. However, Claimant's interpretation of CEPTA and international law are incorrect.

[145] In this section, Respondent shows that **(1)** customary international law does not afford compensation based on FMV for breaches of FET; **(2)** the applicable standard of compensation is clearly defined in CEPTA; **(3)** Claimant is not entitled to the standard of compensation of the Arrakis-Mekar BIT.

1. Customary international law does not afford compensation based on FMV for breaches of FET

[146] The standard of compensation under customary international law is of full reparation.[152] As provided for in *Chórzow*, and Article 36 of ILC's Articles, compensation is intended

[152] Schwenzer, Hachem and Kee (2012), §44.19; Marboe (2017), §2.72; Woss, Rivera, Spiller and Dellepiane (2014), §5.05.

to *"wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed"*.[153]

[147] As established in *Chorzów*, full reparation for unlawful expropriation begets compensation based on FMV.[154] In investment arbitration cases, the standard set out in *Chórzow* is generally applied where the investment was illegally expropriated and no specific standard is found in the applicable treaty.[155]

[148] In very rare occasions, ICSID tribunals awarded investors compensation based on FMV for breach of the FET standard. In such cases, tribunals concluded that the breach of the FET standard was so significant that it equaled to indirect expropriation or other form of taking by the States, and the applicable treaty provided no standard of compensation.[156]

[149] No such rule exists where the consequences of a breach of a treaty do not amount to expropriation. In those cases, compensation based on FMV is no longer appropriate, much less a minimum standard of treatment under international law.[157]

[150] In order to amount to expropriation, States must interfere with property in a way that causes *"total or at least substantial"*[158] loss of property. The investment must have been *"essentially destroyed"*.[159] Actions that merely reduce the value of property are not expropiatory.

[151] While Respondent does not contest the validity of the full reparation standard and its application by international tribunals, such standard is not applicable in this case. Notably, even if the Tribunal concludes that Respondent breached the FET standard, any financial harm eventually caused to Caeli did not amount to the complete nor substantial loss of Caeli's value, much less Caeli's taking by Respondent.

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[153] *Chórzow*, p.47.
[154] Woss, Rivera, Spiller and Dellepiane (2014), §6.24, footnote 25.
[155] *Azurix*, §421; *Enron*, §359; *SD Myers*, §§305-309.
[156] Viñuales, p.735; *Sempra*, §403; *Metalclad*, §113; *Azurix*, §420;
[157] *Lemire*, §§149, 244; *LG&E*, §39.
[158] Kriebaum (2007), p.69.
[159] *Ibid.*

[152] In fact, the amount paid by Respondent to acquire Caeli represented 50% of the amount originally paid by Claimant to acquire Caeli's shares in 2011.[160] Given Claimant's catastrophic management of Caeli and the economic crisis in Mekar, nothing warrants the conclusion that Respondent's acts could amount to a total or even substantial destruction of Caeli's value.

2. The standard of compensation is clearly defined in CEPTA

[153] The general rule on treaty interpretation is that provisions must be interpreted with good faith and in accordance with the ordinary meaning of the treaty text.[161] In order to apply the rule laid out in Article 31 of VLCT, the ordinary meaning of the text of the treaty is key, as it is considered *"the authentic expression of the intention of the parties"*[162] and must be the primary source for understanding the will of the parties.[163]

[154] Where the application of Article 31 is sufficiently clear to extract the meaning of the treaty provision, Article 32 provides resources to confirm such interpretation.[164] The means to confirming such interpretation can be the preamble of the treaty as well as the preparatory works, however, it would be contrary to the canons of interpretation to apply Article 32 to attempt to nullify express provisions of the treaty.[165]

[155] *In casu,* Article 9.21(1)(a) specifically provides that damages shall be awarded at market value.[166] Since there is a specific provision in the BIT, fairly negotiated by the parties, there is no need to resort to other means of interpretation seeking to apply a different standard than that accorded in CEPTA.

[156] Furthermore, when considering the purposes of the negotiation of CEPTA, Contracting Parties specifically intended to remove investors' protections against indirect expropriations[167] and to balance investors and States' rights.[168] Such changes were made

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[160] L.1034; 1392.
[161] VCLT, Art.31.
[162] Dörr and and Schmalenbach (2012), p.522; *Methanex, Final Award,* §22.
[163] Romesh (2012), §3.13; *Territorial Dispute Libyan v. Chad/ICJ*, §41; *Legality of Use of Force/ICJ*, §100.
[164] *Methanex, Final Award*, §§19-22; *AAPL*, §40.
[165] *Fraport*, §340; *Telenor*, §§96-97; *Maffezini, Decision on Jurisdiction*, §§58-64.
[166] L.3016-3021.
[167] L.3217-3223.
[168] L.2335.

due to the prior experience of the parties with the Bonooru-Mekar BIT, as it did not have a specific compensation standard.

[157] Therefore, by both ordinary and supplementary means of interpretation, it is unequivocal that the Contracting Parties specifically intended to afford investors under CEPTA with compensation based on the market value.

3. Claimant is not entitled to the standard of compensation of the Arrakis-Mekar BIT

[158] Article 13 of the Arrakis-Mekar BIT provides that investors are entitled to compensation *"equivalent to the fair market value of the investment immediately on the day before the measures inconsistent with the provisions were taken by the host State."*

[159] Claimant argues that is entitled to this same treatment by virtue of the MFN clause in Article 9.7 of CEPTA.

[160] In the two following sections, Respondent shall demonstrate that the standards of compensation (a) are not included by Article 9.7(1) of CEPTA, being in fact excluded by Article 9.7(2) of CEPTA; and (b) do not apply because the MFN provision cannot apply retroactively, especially considering the specific standard of compensation contained in CEPTA.

i. Standards of compensation are not treatment covered by CEPTA's MFN clause.

[161] Article 9.7(1) of CEPTA provides the following:

> *"Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords in like situations, to investors of a third country and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory."* [169]

[169] L.2711-2714.

[162] Since MFN clauses are contained within treaties, they constitute the most relevant starting point for the interpretation of said clauses, and therefore ought to be interpreted in accordance with the general rule of treaty interpretation (Article 31 VCLT). [170]

[163] Under the general rule of treaty interpretation, a provision must be interpreted by its ordinary meaning, the object, purpose, and the context in which the parties signed the treaty.[171]

[164] An analysis of the ordinary meaning of CEPTA's MFN provision leaves no doubt: standards of compensation do not fall within the limits of such clause. Following the tenets of interpretation under Article 31 of the VCLT, Respondent sets forth below an analysis of each of the relevant requisites established under such provision, followed by their application to the present case.

- *"with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory."* [172]

[165] The non-inclusion of the term *"dispute settlement"* or *"compensation"* in this provision is no accident. A right can only be said to be guaranteed be an MFN provision if it falls within the limits of said clause. If the text of an MFN clause provides an exhaustive list of treatments covered by the MFN clause, the treatment sought to be incorporated must be within such list, if not, a tribunal must exclude that treatment from the auspices of the MFN clause – to do otherwise would run contrary to the requirement of good faith treaty interpretation. [173]

[166] It would be unreasonable to argue that an MFN clause, especially the one in question, which was even listed as one of the main objectives of the Article 1.3 of CEPTA,[174] would have intended to include something as important as the compensation standard

[170] Final Report on MFN, §175.
[171] *Daimler*, §173; *Kılıç*, §7.4.1; *Hochtief*, §§101-105; *Impregilo*, §156; *Vladimir Berschader*, §185.
[172] L.2713.
[173] Banifatemi (2009), p.271; NAFTA, Art.1103(2), which provides for more favourable treatment 'with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments', dispute settlement being notably not part of this list, and therefore excluded from the scope of the MFN clause contained in the treaty; *ICS*, §300.
[174] L.2520-2522.

without expressly stating it, particularly when considering the length and specificity of the MFN clause in question.

[167] This understanding of the MFN clause in question is further ratified by Article 9.7(2) of CEPTA, which explicitly states:

- *"For greater certainty, the treatment referred to in paragraph 1 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements."*[175]

[168] The text above explicitly rules out procedural rights from the MFN clause. Seeing as compensation is considered a procedural, not substantive right, CEPTA goes further than to not include compensation in the MFN clauses, it expressly excludes it.

[169] Therefore, in view of the actual text of Article 9.7 of CEPTA, the ordinary meaning of the clause, and the general rules of treaty interpretation, the MFN clause in question cannot be said to include compensation.

ii. The MFN clause does not apply retroactively

[170] The Arrakis-Mekar BIT of signed was signed on 16 January 2006.[176] CEPTA, however, was signed on the 15 October 2014,[177] and contains a specific standard of compensation.[178] It follows that the importation of the standard in the Arrakis-Mekar BIT would have to be done retroactively and in variance with the standard specifically negotiated by the Contracting Parties.

[171] Context is extremely relevant to ascertain the ordinary meaning of an MFN clause. States are obviously aware of standards afforded in prior treaties. They would not afford a certain treatment if this treatment would be automatically moot because of the MFN clause.[179]

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[175] L.2715-2720.
[176] L.3106.
[177] L.3065.
[178] L.3016-3024.
[179] *ICS*, §315; *ADF*, §§148-149; *RosInvest*, §121; *Asian Agric*, §41.

[172] Attempts to retroactive import standards from other treaties has been shot down on multiple occasions by various tribunals. If a treaty sets out a specific provision, it would be unreasonable to import a clause via another treaty to invalidate said provision,[180] especially retroactively.[181]

[173] The general rule applied in international law is that treaties may not apply retroactively unless explicitly stated otherwise, this rule is recognized by Article 28 of the VCLT, and also by investor-state tribunals in the past.[182]

[174] Claimant has argued that the MFN clause should import the best standard of compensation from a treaty signed before CEPTA, despite there being no provision in said clause that permits the retroactivity of the treatment.

[175] Claimant has made this argument despite the fact that a clear standard of compensation was set in CEPTA. It would have made no sense for the State officials involving negotiating CEPTA to write up a standard that would be automatically obsolete because of a provision contained in another treaty. Importing the standard contained in the Arrakis Mekar BIT would validate a bad-faith interpretation of CEPTA, completely ignoring the context in which it was written.

[176] Therefore, considering the ordinary meaning and the context of the MFN clause contained in CEPTA, as per the VCLT, the clause in question cannot be interpreted in good faith *and* be said to include the retroactive application of a standard which runs in contrary to a specific provision contained in CEPTA, because otherwise there would be no point in establishing a compensation standard in the first place.

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[180] *Maffezini, Decision on Jurisdiction,* §63; *Plama, Decision on Jurisdiction,* §209; *Hochtief,* §77.

[181] *Tecmed,* §69; *M.C.I.*, §§118-128; *Plama, Decision on Jurisdiction,* §195; *Telenor*, §95; *Churchill*, §§198–99, 203.

[182] *Phoenix Action,* §§54, 77; Briggs (1968), p.320; Draft Articles on the Law of Treaties (1966), Art.24.94 Non-retroactivity of treaties *"Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."*

B. Respondent did not cause any financial harm to Caeli

[177] Even if the Tribunal concludes that Respondent breached CEPTA, none of the breaches alleged by Claimant caused financial harm or is otherwise connected to the devaluation of Caeli. Consequentially, Respondent already compensated Claimant by paying the MV of Caeli to Claimant – USD 400 million – and no further reparation is due.

[178] Claimant fails to discharge the burden of proof necessary to establish that Respondent's actions caused financial harm to Caeli. But this connection between the damages alleged by Claimant and causation must be proved.[183]

[179] Article 31(1) of ILC Articles establishes that a State must compensate for injuries caused by its international wrongful act. International tribunals generally look for sufficient link between damage incurred by the investor and the violation of the treaty by the host state.[184]

[180] Respondent has not committed any unlawful acts under international law and did not cause any financial damage to Claimant. As presented in Part 3, CCM's investigations and the imposition of fines and airfare caps did not harm to Claimant. Further, all economic hardships endured by Claimant was caused by the economic crisis in Mekar as well as the poor financial management of Caeli in Claimant's behalf.

[181] As such, Respondent did not cause any damage to Respondent and should not be held liable. Respondent has already paid USD 400 Million to claimant,[185] which represents the MV of the investment. Thus, Claimant is owed no compensation whether it be under customary international law or CEPTA.

[183] Woss, Rivera, Spiller and Dellepiane (2014), §5.129; *LG&E,* §45; *Desert Line,* §282; *Victor Pey,* §234.
[184] *El Paso, Award,* §682; *SD Myers,* §315; *LG&E,* §50; *BG,* §428.
[185] L.1390-1393.

C. Claimant is responsible for the downfall of Caeli

[182] Claimant contributed directly to the failure of Caeli, which was caused by of rash business decisions and an aggressive price cutting policy.[186] When the crisis hit Mekar, as is common in developing nations, Caeli was not prepared.

[183] Article 39 of ILC Articles provides that in the determination of compensation, due consideration must be given to whether the injured party has contributed to its injury through willful action, negligent action, or omission. Full reparation necessarily means to put in a position as if the breach had not occurred.[187] If contributory fault is found to have taken place, it is necessary to diminish the amount of compensation due to the aggrieved investor.[188]

[184] Contributory fault entails a manifest lack of care on the part of the victim of the breach for his or her own property rights.[189] Furthermore, a materially significant contribution to the failure of the investment (such as a breach of the host states law) has in many instances been found to constitute contributory fault.[190]

[185] Behaving in a reckless manner or exercising poor business judgment is also a basis for a tribunal to find that contributory fault has occurred.[191] Investment arbitration is not an insurance policy against bad business decisions.[192]

[186] In the case at hand, it is clear from analyzing Claimant's conduct throughout its investment in Caeli, that it contributed in a materially significant way to the failure of its investment by way of its negligent business decisions.

[187] When Claimant made its investment in the territory of Mekar in 2011, it also inherited debt liabilities associated with Caeli Airways.[193] Instead of being wary when entering a

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[186] L.51-54.
[187] Senn and Hewett (2017), p.415; Marboe (2017), §3.323.
[188] *Occidental*, §670; *Yukos*, §1600; *Burlington Resources*, §576; *Stati*, §1331; *UAB*, §1144.
[189] ILC Articles, Art.39, commentary §5.
[190] *Occidental*, §670; *Yukos*, §1600; *Burlington Resources*, §576; *Stati*, §1331; *UAB*, §1144.
[191] *MTD*, §242/243; Sabahi, Duggal and Birch (2018), pp.326-327.
[192] *Maffezini, Award*, §64; *Waste Management*, §177.
[193] L.1103-1104.

developing State – which are, as is common knowledge, prone to economic instability – took a reckless approach by expanding rapidly. Indeed, it acted as if the low oil prices at the beginning of its investment[194] would remain in place forever, and it ignored the anti-trust legislation in Mekar. This behavior represents a stark contrast with a conservative approach to investing, focusing on reducing debt and respecting local law, which would have safeguarded the long-term financial health of Caeli.

[188] Therefore, to award Claimant full reparation would be to ignore the clear and decisive role Claimant played in the downfall of Caeli, and to give out a signal to other investors throughout Mekar that investor-state arbitration is an insurance against negligent business decisions.

D. Conclusion Part IV

[189] In conclusion and in light of what has been demonstrated, it is clear that the appropriate standard for compensation is the MV standard, as per CEPTA and the general principles of international law on compensation. Furthermore, the MFN clause contained in CEPTA does not permit standards on damages to be imported from third-country treaties. Indeed, even a basic analysis of said clause's ordinary meaning can rule out the all-encompassing interpretation sought by Claimant.

[190] Lastly, Respondent is confident that this Tribunal will find that if any compensation owed by Respondent should be substantially reduced as a result of Claimants contributory fault towards the failure of the investment.

[194] L.1120-1126; "According to the CEPO Secretary-General, these prices "have already hit bottom. We do not see the possibility of **further decline and are even preparing for a strong uptick in prices in the near future**"."

V. PRAYER FOR RELIEF

[191] In light if the above, Respondent hereby respectfully requests the Tribunal to:

a. Declare that it does not have jurisdiction *ratione* personae to hear the dispute, by:

- Holding that Claimant is not a qualified investor under CEPTA; or

- Finding that Claimant's acts regarding its investment in Caeli are attributable to Bonooru;

b. Grant CRPU's application for leave to file an *amicus curiae* brief;

c. Dismiss CBFI's application for leave to file an *amicus curiae* party brief;

d. Find that Respondent did not breach the FET standards set out in Article 9.9 of CEPTA;

e. In the event the Tribunal finds a breach of CEPTA, to hold that any compensation granted to Claimant is based on the MV of Claimant's shares in Caeli;

f. Hold that that Respondent did not give cause to devaluation of Claimant's investment;

g. Mitigate the damages given that Claimant contributed to the damages suffered.

On Behalf of Respondent
Team ODA G
23 September 2021