TEAM ALIAS: RANJEVA G

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

MEMORANDUM FOR RESPONDENT

ON BEHALF OF:	**AGAINST:**
The Federal Republic of Mekar	*Vemma Holdings Inc.*
RESPONDENT	**CLAIMANT**

FOREIGN DIRECT INVESTMENT INTERNATIONAL ARBITRATION MOOT 2021

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ABBREVIATION	CITATION
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ELSI	*Elettronica Sicula SpA. (ELSI) (USA v Italy),* International Court of Justice, Judgment of 20 July 1989, ICJ Rep. 15 (1989)

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Baker Marine v Chevron	*Baker Marine (Nig.) Ltd. v Chevron (Nig.) Ltd*. (1999) 191 F. 3d 194 (US 2nd Circuit) (USA)
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Yukos Capital v OAO Rosneft	*Yukos Capital v OJSC Rosneft Oil Co*. [2012] EWCA Civ 855 (English High Court) (England)
Durkan Holding v OFT	*Durkan Holdings Limited v Office of Fair Trade*, [2011] CAT 6 (UK)
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Bell Atlantic Corp. v Twombly	*Bell Atlantic Corp. v Twombly* 550 U.S. 544 (2007) (Supreme Court of the US) (USA)
COMP/A.38284/D2	Commission Decision of 7 April 2004 relating to a proceeding pursuant to Article 81 of the EC Treaty concerning case COMP/A.38284/D2; Société Air France/Alitalia Linee Aeree Italiane SpA (EU)

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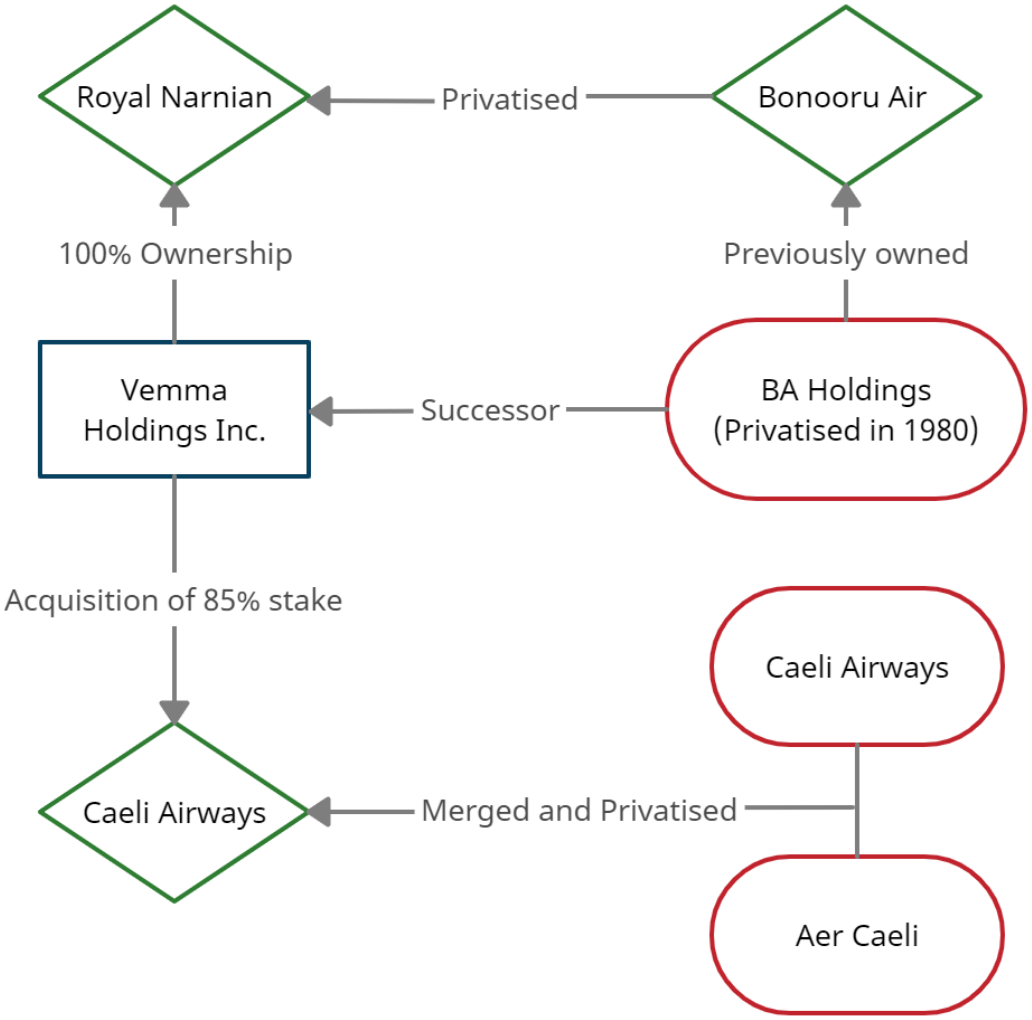
LIST OF ABBREVIATIONS

ABBREVIATION	TERM
1994 BIT	Treaty between Mekar and Bonooru for the Promotion and Protection of Investments
AFR	ICSID Additional Facility Rules
Arrakis-Mekar BIT	Treaty between Mekar and Arrakis for the Promotion and Protection of Investments
ARSIWA	Responsibility of States for Internationally Wrongful Acts 2001
Art.	Article
B	Billion
Caeli	Caeli Airways JSC
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	Bonooru - Mekar Comprehensive Economic Partnership and Trade Agreement 2014
CETA	Canada-EU Comprehensive Trade Economic Agreement 2016
CIL	Customary International Law
CLAIMANT/ Vemma	Vemma Holdings Inc.
CRPU	Committee on Reform of Public Utilities, Mekar
EU	European Union
External Advisors	External advisors to the Committee on Reform of Public Utilities
FET	Fair and Equitable Treatment
Hawthorne	Hawthorne Group LLP

ICSID/Centre	International Centre for Settlement of Investment Disputes
Lapras	Lapras Legal
M	Million
Mekar Airservices	Mekar Airservices Ltd
MFN	Most Favoured Nation
MON	Mekari MON
MRTP Act	Monopoly and Restrictive Trade Practices Act, as amended in 2009
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
p.	Page number
PCA	Permanent Court of Arbitration
Phenac Airport	Phenac International Airport
PO	Procedural Order
RESPONDENT/ Mekar	The Federal Republic of Mekar
SCC	Sinnoh Chamber of Commerce
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Transparency Rules	UNCITRAL Rules on Transparency in Investor-State Arbitration
USD	United States Dollars
VCLT	Vienna Convention on the Law of Treaties

STATEMENT OF FACTS

RELATIONSHIP OF PARTIES:



TIMELINE OF EVENTS:

1980-1984 BA Holdings, which was Bonooru Air's parent company, was privatised. Bonooru Air split up into three airlines, one being the Royal Narnian. Vemma Holdings bought 100% stake in Royal Narnian. At this time, Bonooru was a minority shareholder (31-38%) in Vemma.

2010	Bonooru launched the Caspian Project. It is an initiative to facilitate the movement of resources around the Greater Narnian Region. Bonooru plans to spend an estimated 100B BAK between 2010 and 2030 to build infrastructure and enable trade.
September 2010	Caeli Airways and Aer Caeli were merged into a single airline company; and consequently attempts were made to privatise it. During the third attempt to privatise, Caeli's assets and debt liabilities were transferred to Mekar Airservices.
5 January 2011	Vemma Holdings' submitted its bid proposal for acquiring Caeli Airways at 800M USD. Vemma was the highest bidder and proposed the most attractive business model for its growth. The same was approved by the CCM.
29 March 2011	Mekar Airservices and Vemma entered into a Share Purchase Agreement, where Vemma purchased an 85% stake in Caeli. The remaining 15% was owned by Mekar Airservices. Vemma inherited existing discounts on airport services and young A340 aircrafts.
15 October 2014	CEPTA comes into force, which was signed between Mekar and Bonooru.
2015	Caeli placed orders for 45 Boeing 737 aircrafts. It invested its earnings for expansion. It rolled out the Frequent Flyer Programme and the Corporate Discount Scheme.
9 September 2016	The CCM began its First Investigation against Caeli. This investigation was started to find out whether Caeli had adopted predatory pricing strategies. The CCM imposed airfare caps on Caeli as an interim measure.
December 2016	The CCM began its Second Investigation against Caeli. This was based on a complaint by a consortium of regional airlines that Caeli was undercutting competition by using its dominant position at the Phenac Airport.
March 2017	A currency crisis ensued in Mekar. The MON began to nosedive and the inflation rate was rapidly increasing.

30 January 2018	The Mekari government passed a decree requiring all companies operating in Mekar to denominate its services in MON.
27 March 2018	Caeli decided to file a claim against the CCM to seek judicial review of the same. A hearing on interim measures was scheduled for April 2019.
August 2018	CCM concluded its First Investigation. It found Caeli guilty of predatory pricing. A penalty of 150M MON was imposed on Caeli.
25 September 2018	Mekar's President passed an Executive Order 9-2018 to grant subsidies for airlines. Caeli's application for subsidies was rejected.
1 January 2019	CMM concluded its Second Investigation. It found Caeli guilty of engaging in anti-competitive behaviour. A penalty of 200M MON was imposed on Caeli.
8 February 2019	Caeli applied for a 200M USD loan to First Phenac Bank. The bank offered a credit line at an inflated interest rate. Caeli had a credit score of CCC+. It rejected this loan.
15 June 2019	The Mekari High Court heard Caeli's case. The court declined to remove the airfare caps, on a balance of convenience. It dismissed the case on merits.
October 2019	The CMM lifted airfare caps from Caeli because its market share fell below 40%.
1 August 2020	Vemma decided to sell its stake in Caeli. It received an offer from Hawthorne. Mekar commenced arbitration under SCC regarding the same. Mr. Cavannaugh ruled in favour of Mekar setting aside Hawthorne's offer. The SC of Sinnograd set aside the award as it violated its public policy.
25 September 2020	The High Court and the Supreme Court of Mekar enforced the arbitral award.
8 October 2020	Vemma sold its investment in Caeli to Mekar Airservices for 400M USD.

ARGUMENTS

[I] THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE INSTANT DISPUTE

1. Bonooru using CLAIMANT and its economic leverage, sought to redefine trade patterns in the Greater Narnian region, including in the RESPONDENT State. When its plans of doing so were rightly obstructed, it abandoned its investment. The instant dispute is an attempt by CLAIMANT to recover its losses, before a Tribunal which does not have jurisdiction.

2. According to the agreement between the disputing parties, the applicable laws are the AFR and Chapter 9 CEPTA.[1] Consequently, for the Tribunal to have jurisdiction in the instant dispute, it must satisfy the requirements under both CEPTA and the AFR. This Tribunal does not have jurisdiction because: *first*, neither CEPTA nor the AFR contemplate State-to-State arbitration **[1.1]**; and *second* CLAIMANT'S conduct is attributable to Bonooru, making the instant dispute a State-to-State arbitration **[1.2]**.

[1.1] NEITHER CEPTA NOR THE AFR CONTEMPLATE STATE-TO-STATE ARBITRATION

3. As per the "double-barrelled test" or "twofold test", while assessing its *ratione personae* jurisdiction, the Tribunal must ascertain both its special and general jurisdiction under relevant treaty provision and the AFR respectively.[2]

4. The Tribunal does not have jurisdiction because: *first,* CEPTA does not contemplate State-to-State arbitration **[1.1.1]**; and *second*, in any case, the AFR also do not contemplate State-to-State arbitration **[1.1.2]**.

[1.1.1] CEPTA does not contemplate State-to-State arbitration

5. CLAIMANT may erroneously contend that the applicable treaty is the 1994 BIT and that the 1994 BIT expressly includes government-owned entities within covered investors. In response, RESPONDENT argues that: *first*, the applicable treaty is CEPTA

[1] Moot Case 2021, Notice of Arbitration, p.2, 11.
[2] Laurence Burger, 'The Trouble with Salini (Criticism of and Alternatives to the Famous Test)' 31(3) ASA Bulletin, 521 p.527.

[1.1.1.1]; and *second*, CEPTA does not contemplate State-to-State Arbitration **[1.1.1.2]**.

[1.1.1.1] The applicable treaty is CEPTA

6. Both parties agreed to terminate the 1994 BIT under Art. 1.6 of CEPTA.[3] Under the same article, they agreed that investments made under the BIT shall be governed by CEPTA from date of entry into force of CEPTA,[4] which is 15 October 2014.[5] Since this dispute arose on 15 November 2020, CEPTA is the applicable treaty.[6] The same was acknowledged in CLAIMANT'S NoA.[7]

7. CLAIMANT may contend that since it was a covered investor under the 1994 BIT, that protection should also be extended to CEPTA. However, Art. 1.6 also clarifies that no investor has the right to bring a claim under the 1994 BIT after CEPTA comes into force.[8] Thus, the applicable treaty remains CEPTA.

[1.1.1.2] CEPTA does not contemplate State-to-State arbitration

8. CEPTA does not contemplate State-to-State arbitration since a State would not satisfy the requirements of being an investor. The status of an investor is only conferred upon natural persons or enterprises,[9] neither of which encompasses a State.

[1.1.2] The AFR do not contemplate State-to-State arbitration

9. In any case, the Tribunal must also meet the requirements of the AFR. Art. 2 of the AFR allows the Secretariat of the Centre an additional facility to administer proceedings between a State and a national of another State.[10] From the text of Art. 2, it is clear that the AFR do not contemplate proceedings between two States. This also receives support from the negotiating history of the ICSID Convention.[11] Thus,

[3] Moot Case 2021, CEPTA, p.72, 2548-2550.
[4] ibid, 2551-2552.
[5] Moot Case 2021, Statement of Uncontested Facts, p.33, 1117.
[6] Moot Case 2021, PO3, p.86, 3151-3152.
[7] Moot Case 2021, Notice of Arbitration, p.2, 11.
[8] Moot Case 2021, CEPTA, p.72, 2553-2554.
[9] ibid, p.73, 2589-2581.
[10] AFR, art. 2.
[11] Aron Broches, Selected Essays, World Bank, ICSID, and other Subjects of Public and Private International Law (Martinus Nijhoff Publishers 1995) p.202.

the AFR do not contemplate State-to-State arbitration. In sum, neither CEPTA nor the AFR contemplate State-to-State arbitration.

[1.2] CLAIMANT'S CONDUCT IS ATTRIBUTABLE TO BONOORU

10. Since neither the AFR nor CEPTA establish guiding principles for deciding the boundaries of sovereign conduct, the Tribunal must avail of attribution rules under CIL.[12] CIL consists of the Aron Broches test and ARSIWA.[13]

11. As per *BUCG v Yemen*, the Aron Broches test is mirrored in Art.8 and Art.5 of ARISWA. Thus, the test that should be used is whether the enterprise was (i) "acting as an agent for the government" **or** (ii) "discharging an essentially governmental function".[14] On the satisfaction of any of these prongs, the conduct of the enterprise is attributed to the State.

12. CLAIMANT'S conduct is attributable to Bonooru because CLAIMANT is acting as an agent for the Bonooru government **[1.2.1]**. In any case, CLAIMANT is exercising elements of governmental authority **[1.2.2]**.

[1.2.1] CLAIMANT is acting as an agent of the Bonooru Government

13. CLAIMANT is acting as an agent of the Bonooru government. The standard for proving agency in CIL is effective control with respect to a particular operation.[15] The same has been met in the instant dispute with respect to CLAIMANT'S investment in Mekar.

14. Bonooru owned a sizable stake in CLAIMANT at the time of the investment which ranged between 31% to 38%. While is not a majority stake, the same is not required to establish control.[16] Control can be established by looking at other surrounding factors based on the factual matrix of every case.[17] In the instant dispute, no other

[12] *Maffezini v Spain* (Jurisdiction), ¶76.
[13] *BUCG v Yemen,* ¶33-34.
[14] ibid.
[15] *Hamester v Ghana*, ¶179.
[16] *Vacuum salt v Ghana*, ¶43
[17] ibid, *Prosecutor v Tadić,* ¶117.

shareholder holds more than a 7% stake in CLAIMANT,[18] which gives the State of Bonooru more control over the activities of CLAIMANT vis-à-vis other shareholders.

15. Another surrounding factor the Tribunal must consider is the authoritative reputation of the shareholders.[19] Additionally, Bonooru (a State) would carry more authoritative reputation, as against other shareholders which are private and institutional in nature.[20]

16. Further, the articles of association gives Bonooru the right to nominate a non-executive director from the Ministry of Transport and Tourism,[21] who is part of the Board of Directors.[22] The Board of directors are the decision-making authority in CLAIMANT.[23] While their exact number is not indicated on the record, Bonooru's representatives on CLAIMANT'S board are sufficient to pass decisions in certain instances.[24]

17. This general control exercised by Bonooru as a shareholder in CLAIMANT also translated into CLAIMANT'S investment in Mekar. While the record does not provide the minutes of meetings conducted by CLAIMANT'S Board of Directors or any communication between Bonooru and CLAIMANT directly, we know that Bonooru frequently uses its economic leverage to achieve its goals.[25] This is also true of the instant dispute.

18. When Caeli was in a severe financial crisis,[26] such that even Mekar was not able to provide timely state aid,[27] CLAIMANT refinanced Caeli's debt from a Bonoori government-owned bank.[28] This debt was refinanced at more favourable rates than available on the market.[29]

[18] Moot Case 2021, PO4, p.89, 3273-3274.
[19] *Thunderbird v Mexico,* ¶108.
[20] Moot Case 2021, Statement of Uncontested Facts, p.39, 935-937.
[21] Moot Case 2021, Annex IV, p.46, 1575-1576.
[22] ibid, 1566-1567.
[23] Moot Case 2021, Annex IV, p.45, 1569-1571.
[24] Moot Case 2021, PO3, p.86, 3156-3160.
[25] Moot Case 2021, Statement of Uncontested Facts, p.28, 893-894.
[26] ibid, p.31, 1006.
[27] ibid, p.30, 977-978.
[28] ibid, p.31, 1024-1026.
[29] ibid, p.33, 1103-1104.

19. Even during the investment CLAIMANT received recurring subsidies from Bonooru under the Horizon 2020 Scheme.[30] This subsidy was granted because CLAIMANT itself admitted to using its investment in Caeli to draw more travellers from Mekar and the Greater Narnian region to Bonooru.[31] As proved in CCM's first investigation, the subsidies granted by Bonooru enabled CLAIMANT to engage into predatory pricing.[32] Interestingly, the secretary to the Ministry of Tourism and Transport (Ms. Sabrina Blue) who defended this subsidy before the House of Commons[33] was an erstwhile Head of CLAIMANT'S Board of Directors.[34]

20. Bonooru's use of economic leverage extended to not only CLAIMANT but also Mekar. Subsequent to CLAIMANT'S investment in Caeli, Bonooru promised funds update the Phenac International Airport[35]—which is central to trade in the entire Greater Narnian Region;[36] and over which Bonooru had full control through CLAIMANT'S investment in Caeli.[37] When its plans of making Phenac its fortress were rightly obstructed by the CCM in January 2019, it withdrew its funding a few days later.[38]

21. CLAIMANT may ask the Tribunal to only consider its stake as on the date of commencement of proceedings (31-38%), and disregard the subsequent increase to 55%. However, the Tribunal must also consider this as it shows the control exercise by Bonooru over CLAIMANT. When CLAIMANT made a commercially sound decision of scaling back the services offered by Royal Narnian, Bonooru used the Airways Infrastructure Rescue Act to increase its stake in CLAIMANT pursue large-scale restructuring.

22. CLAIMANT may also contend that it is not agent of Bonooru with respect to its investment in Mekar as it was chosen through a competitive bid based on its proposal. However, its proposal was not favoured by everyone on the Committee advising on the privatisation of Caeli. Some members found CLAIMANT'S "overly optimistic".

[30] Moot Case 2021, PO4, p.89, 3291-3292.
[31] Moot Case 2021, Statement of Uncontested Facts, p.32, 1084-1085.
[32] ibid, p.34, 1155-1157.
[33] ibid, p.32, 1081-1083.
[34] ibid, p.31, 1020-1021.
[35] Moot Case 2021, PO4, p.89, 3256-3269.
[36] Moot Case 2021, Statement of Uncontested Facts, p.32, 1060-1066.
[37] ibid, p.35, 1174-1176.
[38] Moot Case 2021, PO4, p.89, 3269-3271.

The Chairperson of the committee strongly proposed choosing CLAIMANT not because of the commercial merits of its proposal but because of CLAIMANT'S ties to Bonooru being an asset.

23. Thus, CLAIMANT is acting as an agent for Bonooru. This attributes its conduct to Bonooru and renders this arbitration between Mekar and Bonooru instead of Mekar and CLAIMANT.

[1.2.2] CLAIMANT is exercising elements of governmental authority

24. To attribute CLAIMANT'S conduct to Bonooru, RESPONDENT must prove that (i) CLAIMANT was exercising elements of governmental authority **[1.2.2.1]**, (ii) this governmental authority was exercised with respect to CLAIMANT'S investment in Mekar **[1.2.2.2]**, and (iii) CLAIMANT was empowered by the law of Bonooru to exercise governmental functions **[1.2.2.3]**.[39]

[1.2.2.1] Claimant was exercising elements of governmental authority

25. CLAIMANT was exercising elements of governmental authority while promoting mobility rights for Bonoori citizens. To determine what constitutes a governmental function, the Tribunal must look to the history and traditions of the particular State,[40] the nature of the power conferred, **and** the purposes for which such power is conferred.[41]

26. As per the history and traditions of Bonooru, the State has been responsible for regulating civil aviation.[42] This is because Bonooru is an archipelagic state where basic amenities concentrated in the major islands.[43] Civil aviation is necessary for citizens to access these amenities.[44] This is why the Constitution of Bonooru protects mobility rights,[45] and imposes a positive obligation upon the state.[46]

[39] ARSIWA, art. 5.
[40] YBICL 'Report of the Commission to the General Assembly on the work of its fifty-third session', (2001).
[41] *Maffezini v Spain* (Jurisdiction), ¶85-86, *BUCG v Yemen,* ibid.
[42] Moot Case 2021, Statement of Uncontested Facts, p.28, 908-910.
[43] ibid, 895-898.
[44] Moot Case 2021, Annex III, p.43, 1485-1487.
[45] Moot Case 2021, Annex I, p.41, 1427-1429.
[46] Moot Case 2021, Annex II, p.42, 1454-1459.

27. As to the nature of CLAIMANT'S activities, CLAIMANT'S investment in Caeli was not purely commercial. The routes between Bonooru and Mekar incurred particularly high fall-winter losses. Against the advice of Mekar[47] and other experts,[48] CLAIMANT refused to cut back its operation on these routes. Instead, significant resources are put into flights between Mekar and Bonooru.[49] Since these routes seem to more benefit Bonooru than CLAIMANT or Caeli,[50] it cannot be said that CLAIMANT was acting like any other private player in a commercial capacity.

28. CLAIMANT'S purpose or objective is also carrying out governmental functions. Its objective is expressed in its Memorandum of Association.[51] Art. 3(h) provides that CLAIMANT must develop the aviation industry and the civil aviation infrastructure for Bonoori citizens and their mobility rights.[52] Claimant is also playing an instrumental role in Bonooru's Caspian project.

29. The Caspian Project was launched to facilitate the movement of goods, people, services, and knowledge amongst its neighbours.[53] CLAIMANT'S contribution to this project was two-fold: *first*, it was able to facilitate business travellers from Mekar and other neighbouring countries to Bonooru,[54] and *second,* under the Horizon 2020 Scheme, as part of the Caspian Project, it assisted Bonooru in developing tourism-related infrastructure in Bonooru.[55] Such contribution was possible because of CLAIMANT'S expansion into Mekar.[56]

[1.2.2.2] The governmental authority was exercised with respect to CLAIMANT'S investment in Mekar

30. CLAIMANT exercised its governmental authority with respect to its investment in Mekar. CLAIMANT may argue that the governmental function of protecting mobility rights was restricted to within the territory of Bonooru and did not extend to its

[47] Moot Case 2021, Statement of Uncontested Facts, p.33, 1095-1098.
[48] ibid, 1124-1126.
[49] Moot Case 2021, Annex VII, p.55, 1862-1863.
[50] ibid, 1869-1871.
[51] Moot Case 2021, Annex IV, p.44, 1506.
[52] ibid, 1519-1521.
[53] Moot Case 2021, Statement of Uncontested Facts, p.28, 889-891.
[54] ibid, p.32, 1074-1076.
[55] ibid, 1076- 1081.
[56] Moot Case 2021, Statement of Uncontested Facts, p.33, 1086.

investment into Mekar. It may also argue that its objective of developing was restricted to the operation of Royal Narnian and not Caeli. Both these contentions are fallacious.

31. Mobility rights for Bonoori citizens extend even outside Bonooru. This is supported not only by the text of Art. 70 of the Constitution but also by the Constitutional Court of Bonooru's interpretation of Art. 70. Art. 70 clearly states that Bonoori citizens have the right to leave its territory,[57] and travel from its many islands (to other States).[58] The same was upheld in *The National Ferry Workers Union v Bonooru (Minister of Transportation).* The Court recognised the positive obligation on the state to ensure travel both "within, and *outside, Bonooru* (emphasis supplied)".[59]

32. CLAIMANT'S objective of developing the aviation industry and the civil aviation infrastructure for Bonoori citizens was translated in its acquisition of Caeli. This is clear for the Memorandum of Association of CLAIMANT. As per Art. 3(l), CLAIMANT can only investment in companies who are "undertaking the objectives of which are similar to" its own.[60]

[1.2.2.3] CLAIMANT was empowered by the law of Bonooru to exercise governmental functions

33. CLAIMANT was empowered by Privatisation of Enterprises Act 1972[61] read with CLAIMANT'S Memorandum of Association to exercise these functions.[62] Thus the third requirement is also met.

34. Therefore, CLAIMANT was discharging an essentially governmental function, and its conduct can be attributed to Bonooru. In that case, the instant dispute is an arbitration between two states, and the Tribunal does not have jurisdiction over the same.

[57] Moot Case 2021, Annex I, p.41, 1428.
[58] ibid, 1429.
[59] Moot Case 2021, Annex II, p.42, 1458.
[60] Moot Case 2021, Annex IV, p.44, 1525.
[61] Moot Case 2021, Statement of Uncontested Facts, p.29, 914.
[62] Moot Case 2021, Annex IV, p.44, 1519-1521.

CONCLUSION TO ISSUE ONE

35. Neither CEPTA nor the AFR contemplate proceedings between two States. Thus, Mekar has not consented to State-to-State arbitration with Bonooru. The instant dispute is a State-to-State arbitration because CLAIMANT'S conduct is attributable to Bonooru. This is because CLAIMANT is acting as an agent for Bonooru. Alternatively, CLAIMANT is exercising elements of governmental authority.

[II] THE CBFI'S *AMICUS* SUBMISSION IS INADMISSIBLE AND THE EXTERNAL ADVISORS' *AMICUS* SUBMISSION IS ADMISSIBLE

36. Owing to Art. 41(3) of the AFR and Art. 9.19 of CEPTA, non-disputing parties may make *amicus* submissions to the Tribunal. In pursuance of this, two such entities – the CBFI and the external advisors, have filed applications for leave to file non-disputing party *amicus curiae* submissions. In order to decide on the admissibility of the two *amicus* submissions, the Tribunal should take into consideration the interacting provisions laid down in the three specific documents and Rules agreed to by the parties: Art. 9.19 of CEPTA, Art. 41(3) of the AFR, and Art. 4.2 of the UNCITRAL Transparency Rules.

37. The interacting provisions of the aforementioned three rules lay certain evidentiary standards for consideration. In addition to this, the application of the UNCITRAL Transparency Rules also warrants 'public interest' to be a relevant standard for consideration. However, apart from the above, the Tribunal may also consider additional standards such as independence since there exists strong jurisprudence and policy considerations underlying the use of such standards. Further, other ICSID tribunals deciding on the admissibility of *amicus* submission have consistently used both public interest and independence as relevant standards.[63] The failure to meet even one of the relevant standards of consideration is sufficient to preclude the admissibility of an *amicus* submission.

38. Applying these evidentiary standards, it is submitted: *first*, that the CBFI's *amicus* submission is inadmissible **[2.1]**; and *second*, that the External Advisors' *amicus* submission is admissible **[2.2]**.

[2.1] THE CBFI'S *AMICUS* SUBMISSION IS INADMISSIBLE

39. The CBFI is a not-for-profit organisation representing Bonoori investors. It seeks to provide insight into the investment and business regime in Bonooru and Greater Narnia.[64] The CBFI's submission fails to satisfy three of the required evidentiary standards, which

[63] *Apotex v USA; InterAguas v Argentina; Von Pezold v Zimbabwe*.
[64] Moot Case 2021, *Amicus* Submission by the Consortium of Bonoori Foreign Investors, pp.16-17.

warrants its inadmissibility. The three failed standards are: *first*, the submission does not provide a different perspective from that of CLAIMANT **[2.1.1]**; *second*, the submission is not made in furtherance of any public interest **[2.1.2]**; and *third*, the CBFI does not satisfy the relevant independence threshold **[2.1.3]**.

[2.1.1] The submission does not provide a different perspective from that of CLAIMANT

40. The CBFI's *amicus* submission merely reiterates CLAIMANT'S narrative of supposed free-market conditions in Bonooru, and provides no different perspective to the dispute. Both the AFR and the UNCITRAL Transparency Rules require the non-disputing party to bring a different perspective to the dispute.

41. The CBFI seeks to represent the interests of Bonoori investors that have invested in Mekar and Greater Narnia. However, the interests carried by these investors are not different from that of CLAIMANT, which is a Bonoori investor that has invested in Mekar. Therefore, any interests and perspectives that are brought forth by the CBFI will have a significant overlap with the ones put forth by CLAIMANT, thereby making the CBFI's participation redundant.

42. In *Eli Lilly v Canada*, the tribunal barred participation by organisations owing to an overlap in opinions caused by membership and similar interests.[65] This is similar to the relationship between CLAIMANT and CBFI, which deems the latter's submission needless.

43. Further, although the CBFI claims to have industry-wide expertise,[66] the mere proclamation of the same does not warrant its participation. Even if a non-disputing party *claims* to have industry-wide experience, the Tribunal should preclude its submission if there is no scope for furthering arguments not put forth by the parties themselves.[67] As shown earlier, owing to an overlap of interests, there is no scope for the CBFI to provide a different perspective than CLAIMANT on the supposed free-market conditions in Bonooru. The overlap in this perspective would amount to the CBFI being a second CLAIMANT since it is more hostile to RESPONDENT than to CLAIMANT.[68]

[65] *Eli Lilly v Canada,* ¶4.
[66] Moot Case 2021, *Amicus* Submission by the Consortium of Bonoori Foreign Investors, p.16, ¶2.
[67] *Resolute Forest v Canada,* ¶4.4.
[68] *Electrabel v Hungary*, ¶234.

44. In any case, the participation of the CBFI would unfairly prejudice RESPONDENT since there would be additional costs and delays when there is no new perspective being brought to the dispute. Hence, although experienced and knowledgeable, the Tribunal should preclude the CBFI's submission.

[2.1.2] The submission is not made in furtherance of any public interest

45. The CBFI's *amicus* submission is not made in furtherance of any public interest. The application of the UNICTRAL Transparency Rules specifies public interest to be a relevant consideration in investor-state arbitration.[69] Further, public interest has also otherwise been consistently used as an evidentiary standard for the admission of *amicus* submissions, even without the application of the UNCITRAL Transparency Rules.[70]

46. The CBFI claims to be making its submission in furtherance of public interest in Greater Narnia's investment regime.[71] However, this is merely superficial since it only seeks to further professional interest. In *Apotex v USA*, the tribunal precluded an *amicus* submission made by a person who had vested interests in other disputes concerning the same treaty.[72] At the moment, 38 members of the CBFI hold investment rights in Mekar, and two such members are currently pursuing claims against RESPONDENT under CEPTA.[73] Any submissions made by the CBFI would therefore be clouded with the interests they have in securing favourable outcomes in all disputes involving their members.

47. Therefore, although the CBFI claims to make submissions in larger public interest, the Tribunal should note the obvious professional interest underlying such claims. Such furtherance of professional interest should preclude an *amicus* submission notwithstanding any outwardly claim by the non-disputing party that it is furthering public interest.[74]

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[69] Art. 1(4)(a).
[70] *Apotex v USA*.
[71] Moot Case 2021, *Amicus* Submission by the Consortium of Bonoori Foreign Investors, p.16, ¶8.
[72] *Apotex v USA*, ¶¶39-40.
[73] ibid, ¶6.
[74] *Apotex v USA*, ¶43.

[2.1.3] The CBFI does not satisfy the relevant independence threshold

48. The CBFI's *amicus* submission should be precluded owing to an apparent lack of independence. Although not a standard laid in any of the relevant provisions, the apparent lack of independence is sufficient grounds to deny an *amicus* submission[75] since such a lack of independence would be prejudicial to the other party.

49. Both CLAIMANT and its funding advisor Lapras are members of the CBFI.[76] Since Lapras is advising CLAIMANT with respect to the instant dispute, it does have a financial interest in the dispute. However, Lapras was still allowed to vote on the CBFI's *amicus* submission notwithstanding this interest.[77]

50. Hence, the admission of CBFI's brief would amount to allowing Lapras to indirectly participate in the dispute. This further leads to a conflict of interest since it already has an interest in the dispute, as CLAIMANT'S funding advisor. Furthermore, even CLAIMANT is a member of the CBFI, which therefore seeks to advance similar interests owing to such a membership.[78] The *amici*'s lack of independence would be contrary to the very purpose of such participation since any factual or legal assistance provided would be biased. This applies to the CBFI since it lacks independence from both CLAIMANT and Lapras, two bodies that already have vested interests in the instant dispute.

[2.2] THE EXTERNAL ADVISORS' *AMICUS* SUBMISSION IS ADMISSIBLE

51. The External Advisors are a group of investment bankers who were involved in the privatisation process of Caeli.[79] The core of their *amicus* submission deals with an act of bribery committed by CLAIMANT, in order to invest in Caeli.[80]

52. The External Advisors' submission is admissible because it meets all the required evidentiary standards in the interacting provisions of the AFR, CEPTA, and UNCITRAL Transparency Rules. Unlike the CBFI's submission, it provides a different perspective

[75] *Von Pezold v Zimbabwe*, ¶38.
[76] Moot Case 2021, *Amicus* Submission by the Consortium of Bonoori Foreign Investors, p.16, ¶7.
[77] Moot Case 2021, PO3, p.87, ¶12.
[78] Argued at §2.1.2.
[79] Moot Case 2021, *Amicus* Submission by External Advisors to the Committee on Reform of Public Utilities, p.19, 616.
[80] ibid, 635.

from that of the parties by providing facts that neither of them have access to.[81] This is because the External Advisors were involved in special internal activities during the privatisation of Caeli and are therefore in the unique position to adduce relevant facts.[82] The submission is also made by an independent body of advisors that are external to Respondent.[83]

53. The External Advisors satisfy all the requisite evidentiary standards, which warrants the admission of their submission. However, despite this, CLAIMANT contends that the External Advisors' submission is inadmissible.[84] In response to this, it is submitted that: *first*, the subject matter of the submission does not fall outside the scope of the dispute **[2.2.1]**; and *second*, the submission is made in furtherance of public interest **[2.2.2]**.

[2.2.1] The subject matter of the submission does not fall outside the scope of the dispute

54. CLAIMANT contends that External Advisors' *amicus* submission falls outside the scope of the dispute by raising a new jurisdictional question.[85] Admittedly, the AFR, CEPTA and the UNCITRAL Transparency Rules all require an *amicus* submission to fall within the scope of the dispute. However, CLAIMANT'S contention is erroneous. The External Advisors argue that the assessment of the legality of the investment is crucial to the determination of the Tribunal's competence-competence.[86]

55. In *Electrabel v Hungary*,[87] *amici* have been consulted on pertinent jurisdictional questions. Cases that have precluded *amici* submissions on jurisdictions have only done so if the parties have already argued issues on jurisdiction comprehensively, or have the capacity to do so.[88] Therefore, if the parties have not comprehensively argued all jurisdictional questions, the Tribunal should permit *amicus* submissions on the same. In the instant

[81] ibid, 636-640.
[82] ibid, 625-631.
[83] ibid, 616-623.
[84] Moot Case 2021, CLAIMANT'S Comments on Applications for Leave to File *Amicus* Submissions, p.21, 713-716.
[85] ibid.
[86] Moot Case 2021, *Amicus* Submission by External Advisors to the Committee on Reform of Public Utilities, p.19, 651.
[87] *Electrabel v Hungary*, ¶234.
[88] *UPS v Canada*, ¶71.

dispute, the parties have only addressed the *ratione personae* jurisdiction[89] of the Tribunal and not its *ratione legis* jurisdiction. Further, neither of them have access to the facts that the external advisors may provide. Therefore, the external advisors could assist the Tribunal with deciding on its *ratione legis* jurisdiction by adducing unique unbiased facts.

56. The Tribunal further has an independent obligation to decide whether the dispute before it falls within its jurisdiction, regardless of the stage at which the issue is raised.[90] If the corruption allegation is proven to be true, it would invalidate the investment and therefore all of CLAIMANT'S submissions before this Tribunal.[91] While CLAIMANT may contend that any such act has the possibility of being condoned by Mekari public policy, it is pertinent to note that liability for corruption may be extended notwithstanding domestic public policy.[92] This is also because corruption in international investment violates international public policy as well.[93]

57. The External Advisors' submission is within the scope of the dispute since it seeks to adduce important facts that will help decide on the legality of CLAIMANT'S investment in Caeli and thereby the *ratione legis* jurisdiction of the Tribunal. Not deciding on the legality of the investment could challenge the instant proceedings and any award rendered in the future. Therefore, in the instant dispute, the External Advisors' submission should be admitted since it raises an issue not raised or argued by either of the parties, and falls within the scope of the dispute.

[2.2.2] The submission is made in furtherance of public interest

58. Unlike the CBFI, the external advisors make their *amicus* submission in clear furtherance of public interest. As rightly noted by the External Advisors in their application,[94] there is a clear public interest that raises policy considerations in the dispute. This is because deciding on the acts of bribery by CLAIMANT will have significant ramifications in the investment regime at large. Since CLAIMANT'S submissions are tainted by allegations of

[89] Argued at §1.
[90] AFR, art. 45(3).
[91] *World Duty Free v Kenya*, ¶188(3); *Metal-Tech v Uzbekistan*, ¶422.
[92] *World Duty Free v Kenya*, ¶¶156-157.
[93] ibid.
[94] Moot Case 2021, *Amicus* Submission by External Advisors to the Committee on Reform of Public Utilities, p.19, 635.

bribery, it is imperative that this Tribunal decide on the same in an unbiased manner. In order to decide on the corruption claim in the most accurate and unbiased manner possible, the Tribunal must consider the External Advisors submissions since they are both knowledgeable and independent. As a result, the External Advisors make their *amicus* submission to address the larger policy concern of corruption in investment arbitration, their submission is in furtherance of public interest.

59. In any case, even if this Tribunal were to decide that the submission is not made in public interest, it may still admit the submission since it satisfies all other criteria and would aid in the transparency of the proceedings.[95] Transparency is a specific consideration since the parties have chosen to adopt the UNCITRAL Transparency Rules.[96] However, it is pertinent to note that the CBFI do not receive protection under this provision since they fail to satisfy other evidentiary standards such as independence and no different perspective from that of CLAIMANT. Therefore, the External Advisors' submission meets the relevant public interest standard.

CONCLUSION TO ISSUE TWO:

60. In applying the relevant evidentiary standards in the applicable law, only the External Advisors' submission is admissible among the two *amicus* submissions. The CBFI's *amicus* submission is inadmissible since it does not fulfil the standards of providing different perspective from that of CLAIMANT, independence from CLAIMANT, and furtherance of public interest. On the other hand, the External Advisors' submission satisfies all the relevant standards for consideration, including the ones that the CBFI fails to satisfy. Further, contrary to CLAIMANT'S contention, the External Advisors' submission also falls within the scope of the dispute since it seeks to provide facts to help decide on the *ratione legis* jurisdiction of this Tribunal.

[95] *Biwater Gauff v Tanzania* (PO5), ¶54.
[96] Art. 1(4)(a).

[III] RESPONDENT HAS NOT BREACHED ART. 9.9 OF CEPTA

61. After making a series of reckless decisions driving Caeli to the ground,[97] CLAIMANT approaches this Tribunal in an attempt to shrug off liability on RESPONDENT using Mekari taxpayers' money. CLAIMANT'S contentions on the breach of the FET standard are a classic example of an investor bending developing countries to their will.

62. The FET standard is embodied in Art. 9.9 of CEPTA. Arts. 9.9(2) and 9.9(3) of CEPTA exhaustively list down all the possible breaches of the FET standard by a state's measures.[98]

63. It is imperative to note three considerations: *First*, the measures constituting a breach of the FET standard encompass acts and omissions of the Mekar's legislature, executive, and judiciary.[99] *Second*, the CIL standard should not be applied since Art 9.9 is an 'autonomous treaty' standard[100] and reflects specific party intent.[101] The FET standard in CEPTA mirrors the one in CETA.[102] Scholars have interpreted that the FET standard of CETA is quite high and can be invoked only in tightly defined circumstances.[103] *Third*, the FET standard of Art. 9.9 is constricted by a state's 'Right to Regulate', guaranteed under Art. 9.8 of CEPTA.[104] Negative effects on an investment through mere regulatory conduct can thus not attract FET.[105]

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[97] Moot Case 2021, Annex IX, p.57, 1956-1959; Annex VII, p.55, 1890-1895.
[98] Moot Case 2021, CEPTA, p.76, 2738-2750.
[99] Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge University Press 2009) p.79.
[100] Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6(3) Journal of World Investment and Trade 357, p.359; Hussein Haeri, 'A Tale of Two Standards: 'Fair and Equitable Treatment' and Minimum Standard In International Law' (2011) 27(1) Arbitration International 27, p.34; *Lemire v Ukraine*, ¶284; *National Grid v Argentina* ¶¶170-172; *Total v Argentina*, ¶107; *Saluka v Czech Republic*, ¶294.
[101] Christophe Bondy, 'Fair and Equitable Treatment – Ten Years On' in Jean Kalicki and Mohamed Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration* (Kluwer 2019) 198, p.224.
[102] CETA, Art 8.10(2).
[103] Bondy (n 101) p.222, Caroline Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP' [2016] 19(1) Journal of International Economic Law 27, p.49.
[104] Moot Case 2021, CEPTA, p.76, 2724-2732.
[105] ibid, 2729-2732.

64. RESPONDENT has not breached the FET standard because: *first*, it has not violated CLAIMANT'S legitimate expectations [Art. 9.9(3)] **[3.1]**; *second*, it has not denied justice in judicial or administrative proceedings [Art. 9.9(2)(a)] **[3.2]**; *third*, there has been no fundamental breach of due process or transparency [Art. 9.9(2)(b)] **[3.3]**; *fourth*, RESPONDENT'S measures were neither arbitrary nor discriminatory [Art. 9.9(2)(c)] **[3.4]**; *fifth*, RESPONDENT'S conduct was not abusive [Art. 9.9(2)(d)] **[3.5]**.

[3.1] RESPONDENT HAS NOT BREACHED CLAIMANT'S LEGITIMATE EXPECTATIONS [ART. 9.9(3)]

65. In FET parlance, legitimate expectations are expectations an investor has that specific benefits assured to them at the time of investment will not be revoked by legal or other framework.[106]

66. Art. 9.9(3) of CEPTA stipulates that the Tribunal *may* consider whether *specific* representations that induced the investment were frustrated by state conduct. Legitimate expectations is not part of the list of measures that constitute a breach of the FET standard under Art 9.9(2).[107]

67. Such a phrasing of the treaty has two key implications: *first*, the breach of legitimate expectations cannot independently result in a breach of Art. 9.9; and *second*, only specific representations made at the time of the investment will fall under the purview.[108] Therefore, claims of a stable legal framework[109] and preventing economy crisis[110] are ousted under CEPTA. Thus, no claims can be made on the Mekari MON Crisis.

68. CLAIMANT may contend that the CCM Investigations[111] breached their legitimate expectations. Admittedly, CLAIMANT'S benefits with respect to the Moon Alliance

[106] *Tecmed v Mexico*, ¶154; *Occidental v Ecuador*, ¶145; *National Grid v Argentina*, ¶173; *Waste Management v Mexico*, ¶98.
[107] Moot Case 2021, CEPTA, p.76, 2747-2750.
[108] Rudolph Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn. OUP 2012) 371.
[109] *Glencore v Columbia*, ¶1368; *Perenco v Ecuador*, ¶562.
[110] *CMS v Argentina*, ¶240; *Enron v Argentina*,¶149.
[111] Moot Case 2021, Statement of Uncontested Facts, p.34, 1048-1055; p.35, 1176-1178.

and Phenac Airport were approved at the time of the investment.[112] Moreover, the benefits of Moon Alliance[113] and Phenac Airport[114] were key to their decision to invest.

69. RESPONDENT is not contesting the existence of these expectations, however, the issue is the scope of the legitimate expectations. Investor's expectations should legitimate, reasonable, and fair.[115] It is highly unreasonable to expect that an approval of benefits implies that an investor will never be prosecuted for misusing the benefits. The investor is supposed to exercise the benefits within the bounds of the law.[116]

70. When CLAIMANT'S benefits were approved by the CCM, CLAIMANT took an undertaking that it will not engage in "high-level co-operation on competition parameters such as prices, schedules, capacity, facilities, and other sensitive information will Moon Alliance members".[117] Moreover, all investors are bound by the provisions of Mekar's MRTP Act, which listed the offences.[118] RESPONDENT never promised CLAIMANT that it can abuse the benefits to the detriment of competition in Mekar. States can regulate matters in public interest, including economic interest.[119]

71. The two CCM Investigations were legally sound. The First Investigation (September 2016) concerned with the allegation of predatory pricing.[120] This was due to CLAIMANT'S ties with the Moon Alliance *and* benefits CLAIMANT received under the Horizon 2020 Scheme.[121] There were allegations of preferential slot-trading between Caeli and Royal Narnian.[122] Practices of *preferential* slot-trading have been found to be anti-competitive.[123] Before the investigation, a CCM White Paper emphasised the anti-competitive nature of market-disruptive agreements, where one of the parties is

[112] ibid p.32, 1042-1057.
[113] ibid, p.31, 1024-1026.
[114] ibid, 1026-1028.
[115] *Silver Ridge v Italy*, ¶444; *Fuchs v Georgia*, ¶440; *Rumeli v Kazakhstan*, ¶609.
[116] Campbell McLachlan, Laurence Shore, and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, OUP 2017) ¶7.16.1.
[117] Moot Case 2021, Statement of Uncontested Facts, p.32, 1046-1049.
[118] Moot Case 2021, Annexure V
[119] *Saluka v Czech Republic*, ¶305; *Lemire v Ukraine*, ¶285; *AES v Hungary*, ¶10.3.8.
[120] Moot Case 2021, Statement of Uncontested Facts, p.34, 1149-1150.
[121] ibid 1155-1157.
[122] ibid, 1155.
[123] Ian Jones, Ivan Viehoff, and Philippa Marks, 'The Economy of Airport Slots' [1993] 14(4) Fiscal Studies 37, 50; *Sea Containers v Stena Sealink*, p.79

state-owned.[124] This was exactly happening in the instant dispute, where Caeli and Royal Narnian were killing competition with influx of Bonoori capital. Finally, CCM found the allegations to be true and released voluminous reports explaining the same.[125]

72. The CCM instituted the Second Investigation in December 2016 upon the application of consortium of small regional airlines in Greater Narnia.[126] Caeli was accused of launching flights on routes just to push competitors off by using its privileges at the Phenac Airport.[127] Such an action would attract Chapter 4 of the MRTP Act.[128] The argument that Caeli was competing with other forms of transport[129] is erroneous.[130]

73. These allegations were found to be true.[131] Caeli used its privileges of the Phenac Airport to kill competition by introducing excessively low prices only on routes to and from the airport *without* making new customers or extra revenues.[132]

74. Fairness is assessed on the basis of the investor's knowledge about the host state and what they should have reasonably known.[133] Both the investigations were correct application of the applicable laws and undertakings that Caeli knew and was bound by. Nothing on the record shows that these investigations were carried out only on the basis of benefits part of the original privatization package. Subsequent actions of Caeli were the cause of these investigations. RESPONDENT was merely regulating competition as rational policy objective. Thus, CLAIMANT'S legitimate expectations are not violated.

[124] Moot Case 2021, Statement of Uncontested Facts, p.34, footnote 3.
[125] ibid, p.36, 1243-1247.
[126] ibid, p.35, 1170-1182.
[127] ibid, 1172-1174.
[128] Moot Case 2021, Annexure V, p.48, 1651-1659.
[129] Moot Case 2021, Statement of Uncontested Facts, p.35, 1178-1180.
[130] COMP/A.38284/D2, ¶11.
[131] Moot Case 2021, Statement of Uncontested Facts, p.37, 1278-1279.
[132] ibid, 1282-1285.
[133] *Electrabel v Hungary*, ¶7.78.

[3.2] CLAIMANT WAS NOT DENIED JUSTICE IN ADMINISTRATIVE OR JUDICIAL PROCEEDINGS

75. A claim for denial of justice lies in judicial proceedings when there are undue delays,[134] denial of reasonable access to courts,[135] clearly improper and discreditable judgment,[136] justice delivered in a seriously inadequate manner,[137] and violation of due process rights.[138] Arguments on violation of due process and transparency will be dealt with in the next submission.[139]

76. The concept of denial of justice is a procedural standard since international law recognises special deference to adjudicatory process.[140] Denial of justice does not occur in a misapplication of domestic law.[141] It occurs when the outcome is irrational and abusive *beyond* a misapplication of law.[142]

77. There is nothing on the record to indicate any procedural defects with respect to the CCM Investigations. CLAIMANT may contend that Mekari judiciary denied them justice by having undue delays and enforcing an annulled award. These contentions are erroneous because *first*, there were no undue delays in the Mekari judiciary **[3.2.1]**; and *second*, the decision to enforce an annulled award was not clearly improper, discreditable, irrational, or abusive **[3.2.2]**.

[3.2.1] There were no undue delays in the Mekari judiciary

78. In accordance with the MRTP Act,[143] CCM placed airfare caps on Caeli during the First Investigation.[144] After the MON began to nosedive in 2016, the maintenance of

[134] *Toto v Lebanon* (Jurisdiction), ¶¶358-60.
[135] *Azinian v Mexico*, ¶¶99-103; *Iberdrola v Guatemala* (I), ¶432.
[136] *Mondev v USA*, ¶127; *Arif v Moldova* ¶445.
[137] *Azinian v Mexico* ¶¶102-03.
[138] *Krederi v Ukraine* ¶¶461-65; *Manchester Securities v Poland* ¶498; *Siag v Egypt*, ¶¶454-455.
[139] Argued at §3.3.
[140] McLachlan (n 116) ¶7.109; Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press 2005) p.7; Zachary Douglas, 'International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed' 63 International and Comparative Law Quarterly pp.867, 877.
[141] Moot Case 2021, CEPTA, p.76, 2753-2754.
[142] *Rumeli v Kazakhstan*, ¶¶652-653.
[143] Moot Case 2021, Annex V, p.47, 1615-1627.
[144] Moot Case 2021, Statement of Uncontested Facts, p.34, 1160-1162.

these caps started causing Caeli losses.[145] Consequently, Caeli's board sought a judicial review of these caps in March 2018.[146] An interim hearing was scheduled after 13 months, in April 2019.[147] CLAIMANT may contend that this delay of 13 months was undue.

79. A determination on the claim of undue delay amounting to denial of justice is specific to the facts of each case.[148] Tribunals have considered factors like: the state of a country's judiciary,[149] the need for celerity,[150] and complexity of the dispute.[151] Delay must be indefinite or undue.[152] There have been instances where a judicial delay of more than 5 years has not been considered denial of justice due to the state of the country's judiciary.[153]

80. In the instant dispute, CLAIMANT should have reasonably known that owing to Mekar's population, commercial matters took 27 months on an average to get adjudicated.[154] In the middle of the MON crisis, the burden on judiciary was even worse.[155] In the instant dispute, the delay was definite (13 months) and warranted due to the workings of Mekari judiciary, known to the CLAIMANT. Therefore, there is no undue delay.

[3.2.2] Mekari court's decisions to enforce the annulled award does not constitute a denial of justice

81. Owing to the burgeoning liabilities, CLAIMANT decided to sell its stake in Caeli in November 2019.[156] It received a bid of 600M USD from Hawthorne.[157] RESPONDENT,

[145] Moot Case 2021, Statement of Uncontested Facts, p.36, 1221-1229.
[146] ibid, 1229-1230.
[147] ibid, 1233-1235.
[148] *White Industries v India*, ¶10.4.10.
[149] ibid ¶¶10.4.10-10.4.24; *Toto v Lebanon* (Jurisdiction), ¶165.
[150] *Toto v Lebanon* (Jurisdiction), ¶163.
[151] *Jan de Nul v Egypt*, ¶204.
[152] *Azinian v Mexico*, ¶¶102-103.
[153] *White Industries v India*, ¶¶10.4.10-10.4.24.
[154] Moot Case 2021, Statement of Uncontested Facts, p.30, 953-954.
[155] ibid, p.36, 1239-1241.
[156] ibid, p.38, 1339-1341.
[157] Moot Case 2021, Annex X, p.58, 1990-1993.

through Mekar Airservices,[158] had the right to match an arms-length offer.[159] RESPONDENT challenged that offer for not being arms-length.[160] Consequently, an arbitration headed by Justice Cavannaugh was instituted.[161] The arbitrator rendered an award in favour of RESPONDENT.[162]

82. A report emerged alleging bribery between Mekari authorities and Justice Cavannaugh.[163] Consequently, CLAIMANT challenged the award at Sinnoh, the seat of the arbitration.[164] The award was set aside on grounds of violation of public policy.[165] The Mekari High Court and Supreme Court, applying a cogent interpretation of the New York Convention, domestic law, and fact-circumstances, enforced the award by Justice Cavanaugh.[166]

83. This Tribunal is not a super-appellate court to substantially review whether the law was applied correctly.[167] As mentioned earlier,[168] denial of justice is a procedural standard and the correctness of a decision cannot be questioned before the Tribunal.[169] Tribunals in the past have used terms like "so lacking in seriousness as to indicate bias"[170] and "malicious and clearly wrong"[171] in the context of judgments. The scope of review of a judgment is therefore extremely limited.

84. In the instant dispute, Mekar's High Court and Supreme Court applied the discretion vested upon them by the New York Convention.[172] They gave a reasoned decision, applying all the relevant laws. In the past, courts and scholars have held that annulled

[158] Moot Case 2021, PO1, p.13, 414-416.
[159] Moot Case 2021, Annex VI, Art 39, pp.52-53, 1749-1781.
[160] Moot Case 2021, Statement of Uncontested Facts, p.39, 1345-1346.
[161] ibid, 1355-1357.
[162] ibid, 1358-1361.
[163] ibid; 1366-1373; Annex XII, p.61, 2070-2074.
[164] Moot Case 2021, Statement of Uncontested Facts, p.39, 1376-1377.
[165] ibid, 1378-1382; Annex XIII, p.64, 2209-2211.
[166] Moot Case 2021, Statement of Uncontested Facts, p.39, 1384-1389; Annex XIV, pp.65-66, 2254-2270; Annex XV, pp.67-68, 2341-2364.
[167] *Mamidoil v Albania*, ¶¶764-770; *Loewen v USA*, ¶136.
[168] Argued at §3.2.
[169] McLachlan (n 116) ¶7.109.
[170] *Lidercón v Peru*, ¶270.
[171] *Al-Bahloul v Tajikistan*, ¶237.
[172] New York Convention, art V(1)(e).

awards can be recognised at the place of enforcement.[173] In *Hilmarton*, French courts applied their public policy to recognise an annulled award.[174]

85. Owing to past practice and global jurisprudence, Mekari court's decision to enforce the awards is not egregious, to say the least. Thus, there has been no denial of justice in the instant dispute.

[3.3] THERE WAS NO FUNDAMENTAL BREACH OF DUE PROCESS OR TRANSPARENCY

86. Due process entails right to be heard and right to be treated without prejudice.[175] Art. 9.9(2)(b) of CEPTA is violated if a state's measures constitute a *fundamental* breach of due process, including a *fundamental* breach of transparency in judicial and administrative proceedings. Emphasis is placed on the qualifier 'fundamental' since it indicates party intent to increase the threshold of the breach.[176]

87. CLAIMANT may contend that due process was breached when Justice VanDuzer dismissed the case on merits after an interim hearing on the removal of airfare caps.[177] However, there was no procedural impropriety in the instant dispute. This is because during the interim hearing, CLAIMANT was given an opportunity to present its case.[178]

88. With respect to the dismissal on final merits, the domestic law of Mekar empowers the courts to pass summary judgments,[179] in line with global precedent.[180] CLAIMANT should have reasonably known the nature of Mekari judiciary.[181]

89. CLAIMANT may also contend Justice VanDuzer's dismissal was not well-reasoned. As established earlier, a poorly-written judgment or an incorrect decision cannot give rise

[173] *Chromalloy v Egypt*; *Baker Marine v Chevron*; *Rosneft v Yukos*; Gary Born, *International Commercial Arbitration* (3rd edn, Kluwer 2021) pp.3991-3994; Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer, 2016) 210-211.
[174] *Hilmarton v OTV*.
[175] *Loewen v USA*, ¶123.
[176] Bondy (n 101) p.222.
[177] Moot Case 2021, Statement of Uncontested Facts, p.38, 1321-1334.
[178] ibid, 1309-1310.
[179] Moot Case 2021, PO4, p.86, 3181-3183.
[180] *Hryniak v Mauldin*; *Bell Atlantic Corp.v Twombly*.
[181] *Electrabel v Hungary*, ¶7.78.

to a claim of denial of justice.[182] Justice VanDuzer had heard the case in the interim hearing and concluded that CCM's investigation was reasonably cogent.[183] Therefore, there is no fundamental breach of due process or transparency.

[3.4] RESPONDENT'S MEASURES WERE NEITHER ARBITRARY NOR DISCRIMINATORY

90. Art 9.9(2)(c) protects investors against arbitrary and discriminatory measures by a state. Since the terms 'arbitrary' and 'discriminatory' are separated by an 'or', the test is disjunctive.[184] RESPONDENT has a 'Right to Regulate' under Art. 9.8 and an action is not arbitrary or discriminatory merely on the basis that it is detrimental to CLAIMANT.[185] RESPONDENT'S measures were neither arbitrary **[3.4.1]** nor discriminatory **[3.4.2]**.

[3.4.1] Respondent's measures were not arbitrary

91. An arbitrary measure is not based on legal standards or facts but on excess discretion, prejudice or personal preference.[186] The standard for arbitrariness is borrowed from *ELSI*:[187]

> Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.

92. Subsequent tribunals have endorsed this standard in investor-state disputes.[188] This essentially means that there should be a blatant disregard of the law and not a mere misapplication of the law.[189] Moreover, Tribunals have rarely read in proportionality into the requirement of non-arbitrariness in FET.[190]

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[182] Argued at §3.2, ¶75.
[183] Moot Case 2021, Statement of Uncontested Facts, p.38, 1323-1333.
[184] *Azurix v Argentina*, ¶391; *Lemire v Ukraine*, ¶260.
[185] Moot Case 2021, CEPTA, p.76, 2724-2732.
[186] *Occidental v Ecuador*, ¶104; *Teinver v Argentina*, ¶923.
[187] *ELSI*, ¶128.
[188] *Azurix v Argentina* ¶¶392-393; *Noble Ventures v Romania*, ¶178; *Tza Yap Shum v Peru*, ¶192.
[189] *Lemire v Ukarine*, ¶385.
[190] Gerard Bücheler, *Proportionality of Investor-State Arbitration* (OUP 2015) p.93.

93. CCM has not been arbitrary by initiating *suo moto* investigation on Caeli **[3.4.1.1]** or by maintaining airfare caps during the currency crisis **[3.4.1.2]**. The executive's decision to revoke the exemption to use USD was also not arbitrary **[3.4.1.3]**.

[3.4.1.1] *Suo Motu* Investigation into Caeli was not arbitrary

94. In September 2016, CCM instituted the First Investigation into Caeli's activities.[191] For a *suo moto* institution of the offence, the MRTP Act requires the corporation to have a 50% market share.[192] Discretion can be exercised in exceptional circumstances to investigate companies with lower market share.[193] At that time, Caeli enjoyed a market share of 43%.[194] CCM took *suo moto* cognisance by combining Caeli with Caeli's Moon Alliance partner, Royal Narnian, who had a 13% market share.[195]

95. CLAIMANT may contend that such an exercise of power was arbitrary alleging alliances cannot be looked at together. This is untenable. The charge of predatory pricing was due to Caeli abusing its ties with the Moon Alliance members.[196] It should also be noted that Royal Narnian was also a 100% subsidiary of CLAIMANT.[197] They would be a single economic entity.[198] In any case, CCM had the discretion to investigate corporations having a market share below 50%. The circumstances when look at cumulatively warranted a *suo moto* investigation. Thus, the investigation was not arbitrary.

[3.4.1.2] Maintenance of Airfare Caps in the MON crisis is not arbitrary

96. In September 2016, CCM imposed airfare caps as an interim measure to prevent Caeli from undercutting prices and making supra-competitive profits while the investigation on predatory pricing was pending.[199] These caps, an interim measure, sourced their

[191] Moot Case 2021, Statement of Uncontested Facts, p.34, 1147-1150.
[192] Moot Case 2021, Annex V, p.47, 1600-1603.
[193] ibid.
[194] Moot Case 2021, Statement of Uncontested Facts, p.34, 1150-1151.
[195] ibid, 1153-1154.
[196] ibid,1153-1155.
[197] Moot Case 2021, Statement of Uncontested Facts, p.29, 932-933.
[198] *Durkan Holding v OFT*, ¶¶15, 22.
[199] Moot Case 2021, Response to Notice of Arbitration, p.7, 239.

legality from the MRTP Act.[200] The imposition of these caps was in accordance with the procedure. These caps were reasonably above airfare prices charged by Caeli and did not even hurt CLAIMANT'S profitability.[201]

97. The issue arises whether the maintenance of these caps in the MON crisis was arbitrary. The facts in the instant dispute are strikingly similar to *Teinver v Argentina*. In *Teinver*, an airline was facing losses in an economic crisis and there were economically unreasonable airfare caps. The *Teinver* tribunal did not find such an act to be arbitrary.[202]

98. In the instant dispute, the airfare caps arose from allegations of predatory pricing (First Investigation). CLAIMANT was found to have engaged in anti-competitive measures by charging low prices[203] and undercut ticket fares to push competitors off the market.[204] These caps were thus necessary. Moreover, when Caeli's market share dropped below the relevant threshold of 40%, these caps were lifted.[205]

99. In any case, the fact that the caps were disproportionate does not make them arbitrary. As argued earlier, the threshold to prove arbitrariness is high and a wilful disregard of due process has to be shown. The present circumstances do not meet this standard since the procedure was duly followed.

[3.4.1.3] The revocation of the exemption to USD is not arbitrary

100. In order to generate trust in MON, RESPONDENT mandated the use of MON for all services in Mekar. However, RESPONDENT approved the denomination of airfare in USD for all airlines operating in its territory in October 2017.[206] As the crisis worsened, the decision to allow the use of USD was overturned and all companies

[200] Moot Case 2021, Annex V, p.47, 1615-1627.
[201] Moot Case 2021, Statement of Uncontested Facts, p.35, 1168-1169.
[202] *Teinver v Argentina*, ¶924.
[203] Moot Case 2021, Statement of Uncontested Facts, p.36, 1244-1247.
[204] ibid, p.37, 1281-1282.
[205] ibid, p.38, 1336-1338.
[206] ibid, p.35, 1198-1199.

had to offer services exclusively in MON.[207] This course of action to ensure credibility in the currency was also suggested by IMF.[208]

101. RESPONDENT had the 'Right to Regulate' their affairs in public interest. Such revocation of the exemption is not arbitrary. It was driven by rational policy suggested by experts. As mentioned earlier, the fact that CLAIMANT suffered losses would be immaterial. Thus, RESPONDENT'S conduct has not been arbitrary.

[3.4.2] Respondent's measures were not discriminatory

102. To alleviate the effects of the crisis, RESPONDENT passed Executive Order 9-2018.[209] It granted subsidies to the airline industry in September 2018.[210] Caeli was denied subsidies on the grounds of being state-owned.[211]

103. State actions are discriminatory, if cases (i) in like circumstances (ii) are treated differently, and (iii) without reasonable justification.[212] Admittedly, Caeli was in like circumstances compared to the airlines that received the subsidy and was treated differently. However, the differential treatment had rational justification.

104. Mekar's Deputy Minister of Transportation publicly said that State-owned companies would not receive the benefit of the subsidy.[213] The question arises whether state-ownership is a rational policy justification to deny subsidies in an economic crisis. The fact that companies receiving greater subsidies than CLAIMANT is therefore immaterial.

105. In an economic crisis, a state's resources are limited and there has to be some prioritisation of who gets saved first. State-owned companies have unique competitive advantages like tax-rebates, purchase and sale preferences, regulatory advantages, and

[207] ibid, 1209-1210.
[208] ibid, 1189-1190.
[209] Moot Case 2021, Annex VIII, p.56, 1903-1904.
[210] Moot Case 2021, Statement of Uncontested Facts, p.36, 1252-1256.
[211] ibid, p.37, 1264-1265.
[212] *Saluka v Czech Republic*, ¶313; *Bayindir v Pakistan*, ¶399; *Plama v Bulgaria*, ¶158; *Cargill v Mexico* ¶298.
[213] Moot Case 2021, Statement of Uncontested Facts, p.37, 1261-1265.

deep pockets.[214] Thus, to ensure fair competition, rejecting subsidies to state-owned entities would be rational. In fact, another government-owned airline – Larry Air was also denied subsidies.[215] This echoes that the denial of subsidies was not targeted at the CLAIMANT.

106. CLAIMANT may bring to light the *Saluka* judgment where the tribunal found the denial of financial assistance on the basis of ownership to be discriminatory.[216] However, the instant dispute is distinguishable. In *Saluka*, the owner was a private banking magnate Nomura bank. On the contrary, Bonooru has continuously pumped funds and exercised control on CLAIMANT and consequently, Caeli.[217] Caeli's roots to Bonooru therefore placed them in an advantageous position compared to its competitors. Thus, there was a rational justification to deny Caeli the subsidies. Hence, RESPONDENT'S conduct is not discriminatory.

[3.5] RESPONDENT'S CONDUCT WAS NOT ABUSIVE

107. Art. 9.9(2)(d) protects investors from abusive conduct like harassment, coercion, and duress.

108. To prove harassment, tribunals considered the exertion of undue pressure to renegotiate contracts,[218] political motives,[219] unreasonable investigations,[220] threat of criminal proceedings,[221] and obstruction of daily business activities.[222] However, "bureaucratic overzealousness" and excessive enforcement of action does not constitute harassment.[223] As argued earlier, the CCM's actions do not fulfil the standard for "unreasonable investigations" as they were neither arbitrary nor discriminatory.[224] There is also no evidence of any bad faith in these actions.

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[214] Richard Nielson, 'Competitive Advantages of State Owned and Controlled Businesses' (1981) 21(3) Management International Review pp.56, 66.
[215] Moot Case 2021, Statement of Uncontested Facts, p.37 1266-1268.
[216] *Saluka v Czech Republic*, ¶334.
[217] Argued at §1.2.1.
[218] *PSEG v Turkey*, ¶247.
[219] *Burlington v Ecuador* (Liability), ¶172.
[220] *Krederi v Ukraine*, ¶638; *Vivendi v Argentina*, ¶7.4.19.
[221] *CME v Czech Republic* (Award), ¶¶490, 511.
[222] *Biwater Gauff v Tanzania* (Award) ¶¶223-224.
[223] *Mamidoil v Albania*, ¶¶748-749.
[224] Argued at §3.4.

109. To prove that an agreement was made under duress, the investor has to prove that there was illegitimate pressure and they had no alternative but to sign the agreement.[225] However, the *Desert Line* tribunal noted that mere financial pressure does not constitute duress.[226] For duress, the appropriate standard is "compulsion that can be created by a superior force in a hostile environment, where the scales of justice have been manifestly compromised".[227]

110. CLAIMANT may contend that selling their stake in Caeli to RESPONDENT was under duress. This is misconceived. CLAIMANT was only under economic pressure due to the crisis. There was no manifest judicial improprieties, as established earlier.[228] Moreover, the pressure on CLAIMANT to sell was due to the losses created by their own mismanagement.[229] The same cannot be attributed to RESPONDENT. Therefore, the agreement was not signed under duress. Thus, Art. 9.9(2)(d) is not violated.

CONCLUSION TO ISSUE 3:

111. RESPONDENT has complied with its FET obligations at every step of the investment. Owing to the fact-circumstances of this case and the appropriate standards: CCM's investigations were not in violation of CLAIMANT'S legitimate expectations; the judiciary complied with the principles of justice and due process; the CCM was not arbitrary in investigating Caeli and maintain airfare caps; the executive's order to reject subsidies to Caeli was not discriminatory. The actions do not constitute harassment and the agreement to sell Caeli to RESPONDENT was not made under duress. Thus, the FET standard is not violated.

[225] *Desert Line Projects v Yemen*, ¶¶148-190.
[226] ibid, ¶151.
[227] ibid, ¶155.
[228] Argued at §§3.2-3.3.
[229] Moot Case 2021, Annex IX, p.57, 1956-1959; Annex VII, p.55, 1890-1895.

[IV] THE APPROPRIATE COMPENSATION STANDARD IS OF "MARKET VALUE", WHICH IS ALREADY PAID TO CLAIMANT

112. In November 2019, CLAIMANT decided to sell its investment in Caeli.[230] After the Hawthorne offer was declared unlawful, CLAIMANT was unsuccessful in attracting a suitable buyer till September 2020.[231] Consequently, CLAIMANT decided to sell its stake in Caeli to RESPONDENT for 400M USD.[232]

113. Art. 9.21 of CEPTA explicitly provides for damages at the standard of *market value*.[233] Despite this explicit standard, CLAIMANT erroneously argues that it is owed compensation at a "fair market value" standard amounting to 700M USD.[234]

114. It is submitted that the appropriate standard of compensation is of "market value", the same being already paid to CLAIMANT. This is because: *first*, there exists no causal link between the violation of Art. 9.9 and the economic losses faced by CLAIMANT **[4.1]**; *second*, Art. 9.21 of CEPTA is an express treaty standard which cannot be derogated from in favour of CIL **[4.2]**; *third*, CLAIMANT cannot invoke the MFN clause pursuant to Art. 9.7 of CEPTA **[4.3]**; and *fourth*, in any case, the compensation awarded must be reduced due to the presence of mitigating factors **[4.4]**.

[4.1] THERE EXISTS NO CAUSAL LINK BETWEEN THE VIOLATION OF ART. 9.9 AND THE ECONOMIC LOSSES FACED BY CLAIMANT

115. It is an established position under international law that treaty violations do not by themselves give rise to compensation claims.[235] Even if RESPONDENT has violated the Art. 9.9 of CEPTA, CLAIMANT'S economic losses are not necessarily a result of the same. The burden of proof lies on CLAIMANT to establish the link of causation between the violation of the BIT and the economic losses sustained by it.[236]

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[230] Moot Case 2021, Statement of Uncontested Facts, p.38, 1339-1341.
[231] ibid, p.40, 1390-1391.
[232] ibid, 1391-1392.
[233] Moot Case 2021, CEPTA, p.82, 3018-3021.
[234] Moot Case 2021, Notice of Arbitration, p.5, 151-156.
[235] 'Arbitration under Investment Treaties' in Blackaby Nigel, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* (Oxford University Press, 6th edn., 2015) p.496.
[236] *Biwater Gauff v Tanzania* (Award), ¶779; *Victor Pey v Chile*, ¶¶235-236.

116. The standard of causation applicable under international law is that of 'proximate cause' and 'foreseeability'.[237] The standard of proximity is met when it is proven that in the natural course of events, a particular cause will produce a particular effect.[238] The standard of foreseeability is met when the economic loss was foreseeable at the time of the impugned act.[239]

117. CLAIMANT'S losses can only be attributed to its own risky and rash business decisions. CLAIMANT'S assertion that Mekar's administrative, executive and judicial bodies' actions caused the economic losses are erroneous and a misrepresentation of the facts.

118. *First*, CLAIMANT may refer to the CCM investigations. Admittedly, the CCM did launch two investigations against CLAIMANT.[240] The CCM also found CLAIMANT guilty on both counts and imposed fines amounting to 350 MON on it.[241] However, these fines were never enforced as Mekar has a policy of not enforcing fines until judicial review.[242] As this judicial review was still pending, CLAIMANT never actually paid them. Hence, the CCM investigations and subsequent fines did not affect CLAIMANT financially.

119. *Second*, CLAIMANT may refer to the airfare caps. The CCM did place airfare caps on Caeli flights as an interim measure while the investigations were ongoing.[243] It is pertinent to note that these caps were placed reasonably above the rates Caeli charged.[244] Importantly, the same did not hurt Caeli's profitability in 2016.[245] These airfare caps were removed as soon as Caeli's market share fell below 40%.[246] Lastly, it was the quickly deteriorating economic situation in Mekar, and not the maintenance of the caps that led to economic losses. Hence, even if placing the airfare caps amounts to an FET violation, there is no evidence to show that the same fulfils the standard of being proximate or foreseeable.[247]

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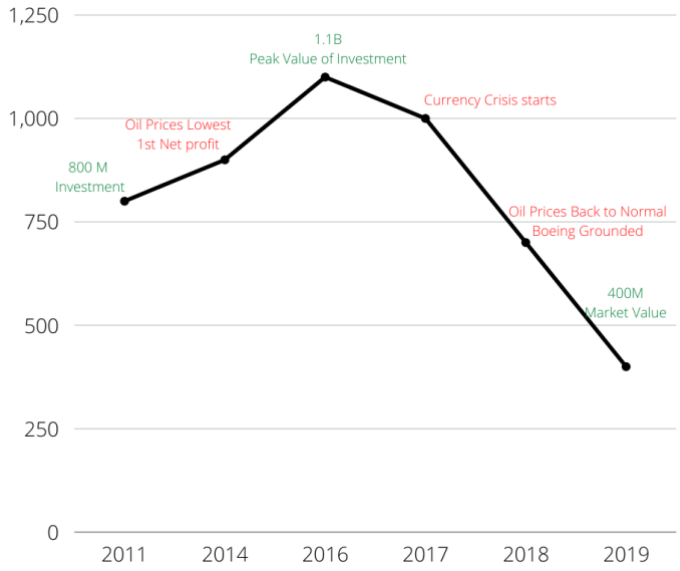
[237] *Lemire v Ukraine*, ¶¶169-171.
[238] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), pp.204–205; *Deutsche Bank v Sri Lanka*, ¶¶556–565.
[239] Thomas W. Walde and Borzu Sabahi, 'Compensation, Damages and Valuation' in Peter Muchlinski, Federico Ortino and Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Oxford University Press, 2012) p.1093.
[240] Moot Case 2021, Statement of Uncontested Facts, pp.34-35, 1147-1182.
[241] ibid, p.36, 1247-1248.
[242] ibid, p.37, 1295-1298.
[243] ibid, p.34, 1160-1161.
[244] Argued at §3.4.1.2.
[245] ibid.
[246] Moot Case 2021, Statement of Uncontested Facts, p.37, 1287-1289.
[247] Moot Case 2021, Statement of Uncontested Facts, p.36, 1221-1232.

120. *Third*, CLAIMANT may refer to Mekari judicial actions. Admittedly, the establishment of denial of justice can also lead to a claim for economic losses.[248] However, the chain of causation must still be proven.[249] The delay of 13 months for an interim hearing on the airfare caps did not affect CLAIMANT financially.[250] Nor did the Mekari High Court judgement.[251] Hence, in the instant dispute, even the case of having no judicial redressal did not directly cause financial distress.

121. *Fourth*, CLAIMANT may refer to the executive decisions. The Executive Order 9-2018 granted subsidies to the airline industry in order to alleviate their losses.[252] Caeli was not granted the same, owing to its ownership structure. It is pertinent to note that not receiving the subsidies was not the operating cause of financial distress, but rather the rising oil prices.[253] CLAIMANT had enjoyed low oil prices for years when industry experts cautioned that the same were bound to go up.[254] When they did, CLAIMANT was left in a dire state. Added to this was the grounding of all Boeing 737 MAX flights, which were unsafe for use and comprised CLAIMANT'S main aircrafts.[255] Hence, none of these acts causing losses can be attributed to RESPONDENT.



[248] Paulsson (n 140), p.168.
[249] ibid.
[250] Moot Case 2021, Statement of Uncontested Facts, p.36, 1233-1237.
[251] ibid, p.38, 1330-1334.
[252] ibid, p.36, 1251-1253.
[253] ibid, p.37, 1269-1271.
[254] Moot Case 2021, Annexure VII, p.54, 1844-1847.
[255] Moot Case 2021, Statement of Uncontested Facts, p.37, 1271-1276.

122. Thus, the requirement of causation between the violative acts and economic losses has not been fulfilled in the instant dispute.

[4.2] ART. 9.21 OF CEPTA IS AN EXPRESS TREATY STANDARD WHICH CANNOT BE DEROGATED FROM IN FAVOUR OF CIL

123. Art. 54 of the AFR defines the applicable law relevant to solving the substance of the dispute.[256] It is an established position that treaty language is supreme and must be given effect to in its ordinary meaning.[257] The Tribunal can only derogate to CIL if the treaty provides no guidance on the same.

124. The standard of "market value" under CEPTA cannot be derogated from in favour of CIL because: *first*, CEPTA prescribes an express standard for calculating compensation **[4.2.1]**; *second*, a derogation from an express treaty standard in inadmissible **[4.2.2]**; *third*, in any case, the standard under CIL for FET violations is not "fair market value" in the instant dispute **[4.2.3]**; and *fourth*, in any case, "fair market value" does not amount to 700M USD in the instant dispute **[4.2.4]**.

[4.2.1] CEPTA prescribes an express standard for calculating compensation

125. Art. 9.21 of CEPTA empower the tribunal to award "(a) monetary damages at a *market value*, *except* as otherwise provided for in Art. 9.12" (emphasis supplied).[258] It is quite obvious that the treaty expressly mentions the standard of "market value".

126. CLAIMANT may emphasise on the word "may" to argue that the same denotes that the standard is merely directive and not imposing a binding standard.[259] However, this position would be erroneous. This is because the word "may" has been used in reference to the phrase "Where a tribunal makes a final award" and denotes that the tribunal has discretion whether to award damages or not; and not regarding the standard for the same.

[256] AFR, Schedule C, art.54.
[257] VCLT, art.31.
[258] Moot Case 2021, CEPTA, p.82, 3018-3021.
[259] Earl T. Crawford, *The Construction of Statutes* (2016) p.516.

127. Further, it was the intention of the parties to distinguish between the "market value" and "fair market value" standards. Art. 9.21 mentions the phrase "except as otherwise provided for in Art. 9.12". Art. 9.12 of CEPTA prescribes the standard of "fair market value" compensation to be paid in cases of expropriation.[260] Hence, the treaty itself creates a distinction between "fair market value" and "market value" and portrays the explicit intention that the parties wanted to keep the two separate.

128. Admittedly, CEPTA does not define the term "market value".[261] In the absence of a special meaning provided to this term under the treaty, the ordinary meaning of the term should prevail.[262] For this, we rely on the international law definition of the same. The International Valuation Standards Council defines "market value" as:[263]

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

129. In contrast, the standard of "fair market value" is generally defined as "the value of the investment that would have existed had the illegal acts not taken place."[264] Hence, the two standards differ significantly and the treaty has chosen "market value" to govern compensation claims for treaty breaches.[265]

[4.2.2] A derogation from an express treaty standard in inadmissible

130. CLAIMANT is asking the Tribunal to rewrite CEPTA. It is an established position in international law that the tribunal can only derogate to CIL when the treaty provides no guidance on the settlement of a dispute.[266] This is because the treaty is the *lex specialis* to discern the metric of compensation.[267]

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[260] Moot Case 2021, CEPTA, p.78, 2804-2808.
[261] ibid, p.72, 2561-2599.
[262] Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2009).
[263] International Valuation Standards Council, 'Exposure Draft: IVS 104: Bases of Value', (2016) Art. 30.1, p.8.
[264] American Society of Appraisers, 'International Glossary of Business Valuation Terms', (2001), p.4.
[265] Herfried Wöss and Adriana San Román, "Full Compensation, Full Reparation, and the But-For Premise" in, *The Guide to Damages in International Arbitration* (4th Edition, 2021); *Johannesburg v Chairman*, ¶24.
[266] *S.D. Myers v Canada*, ¶701.
[267] *AAPL v Sri Lanka*, ¶19.

131. Admittedly, the ARSIWA prescribes the standard of "full compensation" after the same was adopted post the *Chorzów Factory*[268] dictum.[269] However, the ARSIWA commentary itself precludes its application from matters where the treaty is clear on its stance.[270] This is because the ARSIWA only exists to fill gaps in the absence of subsisting compensation provisions in the treaty.[271]

132. All cases that have referred to CIL for determining compensation have expressly stated that they are doing so only in light of the fact that the treaty is silent on the same.[272] In fact, in the *Amoco* case, it was opined that resorting to CIL would be "to ignore the fact that the States […] have carefully negotiated an express commitment in that Treaty precisely in order to avoid to the maximum extent possible any future reference to CIL".[273]

133. Lastly, the principle of risk allocation provides the rationale behind having this standard. BITs are instruments of bargain and risk allocation; and states have the power to draft the same however they seem fit.[274] This is exactly the case in the instant dispute because during the lifetime of the 1994 BIT, Mekar lost several cases against Bonooru.[275] The same was also termed as "the worst BIT in the history of BITs".[276] Furthermore, the 2006 Arrakis-Mekar BIT provides for the "fair market value" standard.[277] All these events led to Mekar deviating from its past BITs and adopting the standard of "market value" under CEPTA. Thus, the Tribunal must consider party intention to hold that a derogation from an express treaty standard is inadmissible.

[4.2.3] In any case, the standard under CIL for FET violations is not "fair market value" in the instant dispute

134. If the Tribunal were to derogate from CEPTA and resort to CIL, the standard of compensation does not automatically become "fair market value". Arts. 31 and 36 of the

[268] *Chorzów Factory v Poland*, pp.55-57.
[269] Crawford (n 238), p.516.
[270] ibid, pp.86-87.
[271] *Masdar v Spain*.
[272] *S.D. Myers v Canada*, ¶701; *CMS v Argentina*, ¶409; *El Paso v Argentina*, ¶¶700-702; *EDF v Romania*, ¶994; *OI v Venezuela*, ¶649.
[273] *Amoco v Iran*, ¶16.
[274] Walde and Sabahi (n 239) p.1065.
[275] Moot Case 2021, PO3, p.87, 3218-3226.
[276] ibid.
[277] Moot Case 2021, Arrakis-Mekar BIT, art.13, p.76, 3089-3094.

ARSIWA prescribe the standard of "full reparation" for the breach of an international obligation.[278] This standard of full reparation translates to the "fair market value" standard, as also explained in the ARSIWA Commentary.[279] Admittedly, the application of this standard is established in cases of expropriation.[280] However, it is pertinent to note that in cases of FET violations the applicability of this standard is strongly disputed.[281]

135. The peculiarities of the instant dispute warrant the Tribunal to adopt the "market value" standard under international law. Cases of expropriation are very different from cases of FET violations, as recognised by tribunals.[282] This distinction was also endorsed by CEPTA.[283] The specific circumstances of the case need to be taken into account to determine the best suited standard,[284] which in the instant dispute is "market value".

136. The tribunal in *Petrobart v Kyrgyz Republic*, made an important observation.[285] It noted that looking at the weak financial situation of the company, it was improbable that it would recover its losses on the market. It applied the concept of 'enforcement risk discount' and found that Petrobart's claims are not readily reimbursable.

137. Further, the application of the "fair market value" standard in FET breaches has also been criticised widely.[286] The concern with this standard is that it was laid down for expropriation-type actions. It operates under the assumption that by simply going back (ex-ante) and valuating the previous situation with the current one (ex-post), the tribunal would have an easy compensation value. However, for applying this test to cases of FET breach, in the exact sense, the tribunal has to compare the current value (ex-post) with the value as it would have been had the state pursued the same policy, but complied with the BIT. This is a highly speculative method and leads to absurdity.

138. Lastly, the Tribunal must also consider the effect of the breach, along with the nature of the same.[287] In the instant dispute, the breaches by administrative, executive and judicial

[278] ARSIWA, arts.31 & 36.
[279] Crawford (n 238) p.22.
[280] *ADC v Hungary*, ¶290.
[281] *S.D. Myers v Canada*, ¶309.
[282] *CMS v Argentina*, ¶409; *MTD v Chile*, ¶238.
[283] Argued in §4.2.1, ¶127.
[284] *Unión Fenosa v Egypt*, Part X ¶10.1; *Azurix v Argentina*, ¶420.
[285] *Petrobart v Kyrgyz Republic*, ¶9.
[286] Walde and Sabahi (n 239).
[287] *Sempra v Argentina*, ¶403.

bodies did not cause the diminishing of CLAIMANT'S investment. The effect of such a breach is very different from one of indirect expropriation, where the investor is indirectly deprived of its investment.[288] Thus, even if the Tribunal resorts to CIL, the standard of "fair market value" is not applicable.

[4.2.4] In any case, "fair market value" does not amount to 700M USD in the instant dispute

139. If the Tribunal were to adopt the "fair market value" standard under CIL, the same does not amount to 700M USD. In cases of FET breaches, tribunals have adopted the "but-for" test to calculate the amount of compensation.[289] This means that the compensation must be equal to the value of the investment that would have existed, *as if* the unlawful acts did not occur. As argued, this is a highly speculative method in FET-related cases.[290]

140. In November 2016, CLAIMANT estimated that the "fair market value" of its investment in Caeli is 1.1B USD.[291] Aviation Analytics released a report that this was CLAIMANT'S "peak valuation".[292] This means that in all of its years of investing in Caeli, CLAIMANT'S investment touched 1.1B USD at one point of time. CLAIMANT now argues that the entire amount must be compensated by RESPONDENT. If CLAIMANT is taken on their best case, this would mean that CLAIMANT had no hand in affecting its own investment's valuation on the market, but only RESPONDENT did.[293] This leads to absurdity.

141. CLAIMANT is attempting to make RESPONDENT pay for the business risk every company undertakes in a market. Hence, the "fair market value" does not amount to 700M USD in the instant dispute.

[288] María Beatriz and Pascale Lorfing, 'The Evolution and Current Status of the Concept of Indirect Expropriation in Investment Arbitration and Investment Treaties' 6(2) Indian Journal of Arbitration Law p.98.
[289] *Burlington v Ecuador* (Reconsideration), ¶160.
[290] Argued at §4.2.3, ¶137.
[291] Moot Case 2021, PO4, p.89, 3276-3277.
[292] ibid.
[293] Argued in §4.1.

[4.3] CLAIMANT CANNOT INVOKE THE MFN CLAUSE PURSUANT TO ART. 9.7 CEPTA

142. CLAIMANT argues that it can invoke the MFN clause under Art. 9.7 of CEPTA in favour of Art. 13 of the Arrakis-Mekar BIT to bring in the "fair market value" standard.[294] The scope of Art. 9.7(1) extends to applying the MFN treatment to "the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments".[295] The present issue of compensation falls outside the scope of the MFN clause as the same only covers the 'treatment' of the investment.

143. In any case, the MFN clause does not extend to all types of claims under the treaty.[296] Hence, CLAIMANT cannot invoke the MFN clause because: *first*, the standard of compensation is a procedure for the resolution of investment disputes **[4.3.1]**; *second*, the exception in Art. 9.7(2) of CEPTA is applicable **[4.3.2]**; and *third*, in any case, specific intention bars the applicability of Art. 9.7 **[4.3.3]**.

[4.3.1] Standard of compensation is a procedure for the resolution of investment disputes

144. Art. 9.7(2) of CEPTA explicitly excludes from the scope of the MFN clause any procedures for the resolution of investment disputes.[297] The issue of compensation amounts to procedural treatment under CEPTA and international law. This is because 'Section E' of CEPTA is titled as "Settlement of Disputes".[298] It is under this section that Art. 9.21 is placed and hence the same amounts to procedural treatment under CEPTA.

145. The tribunal in *CME v Czech Republic* classified compensation under a procedural requirement.[299] Admittedly, getting compensation is a substantive right under international law.[300] However, the *standard* of the same is merely the procedure that the Tribunal must adopt for resolving the dispute. Hence, as this issue falls under the scope of

[294] Moot Case 2021, Notice of Arbitration, p.5, 154-156.
[295] Moot Case 2021, CEPTA, p.76, 2711-2714.
[296] ibid, 2715-2720.
[297] ibid.
[298] Moot Case 2021, CEPTA, p.79, 2853.
[299] *CME v Czech Republic* (Separate Opinion Quantum Phases), ¶11.
[300] Andrew Newcombe and Lluís Paradell, *Law And Practice Of Investment Treaties* (Kluwer Law, 2009) p.385.

a 'procedure for the resolution of disputes' it is excluded from the scope of the MFN clause.

[4.3.2] The exception in Art. 9.7(2) of CEPTA is applicable

146. Even if the Tribunal were to consider this issue to amount to a substantive obligation, the exception in Art. 9.7(2) of CEPTA is applicable. This is because not all substantive obligations can be invoked through the MFN clause, but only "measures adopted or maintained by a Party".[301]

147. Admittedly, tribunals established under the Arrakis-Mekar BIT have awarded compensation at "fair market value".[302] However, there is nothing on the record to show that RESPONDENT actually paid such a compensation under the treaty. In other words, RESPONDENT never "adopted or maintained" such a measure. Thus, this does not fulfil the standard of Art. 9.7(2) CEPTA.

[4.3.3] In any case, specific intention bars the applicability of Art. 9.7

148. If the Tribunal finds that the issue of compensation comes within the scope of the MFN clause, it must consider the specific intention of Parties. Under international law, express intention to include a clause in the BIT bars a different standard from being imported through an MFN clause.[303] This means that an express choice by the parties under the treaty cannot be replaced by an MFN standard.[304]

149. In the instant dispute, RESPONDENT had the 1994 BIT and the Arrakis-Mekar BIT to refer to before it started negotiating CEPTA. The 1994 BIT had proven to be extremely unfavourable for RESPONDENT.[305] In light of this, RESPONDENT carefully drafted Art. 9.21 of CEPTA expressly providing for the "market value" standard. Thus, the same cannot be replaced by Art. 13 of Arrakis-Mekar BIT.

[301] Moot Case 2021, CEPTA, art.9.7(2), p.76, 2715-2720.
[302] Moot Case 2021, PO3, p.87, 3227-3228.
[303] *Salini v Mexico*.
[304] *CME v Czech Republic* (Separate Opinion Quantum Phases), ¶¶11-12.
[305] Argued at §4.2.2, ¶133.

150. Lastly, CLAIMANT may rely on *CME v Czech Republic* to argue that the standard of "market value" must be interpreted in light of "fair market value".[306] However, this case is inapplicable because unlike the BIT in question in that case, CEPTA distinguishes between the two standards. Thus, the Tribunal must consider the specific intention of RESPONDENT to bar the application of MFN clause.

[4.4] IN ANY CASE, THE COMPENSATION AWARDED MUST BE REDUCED DUE TO THE PRESENCE OF MITIGATING FACTORS

151. If the Tribunal favours awarding compensation, over and above the compensation already paid to CLAIMANT, the same must be reduced. Tribunals everywhere have opined that the presence of mitigating factors warrant a reduction in the compensation amount.[307] Admittedly, the burden of proving the same lies on RESPONDENT.[308]

152. The tribunal in *Azurix v Argentina* awarded damages to CLAIMANT but reduced it drastically due to several factors.[309] It identified contributory negligence, political factors, economic situation of the host state, and the market conditions as some of the factors relevant for the same.[310]

153. The compensation of 700M USD must be reduced because: *first*, there is contributory fault on part of CLAIMANT **[4.4.1]**; and *second*, the economic crisis in Mekar reduces the compensation **[4.4.2]**.

[4.4.1] There is contributory fault on the part of CLAIMANT

154. Art. 39 ARSIWA empowers the Tribunal to look into the contributory injury caused by the investor while determining the quantum of compensation.[311] Such a contribution must be 'material and significant'.[312] Further, there must be a causal link between the two.[313]

[306] *CME v Czech Republic* (Award) (2003) UNCITRAL, ¶500.
[307] *East Cement v Egypt*, ¶167; *Maffezini v Spain* (Award), ¶64.
[308] *Abengoa v Mexico*, ¶670.
[309] *Azurix v Argentina*, ¶421.
[310] ibid.
[311] ARSIWA, art.39.
[312] *Yukos v Russia*, ¶72.
[313] *Bear Creek v Peru*, ¶410.

155. The business decisions taken by CLAIMANT were both material and significant in causing the economic losses. Irrespective of the treatment provided by the host state, an investor bears responsibility for undertaking business risks.[314] CLAIMANT ignored RESPONDENT'S concerns regarding its exorbitant costs of maintaining its fleet during low demand season, while rapidly investing in expansion.[315]

156. Experts also warned CLAIMANT to cut back its operations on certain loss-making high-risk routes.[316] The concern was that oil prices were bound to go up, which would then lead to CLAIMANT'S entire business model failing.[317] This is exactly what happened when the oil prices did go up in 2018, leaving Caeli in deep financial distress.[318]

157. CLAIMANT'S entire business model was based on overly optimistic expansionary policies, which were contrary to RESPONDENT'S advice of restructuring debt.[319] RESPONDENT also cautioned CLAIMANT three times regarding its risky decisions, which the latter ignored. This fulfils the standard of the contributory fault being 'material' and 'significant'. Hence, the compensation awarded should be reduced.

[4.4.2] The economic crisis in Mekar reduces the compensation

158. Capacity to pay has a bearing on the mitigation of compensation awarded by tribunals.[320] In *CMS v Argentina*, the tribunal recognised that such extraordinary circumstances must definitely have an effect on the compensation payable.[321] Consequently, various other tribunals have also reduced the same due to economic crisis'.[322]

159. Mekar has been going through an economic crisis.[323] The IMF predicted four quarters of negative growth for the state and it is estimated that paying 700M USD to CLAIMANT

[314] *MTD v Chile*, ¶242.
[315] Moot Case 2021, Statement of Uncontested Facts, p.33, 1108-1110.
[316] ibid, 1124-1126.
[317] Argued at §4.1, ¶117.
[318] Moot Case 2021, Statement of Uncontested Facts, p.37, 1269-1271.
[319] Moot Case 2021, Annexure IX, p.57, 1956-1960.
[320] Amerasinghe, 'Quantum of Compensation for Nationalised Property' in R Lillich (ed.), *The Valuation of Nationalised Property* (University Press of Virginia, 1972) p.124.
[321] *CMS v Argentina*, ¶244.
[322] *CME v Czech Republic* (Separate Opinion by Ian Brownlie), ¶70; *LG&E v Argentina,* ¶ 251.
[323] Moot Case 2021, PO3, p.87, 3161-3168.

would force RESPONDENT to cut down on its annual public spending twice.[324] Mekar has a very high inflation rate and may undergo a third debt default, resulting in its credit rating falling down to CCC.[325] This portrays RESPONDENT'S manifest inability to pay the compensation. Thus, there exist mitigating factors which warrant the Tribunal to reduce the compensation.

CONCLUSION FOR ISSUE FOUR

160. Even if RESPONDENT has violated Art. 9.9 of CEPTA, RESPONDENT is not liable to compensate CLAIMANT for its economic losses. This is because there exists no causal link between its unlawful acts and the economic losses faced by CLAIMANT. The Tribunal must adopt the "market value" standard which has been expressly mentioned in CEPTA, to find that the same has already been paid to CLAIMANT. The standard of "fair market value" under CIL is inapplicable in light of an express treaty standard. The MFN clause under CEPTA cannot be invoked in favour of the Arrakis-Mekar BIT, as the same does not constitute "treatment". In any case, the compensation awarded must be reduced due to contributory negligence of CLAIMANT and the economic situation in Mekar.

[324] ibid.
[325] ibid.

PRAYER FOR RELIEF

RESPONDENT respectfully requests the Tribunal to adjudicate and declare that:

I. The Tribunal does not have jurisdiction under Chapter 9 of CEPTA.

II. The Tribunal should admit only the External Advisors' *amicus* submissions.

III. RESPONDENT has not violated Art. 9.9 of CEPTA.

IV. The correct standard for compensation is "market value" and the same has been paid to CLAIMANT.