IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 9 OF THE BONOORU-MEKAR COMPREHENSIVE ECONOMIC PARTNERSHIP AND TRADE AGREEMENT AND THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES ("ICSID") ARBITRATION (ADDITIONAL FACILITY) RULES

Vemma Holdings Inc.

(Claimant)

v.

The Federal Republic of Mekar

(Respondent)

MEMORIAL FOR RESPONDENT

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LIST OF AUTHORITIES

TREATIES

Abbreviation	Citation
Canada-EU CETA	EU-Canada Comprehensive Economic and Trade Agreement
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
ECT	Energy Charter Treaty 2080 UNTS 100
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) 330 UNTS 38
TFEU	Treaty on the Functioning of the European Union [2012] OJ C326/47
US-Singapore FTA	United States-Singapore Free Trade Agreement
VCLT	Vienna Convention on the Law of Treaties [1980] 1155 UNTS 331

ICSID ARBITRAL DECISIONS

Abbreviation	Citation
9REN	*9REN Holding v Spain*, ICSID No. ARB/15/15, Award (31.05.2019)
AAPL	*Asian Agricultural Products v Sri Lanka*, ICSID No. ARB/87/3, Final Award (27.06.1990)
Adamakopolous	*Theodoros Adamakopolous v Cyprus*, ICSID No. ARB/15/49, Decision on Jurisdiction (07.02.2020)
ADC	*ADC Affiliate v Hungary*, ICSID No. ARB/03/16, Award (02.10.2006)
AdT	*Aguas del Tunari v Bolivia*, ICSID No. ARB/02/3, Decision on Objections to Jurisdiction (21.10.2005)
AES	*AES Summit Generation v Hungary (II)*, ICSID No. ARB/07/22, Award (23.09.2010)
Agility	*Agility Public Warehousing Company v Iraq*, ICSID No. ARB/17/7, Final Award (22.02.2021)
Alapli	*Alapli Elektrik v Turkey*, ICSID No. ARB/08/13, Award (16.07.2012)
Apotex (Appleton)	*Apotex Holdings v USA*, ICSID No. ARB(AF)/12/1, Procedural Order No. 4 (04.03.2013)
Apotex (BNM)	*Apotex Holdings v USA*, ICSID No. ARB(AF)/12/1, Procedural Order No. 5 (04.03.2013)
Apotex (PO2)	*Apotex Holdings v USA*, ICSID No. UNCT/10/2, Procedural Order No. 2 (11.10.2011)
Arif	*Franck Charles Arif v Moldova*, ICSID No. ARB/11/23, Award (08.04.2013)
ATA	*ATA Construction v Jordan*, ICSID No. ARB/08/2, Award (18.05.2010)
Azinian	*Azinian v Mexico*, ICSID No. ARB(AF)/97/2, Award (01.11.1999)

Azurix	*Azurix Corp v Argentina*, ICSID No. ARB/01/12, Award (14.07.2006)
Bayindir	*Bayindir Insaat Turizm v Pakistan*, ICSID No. ARB/03/29, Award (27.08.2009)
Bear	*Bear Creek Mining v Peru*, ICSID No. ARB/14/21, Procedural Order No. 5 (21.07.2016)
Besserglik	*Oded Besserglik v Mozambique*, ICSID No. ARB(AF)/14/2, Award (28.10.2019)
Biwater	*Biwater Gauff v Tanzania*, ICSID No. ARB/05/22, Procedural Order No. 5 (02.02.2007)
Blue Bank	*Blue Bank International v Venezuela*, ICSID No. ARB/12/20, Award (26.04.2017)
Bridgestone	*Bridgestone Licensing Services v Panama*, ICSID No. ARB/16/34, Award (14.08.2020)
BUCG	*Beijing Urban Construction Group v Yemen*, ICSID No. ARB/14/30, Decision on Jurisdiction (31.05.2017)
Burlington	*Burlington Resources v Ecuador*, ICSID No. ARB/08/5, Decision on Disqualification of Francisco Orrego Vicuña (13.12.2013)
Caratube	*Caratube International Oil v Kazakhstan (I)*, ICSID No. ARB/08/12, Decision on Annulment Application (21.02.2014)
Casinos	*Casinos Austria International v Argentina*, ICSID No. ARB/14/32, Decision on Jurisdiction (29.06.2018)
Churchill	*Churchill Mining v Indonesia*, ICSID No. ARB/12/14 and ARB/12/40, Award (06.12.2016)
CMS	*CMS Gas Transmission v Argentina*, ICSID No. ARB/01/8, Award (12.05.2005)
Corona	*Corona Materials v Dominican Republic*, ICSID No. ARB(AF)/14/3, Award on Expedited Preliminary Objections (31.03.2016)
Cortec	*Cortec Mining Kenya v Kenya*, ICSID No. ARB/15/29, Final Award (22.10.2018)
CSOB	*Ceskoslovenska Obchodini Banka v Slovakia*, ICSID No. ARB/97/4, Decision on Objections to Jurisdiction (24.05.1999)
Daimler	*Daimler Financial Services v Argentina*, ICSID No. ARB/05/1, Award (22.08.2012)
EBO	*EBO Invest v Latvia*, ICSID No. ARB/16/38, Award (28.02.2020)
Eco	*Eco Oro Minerals v Colombia*, ICSID No. ARB/16/41, Procedural Order No. 6 (18.02.2019)
EDF	*EDF (Services) v Romania*, ICSID No. ARB/05/13, Award (08.10.2009)
EDF (International)	*EDF International v Argentina*, ICSID No. ARB/03/23, Award (11.06.2012)
El Paso	*El Paso Energy International v Argentina*, ICSID No. ARB/03/15, Award (31.10.2011)
El Paso (Jurisdiction)	*El Paso Energy International v Argentina*, ICSID No. ARB/03/15, Decision on Jurisdiction (27.04.2006)

Electrabel	*Electrabel SA v Hungary*, ICSID No. ARB/07/19, Award (25.11.2015)
Eli	*Eli Lilly v Canada*, ICSID No. UNCT/14/2, Procedural Order No. 4 (23.02.2016)
Eli (Award)	*Eli Lilly v Canada*, ICSID No. UNCT/14/2, UNCITRAL, Final Award (16.03.2017)
Enron	*Enron Corporation v Argentina*, ICSID No. ARB/01/3, Award (22.05.2007)
Foresti	*Piero Foresti v South Africa*, ICSID No. ARB(AF)/07/1, Letter Regarding Non-Disputing Parties (05.10.2009)
Fraport-I	*Fraport AG Frankfurt v Philippines (I)*, ICSID No. ARB/03/25, Award (16.08.2007)
Fraport-II	*Fraport AG Frankfurt v Philippines (II)*, ICSID No. ARB/11/12, Award (10.12.2014)
Funnekotter	*Bernardus Henricus Funnekotter v Zimbabwe*, ICSID No. ARB/05/6, Award (22.04.2009)
Garanti	*Garanti Koza v Turkmenistan*, ICSID No. ARB/11/20, Decision on Objection to Jurisdiction (03.07.2013)
Gavrilovic	*Georg Gavrilovic v Croatia*, ICSID No. ARB/12/39, Award (26.07.2018)
Getma	*Getma International v Guinea (II)*, ICSID No. ARB/11/29, Award (16.08.2016)
Gold Reserve	*Gold Reserve v Venezuela*, ICSID No. ARB(AF)/09/01, Award (22.09.2014)
Grenada	*Grenada Private Power v Grenada*, ICSID No. ARB/17/13, Award (19.03.2020)
Guardian	*Guardian Fiduciary Trust v Former Yugoslav Republic of Macedonia*, ICSID No. ARB/12/31, Award (22.09.2015)
H&H	*H&H Enterprises Investments v Egypt*, ICSID No. ARB 09/15, Excerpts of Award (06.05.2014)
Hamester	*Hamester v Ghana*, ICSID No. ARB/07/24, Award (18.06.2010)
Hochtief	*Hochtief Aktiengesellschaft v Argentina*, ICSID No. ARB/07/31, Decision on Jurisdiction (24.10.2011)
Iberdrola	*Iberdrola Energía v Guatemala*, ICSID No. ARB/09/5, Award (17.08.2012)
İçkale	*İçkale İnşaat v Turkmenistan*, ICSID No. ARB/10/24, Award (08.03.2016)
Impregilo	*Impregilo SpA v Argentina*, ICSID No. ARB/07/17, Award (21.06.2011)
Inceysa	*Inceysa Vallisoletana v El Salvador*, ICSID No. ARB/03/26, Award (02.08.2006)
Infinito	*Infinito Gold v Costa Rica*, ICSID No. ARB/14/5, Award (03.06.2021)
Infinito (Jurisdiction)	*Infinito Gold v Costa Rica*, ICSID No. ARB/14/5, Decision on Jurisdiction (04.12.2017)
Infinito (PO2)	*Infinito Gold v Costa Rica*, ICSID No. ARB/14/5, Procedural Order No. 2 (01.06.2016)
InterAguas	*Suez, InterAguas Servicios v Argentina*, ICSID No. ARB/03/17, Order for Participation as Amicus Curiae (17.03.2006)

Interocean	*Interocean Oil Development v Nigeria*, ICSID No. ARB/13/20, Award (06.10.2020)
Jan de Nul	*Jan de Nul v Egypt*, ICSID No. ARB/04/13, Award (06.11.2008)
Joy	*Joy Mining v Egypt*, ICSID No. ARB/03/11, Award on Jurisdiction (06.08.2004)
Kiliç	*Kiliç İnşaat İthalat v Turkmenistan*, ICSID No. ARB/10/1, Award (02.07.2013)
Kim	*Vladislav Kim v Uzbekistan*, ICSID No. ARB/13/6, Decision on Jurisdiction (08.03.2017)
Klöckner	*Klöckner Industrie-Anlagen v Cameroon*, ICSID No. ARB/81/2, Award (excerpt) (21.10.1983)
Krederi	*Krederi Ltd v Ukraine*, ICSID No. ARB/14/17, Award (02.07.2018)
KT	*KT Asia Investment v Kazakhstan*, ICSID No. ARB/09/8, Award (17.10.2013)
Landesbank	*Landesbank Baden-Württemberg v Spain*, ICSID No. ARB/15/45, Decision on "Intra-EU" Jurisdictional Objection (25.02.2019)
Lemire	*Lemire v Ukraine*, ICSID No. ARB/06/18, Award (28.03.2011)
Lemire (II)	*Lemire v Ukraine (II)*, ICSID No. ARB/06/18, Decision on Jurisdiction and Liability (14.01.2010)
LETCO	*Liberian Eastern Timber Corporation v Liberia*, ICSID No. ARB/83/2, Award (31.03.1986)
LG&E	*LG&E v Argentina*, ICSID No. ARB/02/1, Decision on Liability (03.10.2006)
Lighthouse	*Lighthouse Corporation v Timor Leste*, ICSID No. ARB/15/2, Award (22.12.2017)
Liman	*Liman Caspian Oil v Kazakhstan*, ICSID No. ARB/07/14, Excerpt of Award (22.06.2010)
Maffezini	*Emilio Agustín Maffezini v Spain*, ICSID No. ARB/97/7, Decision on Objections to Jurisdiction (25.01.2000)
Malicorp	*Malicorp Limited v Egypt*, ICSID No. ARB/08/18, Award (07.02.2011)
Mamidoil	*Mamidoil Jetoil Greek Petroleum Products v Albania*, ICSID No. ARB/11/24, Award (30.03.2015)
Metalclad	*Metalclad Corporation v Mexico*, ICSID No. ARB(AF)/97/1, Award (30.08.2000)
Metal-Tech	*Metal-Tech Ltd v Uzbekistan*, ICSID No. ARB/10/3, Award (04.10.2013)
Micula	*Ioan Micula v Romania (I)*, ICSID No. ARB/05/20, Decision on Jurisdiction and Admissibility (24.09.2008)
Micula (Award)	*Ioan Micula v Romania*, ICSID No. ARB/05/20, Award (11.12.2013)
Minnotte	*David Minnotte v Poland*, ICSID No. ARB(AF)/10/1, Award (16.05.2014)
Mondev	*Mondev International v USA*, ICSID No. ARB(AF)/99/2, Award (11.10.2002)
MTD	*MTD Equity v Chile*, ICSID No. ARB/01/7, Award (25.05.2004)

Muhammet	*Muhammet Çap v Turkmenistan*, ICSID No. ARB/12/6, Award (04.05.2021)
Nelson	*Joshua Dean Nelson v Mexico*, ICSID No. UNCT/17/1, Final Award (05.06.2020)
Pac Rim	*Pac Rim Cayman v El Salvador*, ICSID No. ARB/09/12, Procedural Order No. 8 (23.03.2011)
Pantechniki	*Pantechniki (Greece) v Albania*, ICSID No. ARB/07/21, Award (30.07.2009)
Parkerings	*Parkerings-Compagniet v Lithuania*, ICSID No. ARB/05/8, Award (11.09.2007)
Pey	*Victor Pey Casado v Chile*, ICSID No. ARB/98/2, Award (13.09.2016)
Pezold	*Bernhard von Pezold v Zimbabwe*, ICSID No. ARB/10/15, Procedural Order No. 2 (26.06.2012)
Pezold (Award)	*Bernhard von Pezold v Zimbabwe*, ICSID No. ARB/10/15, Award (28.07.2015)
Philip Morris	*Philip Morris v Uruguay*, ICSID No. ARB/10/7, Award (08.07.2016)
Phillip Morris (PO3)	*Philip Morris v Uruguay*, ICSID No. ARB/10/7, Procedural Order No. 3 (17.02.2015)
Phillip Morris (PO4)	*Philip Morris v Uruguay*, ICSID No. ARB/10/7, Procedural Order No. 4 (24.03.2015)
Phoenix	*Phoenix Action v Czechia*, ICSID No. ARB/06/5, Award (15.04.2009)
PIP	*Participaciones Inversiones Portuarias v Gabon*, Decision on Proposal to Disqualify Arbitrator, ICSID No. ARB/08/17 (12.11.2009)
Plama	*Plama Consortium v Bulgaria*, ICSID No. ARB/03/24, Decision on Jurisdiction (08.02.2005)
Plama (Award)	*Plama Consortium v Bulgaria*, ICSID No. ARB/03/24, Award (27.08.2008)
Quiborax	*Quiborax SA v Bolivia*, ICSID No. ARB/06/2, Decision on Jurisdiction (27.09.2012)
Raiffeisen	*Raiffeisen Bank International v Croatia (I)*, ICSID No. ARB/17/34, Decision on Respondent's Jurisdictional Objections (30.09.2020)
Rumeli	*Rumeli Telekom v Kazakhstan*, ICSID No. ARB/05/16, Award (29.07.2008)
Rusoro	*Rusoro Mining v Venezuela*, ICSID No. ARB(AF)/12/5, Award (22.08.2016)
Salini	*Salini Costruttori v Morocco*, ICSID No. ARB/00/4, Decision on Jurisdiction (16.07.2001)
Sempra (Annulment)	*Sempra v Argentina*, ICSID No. ARB/02/16, Decision on Annulment of the Award (29.06.2010)
Sempra (Award)	*Sempra v Argentina*, ICSID No. ARB/02/16, Award (28.09.2007)
Siemens	*Siemens AG v Argentina*, ICSID No. ARB/02/08, Decision on Jurisdiction (03.08.2004)

Strabag	*Strabag SE v Poland*, ICSID No. ADHOC/15/1, Partial Award on Jurisdiction (04.03.2020)
Tallinn	*United Utilities (Tallinn) v Estonia*, ICSID No. ARB/14/24, Award of Tribunal (21.06.2019)
Tecmed	*Técnicas Medioambientales Tecmed v Mexico*, ICSID Case No ARB(AF)/00/2, Award (29.05.2003)
Teinver	*Teinver SA v Argentina*, ICSID No. ARB/09/1, Decision on Jurisdiction (21.12.2012)
Telenor	*Telenor Mobile Communications v Hungary*, ICSID No. ARB/04/15, Award (13.09.2006)
Tethyan	*Tethyan Copper v Pakistan*, ICSID No. ARB/12/1, Decision on Application to Dismiss Claims (10.11.2017)
Tokios	*Tokios Tokelés v Ukraine*, ICSID No. ARB/02/18, Decision on Jurisdiction (29.04.2004)
Total	*Total SA v Argentina*, ICSID No. ARB/04/1, Decision on Liability (27.12.2010)
Toto	*Toto Costruzioni Generali v Lebanon*, ICSID No. ARB/07/12, Award (07.06.2012)
Tulip	*Tulip Real Estate v Turkey*, ICSID No. ARB/11/28, Award (10.03.2004)
UFG	*Unión Fenosa Gas v Egypt*, ICSID No. ARB/14/4, Award (31.08.2018)
UP&CD	*Le Chèque Déjeuner and CD Holding Internationale v Hungary*, ICSID No. ARB/13/35, Decision on Jurisdiction (03.03.2016)
UPS	*UPS v Canada*, ICSID No. UNCT/02/1, Decision on Petitions for Intervention and Participation as Amici Curiae (17.10.2001)
Vannessa	*Vannessa Ventures v Venezuela*, ICSID No. ARB(AF)/04/6, Award (16.01.2013)
Vattenfall (II)	*Vattenfall AB v Germany (II)*, ICSID No. ARB/12/12, Decision on Achmea Issue (31.08.2018)
Vivendi	*Vivendi Universal v Argentina*, ICSID No. ARB/97/3, Decision on Jurisdiction (14.11.2005)
Vivendi (Award)	*Vivendi Universal v Argentina*, ICSID No. ARB/97/3, Award (20.08.2007)
Vivendi-II	*Suez, InterAguas Servicios Integrales del Agua v Argentina*, ICSID No. ARB/03/19, Order in Response to Petition for Transparency and Participation as Amicus Curiae (19.05.2005)
Vivendi-II (Liability)	*Suez, Sociedad General de Aguas de Barcelona v Argentina*, ICSID No. ARB/03/19, Decision on Liability (30.07.2010)
Waste	*Waste Management v Mexico (I)*, ICSID No. ARB(AF)/98/2, Award (02.06.2000)
Wena Hotels	*Wena Hotels v Egypt*, ICSID No. ARB/98/4, Award (08.12.2000)
World Duty	*World Duty Free v Kenya*, ICSID No. ARB/00/7, Award (04.10.2006)

UNCITRAL DECISIONS

Abbreviation	Citation
Al-Warraq	*Al-Warraq v Indonesia*, UNCITRAL, Final Award (15.12.2014)
Austrian Airlines	*Austrian Airlines v Slovakia*, UNCITRAL, Final Award (09.10.2009)
AWG	*AWG Group v Argentina*, UNCITRAL, Decision on Jurisdiction (03.08.2006)
Chevron	*Chevron Corporation v Ecuador*, UNCITRAL, Partial Award on Merits (30.03.2010)
Chevron (PO8)	*Chevron Corporation v Ecuador (II)*, UNCITRAL, PCA No. 2009-23, Procedural Order No. 8 (18.04.2011)
CME	*CME Czech Republic v Czechia*, UNCITRAL, Final Award (14.03.2003)
Energoalians	*Energoalians LLC v Moldova*, UNCITRAL, Award, (23.10.2013)
Frontier	*Frontier Petroleum Services v Czechia*, UNCITRAL, Final Award (12.11.2010)
Lauder	*Lauder v Czechia*, UNCITRAL, Final Award (03.09.2001)
Methanex	*Methanex Corporation v USA*, UNCITRAL, Decision on Petitions to Intervene as "amici curiae" (15.01.2001)
Myers	*SD Myers v Canada*, UNCITRAL, Partial Award (13.11.2000)
National Grid	*National Grid v Argentina*, UNCITRAL, Decision on Jurisdiction (20.06.2006)
Oostergetel	*Oostergetel v Slovakia*, UNCITRAL, Final Award (23.04.2012)
Oxus	*Oxus Gold v Uzbekistan*, UNCITRAL, Award (17.12.2015)
Paushok	*Paushok v Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (28.04.2011)
Thunderbird	*International Thunderbird Gaming v Mexico*, UNCITRAL, Arbitral Award (26.01.2006)
White	*White Industries Australia v India*, UNCITRAL, Final Award (30.11.2011)

PCA ARBITRAL DECISIONS

Abbreviation	Citation
AMF	*AMF v Czechia*, PCA No. 2017-15, Final Award (11.05.2020)
Bilcon	*Bilcon of Delaware v Canada*, PCA No. 2009-04, Award on Jurisdiction and Liability (17.03.2015)
CC/Devas	*CC/Devas (Mauritius) v India*, PCA No. 2013-09, Award on Quantum (13.10.2020)
Chevron (II)	*Chevron Corporation v Ecuador (II)*, PCA No. 2009-23, Second Partial Award on Track II (30.08.2018)
Copper Mesa	*Copper Mesa Mining v Ecuador*, PCA No. 2012-2, Award (15.03.2016)
Doutremepuich	*Christian Doutremepuich v Mauritius*, PCA No. 2018-37, Award on Jurisdiction (23.08.2019)
ICS	*ICS Inspection and Control Services v Argentina (I)*, PCA No. 2010-09, Award on Jurisdiction (10.02.2012)

Manchester	*Manchester Securities v Poland*, PCA No. 2015-18, Award (07.12.2018)
Rawat	*Dawood Rawat v Mauritius*, PCA No. 2016-20, Award on Jurisdiction (06.04.2018)
RFP	*Resolute Forest Products v Canada*, PCA No. 2016-13, Procedural Order No. 6 (29.06.2017)
Saluka	*Saluka Investments v Czechia*, PCA No. 2001-04, Partial Award (17.03.2006)
Tatneft	*Tatneft v Ukraine*, PCA No. 2008-8, Partial Award on Jurisdiction (28.09.2010)
Tatneft (Merits)	*Tatneft v Ukraine*, PCA No. 2008-8, Award on Merits (29.07.2014)
Yukos	*Yukos Universal v Russia*, PCA No. 2005-04/AA227, Interim Award on Jurisdiction and Admissibility (30.11.2009)

SCC DECISIONS

Abbreviation	Citation
Al-Bahloul	*Al-Bahloul v Tajikistan*, SCC No. 064/2008, Partial Award on Jurisdiction and Liability (02.09.2009)
Berschader	*Vladimir Berschader v Russia*, SCC No. 080/2004, Award (21.04.2006)
Renta	*Renta 4 SVSA v Russia*, SCC No. 024/2007, Award on Preliminary Objections (20.03.2009)
RosInvest	*RosInvestCo UK v Russia*, SCC No. 079/2005, Final Award (12.09.2010)

ICC AND OTHER ARBITRAL DECISIONS

Abbreviation	Citation
Cengiz	*Cengiz İnşaat Sanayi v Libya*, ICC No. 21537/ZF/AYZ, Final Award (07.11.2018)
Ebrahimi	*Shahin Shaine Ebrahimi v Iran*, IUSCT Nos. 44, 46 and 47, Final Award (12.10.1994)
EnCana	*EnCana Corporation v Ecuador*, LCIA No. UN3481, Award (03.02.2006)
Güriş	*Güriş v Syria*, ICC No. 21845/ZF/AYZ, Final Award (31.08.2020)
Rosneft	*Yukos Capital v Rosneft*, Tijdschrift voor Arbitrage (TvA) 2011/1
Sola	*Sola Tiles v Iran*, IUSCT No. 317, Award (22.04.1987)

ICJ DECISIONS

Abbreviation	Citation
Anglo-Iranian Oil	*Anglo-Iranian Oil Co Case (UK v Iran)* [1952] ICJ 93
Armed Activities	*Armed Activities on the Territory of the Congo (New Application: 2002) (Congo v Rwanda)*, Jurisdiction and Admissibility [2006] ICJ 6
Arrest Warrant	*Arrest Warrant of 11 April 2000 (Congo v Belgium)* [2002] ICJ 3
Avena	*Avena and Other Mexican Nationals (Mexico v USA)* [2004] ICJ 12
Barcelona Traction	*Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Judgment (2nd Phase) [1970] ICJ 3
Bosnia Genocide	*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment [2007] ICJ 43
Diallo	*Ahmadou Sadio Diallo (Guinea v Congo)*, Preliminary Objections [2007] ICJ 582
ELSI	*Elettronica Sicula SpA (ELSI) (USA v Italy)* [1989] ICJ 15
Jadhav	*Jadhav Case (India v Pakistan)* [2019] ICJ 418
Lockerbie	*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan v USA)*, Preliminary Objections [1998] ICJ 9
Nicaragua/USA	*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ 14
Nottebohm	*Nottebohm Case (Liechtenstein v Guatemala)*, Preliminary Objections [1953] ICJ 111
Palestinian Wall	*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ 136
Right of Nationals	*Right of Nationals of the United States of America in Morocco (France v USA)* [1952] ICJ 176
Right of Passage	*Right of Passage over Indian Territory (Portugal v India)*, Preliminary Objections [1957] ICJ 125

PCIJ DECISIONS

Abbreviation	Citation
Chorzów	*Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) PCIJ Series A No. 17

INTERNATIONAL DECISIONS

Abbreviation	Citation
AKZO	Case C-62/86 *AKZO Chemie v Commission* ECLI:EU:C:1991:286
Ambatielos	*Ambatielos Claim (Greece v UK)* (1956) 12 RIAA 83
British Airways	Case C-95/04 P *British Airways v Commission* [2007] ECR I-02331
Hoffmann-La Roche	Case 85/76 *Hoffmann-La Roche v Commission of the European Communities* ECLI:EU:C:1979:36
Intel	Case C-413/14 P *Intel Corporation v Commission* ECLI:EU:C:2017:632
Irish Sugar	Case T-228/97 *Irish Sugar v Commission of the European Communities* [1999] EU:T:1999:246
Konkurrencerådet	Case C-209/10 *Post Danmark v Konkurrencerådet* EU:C:2012:172
Loizidou	*Loizidou v Turkey* App no 15318/89 (ECtHR,18.12.1996)
Michelin	Case 322/81 *Michelin v Commission of the European Communities* ECLI:EU:C:1983:313
Sumo	*Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Judgment, IACHR Series C No 79 (31.08.2001)
Tadić	*Prosecutor v Duško Tadić* (Judgment) ICTY-94-1-A (15.07.1999)
Tetra	Case C-333/94 P *Tetra Pak v Commission* [1996] ECR I-5951
US-Shrimp	WTO, *United States: Import Prohibition of Certain Shrimp Products—Appellate Body* (06.11.1998) WT/DS58/AB/R
Vetro	Case T-68/89 *Societa Italiana Vetro v Commission* EU:T:1992:38

NATIONAL JUDICIAL DECISIONS

Abbreviation	Citation
Chromalloy	*Chromalloy Aeroservices v Egypt*, 939 F Supp 907 (DCC 1996)
Hilmarton	*Hilmarton Ltd v Omnium de traitement et de valorisation* (1995) 20 YB Com Arb 663
Maximov	*Maximov v OJSC Novolipetsky* [2017] EWHC 1911 (Comm)
Norsolor	*Norsolor SA v Pabalk Ticaret* (1986) 11 YB Com Arb 484
Pemex	*Corporación Mexicana de Mantenimiento Integral v Pemex-Exploración Y Producción*, No. 13-4022 (2d Cir 2016)
Putrabali	*PT Putrabali Adyamulia (Indonesia) v Rena Holding* (2007) 32 YB Com Arb 299
Yukos (UK)	*Yukos Capital v OJSC Rosneft Oil* [2012] EWCA Civ 855

INTERNATIONAL INSTRUMENTS

Abbreviation	Citation
AUCPCC	African Union Convention on Preventing and Combating Corruption (11.07.2003)
Criminal-LCC	Criminal Law Convention on Corruption (1999) CETS 173
ECtHR Rules	Rules of Court of the European Court of Human Rights (01.08.2021)
IACAC	Inter-American Convention against Corruption E/1996/99 (29.03.1996)
IACtHR Rules	Rules of Procedure of the Inter-American Court of Human Rights (01.08.2013)
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration (23.10.2014)
ICC Rules	International Criminal Court Rules of Procedure and Evidence (01.07.2002)
ICSID Convention	International Centre for Settlement of Investment Disputes (ICSID) Convention [1965] 575 UNTS 159
ICSID-AFR	Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID (10.04.2006)
ICSID-AFR-PA	ICSID Rules of Procedure for Arbitration Proceedings Arbitration (Additional Facility) Rules (10.04.2006)
ICSID-PA	ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) (10.04.2006)
Iran-US Claims Tribunal Rules	Iran-United States Claims Tribunal Rules of Procedure for Arbitration (03.05.1983)
OECD Anti-Bribery Convention	Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1998)
UNCITRAL Arbitration Rules	United Nations Commission on International Trade Law Arbitration Rules (1976)
UNCITRAL Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (01.04.2014)

ARTICLES

Abbreviation	Citation
Batifort	Batifort S and JB Heath, 'The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization' [2018] 111(4) Am J Int'l L 873
Born	Born G and S Forrest, 'Amicus Curiae Participation in Investment Arbitration' (2019) 34 ICSID Rev 626
Broches	Broches A, 'The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction' (1966) 5 Colum J Transnat'l L 263
Broches-II	Broches A, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1972-II) 136 Recueil des Cours 331
Douglas	Douglas Z, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails' [2011] 2(1) J Int Disput Settl 97

Goldie	Goldie LFE, 'The Critical Date' [1953] 12(4) Int'l & Comp L Q 1251
McLaughlin	McLaughlin M, 'Defining a State-Owned Enterprise in International Investment Agreements' [2019] 34(3) ICSID Rev 595
Poudret	Poudret JF, 'Quelle solution pour en finir avec l'affaire Hilmarton? Réponse à Philippe Fouchard' (1998) Rev Arb 1
Schwartz	Schwartz EA, 'A Comment on Chromalloy Hilmarton, à l'américaine' (1997) 14 J Int'l Arb 125
Sinha	Sinha AK, 'An Inquiry into the Scope of MFN Provisions in Bilateral Investment Treaties' [2020] 45(2) Brooklyn J Int'l L 680
Sonatrach	'Tribunal de premiere instance [Court of First Instance] of Brussels, 6 December 1988, Societe National pour la Recherche, le Transport et la Commercialisation des Hydrocarbures (Sonatrach) (Algeria) v. Ford, Bacon and Davis Inc.' (1990) XV YB Com Arb 370
Wijck	van Wijck P, 'Loyalty rebates and the more economic approach to EU competition law' [2021] 17(1) Eur Compet J 1

BOOKS

Abbreviation	Citation
Douglas	Douglas Z, *The International Law of Investment Claims* (CUP 2012)
Paparinskis	Paparinskis M, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013)
Paulsson	Paulsson J, *Denial of Justice in International Law* (CUP 2005)
Schreuer	Schreuer CH, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009)

BOOK CHAPTERS

Abbreviation	Citation
Salmon	Salmon J, 'Duration of the Breach' in J Crawford *et al*. (ed), *The Law of International Responsibility* (OUP 2010)

OFFICIAL DOCUMENTS

Abbreviation	Citation
ICSID-CIRDI-CIADI	ICSID *et al.*, *History of the ICSID Convention—Volume II* (ICSID 2009)
World Bank	World Bank *et al.*, *Legal Framework for the Treatment of Foreign Investment* (Washington, DC 1992)

UN DOCUMENTS

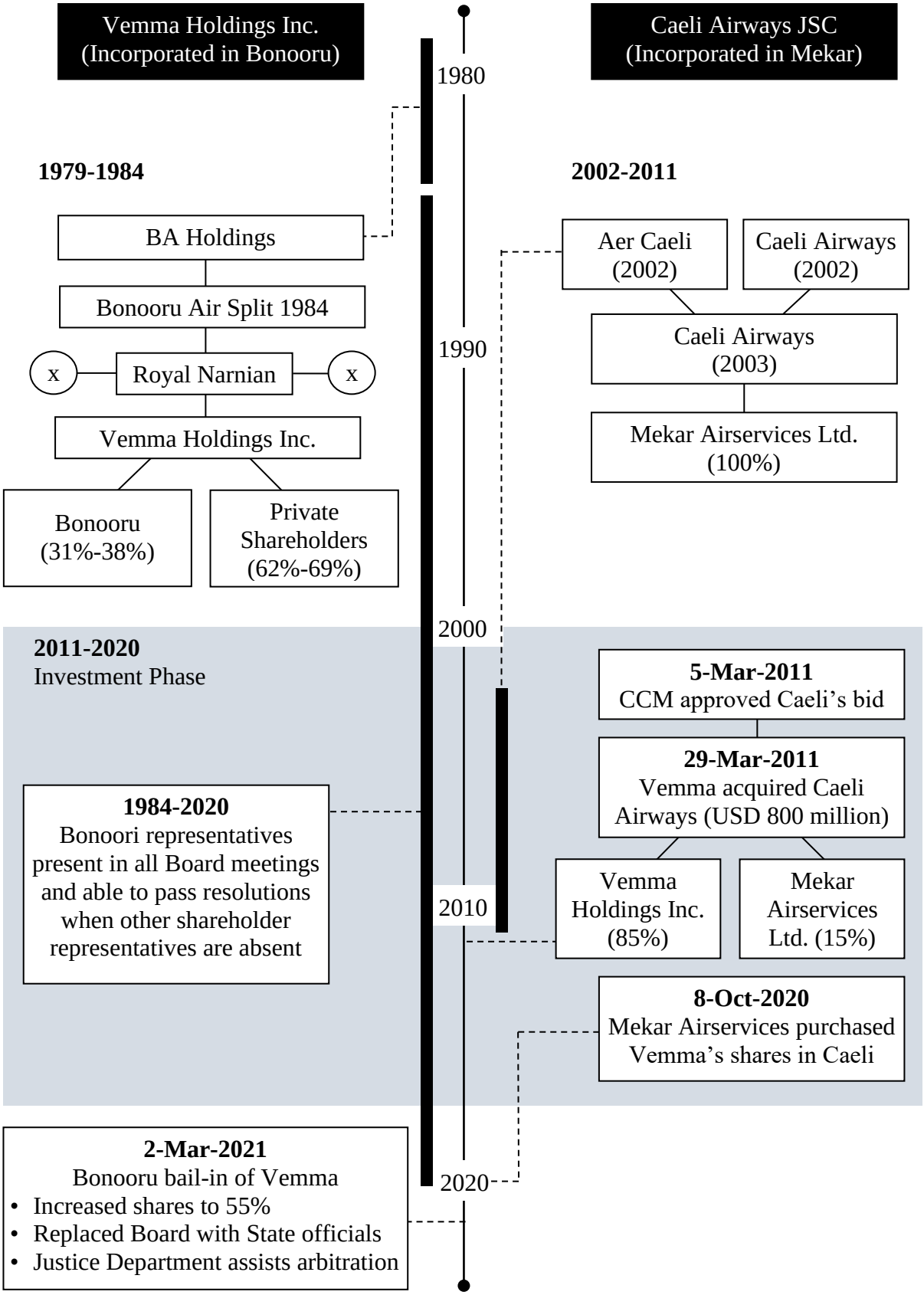
Abbreviation	Citation
ARSIWA	ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts' (2001) A/CN.4/SER.A/2001/Add.1(Part 2)
ARSIWA Commentaries	ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) A/56/10
ILC 1976 Report	ILC, 'Report of the International Law Commission on the work of its twenty-eighth session' (1976) A/31/10
ILC Fragmentation Report	ILC, 'Report of the Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) A/CN.4/L/682
ILC MFN Report	ILC, 'Final Report of the Study Group on the Most-Favoured-Nation clause' (2015) A/70/10
ILC Model Rules	ILC, 'Model Rules on Arbitral Procedure' (1958) A/3859
UNCAC	UNGA, 'United Nations Convention against Corruption' (2003) A/58/422
UNCITRAL Model Law	UNCITRAL, 'UNCITRAL Model Law on International Commercial Arbitration' (1985) A/40/17
UNCTAD	UNCTAD, 'The effects of anti-competitive business practices on developing countries and their development prospects' (2008) UNCTAD/DITC/CLP/2008/2

TABLE OF ABBREVIATIONS

Abbreviation	Term
1994 Bonooru-Mekar BIT	Treaty Between the Federal Republic of Mekar and the Commonwealth of Bonooru for the Promotion and Protection of Investments (1994)
2006 Arrakis-Mekar BIT	Treaty Between the Federal Republic of Mekar and the Kingdom of Arrakis for the Promotion and Protection of Investments (2006)
BIT	Bilateral Investment Treaty
Bonooru	Commonwealth of Bonooru
Caeli	Caeli Airways JSC
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	Comprehensive Economic Partnership and Trade Agreement
CILS	Centre for Integrity in Legal Services
CRPU	Committee on Reform of Public Utilities
ECtHR	European Court of Human Rights
EU	European Union
FET	Fair and Equitable Treatment
FMV	Fair Market Value
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Dispute
ICTY	International Criminal Tribunal for the Former Yugoslavia
Lapras	Lapras Legal Capital
Mekar	The Federal Republic of Mekar
MFN	Most-Favoured-Nation
MON	Mekari Mon
MRTPA	Monopoly and Restrictive Trade Practice Act
MV	Market Value
NAFTA	North American Free Trade Agreement
NDP	Non-Disputing Party
NGO	Non-Governmental Organisation
PAHO	Pan American Health Organization
PCIJ	Permanent Court of International Justice
SCC	Sinnoh Chamber of Commerce
SOE	State-Owned Enterprise
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
US	United States of America
Vemma	Vemma Holdings Inc.
WHO	World Health Organization
WTO	World Trade Organization

STATEMENT OF FACTS

Corporate Structure of Parties



Overview

Caeli's Rapid Expansion

June-2011
New fleet
- Purchased (8)
- Leased (15)

2012 & 2014
New routes (>20)

2012 & 2013
Ignored Mekar's warnings against expansion

2015
Purchased Boeing 737 MAX (45)

Late 2016-2021
Monetary crisis in Mekar

Fluctuating oil prices
- Drop (2011-2014)
- High (2016-2018)

Grounding of Boeing 737 MAX due to Jakarta crash (2018-2020)

30-Jan-2018
Denomination of airfares in MON

25-Sept-2018
Caeli denied subsidy under Executive Order 9-2018

8-Feb-2019
Caeli rejected USD 200 million loan from Mekari bank

Vemma's Sale of Caeli
- Hawthorne offer invalid
- SCC Award enforced in Mekar
- Shares sold to Mekar Airservices

2011-2015	2016-2017	2018-2019	2020-2021

1st Investigation
Eliminate domestic competitors through predatory pricing

2nd Investigation
Eliminate regional competitors through price undercutting

1st Investigation Report (2018)
- Predatory pricing
- Loyalty inducing programmes
- Airfare below average avoidable costs

2nd Investigation Report (2019)
- Abuse of dominant position at Phenac
- Excessively low prices on routes to and from Phenac

Caeli after Vemma's Exit (2021)
- Market share in Mekar below 30%
- State aid infusion to avert insolvency

Caeli's Judicial Review against CCM Sanctions (2018-2020)

2018	2019	2020
27-Mar 1st Appeal and Stay Motion filed (airfare cap)	**1-Jan** 2nd Investigation Report (MON 200 million fine + interim measure)	**May** Hearing of 2nd Appeal
Aug 1st Investigation Report (MON 150 million fine + interim measure)	**20-Jan** 2nd Appeal filed (fines)	**Oct** Claimant exited Caeli before decision delivered
	26-Jan Hearing of 2nd Appeal fixed in May 2020	
	25 to 27-Apr Hearing of Stay Motion	
	15-June Conclusion of Stay Motion and 1st Appeal	

Enforcement of SCC Award Invalidating Hawthorne Offer (2019-2020)

2019		2020	
Nov	Vemma received Hawthorne offer (USD 600 million)	**11-Feb**	Mekar Airservices commenced arbitration in SCC to invalidate Hawthorne offer
17-Dec	Mekar Airservices rejected offer • Price inflated • Hawthorne not a *bona fide* 3rd-party purchaser	**9-May**	Mr Cavanaugh (sole arbitrator) delivered Award granting Mekar Airservices' Claim
		14-June	CILS report alleging Mekar Airservices bribed Mr Cavanaugh
		1-Aug	Sinnoh Supreme Court set aside Award
		23-Aug **25-Sept**	Mekari High Court enforced Award Mekari Supreme Court upheld enforcement of award
		Feb to Sept	Vemma received no other 3rd-party offer
		8-Oct	Vemma sold Caeli's stake to Mekar Airservices (USD 400 million)

EXECUTIVE SUMMARY

[1] ***Jurisdiction***: Claimant is a governmental puppet of Bonooru—the true beneficiary of Claimant's investment, and true claimant in this arbitration. Throughout its control of Caeli in 2011-2020, Claimant was razor-focused on diverting Caeli's flights to boost Bonooru's tourism industry and economic engine. That Bonoori governmental officials now pack Claimant's Board and legal team bears testament that this arbitration is essentially a dispute between two sovereign States straying beyond the jurisdictional limits of ICSID.

[2] ***Amicus Curiae***: Claimant's objection to admit CRPU advisors is hypocritical. Claimant finds fault with the Mekari courts enforcing an arbitral award allegedly procured by bribery, yet brushes aside damning evidence of corruption tainting the very root of this Tribunal's jurisdiction. Further, Claimant throws full weight behind CBFI—a partisan bloc of Bonoori investors seeking audience simply to parrot Claimant's submissions. This Tribunal should only welcome friends of public interest (CRPU advisors), not fans of private interest (CBFI).

[3] ***Merits***: Claimant's long laundry list of grievances range from procedural missteps by Mekari regulators and denial of justice by Mekari courts. However, Claimant conveniently overlooks the backdrop behind Caeli's downward spiral under its watch—the dire economic recession in Mekar necessitating emergency measures, and Claimant's own reckless market expansion strategy falling afoul with anti-monopoly laws and commercial prudence. Ultimately, the claim of creeping FET violation is built upon a house of cards devoid of legal foundation.

[4] ***Compensation***: The common intention of Bonooru and Mekar to adopt '*market value*' as the compensation standard for non-expropriation violations is made crystal clear in CEPTA. Yet, Claimant seeks to override such explicit treaty standard by falling back on customary principles of restitution and invoking the MFN clause to import the '*fair market value*' standard from the 2006 Arrakis-Mekar BIT. Such attempt is futile in light of cardinal canons of construction, ICSID *jurisprudence constante*, and above all, textual architecture of CEPTA itself.

PLEADINGS

I. THIS TRIBUNAL LACKS JURISDICTION *RATIONE PERSONAE* OVER THE DISPUTE

[1] This Tribunal lacks jurisdiction over what is essentially a State-to-State dispute.[1] Claimant's corporate veil should be lifted[2] to reveal Bonooru disguising as the [*A*] true investor in Mekar (2011-2020); and [*B*] true claimant in this arbitration (2021-present).

A. Claimant Invested in Caeli on Behalf of Bonooru (2011-2020)

[2] To seise an ICSID tribunal's jurisdiction *ratione personae*, an investor must cumulatively fulfil the double-barreled test of nationality under Article 25 of ICSID Convention and the BIT.[3] Article 25 delineates the '*outer limits*' of ICSID's jurisdiction that cannot be extended by a BIT.[4]

[3] Accordingly, this Tribunal must examine whether Claimant is [*1*] a '*national*' under Article 25 of ICSID Convention; and [*2*] an '*Investor*' under Article 9.1 of CEPTA.

1. Claimant is not a '*national*' of Bonooru under Article 4(2) of ICSID-AFR and Article 25 of ICSID Convention

[4] Since Respondent is not a State party to ICSID Convention,[5] this arbitration has been instituted under ICSID-AFR.[6]

[5] Article 2(a) of ICSID-AFR authorises ICSID '*to administer (…) proceedings between a State (…) and a* ***national of another State***' for arbitration involving non-ICSID State parties.[7] According to Article 4(2), the '*jurisdictional requirements* ratione personae' under Article 25 of ICSID Convention must be met.[8] Hence, despite the

[1] Record, 6.
[2] *KT* [134]; *Rumeli* [328]; *Tokios* [53].
[3] *Guardian* [140]; *Tokios* [39].
[4] *Blue Bank* [152]–[153]; Broches-II, 361; *Joy* [50]; *Vattenfall (II)* [126].
[5] Record, 31.
[6] Record, 2.
[7] ICSID-AFR, art 2(a) (*emphasis added*).
[8] ICSID-AFR, art 4(2).

general inapplicability of ICSID Convention,[9] ICSID *jurisprudence constante* interpreting Article 25(1) remains relevant to this arbitration.[10]

[6] The '*main jurisdictional feature*' of ICSID '*is to decide disputes between a private investor and a State*' and not '*disputes between two States*'.[11] To institute an ICSID arbitration, a claimant must be an '*investor of a Contracting Party, rather than being the Contracting Party itself*'.[12]

[7] The term '*national*' in Article 25(1) of ICSID Convention is left undefined.[13] To reinforce the objective outer limits,[14] ICSID tribunals consistently resort to the test laid down by Broches (ICSID's first Secretary-General):

> '*[F]or purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an* ***agent for the government*** *or is* ***discharging an essentially governmental function***.'[15]

[8] The *Broches* test is a '*mirror image*'[16] to the customary rules of attribution in ARSIWA.[17] Claimant's activities are attributable to Bonooru because Claimant [*1*] exercised an essential governmental function (Article 5); or alternatively, [*2*] acted under Bonooru's instructions, directions or control (Article 8).

a. Claimant exercised essential elements of governmental function

[9] The second limb of the *Broches* test is embodied in Article 5 of ARSIWA:

> '*The conduct of a person or entity (…) which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law (...)*'[18]

[9] ICSID-AFR, art 3.
[10] *KT* [82]–[83].
[11] Broches, 265; *Maffezini* [74].
[12] *Landesbank* [98].
[13] *Blue Bank* [153]; *KT* [113]; *Maffezini* [74].
[14] *Blue Bank* [153].
[15] Schreuer, 161.
[16] *BUCG* [34].
[17] *Bilcon* [306]–[307]; *Gavrilovic* [779]; *UFG* [9.90].
[18] ARSIWA, art 5.

[10] Despite the dual structural-functional test laid down in *Maffezini*,[19] the functional test has emerged as the pivotal determinative criterion of '*nationality*'.[20] The inconclusiveness of corporate structure is in line with the principle of separate legal personality.[21] Indeed, recent arbitral awards have largely disregarded majority ownership, such as in *CSOB* (65%)[22] and *BUCG* (100%).[23]

[11] Throughout Claimant's investment in Caeli, Bonooru only held a minority stake in Claimant (31%-38%).[24] Neither is Bonooru granted any '*golden share*'[25] with majority voting rights under Claimant's Memorandum of Association.[26] Nevertheless, such facts are not dispositive of the nature of Claimant's functions.

[12] The best formulation of the functional test was laid down in *CSOB*:

> '*[I]n determining whether CSOB, in discharging these functions, exercised governmental functions, the focus must be on the nature of these activities and not their purpose. While it cannot be doubted that in performing the above-mentioned activities, CSOB was promoting the governmental policies or purposes of the State, the activities themselves were essentially commercial rather than governmental in nature.*'[27]

[13] In *BUCG*, an entity wholly-owned and controlled by China was hired as a construction contractor at an airport site in a commercial capacity.[28] The Tribunal emphasised that '*the issue is not the corporate framework of the State-owned enterprise, but whether it* functions *as an agent of the State in the fact-specific context*'.[29] In *Maffezini*, SODIGA's creation by ministerial decree to promote regional industrial development was deemed a governmental function and not '*commercial in nature*'.[30]

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[19] *Maffezini* [84]; *Salini* [31]–[35].
[20] *BUCG* [33]; *CSOB* [17]–[18]; *Tatneft* [135].
[21] *Barcelona Traction* [41]; *Diallo* [61]; *EDF* [190]; *Interocean* [297]; *Tatneft* [128]; *Tulip* [289].
[22] *CSOB* [18].
[23] *BUCG* [32].
[24] Record, 29.
[25] *Tatneft* [129]–[130].
[26] Record, 44–45.
[27] *CSOB* [20].
[28] *BUCG* [40]–[42].
[29] *BUCG* [39].
[30] *Maffezini* [85]–[86].

[14] In sum, the functional test is met when an entity exercises governmental authority '*to a limited extent or in a specific context*'.[31] As succinctly summarised in *Rumeli*:

> '*The standing of a state-owned entity under Article 25 of the ICSID Convention should be reviewed not on the basis of the acts and function of the state-owned entity in general, but rather on the basis of its acts and function in connection with the actual dispute under review.*'[32]

[15] The scope of governmental authority depends on each State's history and traditions. [33] The essentiality of '*mobility rights*' is woven into Bonooru's constitutional fabric due to its unique geographical features:

(a) Bonooru is an archipelago of 109 islands with uneven terrains separating remote communities.[34]

(b) Due to technological advancement, Bonooru invested heavily in civil aviation to upgrade the primary mode of transportation from waterways to airways.[35]

(c) After the 1970s oil crisis, Bonooru's privatisation of civil aviation resulted in Claimant operating Royal Narnian, Bonooru's flag carrier (previously operated by State-owned BA Holdings).[36]

(d) Under Article 70 of the Bonooru Constitution, every citizen has '*the right to enter, remain in, and leave its territory*' and the government '*shall ensure every citizen is guaranteed travel to and from its many islands*'.[37]

(e) Boonoru's Constitutional Court affirmed that the government owes a '*positive obligation*' to enable citizens to '*move between islands or leave the islands for another nation*' by '*air travel*' as the '*dominant means to connect Bonooru's disparate communities*'.[38] Privatisation did not impair such positive obligation since the government guaranteed '*utilisation of the Royal Narnian for public benefit*' by continuing to '*operate routes to remote communities*' and '*enjoy subsidies under Bonoori law*'.[39]

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[31] ARSIWA Commentaries, art 5 cmt 3; *EDF* [193]; *Jan de Nul* [165].
[32] *Rumeli* [212].
[33] ARSIWA Commentaries, art 8 cmt 8; *BUCG* [34].
[34] Record, 28.
[35] Record, 28.
[36] Record, 29.
[37] Record, 41.
[38] Record, 43.
[39] Record, 43.

[16] The sovereign function of Claimant spilt over to Caeli's operations in Mekar:

(a) Claimant's successful bid for Caeli hinged on leveraging the '*economies of traffic density*' at Phenac International to lower air fares in view of '*boosting consumer welfare*' (as acknowledged by CCM).[40]

(b) Claimant's early business model focused on attracting business travellers and tourists from Mekar to Bonooru.[41]

(c) From 2011 to 2016, Claimant received recurring subsidies under Bonooru's Horizon 2020 Scheme as part of the Caspian Project to attract more Mekari tourists to Bonooru's beaches, national parks and cultural heritage sites.[42]

(d) Claimant's business expansion to low-cost cross-continental flights aimed to offset traffic and revenue decline during the fall and winter 'off-season'.[43]

(e) As of 2019, civil aviation accounted close to 13% of Bonooru's GDP and 11.6% of employment.[44]

[17] In sum, Claimant's investment in Mekar was instrumental in driving Bonooru's economic engine and fulfilling its citizens' mobility rights.

[18] Hence, such activities pursue a sovereign function (*de jure imperii*[45] *or puissance publique*[46]) rather than being purely commercial in nature.[47]

b. Claimant acted under Bonooru's instructions, directions or control

[19] The '*agent*' limb of the *Broches* test can be analogised with Article 8 of ARSIWA:

> '*The conduct of a person (…) shall be considered an act of a State under international law if the person (…) is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.*'[48]

[20] According to ICJ's jurisprudence, the test is '*effective control*'.[49] Some tribunals have embraced this high and demanding threshold.[50] However, in assessing jurisdiction, the

[40] Record, 32.
[41] Record, 32.
[42] Record, 32; 89.
[43] Record, 33.
[44] Record, 28.
[45] *Tatneft* [116].
[46] *EBO* [342].
[47] *Hamester* [180].
[48] ARSIWA, art 8.
[49] *Bosnia Genocide* [400]; *Nicaragua/USA* [115].

'*overall control*' test has been preferred in other international fora (ICTY[51] and ECtHR[52]). As opined by the *Bayindir* Tribunal:

> '*[T]he levels of control required for a finding of attribution under Article 8 in other factual contexts, such as foreign armed intervention or international criminal responsibility, may be different. It believes, however, that the approach developed in such areas of international law is not always adapted to the realities of international economic law and that they should not prevent a finding of attribution if the specific facts of an investment dispute so warrant.*'[53]

[21] A few guiding principles can be drawn from arbitral *jurisprudence constante*:

(a) Characterisation of activity as '*sovereign or commercial in nature*' (*jure imperii* or *jure gestionis*) is irrelevant.[54]

(b) Structure of entity (i.e., majority shareholding and Board representation,[55] manner of appointment of directors and frequency of consultation[56]) is inconclusive.

(c) What must be shown is that the State dominated the general corporate decision-making[57] or controlled the entity over a '*specific activity*'[58] towards '*achieving a particular result in its sovereign interests*'.[59]

[22] Again, it is immaterial that Bonooru is a minority shareholder (31%-38%) in Caeli,[60] and only had one non-executive director.[61]

[23] Bonooru wielded great influence over Claimant's investment, from start to finish:

(a) In November 2010, the same day that Claimant submitted a bid to acquire Caeli, the head of Claimant's Board (Sabrina Blue) was appointed as Bonooru's Secretary of Transport and Tourism.[62]

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[50] *Hamester* [172], [179]; *Jan de Nul* [173]; *Tulip* [304]; *White* [8.1.4].
[51] *Tadić* [131].
[52] *Loizidou* [56].
[53] *Bayindir* [130].
[54] *Bayindir* [129].
[55] *White* [8.1.6].
[56] *Tulip* [306]–[308].
[57] *LETCO* [16.5]; *White* [8.1.18].
[58] *Tulip* [309].
[59] *Tulip* [326].
[60] Record, 29.
[61] Record, 45–46.
[62] Record, 31.

(b) From 2011 to 2016, Bonooru provided subsidies to Claimant under Horizon 2020 because '*expansion into Mekar will offer substantial benefits (…) to all of Bonooru by enhancing the aviation network [which] will boost the tourism infrastructure*' (in Sabrina Blue's words).[63]

(c) From 2011 to 2015, Claimant's Board representatives continually pressed for expansion (e.g., new flight routes and new fleet) over debt-alleviation favoured by Mekar Airservices.[64]

(d) Bonooru's representatives attended every Claimant's Board meeting and passed resolutions when other shareholders' representatives were absent.[65]

(e) In 2016, Sabrina Blue publicly praised Claimant's contribution to Bonooru's tourism infrastructure, which has '*enhanced the mobility rights*' of its citizens in the Greater Narnian region.[66]

[24] By exerting '*sovereign control*' to '*achieve an ulterior motive*' in boosting Bonooru's tourism industries and mobility rights,[67] Bonooru effectively controlled Claimant's operations of Caeli in Mekar.[68]

2. Claimant is not an '*Investor*' under Article 9.1 of CEPTA

[25] Aside from falling outside the objective '*outer limits*' of Article 25 of ICSID Convention,[69] Claimant also fails to fulfil the subjective test under CEPTA.[70] Article 9.1 defines '*Investor*' as '*an **enterprise** with the nationality of a Party or seated in the territory of a Party*'.[71]

[26] Indeed, States have '*broad discretion*' to define '*corporate nationality*' under BITs.[72] Article 9.1 reflects the *incorporation* test rather than the *control* test.[73] However, Article 9.1 implicitly *excludes* SOE.

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[63] Record, 32–33; 89.
[64] Record, 33–34.
[65] Record, 86.
[66] Record, 89.
[67] *Tulip* [308], [318].
[68] ARSIWA, art 8.
[69] *Blue Bank* [153].
[70] *Blue Bank* [153]; *KT* [113].
[71] Record, 73.
[72] *Adamakopolous* [331]–[332]; *Rumeli* [329].
[73] Douglas, 22–23; *Plama* [124]; *Saluka* [240]; *Tokios* [30]; *Yukos* [416].

[27] It is trite law that BITs are to be interpreted based on ordinary meaning in light of their context and object (*vide* Article 31 of VCLT).[74] Since the meaning of '*enterprise*' in Article 9.1 is '*ambiguous or obscure*', the surrounding circumstances of CEPTA is relevant as a supplemental means of interpretation.[75]

[28] Article I of 1994 Bonooru-Mekar BIT defines '*enterprise*' as '*any entity (…) whether privately-owned or* ***government-owned***'.[76] The omission of such broad definition of '*enterprise*' in Article 9.1 of CEPTA evinces State parties' intention to exclude SOEs from the definition of '*Investor*'. Article 1.6 clarifies that 1994 Bonooru-Mekar BIT '*will cease to have effect on the date of entry into force*' and investments made under the latter '*shall be governed*' by CEPTA henceforth.[77]

[29] Further, such omission constitutes an '*exception*' to the emerging '*pattern*'[78] of modern investment treaties BITs classifying different types of SOEs:[79]

	Treaty	**Categories of SOE**
(a)	Comprehensive and Progressive Agreement for Trans-Pacific Partnership[80]	• directly owns above 50% of share capital; • controls, through ownership interests, exercise of voting rights above 50%; or • holds power to appoint majority of Board members
(b)	US-Singapore FTA[81]	• '*an enterprise owned, or controlled through ownership interests, by [US]*'. • '*an enterprise in which [Singapore] has effective influence*'.

[30] Hence, Article 9.1 of CEPTA excludes Claimant from qualifying as an '*Investor*' due to Bonooru's ownership.

B. Bonooru's Takeover of Claimant during Arbitration Deprives This Tribunal's Jurisdiction *Rationae Personae* (2021-Present)

[31] In November 2020, Claimant commenced this arbitration.[82]

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[74] *Alapli* [333]; *Daimler* [46]; *KT* [86]; *Maffezini* [27]; *Mondev* [43]; *Phoenix* [75]–[76]; *Saluka* [296]–[300]; *Tokios* [27]; *Waste* [9].
[75] VCLT, art 32.
[76] Record, 69.
[77] Record, 72.
[78] *AdT* [291].
[79] McLaughlin, 615–618.
[80] CPTPP, art 17.1
[81] US-Singapore FTA, art 12.8(5)–(6).

[32] In March 2021, Bonooru tightened control over Claimant by acquiring majority shareholding (55%), replacing the entire Board with governmental functionaries and staffing the legal team with Justice Department lawyers to steer this arbitration.[83] Such subsequent events [*1*] corroborate Bonooru's control over Claimant; and [*2*] constitute a form of substitution prohibited by ICSID.

1. Subsequent events corroborate Bonooru being the true beneficiary of Claimant's investment

[33] Generally, the date of institution of proceedings is the critical date to determine jurisdiction for international courts.[84] Under ICSID, jurisdiction is assessed '*at the time when proceedings are instituted*'[85] and '*date on which the parties consented to submit such dispute*'.[86] ICSID tribunals regularly recognise that jurisdiction, once established, cannot be subsequently defeated.[87]

[34] Nevertheless, it is permissible to consider subsequent events that change the legal identity of *investor* (as opposed to assignment of *investment*[88]). The Tribunal in *Vivendi* observed that '*the situation is less clear when nationality depends on foreign control*' and ICSID tribunals '*have not wholly disregarded subsequent developments*'.[89] Similarly, Professor Goldie has opined:

> '*[S]ubsequent facts are admissible (...) in a subordinate capacity (...) to corroborate and explain the probative events occurring before the critical date.*'[90]

[35] Accordingly, this Tribunal is not constrained from gazing past the critical date. Bonooru's subsequent takeover of Claimant corroborates the overwhelming evidence indicating that the '*real beneficiary*'[91] of Claimant's investment in Caeli (2011-2020) was Bonooru.[92]

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[82] Record, 86.
[83] Record, 40.
[84] *Arrest Warrant* [26]; *Lockerbie* [38]; *Nottebohm*, 123; *Right of Passage*, 142.
[85] ICSID-AFR, art 4(2).
[86] ICSID Convention, art 25(2)(b).
[87] *CSOB* [31]; *Klöckner* [17]; *LETCO* [16.4]; *Teinver* [255]–[259]; *Vivendi* [65].
[88] *CSOB* [31]; *El Paso (Jurisdiction)* [135]; *EnCana* [129]–[131]; *Teinver* [256]–[259].
[89] *Vivendi* [65].
[90] Goldie, 1254.
[91] *ADC* [335]; *Rumeli* [205].
[92] See Issue I(A)(1)(a)–(b).

2. Bonooru's substitution of Claimant is prohibited

[36] Lastly, ICSID forbids an investor-State dispute from transforming into a State-to-State dispute by substitution.[93] A preliminary draft of the ICSID Convention provided:

> '*Consent by a Contracting State to the submission of any dispute with a national of another Contracting State (...) be deemed consent to the substitution of that national in proceedings (...) by its State (...) having compensated such national for its claim, has been subrogated to its right.*'[94]

[37] Due to strong opposition, the provision was eventually deleted to close the loophole of stronger capital-exporting States stepping into the shoes of private investors.[95]

[38] By pumping sovereign resources to fund this arbitration, Bonooru stands as the *true claimant*. Jurisdiction, even if established at the critical date, should be withdrawn[96] because such substitution subverts ICSID in a manner not intended by State parties.[97]

[93] Schreuer, 187–188.
[94] ICSID-CIRDI-CIADI, 622.
[95] ICSID-CIRDI-CIADI, 974–981, 1017–1018.
[96] *Vivendi* [63].
[97] *Tokios* [39].

II. THIS TRIBUNAL SHOULD ADMIT NON-DISPUTING PARTY SUBMISSION FROM CRPU ADVISORS BUT NOT CBFI

[39] *Amicus curiae* is a '*friend of the court*' whose function is to '*help the decision maker arrive at its decision by providing (…) arguments, perspectives, and expertise that the litigating parties may not provide*'.[98] However, an *amicus* remains as a non-party.[99]

[40] *Amici* submissions have been widely accepted across international fora (e.g., WTO,[100] ECHR,[101] IACtHR,[102] ICC[103] and Iran-US Claims tribunal[104]). In 2006, ICSID-PA[105] and ICSID-AFR-PA[106] were amended to expressly allow written submission by non-disputing party (NDP). Since then, various *amici* have been admitted in ICSID-AFR arbitrations.[107]

[41] This Tribunal's discretionary power[108] to accept NDP submissions under Article 9.19 of CEPTA and Article 41(3) of ICSID-AFR-PA[109] is guided by three criteria:

(a) bring a different perspective, particular knowledge or insight;

(b) address a matter within the scope of the dispute; and

(c) significant interest in the proceeding.

[42] This Tribunal should [*A*] admit Committee on Reform of Public Utilities' (CRPU) advisors;[110] but [*B*] disallow Consortium of Bonoori Foreign Investors (CBFI).[111]

A. CRPU Advisors Should Be Admitted As *Amicus Curiae*

[43] CRPU advisors' submission [*1*] offers a new perspective different from parties; [*2*] raises matters within the scope of this dispute; and [*3*] involves public interest.

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[98] *Vivendi-II* [13].
[99] *Biwater* [46]; *UPS* [61].
[100] *US-Shrimp* [105]–[108].
[101] ECtHR Rules, r 44.
[102] IACtHR Rules, art 44; *Sumo* [41]–[42].
[103] ICC Rules, r 103.
[104] Iran-US Claims Tribunal Rules, art 15.
[105] ICSID-PA, r 37.
[106] ICSID-AFR-PA, art 41(3).
[107] *Apotex (BNM)* [15]–[19]; *Foresti*, 2.
[108] *Apotex (Appleton)* [26]; Born, 633–634.
[109] Record, 14.
[110] Record, 18–20.
[111] Record, 15–17.

1. CRPU advisors offer a different perspective, knowledge or insight

[44] This criterion examines whether an applicant is '*likely*'[112] to provide different '*arguments, and expertise and perspectives that the parties may not have provided*'.[113] Mere technical knowledge or expertise alone is insufficient to meet the threshold.[114]

[45] In *Biwater*, the broad legal expertise on '*international investment agreements and national development policy*' of environmental NGOs was '*irrelevant*' to a claim concerning a defunct water and sewage system.[115]

[46] In contrast, CRPU possesses both *general* expertise on Respondent's investment environment and *specific* insider knowledge on Claimant's investment since inception:[116]

(a) CRPU advisors represent Mekari civic society on investment banking.

(b) In 2010, CRPU advisors were engaged by CRPU under statutory law to '*advise on the privatization, liquidation, and/or restructuring of Caeli*'.

(c) CRPU advisors' engagement was vetted through a '*transparent and competitive process*' based on a '*criteria of competence*' mandated by law.

(d) CRPU advisors actively participated in CRPU's deliberations on the tender process culminating in Claimant's acquisition of Caeli.

(e) CRPU advisors possess evidence that Claimant's successful bid was '*procured by means of bribes paid*' to CRPU's Chairperson (Mr Umbridge).

[47] Hence, CRPU advisors' input is of immense value in assisting this Tribunal's decision-making.

2. CRPU advisors raise matters within the scope of this dispute

[48] Next, the issue is whether CRPU advisors' submission addresses matters related to this arbitration.[117] The power to admit *amicus curiae* is limited '*to facilitate the*

[112] *Methanex* [49]–[50]; *UPS* [70].
[113] *InterAguas* [23]; *Pezold* [49].
[114] *Eco* [31]–[33]; *RFP* [4.4].
[115] *Biwater* [35].
[116] Record, 18–20.
[117] *Eco* [28]; *Philip Morris (PO4)* [25]–[27].

Tribunal's process of inquiry into, understanding of, and resolving, that very dispute'[118] in order to '*avoid the unnatural broadening*' of the scope of dispute.[119]

[49] Admittedly, CRPU advisors' bribery allegation has not been raised by Respondent. Nevertheless, consideration of such fresh allegation is within this Tribunal's [*a*] *Kompetenz-Kompetenz* jurisdiction; and [*b*] *ex officio* investigatory power.

a. This Tribunal has inherent jurisdiction to rule on its own jurisdiction

[50] Although '*arbitral jurisdiction is based exclusively on consent*', tribunals retain inherent '*power to determine its own jurisdiction*'.[120] The doctrine of *Kompetenz-Kompetenz* is well-enshrined under custom, [121] ICSID Rules [122] and arbitral *jurisprudence constante*.[123]

[51] This Tribunal's inherent power extends *a fortiori* over jurisdictional issues not raised by parties. Article 45(3) of ICSID-AFR-PA provides that a '*Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute before it is within its competence*'.[124]

[52] In *Chevron*, the Tribunal was reluctant to admit *amicus curiae* at the jurisdictional phase. [125] In *UPS*, the Tribunal considered allowing an applicant to submit on '*questions of jurisdiction and the place of arbitration*' as inappropriate.[126]

[53] Nevertheless, as opined in *Apotex*, there is no '*hard and fast rule*' since it is '*perfectly conceivable that issues of jurisdiction might raise matters of public interest*'.[127] Such flexible approach has been endorsed by Born[128] and tribunals.[129]

[54] Hence, this Tribunal is competent to hear CRPU advisors' submissions.

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[118] *UPS* [60].
[119] *Apotex (BNM)* [27].
[120] *ICS* [255].
[121] *Nottebohm*, 120.
[122] ICSID-AFR-PA, art 45(1); ICSID-PA, r 41(1).
[123] *Copper Mesa* [5.64]; *Grenada* [106]; *Malicorp* [98]; *Raiffeisen* [156].
[124] ICSID-AFR-PA, art 45(3).
[125] *Chevron (PO8)* [18].
[126] *UPS* [71].
[127] *Apotex (PO2)* [33].
[128] Born, 649.
[129] *Electrabel* [234]; *Pac Rim* [ii].

b. Corruption goes to the root of this Tribunal's jurisdiction

[55] International law draws a clear distinction between jurisdiction and admissibility. Jurisdiction goes to the root of parties' consent to an adjudicatory body's competence to hear a dispute.[130] In contrast, issues of admissibility take aim at the claim rather than the tribunal.[131] The distinction is critical because '*[d]efects in admissibility can be waived or cured by acquiescence*' whilst '*defects in jurisdiction cannot*'.[132]

[56] In practice, this distinction can be rather blurry.[133] Arbitral tribunals treat corruption both as an issue of jurisdiction[134] and admissibility.[135] Even Claimant has recognised that CRPU advisors' submission relates to '*the* ratione legis *jurisdiction*' of this Tribunal.[136] In absence of actual or constructive knowledge[137] of the alleged bribery, Respondent cannot be estopped from supporting a new jurisdictional challenge previously unpleaded.[138] Such allegation constitutes a '*new factual development*' that prompts this Tribunal's consideration.[139]

[57] Moreover, it is immaterial that Mekari society is ambivalent towards corruption, and only Bonoori authorities have instituted investigation thus far.[140] In *Infinito,* the Tribunal allowed an environmental NGO to provide information on corruption allegations against ex-officials involved in the investor's concession even though '*neither Party has made any allegations of corruption*'.[141]

[58] CEPTA's definition of '*investment*' (*vide* Article 9.1[142]) lacks the phrase '*in accordance with domestic law*' (as embodied in other BITs[143]). Nevertheless, such '*legality*' condition is implicit in BITs pursuant to the principle of good faith.[144]

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[130] *Armed Activities* [88].
[131] *ICS* [259].
[132] *Hochtief* [95].
[133] *Micula* [64].
[134] *Energoalians* [261]; *Fraport-II* [467]; *Getma* [174]; *Hamester* [123]–[124]; *UFG* [7.46].
[135] *Churchill* [507], [528]–[532]; *Kim* [593]; *Metal-Tech* [292]; *Oxus* [706], [713]; *Pezold (Award)* [344]–[346].
[136] Record, 22.
[137] *Besserglik* [269].
[138] *Fraport-I* [346]–[347]; *Wena Hotels* [111]–[116].
[139] *Strabag* [8.92]–[8.97].
[140] Record, 87.
[141] *Infinito (PO2)* [33].
[142] Record, 73.
[143] *Fraport-I* [281]; *Infinito* [173]; *Metal-Tech* [372]–[373].
[144] *Cortec* [260]–[261]; *Inceysa* [230]–[239]; *Phoenix* [114].

Moreover, similar to ECT's preambular purpose of '*encouraging respect for the rule of law*',[145] CEPTA aims to promote '*transparency, good governance, and the rule of law, and eliminate bribery and corruption in trade and investment*'.[146]

[59] There is a direct '*causal link*' between the alleged bribe received by Mr Umbridge and Claimant's acquisition of Caeli because the corruption '*contributed to obtaining a right or benefit related to the investment*'.[147] Unlike investments tainted by corruption during '*subsequent performance*',[148] investments procured by corruption strike at the heart of parties' consent to jurisdiction[149] warranting dismissal of an investor's claim *in limine*.[150]

[60] Hence, this Tribunal has an *ex officio* duty to '*engage in its own inquiry on the basis of the evidence in the record*'[151] vested under ICSID Rules[152] or principle of *iura novit arbiter*.[153]

3. CRPU advisors' submission pursues public interest

[61] Article 9.20(6) provides that UNCITRAL Rules on Transparency '*shall apply to any international arbitration proceedings*' against Bonooru whilst Mekar '*shall duly consider [its] application in international arbitration proceedings*' against Mekar.[154]

[62] Although not strictly binding, such rules have equal force here due to Respondent's consent[155] and CEPTA's preambular purpose.[156] Pursuant to Rule 4(a) of UNCITRAL Rules on Transparency, this Tribunal's exercise of discretion should be guided by

[145] *Plama* [138]–[139].
[146] Record, 71.
[147] *Tethyan* [336].
[148] *Fraport-I* [345]; *Quiborax* [266].
[149] *Fraport-II* [467]; *Infinito (Jurisdiction)* [137].
[150] *Minnotte* [132].
[151] *Infinito (Jurisdiction)* [137].
[152] ICSID-AFR-PA, art 45(2); ICSID-PA, r 41(2).
[153] *Caratube* [95]; *Casinos* [172]; *Lighthouse* [109]; *Metal-Tech* [287].
[154] Record, 82.
[155] Record, 72.
[156] Record, 71.

'*public interest in transparency in treaty-based investor-State arbitration*'.[157] Hence, the '*significant interest*' criterion encompasses '*public interest*'.[158]

[63] CRPU's advisors are deeply committed to preventing the '*insidious plague*' of corruption from '*upending investor-State arbitration*'. [159] This echoes the overwhelming arbitral consensus that corruption is antithetical to international public policy.[160] As noted in *World Duty*, '*bribery or influence peddling, as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries*'.[161] Majority of States have ratified international conventions to combat corruption, globally[162] and regionally.[163]

[64] Hence, the criterion of '*public interest*' is fulfilled.

B. CBFI Should Not Be Admitted As *Amicus Curiae*

[65] This Tribunal should reject the *amici* application by CBFI in absence of [*1*] a different perspective, knowledge or insight; [*2*] public interest; and [*3*] independence.[164]

1. CBFI does not offer a different perspective, knowledge or insight

[66] CBFI is an industrial association representing Bonoori investors from businesses of all sizes across different sectors.[165] There is no doubting CBFI's breadth of expertise. The critical question, however, is whether CBFI is well-positioned to make submissions on legal and factual issues *directly related* to the dispute.[166]

[67] In *Apotex*, the Tribunal did not consider the '*knowledge and insight of a single practitioner*' on investment treaties and governmental regulatory conduct '*however*

[157] UNCITRAL Rules on Transparency, art 4(a).
[158] *Apotex (Appleton)* [41]–[43]; *Biwater* [54]; *Methanex* [49]; *RFP* [4.7]; *Vivendi-II* [19].
[159] Record, 19.
[160] *Churchill* [493]; *Inceysa* [245]–[252]; *Infinito (Jurisdiction)* [137]; *Metal-Tech* [290]–[292]; *Plama* [142]–[143]; *UFG* [7.48]; *World Duty* [157].
[161] *World Duty* [142].
[162] OECD Anti-Bribery Convention; UNCAC.
[163] IACAC; Criminal-LCC; AUCPCC.
[164] Record, 24.
[165] Record, 16.
[166] *Pezold* [57].

extensive, equals (still less surpasses) the very considerable experience and insights' possessed by parties' counsel.[167]

[68] In *Philip Morris*, the Tribunal found that '*official technical information and evidence regarding distinct trends in tobacco marketing and consumption in Uruguay*' furnished by PAHO related to Uruguay's enforcement of tobacco control legislation[168] (and not '*duplicative*' of the global coverage in WHO's *amici* brief[169]).

[69] All that CBFI can provide to this Tribunal is information of a *general* nature that are already adequately addressed by parties:

	Information	**Inadequacy**
(a)	Bonooru's regulatory framework and business landscape on private enterprises.[170]	Duplicative and less insightful than Claimant's own expertise in civil aviation.[171]
(b)	That the nature of private enterprises (rather than purpose) '*should guide a Tribunal's decision*'.[172]	Duplicative of parties' submission on jurisdiction (*Broches* test).[173]
(c)	Uncertainty faced by semi-private investors' access to '*a free and fair judicial system*'.[174]	A policy consideration devoid of any factual and legal weight to this Tribunal's determination.

[70] In short, CBFI brings nothing new (nor helpful) to the table.

2. CBFI lacks significant interest in this dispute

[71] A '*significant*' interest must be more than a '*general*' interest.[175] In *Apotex*, the prospective investor's plan to establish a venture capital fund in the host State was deemed '*at best, an aspiration*'.[176] In *RFP*, the applicant's '*admirable goal*' of defending the rule of law and international public law fell short of being significant.[177]

[167] *Apotex (Appleton)* [32].
[168] *Philip Morris (PO4)* [25]–[27].
[169] *Philip Morris (PO3)* [23]–[24].
[170] Record, 17.
[171] Record, 28–29.
[172] Record, 17.
[173] See Issue I(A)(1).
[174] Record, 17.
[175] *Apotex (Appleton*) [38]; *Eco* [34]–[35].
[176] *Apotex (BNM)* [32]–[33].
[177] *RFP* [4.6].

[72] CBFI represents a host of diverse and disparate businesses. No particulars are furnished on the exact nature of the investments in Mekar held by 38 members, nor the investment claims instituted by SRB Infrastructure and Wiig Wealth Management Group.[178] CBFI's interest in enjoying '*stable regulatory regimes*' and '*access to an independent and impartial justice system*'[179] is of a general and aspirational character.

[73] Moreover, unlike CRPU, CBFI's submission lacks any element of '*public interest*'.[180] In *RFP*, the mere fact that interpretation of NAFTA provisions on jurisdictional issues '*could impact upon individuals and entities beyond the Disputing Parties*' was insufficient to be in '*furtherance of the public interest*'.[181] In *Apotex*, the Tribunal found a lawyer '*representing and defending the interests of his professional clients*' in NAFTA arbitrations lacked '*significant interest*'.[182]

[74] Similarly, this Tribunal should not be moved by CBFI's concern over the impact of the interpretation of CEPTA's dispute resolution mechanism on future disputes.[183]

[75] Hence, the criterion of '*significant interest*' is unmet.

3. CBFI lacks independence

[76] Lastly, this Tribunal should consider [*a*] independence as an '*essential attribute*' of *amicus curiae*; and [*b*] that CBFI is not independent.[184]

a. Independence of *amicus curiae* is a critical criterion

[77] Admittedly, there is no express rule in ICSID-AFR-PA requiring the independence of NDPs. Nevertheless, tribunals have consistently found that independence is implicit from the first criterion on '*bringing new perspective*'[185] and duty of disclosure.[186]

[178] Record, 16.
[179] Record, 16.
[180] UNCITRAL Rules on Transparency, art 4(a).
[181] *RFP* [4.7].
[182] *Apotex (Appleton)* [39]–[40].
[183] Record, 16.
[184] Record, 24.
[185] *InterAguas* [23]; *Pezold* [49].
[186] *Bear* [23]; *Eli* [D].

Article 9.19(3) of CEPTA obliges applicants to disclose '*any affiliation, direct or indirect, with any disputing party*'.[187]

[78] There is no '*latent tension*' between independence and the second criteria of '*significant interest*'[188] because the entire rationale of *amici* is to '*advance a particular case*' in their own independent capacity (and not on behalf of disputing parties).[189]

b. Lapras' relationship with Claimant is a conflict of interest

[79] The test of independence is whether circumstances '*give rise to legitimate doubts as to the independence or neutrality*'.[190] This is akin to the '*justifiable doubts*' standard under the UNCITRAL Arbitration Rules for disqualification of arbitrators.[191] In the absence of standards for *amici*, drawing an analogy with arbitrators is apt (albeit imperfect).[192]

[80] Although not binding, IBA Guidelines is highly persuasive in ICSID arbitration:[193]

	Category	**Conflict of Interest**
(a)	Non-Waivable Red List	A person '*regularly advises the party*' and '*derives significant financial income therefrom*'.[194]
(b)	Waivable Red List	A person has '*given legal advice, or provided an expert opinion, on the dispute to a party*'.[195]

[81] In *InterAguas*, information on the '*professional and financial relationships*' between the applicant and disputing parties was necessary to properly evaluate their independence.[196] In *Pezold*, an indigenous tribal chief's active role in Zimbabwe's land reform policies underlying the dispute gave rise to legitimate doubts of independence or neutrality.[197]

[187] Record, 80.
[188] *Pezold* [62].
[189] *Methanex* [38].
[190] *Pezold* [56].
[191] UNCITRAL Arbitration Rules, art 12(1).
[192] Born, 640–641.
[193] *Burlington* [38]; *PIP* [24].
[194] IBA Guidelines, Part II [1.4].
[195] IBA Guidelines, Part II [2.1.1].
[196] *InterAguas* [32].
[197] *Pezold* [55]–[56].

[82] There is a direct conflict of interest between Claimant and CBFI members:

(a) Lapras advises Claimant on funding strategies in this dispute.[198]

(b) Mr Velveteen, Lapras' CEO and CBFI Executive Committee member, was permitted to vote on CBFI's *amicus* submission.[199]

[83] Due to Claimant and CBFI being financially '*closely linked*'[200] beyond mere membership affiliation,[201] justifiable doubts arise over CBFI's independence. There is high likelihood that CBFI—if admitted—will be equally (if not more) '*hostile*' towards Respondent beyond the '*traditional role*' of an *amicus*.[202]

[198] Record, 16.
[199] Record, 87.
[200] *Pezold* [55]–[54].
[201] *Eli* [E].
[202] *Electrabel* [234].

III. RESPONDENT DID NOT VIOLATE THE FAIR AND EQUITABLE TREATMENT STANDARD UNDER ARTICLE 9.9(2) OF CEPTA

[84] Claimant's long litany of grievances stretches over a span of 5 years (2016-2020), depicting different scenes involving different actors (ranging from vigilant regulators to overburdened judges). Such convoluted claim, trumped up with wild conspiracy theories,[203] reads more like a letter of a jilted ex-lover.

[85] Claimant invokes the fair and equitable standard (FET) enshrined in Article 9.9(2) of CEPTA, particularly:[204]

(a) Denial of justice;

(b) Fundamental breach of due process; and

(c) Arbitrary or discriminatory conduct.

[86] To guide this Tribunal, Respondent reassembles the jagged pieces of Claimant's scattershot submission into 4 sections: [*A*] anti-monopoly actions (denial of justice and due process); [*B*] governmental subsidies (arbitrary or discriminatory conduct); [*C*] enforcement of annulled award (denial of justice); and [*D*] non-recognition of '*creeping FET violation*' under CEPTA.

A. The Anti-Monopoly Regulatory Actions against Caeli Did Not Constitute a Denial of Justice nor Breach of Due Process

[87] The essence of denial of justice is '*to protect foreigners against delictual acts of the judiciary*'.[205] The threshold is '*high*'[206] and '*demanding*'.[207] As observed in *Mondev*, the test is '*whether the shock or surprise occasioned to an impartial tribunal*' raises '*justified concerns as to the judicial propriety of the outcome*'.[208]

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[203] *Nelson* [343]–[345].
[204] Record, 5.
[205] *Arif* [434].
[206] *Agility* [210]–[216]; *Al-Warraq* [620]; *Jan de Nul* [209]; *Krederi* [447]–[448]; *Philip Morris* [499]–[500]; *Vannessa* [227]; *White* [10.4.8].
[207] *Chevron (II)* [8.36]; *Oostergetel* [273].
[208] *Mondev* [127].

[88] Only a fundamental systemic failure of judiciary constitutes a denial of justice.[209] It is not this Tribunal's task to function as an appellate court,[210] nor correct the errors of domestic courts in applying domestic law within their margin of appreciation.[211]

[89] Due process is embodied in the minimum standard of treatment accorded to aliens.[212] Its sphere of protection extends over judicial decisions[213] and administrative actions.[214] The standard of review varies flexibly.[215] Administrative actions '*trigger less stringent due process obligations than judicial proceedings*'.[216]

[90] Both standards closely overlap.[217] Due process relates to procedure;[218] denial of justice is broader and encompasses a substantive dimension.[219] Neither [*A*] CCM's actions; nor [*B*] Mekari courts' disposal of Caeli's appeals violates both standards.

1. CCM's regulatory actions were properly conducted

[91] In late 2016, CCM launched two related investigations on Caeli:

	Investigation	Report
First	**September 2016** Caeli's predatory pricing strategies[220] (imposition of airfare cap as interim measure[221]).	**August 2018** Imposed airfare cap and MON 150 million fine due to predatory pricing and State subsidy.[222]
Second	**December 2016** Caeli's predatory pricing on routes via Phenac International pursuant to a complaint by regional airlines in Greater Narnia.[223]	**January 2019** Imposed MON 200 million fine for pushing out regional competitors at Phenac International via predatory pricing.[224]

[209] *Chevron (II)* [8.40]; *Liman* [279]; *Oostergetel* [273]; *Pantechniki* [94]; *Philip Morris* [499].
[210] *Arif* [441]; *Azinian* [99]; *Bridgestone* [410]; *Eli (Award)* [221], [224]–[225]; *Infinito* [217]; *Krederi* [486]; *Liman* [274]; *Mamidoil* [764]; *Mondev* [126]–[127]; *Oostergetel* [291]; *Tallinn* [870]; *Tatneft* [474].
[211] *Al-Warraq* [620]; *Chevron (II)* [8.36]–[8.37], [8.41]–[8.42]; *H&H* [400]; *Myers* [261]–[263]; *Oostergetel* [273].
[212] Paparinskis, 72–73; Paulsson, 10–37.
[213] *Eli (Award)* [219].
[214] *Bilcon* [434]–[435]; *Corona* [248]; *Nelson* [358]; *Saluka* [308].
[215] *Waste* [98]–[99].
[216] *Tallinn* [870]; *Thunderbird* [200].
[217] *Al-Bahloul* [221].
[218] Paulsson, 98.
[219] *Arif* [449], [497]; *Azinian* [103]; *Iberdrola* [432]; *Infinito* [445], [494]; *Jan de Nul* [195]; *Liman* [279]; *Pantechniki* [94]; *RosInvest* [279]; *Oostergetel* [275], [296]; *Oxus* [799].
[220] Record, 34.
[221] Record, 34.
[222] Record, 36.
[223] Record, 35.

[92] In accordance with Respondent's domestic framework (MRTPA) and international anti-monopoly standards (EU law), CCM rightly sanctioned Caeli for its [*a*] dominant position; and [*b*] abusive practices.

a. Caeli occupied a dominant position in Mekar

[93] Under MRTPA, CCM may open *suo moto* investigations if '*a corporation **obtains** a market share greater than 50%*'.[225] The First Investigation was instituted because Caeli's market share exceeded 54% combined with other Moon Alliance members.[226]

[94] The word '*obtains*' has a possessive connotation. Parallels can be drawn with the EU regime,[227] which recognises '*collective dominance*' by multiple independent economic entities united by '*economic links*'[228] with '*power to adopt a common market policy*'.[229]

[95] Moon Alliance is a bloc operating '*a fleet of nearly 4800 aircraft and serve over 1100 airports in 178 countries*'.[230] Members engage in slot-trading[231] and sharing of airport facilities.[232] This enabled Caeli to '*obtain*' a greater market share than its own.

[96] Under MRTPA, CCM may open investigations on a corporation with at least 10% market share upon a direct competitor's complaint.[233] The Second Investigation was instituted when Caeli directly held 43% market share in Mekar.[234] By enjoying a sizeable lead over its closest competitor JetGreen (21%),[235] Caeli occupied a dominant position in a '*narrow oligopolistic market*'.[236] Moreover, market concentration is more acute in small developing countries.[237]

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[224] Record, 37.
[225] Record, 47 (*emphasis added*).
[226] Record, 34.
[227] TFEU, art 102.
[228] *Vetro* [358].
[229] *Irish Sugar* [49]–[51].
[230] Record, 29.
[231] Record, 34.
[232] Record, 32.
[233] Record, 47.
[234] Record, 34.
[235] Record, 86.
[236] *Hoffmann-La Roche* [50]–[51].
[237] UNCTAD, 587.

[97] Market size is defined based on *product characteristics* and *geographical coverage*.[238] Caeli's defence that the market should be enlarged to include '*train, car, and bus journeys*'[239] is comparing apples and oranges. The fact that Caeli's primary target market (long-haul flights) is different from regional competitors (short-distance flights) is immaterial because the investigation was focused on Caeli's usage of Phenac International's airspace and ground facilities as a '*fortress hub*' in Mekar (regardless of flight destination).[240]

[98] Hence, CCM's institution of both investigations was not a '*wilful disregard of due process*'.[241]

b. Caeli abused its dominant position

[99] CCM's '*voluminous*' reports revolve around three common findings: Caeli's predatory pricing, loyalty rebates and State aid.[242]

[100] The test is whether they have an '*exclusionary effect*' that '*bears no relation to advantages for the market and consumers*'.[243] Predatory pricing lacking '*a realistic chance to recoup losses*' is exclusionary in nature.[244] Discounts are justifiable for cost-savings, but not to induce loyalty.[245] Holding customers captive through a '*system of loyalty rebates*' based on '*conditional discounts*' is abusive.[246]

[101] The '*effects-based*' approach involves a multi-layer economic analysis:[247]

(a) Extent of dominance in the relevant market;

(b) Exclusion of equally efficient competitors;

(c) Extent of exclusionary effect on the market; and

(d) Possible benefits to consumers.

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[238] *Vetro* [360]–[364].
[239] Record, 34.
[240] Record, 35.
[241] *ELSI* [128].
[242] Record, 36–37.
[243] *British Airways* [86].
[244] *Tetra* [44].
[245] *British Airways* [62]; *Hoffmann-La Roche* [90]; *Michelin* [107]–[111].
[246] *Intel* [137].
[247] *Intel* [139]–[140].

[102] From a substantive dimension, CCM's findings were well-reasoned:

(a) Claimant's acquisition of Caeli in 2011 was approved by CCM upon the undertaking to '*not engage in high-level co-operation on competition parameters such as prices, schedules, capacity, facilities, and other sensitive information with Moon Alliance members*'.[248]

(b) Caeli bought and leased a new fuel-efficient and cost-cutting Boeing 737 fleet '*through contacts with a fellow Moon Alliance member*'.[249]

(c) Caeli's frequent-flyer programme allowed accumulated points to be used '*at supermarkets and gas stations*'.[250]

(d) Caeli was able to lower pricing, having '*extracted significant additional privileges in terms of airport service fees from Phenac International*'.[251]

(e) Caeli shared airport facilities with Moon Alliance members.[252]

(f) Caeli enjoyed '*preferential secondary slot-trading*' with Royal Narnian.[253]

(g) Caeli's predatory pricing is unsustainable in the long-term[254] (and fortuitously gained short-term profit during the global oil crash in mid-2014).[255]

(h) From 2011 to 2016, Caeli received subsidies from Bonooru's Horizon 2020 Scheme.[256]

(i) Caeli did not attract any new customers nor increase revenue.[257]

[103] There is nothing sinister with CCM investigating Caeli (but not other Moon Alliance members).[258] The conduct of a single entity within a unit of collective dominance can still constitute an '*abusive exploitation of that position*'.[259]

[104] In sum, Caeli's anti-competitive practice had the object and effect of excluding equally efficient (but less resourceful) competitors from the market with no

[248] Record, 32.
[249] Record, 32.
[250] Record, 89.
[251] Record, 37.
[252] Record, 32.
[253] Record, 34.
[254] Record, 55; 34.
[255] Record, 33.
[256] Record, 32.
[257] Record, 37.
[258] Record, 34.
[259] *Irish Sugar* [66].

discernible benefits to consumers.[260] Hence, CCM's airfare cap and fines were not a conduct '*which shocks, or at least surprises, a sense of juridical propriety.*'[261]

2. The Mekari courts' disposal of Caeli's judicial review appeals were just

[105] In March 2018, Caeli appealed against CCM's refusal to remove the airfare cap.[262] In January 2019, Caeli appealed against CCM's fines.[263] Two issues arise: [*1*] timing of hearings; and [*2*] summary dismissal of appeal.

a. The hearing of appeals was not unduly delayed

[106] Justice is denied if domestic courts '*refuse to entertain a suit*' or '*subject it to undue delay*'.[264] There is no magic formula—even 13 years is insufficient *ipso facto* to constitute undue delay.[265] The factors include complexity of case, significance of interests at stake, behaviour of litigants and courts.[266]

[107] In March 2018, the Mekari Court Registrar fixed the hearing of Caeli's interim motion to stay the airfare cap in April 2019.[267] Similarly, upon filing in January 2019, Caeli's second appeal was fixed a year later in May 2020.[268]

[108] In *White*, a 9-year delay to hear enforcement proceedings of an arbitral award did not constitute a denial of justice.[269] The Tribunal opined that whilst criminal cases need '*urgent resolution*', commercial matters can '*be allowed to languish*' because delay is compensable by interest.[270] This echoes the Registrar's rationale to '*prioritise criminal matters*'[271] to avoid prolonged detention for suspects.[272] Further, CCM's fines were suspended pending judicial review.[273]

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[260] *AKZO* [72]; *British Airways* [85]–[86]; *Intel* [139]–[140]; *Konkurrencerådet* [41].
[261] *ELSI* [128]; *Waste* [98].
[262] Record, 36.
[263] Record, 37.
[264] *Azinian* [102].
[265] *Chevron* [253].
[266] *Chevron* [250]; *Oostergetel* [290]; *White* [10.4.10].
[267] Record, 36.
[268] Record, 37.
[269] *White* [10.4.21]–[10.4.22].
[270] *White* [10.4.14].
[271] Record, 36.
[272] Record, 30.
[273] Record, 37.

[109] The *White* Tribunal further acknowledged India's status as a '*developing country*' with a high population and an '*over-stretched judiciary*'.[274] Similarly, Mekar suffers from judicial backlog due to population growth.[275]

[110] Moreover, anti-monopoly investigation involves troves of economic data analysis and evolving legal norms.[276] In *Jan de Nul*, a 10-year delay to obtain judgment on a '*complex and highly technical*' dispute was reasonable.[277]

[111] Hence, there is no undue judicial delay to entertain Caeli's appeals.

b. Caeli's right to be heard was not denied

[112] Justice is denied if domestic courts '*administer justice in a seriously inadequate way*'.[278]

[113] In June 2019, Justice VanDuzer dismissed Caeli's interim motion to remove the airfare cap and the entire claim due to unlikelihood of success.[279] Such summary disposal is made possible by Executive Order 5-2014 passed '*to expedite court proceedings and alleviate the backlog in Mekari courts*'.[280]

[114] Peculiar procedures are not necessarily improper nor shocking.[281] This was exemplified in *Mamidoil*, where two different tribunals refused to hear an investor's tax claim in '*a legal system that is characterized by a division between public and private law*'.[282] As observed by Professor Paulsson, '*the vagaries of legal culture that enrich the world are to be respected*'.[283] Hence, the summary disposal of Caeli's claim without appeal falls short of a '*manifest failure of natural justice*'.[284]

[274] *White* [10.4.18].
[275] Record, 19–30.
[276] Wijck, 1.
[277] *Jan de Nul* [204].
[278] *Azinian* [102].
[279] Record, 38.
[280] Record, 86.
[281] *Philip Morris* [533].
[282] *Mamidoil* [765]–[770].
[283] Paulsson, 205.
[284] *Vannessa* [227]; *Waste* [98].

[115] Lastly, exhaustion of local remedies is a prerequisite.[285] Claimant exited Caeli before the Mekari court delivered its decision on Caeli's second appeal.[286] So long as administrative actions are '*not final and binding and can be corrected by the internal mechanisms of appeal*', justice is not denied.[287]

B. Respondent's Airfare Caps and Denial of Subsidies to Caeli during the Monetary Crisis Was Not Discriminatory (2018)

[116] In late 2016, MON depreciated steeply.[288] In September 2018, to cushion the impact of the ensuing economic crisis on the aviation industry, Respondent granted subsidies to Mekari airline passengers (*vide* Executive Order 9-2018).[289] The denial of subsidies to Caeli was not [*1*] arbitrary; nor [*2*] discriminatory.[290]

1. The denial of subsidies was not arbitrary

[117] The concept of '*arbitrariness*' is analogous to the test of '*reasonableness*'.[291] This must be balanced against Respondent's right to regulate (*vide* Article 9.8 of CEPTA).[292] The test is two-fold: [*a*] rational policy; and [*b*] proportionality.

a. Economic stimulus during recession is a rational policy

[118] A rational policy aimed at public interest[293] includes economic and social matters.[294]

[119] In January 2018, to stabilise its depreciating currency, Respondent mandated all goods and services to be denominated exclusively in MON.[295] This put an end to the temporary exemption accorded to airline fares in October 2017[296]—and rightly so. In

[285] *Apotex* [282], [284]; *Chevron (II)* [7.117]; *Corona* [249], [259]; *Jan de Nul* [255]; *Krederi* [473]–[474]; *Manchester* [483]; *Toto* [164].
[286] Record, 40.
[287] *Arif* [443].
[288] Record, 35.
[289] Record, 36.
[290] Record, 4.
[291] *Micula (Award)* [525].
[292] Record, 76.
[293] *9REN* [254]; *Lemire* [285]; *Saluka* [305].
[294] *Mamidoil* [614], [617].
[295] Record, 35.
[296] Record, 35.

LG&E, Argentina's peso conversion policy was criticised for targeting the gas-distribution sector but left other economic sectors unaffected.[297]

[120] In September 2018, Executive Order 9-2018 was passed to grant subsidies to airlines '*for each Mekari citizen travelling on board*'.[298] This pursued a balanced rational policy—economic stimulus to aid distressed industries and preserve public welfare.

b. Denial of subsidies was proportionate to balance economic stimulus and market distortion

[121] The proportionality test requires an '*appropriate correlation*'[299] between the measure adopted to achieve a rational policy without excessively affecting investors' interests.[300]

[122] In *Micula*, Romania's elimination of incentives which had '*capacity to distort competition*' was '*logically related to, narrowly tailored, and necessary for, the pursuit of a legitimate and rational policy*' under EU State aid regulations.[301]

[123] Similarly, Respondent was concerned about Caeli's receipt of State aid and status as an SOE.[302] Denying subsidies to Caeli was proportionate to avoid excessive distortion to the airline market.[303]

2. The denial of subsidies was not discriminatory

[124] A treatment is only discriminatory if an investor is treated less favourably [*a*] with investors in like circumstance; and [*b*] without reasonable justification.[304]

a. Caeli was not in like circumstance with Star Wings and JetGreen

[125] Star Wings and JetGreen received subsidies under Executive Order 9-2018.[305] Caeli and LarryAir (a wholly government-owned company) received none.[306]

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[297] *LG&E* [134]–[135].
[298] Record, 36.
[299] *AES* [10.3.8]–[10.3.9].
[300] *Electrabel* [179]; *Micula (Award)* [525].
[301] *Micula (Award)* [805].
[302] Record, 37.
[303] Record, 37.
[304] *Bayindir* [399]; *Lemire (II)* [261].

[126] The subsidy amount received by Star Wings and JetGreen from Arrakis was higher than the amount received by Caeli from Bonooru.[307] Nevertheless, their subsidies were merely a one-time payment to alleviate the effects of economic downturn,[308] whilst Claimant's recurring subsidies were aimed at powering up Bonooru's tourism industry.[309]

[127] Another critical differentiating factor is market share. Caeli's closest competitor is JetGreen, whose market share of all flights through Phenac International (21%) was less than half of Caeli's market share (43%).[310]

[128] Hence, Caeli was *not* in like circumstance with Star Wings and JetGreen.[311]

b. Alternatively, Caeli's less favourable treatment was justified

[129] The next issue is whether Caeli's less favourable treatment was justified.[312] The test is based on '*reasonableness*'.[313] As previously canvassed, Respondent's denial of subsidies to Caeli was proportionate in achieving a rational policy.[314]

C. Enforcement of the Award Was Not a Denial of Justice

[130] There was no denial of justice because the Mekari courts' enforcement of the Award annulled by the Sinnoh court is consistent with [*1*] New York Convention (NYC); and [*2*] Mekari public policy.

1. Annulment of the Award is not a bar to enforcement under New York Convention

[131] As a State party to NYC,[315] Respondent is not bound to refuse enforcement of the annulled Award from [*a*] textual construction; and [*b*] teleological standpoint.

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[305] Record, 36–37.
[306] Record, 37.
[307] Record, 36–37.
[308] Record, 89–90.
[309] Record, 89.
[310] Record, 86.
[311] *Parkerings* [371]; *Total* [210].
[312] *Bayindir* [399]; *Lemire (II)* [261].
[313] *Saluka* [307].
[314] See Issue IV(B)(1)(a).

a. Courts of enforcement retain discretion to enforce annulled awards

[132] Article V(1)(e) of NYC stipulates:

> '*Recognition and enforcement of the award* ***may be refused*** *(…) only if (…) [the award] has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*'[316]

The identical text appears in Article 36(1)(a)(v) of UNCITRAL Model Law[317] and Section 31(1)(2) of Commercial Arbitration Law of Mekar.[318]

[133] Since the word '*may*' is permissive, enforcement courts are vested discretionary power of review (as held by the Mekari Superior Court[319]). Such approach has gained judicial reception in US,[320] UK,[321] France,[322] Netherlands[323] and Belgium.[324]

[134] As opined by the French *Cour de cassation* in *Hilmarton*:

> '*Lastly, the award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy.*'[325]

This closely echoes the Mekari Superior Court's ruling in *Alta Lumina Trading*.[326]

[135] As part of the infamous *Yukos* saga, the Dutch Court of Appeal enforced an award annulled by Russian courts due to judicial impartiality:

> '*The 1958 New York Convention does not require an automatic recognition of annulment decisions in the country where their enforcement is sought (…) Instead, Dutch general private international law determines whether the annulment decision can be recognised in the Netherlands.*'[327]

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[315] Record, 40.
[316] NYC, art V(1)(e) (*emphasis added*).
[317] UNCITRAL Model Law, art 36(1)(a)(v).
[318] Record, 68.
[319] Record, 68.
[320] *Chromalloy*, 909; *Pemex*, 26–27.
[321] *Yukos (UK)* [125].
[322] *Chromalloy*; *Hilmarton*; *Norsolor*; *Putrabali*.
[323] *Maximov* [3.4.5]; *Rosneft* [3.4].
[324] Sonatrach, 370–377.
[325] *Hilmarton* (unofficial translation).
[326] Record, 68.
[327] *Rosneft* [3.4] (unofficial translation).

[136] In sum, Article V(1)(e) of NYC vests discretion in the Mekari courts to enforce the annulled Award.

b. Courts of enforcement are guided by public policy and comity

[137] Further, public policy objections against enforcement of annulled awards lack bite.

[138] First, the principle of autonomy entitling commercial parties to choose their arbitral seat is irrelevant.[328] Enforcement of awards is ultimately guided by public policy balanced by comity between sovereign nations.[329]

[139] Second, there is no risk of '*forum shopping*'.[330] Since Caeli is incorporated in Mekar, Claimant would have known (and assumed the risk) that any award of a shareholder dispute would require enforcement by Mekari courts.

2. Enforcement of the Award is consistent with Mekari public policy

[140] Corruption of arbitrator taints the root of an award warranting annulment.[331] Nevertheless, the critical issue before the Mekari courts was whether acceptance of circumstantial evidence from an organisation blacklisted for political interference was contrary to Mekari public policy.[332]

[141] Enforcement courts enjoy a margin of appreciation to determine public policy due to divergence across different jurisdictions.[333] Hence, this Tribunal's standard of review is a narrow one. As opined by the *Frontier Petroleum* Tribunal:

> '*[I]t is not necessary for this Tribunal to determine whether the findings of the Czech courts meet the applicable standard of international public policy, or to determine the precise contents of that standard. (…) [I]t is sufficient to examine whether the conclusion reached by the Czech courts applied a plausible interpretation of the public policy ground in Article V(2)(b) of the New York Convention.*'[334]

[328] Schwartz, 125.
[329] *Chromalloy*, 913; *Pemex*, 27–28; *Yukos (UK)* [125].
[330] Poudret, 1.
[331] ILC Model Rules, art 35(b); ICSID Convention, art 52(1)(c).
[332] Record, 66.
[333] *Frontier* [527]; *Yukos (UK)* [150]–[151].
[334] *Frontier* [527].

[142] Unlike in *Yukos* and *Maximov*, there is no allegation here that the Mekari judges were '*corrupt*'[335] or '*deliberately wrong*'.[336] Hence, their public policy concerns against admitting evidence from illicit sources should be respected.

D. Creeping Violation of FET Standard Is Not Recognised under CEPTA

[143] If this Tribunal finds that none of the discrete measures contravenes the FET standard, their '*cumulative effect*' cannot be combined to find a '*creeping violation*'.[337]

[144] Such controversial notion originated from the *El Paso* award where analogy was drawn with creeping expropriation:

> '*A creeping violation of the FET standard could thus be described as a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result.*'[338]

[145] Other formulations by tribunals include '*aggregate of the events*'[339] and '*combination of administrative actions and the failure of the judiciary to correct them*'.[340] Nevertheless, such isolated passing mentions in awards[341] are insufficient to materialise into concrete *jurisprudence constante*.

[146] Moreover, a distinction must be drawn from a '*composite act*' under ARSIWA:

> '*The breach of an international obligation by a State through a* ***series of actions*** *or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.*'[342]

[147] The examples given in ARSIWA Commentaries (genocide)[343] and explanation in earlier drafts[344] indicate that a '*composite act*' is limited to '*breaches characterized by an aspect of a systematic policy*'.[345]

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[335] *Yukos (UK)* [129], [135].
[336] *Maximov* [15].
[337] *El Paso* [519].
[338] *El Paso* [518].
[339] *Tatneft (Merits)* [413].
[340] *AMF* [700].
[341] *Bayindir* [181], [381]; *Pey* [209]; *RosInvest* [280].
[342] ARSIWA, art 15(1) (*emphasis added*).
[343] ARSIWA Commentaries, art 15 cmt 2.
[344] ILC 1976 Report, 93–95.
[345] Salmon, 391.

[148] However, the phrase '*a measure or **measures***' in Article 9.9(2) of CEPTA[346] falls short of the more definitive phrase '*a measure or **series of measures***' in the FET standard of Canada-EU CETA.[347] The analogy to '*composite act*' therefore fails.

[149] Hence, this Tribunal should decline to recognise Respondent's separate acts as constituting a '*creeping violation*' of Article 9.9(2) of CEPTA. Put simply, international law does not entitle Claimant to build a mountain out of tiny molehills.

[346] Record, 76 (*emphasis added*).
[347] Canada-EU CETA, art 8.10(2).

IV. ALTERNATIVELY, RESPONDENT IS NOT BOUND TO PAY COMPENSATION BASED ON FAIR MARKET VALUE

[150] Assuming *arguendo* the Tribunal finds Respondent violated Article 9.9 of CEPTA, Claimant is *not* entitled to compensation because [*A*] Respondent's payment of USD 400 million satisfies the market value compensation standard under CEPTA; and [*B*] Claimant stands to be unjustly enriched.[348]

A. Respondent's Purchase of Claimant's Stake in Caeli at MV Satisfies Claimant's Entitlement to Compensation

[151] Article 9.21(1) of CEPTA makes it crystal clear that investors are only entitled to compensation at *market value* (MV):[349]

(a) '*monetary damages at a* ***market value****, except as otherwise provided for in Article 9.12*'.

(b) '*restitution of property, in which case the award shall provide that the respondent may pay monetary damages at a* ***market value*** *(...)*'.

[152] Yet, Claimant seeks to invoke a different standard altogether based on *fair market value* (FMV)[350] and recover an additional sum of USD 700 million *on top* of the USD 400 million received from Respondent (based on Claimant's self-valuation of its investment worth USD 1.1 billion).[351]

[153] To justify the FMV standard, Claimant posits two alternate legal bases: [*1*] customary international law; or [*2*] importation from 2006 Arrakis-Mekar BIT via the MFN clause (*vide* Article 9.7 of CEPTA).

1. The FMV compensation standard under customary international law is inapplicable

[154] Custom provides two possible legal sources to the FMV standard: [*a*] reparation (*lex generalis*); and [*b*] expropriation (*lex specialis*).

[348] Record, 9.
[349] Record, 82 (*emphasis added*).
[350] Record, 5.
[351] Record, 87.

a. Article 9.21 of CEPTA prevails over custom

[155] The principle of reparation is to '*wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.*'[352] The PCIJ's classical dictum in *Chorzów Factory* has been cited in a long line of ICJ judgments[353] and ICSID awards.[354]

[156] The FMV standard is considered as '*just*',[355] '*adequate*'[356] and '*effective*'[357] compensation in lieu of restitution in kind. FMV reflects the '*price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms length*'[358] in the open market at the date of violation.[359]

[157] However, it is axiomatic that the text of BITs takes precedence in the determination of compensation.[360] Recourse to customary principles of reparation is only permissible in the absence of an express treaty standard.[361] As the *ADC* Tribunal opined:

> '*There is general authority for the view that a BIT can be considered as a lex specialis whose provisions will prevail over rules of customary international law (…)*'[362]

[158] Here, CEPTA contains a *specific* compensation standard based on FMV for expropriation (*vide* Article 9.12) and a *general* compensation standard based on MV for all other violations '*except as otherwise provided in Article 9.12*' (*vide* Article 9.21(1)(a)). The combination of both clauses is watertight enough to form a '*self-contained regime*' to exclude other residual principles under custom.[363]

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[352] *Chorzów*, 47.
[353] *Arrest Warrant* [76]; *Avena* [119]; *Bosnia Genocide* [460]; *Jadhav* [138]; *Palestinian Wall* [152].
[354] *ADC* [481]–[485]; *Gold Reserve* [678]; *Impregilo* [361]; *Metalclad* [122]; *Rusoro* [640].
[355] *CME* [501].
[356] World Bank, 41.
[357] *Gold Reserve* [681].
[358] *CMS* [402].
[359] *CMS* [508]–[509].
[360] *Vivendi (Award)* [8.2.1].
[361] *CME* [497]; *CMS* [409]; *Myers* [309]; *Rusoro* [640]; *Vivendi (Award)* [8.2.7].
[362] *ADC* [481].
[363] *Sempra (Annulment)* [153].

[159] This position is further fortified by appreciating the *context* of CEPTA,[364] inclusive of negotiation histories of State parties[365] and their treaty practice with third States.[366]

[160] The predecessor 1994 Bonooru-Mekar BIT is silent on any compensation standard.[367] In the ensuing years, two notable developments emerged:[368]

(a) From 2000 onwards, Respondent's Model BIT stipulated the MV compensation standard.

(b) CEPTA was the product of renegotiations triggered by political uproar in Mekar following Respondent's losses in several high-profile arbitrations arising from indirect expropriation claims by Bonoori investors.

[161] Since CEPTA came into force in 2014 with the common intention of providing greater certainty of State parties' obligations to investors, the express compensation standard in Article 9.21(1)(a) should be construed as exhaustive and exclusionary.

b. The alleged expropriatory effects of Respondent's violations do not modify the compensation standard

[162] A few arbitral awards have applied FMV compensation standards for FET violations resulting in an indirect taking over of investors' entire investment,[369] destruction of investment value[370] or total deprivation of rights.[371] This is especially so for violations that are '*cumulative*'[372] in nature. However, such authorities are distinguishable due to two factors:

Case	Compensation standard for violations other than expropriation	Liability for expropriation
Azurix	Silent[373]	No[374]
CC/Devas	Silent[375]	Yes[376]

[364] VCLT, art 31(1).
[365] *Berschader* [175]; *Plama* [192]–[196].
[366] *Metal-Tech* [159]–[162]; *Plama* [195].
[367] Record, 69–70.
[368] Record, 87.
[369] *Azurix* [424].
[370] *Vivendi (Award)* [8.2.8].
[371] *Gold Reserve* [680]–[681].
[372] *CMS* [410]; *Enron* [363].
[373] *Azurix* [419].
[374] *Azurix* [322].
[375] *CC/Devas* [199].
[376] *CC/Devas* [203].

Case	Compensation standard for violations other than expropriation	Liability for expropriation
CMS	Silent[377]	No[378]
Enron	Silent[379]	No[380]
Gold Reserve	Monetary damage (silent on MV or FMV)[381]	No[382]
MTD	Silent[383]	No[384]
Vivendi	Silent[385]	Yes[386]
Vemma Holdings v Mekar	**Yes (FMV)**	**No (not pleaded by Claimant)**

[163] Further, by agreeing to limit its claim to Article 9.9 of CEPTA (in exchange for Respondent not contesting the attributability of Mekar Airservices' actions to Respondent),[387] Claimant is now estopped from invoking the FMV compensation standard for expropriation (*vide* Article 9.12(2)).[388]

[164] In any event, the full effect of Respondent's violations under Article 9.9 (if any) left Claimant with a distressed asset worth USD 400 million. Respondent's purchase of Claimant's stake in Caeli is not an '*outright seizure*'[389] nor '*overt taking*'[390] of property amounting to direct expropriation. Neither did the buy-out '*effectively neutralize*'[391] nor '*virtually annihilate*'[392] Claimant's shareholder value with the '*irreversible and permanent*' effect[393] of indirect or creeping expropriation.

[165] Hence, as a matter of law and fact, Claimant's invocation of the FMV standard due to '*expropriatory*' effects is untenable.

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[377] *CMS* [409].
[378] *CMS* [264].
[379] *Enron* [359].
[380] *Enron* [244]–[246].
[381] *Gold Reserve* [674]–[675].
[382] *Gold Reserve* [668].
[383] *MTD* [238].
[384] *MTD* [214].
[385] *Vivendi (Award)* [8.2.3].
[386] *Vivendi (Award)* [8.2.1].
[387] Record, 13.
[388] *Chevron (II)* [7.105]–[7.107].
[389] *Metalclad* [103].
[390] *LG&E* [188].
[391] *Lauder* [200].
[392] *Sempra (Award)* [285].
[393] *Tecmed* [116].

2. The FMV standard from 2006 Arrakis-Mekar BIT cannot be imported into CEPTA via the MFN clause in Article 9.7

[166] Under investment law, a most-favoured-nation (MFN) clause serves to maintain '*fundamental equality without discrimination*' [394] and '*equality of competitive opportunities*'[395] between different foreign investors in a State. As affirmed in *Güriş*, '*the very purpose of MFN clauses is to extend more-favourable treatment*' due under another *comparator* treaty (between a State party with a third State) into the *base* treaty (between State parties).[396]

[167] Traditionally, arbitral tribunals have liberally allowed a wide array of *comparator* BIT provisions to be imported into a *base* BIT, including dispute resolution procedures,[397] effective means,[398] FET standard[399] and umbrella clause.[400] However, recent tribunals have exhorted greater caution. In *National Grid*, the Tribunal warned against the rising prevalence of claimants trying '*to extend an MFN clause beyond appropriate limits*'.[401] Many scholars echo this growing concern.[402]

[168] Here, Claimant seeks to invoke the MFN clause in Article 9.7 of CEPTA to import the FMV standard in 2006 Arrakis-Mekar BIT to '*override*'[403] and '*displace*'[404] the MV standard in Article 9.21(1) of CEPTA.

[169] At the outset, the very notion of whole-sale replacement is highly suspect. According to *Austrian Airlines* Tribunal, '*it would be paradoxical to invalidate that specific intent by virtue of the general, unspecific intent expressed in the MFN clause*'.[405] Similar sentiments were shared in *Plama*:

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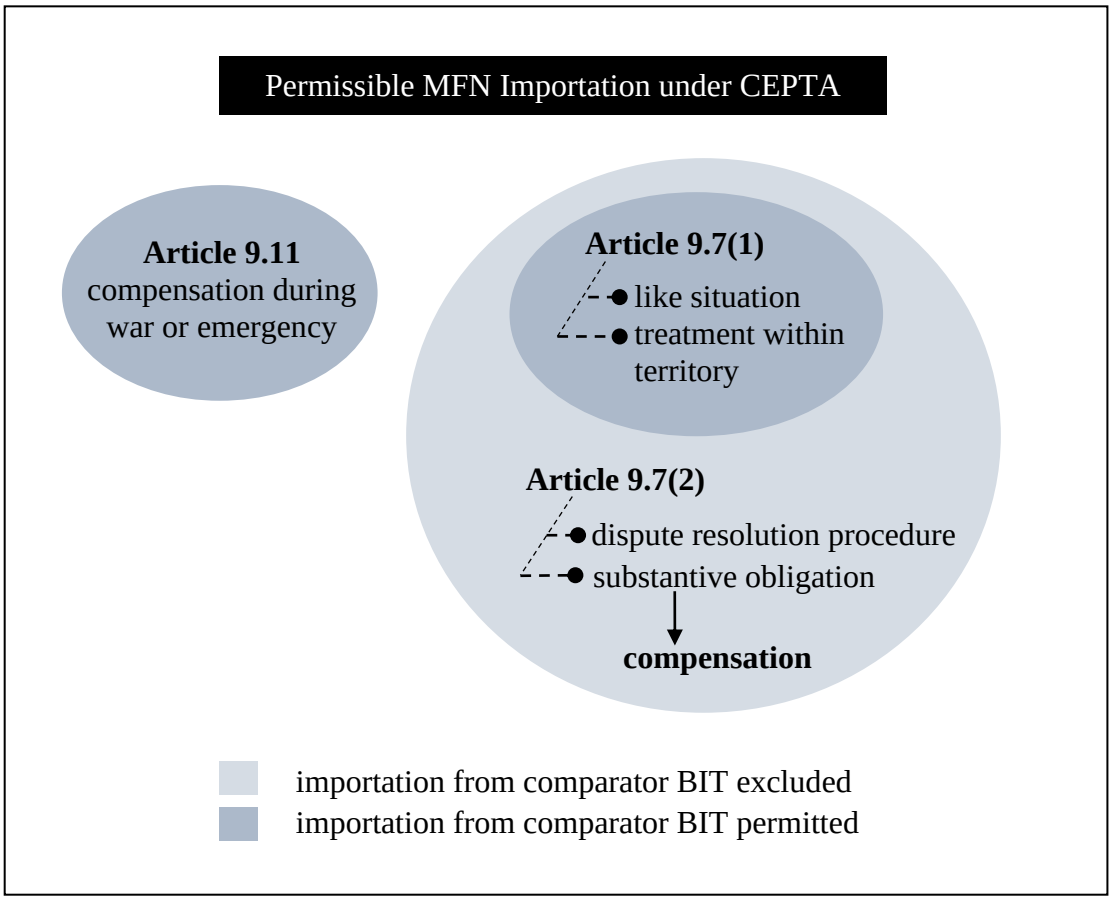
[394] *Right of Nationals*, 192.
[395] ILC MFN Report [75].
[396] *Güriş* [258].
[397] AWG [59]; *Doutremepuich* [218], [229]; *Garanti* [54]–[57]; *Hochtief* [97]–[99]; *Maffezini* [64]; *Renta* [101], [116]; *Siemens* [102]–[103]; *UP&CD* [181]–[184], [203]–[205].
[398] *Tatneft (Merits)* [358]; *White* [11.2.1]–[11.2.4].
[399] *Al-Warraq* [555]; *ATA* [125]; *Bayindir* [167]; *MTD* [104], [197]; *Paushok* [254], [570]; *Renta* [103]; *Rumeli* [581]; *Tatneft (Merits)* [365].
[400] *Arif* [169]; *EDF (International)* [929]–[937].
[401] *National Grid* [92].
[402] Batifort, 873; Douglas, 97; Sinha, 680.
[403] *Siemens* [109].
[404] *Garanti* [54].
[405] *Austrian Airlines* [135].

> '*It is one thing to add to the treatment provided in one treaty more favorable treatment provided elsewhere. It is quite another thing to replace a procedure specifically negotiated by parties with an entirely different mechanism.*'[406]

[170] Moreover, in the entire history of investment arbitration, such ingenious invocation has succeeded only once in *CME* (importing a more favourable expropriation compensation standard from US-Czech BIT into Netherlands-Czech BIT).[407]

[171] However, Claimant's similar attempt here is doomed to fail because compensation standard [*a*] falls outside the ambit of Article 9.7 of CEPTA; and [*b*] is excluded by the '*war loss*' clause in Article 9.11 of CEPTA. For the Tribunal's ease of reference, a diagram mapping out the entire coverage of permissible MFN importation under CEPTA is illustrated below.



[406] *Plama* [209].
[407] *CME* [500].

a. Article 9.7(1) of CEPTA precludes importation of compensation standard

[172] The classical maxim *res inter alios acta* dictates that a treaty is only binding on State parties and '*does not create either obligations or rights for a third State without its consent*'.[408] As observed by ICJ in *Anglo-Iranian Oil*, the *base* treaty '*establishes the juridical link*' between State parties and a *comparator* treaty.[409]

[173] Put simply, the starting point to ascertain whether a more favourable standard can be imported from another *comparator* treaty is the text and context of the *base* treaty (construed in accordance with customary rules of treaty interpretation).[410] Paramount consideration must be accorded to common intention of State parties[411] (as opposed to '*some abstract principle of investment protection in favour of a putative investor who is not a party to the BIT*'[412]).

[174] Article 9.7(1) of CEPTA states:

> '*Each Party shall accord to an investor of the other Party and to a covered investment, **treatment** no less favourable than the treatment it accords in **like situations**, to investors of a third country and to their investments (…) **in its territory**.*'[413]

[175] The key terms that merit this Tribunal's scrutiny are [*i*] '*treatment*'; [*ii*] '*like situations*'; and [*iii*] '*in its territory*'. It is sufficient for Respondent to prove that the FMV compensation standard does *not* fall within any of these conjunctive terms.

i. Compensation is a '*substantive obligation*' and not '*treatment*'

[176] The term '*treatment*' is broader than '*measure*'[414] but narrower than '*all matters*' or '*all respects*' embodied in other model MFN clauses.[415]

[177] The narrow scope of '*treatment*' is fortified by Article 9.7(2), clarifying that '*treatment*' excludes '*substantive obligations (…) absent measures adopted or*

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[408] VCLT, art 34.
[409] *Anglo-Iranian Oil*, 109.
[410] *İçkale* [328]; *Telenor* [92].
[411] *Bershader* [204].
[412] *Telenor* [95].
[413] Record, 76 (*emphasis added*).
[414] *Güriş* [244].
[415] *Bershader* [184]; *İçkale* [322]; *Muhammet* [568]; *Plama* [205].

maintained by a Party pursuant to those obligations'.[416] Such proviso evinces State parties' intention to draw a distinction between '*substantive rights in relation to investments, and remedial procedures in relation to those rights*'.[417]

[178] This begs the critical question of whether the compensation standard under Article 9.21(1)(a) of CEPTA constitutes a '*substantive obligation*'. The answer is *yes*.

[179] At first blush, international law appears to distinguish between primary and secondary obligations. ARSIWA Commentaries characterises a State's duty to make reparation as a '*secondary obligation*'.[418]

[180] Nevertheless, such classification should *not* be conflated with the *lex specialis* distinction between substantive and procedural obligations in MFN clauses. As opined in *Renta*, '*there is nothing normative about the primary/secondary dichotomy*' propounded by ILC in '*its field work on State responsibility*' which '*merges into that of a substance/procedure distinction*'.[419]

[181] Hence, compensation is a '*substantive obligation*' excluded from the ambit of '*treatment*' under Article 9.7 of CEPTA.

ii. Claimant is not in a '*like situation*' with Arrakis-based foreign airlines operating in Mekar

[182] The next hurdle is even more insurmountable. The term '*like situation*' embodied in MFN clauses of BITs[420] reflects the inherent principle of *ejusdem generis*.[421] As put by the *Ambatielos* Tribunal, MFN clauses '*can only attract matters belonging to the same category of subject as that to which the clause itself relates.*'[422]

[183] The *comparator* treaty must not only be related to the same subject matter,[423] but also contain a clause of similar subject matter.[424] In *İçkale*, the Tribunal opined that the

[416] Record, 76.
[417] *Kiliç* [7.3.9].
[418] ARSIWA Commentaries, art 33 cmt 4; art 34 cmt 6.
[419] *Renta* [99].
[420] *Al-Warraq* [544]; *Güriş* [254]–[255]; *İçkale* [329]; *Muhammet* [781]–[786].
[421] *Rawat* [187].
[422] *Ambatielos*, 107.
[423] *UP&CD* [178]–[180].
[424] *Muhammet* [787].

MFN clause could only be invoked where there exists '*discriminatory treatment between investments of investors of one of the State parties and those of investors of third States*' who are '*in a factually similar situation*'.[425]

[184] Put simply, there must be proof of *de facto* discrimination.[426] As recently expounded by the *Muhammet* Tribunal in May 2021:

> '*This involves comparing the factual circumstances surrounding the investments in question. It must be shown that actual investors, found in a similar situation, were treated differently. It is not sufficient that the two investors invested in the same State.*' [427]

[185] Here, Respondent accepts the '*sameness*' at two granular levels of comparison: *nature of treaty* and *subject matter of treaty provision*.[428] Both Article 9.7(1) of CEPTA and Article 13 of 2006 Arrakis-Mekar BIT provide for a general compensation standard.

[186] Nevertheless, Respondent disputes any '*sameness*' in the *treatment of investments* accorded to Claimant (Bonooru) compared with Star Wings and JetGreen (Arrakis). As previously canvassed, the denial of subsidies to Caeli being the dominant airline in Mekar was justified. [429] Further, there is no evidence of Respondent paying compensation based on FMV to Arrakis-based airlines in investment arbitrations.

[187] Hence, Claimant is *not* in a '*like situation*' with investors from Arrakis.

iii. Compensation is not a form of '*treatment*' accorded by Respondent '*within its territory*'

[188] The phrase '*in its territory*' in Article 9.7(1) '*plainly invokes territorial limits that are directed to substantive provisions in relation to local treatment of the investment*'.[430] As observed in *ICS*, investor-State arbitration '*is not an activity inherently linked to the territory of the respondent State.*'[431]

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[425] *İçkale* [328]–[332].
[426] *İçkale* [328]; *Muhammet* [780].
[427] *Muhammet* [783].
[428] *Doutremepuich* [217]; *Muhammet* [787].
[429] See Issue III(B)(2).
[430] *BUCG* [116].
[431] *ICS* [306].

[189] Similar to dispute resolution procedures,[432] a compensation standard that can only be invoked before an arbitral tribunal *after* a dispute has arisen cannot be characterised as '*material rights accorded to investors within the territory*' of State parties.[433]

[190] Hence, the '*logical corollary*' of the extraterritorial nature of this very present arbitral proceeding[434] is that this Tribunal's power to award compensation falls outside the territory of Mekar, and consequently, the ambit of Article 9.7.

b. Article 9.11 of CEPTA is *lex specialis* which only permits importation of compensation standards during war and emergency

[191] Alternatively, importation of compensation standards is permissible only by virtue of Article 9.11 which obliges States to accord favourable treatment to investors '*whose covered investments suffer losses owing to armed conflict, civil strife, a state of emergency or natural disaster in its territory*' on '*restitution, indemnification, compensation, or other settlement*'.[435]

[192] The *lex specialis* character of '*war loss*' clauses has been regularly rejected by arbitral tribunals.[436] Generally, such clauses are presumed to be additive rather than reductive.[437] As observed by the Tribunal in *Güriş*:

> '*[L]ex specialis requires more than just pointing to a more-specific provision (…) [The war loss clause] is therefore a non-discrimination provision with a highly specific purpose. It implements, rather than displacing, [the MFN clause].*'[438]

[193] Nevertheless, there are two critical distinctions between such decisions from our case.

(a) **Narrowness of *lex specialis* effect**: Whilst the States sought to exclude the general MFN clause entirely from importing *all* treaty standards, Respondent's target of exclusion here is narrowly aimed at the '*restitution, indemnification, compensation, or other settlement*' limb of Article 9.11.

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[432] *BUCG* [119]–[121]; *ICS* [309].
[433] *Bershader* [185].
[434] *ICS* [308].
[435] Record, 77.
[436] *AAPL* [65]; *Cengiz* [363]–[364]; *CMS* [375]; *UP&CD* [201]; *Vivendi-II (Liability)* [270]–[271].
[437] *Cengiz* [370]; *Funnekotter* [104]; *Güriş* [236]; *Total* [230].
[438] *Güriş* [261].

(b) **Treaty text of BITs**: In *Güriş*, the '*war loss*' clause in the *base* treaty lacked any provision on compensation,[439] whilst the '*war loss*' clause in the *comparator* treaty contained a guarantee to '*offer adequate compensation*' to investors for '*losses or damages*' regardless of cause.[440] In contrast, Article 9.11 of CEPTA (our *base* treaty) expressly provides for compensation. In short, it is one thing to *add* a standard to fill a gap (*Güriş*), but quite another to *replace* an existing standard entirely (our case).

[194] Ultimately, the power of a *lex specialis* rule is '*entirely dependent*' on its normative basis evinced by '*context, capacity to reflect State will, concreteness, clarity, definiteness*'.[441] The rule accords with the maxim *expressio unius est exclusio alterius*.[442]

[195] Here, Article 9.11 of CEPTA possesses the '*necessary characteristics*' of a *lex specialis* provision bearing the '*hallmark of derogating from other provisions that are general by comparison*'.[443] The intent behind Article 9.11 is crystal-clear—more favourable compensation standards from other *comparator* treaties can be imported into CEPTA for losses suffered by investments due to war, emergencies and natural disasters. Economic emergency does *not* fall within such category.[444]

[196] Hence, due to the '*exclusionary effect*' of Article 9.11 (*lex specialis*), Claimant cannot fall back on Article 9.7 (*lex generalis*) to import the compensation standard in 2006 Arrakis-Mekar BIT.[445]

B. Claimant Would Be Unjustly Enriched by an Award of Compensation

[197] Alternatively, this Tribunal should make no award of compensation due to [*1*] Claimant's contributory fault in taking '*risky business choices*'; and [*2*] '*dire economic situation in Mekar*'.[446]

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[439] *Güriş* [227].
[440] *Güriş* [289].
[441] ILC Fragmentation Report [119].
[442] *Kiliç* [7.7.3]; *Plama* [191]; *UP&CD* [200]–[202].
[443] *Güriş* [230].
[444] *Total* [229].
[445] *Güriş* [230].
[446] Record, 9.

1. Claimant bears contributory fault

[198] It is well-recognised under international law that States cannot be made responsible to compensate speculative losses.[447] Causal links can be categorised either as *pure* or *transitive*. As the *Lemire* Tribunal explained:

> '*Pure causal links exist when the damage derives directly from the wrongful act, without intermediary elements (…) Normally, the link between wrong and damage is more complex, and additional elements intervene to form a chain of events.*'[448]

[199] Indeed, ILC recognises that the *transitive* causal link between breach and injury is broken where the injury '*was effectively caused by a combination of factors*'.[449] The defence of '*contributory fault*' is embodied in ARSIWA:

> '*In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought*'.[450]

[200] Claimant is predominantly responsible for Caeli's downward spiral due to its own poor commercial judgment on multiple fronts:

(a) *Strategy*: mass expansion of long-distance flight routes at low fare.[451]

(b) *Expenditure*: excessive purchase and lease of Boeing 737 MAX planes.[452]

(c) *Management*: refusal to heed advice of minority Mekari shareholders.[453]

(d) *Monopoly*: loyalty rebates[454] and predatory pricing.[455]

(e) *Customer Service*: increase of baggage and refreshment charges.[456]

[201] Since Claimant's actions contributed significantly to Caeli's financial troubles, the causal link between Respondent's violations (if any) and Claimant's losses is severed. Put simply, Claimant's downfall was self-inflicted.

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[447] *Gold Reserve* [685]; *Rusoro* [641].
[448] *Lemire* [164].
[449] ARSIWA Commentaries, art 31 cmt 12 (*emphasis added*).
[450] ARSIWA Commentaries, art 39 cmt 3.
[451] Record, 33.
[452] Record, 34.
[453] Record, 34.
[454] Record, 33.
[455] Record, 34.
[456] Record, 38.

2. Claimant's investment suffered from a dire economic situation beyond Respondent's control

[202] International law entitles this Tribunal '*to take account of the economic situation of the respondent State*'.[457] This is to ensure that investors are not unjustly enriched by being compensated for losses stemming from general deterioration of a State's economy.[458] The plea of '*economic hardship*' only fails when the host State '*completely dismantles the very legal framework constructed to attract investors*'.[459]

[203] Here, Respondent had to grapple with a *perfect storm* of unforeseen hardships:

(a) *Industrial instability*: distortion of demand due to drastic drop in oil prices.[460]

(b) *Economic crisis*: weakening of currency and rising trade deficit.[461]

(c) *Aviation safety*: grounding of Boeing 737 MAX planes due to lethal accident.[462]

[204] Hence, Claimant's financial woes flowed from the dire socio-economic situation in Mekar caused by external factors beyond Respondent's control. Launching this arbitration is nothing more than an opportunistic attempt to squeeze out a large pound of flesh from a host State on life support crippled by terminal illness. Such callous conduct alone should disentitle Claimant from any award of compensation.

[457] *CME* [380].
[458] *CME* [562]; *Ebrahimi* [124]; *Sola* [41]–[46].
[459] *LG&E* [139].
[460] Record, 33–34.
[461] Record, 35.
[462] Record, 37.

PRAYER FOR RELIEF

The Respondent respectfully requests the Tribunal to adjudicate and declare that:

I

This Tribunal lacks jurisdiction *ratione personae* over the dispute.

II

This Tribunal should allow *amicus curiae* submissions from CRPU advisors but not CBFI.

III

Respondent did not violate the FET standard under Article 9.9(2) of CEPTA.

IV

Claimant is not entitled to any award of further compensation.

On behalf of the Respondent

Team Rezek