TEAM PALMER

IN THE MATTER OF AN ARBITRATION UNDER THE CEPTA AND THE ICSID ADDITIONAL FACILITY RULES

Between:

VEMMA HOLDINGS INC.

(CLAIMANT)

v.

THE FEDERAL REPUBLIC OF MEKAR

(RESPONDENT)

ICSID Case No. ARB(AF)/19/78

MEMORIAL FOR RESPONDENT

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LIST OF AUTHORITIES

TREATIES

Abbreviation	Citation
Arrakis-Mekar BIT	Treaty Between The Federal Republic Of Mekar And The Kingdom Of Arrakis For The Promotion And Protection Of Investments
Bonooru-Mekar BIT	Treaty Between The Federal Republic Of Mekar And The Commonwealth Of Bonooru For The Promotion And Protection Of Investments
CEPTA	Comprehensive Economic Partnership And Trade Agreement Between The Commonwealth Of Bonooru And The Federal Republic Of Mekar
VCLT 1969	Vienna Convention on the Law of the Treaties of 1969
NYC 1958	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958

ARBITRAL AWARDS

Abbreviation	Citation
Maffezini	Maffezini v. Spain, ICSID Case No. ARB/97/7 (Argentina/Spain BIT), Award, November 13, 2000
Hamester	Gustav F W Hamester GmbH & Co KG Claimant v. Republic of Ghana Respondent (ICSID Case No. ARB/07/24), Award, June 18, 2010. Available at: https://www.italaw.com/sites/default/files/case-documents/ita0396.pdf

Adel A Hamadi Al Tamimi	Carlo de Stefano, 'Adel A Hamadi Al Tamimi v Sultanate of Oman: Attributing to Sovereigns the Conduct of State-Owned Enterprises: Towards Circumvention of the Accountability of States under International Investment Law', in Kinnear, Meg and McLachlan, Campbell (eds), ICSID Review - Foreign Investment Law Journal, Oxford University Press 2017, Volume 32, Issue 2.
Teinver	Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic, ICSID Case No. ARB/09/1
Lemire II	Joseph Charles Lemire v. Ukraine (II), ICSID Case No. ARB/06/18
El Paso	El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15
SAUR	SAUR International v. Argentine Republic, ICSID Case No. ARB/04/4
Feldman	Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1
Philip Morris	Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7
Total S.A.	Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1
EDF	Electricite de France (EDF) International S.A. v. Republic of Hungary
National Grid	National Grid PLC v. The Argentine Republic

Plama	Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24
CMS	CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8
Tza Yap Shum	Tza Yap Shum v. Republic of Peru, ICSID Case No. ARB/07/6
Clayton/Bilcon	William Ralph Clayton, William Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada, PCA Case No. 2009-04
Glamis Gold	Glamis Gold Ltd. v. United States of America
Eastern Sugar	Eastern Sugar B.V. v. The Czech Republic, SCC Case No. 088/2004
Cavalum SGPS	Cavalum SGPS, S.A. v. Kingdom of Spain, ICSID Case No. ARB/15/34
RREEF	RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/30
Koch Minerals	Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/19
JSW Solar	Mr. Jürgen Wirtgen, Mr. Stefan Wirtgen, and JSW Solar (zwei) GmbH & Co.KG v. Czech Republic, PCA Case No. 2014-03
Pac Rim Cayman	Pac Rim Cayman LLC v. The Republic of El Salvador, ICSID Case

	No. ARB/09/12
Hydro Energy	Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain, ICSID Case No. ARB/15/42
Magyar	Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary, ICSID Case No. ARB/17/27
Apotex	Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1
Guaracachi	Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, PCA Case No. 2011-17
AES II	AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary (II), ICSID Case No. ARB/07/22
Crystallex	Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2
Lauder	Ronald S. Lauder v. Czech Republic
Lidercón	*Lidercón, S.L. v. Republic of Peru, ICSID Case No. ARB/17/9*
Saluka	Saluka Investments BV v. The Czech Republic, PCA Case No. 2001-04
ADM	Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/5

Corn Products	Corn Products International, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/1
Pope & Talbot	Pope & Talbot v. Government of Canada
BG	BG Group Plc v. The Republic of Argentina
LG&E	LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1
Jan de Nul	Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13
Siag	Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt, ICSID Case No. ARB/05/15
Manchester Securities	Manchester Securities Corporation v. Republic of Poland, PCA Case No. 2015-18
Azinian	Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States, ICSID Case No. ARB(AF)/97/2
Duke Energy	Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19
Dan Cake	Dan Cake (Portugal) S.A. v. Hungary, ICSID Case No. ARB/12/9
Saipem	Saipem S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7

Agility	Agility Public Warehousing Company K.S.C. v. Republic of Iraq, ICSID Case No. ARB/17/7
EBO	EBO Invest AS, Rox Holding AS and Staur Eiendom AS v. Republic of Latvia, ICSID Case No. ARB/16/38
Krederi	Krederi Ltd. v. Ukraine, ICSID Case No. ARB/14/17
Al-Warraq	Hesham Talaat M. Al-Warraq v. The Republic of Indonesia
Energoalians	Energoalians LLC v. Republic of Moldova
Oostergetel	Jan Oostergetel and Theodora Laurentius v. The Slovak Republic
White Industries	White Industries Australia Limited v. The Republic of India
Toto	Toto Costruzioni Generali S.p.A. v. Republic of Lebanon, ICSID Case No. ARB/07/12
Arif	Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23
Genin	Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2
Iberdrola	Iberdrola Energía, S.A. v. Republic of Guatemala (I), ICSID Case No. ARB/09/5

LEGISLATION/RULES

Abbreviation	Citation
Rules for AF	Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes
ICSID AFR	Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for the Settlement of Investment Disputes
OECD Guidelines	Organisation for Economic Co-operation and Development Guidelines on Corporate Governance of State-Owned Enterprises, 2015
ARSIWA	International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts
UNCITRAL Transparency Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State

BOOKS/ARTICLES

Abbreviation	Citation
Ferguson Reed, *et al.*	Ferguson Reed, Lucy, Paulsson, Jan, Blackaby, Nigel, "Chapter 4: ICSID Arbitration Procedure", Guide to ICSID Arbitration, Kluwer Law International, 2010.
Kovács	Kovács, Csaba, "Chapter 7: The Attribution of Claims by State Enterprises", *Attribution in International Investment Law,*

	International Arbitration Law Library, Kluwer Law International, Volume 45, 2018.
Martinez-Fraga, *et. al.*	Martinez-Fraga, P.J., Reetz, R.C., Public Purpose in International Law: Rethinking Regulatory Sovereignty in the Global Era, 2015.
Olleson	Olleson, Simon, "Attribution in Investment Treaty Arbitration", in Kinnear, Meg and McLachlan, Campbell (eds.), ICSID Review - Foreign Investment Law Journal, Oxford University Press, 2016, Volume 31, Issue 2.
Caron	Caron, D.D., and Shirlow, E., Most-Favored-Nation Treatment: Substantive Protection in Kinnear, M., Fischer G.R., Almeida J.M., Torres, L.F., Bidegain, M.U., Building International Investment Law: The First 50 Years of ICSID, 2015.
Badia	Badia, Albert, "Chapter 1: State Enterprises and Foreign Direct Investment", Piercing the Veil of State Enterprises in International Arbitration, International Arbitration Law Library, Kluwer Law International, Volume 29, 2014.
Feldman	Feldman, Mark, 'State-Owned Enterprises as Claimants in International Investment Arbitration', in Meg Kinnear and Campbell McLachlan (eds), ICSID Review - Foreign Investment Law Journal, Oxford University Press 2016, Volume 31, Issue 1.
Vandevelde	Vandevelde, Kenneth J., United States Investment Treaties: Policy and Practice, Kluwer Law and Taxation, 1992.
Salmon	Jean Salmon, 'Duration of the Breach,' in The Law of International Responsibility. 2010.
Paulsson	Marike R. P. Paulsson , The 1958 New York Convention in Action, (© Kluwer Law International; Kluwer Law International 2016) pp. 157 - 216

MISCELLANEOUS

Abbreviation	Citation
UNCTAD	UNCTAD, Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements II, 2012.
United Nations General Assembly.	United Nations General Assembly. "Commentaries to the draft articles on Responsibility of States for internationally wrongful acts". extract from the Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.2, 2001.

LIST OF ABBREVIATIONS

Abbreviation	Term
SCCAI	Sinnoh Chamber of Commerce's Arbitration Institute
Art(s).	Article(s)
ANNX	Annex
APPX	Appendix
Caeli	Caeli Airways
CILS	Centre for Integrity in Legal Service

CCM	Competition Commission of Mekar
CBFI	Consortium of Bonoori Foreign Investors
CRPU	Committee on Reform of Public Utilities
ed(s).	editor(s)
FET	Fair and Equitable Treatment
FMV	Fair Market Value
IIA	International Investment Agreement
MFN	Most Favoured Nation
MCA	Ministry of Civil Aviation
MRTPA	Monopoly and Restrictive Trade Practice Act 2009
MMT	Mekar Minister of Transportation
P.O.1	Procedural Order No. 1
P.O.2	Procedural Order No. 2

P.O.3	Procedural Order No. 3
P.O.4	Procedural Order No. 4
Claimant	Vemma Holdings Inc.
Respondent	The Federal Republic of Mekar
BIT	Bilateral Investment Treaty
SOE	State-Owned Enterprise
SOUF	Statement of Uncontested Facts
et al.	And others
NOA	Notice of Arbitration
RNA	Response to Notice of Arbitration
¶(¶)	paragraph(s)
p(p).	page(s)
ILC	International Law Commission

LPM	Labourers' Party of Mekar
ll.	lines
USD	United States Dollars
OECD	Organisation for Economic Co-operation and Development

STATEMENT OF FACTS

1. In late 2010, Respondent launched a tendering process through which it planned to privatize Caeli Airways. On 5 January 2011, Claimant was notified that its bid was successful and acquired 85% stake of Caeli Airways.

2. Back then, when the CCM approved Claimant's acquisition in Caeli and the airline's participation in the Moon Alliance, it noted that Caeli's partnership with Moon Alliance members "would enable the airlines to offer new and improved services, as well as low-cost services" due to economies of traffic density, boosting consumer welfare.

3. However, the strategy pursued by Claimant flew Caeli Airways into a crisis by pursuing a very aggressive business plan. The latter included an expansion plan by purchasing several aircrafts. This, against the better advice given by Mekar Airservices.

4. In September 2018, Respondent passed Executive Order 9-2018, granting subsidies to airlines in an attempt to alleviate some of the industry's economic concerns. Caeli's application for subsidies under the order was rejected under the regulatory discretion of Respondent and because it was already receiving subsidies from the Horizon scheme.

5. Caeli then sought for judicial review of the CCM's airfare caps on 27 March 2018. In the meantime, in August 2018, the CCM concluded its First Investigation into Caeli and found predatory conduct and imposed airline caps in place pending the Second Investigation. Then, on 1 January 2019, the CCM completed its Second Investigation finding anticompetitive conduct and it decided to continue to impose airfare caps.

6. Later, Claimant acquired an offer from Hawthorne to buy Claimant's stake in Caeli and communicated the terms of this offer to representatives of Mekar Airservices on 9 Dec 2019. In its response, Mekar Airservices legitimately disputed the validity of Hawthorne's offer due to its Moon Alliance membership and instead offered a significantly lower price for Claimant's stake in Caeli. After failed negotiations, on 11 Feb 2020 Mekar Airservices initiated an arbitration under the SA before the SCCAI, contending that Claimant had failed to secure a *bona fide* third party offer.

7. After a fast-track arbitration procedure, the sole arbitrator rendered an award in favour of Mekar Airservices on 9 May 2020. Claimant filed a motion for the set aside of the award in

the courts of Sinnoh. In that regard, the Supreme Arbitrazh Court of Sinnoh set aside the award, reasoning that the failure to do so would offend "basic notions of justice and contravene the objective of combating bribery".

8. The High Commercial Court of Mekar enforced the award on 23 August 2020 in its discretionary faculty to enforce annulled arbitral awards.

9. Claimant then notified Respondent about a dispute on 17 November 2020, same which it insisted on pursuing before a Tribunal that cannot govern the proceedings, in hopes of buying time.

10. By March 2021, Bonooru increased its shareholding in Claimant to 55%, and added a legal team that would represent the entity in the present proceedings.

11. Once the Tribunal was appointed, two *amicus curiae* submissions were presented. The first one was by CBFI on April 19, 2021. The second one was presented by the CRPU on May 28, 2021.

SUMMARY OF ARGUMENTS

1. **JURISDICTION.** Claimant has acted as a state agent and discharge essentially governmental actions, which entail that it cannot qualify as an investor, and thus, it cannot raise claims before this Tribunal.

2. **AMICI SUBMISSIONS.** The Tribunal shall grant leave to CRPU *amici* submission and bar the CBFI submission.

3. **MERITS: ARBITRARY AND DISCRIMINATORY TREATMENT.** The decision to price airservices in MON was justified in the context of the economic crisis of Mekar, CCM investigations were pursued under the protection of fair competition and Caeli was not in like circumstances to receive subsidies under EXO 9-2018.

4. **MERITS: DENIAL OF JUSTICE.** Mekari courts acted in a timely manner, Mekari courts guaranteed Caeli's right to be heard and a fair trial, and Mekari courts appropriately exercised their discretion to enforce the arbitral award annulled by Sinnoh courts.

5. **MERITS: CREEPING VIOLATIONS.** FET creeping violations are not supported by the CEPTA or customary international law

6. **COMPENSATION.** Compensation is to be granted under the Market Value standard contained in Art. 9.21 CEPTA and in any event any compensation awarded to Claimant should be reduced for the losses it has incurred.

ARGUMENTS

Part I. The Tribunal lacks jurisdiction ratione personae

1. Contrary to Claimant's contention, the Tribunal is facing a State-to-State conflict, which renders CEPTA and the ICSID AFR non applicable [**I**]. Consequently, the Tribunal has no jurisdiction over the present proceedings [**II**].

I. Both the CEPTA and the ICSID AFR only govern Investor-State arbitrations

2. In investment arbitration, the rules that govern the proceedings are those that the parties chose, contained in an IIA. In the present case, we are facing a dispute between parties from Bonooru and Mekar. The states began relations in 1994, by signing the BIT for the promotion and protection of investments[1]. Later, in 2014, they agreed to terminate said BIT and signed the Comprehensive Economic Partnership and Trade Agreement ("**CEPTA**")[2]. Said texts include as governing law for disputes the ICSID AFR[3].

3. According to the aforementioned scholarly writings, the reference is enough to render the rules applicable. However, regard is to be had on the status of the parties in relation to the ICSID Rules, since the ICSID AFR will apply if one of the parties to the dispute is not a contracting state or a national of one[4]. It is a fact that Mekar is not a signatory to the ICSID Convention.

4. At a first glance, CEPTA supplemented by the ICSID AFR are applicable. However, there is a second element to analyze: the nature of the parties participating. According to both treaties, the conflict must be between an investor and a State, either from a contracting State[5].

[1] Bonooru-Mekar BIT, pp. 69-70.
[2] APPX, p. 33, ¶ 32; CEPTA, p. 71-83.
[3] Art. 9.16.2 CEPTA.
[4] ICSID AFR, Introduction, p. 5; Ferguson (2010), p. 129.
[5] Art. 9.16.1 CEPTA.

It is the Respondent's contention that the rules are non applicable since Claimant does not qualify as an investor (see Sec. **II,** below).

II. Claimant does not qualify as an investor

5. Claimant submitted a request for arbitration on 17 november 2020[6], with the hopes of having a tribunal to adjudicate the case, but regrettably the tribunal cannot solve it. Even when Claimant is fully aware of the way it has conducted its transactions all through the investment, it is trying to mislead the Tribunal into believing that it can be qualified as an investor[7]. Nonetheless, Respondent is of the position that Claimant has acted as an agent of Bonooru, resulting in the present conflict being between States, and not an investor-State dispute.

6. To untangle this situation, it is Respondent's contention that regard is to be had on ARSIWA as customary international law. This set of Articles have been used as customary law to attribute conducts to States[8]. Pursuant to its commentary, the ARSIWA's purpose is to solve secondary issues related to State responsibility, such as "determining in what circumstances conduct is to be attributed to the State as a subject of international law"[9]. Following this line of reasoning, the general rule in international law establishes that "the only conduct attributed to the State at the international level is that [...] of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State"[10]. For the current case, ARSIWA Articles 5 and 8 are relevant, same which read as follows:

> *Article 5: "The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."*
>
> *Article 8: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."*

[6] P. O. 3, p. 86, ¶1.
[7] NOA, p. 2, ¶1.
[8] *Adel A Hamadi Al Tamimi, p. 270*; Olleson (2016), p. 457.
[9] United Nations General Assembly (2001), p. 60, ¶3(d).
[10] United Nations General Assembly (2001), p. 60, ¶3(d).

7. From the referred articles, one can conclude that conduct should be attributable to a State when an entity is "empowered to exercise the governmental authority of a State"[11], or when its "conduct [is] carried out on the instructions of a State organ or under its direction or control"[12]. Therefore, the Tribunal should follow it in order to determine if Claimant is in fact an agent of Bonooru[13]. Different from what Claimant may contend, this should be the test considered, rather than the Broches Test. The latter was created under the ICSID Convention's context, making it inapplicable since ICSID AFR[14] would govern the proceedings.

8. From the reading of the facts, Respondent trusts that the Tribunal will find that Claimant not only has discharged essentially governmental functions [**A**], but also, it has exercised governmental authority of Bonooru [**B**].

A. Claimant has discharged essentially governmental functions

9. Firstly, it has to be analyzed if the activities performed by Claimant could be considered as essentially governmental functions. According to the commentaries to ARSIWA,

> *"The justification for attributing to the State under international law the conduct of 'parastatal' entities lies in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority"*[15].

10. Commentators further elaborate and establish that far from giving a specific definition as to what is "governmental", this should be defined by the "particular society, its history and traditions"[16]. In the case at hand, Art. 9.13 CEPTA sets forth the rule on attribution of conduct, in which it states that governmental authority includes approval of commercial transactions[17]. This rule is supplemented by the ARSIWA test[18]. Even when Claimant may argue that all the actions related to the investment were from a commercial point of view,

[11] United Nations General Assembly (2001), p. 83, ¶8.
[12] Idem.
[13] Olleson (2016), p. 461.
[14] Rules for AF, Art. 2 establish that due to the different approaches that each set of rules was created for, the ICSID Convention and its interpretation shall not extend to the ICSID AFR.
[15] United Nations General Assembly (2001), p. 94, ¶5.
[16] Ibid., ¶6.
[17] Art. 9.13 CEPTA, ll. 2821-2824.
[18] Badia (2014), p. 8; it comments that the rules are only to supplement any existing rule in a BIT or IIA entered into by the parties.

however, taking into account Art. 9.13 CEPTA, this does not automatically dismiss the State connection.

11. As a matter of fact, the first main commercial transaction was the approval to join the bidding process and later purchase Caeli Airways[19]. Derived from that, Claimant managed the airline and flew it to the crisis it is now going through with its aggressive business model, even against the advice given by Mekar Airservices[20]. In that same line, Ms. Misty Kasumi, former high-ranking employee within Bonooru's Ministry of Tourism[21], agreed in the Phenac Business Today Podcast that Claimant's commercial strategy appears to benefit them (Bonooru and Claimant), more than it does Caeli Airways[22].

12. Moreover, Claimant has received State aid from the Horizon 2020 Scheme with the main objective being to attract tourism into Bonooru[23]. Resources that have been "put into flights between Mekar and [the latter]"[24]. This led to other small regional airlines bringing complaints before the CCM, contending that said flights had the sole purpose of "pushing competitors off these routes"[25]. Also, Claimant was lauded for its contribution to the "enhancement of Bonooru's tourism infrastructure, which has, in turn, enhanced the mobility rights of our population within the Greater Narnian region"[26]. As the Tribunal may notice, even when these could be seemed to be "mere commercial" decisions, they ultimately benefit the true party to the conflict, i.e. Bonooru.

13. Furthermore, tribunals have agreed that the specific acts or omissions must be governmental in nature rather than essentially commercial[27]. In the present case, air transportation is also relevant when defining "governmental actions" within Bonooru's scope. Let this Party remind the Tribunal that mobility in Bonooru is of such importance that it is considered a Constitutional right[28]. The Court in Bonooru agrees because "air travel serves a unique purpose in Bonooru compared to other nations around the globe"[29]. Originally, the airlines

[19] NOA, p. 3, ¶7.
[20] SOUF, p. 33, ¶29.
[21] ANNX VII, p. 54, ll. 1817-1818.
[22] ANNX VII, p. 55, ll. 1870-1871.
[23] SOUF, p. 32, ¶28.
[24] ANNX VII, p. 55, ll. 1861-1863.
[25] SOUF, p. 35, ¶38.
[26] P. O. 4, p. 89, ¶6.
[27] *Maffezini,* ¶¶52 and 57; *Hamester*, p. 58, ¶ 97; Olleson (2016), p. 472.
[28] APPX, p. 28, ¶5.
[29] ANNX III, p. 43, ¶56.

that operated in Bonooru were fully state owned[30]. However, when privatized, due to the strikes made by its citizens, the government assured that the successor would be "directed to ensure that it operates routes to [the] most remote islands, regardless of profitability"[31].

14. In this line of thought, in the CCB Case No. 981-17, the Bonooru Court was approached by the People's Council of the Island of Kyoshi with the concern that privatization would limit their mobility rights. The action was dismissed on the basis that:

> *"The provisional Memorandum of Association of [Claimant], the primary successor to BA Holdings, ensures that Royal Narnian will continue to operate routes to remote communities. The airline, as the flag carrier, will also continue to enjoy subsidies under Bonoori law for flights offered on routes of significance to 1495 mobility of disparate communities"[32].*

15. In other words, a right that was originally granted by the State[33] Claimant as the successor, is now the one in charge of guaranteeing the citizens of Bonooru the right of mobility.

B. Claimant acted as an agent

16. Another way to adjudicate an entity's actions to a State is if the latter is an agent of the first. According to the ARSIWA Commentary, the actions of an entity that is owned and subject to the control of the State are considered to be separate, unless they are exercising governmental authority within the meaning of Art. 5 ARSIWA[34]. As it was shown in the previous section, it is the Respondent contention that Claimant has exercised governmental authority, and in the following paragraphs it will demonstrate the control that Bonooru has over it.

17. In order to understand Claimant's standing today, regard is to be had in the overall picture. As a first note, Bonooru's control over Claimant's stake has been not but consistent in a relative majority. The air services in Bonooru were originally given by the State itself[35]. It later turned to Claimant to provide them, but retained 30% stake[36]. Even when Claimant may argue that

[30] APPX, p. 28, ¶6.
[31] APPX, p. 28, ¶8.
[32] ANN III, p. 43, ¶59.
[33] Art. 70 Constitution Act of Bonooru, 1947; ANN I, p. 41.
[34] United Nations General Assembly (2001), p. 107, ¶6.
[35] APPX, p. 28, ¶6.
[36] ANNX IV, p. 45, ¶5.

Bonooru's representation was kept to a maximum of 38% stake[37], it is important for the Tribunal to note that no other stakeholder held more than 7% stake[38]. Currently, Bonooru holds 55% of Claimant's stake[39]. For a clearer image, Respondent presents the following table:

Claimant's stake situation		
Time frame	**Bonooru´s stake**	**Others' stake**
Date of incorporation- March 2020	30% stake- 38% stake	No more than 7% each
Since March 2021	55% stake	

18. As it can be seen, even when Claimant can argue that Bonooru's participation is a minority in relation to the 100%, it is a fact that the State holds a majority related to the other holders.

19. Furthermore, Bonooru's control is not limited to the stake it holds. As part of the agreement, at the beginning Bonooru's representatives on Claimant's board of directors amounted to the sufficient quorum to hold meetings and vote on any decision[40]. Another event that allows to attribute actions to a State, is when the "State [uses] its ownership interest in or control of a corporation specifically in order to achieve a particular result"[41]. Taking into account that "[a]s of 2019, along with the related tourism sector, civil aviation contributed to nearly 13% of Bonooru's GDP and accounted for 11.6% of its total employment"[42], it is only logical to assume that any decisions taken would be along those terms and seeking to maintain said conditions. This is supported by the fact previously mentioned, that Claimant was recognized for its contribution in Bonooru's tourism[43].

20. Finally, actions are also attributable when the entity is exercising public powers[44]. In 2021, Claimant's board of directors "was replaced with government functionaries, its functions were expanded to include paramilitary activities, and its legal team was equipped with

[37] SOUF, p. 29, ¶10.
[38] P. O. 4, p. 89, ¶2
[39] SOUF, p. 40, ¶65.
[40] P. O. 3, p. 86, ¶3.
[41] United Nations General Assembly (2001), p. 108, ¶6.
[42] APPX, p. 28, ¶6.
[43] P. O. 4, p. 89, ¶6.
[44] United Nations General Assembly (2001), p. 108, ¶6.

lawyers from Bonooru's justice department to assist in its arbitration against Mekar"[45]. This not only shows that now the State holds full control, but it has assigned new governmental authority in terms of Art. 5 ARSIWA. Even if Claimant pretends to argue that these facts are not relevant since the investment took place beforehand, the fact that the Bonooru legal team has joined the arbitration, allows for the tribunal to extend its analysis to the current facts.

21. Therefore, the Tribunal lacks jurisdiction *ratione personae* because Claimant does not qualify as an investor, because it discharged essentially governmental functions and it acted as an agent of Bonooru in terms of article 5 and 8 ARSIWA. Consequently the CEPTA and ICSID AFR are non applicable to the current arbitration.

Part II. Amici Submissions

22. Submission means a surrender or yielding, as to an arrest; or a command. It refers to a matter to another for consideration and decision. If the Tribunal were to decide that it has jurisdiction over the present proceedings, the next request to analyze is that of the *amicus curiae* submissions. On April 19, 2021, CBFI requested authorization to present a communication from a non-disputing party, but since it is a consortium focused on the economy and its significant interest, what it intends is to maintain the investments and the rights of the investors.

23. Therefore, the tribunal should bar the admission of CBFI's submission [**I**], on May 28, 2021, CRPU requests permission to present an amicus curiae brief, CRPU are external advisers selected through a transparent and competitive process, their interest in the dispute is public.and allow the one presented by CRPU [**II**].

I. The Tribunal should bar the *amicus curiae* presented by CBFI

24. The CBFI is a consortium that, although it is not for profit, does represent large investors, who invest in the Greater Narnia region, it has a significant interest in economics, in protecting the investments made by its clients, it does not contribute anything different from what has already been mentioned by the parties.

25. Respondent strongly opposes to CBFI's application for the following reasons:

[45] SOUF, p. 40, ¶65.

A. CBFI is not impartial and independent from Bonooru's interests

26. According to the record, the CBFI is a non-profit industry association that represents Bonoori investors investing in the Greater Narnian region and internationally. Also, the CBFI is the national leader in public policy advocacy on national and international business issues and is focused on fostering a strong, competitive economic environment that facilitates growth and development of Bonooru as well as the Greater Narnian región[46]

27. The Consortium represents the investors of Bonooru and has a significant interest in the current proceedings. As their representative it has to ensure that the State grants benefits to the investments.

28. The tribunal has to consider that CBFI advises Vemma through Lapras Legal Capital and could not be considered as an independent amici since it would benefit from the outcome of the case if Claimant´s succeeds. If Claimant manages to win the dispute, it would benefit Bonooru and Bonooru would benefit CBFI, therefore all share a significant interest in alleging Claimant´s case.

B. CBFI's submission lacks a public interest component

29. The Consortium is a commercial entity, its constituents invest not only in the Greater Narnia Region, but also internationally, the members have companies in different sectors and in different regions of Bonooru. As a private and commercial entity its activities are intrinsically related to a private interest not a public one.

C. CBFI's submission will not bring a particular knowledge, perspective or insight different from that of the disputing parties

30. CBFI has a significant and private interest in the current dispute and its submission does not comply with the requirements set forth in Art. 41.3 of the ICSID AFR*: "(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;"*

31. Similarly, Art. 4.3 b) of the UNCITRAL Transparency Rules states that:

[46] P.O.3, p. 17.

> *In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant:(b) The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties".*
>
> (Emphasis added)

32. CBFI is biased in favour of Claimant, therefore its perspective would be Claimant's position that has been already submitted to the tribunal and CBFI´s submission would not contribute to the expedited resolution of the current dispute. In addition, it does not have access to any particular knowledge or insight that might be relevant to the outcome of the case.

II. The Tribunal should allow for the submission presented by CRPU

33. The CRPU, in principle, can provide different information to the Court because it is an external advisor and with important tasks assigned to Mekar, it is in charge of analyzing the situation and economic performance, as well as, if necessary, improving it.

A. CRPU complies with the request

34. Respondent supports CRPU's submission considering the following circumstances. CRPU, acts as a party that provides advice to Vemma and does not have a significant interest in the dispute and fulfills the requirements set forth in article 41.3 of the Additional Facility Rules.

> *(3) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Article called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:*
> *(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;*
> *(b) the non-disputing party submission would address a matter within the scope of the dispute;*
> *(c) the non-disputing party has a significant interest in the proceeding.*

35. Requirement a) consists of being impartial and independent of the parties that is accredited with the following facts:

36. Considering that CRPU act "as independent advisors involved in the entirety of the privatisation process, are in the unique position to adduce unbiased facts to this effect before the Tribunal that may not be obtained from either disputing party".

37. Requirement b) is about bringing a new perspective to court. The new perspective that CRPU would bring to the court is:

38. CRPU is responsible for analyzing the economic situation in Caeli and advises on the privatisation, liquidation, and/or restructuring of Caeli. Due to its activities it has access to relevant information that could bring a new perspective to the arbitral tribunal.

39. In accordance with Art. 4.3 of UNCITRAL Transparency Rules:

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

B. CRPU is impartial and its interest is public

40. Therefore, CRPU is an impartial and independent entity and has a public interest in the fight against corruption in Mekar:

> *"…as independent advisors involved in the entirety of the privatisation process, are in the unique position to adduce unbiased facts to this effect before the Tribunal that may not be obtained from either disputing party".*

41. CRPU has been involved in the approval of projects, in the fight against corruption, regarding the Mekar procedures.

42. In conclusion CRPU meets both requirements, therefore your request should be admitted by the Arbitral Tribunal.

Part III. The Respondent did not violate Art. 9.9 CEPTA

43. Art. 9.9 CEPTA establishes *inter alia*:

> *Article 9.9: Minimum Standard of Treatment*
> *1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment* [...] *in accordance with paragraphs 2 through 7.*
> *2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or measures constitute:*
> *(a) denial of justice in criminal, civil or administrative proceedings*
> *(b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;*
> *(c) arbitrary or discriminatory conduct;*
> *(d) abusive treatment of investors, such as coercion, duress, and harassment;*
> *(e) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with Article 9.22.*
>
> (Emphasis added)

44. CEPTA provides for the application of the Fair and Equitable Treatment standard ("**FET**"). The meaning of the FET standard must be construed on the basis of the wording and the context of the applicable treaty[47]. Under the Treaty, the FET standard is breached if a measure impairs the covered investment or the investor by any of the listed circumstances set forth in Art. 9.9.2 CEPTA.

45. To successfully argue a violation of the FET standard under the CEPTA, the Claimant must prove that Respondent's actions exceeded the regulatory authority that the Treaty provides for contracting parties, or that it denied justice. However, in both scenarios it is not the case.

46. It is the Respondent's submission that the measures pursued by the Mekari authorities were within the scope of its regulatory authority. In particular, Respondent submits that [**I**] the measures impugned were pursued under legitimate public policy objectives, [**II**] Respondent accorded justice to Claimant and [**III**] Creeping violations are not supported by the CEPTA or customary international law.

I. Respondent's measures were pursued under legitimate public policy objectives

47. Also, Art. 9.8 CEPTA establishes:

> *Article 9.8: Right to Regulate*

[47] *Teinver*, ¶665; *Lemire II*, ¶284.

1. For the purpose of this Chapter, the Parties recognise their right to regulate in their territories in order to achieve legitimate public policy objectives, such as national security, the protection of public health, safety, the environment, public morals, social and consumer protection, or the promotion and protection of cultural diversity.
2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.

(Emphasis added)

48. Moreover, Art. 9.13 CEPTA provides:

Article 9.13: State Enterprises
1. Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any State enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under this Chapter wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licences, approve commercial transactions or impose quotas, fees or other charges.
2. Each Party shall ensure that any State enterprise that it maintains or establishes accords non-discriminatory treatment in the sale of its goods or services to investments in the Party's territory of investors of the other Party.

(Emphasis added)

49. Furthermore, Art. 9.14 CEPTA states:

Article 9.14: Investment and Environmental, Health and Other Regulatory Objectives
l. The Parties recognize that it is inappropriate to encourage investments by relaxing domestic measures relating to health, environment, or other regulatory objectives. Accordingly, a Party should not waive, relax, or otherwise derogate from, or offer to waive, relax, or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion. or retention in its territory of an investment of an investor. [...]

(Emphasis added)

50. Under the Preamble of the CEPTA, the parties' flexibility to achieve legitimate policy objectives is expressly recognised[48]. Accordingly, the policy objectives listed in Art. 9.8 are non exhaustive. This conclusion is also consistent with the wording of Art. 9.14 CEPTA when referring to "other regulatory objectives".

[48] Preamble CEPTA, p. 71, ll. 2500-2506.

51. The inherent power of the State to regulate in light of the public interest has been recognized as a rule of customary international law[49]. The concept of regulatory power is not limited to expropriation and is relevant in the context of the FET standard alleged violations[50].

52. According to some tribunals, State regulation enjoys a presumption of legitimacy and cannot be bound to "please every constituent and address every harm with each piece of legislation"[51]. Deference should be given to the interpretation of State laws given in good faith by the responsible authorities[52]. A State is not liable for non-discriminatory regulations[53].

53. With regard to the "public interest" concept, although there is not a uniform definition of this concept under customary international law, public interest exceptions can be incorporated into treaties to safeguard the State's ability to regulate[54].

54. Respondent submits that [**A**] the decision to price airservices in MON is excusable in the context of the economic crisis of Mekar, [**B**] CCM investigations were pursued under the protection of fair competition and [**C**] Caeli was not in like circumstances to receive subsidies under EXO 9-2018.

A. CCM investigations were conducted for the protection of fair competition

55. Claimant contends that the CCM arbitrarily initiated investigations against Caeli in violation of Mekari law and the CEPTA. Nevertheless, CCM investigations were conducted lawfully for the protection of fair competition in Mekar.

56. Art. 1.3 CEPTA establishes:

> *Article 1.3: Objectives*
> *1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favoured-nation treatment, and transparency, are to:* [...]
> *(b) promote conditions of fair competition in the free trade area;* [...]

[49] *SAUR*, ¶398; *El Paso*, ¶238; *Feldman*, ¶103.
[50] *Philip Morris*, ¶¶422-423; *Total S.A.*, ¶197; *EDF*, ¶219; *National Grid*, ¶¶189-190; *Plama*, ¶177; *CMS*, ¶277.
[51] *Tza Yap Shum*, ¶125; *Clayton/Bilcon*, ¶437; *Glamis Gold*, ¶804; *Eastern Sugar*, ¶272.
[52] *Cavalum SGPS*, ¶424; *RREEF*, ¶242-244; *Koch Minerals*, ¶7.22; *JSW Solar*, ¶444; *Pac Rim*, ¶8.31.
[53] *Hydro Energy*, ¶568; *Magyar*, ¶364; *Apotex*, ¶8.75; *Guaracachi*, ¶431; *AES II*, ¶10.3.34-10.3.36.
[54] Martinez-Fraga *et. al.* (2015), p. 126.

2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

(Emphasis added)

57. According to Art. 31(1) VCLT 1969, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. One of the objectives of the CEPTA is the promotion of fair competition in the FTA comprising Bonooru and Mekar.

58. A measure may be arbitrary *inter alia*, if: it inflicts damages on the investor without serving any apparent legitimate purpose, it's not based on legal standards but on excess of discretion, prejudice or personal preference and it's taken for reasons that are different from those put forward by the decision maker[55]. A mere violation of domestic law does not entail a violation of the FET standard under the CEPTA[56].

59. In the case at hand, the rapid expansion of Caeli drew the attention of the CCM and Caeli's competitors. The two investigations conducted by the CCM into Caeli and the fines imposed were merely applications of the domestic law, which were in force at the time Claimant made its investment.

60. Back in 2011, when the CCM approved Claimant's acquisition of an 85% stake in Caeli and the airline's participation in the Moon Alliance, it sought an undertaking from Caeli that it would not engage in high-level co-operation on competition parameters such as prices, schedules, capacity, facilities, and other sensitive information with Moon Alliance members, which was duly submitted.

61. The CCM initiated the First Investigation against Caeli and found a breach of the MRTPA for predatory pricing resulting from low airfares and loyalty programmes. Then, when the Second Investigation was concluded, it was found that Caeli had engaged in anti-competitive behaviour in conducting its business activities in Phenac International Airport. The CCM ultimately imposed caps on Caeli in order to prevent it from earning supra-competitive profits in the future. All these actions by the CCM were pursued under its duties and powers set forth in the MRTPA.

[55] *EDF*, ¶303; *Crystallex*, ¶578; *Lauder*, ¶221.
[56] Art. 9.9.6 CEPTA.

62. Chapter III of the MRTPA expressly provides:

> *CHAPTER III: TRIBUNAL INVESTIGATION*
> *(1) The CCM has the sole competence to initiate an investigation concerning potentially anti- competitive behaviour.*
> *(2) The CCM may open an investigation into behaviour it deems anti-competitive, suo moto if the following circumstances are met:*
> *(a) a corporation obtains a market share greater than 50%. The CCM may exercise discretion in industries that require special attention to open an investigation where a corporation owns a lower market share. The use of discretion should be exceptionally rare;*
> *(b) the corporation poses a unique threat to the competition in a particular market; and*
> *(c) there is evidence the corporation's actions have, or are likely to in the near future, push competitors out of the market.*
>
> (Emphasis added)

63. Given the special position that Caeli had as a Moon Alliance member, the CCM initiated investigations under its faculties pursuant to the Mekari law for the protection of fair competition. In any event, if the Tribunal considers that the CCM investigations were illegal, a mere violation of domestic law does not amount to arbitrariness.

64. The CCM is an institution created to inspire investor confidence. Claimant cannot expect to be exempt from its regulatory authority since it was expressly notified that any anti-competitive behaviour would be subject to the review of the CCM.

65. Therefore, the CCM investigations are not arbitrary and were conducted for the protection of fair competition

B. The decision to price in MON was justified in light of the currency crisis

66. Claimant contends that the decision taken by Respondent requiring companies operating in the country to offer services denominated exclusively in MON, hurt Caeli's profitability. However, this decision is justified in light of article 9.8 of the CEPTA.

67. As previously stated, Art. 9.8 CEPTA recognises Respondent's right to regulate in order to assure social and consumer protection. In the midst of the ongoing currency crisis, the financial regulation was a reasonable and key measure, it could even be considered as a measure expected by any State in the fulfillment of its obligations.

68. In late 2016, the MON began to nosedive and while economists disputed the predominant cause of the MON's fall a currency crisis ensued in Mekar. The IMF emphasised "the need to establish credibility in the [local] currency to avoid a debilitating economic situation".

69. Naturally, on 30 January 2018, with a view to stabilise the MON, Mekar's government passed a decree requiring all companies operating in the country to offer goods and services denominated exclusively in MON.

70. Therefore, in order to establish economic credibility in light of the currency crisis the decision to price in MON was justified.

C. Caeli was not in like circumstances to receive subsidies under EXO 9-2018

71. Claimant contends that EXO 9-2018 arbitrarily discriminated against it by not granting subsidies. Nonetheless, Caeli was not in like circumstances to receive subsidies under EXO 9-2018 to argue discriminatory treatment.

72. A measure is discriminatory when a situation is treated differently from similar cases without justification, exposing the claimant to sectional prejudice or targeting claimant's investments specifically as foreign investments[57]. In simpler words: "unequal treatment of equal circumstances without any justified motive"[58].

73. Discrimination may be *de facto* or *de iure*. *De iure* discrimination refers to measures that treat entities differently by themselves, whereas *de facto* discrimination refers to measures that are neutral but result in differential treatment[59].

74. In order to find discrimination there must be (i) an intentional treatment (ii) in favor of a national (iii) against a foreign investor, and (iv) that is not taken under similar circumstances against another national[60]. When determining discriminatory treatment, the tribunal may take into account the basis of comparison and justification for differential treatment[61]. A discriminatory effect is sufficient to find discrimination rather than a discriminatory intent[62].

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[57] *Lemire 11*, ¶261; *Saluka*, ¶307.
[58] *Lidercon*, ¶169.
[59] *ADM*, ¶193; *Total S.A.*, ¶211; *Corn Products*, ¶115; *Pope & Talbot*, ¶43.
[60] *ELSI*, ¶¶61-62.
[61] *BG*, ¶357; *CMS*, ¶293.
[62] *LG&E*, ¶146; Vandevelde (1992), p. 77.

75. In the case at hand, Caeli was not in like circumstances since Claimant is receiving subsidies under the Horizon scheme.

76. In September 2018, Respondent passed EXO 9-2018, granting subsidies to airlines in an attempt to alleviate some of the industry's economic concerns. Caeli's application for subsidies under the order was rejected. The reason is that Respondent have the discretion to give subsidies to whoever it considers appropriate under the order. Although other airlines were granted subsidies, Caeli was not in like circumstances due to its close ties with Bonooru. Larry Air, another foreign government airline operating in Mekar at the time, was also rejected.

77. Therefore, Caeli did not receive subsidies under EXO 9-2018 because it was not in like circumstances.

II. Respondent accorded justice to Caeli

78. The concept of denial of justice under the FET standard is defined as any gross misadministration of justice resulting from the ill-functioning of the State's judicial system[63]. Denial of justice can be pleaded when the host State fails to afford the investor due process in the context of court proceedings[64]. Due process violations comprises a serious misadministration of justice, including no available or inadequate remedies[65]. The threshold for a denial of justice claim is high[66].

79. Respondent submits that [**A**] Mekari courts acted in a timely manner, [**B**] Mekari courts guaranteed Caeli's right to be heard and a fair trial, and [**C**] Mekari courts appropriately exercised their discretion to enforce the arbitral award annulled by Sinnoh courts.

A. Mekari courts acted in a timely manner

80. Claimant contends that when Caeli fought the CCM resolutions in Mekari courts, these were underfunded, leading to significant delays in hearing urgent matters. However, the Mekari courts acted in a timely manner.

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[63] UNCTAD (2012), pp. 80-81.
[64] *Jan de Nul*, ¶256; *Siag*, ¶455; *Manchester Securities*, ¶498.
[65] *Azinian*, ¶102-103; *Dan Cake*, ¶154; *Duke Energy*, ¶¶399-402; *Saipem*, ¶182.
[66] *Agility*, ¶¶210 & 216; *EBO*, ¶472; *Krederi*, ¶¶447-449; *Al Warraq*, ¶620; *H&H*, ¶400; *Oostergetel*, ¶273

81. Courts delays are not sufficient to characterize a denial of justice[67]. Therefore, to claim a denial of justice, Claimant must prove that the delays were excessive or unreasonable bearing in mind the complexity of the case, behaviour of litigants involved, significance of interests at stake and behaviour of courts[68].

82. In the case at hand, the Mekari courts acted in a timely manner. The average time taken from commencing an action to receiving a final decision in Mekari courts in commercial matters are normally 27 months. Despite being overwhelmed by cases, the courts managed to dispense justice speedily, as compared to the time it usually takes Mekari courts to render decisions in commercial matters.

83. In the context of the economic crisis in Mekar in order to save resources, Mekari courts prioritised criminal matters due to their far-reaching consequences. Nonetheless, Claimant's judicial actions were solved in 14 months, almost half of the average.

84. Therefore, Mekari courts acted in a timely manner since the delay was reasonable bearing in mind the economic crisis.

B. Mekari courts guaranteed Caeli's right to be heard and a fair trial

85. Claimant contends that when its pleas were finally heard by the Mekari courts, Caeli's claims on the merits were dismissed prematurely. Nonetheless, Mekari courts guaranteed Caeli's right to be heard and a fair trial.

86. Denial of justice may result from a violation of equal treatment of the parties or the right to be heard. In the context of judicial relief, equality of the parties and the right to be heard are core elements of a fair trial and must be respected by the domestic courts of host States[69]. Also, under international law a denial of justice under international law could constitute the unjustified refusal of a tribunal to hear a matter within its competence[70].

87. In the case at hand, the court also dismissed the merits of Caeli's appeal. The reason was that it did not foresee the possibility of arriving at a different final decision. However, this decision does not amount to a violation of Caeli's right to be heard, since arguments on the

[67] *Energoalians*, ¶358; *Jan de Nul*, ¶204.
[68] *White Industries*, ¶10.4.10; *Toto*, ¶¶160-163.
[69] *Krederi*, ¶¶449 & 595; *Arif*, ¶¶445 *et. seq.*; *Genin*, ¶¶358-362.
[70] *Iberdrola*, ¶432.

merits were taken into consideration. Also, it is important to note that a review of the case would have been useless and costly for Respondent due to the economic crisis.

88. Therefore, Mekari courts guaranteed Caeli's right to be heard and a fair trial, since the court's actions do not amount to a denial of justice violation.

C. Mekari courts appropriately exercised their discretion to enforce the award

89. Claimant contends that enforcing an award that had been set aside at the seat of the arbitration grossly violated international conventions and agreements to which Mekar is party, as well as Mekar's own domestic law. However, Mekari courts appropriately exercised their discretion to enforce an award that has been set aside at the seat of arbitration.

90. Courts have discretion to refuse the enforcement of the award under Art. V NYC 1958. The word "may" attributes discretion to courts as it is a generally recognized judicial principle that "may" implies express attribution of discretion to a judge. The purpose of the NYC 1958 is to contribute to the effectiveness of international arbitration by granting enforcement of the award[71].

91. This was also the reasoning followed by the Supreme Court of Mekar. This discretion cannot be subject to review before this tribunal and cannot be a ground for denial of justice. It is widely accepted that courts have discretion when it comes to enforcement of arbitral awards. In this case, in order to contribute to the effectiveness of international arbitration the Supreme Court enforced the award exercising its discretion.

III. Creeping violations are not supported by CEPTA or customary international law

92. Claimant contends that a combination of acts or omissions can be considered to cumulatively constitute a composite breach of the CEPTA's FET standard. Nonetheless, FET creeping violations are not supported by the CEPTA or customary international law.

93. In *El Paso v. Argentina*, the tribunal has recognised the concept of creeping violations[72]:

> *The Tribunal considers that, in the same way as one can speak of creeping expropriation, there can also be creeping violations of the FET standard. According to the case-law, a creeping expropriation is a process extending over*

[71] Paulsson (2016), p. 160.
[72] *El Paso*, ¶¶518-519.

> *time and composed of a succession or accumulation of measures which, taken separately, would not have the effect of dispossessing the investor but, when viewed as a whole, do lead to that result. A creeping violation of the FET standard could thus be described as a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result.*
>
> (Emphasis added)

94. In offering support for the concept of a creeping violation of the FET standard, the tribunal in *El Paso* relied on Art. 15 ARSIWA, explicitly finding that the various measures taken by Argentina constituted a "composite act"[73]. Commentators have stated that "a composite act must be limited to breaches characterized by an aspect of systematic policy" and also that "what characterizes the composed delict is, apart from a quantitative aspect, the existence of a motive which unites the whole of the criticized conducts in one determined wrongful act"[74].

95. In the case at hand, there is no evidence that Respondent took all the measures with a particular motive. All the measures taken by Respondent were under the scope of its right to regulate. Claimant has not provided sufficient evidence to prove the allegedly malicious actions pursued by Mekari authorities.

Part IV. Compensation Claim

96. In the event this Tribunal concludes that Respondent has violated the CEPTA, it is the Respondent submission that: [**I**] compensation is to be granted under the Market Value standard contained in Art. 9.21 CEPTA and if the Tribunal does not agree, in any event [**II**] any compensation awarded to Claimant should be reduced for the losses it has incurred.

I. Compensation is to be granted under the Market Value standard

97. Claimant contends that compensation shall be granted under the fair market value ('**FMV**') standard according to both principles of international law and the MFN obligation contained in the CEPTA. However, Respondent submits that [**A**] CEPTA does not provide for the application of a FMV method of valuation for compensation and [**B**] CEPTA expressly prohibits the use of the MFN clause to benefit from other BITs.

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[73] *Ibidem*, ¶516.
[74] Salmon (2010), ¶¶383-391

A. CEPTA does not provide for the application of a FMV method of valuation

98. The general standard of compensation set forth in Art. 9.21.1 CEPTA establishes:

> *Article 9.21: Final Award*
> *1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination:*
> *(a) monetary damages at a market value, except as otherwise provided for in Article 9.12; and*
> *(b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages at a market value and any applicable interest in lieu of restitution.*
>
> (Emphasis added)

99. Instead, with regard to expropriation, the CEPTA expressly provides in Art. 9.12:

> *Article 9.12: Expropriation and Compensation*
> *1. Neither Contracting Party may directly nationalize or expropriate except:*
> *(a) in the public purpose;*
> *(b) in a non-discriminatory manner;*
> *(c) under due process of law; and*
> *(d) against payment of prompt, effective and appropriate compensation. The term appropriate compensation shall neither include losses which are not actually incurred nor probable or unreal profits. For greater certainty, owing to the evolving economic structures of both Contracting Parties, investors are not protected against measures that may be considered to indirectly expropriate an investment.*
> *2. The compensation referred to in paragraph 1 shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became known, whichever is earlier.*
>
> (Emphasis added)

100. If the parties to the CEPTA were to consider a FMV as a general method of compensation they could have been included as such in the Treaty. However, the intention of the parties was to value according to a FMV method in case of expropriation claims. In the case at hand there are no expropriation claims.

B. CEPTA expressly prohibits the use of the MFN clause to benefit from other BITs

101. It is true that MFN clauses can be invoked to benefit from more favourable provisions in comparator treaties by failing to accord the investor the more favourable protections that it has accorded to other investors under another treaty[75]. However, in the case at hand the

[75] Caron (2015), p. 399.

CEPTA expressly prohibits the use of the MFN clause to benefit from other BITs, including the Arrakis–Mekar BIT.

102. The MFN clause of the CEPTA under Art. 9.7 establishes:

> *Article 9.7: Most Favoured Nation Treatment*
> *1. Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords in like situations, to investors of a third country and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.*
> *2. For greater certainty, the treatment referred to in paragraph 1 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.*
>
> (Emphasis added)

103. Art. 13 Arrakis-Mekar BIT provides:

> *Article 13 – Compensation and Prompt Payment*
> *If the Tribunal makes a Final Award in favour of the investor, the Tribunal may award compensation. Such compensation shall be equivalent to the fair market value of the investment immediately on the day before the measures inconsistent with the provisions herein were taken by the host State.*
>
> (Emphasis added)

104. The tribunal in *CME v. Czech Republic* has accepted the application of a MFN clause to import a FMV compensation standard under certain circumstances that are not met in the present case. The treaty at issue between the Netherlands and Czech Republic provided that:

> *"Neither contracting Party shall take any measure depriving, directly or indirectly, investors of the other contracting Party of their investments unless the following conditions are complied with: […] c. The measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investment affected […]"*

105. The tribunal reasoned that a compensation under a FMV standard finds support in the MFN clause of the treaty given its broad wording and ruled that the Czech Republic was it was obligated to provide no less than FMV to Claimant in respect of its investment, since the BIT between the United States of America and the Czech Republic provided that compensation shall be equivalent to the FMV.

106. In the case at hand, the parties expressly prohibited the use of the MFN clause as substantive obligations in other international investment treaties such as the Arrakis–Mekar BIT do not constitute treatment and thus cannot give rise to a breach of MFN treatment. Also, in the only case when a FMV was imported, the MFN clause and definition of compensation was broad enough for such importation.

107. Therefore, since CEPTA does not provide for the application of a FMV method of valuation and CEPTA expressly prohibits the use of the MFN clause to benefit from other BITs, compensation shall be granted under the Market Value standard.

II. In any event, any compensation awarded to Claimant should be reduced for the losses it has incurred.

108. In the event, the Tribunal finds to compensate under the FMV, Claimant should be reduced for the losses it has incurred. Claimant is responsible for its own losses, since the damages it suffered were caused by its extravagant approach to its investment activities and against the clear warnings of the representatives of Mekar present on Caelis' board.

Part V. Prayer for Relief

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

1. Find that it lacks jurisdiction over the present proceedings;

2. Admit the CRPU *amici* submission;

3. Bar the CFBI *amici* submission;

4. Find that Respondent accorded FET to Claimant under Chapter 9 of the CEPTA;

5. Declare that Respondent has already purchased the Claimant's investment at market value and award no compensation; or in the alternative, reduce any compensation awarded considering the Claimant's contributory fault and the ongoing economic crisis in Mekar.

6. Order Claimant to reimburse Respondent for all costs and expenses associated with this arbitration.