TEAM AJIBOLA

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID ARB(AF)/20/78

Vemma Holdings Inc.

(Claimant)

v.

The Federal Republic of Mekar

(Respondent)

MEMORIAL FOR RESPONDENT

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TABLE OF DEFINITIONS

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Bonooru – Mekar BIT	Treaty between the Federal Republic of Mekar and the Commonwealth of Bonooru for the promotion and protection of investments
CBFI's submission	*Amicus* Submission by the Consortium of Bonooru Foreign Investors
CEPTA	Comprehensive Economic Partnership and Trade Agreement concluded between the Commonwealth of Bonooru and the Federal Republic of Mekar
FET	Fair and Equitable Treatment
ICSID	International Centre for Settlement of Investment Disputes
ICSID AF Rules	Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes
ILC	International Law Commission
Mekar Advisors' submission	*Amicus* Submission by External Advisors to the Committee on Reform of Public Utilities
MFN	Most Favoured Nation
MST	Minimum Standard of Treatment
SOE	State-owned enterprise
Tribunal	The Arbitral Tribunal constituted to decide on the present dispute
Uncontested Facts	Statement of Uncontested Facts

LIST OF AUTHORITIES

I. Treaties and Conventions

cited as	*full citation*
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 159 (1965)
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 3 (1958)
VCLT	Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969)

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AMTO	*Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Award, 26 March 2008
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STATEMENT OF FACTS

1. Bonooru is a developing country in the Greater Narnian region which consists of more than 100 islands within the territory of 5000 square kilometres. Bonooru's major public facilities are located in four islands. In order to provide essential transportation to 'major islands' to the population living in remote areas, Bonooru developed a robust network of domestic airways.
2. Vemma Holdings Inc. ("**Vemma**", "**Claimant**") is an airline holding company, incorporated in Bonooru. Claimant is a successor of Bonooru's privatised State-owned enterprise ("**SOE**"). However, Bonooru still remains a Claimant's shareholder.
3. Claimant owns and manages Royal Narnian Airline, flag carrier of Bonooru. It uses Royal Narnian to provide Bonooru's citizens with mobility right guaranteed to them by the Constitution Act of Bonooru. Additionally, civil aviation plays a vital role for Bonooru's economy since it contributes 13% of GDP and 11,6% of employment.
4. The Federal Republic of Mekar ("**Mekar**", "**Respondent**") is a developing country in the Greater Narnian region which has witnessed political instability and economic problems for a long time and sustained a cautious approach to economic governance after its independence.
5. Since 1994 Mekar has embarked on the path of economic reforms and attraction of foreign investments. Therefore, in 1994 Mekar and Bonooru signed the BIT, which was replaced by the Comprehensive Economic Partnership and Trade Agreement (the "**CEPTA**") in April 2014. In 2006, Mekar also concluded the BIT with Arrakis ("**Arrakis – Mekar BIT**"). Both Mekar and Bonooru are parties to the VCLT and the New York Convention.
6. Respondent has also gone through the protracted period of statutory monopoly of SOEs. Thereafter, in 2009, Respondent revised the Monopoly and Restrictive Trade Practice Act ("**MRTP Act**") which established a new autonomous body named Competition Commission of Mekar ("**CCM**"). The CCM was created to sustain the freedom of trade, protect interests of consumers, and prevent anti-competitive practices.
7. The same year Respondent authorised privatisation of several companies including unprofitable civil airline Caeli Airways ("**Caeli**") and initiated tendering process. Claimant was one of the bidders.
8. In 2010 and 2011, Bonooru launched the Caspian Project to redefine Great Narnian trade patterns and build infrastructure in the region countries. As a part of the project,

Bonooru also offered subsidies to companies that invested in tourism-related infrastructure in Bonooru under the "Horizon 2020" Scheme.

9. Right after the Caspian Project was launched, Claimant submitted a bid to purchase an 85% stake in Caeli. The purchase resulted in access to Mekar's Phenac International Airport which captures global connecting traffic flows being close to 90 major regional airports.
10. Therefore, despite the political instability in the past, economic crisis in Mekar in 2008 and precarious financial condition of Caeli in 2010, Claimant took a calculated risk of investing in Caeli. Hence, on 29 March 2011, Vemma Holdings purchased an 85% stake in the company, while remaining 15% shares were beneficially owned by Mekar Airservices Ltd ("**Mekar Airservices**"). As the result, Vemma and Mekar Airservices entered into the Shareholders' Agreement.
11. Although Claimant's bid proposal was financially attractive, Mekari officials and representatives of Mekar Airservices several times noted overly optimistic forecast of Claimant which did not account for serious volatility of fuel prices and potential competitors in the airline market and reminded of Caeli's debt liabilities.
12. Due to decreasing oil prices and subsidies received under "Horizon 2020" Scheme from Bonooru, Caeli indeed earned profit during 2014-2015. However, instead of injecting these profits into outstanding debt and improving financial health, Vemma's representatives preferred fleet expansion and reduced airfares. Claimant also implemented frequent-flyer programme and corporate-discount scheme which allowed Caeli to become the largest airline thus pushing out the smaller companies from Mekari market.
13. Eventually Caeli attracted attention of the CCM. The CCM launched two investigations to determine whether Claimant's practices were anti-competitive under the MRTP Act. Caeli also took advantage of airline alliance, the Moon Alliance, established by Royal Narnian, in particular, through preferential secondary slot-trading between the Royal Narnian and Caeli. Therefore, the CCM grounded its investigations on the total market share of Caeli and Royal Narnian. The CCM also placed interim caps on Caeli's airfare until the end of investigations to prevent it from earning supra-competitive profits. Finally, the CCM found a breach of Mekar's antitrust legislation and imposed respective fines.
14. Unfortunately, by March 2017 Mekari domestic currency (MON) started to decrease and a currency crisis followed in Mekar. In October 2017, at request of Claimant and

other airlines Mekari authorities approved the denomination of airfare in US Dollars. However, the economic situation was deteriorating and on 30 January 2018, Mekar's government was forced to require all companies, including airlines, to denominate their services back in MON.

15. Claimant decided to appeal the airfares and fines in Mekari court. As Mekar prioritized criminal cases in courts to avoid long detention for the accused, the average time for resolution of other cases varied from 22 to 27 months. Despite this, Mekari courts resolved the disputes on airfare caps and fines in a shorter period.
16. On 25 September 2018, Respondent passed Executive Order 9-2018, which provided an opportunity for airlines to receive subsidies in order to alleviate economic problems of air companies. Claimant's bid was fairly dismissed as it already received subsidies under Bonooru's "Horizon 2020" Scheme.
17. In 2018, oil prices rose to the highest since 2013 which, just as expected, led to financial distress of Caeli. Claimant refused to take a credit offered by Respondent's bank despite a risk of insolvency. Eventually, in November 2019, Claimant decided to sell its stake in Caeli and received an offer from Hawthorne Group LLP ("**Hawthorne Group**"), a Sinnoh private company.
18. In accordance with the conditions of Shareholders Agreement Claimant suggested Mekar Airservices to buy the Claimant's stake at the terms of the Hawthorne Group. However, considering the deteriorating economic situation of Caeli, the price was overestimated and Mekar Airservices rejected the offer. Since the parties could not resolve the dispute about the validity of Hawthorne Group's offer, Mekar Airservices commenced an arbitration in the Sinnoh Chamber of Commerce's Arbitration Institute ("**SCC Arbitration Institute**").
19. On 9 May 2020, the SCC tribunal rendered the Award ("**Award**") in favor of the Mekar Airservices. Claimant filed a setting aside application and on 1 August 2020, the Supreme Arbitrazh Court of Sinnograd in Sinnoh set aside the award on the ground of arbitrator's partiality.
20. On 23 August 2020, the High Commercial Court of Mekar issued a ruling recognising and enforcing the Award in Mekar due to the lack of substantial evidence of arbitrator's partiality and based on its discretion to enforce an award provided by the New York Convention. This decision was later upheld by the Superior Court of Mekar.

21. Unable to accept the losses as a result of its own risky and ill-considered actions, on 15 November 2020, Claimant submitted a request for arbitration under the ICSID AF Rules against Respondent.

SUMMARY OF ARGUMENTS

1. **Jurisdiction:** the Tribunal lacks jurisdiction over the present dispute since Claimant is a SOE which exercises governmental functions, or in the alternative, acts as Bonooru's agent. Therefore, Claimant is not "a national" under the ICSID AF Rules. Additionally, Claimant is not covered by the term "investor" in the sense of the CEPTA since Parties unequivocally excluded SOEs from the scope of CEPTA. Furthermore, Claimant does not satisfy the "substantial business activities" test for investors. Therefore, the Tribunal lacks jurisdiction to hear the case.

2. **Amici submissions:** the Tribunal should bar the CBFI's submission as it neither t provides facts unknown to Parties or the Tribunal nor illustrates the CBFI's significant interest in the proceeding's outcome. Moreover, the CBFI is not independent from Claimant due to financial interests of the CBFI's member in the case. However, the Tribunal should accept the Mekar advisors' submission as facts on Claimant's corruption are crucial for determination of legality of Claimant's investment as a jurisdictional issue. The Mekar advisors also have a significant interest in the proceeding since corruption negatively affects investment attractiveness of Mekar and cause an increased use of unfair business practices.

3. **Fair and Equitable Treatment ("FET"):** Respondent submits that it acted in full compliance with Article 9.9 of the CEPTA, which establishes a FET standard equal to the minimum standard of treatment ("**MST**"). First, neither the CCM's measures nor the decisions of the Respondent's courts reach a high threshold of denial of justice. Second, Respondent followed the principles of due process and transparency when considering Claimant's cases. Third, non-granting of subsidies to Claimant under the Executive Order 9-2018 was neither discriminatory nor arbitrary. Fourth, Respondent did not frustrate legitimate expectations of Claimant as it did not make any specific representations to Claimant. In any event, even if taken collectively, Respondent's measures do not violate Article 9.9 of the CEPTA. Besides, denomination in MON was regulatory measure of Respondent necessary during the economic crisis.

4. **Compensation:** without prejudice to the Respondent's firm position on the absence of a breach of the CEPTA, Respondent submits that it does not owe any compensation to Claimant, since the compensations payable to Claimant is already disbursed due to sale of its stake in Caeli. The compensation shall be determined according to the market value ("**MV**") standard contained in Article 9.21 of the CEPTA. Thereafter, the

compensation shall be reduced due to two reasons: first, Claimant's contribution to the damage suffered by its investment, and second, the dire economic situation in Mekar. Finally, Respondent has already paid all the compensation, when Mekar Airservices purchased the Claimant's stake in Caeli.

ARGUMENTS

I. The Tribunal lacks jurisdiction because Claimant falls outside the scope of both the ICSID AF Rules and the CEPTA

1. Not only did Claimant flagrantly breach Respondent's domestic antitrust legislation of Respondent by monopolising the airline market, but it is also now attempting to initiate arbitration in the absence of a jurisdictional basis to do so. Claimant, as a SOE, does not qualify as a national and an investor under both **(A)** the ICSID Additional Facility Rules **(ICSID AF Rules)** and **(B)** the CEPTA. The present case is a State-to-State dispute to which Mekar did not consent. Therefore, the Tribunal lacks jurisdiction *ratione personae*.

A. Claimant cannot be considered as a national under the ICSID Additional Facility Rules

2. Claimant submitted the present dispute under the ICSID AF Rules. According to Article 2 of the ICSID AF Rules:

> *"the Secretariat of the Centre administers arbitration proceedings between a State and a national of another State for the settlement of legal disputes arising directly out of an investment…".*

3. The ICSID AF Rules do not clarify the meaning of the term "a national", but the wording of it is the same as in the ICSID Convention.[1] Hence, to shed light on this term, one needs to look into the ICSID Convention drafting history. The principal architect of the ICSID Convention, Aaron Broches, emphasised that SOEs may be nationals in the sense of the ICSID Convention unless they are "*discharging an essentially governmental function*" or "*acting as an agent for the government*".[2] Later this test was acclaimed by tribunals as *"the Broches test"*.

4. Respondent objects to the Tribunal's jurisdiction because Claimant is not "a national" within the meaning of the ICSID AF Rules. Respondent will demonstrate that Claimant is **(*1*)** a SOE, which **(*2*)** discharges an essential governmental function or, in the alternative, **(*3*)** acts as an agent for the Bonooru's government.[3]

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[1] ICSID Convention and ICSID AF Rules use the same wording to define the scope of disputes which may be administered by the Centre. Thus, it is possible to use commentaries and case law to ICSID Convention to clarify the meaning of the terms in ICSID AF Rules.
[2] BROCHES, p. 202.
[3] *Ibid*.

1. Claimant is a State-owned enterprise because Bonooru controls it

5. Determination of whether an enterprise is privately or State-owned depends on the level of the government ownership.[4] In the present case, Bonooru always retained a minority shareholding in Vemma, which ranged between 31% to 38%.[5] In 1980, Bonooru's Prime Minister declared that the government planned "*to maintain a significant interest in Bonooru Air and always will*".[6] Subsequently, the Bonooru's highest court stated that *"State shareholding in Vemma was preserved at all times for it to continue to perform the governmental functions of its State-owned predecessor"*.[7]

6. However, the *"level of ownership does not always serve as a reliable indicator of level of control"*.[8] Other factors should be also considered: **(a)** the main aim of decisions made by the Claimant's executives and **(b)** the subject to which Claimant is accountable: shareholders, government, or civil society.[9]

a) The Claimant's decisions are influenced by the government of Bonooru

7. Bonooru predetermined Claimant's decisions by exercising shareholder's rights and launching a governmental project "Caspian". The Claimant's decisions in essence **(*1*)** were made by Bonooru and **(*2*)** aimed at the satisfaction of Bonooru's geopolitical interests.

(1) Bonooru significantly affected the Claimant's corporate decisions

8. The State is responsible for the conduct of entities over which it exercises control,[10] for example, through representatives in a board of directors or participation in shareholders' meetings.[11]

9. Bonooru influenced Claimant corporate decisions as the main voting shareholder at the shareholders meetings. The Claimant's Memorandum of Association requires *"50% of voting shares for a quorum at regular meetings"* of shareholders' and directors' meetings.[12] The Claimant's representatives participated in every meeting and often formed a majority of members present.[13] Therefore, Bonooru had an opportunity to appoint

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[4] OECD Guidelines, p. 14.
[5] Uncontested Facts, ¶10.
[6] *Id*., ¶8.
[7] Annex III, ¶59, Response to the Notice of Arbitration, ¶3.
[8] Feldman, p. 28.
[9] McLaughlin, p. 603.
[10] *Plama,* Award, ¶297.
[11] *Salini*, ¶32.
[12] Procedural Order No. 3, ¶3.
[13] *Ibid*.

executive directors who could form a quorum for board's meetings and promote Bonooru's interest. Consequently, Bonooru often controlled Claimant's corporate decisions at shareholders' and board's meetings.

(2) The Claimant's investment focused on the interests of Bonooru

10. Executives of privately-owned enterprises have a fiduciary duty to maximise financial returns for their shareholders, while the investment decisions of the SOE may be *"taken for financial, strategic or national security reasons"*.[14]

11. Decisions of the Claimant's executives were not aimed at gaining profit as their main objective. It is proved by Ms. Kasumi, a former high-ranking employee within Bonooru's Ministry of Tourism, who claimed that Claimant was profitable only due to low fuel prices at that time and the Bonooru's State aid.[15] Since 28 October 2011 Claimant permanently received the State subsidies under the "Horizon 2020" scheme.[16]

12. All Claimant's managing decisions in Caeli Airways, Claimant's subsidiary, also were not ultimately aimed at being profitable, as was established by the Investment Information and Credit Rating Agency. The agency assigned Claimant CCC+ rating due to its risky investment choices and long-standing debts which were not repaid.[17] Thus, the Claimant's strategic decisions were not aimed at building a sustainable and profitable business model.

13. Therefore, the transformation of the former SOE into the partially State-owned has not resulted in a genuine independence from Bonooru.

b) Claimant is accountable to Bonooru and its citizens

14. Claimant is accountable to Bonooru's civil society and the government. Bonooru's civil society protested against the Claimant's decision to scale back services in Bonooru.[18] This fact made Bonooru take control over Claimant[19] and restore State's shareholding because Claimant could not provide the mobility right to Bonooru's citizens anymore. In addition, Ms. Misty Kasumi, stated that Bonooru's corporations tend to be dependent on the government and accountable to it.[20]

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[14] McLaughlin, p. 603.
[15] Annex VII.
[16] Uncontested Facts, ¶28.
[17] *Id*, ¶51.
[18] *Id*, ¶65.
[19] *Ibid*.
[20] Annex VII.

2. Claimant discharged essentially governmental functions by managing Caeli Airways in Mekar

15. To apply the Broches test, which excludes some SOEs from scope of ICSID Convention, one needs to rely on the provisions of the Articles on Responsibility of State for Internationally Wrongful Acts ("**ARS**") which the test *"closely resemble[s]"*.[21] Article 5 of the ARS, which reflects a customary international rule,[22] provides that:

> *the conduct of entity, which is not an organ of the State, but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the entity is acting in that capacity in the particular instance*.[23]

16. Article 5 of the ARS is applicable to former State corporations which have been privatised but *"retain certain public or regulatory functions"*.[24] Although governmental authority is not defined, *"what is regarded as "governmental" depends on* **(a)** *the particular society,* **(b)** *its history and traditions"*.[25] Moreover, if an entity has "*an independent discretion or power to act",* there is no need to establish State's control.[26] In the present case, the Bonooru's history shows that Claimant exercised governmental authority despite the absence of a State's permanent control.

a) The geography and the role of Bonooru's civil aviation makes the Claimant's activities governmental in nature

17. To define the scope of governmental authority in respect to Bonooru, one needs to look at the features of the Bonooru's geography. Bonooru is an archipelagic State comprising 109 islands, of which only four are major islands.[27] Its' major public facilities, *e.g.*, healthcare and educational institutions, are concentrated on these major islands. Thus, Bonooru's Constitution obliges Bonooru to assist and ensure the provision of essential transportation to the population living in remote areas.[28] The Constitutional Court of Bonooru reaffirmed this duty in a case on Bonooru Air privatisation, the Claimant's company.[29] To comply with the Constitution and the Court's decision, Bonooru developed a network of domestic

[21] Cortesi, p. 113; BARNES, ¶24.39.
[22] *BUCG,* ¶34.
[23] ARS, Article 5.
[24] *Id*., p. 42, ¶1.
[25] *Id*, p. 43, ¶6.
[26] ARS, p. 43, ¶7.
[27] Uncontested Facts, ¶5.
[28] *Ibid*.
[29] Annex III.

airways.[30] The importance of the civil aviation industry is also seen from its share in the Bonooru's GDP (13%).[31]

18. Furthermore, the importance of civil aviation for Bonooru is derived from the Memorandum of the Claimant's Association. Provision 3(h) of the latter establishes that Claimant *"assists in developing the aviation industry and the civil aviation infrastructure in Bonooru for the benefit of its population"*.[32] *"Development of industry"* is an indicator that Claimant exercises a governmental function.[33] The tribunal in *Salini v. Morocco* stated that *"the accomplishment of tasks that are under State control"*, *i.e.,* building, managing, and operating of assets responding to the needs of the State with regard to infrastructure, proves that a SOE exercises governmental functions.[34]

b) Claimant exercises governmental authority ensuring the mobility right to Bonooru's citizens

19. In 1964, the Constitutional Court of Bonooru in the decision on Royal Narnian's privatisation emphasised that *"air travel serves a unique purpose in Bonooru compared to other nations around the globe"*.[35] The Constitutional Court also mentioned that Claimant's subsidiary is *"utilised for public benefit"*,[36] *i.e.* to perform Bonooru's obligation to provide its citizens with mobility rights.

20. Claimant's investment in Mekar enhanced Bonooru citizens' mobility rights. In 2016, the Secretary of Bonooru's Ministry highlighted that Claimant "*lived up the standards set up by its State-owned predecessor*" due to enhancement of the Great Narnian region's tourism infrastructure.[37]

21. Claimant may argue that it performs a commercial function, not a governmental one. However, if Claimant operated on the market as a fully commercial enterprise, there would be no need to artificially exclude any carrier competitors for Claimant subsidiary.[38]

22. Transportation services are not a one-time action, it is a lasting process. Thus, there is no need for Bonooru to permanently revise the Claimant's activity. Bonooru has

[30] Uncontested Facts, ¶6.
[31] *Ibid*.
[32] Annex III.
[33] *Maffezini*, ¶86.
[34] *Salini*, ¶33.
[35] Annex III.
[36] *Ibid*.
[37] Procedural Order No. 4, ¶6.
[38] Uncontested Facts, ¶7.

representatives the Claimant's board of directors to be aware of all decisions made by Claimant which has independent power to act.

23. Therefore, since Claimant ensures the mobility rights of Bonooru's population, granted by Bonooru's Constitution, it exercises governmental authority.

3. Alternatively, Claimant is an agent of Bonooru

24. Under the Broches test, SOEs cannot bring a claim under the ICSID Convention, if they act as agents of the State.[39] In the context of the ICSID AF Rules,

> *the concept of "agency" should be read not in structural terms but functionally ... What matters is that [the agency] performs public functions on behalf of the Contracting State or one of its constituent subdivisions*.[40]

25. Under the ARS, if SOE exercises public powers and then is used by State to achieve a particular result, then SOEs conduct is attributed to the State.[41] Respondent maintains that Bonooru used Claimant to achieve the Caspian Project's goals.

26. As was elaborated in *CSOB v. the Slovak Republic*, promotion of the policies or purposes of the State is also describing an enterprise as an agent of the State.[42] Relevance of purpose was also stated by Iran-US Claims Tribunal in *Hyatt International Corporation v. Iran* case.[43] In addition, the Tribunal should look at the objective of the entity in question.[44]

27. Claimant may rely on the *BUCG v. Republic of Yemen* case*,* in which the tribunal applied the Broches test and analysed the nature of Chinese SOE activity to assess whether it may be an investor before an ICSID tribunal.[45] In that tribunal's point of view, the SOE's purpose is irrelevant in the attribution analysis. However, this approach was rightly criticized as "*to attempt impossible*".[46] An evaluation of the nature of SOE's activity as divorced from its purpose will lead to warped findings.

28. In the present case, Claimant is indeed an agent of Bonooru. First, Claimant followed the Bonooru's policy towards expansion on the Mekar's market. The same year after launching the Caspian Project, Claimant decided to expand the geography of its activity.[47] The fact that Ms. Sabrina Blue, the head of Claimant's board of directors, decided to change the

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[39] BARNES, ¶22.34.
[40] Montashami & El-Hosseny, p. 378.
[41] ARS, p. 48, ¶6.
[42] *CSOB*, ¶20.
[43] CRAWFORD, p. 131.
[44] *Maffezini*, ¶76.
[45] *BUCG*, ¶40.
[46] McLaughlin, p. 611.
[47] Uncontested Facts, ¶¶4, 22.

employer and accept the appointment as Bonooru's Secretary of Transport and Tourism, the same day her company decided to take a quite risky investment decision[48] leads to the reasonable doubts whether Claimant was actually independent from Bonooru.

29. Moreover, the main aim of Claimant's investment was to obtain access to the largest Mekar's airport to *"redefine trade patterns"* in the Great Narnian region, according to the Caspian Project.[49] The indirect evidence of it is a reference in the Claimant's bid that Bonooru's State-owned bank would refinance Caeli's debts without any commercial reason.[50]

30. Bonooru also spent several billions to develop the Phenac International Airport, part of a Caspian Project, without any Mekar's consideration. Right after Bonooru realised Claimant was unable to perform the Caspian Project anymore, Bonooru's construction firms stopped the works due to withdrawal of Bonooru's funding[51] to pressure Mekar and make it stop CCM investigations against Claimant.[52]

31. Second, according to CCM reports, the Claimant's strategy was aimed at running competitors out of the market, while subsidies of Bonooru let Claimant reduce Caeli's airfare below its average avoidable costs.[53] Misty Kasumi stated that all activities of Caeli Airways were only profitable for Bonooru than Claimant itself or Caeli.[54] All these facts and statements make clear the main reason for the Claimant's investment was to satisfy Bonooru's will for more integration and control in the region of the Great Narnian.[55]

32. Therefore, Claimant was acting as the agent of Bonooru to perform the Caspian Project and cannot be considered as an investor under the ICSID AF Rules.

B. Claimant falls outside the scope of protection of the CEPTA

33. Claimant cannot be considered an investor because it is **(*1*)** a SOE which is excluded from the protection under the CEPTA and **(*2*)** it fails to satisfy the requirements of the substantial business activities test under Article 9.1. of the CEPTA.

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[48] *Id.*, ¶22.
[49] *Id.*, ¶4.
[50] *Id.*, ¶23.
[51] Procedural Order No.4, ¶1.
[52] Annex IX.
[53] *Id.*, ¶45.
[54] Annex VII.
[55] *Ibid.*

1. Claimant is excluded from the protection scope of the CEPTA as a State-owned enterprise

34. The CEPTA was not meant to cover SOEs as investors which Parties expressly stated. SOEs are not covered by the CEPTA as the treaty endorses the same logic as the Broches test.

35. Article 9.13 of the CEPTA obliges States to ensure that their SOEs will not act inconsistent with States' obligation and describes features of SOEs. Such entities *"exercise any regulatory, administrative or other governmental authority that the Party has delegated to it"*.[56] In case a treaty contains a rule regulating conduct of SOEs, then it *"creates a lex specialis with respect to attribution of the acts of the SOEs to State"*.[57] The CEPTA provides an illustrative list of governmental acts. It means even non-core governmental functions may result in attribution of SOE's activities to a State. However, these examples should be *"necessarily based on State power"*.[58]

36. The tribunal in the *Ulysseas* case analysed the provision in a BIT with the similar wording and noted that acts of public sector entities exercising governmental authorities in the particular instance are attributable to the State.[59] This authority must be granted by a State to an enterprise.[60] Arbitrator Tolga Ayoglu in his dissenting opinion in *Öztaş Construction* case stated that if an entity made an investment **(a)** the actual purpose of investing was to satisfy public interest and **(b)** based on a governmental assignment rather than on commercial nature, then such action may be attributed to State.[61]

a) The actual purpose of Claimant's acquisition of Mekar Airways was to satisfy Bonooru's public interest

37. One of the main obligations of the State is to increase its' wealth and richness. Bonooru performs this obligation by developing aviation and tourism.[62] Civil aviation, a part of the tourism industry, alone contributes 13% of Bonooru's GDP and accounts for 11,6% of

[56] CEPTA, Article 9.13. The wording of this provision is identical to NAFTA Article 1503(2). Therefore, it is appropriate to refer to case law where tribunals analysed this provision.
[57] *Mesa Power*, ¶364; *UPC*, ¶¶59,62–63.
[58] *UPC*, ¶76.
[59] *Ulysseas*, ¶135.
[60] Petrochilos, p. 267.
[61] *Oztas Construction*, ¶17.
[62] Uncontested Facts, ¶2.

total employment.[63] Aviation is also the main transport for Bonooru since it is an island State.[64] Therefore, aviation industry is vital for Bonooru.

38. In 2010 Bonooru initiated the Caspian Project *"to facilitate the movement of goods, people, services, and knowledge amongst the Aslanian nations"*.[65] The same year Bonooru's flag carrier decided to expand the territory of operation and applied for participation in privatisation of the Respondent's former national carrier.[66] On the day of application, the Claimant's head was appointed as Secretary of Bonooru's Ministry of Transport and Tourism.[67] Right after Claimant bought shares in Caeli Airways the Ministry offered recurring subsidies to Claimant.[68] This financial support was a part of the Caspian Project. The economical reason for the Ministry to finance Claimant was its obligation to develop tourism-related infrastructure. Thus, Claimant was assigned to operate abroad to increase the share of the tourism industry in Bonooru's GDP.

b) The acquisition of Mekar Airways by Claimant was not motivated by commercial reasons

39. One of the unique characteristics of SOEs, which is also present in the Claimant's case, is funding by public grants.[69] If Claimant operated in Mekar only on a commercial and independent basis, there would be no reason for Bonooru to finance Claimant's activities abroad. A subsidy is *"typically given to remove some type of burden, and it is often considered to be in the overall interest of the public, given to promote a social good or an economic policy"*.[70] The actual reason Claimant made investment in Mekar is to "*boost the tourism infrastructure of Bonooru*",[71] using subsidies to "*drastically reduce airfare*"[72] and consequently to capture Mekar's tourism market for the benefit of Bonooru.

40. Therefore, Bonooru delegated to Claimant an obligation to develop the tourism industry, one of the main sources of Bonooru's GDP, using the Caspian Project as the executive order of the government. It excludes Claimant from the CEPTA protection.

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[63] *Id*., ¶6.
[64] *Id*., ¶5.
[65] *Id*., ¶4.
[66] *Id*., ¶22.
[67] *Ibid*.
[68] *Id*., ¶28.
[69] McLaughlin, p. 605.
[70] "Subsidy", Investopedia.
[71] Uncontested Facts, ¶28.
[72] *Id*., ¶45.

2. Claimant does not pursue substantial business activities in Bonooru

41. Claimant does not qualify as an investor under Article 9.1. of the CEPTA because Claimant fails substantial business activities test which had been chosen by Parties to identify investors.

42. Under Article 31 of the VCLT, *"a treaty shall be interpreted in accordance with the ordinary meaning of the terms of the treaty in the light of its object and purpose"*. The ordinary meaning of *"business activities"* is *"any activity a business engages in for the primary purpose of making a profit"*.[73]

43. Here, Claimant, in fact, did not pursue the primary aim of making profit for 2 reasons: first, it provides the mobility right and, second, operates for the benefit of Bonooru.

44. The main reason Bonooru decided to privatise BA Holdings, the Claimant's predecessor, is *"concerns of inefficient allocation of resources"*.[74] However, the new owner of BA Holdings was required to perform Bonooru's obligation to provide the mobility right *"to most remote islands, regardless profitability"*[75] for social and political reasons. The Memorandum of Association of Claimant clearly states that one of its' objectives is *"to develop the aviation industry and civil aviation infrastructure in Bonooru for the benefit of its population"*.[76] Moreover, being a flag carrier, Claimant indirectly acts on behalf of the Bonooru to *"claim a legitimate share of international air transportation and of the benefits thereof"*.[77]

45. To illustrate it, one needs to refer to non-profit organisations. They, as well as Claimant, may conclude commercial contracts, e.g., rent offices, hire employees, and earn profit as a result of their activities. Nevertheless, these activities are not recognised as business because their main aim or object is public benefit.

46. Therefore, Claimant *"was not motivated by profit in the ordinary sense of a purely commercial entity would be"*[78] and cannot be qualified as an investor and shall be barred from bringing the claim under the CEPTA.

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[73] "Business activities", Investopedia.
[74] Uncontested Facts, ¶3.
[75] *Id.*, ¶8.
[76] Annex IV.
[77] Roberto, p. 6.
[78] KOVÁCS, p. 285.

47. To conclude, the Tribunal does not have *ratione personae* jurisdiction over the present case as it is a State-to-State dispute.

II. THE TRIBUNAL SHOULD BAR THE AMICUS SUBMISSION OF THE CONSORTIUM OF BONOORI FOREIGN INVESTORS AND GRANT TO LEAVE THE SUBMISSION OF THE MEKAR'S COMMITTEE ON REFORM OF PUBLIC UTILITIES

48. *Amicus* submissions may assist the tribunal in "*arriv[ing] at a correct decision"* through expertise, knowledge and additional information relating to the dispute.[79] In this case, the Parties envisaged the possibility to submit an *amicus curiae* brief to the Tribunal subject to the criteria set forth in the CEPTA, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (**"UNCITRAL Rules on Transparency"**), and the ICSID AF Rules. Respondent submits that these criteria are not satisfied and, therefore, requests the Tribunal **(A)** to reject the CBFI's submission and **(B)** to grant leave to Mekar advisors' submission.

A. The Tribunal should reject the CBFI submission

49. The CEPTA, UNCITRAL Rules on Transparency and the ICSID AF Rules stipulate the same criteria the Tribunal shall consider, among other things, to determine whether to accept the *amicus* submission. Respondent submits that the CBFI's submission does not **(*1*)** assist the Tribunal in the determination of a factual or legal issue related to the proceeding, **(*2*)** demonstrate a significant interest of the *amicus* in the proceeding.[80] Moreover, **(*3*)** the CBFI has connection with Claimant that cause conflict of interests.

1. The CBFI submission does not assist the Tribunal neither factual nor legal issues of the dispute

50. According to applicable rules on non-parties participation, an *Amici* should assist the tribunal in determination of issues by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.[81] *"To make valuable contribution"* for the Tribunal, the CBFI must have *"special knowledge or relevant expertise or experience"* on the matters of the dispute.[82] The CBFI must present new arguments and evidence that were not submitted by disputing parties.[83] The CBFI fails to do so.

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[79] *Suez*, ¶24.
[80] ICSID AF Rules, Article 41(3).
[81] *Apotex*, Procedural Order, ¶¶25–26.
[82] *Id.*, ¶24; *Suez*, ¶23; Zachariasiewicz, p. 220.
[83] Born & Forrest, p. 638.

51. The CBFI is an industry association representing Bonooru investors and advocating on national and international business issues, among them are training and capacity building activities, networking.[84] The Tribunal has to deal with three main issues: jurisdictional one, whether Mekar violated the FET standard under the CEPTA and what is an appropriate compensation standard.[85] As it is seen, the CBFI does not have any expertise in international investment law or investor-State arbitration. Therefore, it cannot provide any assistance to the Tribunal.

52. As for factual issues, the CBFI's submission does not contain any new facts or knowledge. The business climate of Bonooru and corporate governance framework, to which the CBFI made references, have already been established. These factors are of high importance to decide the issue of the Tribunal's jurisdiction as they illustrate the history, traditions of the Bonooru's society. Hence, the CBFI's submission lacks new information.

53. Thus, the Tribunal should reject the CBFI's submission as irrelevant for determination of factual or legal issues.

2. The CBFI petitioners do not demonstrate a significant interest in the proceeding

54. Article 9.19(3) of the CEPTA and Article 4(3)(a) of the UNCITRAL Rules on Transparency require an *Amici* to have significant interest in the proceeding outcomes. The CBFI's reference to public interest is irrelevant as none of the applicable treaties or arbitration rules require the Tribunal to take it into account.

55. To establish presence of the significant interest, the CBFI must have "*more than a 'general' interest in the proceeding.*[86] Political or systemic goals also does not constitute a significant interest in the specific arbitration.[87]

56. The CBFI states that its main interest is to protect investors from arbitrary acts and to sustain stable regulatory regimes for Bonooru investors.[88] It also adds that investor-State dispute settlement regime is important for society.[89] However, these considerations are not enough to establish *Amici* has no significant interest in the current dispute. While the CBFI's general interest is the unambiguous resolution of the dispute is not significant.[90]

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[84] The CBFI's submission, ¶2; Procedural Order No. 3, ¶11.
[85] Procedural Order No. 2, ¶8.
[86] *Apotex*, Procedural Order, ¶38.
[87] *Bear Creek Mining,* ¶19.
[88] The CBFI's submission, ¶8.
[89] *Id.*, ¶10.
[90] *Apotex*, Procedural Order, ¶40.

57. Hence, the Respondent's interest is purely commercial and is not aimed at representing collecting interests of Bonooru's investors.

3. The CBFI is not independent from Claimant due to the conflict of interests

58. Under Article 4(2)(b) of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, the CBFI must disclose direct and indirect connection with any disputing party. It let the Tribunal access the relevance and CBFI's interest in the present dispute. Therefore, the CBFI must be independent and neutral.[91] Moreover, the CBFI must refrain from *"suggesting to the arbitral tribunal how issues of fact or law as presented by the parties ought to be determined"*.[92]

59. The CBFI has the Executive Committee (**"Committee"**) which discusses and votes regarding CBFI's *amicus* submissions. The CBFI's guidelines prohibit to discuss or vote members of the Committee who have direct financial interest in the outcomes of the case.[93] Mr. Velveteen, member of the Committee, is a CFO of the Lapras Legal Capital (**"Lapras"**). This company advised Claimant on litigation funding and funders for the current dispute.[94] The CBFI mention this fact in the submission.[95] Nonetheless, the CBFI hid that Lapras has financial interests in the proceeding since the Committee decided this fact is not relevant. Respondent insists that it's up to the Tribunal to assess the relationship between Claimant and Lapras.

60. The CBFI also suggests the Tribunal to consider only *"the nature of activities of [SOEs] and not their purpose"*.[96] It contradict to the CBFI's role as the *Amici*.

61. Therefore, the Tribunal should reject the CBFI's *amicus* submission since it does not comply with criteria.

B. The Tribunal should grant leave to the Mekar Advisors' submission

62. Claimant is against acceptance of the Mekar Advisors' submission due to concerns on its content. Nevertheless, Respondent insists that the Mekar Advisors (***1***) addresses matters of the dispute and (***2***) has significant interest in the proceeding.

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[91] *Pezold*, ¶62; BASTIN, p. 139.
[92] NIGEL & RICHARD, p. 272.
[93] Procedural Order No. 3, ¶12.
[94] *Ibid*.
[95] The CBFI's submission, ¶7.
[96] *Id*., ¶10.

1. The Mekar Advisors' submission assist the Tribunal on facts and addresses matter of the dispute

63. The Tribunal's consideration should not be limited only to the issues raised by the Parties due to the mere fact that investment arbitration potentially is broader in impact in terms of effects on citizens and government.[97] It is possible that *"neither party would consider it advantageous to disclose that their agreement was founded on official State corruption"*.[98] In the case at hand, Caeli's privatisation involved a bribery from Claimant.

64. The circumstances of the present case are similar to those in *World Duty Free v. Republic of Kenya* and *Metal-Tech v. Uzbekistan* cases, where tribunals invited *Amici* to present additional submissions and evidence on the issue of corruption, that originally was not raised by parties.[99] As was noted by the *Infracapital* tribunal, the issue of corruption is of high importance since it *"breaches international public policy norm and impedes"* the Tribunal's jurisdiction.[100]

65. Indeed, *Amici* have *"a role to play in bringing forward "issues of corruption".*[101] In light of the general purpose of the *amicus curiae*, which is to provide to the arbitral tribunal perspectives and expertise that the litigating parties may not provide,[102] *Amici* fully complies with this role by assisting the Tribunal on the matter of process of privatisation of Caeli Airlines.

66. Therefore, *Amici* are not raising any new legal issues in the present proceedings apart from those that have already been raised by factual circumstances of the case.

2. The Mekar Advisors has substantial interest in the proceeding's outcomes

67. According to the CEPTA[103] and the ICSID AF Rules,[104] the Tribunal may allow *amici* to file the submission if, among other requirements, it has a significant interest in the proceedings. UNCITRAL Rules on Transparency also prescribe tribunal to consider public interest.[105] Tribunals have consistently affirmed that *Amici* should explain "*how the*

[97] Kinnear, p. 8;
[98] Zachariasiewicz, p. 218.
[99] *Metal-Tech*, ¶242.
[100] *Infracapital*, ¶468.
[101] Zachariasiewicz, p. 218.
[102] *Suez*, ¶13.
[103] CEPTA, Article 9.19(3).
[104] ICSID AF Rules, Article 41(3)(c).
[105] UNCITRAL Rules on Transparency, Article 1(4)(a).

rights or principles it may represent or defend might be directly or indirectly affected by the specific jurisdictional issue on which [they] intends to make submissions".[106]

68. In light of the above, *Amici* have significant interest in this arbitration due to several reasons. *Amici* are members of Mekari civil society whose professional focus is investment banking,[107] which is one of the substantial instruments in attracting investment to enrich Mekar's nation. Second, *Amici* protects public interest of Mekar taxpayers and other citizens.

69. Thus, issue raised in the present arbitration regarding Vemma's corruption methods of acquiring Caeli Airlines affects not only the public policy matters but the direct and significant interest of *Amici* in raising investment attractiveness of Mekar through unbiased and transparent evaluation of internal State policy.

[106] *Eco Minerals*, ¶¶34–35.
[107] Mekar Advisors' submission, p.19.

III. RESPONDENT DID NOT VIOLATE ARTICLE 9.9. OF THE CEPTA

70. Should the Tribunal decide that it has jurisdiction over the dispute, Respondent submits that it did not violate FET standard under Article 9.9 of the CEPTA.

71. Respondent has always followed a cautious approach to economic governance and taken regulatory actions to sustain the gradual development of business and social prosperity. Claimant is an experienced company in the airline industry. While making investments in Mekar by acquiring major stake in airline enterprise named Caeli, Claimant inherited debt liabilities of Caeli. Nevertheless, Claimant could not adequately evaluate the Caeli's assets and took a risky approach to its investment activities in violation of the Respondent's antitrust legislation. Hence, Respondent had to take respective actions to promote competition on the market.

72. Respondent will first demonstrate that (**A**) the FET standard in Article 9.9 of the CEPTA is equal to the minimum standard of treatment under customary international law ("**MST**"). Further, Respondent will submit that (**B**) it acted in full compliance with Article 9.9 of the CEPTA. Finally, (**C**) the decree on denomination of all services in MON was a legitimate regulatory measure of Respondent.

A. Article 9.9 of the CEPTA establishes a minimum standard of treatment

73. Respondent contends that the standard of FET in Article 9.9 of the CEPTA is equal to the MST under customary international law. MST provides the level of protection of fundamental rights and expectations of foreign investors, below which a "*conduct is not accepted by the international community*".[108]

74. According to Article 31(1) of the VCLT the ordinary meaning of the terms of a treaty shall be considered when interpreting a treaty. The text of the treaty "*is presumed to be the authentic expression of the intentions of the parties*".[109]

75. Article 9.9 of the CEPTA which provides the FET obligation is titled "*Minimum Standard of Treatment*". By expressly referring to MST in the title, the parties agreed to confine the level of the protection for investors under the FET standard to the MST. Therefore, the FET standard in Article 9.9 of the CEPTA is limited to the MST under customary international law.

[108] *Glamis*, ¶615; *Al Tamimi*, ¶390.
[109] *Ping An*, ¶165.

B. Respondent acted in accordance with Article 9.9 of the CEPTA

76. Claimant may argue that measures taken by Respondent's authorities caused significant losses. In fact, Claimant has suffered from its own risky and thoughtless management and also from the unforeseeable economic crisis in Mekar.

77. Respondent submits that (***1***) it did not breach the FET obligation as its measures did not constitute separate breaches listed in Article 9.9(2) of the CEPTA. In any event, (**2**) all the measures taken together cannot amount to a composite breach of the FET.

1. Measures taken by Respondent did not constitute separate breaches listed in Article 9.9(2) of the CEPTA

78. Respondent will demonstrate that (**a**) it did not violate obligations provided in Article 9.9 of the CEPTA as it did not commit a denial of justice and (**b**) the measures were taken in accordance with due process of law. Furthermore, (**c**) there was no arbitrariness or discrimination and (**d**) no frustration of legitimate expectations of Claimant.

a) The Respondent's measures did not constitute a denial of justice either in administrative or civil proceedings

79. Claimant alleges that actions of the CCM and the way the Mekari judicial authorities conducted the court proceedings amount to a denial of justice. Respondent submits that it did not breach Article 9.9(2)(a) of the CEPTA because the measures taken by the CCM and Mekari courts did not lead to a denial of justice either in administrative or civil proceedings.

80. The test for establishing a denial of justice sets out a high threshold[110] which "*requires the demonstration of a particularly serious shortcoming and egregious conduct that shocks, or at least surprises, a sense of judicial propriety*".[111] The Tribunal should assess whether the domestic decision was obviously improper and discreditable which led to unfair and inequitable treatment.[112]

81. Denial of justice can be found if the relevant courts refuse to entertain such a claim, if they subject it to undue delay, or if they administer justice in a serious inadequate way, or there is a clear and malicious misapplication of the law.[113]

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[110] *Mondev*, ¶127; *White Industries*, ¶¶10.4.5–10.4.8; *Agility*, ¶¶209–210.
[111] *Chevron*, ¶244; *Agility*, ¶¶209–210.
[112] *Mondev*, ¶127; *Liman*, ¶275.
[113] *Azinian*, ¶¶102–103; *Roussalis*, ¶315; *Liman*, ¶277; *Loewen*, ¶132; *OI*, ¶525.

82. There is no evidence that any such defects can be ascribed to the Respondent's action in this case. Respondent argues that (***1***) the Respondent's administrative body took reasonable and lawful measures and (***2***) the Mekari courts rendered their decisions in accordance with international and domestic law.

(1) The measures taken by the CCM during administrative proceedings were reasonable and lawful

83. Claimant challenges the following decisions of the CCM: initiating two investigations against Caeli regarding the potential anti-competitive behavior on the Mekar's market and imposition of caps on Caeli's airfare as interim measure. Moreover, Claimant contests imposition of two fines on Caeli as penalty based on the results of the investigations.[114] However, these measures were consistent with the MRTP Act and did not constitute denial of justice in administrative proceedings.

84. Mekar's civil aviation industry was monopolized by the SOEs for decades[115] until 2009, when the Mekar's new cabinet authorized privatization of these SOEs.[116] Respondent finally could secure competition in the Mekar's civil aviation market. Therefore, the MRTP Act was enacted "*to promote and sustain competition in markets, to protect the interests of consumers, and to ensure freedom of trade carried on by other participants in markets of Mekar*".[117] For this purpose the CCM has the sole competence to initiate an investigation concerning potentially anti-competitive behavior.[118]

85. First, both investigations were launched to establish whether Caeli's strategy was aimed at hindering competition on the Mekar's market. Claimant was initially warned about the creation of the CCM and possible sanctions in case of unlawful practices[119] and the CCM sought an undertaking from Caeli that it would not engage in high-level co-operation on competition parameters.[120] Despite this fact, Caeli engaged in an anti-competitive behavior.

86. The CCM initiated the First Investigation because Caeli expanded extremely rapidly to the detriment of the other airlines by decreasing the cost of airfares, suggesting wide benefits

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[114] Notice of Arbitration, ¶¶14–15.
[115] Uncontested Facts, ¶14.
[116] *Id.*, ¶18.
[117] Annex V, Chapter III(1).
[118] *Ibid.*
[119] Uncontested Facts, ¶19.
[120] *Id.*, ¶25.

and discounts to the consumers due to close cooperation with another member of Moon Alliance, Royal Narnian.[121] Furthermore, Caeli benefitted from preferential secondary slot-trading with Royal Narnian.[122] Ms. Misty Kasumi, a former high-ranking employee within Bonooru's Ministry of Tourism, also expressed the view that Caeli's business model was focused on undercutting competition with low prices.[123] Hence, the CCM's purpose was to determine whether Caeli had adopted predatory pricing strategies to impede competition on the Mekari airline market.

87. Claimant argues that the CCM had no right to initiate the investigation as Caeli had 43% market share in Mekar,[124] while under the MRTP Act the CCM may open an investigation *suo moto* if a corporation obtains a market share greater than 50%.[125] However, the MRTP Act expressly provides that the CCM "*may exercise discretion in industries that require special attention to open an investigation where a corporation owns a lower market share*".[126] Airline industry does require special attention of the CCM because that autonomous body can prevent the monopolization of the airline market again.

88. The CCM eventually grounded its investigation on the total market share of Caeli and its Moon Alliance partner Royal Narnian exceeding 54%.[127] Claimant fully owns and operates Royal Narnian.[128] Since Claimant could define the actions of both Caeli and its partner Royal Narnian, it was reasonable to initiate an investigation against Caeli.

89. Second, the CCM imposed caps on Caeli's airfare and fines based on the results of investigations to restrain the growing monopoly of Caeli in airline market. The MRTP Act grants the CCM the power to impose any interim and final remedy it deems appropriate under the Respondent's law to prevent anti-competitive practices.[129] Therefore, the CCM lawfully imposed caps on Caeli airfare *"to prevent earning supra-competitive profits by Caeli in the future"*.[130] Moreover, Caeli itself recognized that the airfare caps were

[121] *Id.*, ¶¶35,36.
[122] *Id.*, ¶36.
[123] Annex VII.
[124] Notice of Arbitration, ¶14.
[125] Annex V, Chapter III(2)(a).
[126] *Ibid.*
[127] Uncontested Facts, ¶36.
[128] *Id.*, ¶9.
[129] Annex V, Chapter III.
[130] Uncontested Facts, ¶37.

reasonable.[131] The CCM further imposed fines[132] as penalty after ending the investigations and finding the breach of Mekar's antitrust legislation.

90. Caeli had a right to contest caps and fines and it filed respective claims to the court.[133] The CCM's investigations, airfare caps and fines were a proper application of the Respondent's domestic law. Therefore, Respondent did not deny justice to Claimant in administrative proceedings.

(2) The courts decisions complied with the requirements of international and domestic law

91. Respondent claims that (**i**) there was no denial of justice in civil proceedings as there was no undue delay in civil proceedings and justice was administered in adequate way. Furthermore, (**ii**) the Respondent's courts recognized and enforced the Award in accordance with the New York Convention and Mekar's legislation.

i. Claimant failed to prove that there was an undue delay in civil proceedings or that Respondent administered justice in inadequate way

92. Claimant alleges that Respondent administered justice in inadequate way as it dismissed Caeli's claim on removing airfare caps in interim decision.[134]

93. In June 2019, the Mekari court issued a preliminary decision on refusal to remove the airfare caps.[135] Besides, the decision concerned dismissal of the merits of the claim. However, the court acted in accordance with the Executive Order 5-2014, which gives a court an opportunity to dismiss a case without further appeal if the judge decides there is a little chance to come to the opposite final decision.[136] Moreover, the decision was not premature or meritless as Caeli represented its arguments in the court during a three-day hearing.[137]

94. Therefore, considering the comprehensive reports of the CCM[138] and the market share of Claimant at 42%,[139] the court rendered the reasonable and lawful decision. Respondent

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[131] Notice of Arbitration, ¶15.
[132] Uncontested Facts, ¶¶45,49.
[133] *Id.*, ¶¶44,50.
[134] Notice of Arbitration, ¶20.
[135] Uncontested Facts, ¶54.
[136] Procedural Order No. 3, ¶8.
[137] Uncontested Facts, ¶52.
[138] *Id.*, ¶¶45,49.
[139] *Id.*, ¶49.

did not administered justice in inadequate way as the court secured procedural guarantees and released its interim decision in accordance with domestic law.

95. Claimant also alleges that there was an undue delay in Mekari courts hearing urgent matters.[140]

96. On 20 January 2019 Caeli appealed orders of the CCM imposing fines and the registrar scheduled the respective hearing for May 2020.[141] Although the hearing on caps was planned on April 2019, Caeli was denied holding a joint hearing on caps and fines as the CCM requested time for preparing response to Caeli's notice.[142] Thus, the court secured the due process guarantees for both sides. Besides, that matter was not urgent as the fines could not be enforced during the court proceedings at that point.[143]

97. Moreover, the time of consideration issues in Mekari courts was reasonable. Although there are no fixed time limits within which certain types of cases must be adjudicated in public international law,[144] it is established that the delay in the proceedings must be excessive to reach the high threshold of denial of justice.[145] Arbitral tribunals found that even a period of ten years to obtain a judgment in a complex case did not rise to the level of denial of justice.[146]

98. Mekar had been suffering from the economic crisis[147] and Caeli was not the single company having a commercial dispute.[148] In the meantime, Mekari courts continued to prioritize criminal matters which are considered to be more urgent than the commercial disputes.[149] Despite the hardships the Mekari courts considered the Claimant's cases within the average time periods for court proceedings in Mekar.

99. The Caeli's claim to the court to remove caps on airfares implemented by the CCM was registered on 27 March 2018,[150] and the decision was rendered on 15 June 2019.[151] The hearing on fines was scheduled for May 2020.[152] Hence, it took 14 months for Caeli to

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[140] *Id.*, ¶20.
[141] *Id.*, ¶50.
[142] *Ibid*.
[143] *Ibid*.
[144] *White Industries*, ¶10.4.9.
[145] *AMTO*, ¶83; *Pey Casado*, ¶659.
[146] *Jan de Nul*, ¶204; *White Industries,* ¶10.4.22.
[147] *Id.*, ¶39.
[148] *Id.*, ¶44.
[149] *Ibid*.
[150] Uncontested Facts, ¶44.
[151] *Id.*, ¶54.
[152] *Id.*, ¶50.

receive the decision on caps and 17 months for the court to hold a hearing on CCM's orders. Claimant was aware that average time of consideration of the case in the Respondent's courts generally constituted 22 months and 27 months for commercial disputes.[153]

100. Therefore, there was neither undue delay in adjudicating the Claimant's cases nor inadequate way of considering cases. In any event, it does not reach the threshold of denial of justice.

ii. The Respondent's courts recognized and enforced the Award in accordance with international obligations and the Respondent's domestic law

101. At the November 2019 Claimant decided to sell its stake in Caeli and received an offer from a Sinnoh private company named Hawthorne Group.[154] Claimant suggested Mekar Airservices as the second holder of stake in Caeli to buy the Claimant's stake at the terms of the Hawthorne Group.[155] As the price was overestimated, Mekar Airservices rejected the offer and commenced an arbitration in the SCC Arbitration Institute.[156]

102. On 9 May 2020, the SCC Arbitration Institute rendered the Award in favor of the Mekar Airservices.[157] On 1 August 2020, the Supreme Arbitrazh Court of Sinnograd in Sinnoh, the third country, set aside the award pursuant to the Claimant's application concerning arbitrator's impartiality.[158] On 23 August 2020, the High Commercial Court of Mekar issued a ruling recognizing and enforcing the Award in Mekar which was subsequently supported by the decision of the Superior Court of Mekar.[159] The Respondent's courts recognized and enforced the Award in accordance with international and domestic law.

103. Under Article III of the New York Convention, to which both Bonooru and Mekar are parties,[160] each Contracting State shall recognize arbitral awards as binding and enforce them.[161] At the same time, according to Article V(1)(e) of the New York Convention, "*recognition and enforcement of the award <u>may</u> be refused*" (emphasis added), if the party

[153] *Id.*, ¶13.
[154] *Id.*, ¶56.
[155] *Ibid*.
[156] *Id.*, ¶57.
[157] *Id.*, ¶58.
[158] *Id.*, ¶61.
[159] *Id.*, ¶62.
[160] *Id.*, ¶66.
[161] New York Convention, Article III.

proves that the award has been set aside by a competent authority of the country in which that award was made.[162]

104. Domestic decisions of different countries also support that the setting aside of an international arbitral award by the court of the seat of the arbitration is not the reason *per se* to refuse the recognition and enforcement of the award in another country.[163] An award of international tribunal is not connected with national legal systems and, therefore, does not violate the public policy of the country where the award enforced.[164]

105. Section 36(1)(e) of the Commercial Arbitration Act of Mekar reproduces Article V(1)(e) of the New York Convention.[165] In its decision the Superior Court of Mekar emphasized that "*the use of "may" in the 1958 New York Convention and Section 36 of the Act provides an enforcing court with discretion to recognize an award that has been set aside at its seat…*".[166] Therefore, Mekari courts followed domestic law and practice. The Tribunal should not serve as quasi-appeal reviewing the application of domestic law by domestic courts.[167]

106. Hence, both Mekari Law and the New York Convention grant the State the discretion to refuse the recognition and enforcement of an award on the grounds listed in Article V, including setting aside of the award, "*without obligating them to do so*".[168] Mekari courts exercised this discretion. Moreover, final decision was not extraordinary as there was analogous case practice in Mekar. Therefore, the decisions of the Respondent's courts cannot amount to denial of justice.

b) The measures of Respondent were taken in accordance with due process of law, including the requirement of transparency

107. Article 9.9(2)(b) of the CEPTA provides that a party breaches the FET obligation *"if a measure or measures constitute fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings"*. The actions of the Respondent's judicial and administrative authorities did not amount to fundamental breach of due process and transparency as (***I***) Claimant was granted due

[162] *Id.*, Article V(1)(e).
[163] *Hilmarton; In Re Chromalloy*; *China Agribusiness; IPCO; China Nanhai.*
[164] *Pabalk Ticaret*.
[165] Annex XIV.
[166] Annex XV, ¶18.
[167] *Arif*, ¶441.
[168] UNCITRAL Secretariat Guide, p. 125, ¶5.

process at every step of the domestic judicial and administrative proceedings (***2***) which were fully transparent.

(1) The Respondent's authorities obeyed the due process standard in relation to Claimant

108. As it was stated in *ADC v. Hungary*, *"in general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard"*.[169] Due process is satisfied when an investor has the opportunity to contest the measures in question[170] *"afforded reasonably ahead of a decision"*[171] and includes such legal guarantees as reasonable advance notice, a fair hearing, opportunity to present evidence, an unbiased and impartial adjudicator to assess the actions in dispute.[172]

109. Besides, according to Article 9(2)(b) of the CEPTA breach of due process must be fundamental, that is relating to essential facts.[173] In present case Claimant was granted due process both in administrative and civil proceedings.

110. First, Claimant had the right to appeal measures taken by the CCM to the courts and Claimant actually exercised it.[174] Claimant also had the time to present the evidence prior to the court hearings.[175] As it was demonstrated *supra*,[176] the court decisions were made within reasonable time.

111. Second, Claimant had and exercised the right to appeal the decision of the High Commercial Court of Mekar enforcing the Award. The decision on appeal was also considered within the reasonable time *i.e*., one month.[177]

112. Therefore, the measures taken by the Respondent's authorities complied with due process of law.

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[169] *ADC*, ¶435.
[170] *Ibid*; *Kardassopoulos*, ¶¶395–396,404.
[171] *GTH*, ¶608.
[172] *ADC*, ¶435; *Apotex*, Award, ¶¶9.36,9.50.
[173] "Fundamental", Merriam Webster Dictionary.
[174] Uncontested Facts, ¶¶44,50.
[175] *Id.*, ¶52.
[176] Memorial, ¶99.
[177] Uncontested Facts, ¶62.

(2) The Respondent's authorities obeyed the transparency requirement in relation to Claimant

113. The proceedings in relation to Claimant were transparent. Transparency requires that the investor must be informed about the laws and administrative or other binding decisions before they are imposed, "*there should be no room for doubt or uncertainty on such matters*".[178] Moreover, an administrative process itself must be transparent and impartial.[179]

114. The Respondent's authorities provided transparent administrative and judicial proceedings in relation to Claimant. Besides the schedule of court hearings, Claimant was notified about the reasons of imposition of caps on airfares,[180] its prolongation[181] and the fines as the result of the Investigations.[182] The CCM released thorough reports after finishing the investigations.[183] Claimant did not challenge impartiality of the judges or the CCM's officials.

115. Therefore, measures taken by Respondent authorities did not amount either to the fundamental breach of due process or to the fundamental breach of transparency.

c) The Executive Order 9-2018 was enacted and enforced in a non-discriminatory and non-arbitrary manner

116. The decision not to grant subsidies to Claimant by the Secretary of Civil Aviation of Mekar ("**Secretary**") under the Executive Order 9-2018 does not constitute arbitrary or discriminatory conduct in violation of Article 9.9(2)(c) of the CEPTA.

117. An arbitrary measure is the biased one that unreasonably causes investor's losses *"for reasons that are different from those put forward by the decision maker"*.[184] The State discriminates against a foreign investor *"if similar cases are treated differently and without reasonable justification"*.[185]

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[178] *Metalclad*, ¶76.
[179] *Waste Management*, ¶98.
[180] Uncontested Facts, ¶37.
[181] *Id.*, ¶¶45,49.
[182] *Id.*, ¶¶45,48.
[183] *Id.*, ¶¶45,49.
[184] *EDF*, ¶303.
[185] *Saluka*, ¶313; *Lidercón*, ¶¶167–169; *Mobil*, ¶886; *Crevier*, ¶25.

118. The Executive Order 9-2018 was aimed at granting subsidies to airlines for each Mekari citizen travelling on board.[186] The Order authorized the Secretary at its discretion *"to make or guarantee loans to eligible businesses"* and *"provide the subsidy amounts necessary for such loans and loan guarantees"*.[187]

119. The Secretary satisfied the applications for subsidies of Star Wings and JetGreen and rejected the applications of Caeli and Larry Air.[188] First, the Secretary granted subsidies in accordance with discretion provided by the Executive Order 9-2018 and thus non-granting subsidies to Caeli was not arbitrary.

120. Second, Caeli and Larry Air were not in the similar situation with Star Wings and JetGreen and therefore were treated differently. While Star Wings and JetGreen are Arrakis companies held by private groups, a significant part of Caeli and Larry Air were owned by foreign governments.[189] Moreover, since 2011 Claimant received subsidies from Bonooru government under the "Horizon 2020" scheme as it invested *"in tourism-related infrastructure in Bonooru"*.[190] Thus, Claimant has already received subsidies for air transportation of passengers.[191] Furthermore, the CCM had previously concluded that the subsidies under the "Horizon 2020" scheme enabled Claimant's predatory pricing strategiesto the extent of breaching the Respondent's antitrust legislation.[192] Therefore, non-granting subsidies to Caeli was not discriminatory.

121. In any event, granting subsidies is a discretionary measure that falls into the margin of appreciation of Respondent. A State is entitled to a margin of appreciation in conducting its economic policy[193] and in arriving at its own discretionary decisions,[194] which cannot be equated with arbitrariness.[195] The Tribunal must accord due deference to the decisions of State authorities applying laws governing their area of competence.[196]

122. Since granting of subsidies was based on the Secretary's discretion, Respondent's conduct was not arbitrary. Furthermore, there was no discrimination against Caeli because it was

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[186] Uncontested Facts, ¶41.
[187] Annex VIII, Section 3101(a).
[188] Uncontested Facts, ¶46–47.
[189] *Ibid*.
[190] *Id.*, ¶28.
[191] *Id.*, ¶46.
[192] *Id.*, ¶45.
[193] *RREEF*, ¶468; *PV Investors*, ¶583.
[194] *Electrabel*, ¶484; *Philip Morris,* ¶399; *RREEF*, ¶242.
[195] *RREEF*, ¶468.
[196] *Servier*, ¶568; *RREEF*, ¶244.

not in a similar situation with other companies. Therefore, Respondent did not violate Article 9.9(2)(c) of the CEPTA.

d) Respondent did not frustrate alleged legitimate expectations of Claimant

123. Article 9.9(3) of the CEPTA provides that when applying the FET obligation,

> *a Tribunal may consider whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated*.[197]

Respondent did not make any specific representations to Claimant that created such legitimate expectations.

124. To create legitimate expectations the Tribunal must establish that the State's authorities made clear explicit or implicit representations to induce the investment, Claimant relied on such representations when making the decision about investments, and the representations "*were subsequently repudiated by the state"*.[198]

125. State conduct must be specific and unambiguous and be targeted at a specific person or identifiable group[199] or specific object and purpose.[200] *El Paso* tribunal emphasized that *"[e]ncouraging remarks from government officials do not of themselves give rise to legitimate expectations*".[201]

126. Claimant may allege that Respondent made the specific representations through adoption of the new legislature to inspire investor's confidence[202] and the statement of the Chairperson of the Mekar's Committee on Reform of Public Utilities regarding Vemma's success in Mekar and its encouraging effect for the other investors.[203] However, that the adoption of the new legislation cannot be considered a specific representation to Claimant because it was directed to all potential investors. The Chairperson's expression of hope is an encouraging remark rather than a statement, on which investor could rely during making its investment. Thus, all the alleged representations suffer from vagueness and generality.

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[197] CEPTA, Article 9.9(3).
[198] *Antaris*, ¶360(3).
[199] *White Industries,* ¶10.3.7.
[200] *El Paso*, ¶375.
[201] *Ibid.*
[202] Uncontested Facts, ¶19.
[203] *Id.*, ¶24.

127. Therefore, Respondent did not give any specific representation to Claimant that are amenable to protection under the FET standard.

2. In any event, a series of measures cannot collectively amount to a composite act in breach of Article 9.9 of the CEPTA

128. Claimant may argue that cumulative effect of measures taken by the state amounts to a breach of the FET standard, even if the measures do not constitute a breach of the FET separately.

129. However, as confirmed by investment tribunals, the FET standard has a relatively high threshold[204] and the several acts do not breach FET "*in aggregate any more than they do individually*".[205]

130. There is no basis in the CEPTA for Claimant to argue that despite not individually constituting internationally wrongful acts, acts or omissions together can be considered to cumulatively constitute a composite breach of the FET. Article 9.9(2) of the CEPTA contains a list of elements which Parties negotiated to be a breach of the FET clause.

131. Therefore, actions taken by Respondent cannot together amount to a failure to accord FET when individual actions, taken on their own, would not surmount the threshold for a treaty breach.

C. Denomination in MON was a legitimate regulatory measure during the economic crisis

132. Claimant challenges the denomination of services in MON in Mekar in January 2018 as it hurt profitability of Caeli.[206] However, Respondent submits that this measure was within Respondent's right to regulate.

133. As it was noticed earlier[207] by March 2017 currency crisis started in Mekar with rise of inflation and decrease of consumer spending power.[208] Despite this, in October 2017, Respondent at the request of Claimant approved the denomination of airfare in US Dollars exclusively for airlines.[209] However economic situation in Mekar rapidly deteriorated so that the newly elected government had to adopt several measures to stabilize the

[204] *Blusun*, ¶363.
[205] *Ibid*.
[206] Notice of Arbitration, ¶17.
[207] Memorial, ¶98.
[208] Uncontested Facts, ¶39.
[209] *Id*., ¶40.

economy.[210] Therefore, on January 2018, Respondent established denomination in MON for activities of all companies in Mekar.[211]

134. Such *"elimination of the fixed link to the US dollar"*[212] does not amount to a breach of FET obligation when it is *"bona fide regulatory measure of general application"*, taken reasonably during *"economic and monetary emergency and proportionate to the aim of facing such an emergency"*.[213] Moreover, denomination is legal when no specific undertaking was given to investor by the State.[214]

135. The Respondent's right to regulate *"should also be considered when assessing the compliance with the standard of fair and equitable treatment"*.[215] The right to regulate covers modifications of legal framework during the economic crisis.[216] The investment tribunals conclude that the State is exempt from compensation when it takes a regulatory *bona fide* measure,[217] which is aimed at *"protecting the public welfare, non-discriminatory and proportionate"*.[218]

136. As it was demonstrated earlier, Respondent did not create legitimate expectations that legislation will remain unchanged.[219] On the contrary, Article 9.8 of the CEPTA provides the State's right to regulate *"in order to achieve legitimate public policy objectives, such as ... social and consumer protection"*.[220] Moreover, it underlines that the mere fact of negative effect of legislative modification to the investment does not constitute a breach of an obligation under Section "Investment protection" of the CEPTA which includes FET obligation.[221]

137. In any event, as it was demonstrated earlier,[222] Respondent *"enjoys a margin of appreciation in the field of economic regulation"*[223] which means that the Tribunal should not reconsider the Respondent's measure.

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[210] *Id.*, ¶41.
[211] *Id.*, ¶42.
[212] *Total*, ¶163.
[213] *Id.*, ¶197.
[214] *Ibid*; *Mobil*, ¶387.
[215] *Plama*, Award, ¶177.
[216] *Magyar Farming*, ¶346; *Impregilo*, ¶291; *PV Investors*, ¶581.
[217] *Magyar Farming*, ¶364.
[218] *Philip Morris*, ¶305.
[219] Memorial, ¶¶123–127.
[220] CEPTA, Article 9.8(1).
[221] *Id.*, Article 9.8(2).
[222] Memorial, ¶121.
[223] *PV Investors*, ¶584.

138. Therefore, denomination in MON was *bona fide* measure, purposed for social and consumer protection as the economic crisis evolved. It was proportional and non-discriminatory as the requirement of denomination was directed at the companies from different spheres. Hence, denomination in MON was the necessary and compelled measure of Respondent taken to prevent the catastrophic macroeconomic situation and recover from the currency crisis.

139. To conclude, Respondent did not breach the FET obligations under Article 9.9 of the CEPTA by neither individual measures nor taken together. Furthermore, Respondent legitimately exercised the right to regulate to prevent aggravation of economic crisis.

IV. RESPONDENT OWES NO COMPENSATION TO CLAIMANT

140. Without prejudice to the Respondent's firm position on the absence of breach of the CEPTA, in any event, Respondent does not owe any compensation to Claimant, since Respondent has already paid the full amount of compensation calculated in accordance with MV standard and with due account of circumstances reducing the compensation.

141. To determine the amount of compensation due, if any, (**A**) the Tribunal should apply the MV standard contained in Article 9.21 of the CEPTA. Thereafter, (**B**) any awarded compensation should be reduced, since Claimant contributed to the damage suffered by its investment, and Respondent is in the dire economic situation. Finally, (**C**) Respondent has already paid all the MV for the Claimant's investment, when Mekar Airservices purchased the Claimant's stake in Caeli.

A. Compensation shall be based on the market value of the Claimant's investment

142. Respondent will further demonstrate that (***1***) Claimant is entitled to compensation corresponding to the MV of the investment. In any case, (***2***) the compensation under the MV standard and the fair market value ("**FMV**") standard are identical in the case at hand.

1. The market value standard is applicable for the calculation of the compensation

143. Claimant may argue that Arrakis – Mekar BIT grants to investors of a third country and to their investments treatment more favourable than that which is accorded to investors from Bonooru,[224] thereby violating Article 9.7 of the CEPTA. The allegedly different treatment is based on reference of Arrakis – Mekar BIT to the FMV standard.

144. Article 9.7 of the CEPTA indeed comprises MFN provision, and the CEPTA is not the only international agreement concluded by Respondent.[225] Naturally, the wording used in agreements with other States may differ from the CEPTA. However, the inclusion of the MFN clause in the CEPTA does not grant Claimant the right to apply provisions of other international agreements concluded by Respondent, *inter alia*, to use the FMV standard prescribed by Arrakis – Mekar BIT.

145. Article 9.7(1) of the CEPTA requires that "*an investor of the other Party and to a covered investment*" must not be subject to "*treatment less favourable*" than that which is accorded

[224] Arrakis – Mekar BIT, Article 13.
[225] Uncontested Facts, ¶1.

"*in like situations, to investors of a third country and to their investments with respect to*", *inter alia*, "*the disposal of their investments in its territory*".[226]

146. The application of MFN clause to dispute settlement should be determined considering an analysis of the wording of the clause, exceptions to MFN treatment contained therein,[227] and the circumstances surrounding the conclusion of the treaty.[228]

147. Article 9.7(2) of the CEPTA limits the application of MFN clause providing that:

> "*Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations."*[229]

148. Claimant may argue that the Tribunal established under Arrakis – Mekar BIT indeed have systematically awarded compensation for FET violations under Article 13 of the BIT.[230] However, these awards are part of dispute settlement, they do not constitute measures adopted or maintained by Respondent.

149. First, Article 9.7(2) of the CEPTA explicitly excludes "*procedures for the resolution of investment disputes…*" from the scope of Article 9.7(1) of the CEPTA. Hence, awards of the Tribunal established under Arrakis – Mekar BIT, being part of the resolution of investment disputes, are excluded from the scope of Article 9.7(1).

150. Second, the circumstances surrounding the conclusion of the treaty, Mekar's Model BIT referred to compensation at MV even at the negotiation stage of Arrakis – Mekar BIT.[231] Thus, Respondent tend to pay compensation at MV, and provided compensation at MV in the CEPTA under the expressed consent of Bonooru.

151. Therefore, the MFN provision in the CEPTA does not grant to Claimant the right to demand compensation under the FMV standard.

2. Alternatively, the choice between the market value standard and the fair market value standard does not affect the calculation of compensation

152. The different wording of MV and FMV does not automatically mean unequal standards.

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[226] CEPTA, Article 9.7(1).
[227] *Plama*, Decision on Jurisdiction, ¶192.
[228] *Id*., ¶¶196–197.
[229] CEPTA, Article 9.7(2).
[230] Procedural Order No. 3, ¶15.
[231] *Ibid*.

153. This position is supported in the doctrine. For instance, Irmgard Marboe finds that for the purposes of calculation of compensation in an international investment arbitration *"it seems most appropriate to understand and apply 'fair market value' and 'market value' as synonyms*".[232]

154. According to the ICSC, *"the term MV never requires further qualification and that all States should move toward compliance with this usage*."[233]

155. Thus, for the purposes of correct calculation of compensation the MV standard and the FMV standard are equal.

B. Any compensation awarded should be reduced

156. Any compensation awarded should be reduced, because (***1***) Claimant contributed to its own damage, and (***2***) the dire economic situation in Mekar makes the payment of a larger amount of compensation impossible.

1. Claimant bears responsibility for the losses it has incurred

157. Article 39 of the ARS provides that:

> *[i]n 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*.[234]

158. The concept of contributory fault regards an intentional wrongful act committed by the injured party as a ground to reduce the liability of the respondent state,[235] and the invocation of Article 39 of the ARS is common in the investment arbitration.[236]

159. At the approval stage of Vemma's bid, some members of Mekar's Committee on Reform of Public Utilities noted that its proposal "*relied on an overly optimistic forecast which did not account for serious volatility of fuel prices and potential takeover of the long-distance routes by competitors*".[237] However, Claimant's acquisition of an 85% stake in Caeli[238] allowed to neglect all warnings and make decisions on expansion at its discretion.

160. Moreover, already during active development of Caeli, Mekar Airservices cautioned Claimant that "*Caeli's expansion should be controlled to avoid exorbitant costs … and*

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[232] MARBOE, p. 172.
[233] International Valuation Guidance, p. 194; Glossary for International Valuation Standards, p. 356.
[234] ARS, Article 39.
[235] *Stati*, ¶1331.
[236] *Burlington*, ¶572.
[237] Uncontested Facts, ¶24.
[238] *Id.*, ¶25; Annex VI.

hedge the liability of additional financing".[239] Claimant "*continued to project optimism*" disregarding the volatility of demand in the region during fall and winter months.[240]

161. Finally, Claimant was assigned a 'BB' Long-Term Issuer Default Rating due to its "*looming liquidity crunch, risky investments, and exposure to external risks*".[241]

162. This risky business strategy chosen by Claimant in defiance of warnings of Respondent and Mekar Airservices, Caeli's co-owner, led to its decline and subsequent risk of bankruptcy. Hence, the specified financial position of Claimant was caused not by the Respondent's measures, but by its own actions. Claimant failed to prove the causal link of Respondent's measures to suffered damages.

163. Thus, the contributory fault of Claimant is the ground for the reduction of any compensation awarded.

2. The dire economic situation in Mekar is a ground for mitigation of the compensation

164. Respondent runs deficits in both its fiscal and current accounts,[242] suffering from dire economic situation. The rapid decline of MON began in 2016 and resulted in a currency crisis in 2007, that was followed by a sharp increase in prices for everyday items and a decrease in consumer spending power.[243] Finally, increasing inflation put the economy in freefall.[244] These circumstances should be taken into account in order to decrease the amount of any compensation awarded.

165. The balance between the compensation to Claimant and the economic reality of Respondent has been always urgent problem, but this is not an option "*to disregard the economic reality which underpinned the operation of the industry*."[245] Arbitrator Brownlie, in his Separate Opinion in the *CME* case, wrote in favour of an appropriate consideration of the respondent State's financial situation, arguing that the amounts awarded should consider the financial abilities of the States.[246]

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[239] Uncontested Facts, ¶31.
[240] *Id.*, ¶¶29,31.
[241] Procedural Order No. 4, ¶5.
[242] Uncontested Facts, ¶39.
[243] *Ibid*.
[244] *Id.*, ¶41.
[245] *CMS*, ¶165.
[246] *CME*, Separate Opinion, ¶77.

166. In the context of the economic crisis raging in Mekar, the payment of compensation of more than 400 million USD will finally undermine the Respondent's economy and it will have terrible consequences for its population. According to a Mekari official, "*to pay the USD 700 million that Vemma demands, Mekar would have to transfer about twice its consolidated annual public spending to Vemma*."[247]

167. Hence, economic realities, including financial crises, should be reflected in the calculation of the compensation and reduce its amount.

C. Mekar has already paid the "market value" for the Claimant's investment, when Mekar Airservices purchased the Claimant's stake in Caeli

168. The basic principle of compensation is *restitutio in integrum*, *i.e.,* "*compensation should undo the material harm inflicted by a breach of an international obligation*."[248] If the Tribunal concludes that Respondent breached the CEPTA, the main purpose of the compensation awarded is to put Claimant in such a position but for the alleged violation of the CEPTA. The proper valuation date is the date which corresponds to the culmination of the events which allegedly led to the breach of the FET.[249]

169. Claimant published a press release on its website estimating the FMV of its investment in Mekar in USD 1.1 Billion.[250] According to the press release, "*Vemma has received only USD 400 Million from Mekar upon the coerced sale of its assets*", therefore, Respondent is obliged to pay "*the remaining USD 700 Million as compensation in this arbitration*."[251]

170. However, in concordance with Aviation Analytics article published in 2019, USD 1.1 Billion was a peak and short-term valuation of Caeli.[252] This rapid expansion was immediately accompanied by no less fleeting fall caused by imprudence of Claimant.[253] The compensation cannot be awarded based on the valuation of Claimant's assets in June 2019, when they reached a short-term rise and then fell due to the risky and ill-conceived Claimant's business strategy.

171. One year after the above evaluation, the maximum amount of the potential compensation awarded is 400 million USD. Claimant fully agreed with this assessment of the investment,

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[247] Procedural Order No. 3, ¶4.
[248] *S.D. Myers*, ¶315.
[249] *Watkins Holdings*, ¶¶679–680.
[250] Procedural Order No. 3, ¶16.
[251] *Ibid.*
[252] Procedural Order No. 4, ¶4.
[253] Annex IX.

when sold its stake in Caeli to Mekar Airservices, Mekar's SOE,[254] on 8 October 2020 for the specified amount.[255] Hence, Claimant has already received the compensation to restore its allegedly infringed rights.

172. Thus, Claimant failed to prove that the investment is still estimated in USD 1.1 Billion as well as to prove the violation of Article 9.9 of the CEPTA and demonstrate a causal link between such violation and the amount of damages claimed. Therefore, to date the compensation due to Claimant in the amount of USD 400 Million has already been paid, and Respondent does not owe Claimant compensation.

[254] Uncontested Facts, ¶26.
[255] *Id.*, ¶63.

PRAYER FOR RELIEF

Respondent respectfully requests the Tribunal to adjudicate and declare that:

I. The Tribunal does not have jurisdiction to resolve the case under the ICSID AF Rules and the CEPTA.

II. The Tribunal rejects the CBFI's submission and grant leave for the Mekar advisors' submission.

III. Respondent did not violate Article 9.9 of the CEPTA.

IV. Respondent owes no compensation to Claimant.

On behalf of Respondent

Team Ajibola

23 September 2021