Team MBAYE

The 2021 Foreign Direct Investment International Arbitration Moot

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ARBITRATION PURSUANT TO THE 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

BETWEEN

VEMMA HOLDINGS INC.

(Claimant)

AND

THE FEDERAL REPUBLIC OF MEKAR

(Respondent)

ICSID CASE NO. ARB(AF)/19/78

STATEMENT OF DEFENSE

23 September 2021

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LIST OF ABBREVIATIONS

¶/¶¶	Paragraph(s)
%	per cent
AoA	Articles of Association
Art./ Arts.	Article / Articles
ARSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts
BIT	Bilateral Investment Treaty
BoD	Board of Directors
Caeli case № 1	The judicial proceedings at the Mekar's High Court relating to the First CCM Investigation into the commercial activities of Caeli Airways
Caeli case № 2	The judicial proceedings at the Mekar's High Court relating to the Second CCM Investigation into the commercial activities of Caeli Airways
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEO	Chief Executive Officer
CEPTA	Bonooru – Mekar Comprehensive Economic Partnership and Trade Agreement
CILS	Center of Integrity in Legal Services
Claimant	Vemma Holdings Inc.
Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)
Domestic Proceedings	the judicial proceedings at the Mekar's High Court relating to the First and Second CCM Investigation into the commercial activities of Caeli Airways
EA	External Advisors to Mekar's Committee on Public Utilities Reform
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
ECtHR	European Court of Human Rights

FET	Fair and equitable treatment
FMV	Fair Market Value
FTA	Free Trade Agreement
i.a.	*inter alia*
Ibid.	*Ibidem*
i.e.	*id est*
ICSID	International Center for Settlement of Investment Disputes
ICSID AF Rules	International Center for Settlement of Investment Disputes Additional Facility Rules
Ltd.	Limited
MFN Clause	Most-favored-nation clause
MMRTA	Mekar's Monopoly and Restrictive Trade Practice Act of 2009
MoA	Memorandum of Association
MV	Market value
NoA	Notice of Arbitration
Parties	Claimant and Respondent
PO	Procedural Order
Respondent	The Federal Republic of Mekar
Sec.	Section
SCC Award	Award of 9 May 2020 rendered by Mr Rett Eichel Cavanaugh and according to which Vemma failed to secure a bona fide third party offer under Article 39 of the Shareholders' Agreement
SOE	State-owned enterprise
SoUF	Statement of Uncontested Facts
Tribunal	Arbitral Tribunal
v.	*versus*
VCLT	Vienna Convention on the Law of Treaties (1969)

STATEMENT OF FACTS

1. The Federal Republic of Mekar ("**Mekar**" or the "**Respondent**") is a country situated in the Greater Narnian region. In recent years, it has witnessed prolonged political instability, mass migration, population growth, and economic crises.

2. In order to attract investors, the Respondent amended Mekar's Monopoly and Restrictive Trade Practice Act in 2009 by creating an independent state antitrust agency, the Competition Commission of Mekar (the "**CCM**").

3. In 2010, the Respondent decided to privatise Caeli Airways ("**Caeli**"), a state-owned enterprise (an "**SOE**"), through the tendering process. After Vemma Holdings ("**Vemma**" or the "**Claimant**") won the tender, the CCM sought Caeli's undertaking that it would not engage in high-level cooperation on competition parameters with members of Moon Alliance.

4. On 29 March 2011, the Claimant entered into a Share Purchase Agreement with Mekar Airservices Ltd. to purchase an 85% stake in Caeli. The Respondent remained a beneficial owner of remaining 15% shares through Mekar Airservices Ltd. As a result of the privatisation process, the Claimant acquired not only Caeli's valuable assets, but also its debt liability.

5. During the first years of new ownership, Caeli mainly offered routes from Mekar to Bonooru which was in line with Caeli's traditional business practices. Those routes were flown frequently under State ownership and justified the privatisation of Caeli.

6. However, in 2012, Caeli radically changed its strategy by offering low-fare, long-distance flights into Mekar. Due to the well-known volatility of demand in Mekar during fall and winter months, this approach was considered precarious and overly optimistic.

7. The profit made through low-pricing strategies was not, however, used to repay the existing debt, but was invested in fleet expansion and lowering airfares even further. Caeli's rapid expansion drew the CCM's attention, and it launched a *suo moto* investigation into Caeli's activities.

8. As an interim measure, the CCM placed caps on Caeli Airways' airfare to prevent it from earning supra-competitive profits in the future. Caeli did not protest the airfare caps, and there was no evidence the caps hurt its profitability in 2016.

9. Later, a consortium of small regional airlines in Greater Narnia brought another complaint before the CCM, alleging that Caeli was involved in predatory pricing strategies to push its competitors off the market. On account of this complaint, the CCM launched its second investigation into Caeli's business affairs.

10. In late 2016, the Respondent's currency plunged due to unstable oil prices, which required State interference with the central bank to stabilize the dire economic situation. The economic crisis hit the Respondent.

11. In 2018, the CCM concluded its First Investigation into the commercial activities of Caeli Airways and issued a voluminous report on the results of the investigation. The CCM report found a breach of Mekar's antitrust legislation in the form of predatory pricing resulting from low airfares and loyalty programmes. The report also noted that the subsidies received by the Claimant under the Horizon 2020 scheme helped Caeli drastically reduce its airfare below its average avoidable costs. Accordingly, the CCM imposed a total penalty of MON 150 million on Caeli. The CCM also decided to keep the airline caps in place pending the Second Investigation.

12. In 2019, the CCM completed its Second Investigation into Caeli. Its final report concluded that Caeli had engaged in anti-competitive behaviour while conducting its business activities in Phenac International Airport. Specifically, it was found to have abused its dominant position to extract significant additional privileges in terms of airport service fees from Phenac International Airport, which allowed it to undercut ticket fares and eventually push other competitors off the market consisting of routes to and from Phenac International.

13. Consequently, a fine of MON 200 million was imposed on Caeli. The CCM also decided to continue to impose airfare caps until Caeli' market share, with its fellow Moon Alliance member factored in, were to fall below 40%. Nevertheless, the CCM lifted the caps even earlier, after Caeli's market share alone in Mekar dropped below 40%.

14. Facing the risk of insolvency, Caeli applied for a 200 million USD loan to the First National Phenac. The bank offered a credit line at an inflated interest rate based on Caeli's low credit rating because of its risky business approach.

15. In 2019, representatives of the Claimant announced their intention to sell their stake in Caeli, given the burgeoning liabilities of the enterprise. Mekar Airservices Ltd. insisted on an offer of an arm's length commercial price made by a *bona fide* third party. An offer

from Hawthorne Group LLP secured by the Claimant did not satisfy these requirements due to its affiliation with the Claimant and the unjustifiably inflated price offer.

16. Failed to yield another suitable buyer for its shares, the Claimant sold its stake in Caeli to Mekar Airservices Ltd. Discontented with the deal, the Claimant filed the Notice of Arbitration under ICSID AF Rules in early 2021.

SUMMARY OF ARGUMENTS

I. This case is a matter of a State-to-State arbitration and the Tribunal has no *ratione personae* jurisdiction to hear it since the Claimant is a state-owned enterprise, to which the CEPTA's protection does not extend pursuant to Art. 9(1) CEPTA. However, should the Tribunal have *ratione personae* jurisdiction under Art. 9(1) CEPTA, the Claimant cannot be a party to this arbitration in accordance with the applicable *Broches* test. Based on the *Broches* test, the Claimant acted as the agent of Bonooru at the time the investment was made, which disqualifies it from the CEPTA's protection.

II. The Tribunal should reject the CBFI's *Amicus* as an *amicus curiae* fails to meet the criteria contained in Art. 9.19(3) CEPTA and Art.41(3) ICSID AF Rules. CBFI's *Amicus* will be of no assistance to the Tribunal primarily due to the material concerns about the impartiality of an *amicus curiae*. On the other hand, the Tribunal should grant the leave for EA's *Amicus* as it provides first hand evidence of corruption that is relevant to the issue of the Tribunal's jurisdiction and complies with the requirements set forth by the CEPTA and ICSID AF Rules.

III. The Tribunal should find the Respondent has not breached Art. 9.9(2) CEPTA. In particular, measures taken by the Respondent were reasonably based on its antitrust legislation and proportionate during the economic crisis, being neither arbitrary nor discriminatory. The Respondent did not commit denial of justice as the Caeli cases were administered within a reasonable time and without any egregious shortcomings.

IV. In case the Tribunal finds the Respondent in breach of Article 9.9, then the Tribunal should conclude the Respondent has already purchased the Claimant's investment at "*Market Value*" standard that should be applied in the case at hand and award the Claimant no compensation. Market value standard is the only applicable standard in the case as prescribed by general international law and the CEPTA. Moreover, the "*Fair Market Value*" standard cannot be imported into the CEPTA through MFN clause, hence the Claimant's allegations with regards to the standard are unfounded. Alternatively, the Tribunal should reduce any compensation awarded considering the Claimant's contributory fault and the ongoing economic crisis in Mekar.

ARGUMENTS

PART ONE: JURISDICTION

I. THIS TRIBUNAL LACKS JURISDICTIONS TO HEAR THE CLAIMANT'S CLAIMS AS THE PRESENT DISPUTE IS A STATE-TO-STATE ONE

1. If one was to describe the dispute before the Tribunal in a metaphorical manner, perhaps he would resort to the myth of Icarus who flew too high to the Sun and fell to death. The Icarus here is the Claimant who, in disregard of warnings and obvious onrushing downfall, made reckless decisions and faced a sticky end: not only did the Caeli incur losses but it also lost its standing in the Greater Narnian region.

2. The Claimant's poor judgement also hinders it from comprehending the Tribunal's lack of jurisdiction and the true nature of this arbitration, which is a State-to-state one. The Claimant, despite its current status as a state-owned enterprise (hereinafter – **SOE**) and the circumstances surrounding this case, unreasonably insists on its having standing in this arbitration. First and foremost, the CEPTA's protection does not extend to the Claimant and the Tribunal lacks the *ratione personae* jurisdiction under Arts. 9.1 and 9.13 CEPTA (**A**). Secondly, should the Tribunal have the *ratione personae* jurisdiction under Art. 9.1 CEPTA, the Claimant should still be disqualified from the CEPTA's protection pursuant to the *Broches* test (**B**).

A. THE TRIBUNAL LACKS THE *RATIONE PERSONAE* JURISDICTION UNDER ARTS. 9.1 AND 9.13 CEPTA

3. To ascertain if a tribunal has *ratione personae* jurisdiction, subjects entitled to seek protection under a treaty should be defined. In other words, whether a tribunal can hear a case before it depends on the definition of an "*investor*" embedded in a treaty. Here, the relevant definition is encapsulated in Art. 9.1 CEPTA, which does not extend to the Claimant (**1**). Herewith, the Tribunal should analyze Art. 9.1 in conjunction with Art. 9.13 CEPTA (**2**).

1. The Tribunal lacks the *ratione personae* jurisdiction under Art. 9.1 CEPTA

4. Pursuant to Art. 9.1 CEPTA, the term "investor" means "*an enterprise with the nationality of a Party […] that […] has made an investment in the territory of the other Party*".[1] In its turn, "enterprise" is alternatively defined in paragraphs (a) and (b) as "*an enterprise that is*

[1] CEPTA, Art. 9.1.

constituted or organized under the laws of that Party and *has substantial business activities in the territory of that Party*"[2] or "*is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under paragraph (a)*".[3]

5. To interpret Art. 9,1 CEPTA, the Tribunal is ought to resort to the rules prescribed by the VCLT, and to Art. 31(1) VCLT, in the first place. The Tribunal should interpret the relevant provision in good faith according to *"the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"*.[4]

6. In the second prong of Art. 9.1 CEPTA there is no indication as regards ownership or control exercised by a State or its organs, given that they cannot be considered enterprises in the sense of the CEPTA. In other words, SOEs, which are enterprise owned, controlled or specially designated by any level of government to pursue financial objectives by commercial means,[5] are not covered by the definition of an investor under the CEPTA.

7. State control can be manifested in the AoA of an enterprise where continued state control over the BoD is guaranteed.[6] Additionally, ties between the management of the enterprise and the government, or mechanisms ensuring compliance with State purposes and objectives envisage state control over an enterprise.[7]

8. In this case, the state of Bonooru has exercised control over the Claimant since the beginning of its activity. Initially and through the initiation of the present Proceedings, the ownership of Bonooru in Vemma amounted to 31-38%.[8] Besides, on 23 November 2010, the same day as the Claimant submitted its bid for the purchase of Caeli, Ms Sabrina Blue, the head of the Claimant's BoD, was appointed as the Secretary of Transport and Tourism.[9] This should be regarded as evidence that a degree of control was exercised over the Claimant by the State of Bonooru.

9. At the moment, Bonooru enjoys a 55% stake in the company of the Claimant via the Ministry of Transport and Tourism and exercises substantial control over its activity and

[2] CEPTA, Art. 9.1.
[3] *Ibid.*
[4] VCLT, Art. 31(1)
[5] Badia, 2; *OECD Guidelines*, 14.
[6] McLaughlin, 606.
[7] *Ibid*.
[8] SoUF, ¶10.
[9] *Ibid.*, ¶22.

decision-making process.[10] In particular**,** the Claimant's BoD was replaced with governmental functionaries with its activities including paramilitary ones.[11] Apart from that, the representatives of Bonooru on Claimant's board are present for every meeting forming a majority of members present and voting when not all other shareholders attend.[12]

10. The Claimant may allege that these facts are of no relevance since as of the date of institution of the Proceedings the Bonooru's ownership was not majority and the corporate governance was not in the hand of governmental functionaries. However, the circumstances have changed so drastically that it would be reasonable of the Tribunal to consider them and regard this case as a matter of a State-to-State arbitration.

11. Thus, the Tribunal lacks the *ratione personae* jurisdiction since the Claimant, being an SOE, is excluded from the definition of an investor under Art. 9.1 CEPTA.

2. The Tribunal should analyze Art. 9.1 in conjunction with Art. 9.13 CEPTA

12. The Tribunal should interpret Art. 9.1 CEPTA taking into consideration the context of the Treaty.[13] Particularly, the Tribunal should take a look at Art. 9.13 which evidences that the CEPTA differentiates between enterprises and state enterprises, the latter being excluded from Art. 9.1 and the class on investors respectively.

13. As it follows from Art. 9.13, a special meaning is given to a term "*state enterprise*", which is an enterprise exercising any regulatory, administrative or other governmental authority that the Party has delegated to it.[14] Hence, using a special term "*state enterprise*" in its Art. 9.13, the drafters of the CEPTA intended to exclude the term from Art. 9.1, where only natural persons and non-state enterprises are covered.

B. Should Art. 9.1 CEPTA extend to SOEs, the Claimant should be disqualified from the CEPTA's protection pursuant to the Broches test

14. Since in the course of ICSID-administered cases uncertainty arises as to whether claimants in the face of SOEs are covered by Art. 25 ICSID Convention[15], Aron Broches, the

[10] *Ibid.*, ¶65.
[11] SoUF, ¶65.
[12] PO No.3, ¶3.
[13] VCLT, Art.31(1).
[14] CEPTA, Art. 9.13(1).
[15] ICSID History, 11.

architect of the Convention, suggested a test, now known as the *Broches* test.[16] According to the *Broches* test, SOEs should be qualified as "*a national of another State*" unless acting as an agent for the government *or* discharging an essentially governmental function.[17]

15. Under the Broches test, applicable in this case (**1**), the protection of the CEPTA does not extend to the Claimant since the Claimant acted as the agent of Bonooru at the time the investment was made (**2**).

1. The Tribunal should apply the *Broches* test in this case

16. Despite the fact that the Broches test emerged in the course of the analysis of Art. 25 ICSID Convention, there is no indication as to inapplicability of the test in the cases administered outside the scope of the Convention. In fact, Art. 2 ICSID AF Rules, applicable in this case, is the counterpart of Art. 25 ICSID Convention[18], the only difference being the discrepancy between "a national of another Contracting State"[19], in the context of the ICSID Conventions, and "a national of another State"[20] in the context of ICSID AF Rules.

17. What is more, the purpose of the ICSID AF Rules corresponds to the purpose of the ICSID Convention, clothing the Non-Contracting State or a national of a non-Contracting State with the opportunity to submit a dispute to an arbitration under the auspices of the ICSID.[21] In fact, the tribunal in *Beijing Shougang v. Mongolia*[22], which was a PCA case, did not point out at inapplicability of the *Broches* test argued by the Parties.

18. Thus, the Tribunal should apply the *Broches* test deciding on its *ratione personae* jurisdiction.

2. The Claimant was Bonooru's agent at the time of the investment

19. An enterprise acts as a State's agent if its conduct constitutes a part of an affair under that State's direction or control.[23] Such direction or control may be established where there are unambiguous facts to conclude so, *i.a.*, a link between the home State and an SOE's decision-making body and its utilization in relation to a specific investment.[24]

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[16] Cortesi,112.
[17] Broches, 202.
[18] Schreuer, 60.
[19] ICSID Convention, Art.25(1).
[20] ICSID AF Rules, Art. 2.
[21] Yannaca-Small, 60.
[22] *Beijing Shougang and others v. Mongolia*.
[23] McLaughlin, 605.
[24] *Ibid*; *White Industries v. India*, ¶5.1.25.

20. In this case, the following facts are to be considered in favor of disqualification of the Claimant from the CEPTA's protection. Firstly, the purchase of a 85% stake in Caeli catered to the interests of Bonooru. In 2010, the Caspian Project was initiated by the Bonoori government aimed at expanding the influence of Bonooru in Narnian States, Mekar included.[25]

21. In 2011, the same year the investment was made, Bonooru's Minister of Transportation and Tourism revealed the Horizon 2020 Scheme within the confines of the Caspian Project with the purpose of fostering Bonoori Tourism.[26] In fact, it was indicated by Ms. Sabrina Blue, the head of the Claimant's BoD, that Vemma's expansion into Mekar, *i.e.* the investment made, would be beneficial to Bonooru via *"enhancing the aviation network available to prospective tourists".*[27]

22. Second, it is no secret that corporations in Bonooru are dependent on the government in a certain degree, if not fully.[28] And here the corporation is nothing but an enterprise mainly owned and controlled by the Bonoori government. For that reason, the acquisition of a stake in Caeli by the Claimant should be considered in the context and in conjunction with the Caspian Project and the Horizon 2020 scheme.

23. Another factor evidencing that the Claimant acted as an agent of Bonooru is the provision enshrined in the Claimant's MoA: it undertook to "*assist in developing the aviation industry as well as the civil aviation infrastructure in Bonooru*".[29] The investment made enabled the Claimant to access to the Caeli's contracts with Phenac International Airport, its storage, repair facilities and to enjoy the geographic positioning of the Airport, which would unquestionably ensure both the Claimant's entrance in the airline market of Mekar and the capture of global connecting traffic flows.[30] This, in its turn, would also be lucrative to Bonooru, which settled for expansion in the Narnian region.

24. What also speaks for the fact that the Claimant acted more in interest of Bonooru than in the interest of itself is operations on high-traffic routes between Bonooru and Mekar, notwithstanding the losses it resulted in.[31]

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[25] SoUF, ¶4.
[26] SoUF, ¶28.
[27] SoUF, ¶28.
[28] Phenac Business Today,
[29] Vemma's MoA, Art. 3(h).
[30] SoUF, ¶¶23, 27.
[31] *Ibid.*, ¶33.

25. Additionally, the fact that the Claimant's legal team includes lawyers from Bonooru's justice department to assist it in this arbitration evidences the importance of this arbitration for Bonooru and the real interest it has therein.[32]

II. THE TRIBUNAL SHOULD REJECT CBFI'S *AMICUS* SUBMISSION AND GRANT THE LEAVE FOR EXTERNAL ADVISORS' *AMICUS* SUBMISSION

26. Given the unprecedented public attention to the dispute, the Respondent expresses its keen interest in admitting *amici curiae* that might provide relevant insights contributing to the unprejudiced and consistent decision of the Tribunal.

27. Since a non-disputing party might present evidence, otherwise unavailable to the arbitrators, as none of the parties has an incentive to provide it, *amici* are the only sources of unbiased and independent opinion. Therefore, the Respondent emphasizes the significance of EA's participation as *amici curiae* in the instant dispute.

28. Nevertheless, the Tribunal should be mindful of the nature of *amici* interest in the proceedings, as any affiliation with the Party might turn "*a friend of the court*" into "*a friend of the party*", which is inappropriate for the sake of impartial, transparent and legitimate dispute resolution. The Respondent expresses concerns regarding the potential consequences for the integrity and legitimacy of the arbitration, if the Tribunal considers CBFI's submission fit.

29. Thus, the Respondent considers that CBFI's *Amicus* should be rejected as inappropriate in the light of the affiliation with the Claimant (**A**), whereas EA's *Amicus* should be admitted in order to assist the Tribunal in arriving at correct conclusions regarding key circumstances of the dispute (**B**).

A. THE TRIBUNAL SHOULD REJECT CBFI'S *AMICUS*

30. The Tribunal has the authority to grant the leave to file *amicus*, provided such a submission satisfies the core requirements contained in Art. 9.19(3) CEPTA and Art. 41(3)(a-c) ICSID AF Rules. If any of those requirements are not met the tribunal should reject the submission.

[32] *Ibid.*, ¶65.

31. Furthermore, the criteria for an *amicus curiae* submissions set out in the CEPTA and ICSID AF Rules are not exhaustive. Thus, the arbitrators may consider other factors they deem necessary to address the admissibility of an *amicus.*[33]

32. Therefore, the Tribunal should primarily consider how *amicus* would assist in determination of legal or factual matters, presenting valuable insights from the position of an independent party, claiming to serve as an *amicus curiae*.

33. Additionally, the Tribunal is authorized to reject any submission that might affect the integrity of the proceeding. Thus, an *amicus* that fails to assist the Tribunal due to its affiliation with either party should be dismissed.

34. The Respondent, subsequently, respectfully asks the Tribunal to reject CBFI as a non-disputing party, since it has no significant interest in the dispute due to its affiliation with the Claimant (**1**), CBFI's *Amicus* fails to assist the Tribunal in determination of its jurisdiction (**2**) and it addresses a matter that is out of the scope of the dispute (**3**). Finally, CBFI's *Amicus* will entail the disruption of the proceedings (**4**).

1. CBFI's submission addresses a matter outside of the scope of the instant dispute

35. As the *Apotex* tribunal underlined, for an *amicus curiae* to comply with the requirement of "*addressing a matter within the scope of the dispute*", it should be apparent that the submission is not intended to unnaturally broaden the scope of the dispute.[34] However, it is also important for an *amicus curiae* not to address evident generalized issues that, on the face of it, might seem material, but, in fact, irrelevant to the dispute.[35]

36. Subsequently, an *amicus curia*e should be mindful of the ambits of dispute and provide only relevant and essential information that cannot be obtained from the parties or experts.[36]

37. Nevertheless, CBFI's *Amicus* presents general information on regulatory framework in Bonooru, business landscape in the State and a brief description of the SOEs standing in Bonooru[37]. Thus, generalized issues of corporate rights and CBFI members' rights to enjoy

[33] *Bear Creek Mining v. Peru*, ¶¶35 – 36.
[34] *Apotex v. USA*, ¶27.
[35] *Eco Oro v. Colombia*, ¶28.
[36] Born/Forrest, 644.
[37] CBFI's *Amicus* Submission, ¶10.

protection under the CEPTA making investments in Mekar are beyond the scope of the instant arbitration between the Claimant and the State of Mekar.

38. Therefore, CBFI fails to address a matter within the scope of the dispute.

2. CBFI's *Amicus* fails to assist the Tribunal in determining the latter's jurisdiction as *Amicus Curiae* is aligned with the Claimant

39. *Amicus* should provide insights or a "*unique*" perspective different from that of the parties to assist the arbitrators in a decision-making process.[38] Moreover, the tribunal should only admit an *amicus* that provides "*expertise, experience and independence […]*"[39] in the proceedings. Any evidence of alignment with either party might give rise to "*legitimate doubts as to the independence*" of an *amicus curiae.*[40]

40. Thus, assistance should imply that the expertise of an *amicus curiae* reflects "*independent and impartial view*".[41] Otherwise such an *amicus* would be of no use to the tribunal as it reflects the position of a party.

41. In the instant case, CBFI submitted an *amicus* that delineates the current corporate and antitrust regulatory system in Bonooru and addresses the SOEs' status in business relations.[42]

42. CBFI's *Amicus* does not satisfy the independence and impartiality test for the following reasons. First, since CBFI's funding consists of membership fees, the Claimant might be one of the largest contributors to the fund. The Claimant's company is one of the leading aviation enterprises in the Great Narnian Region with a considerable number of employees. Therefore, the fact that an *amicus curiae* has evident financial reliance on the Claimant's contributions might significantly vitiate its impartiality.

43. Subsequently, even if the Executive Committee concluded that there is no conflict of interest concerning the relations of Lapras with the Claimant[43], Lapras' CEO should not have been given an opportunity to vote on the issue, as the essence of the services rendered by Lapras to the Claimant might have included discussing the strategy of the case to present

[38] Art. 9.19(3) CEPTA, Art. 41(3)(a) ICSID AF Rules.
[39] *Border Timbers Limited v. Republic of Zimbabwe*, ¶49.
[40] *Ibid.*
[41] *Cube Infrastructure v. Spain*, ¶43.
[42] *CBFI's Amicus Submission,* ¶10.
[43] PO No.3, ¶12.

it to the potential sponsors, which might have affected Lapras' impartiality towards the arbitration.

44. Finally, the Respondent points out that the arbitrators should come to a right conclusion concerning the impartiality of CBFI, as biased and partisan *Amicus* would not only misdirect the Tribunal, but also would undermine the legitimacy of the outcome of the proceedings.

45. Therefore, *Amicus* by CBFI fails to satisfy the criterion of assistance to the Tribunal.

3. CBFI does not have a significant interest in the present dispute

46. An *amicus curiae* should demonstrate a "*significant interest*" in the dispute,[44] *i.e.* a non-disputing party should provide persuasive evidence that the outcome of the proceedings would directly or indirectly affect *amicus curiae* or persons it represents.[45] However, if an *amicus curiae* has affiliation with either party, the interest of an *amicus curiae* in the dispute intertwines with its interest. Subsequently, an *amicus curiae* that lacks independence fails to comply with the requirement of having a "*significant interes*t" in the dispute.[46]

47. CBFI argues that it has a significant interest in the outcome of the arbitration as some of the members, being SOEs, are also involved into disputes with Mekar under the CEPTA, highlighting that the tribunals might be inclined to follow the reasoning of the arbitrators in the instant dispute if they decide that the dispute constitutes a state-to-state one.

48. However, such grounds cannot evidence a significant interest in the dispute, because the Tribunal is not bound by precedents set by other tribunals.[47] Moreover, the *Methanex* tribunal outlined that the arbitrators cannot set any legal precedent, thus "*for each arbitration the decision must be made by its tribunal in the particular circumstances of that arbitration only*".[48]

49. Therefore, CBFI fails to comply with a "*significant interest*" requirement.

[44] Art. 9.19(3) CEPTA, Art.41(3) (b) ICSID AF Rules.
[45] Schliemann, 365 – 390.
[46] *Border Timbers v. Zimbabwe*, ¶50.
[47] Sureda, 834.
[48] *Methanex v. USA*, ¶51.

4. CBFI's *Amicus* would cause the disruption of the arbitration proceedings

50. In order to safeguard the integrity and the legitimacy of the proceedings, the Tribunal should ensure that an *amicus* submission would not impose additional burden on either party or entail any "*disruption*" of the arbitration.[49]

51. In the instant dispute, CBFI's *Amicus* will negatively impact the open-mindedness of the arbitrators as CBFI is closely connected with the Claimant. Subsequently, it presents a perspective that is not as independent as it is required from the genuine "*friends of the court*" or any other expert in arbitration.[50] Subsequently, *Amicus* might affect the legitimacy and impartiality of the Tribunal's decision, if the arbitrators grant the leave for CBFI's *Amicus*.

52. Therefore, the Tribunal should not admit CBFI's *Amicus* to avoid the disruption of the proceedings.

B. THE TRIBUNAL SHOULD GRANT LEAVE FOR EA'S *AMICUS*

53. The Tribunal has authority to grant the leave for an *amicus curiae* submission that complies with the requirements set forth by Art. 9.19(3) CEPTA and Art.41(3)(a-c) ICSID AF Rules.

54. In the present arbitration, EA presented evidence of corruption on behalf of the Claimant regarding the Chairperson of the Committee on the Reform of Public Utilities.

55. Although Mekari law does not criminalize bribery due to historical reasons, the Respondent, as a member of the international community, respects transnational public policy.[51]

56. Consequently, it is of high importance for the Tribunal to take into consideration the evidence of the Claimant's wrongdoing and assess whether such facts might influence the outcome of the arbitration.

57. Therefore, the Respondent asks the Tribunal to grant the leave for EA's *Amicus* as it addresses a matter within the scope of the dispute (**1**) and assists the Tribunal in the determination of the jurisdiction (**2**). Moreover, EA have a significant public interest in the dispute (**3**). Finally, EA's submission will not disrupt the proceedings (**4**).

[49] *BayWa v. Spain*, ¶31.
[50] *Cube Infrastructure v. Spain*, ¶39.
[51] *World Duty Free v. Kenya*, ¶139.

1. EA's *Amicus* addresses a matter within the scope of the present dispute

58. An *amicus curiae* should avoid departing the tribunal from the subject matter of the dispute and provide insights that are relevant for the determination of a legal or a factual matter without unnaturally broadening the scope of the dispute.[52]

59. Jurisdiction of the Tribunal in the instant dispute is one of the key matters that is expected to be resolved by the arbitrators.

60. EA's *Amicus* addresses a matter which is relevant to determine the jurisdiction of the Tribunal in the instant dispute.[53] The evidence of the bribes on behalf of the Claimant might influence the Tribunal opinion in terms of granting legal protection to the investment that has been tainted by corruption. Nevertheless, the Tribunal should independently make a decision regarding its competence taking into consideration the facts presented by EA.

61. Ergo, the EA's *Amicus* addresses a matter within the scope of the dispute.

2. EA's *Amicus* would assist the Tribunal in determining its jurisdiction

62. One of the main criterion of an *amicus* admission is whether the perspective or knowledge presented therein assist the tribunal in its deliberations.[54] In the Apotex case, the tribunal pointed out that the issue of a jurisdiction might be addressed by a non-disputing party.[55] Thus, in the instant dispute an *amicus curiae* might present its perspective on the issue of the Tribunal's jurisdiction in light of the initial investment having been tainted by corruption.

63. The tribunals in *World Duty Free v. Kenya, Fraport v. Philippines, Krederi v. Ukraine* ruled that an investor cannot enjoy investment protection and participate in the dispute as a *bona fide* party if such investment was made as a result of fraud or other illegal activities including corruption.[56] Even if there is no provision on legality of investment in the Treaty or local law of the host State, such investment should not be granted protection, according to the principle *ex dolo malo non oritur actio.*[57]

[52] Born/Foresti, 670.
[53] EA's *Amicus* Submission, 19.
[54] Nappert/Tuzheliak, 49.
[55] *Apotex v. USA*; PO No. 2, ¶33.
[56] *World Duty Free v. Kenya*, ¶157; *Frapport v. Philippines*, ¶332; *Krederi v. Ukraine*, ¶386.
[57] *Plama v. Bulgaria*, ¶¶126 –130.

64. EA's *Amicus* contains evidence that might significantly affect jurisdiction of the Tribunal and delineates circumstances of shares acquisition transaction by the Claimant in Caeli Airways from an independent point of view.

65. Regarding the issue of the legality of investment, even if the CEPTA has no explicit requirement for an investment to be made in compliance with the law, the Tribunal should consider whether it is appropriate to provide an opportunity for the Claimant to protect such investment made in breach of international public order.

66. Ergo, EA's *Amicus* complies with the requirement of assisting the Tribunal.

3. EA have a significant interest in the present dispute

67. An *amicus curiae* is required to demonstrate a significant interest in the proceedings.[58] In the present case an *amicus curiae* demonstrates significant public interest, which implies "*a non-State and non-corporate interest*".[59] Such interest relates to the maintenance of rule of law and transparency of the dispute resolution.[60]

68. EA have a significant public interest in the present arbitration. Providing first-handed knowledge of the share purchase transaction, EA justified their reputation of independent financial consultants and provided evidence of wrongdoing. The EA's incentive to provide corruption evidence derives from its mission to battle bribery in the State bodies and revive anti-corruption practices in Mekar. Although this matter is not regulated historically in the Mekari local law, the Respondent highlights that it is of high importance to fight bribery in Mekar to avoid abuse of the national public order by other investors.

69. Therefore, EA have a significant public interest in the dispute.

4. EA's *Amicus* would not disrupt the proceeding and unfairly prejudice the Claimant

70. The Tribunal is responsible for the proceedings to be conducted in accordance with the procedural rules that allow to avoid disruption, unnecessary delays and additional financial burden upon the Parties.[61]

[58] Art. 9.19(3) CEPTA, Art.41(3)(b).
[59] *Suez (Vivendi) v. Argentina*, ¶13.
[60] Faccio, 299.
[61] *United Utilities v. Estonia*, ¶10.

71. EA submitted *Amicus* in a designated time limit, complying with the requirements set out in the PO No. 1 regarding the length and the content of the submission,[62] so both Parties had sufficient time to address the submission.

72. Nevertheless, EA's *Amicus* presents information that might affect the Claimant's case strategy. However, this should not be the cause of the disruption of the proceedings, as an *amicus curiae* provides relevant and essential information, crucial to rendering a correct and impartial decision.

73. Therefore, EA's *Amicus* will not entail the disruption of the proceedings.

[62] PO No.1, ¶¶19 – 21.

PART TWO: MERITS

III. THE RESPONDENT HAS NOT VIOLATED ARTICLE 9.9 OF THE CEPTA

A. THE RESPONDENT DID NOT BREACH ART. 9.9(2)(C) CEPTA, SINCE NONE OF ITS MEASURES WAS ARBITRARY OR DISCRIMINATORY

1. The Respondent did not take arbitrary measures against the Claimant

75. Claimant alleges that Respondent took arbitrary measures against the Claimant. However, the Respondent's measures were not arbitrary. The term "*arbitrary*" is not defined in the CEPTA. Nevertheless, interpretation of the CEPTA under Art. 31 VCLT demonstrates that the ordinary meaning of arbitrary is depending on the will alone.[63] The often cited *ELSI* case sets a high threshold for arbitrariness: "*a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*".[64]

76. It is uncontested between the parties that the CCM is a body independent from the Respondent's governmental structures.[65] Concerning the First Investigation, under Art. 2(a) MMRTA, the CCM enjoys a discretion to open a *sua moto* investigation regardless of a company's market share in industries that require special attention.[66]

77. Air services is an important sector for the Respondent for the following reasons. First, until 1994 the Respondent's civil aviation was a statutory monopoly,[67] and Caeli's privatisation took priority in the governmental agenda, since all valuable assets were transferred to the Claimant.[68] Second, the Respondent relies on tourism as a significant part of its economy,[69] which is deeply intertwined with the air services. Hence, the CCM duly exercised its discretion to investigate the Claimant's economic behaviour.

78. Moreover, the CCM reasonably considered the total market share of Caeli and Royal Narnian, which both belong to the Moon Alliance. Caeli undertook that it would not engage in cooperation on competition parameters with the Moon Alliance members.[70] However,

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[63] Schreuer/Reinisch, 821; *Azurix v. Argentina*, ¶392; *Lauder v. Czech Republic*, ¶221.
[64] *ELSI* case, 15; Schreuer/Reinisch, 822.
[65] SoUF, ¶19.
[66] Annex V, 47.
[67] SoUF, ¶14.
[68] *Ibid*., ¶¶21, 23.
[69] *Ibid*., ¶29.
[70] *Ibid*., ¶25.

Caeli maintained cooperation with Royal Narnian in respect of sensitive competitive information[71] and was involved in preferential slot-trading.[72]

79. In addition, the Claimant owns 100% share in Royal Narnian[73] and 85% in Caeli[74] and receives significant subsidies from the Government of Bonooru under the Horizon 2020 Scheme.[75] A former employee of Bonooru's Ministry of Tourism, Misty Kasumi, confirmed that the flights between the Respondent and Bonooru are not profitable for Caeli and shared her concerns about closed-door arrangements.[76] Against this background, the CCM duly commenced the First Investigation for predatory pricing and calculated the market share of the *de facto* affiliates.

80. Concerning the Second Investigation, Art. 3(a) MMRTA envisages the CCM's obligation to open an investigation upon a complaint by a direct competitor of a company. A consortium of small regional airlines brought such a complaint regarding the bad market access.[77] In that case, the CCM was forced to commence the investigation. Hence, the CCM did not even act within its discretion, but rather followed the rule of law.

81. The CCM substantiated the fines in its voluminous reports on the investigations.[78] The Claimant itself confirmed the reasonableness of caps after the first investigation.[79] Therefore, the Respondent's measures were not arbitrary, but rational and justified.

2. The Respondent did not discriminate against the Claimant

82. The Claimant alleges that denying state aid to Caeli constitutes a discriminatory measure. It adverts to the *Saluka* test to determine the discriminatory character of the Respondent's conduct. Nevertheless, applying the *Saluka* test is unjustified in the instant dispute, because a State's conduct may qualify as discriminatory "*if (i) similar cases are (ii) treated differently (iii) and without reasonable justification*".[80] However, none of these requirements is met by Caeli.

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[71] SoUF, ¶27.
[72] *Ibid*., ¶36.
[73] *Ibid*., ¶10.
[74] *Ibid*., ¶26.
[75] *Ibid*., ¶28.
[76] Annex VII, 55.
[77] SoUF, ¶38.
[78] *Ibid*., ¶¶45, 49.
[79] NoA, ¶15.
[80] *Saluka v. Czech Republic*, ¶313.

83. First, it is true that subsidies were granted to foreign airlines, Star Wings and JetGreen, which also received state aid from their home states. However, those are both firms privately owned by holding groups from another state.[81] Meanwhile, Larry Air and Caeli are government-owned firms.[82] Caeli is owned in significant part by the State of Bonooru through Vemma, with the remaining 15% shares held by the Mekari State through Mekar Airservices Ltd.[83] Hence, Star Wings, JetGree and Caeli are not comparators.

84. Second, Caeli was denied subsidies. This treatment cannot be regarded as different, since help during the economic crisis does not constitute any Respondent's obligation. There is no provision in CEPTA which would obligate a Contracting Party to provide state aid during an economic crisis. Even if there was, under Art. 9.9(5) CEPTA, breaches of other CEPTA provisions do not establish a breach of the FET standard. Indeed, the FET standard in Art. 9.9 CEPTA is tied with the Minimum Standard of Treatment.

85. Third, there is an underlying reasoning behind the denial of subsidies. Caeli, as a government-owned firm, enjoys a unique advantage of easier access to its home state aid. In particular, Caeli has valuable connections with the Government of Bonooru through Vemma's functioners.[84] Hence, it may seek financial aid in times of economic instability in Mekar from its home state.

86. Furthermore, as stipulated by the preamble and Sec. 3101-3102 of the Executive Order 9-2018,[85] the measure was devised to provide emergency relief for businesses affected by the 2017 economic crisis with respect to air transportation needs of small and remote communities. However, Caeli was not affected by the 2017 economic crisis. Caeli's market share of 43% decreased by only one per cent from 2016 till 2019.[86] The reason for this decrease was the rise of oil prices as a result of global sanctions and problems with Boeing 737 MAX aircraft,[87] rather than the Respondent's measures. Therefore, it was reasonable for the Respondent to grant subsidies only to certain airlines who were threatened by the crisis.

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[81] SoUF, ¶46.
[82] SoUF, ¶47.
[83] *Ibid*., ¶¶10, 26.
[84] *Ibid*., ¶22.
[85] Annex VIII.
[86] SoUF, ¶¶36, 49.
[87] *Ibid*., ¶48.

87. Therefore, the Respondent did not discriminate against the Claimant by not granting it unnecessary state aid. The distinction between airlines is based on reason and does not constitute the violation of the FET obligation.

B. THE RESPONDENT COMMITTED NO DENIAL OF JUSTICE

88. According to Art. 9.9(2)(c) CEPTA, a Contracting Party breaches its FET obligation towards foreign investors if its measure constitutes "*denial of justice in criminal, civil or administrative proceedings*".

89. Investors can invoke the denial of justice defence if courts of a given host State, *inter alia*, refuse to entertain their suits, administer justice in a seriously inadequate way with undue delays, or maliciously misapply the underlying law.[88]

90. Here, the judicial proceedings in Mekar were not affected by any alleged undue delays (**1**), nor did the courts committed any misapplication of law or inadequately administer justice (**2**).

1. The Respondent's judiciary did not subject Caeli cases to undue delays

91. As international law has no precise test to assess whether judicial delays amount to a situation of denial of justice,[89] to establish such a borderline beyond which the administration of a case is unduly delayed, arbitral tribunals tend to apply the jurisprudence of the European Court of Human Rights that dwells on Article 6 of the European Convention on Human Rights.[90] The scholars share such approach.[91]

92. According to the ECtHR's practice, when a reasonable length of judicial proceedings is measured, the following factors are considered: the complexity of the case, the conduct of the applicant and of the relevant authorities, as well as the subject matter of the dispute.[92] Nearly the same factors are applied by investment tribunals.[93]

93. Here, first, the overall amount of time Caeli cases took is reasonable (**a**), and, second, any temporary and insignificant delays are adequate and justified in light of the economic crisis (**b**).

[88] *Robert Azinian v. Mexico*, ¶102-103.
[89] *Toto v. Lebanon*, ¶155.
[90] *Pey Casado v. Chile*, ¶664.
[91] Expert Opinion of Prof. David D. Caron, ¶¶127 – 128.
[92] ECtHR GC *Frydlender*, ¶43; ECtHR GC *Nicolae Virgiliu*, ¶209; ECtHR GC *Lupeni*, ¶143.
[93] *White Industries v. India*, ¶10.4.10; *Toto v. Lebanon*, ¶163.

a) The Claimant's case was examined in a reasonable time

94. The ECtHR generally considers complaints premised on an allegedly unreasonable length of proceedings not exceeding 3 years ill-founded.[94] As regards complex cases, it has found as reasonable proceedings that lasted for 8 years,[95] 8 years and 3 months,[96] 10 years,[97] and even 12 years and 7 months.[98]Arbitral tribunals found no denial of justice in cases where judicial proceedings lasted for 9[99] or even 10 years.[100]

95. Furthermore, as follows from the academia, delays in judicial proceedings should be assessed against rules prevailing in municipal courts, and as long as the length of a particular case comports with usual practices, delays should not be deemed as unreasonable.[101]

96. In the present case, the Domestic Proceedings lasted for 14 months and 19 days, which is less than the average time the administration of commercial cases takes in Mekar, namely 27 months.[102]

97. Moreover, the Caeli cases No. 1 and 2 are based on the voluminous report on the results of the investigation by the CCM,[103] which implies the analysis of a difficult question of national air sector regulation, easily justifying the time dedicated.

98. Thus, the Claimant's case was administered in a reasonable way.

b) The economic crisis looming in Mekar justified short and temporary delays throughout the Domestic Proceedings

99. Pursuant to the ECtHR's jurisprudence, in case of an economic crisis delays in scheduling and conducting hearings do not warrant a State's responsibility.[104] The same rule is relied upon by investment tribunals.[105] In such scenario, the State shall take prompt remedial action to deal with an exceptional situation of this kind.[106]

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[94] ECtHR *Litwin*, ¶51; ECtHR *Trymbach*, ¶49.
[95] ECtHR *Klitsche de la Grange*, ¶¶61 – 62.
[96] ECtHR *Rylski*, ¶74.
[97] ECtHR *Bekir-Ousta*, ¶29.
[98] ECtHR *Gromzig*, ¶¶¶79 – 83.
[99] *White Industries v. India*, ¶¶10.4.21 – 10.4.22.
[100] *Jan de Nul v. Egypt*, ¶204.
[101] Bjorklund, 809.
[102] SoUF, ¶13.
[103] *Ibid.*, ¶45.
[104] ECtHR *Buchholz*, ¶51; ECtHR *Foti*, ¶61.
[105] *Frontier Petroleum v. Czech Republic*, ¶336.
[106] ECtHR *Guincho*, ¶40.

100. Furthermore, not only is it normal but rather obligatory for a State to prioritize certain types of cases during the backlog of crisis-driven proceedings:

101. "*Methods which may fall to be considered, as a provisional expedient, admittedly include choosing to deal with cases in a particular order, based not just on the date when they were brought but on their degree of urgency and importance and, in particular, on what is at stake for the persons concerned*".[107]

102. With regard to the urgency and importance of cases, investment tribunals opine that criminal cases deserve more expeditious resolution.[108]

103. Here, the Respondent faced both dire economic[109] and currency[110] crises, its courts being inundated with cases, which forced the Government to react and establish the priority of criminal cases due to their high degree of importance.[111]

104. *Ergo*, any justified delays in the Claimant's case examination cannot be treated as denial of justice in the slightest.

2. The Respondent's Judiciary administered the Domestic Proceedings in an adequate way

105. To prove that justice has been denied, it is necessary to show that "*the administration of justice was 'scandalously irregular' or […] involves 'a particularly serious shortcoming' and 'egregious conduct"' that 'shocks, or [as in ELSI] at least surprises, a sense of judicial propriety*",[112] which is a high burden to discharge.[113]

106. Moreover, it follows from the arbitral practice that if a BIT links the FET with the minimum standard of treatment, as in case of the CEPTA, the Claimant should prove ***gross*** denial of justice.[114]

107. In the instant case, the Tribunal should not treat the administration of justice in Caeli's cases No. 1 and 2 (**a**), nor the enforcement of the SCC Award against the Claimant (**b**) as amounting to denial of justice.

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[107] ECtHR *Zimmermann*, ¶29.
[108] *White Industries v. India*, ¶10.4.14.
[109] SoUF, ¶44.
[110] *Ibid*., ¶39.
[111] *Ibid*., ¶44.
[112] *Staur Eiendom AS v. Latvia*, ¶473; *White Industries v. India*, ¶10.4.6; *Loewen Group v. U.S.A.*, ¶131; *Mondev v. U.S.A.*, ¶127.
[113] Newcombe/Paradell, 238; Diehl, 467, 503; Paulsson, 60.
[114] *Glamis Gold, Ltd. v. USA*, ¶627; *Eli Lilly and Co. v. Canada*, ¶*222.*

a) The judgements of Mekar's High Court approving the CCM investigation's decisions do not constitute denial of justice

108. It is generally accepted that aviation alliances should comply with anti-monopoly requirements and perform pro-competitive obligations.[115]

109. In the present case, although the membership in Moon Alliance was initially considered as an advantage of the Claimant as a bidder, the CCM approved its acquisition of an 85% stake in Caeli only under a caveat that the Claimant would not engage in high-level co-operation on competition parameters with Moon Alliance's members.[116]

110. However, the Claimant failed to comply with these requirements and engaged in anti-competitive cooperation with Moon Alliance afterwards.[117]

111. Therefore, even though Mekar's High Court did not agree with the CCM's rationale, Caeli's anti-competitive actions were clear, with Mekar's High Court having no other option but to approve necessary restrictions of the CCM.[118]

112. As for Justice VanDuzer's early dismissal of Caeli's case No. 1 on the merits on 15 June 2019, this authority of the High Court was granted under the Executive Order 5-2014,[119] whereas the Claimant itself asked the court to accelerate the proceedings.[120]

113. Finally, even if the Respondent's judiciary misapplied the MRTP Act or the Executive Order 5-2014, it is generally accepted that a mere misapplication of law cannot constitute the denial of justice.[121]

114. *Ergo*, Mekar's High Court committed no denial of justice.

b) The enforcement of the SCC Award corresponds to international standards

115. Enforcing an award set aside at the arbitral seat is in line with the most progressive practice of such arbitration friendly countries as England,[122] United States,[123] and France.[124] The scholars share such approach[125].

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[115] DOT Order 2010-2-8; European Commission Decision C(2010) 4738.
[116] SoUF, ¶25
[117] *Ibid*., ¶36.
[118] *Ibid*., ¶54.
[119] PO3, ¶8.
[120] SoUF, ¶44.
[121] Paulsson, 73.
[122] *Yukos v. Rosneft.*
[123] *Chromalloy Aeroservices v. Egypt*.
[124] *Société PT Putrabali Adyamulia v. Société Rena Holding*.
[125] Born, 3992 – 3994.

116. In the words of the French Cour de Cassation, "*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*".[126]

117. Contrary to the Claimant's allegations, enforcing the SCC Award was in no way a "*scandalously irregular administration of justice*". There are examples in the Respondent's domestic judicial practice, namely *ACG Trading v. GlenClose International* and *PTB Mulaney Services v. Tendler Bank*,[127] when set-aside awards are enforced.

118. Finally, the Respondent's judiciary was not entitled to base its decision on the evidence presented by CILS for two reasons. First, CILS was recognized by the Respondent's MHA as "*an entity funded by foreign donations to interfere in [its] domestic affairs*", entailing the freeze of its bank accounts[128] and making it illegal to accept any evidence from it. Second, CILS's status and an ongoing investigation in its activities casted doubts over its impartiality and independence.

119. Thus, while enforcing the SCC Award, the Respondent's courts relied on best world and national practices with respect to the NYC.

IV. SHOULD THE CLAIMANT BE ENTITLED TO ANY COMPENSATION, THE APPROPRIATE COMPENSATION STANDARD IS THE MARKET VALUE UNDER ART. 9.21 OF THE CEPTA

120. The Claimant is not entitled to any award of compensation since the Respondent has already purchased the Claimant's investment at the "market value" applicable in the case at hand (**A**); in the alternative, the Tribunal should reduce any compensation awarded considering the Claimant's contributory fault and the ongoing economic crisis in Mekar (**B**).

A. THE CLAIMANT CANNOT INVOKE THE FMV STANDARD DUE TO THE NATURE OF THE PRESENT CASE

121. The compensation should be calculated based on the "*market value*" standard under general principles of international law (**1**). Alternatively, the Claimant is not entitled to import the

[126] *Hilmarton Ltd v. Omnium de Traitement et de Valorisation (OTV).*
[127] Annex XIV, ¶5; Annex XV, ¶¶11 – 12.
[128] Annex XIV, ¶13.

FMV standard based on the most-favored-nation clause (**2**). In addition, even the MFN clause of the CEPTA does not allow to import the FMV standard in this particular case (**3**). Furthermore, even the application of MFN clause would not entitle an investor to obtain the sum it claims, for the latter relies not upon *de facto* treatment of third countries investors, but on abstract treaty provisions, and does not take into account the prices that existed at the moment of expropriation.

1. The Tribunal shall apply the market value to quantification of the Claimant's investment

122. The MV standard looks at how an asset can be valued at present, not at a certain moment in the past.[129] The FMV standard is defined as "*an amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics*".[130]

123. Both the pertinent investment-tribunal jurisprudence and the wording of vast majority of bilateral and multilateral International Investment Agreements demonstrate that the scope of the FMV standard is predominantly limited to expropriation cases only.[131] In particular, certain conclusions as to the application of FMV can be inferred from the 2012 U.S. Model Bilateral Investment Treaty. As it follows, for instance, from the Model BIT, the FMV standard is relevant for compensation purposes in cases of expropriation only. There is no provision on the applicable standard of compensation in case of the breach of the FET standard of investment protection. Similar conclusions can be drawn from a variety of BITs in force.[132] The FMV standard is only used for calculating compensation in case of expropriation, nationalization or measures equivalent thereto.

124. In addition, *LG&E v. Argentina* tribunal declined to rely on the FMV standard, finding its relevance solely for cases of lawful expropriation. As for unlawful expropriation, the tribunal turned to the assessment of actual losses suffered by the injured party.[133] Noteworthy, actual losses are usually approached in light of the MV standard, not to be

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[129] Muchlinski/Ortino /Schreuer , 553.

[130] *World Bank Guidelines*; *EDF and others v. Argentina*, ¶¶1231 – 1232.

[131] Villiger, 241 ; Malanczuk, 40.

[132] Agreement on the Promotion and Reciprocal Protection of Investments between the United Mexican States and the Kingdom of Spain (2016), U.N.T.S. Vol. 2553, I-45554, Art. V(2)(a); Agreement between Japan and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investment (2018), Art. 11(2); Agreement between the Government of the Republic of Singapore and the Government of the United Arab Emirates (2011), Art. 5(2).

[133] *LG. v. Argentina*, ¶¶45 – 48.

confused with the FMV test. Similarly, the *PSEG* tribunal concluded that the FMV standard is not applicable in non-expropriation cases.[134]

125. In the case at hand, the FMV clause enshrined in Art. 13 of the Mekar-Arrakis BIT which the Claimant is obviously trying to import by virtue of the MFN clause does not seem clear enough as concerning the scope of application of the standard. Paragraph 2 of Art. 9:12 of the Bonooru-Mekar is in line with the general practice described above, i.e. the FMV test is confined to expropriation and related issues only.

126. However, in the case *sub judice* the Claimant is not pursuing an expropriation claim. Nor did it suffer from any measures equivalent to expropriation. The Claimant sold shares in Caeli upon its own will as a result of a commercial transaction (the "*Transaction*"). The latter was not a proximate result of any coercive measures on part of the Respondent.

127. Given the above, the FMV standard is inapplicable when calculating the compensation owed to the Claimant by the Respondent. Therefore, the Tribunal should estimate any compensation to be awarded based on prices existing at the moment the Transaction took place.

128. Additionally, when applying the FMV standard, it is necessary to ascertain whether a given transaction is "*at arm's length*", that is, whether it is between parties that "*do not have a particular or special relationship*".[135] Here, the parties to the transaction in relation to Caeli's shares were affiliated through the Moon Alliance.

129. Thus, the circumstances of the case render the application of FMV standard totally unjustifiable.

2. The Claimant cannot import the FMV standard into the CEPTA by virtue of an MFN clause contained in Art. 9.7 of the CEPTA

130. There are investment treaties that encapsulate the MFN clause,[136] by means of which benefits a host State grants to investors of any third State are conferred upon those of another State enjoying the MFN clause.[137]

131. The scope of an MFN clause, and the volume of substantive obligations it allows to import, directly depend on its wording, the analysis of which should be done on a case-by-case

[134] *PSEG v. Turkey*, ¶305.
[135] Demuth/Gültlinger; *Tenaris v. Venezuela*.
[136] China – Germany BIT (2003); India – Italy BIT (1995); Argentina – France BIT (1991).
[137] *MTD v. Chile*, ¶104; *Maffezini v. Spain*, ¶¶54 – 55.

basis.[138] Thus, when addressing an MFN clause, arbitrators should look at whether, and to what extent (if any), the situation analyzed is similar to those that took place in the past where certain treatment was granted to investors from other States.[139]

132. Art. 9.7 of the CEPTA embodies the MFN standard, pursuant to which the Claimant should be treated in a manner no less favourable than investors of third states "*in like situations*".[140] Contrary to what the Claimant might argue, the FMV standard cannot be relied upon here due to the following reasons. The FMV standard, which can only be applied to situations falling under the concept of "arm's length transactions", cannot be imported here. The 2020 purchase of Caeli's shares was not a transaction entered into between a willing buyer and a willing seller. Quite to the contrary, the Claimant spent up to seven months (between February and September 2020) unsuccessfully trying to find a purchaser.[141] The deal with Mekar Airservices was the Claimant's last resort. This is clearly not the usual course of dealing where FMV standard would be of relevance.

3. Even under FMV standard the claimant is not entitled to the sum it claims

133. First, even if the Tribunal applies the FMV standard to the instant dispute (which the Respondent strongly objects to), the Claimant would never be entitled to the sum it claims. The Arrakis-Mekar BIT invoked by the Claimant provides for compensation in the amount equivalent to the FMV of the investment "*on the day before the measures inconsistent with the provisions herein were taken by the host State*",[142] but not when the price was at its peak.

134. Thus, the MFN clause in the CEPTA (Art. 9.7) does not grant the Claimant a right to seek USD 700 million indemnification.

135. Second, Art. 9.7 (2) of the CEPTA provides that

> "*substantive obligations in other international investment treaties [...] do not 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*".

[138] Dolzer/Schreuer, 254.
[139] *Parkerings v. Lithuania*, ¶369.
[140] Chapter 9, Sec C CEPTA.
[141] SoUF, ¶63.
[142] 2006 Mekar–Arrakis BIT, Art. 13.

136. That implies the following: when deciding the issue of granting a foreign investor regime no less favorable than to investors from third countries, reliance should be made not upon the provisions of treaties with third countries, but on the *de facto* treatment of the investors. Presence of certain favorable treaty provisions does not necessarily imply that they are actually put into place.

137. However, the Claimant bases its argument solely upon a treaty provision (namely, as already noted, Art. 13 of the Arrakis-Mekar Treaty), but not the examples of *de facto* application thereof (*i.e.* Mekar's actual treatment of investors from Arrakis). Thus, the Claimant has not discharged its burden of proof as to the exact practice concerning the application of valuation standards in the relations between Arrakis and Mekar is unclear. Thus, the claim for USD 700 million as a compensation is unfounded.

B. ALTERNATIVELY, EVEN IF THE FMV STANDARD APPLIES, THE COMPENSATION SHOULD BE REDUCED TO NIL

138. If the Tribunal awards compensation, the amount of compensation should be reduced in view of contributory fault (**1**) on part of the Claimant and rigid economic situation in Mekar (**2**).

139. Following a risky line of business that precipitated into a precarious financial situation, the Claimant failed to exercise due care of running Caeli Airways. Moreover, it blindly neglected clear warnings of the representatives of the Respondent present in Caeli Airways' board. Breaking point in this state of the Claimant's turmoil was an "*arm length transaction*" that in fact was hardly a "*finger length transaction*" that led to purchasing its stake for USD 400 million. Hence, the Respondent owes no compensation to the Claimant.

1. The compensation shall be reduced to nil in light of the Claimant's contributory fault

140. Concerning contributory fault approach, the ILC Draft Articles on Responsibility of States for International Wrongful Acts prescribe that in the determination of reparation (compensation), account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.[143]

[143] ARSIWA, Art. 39

141. Vemma's consecutive line of actions amounts to a contributory fault, namely the contributory negligence. Given the Claimant's experience with the airline industry in Bonooru and globally, it could not have been blind to the volatility thereof. Despite this, Vemma decided to resort to a risky approach to its investment behavior, funneling investments towards rapid expansion business plans instead of tending to long-term financial health.[144] It did so against the clear warnings of the representatives of Mekar present on Caeli Airways' board. It is this risky strategy that precipitated into a precarious financial situation for Vemma.[145]

142. In addition, the Respondent recognizes that not every contribution to causation is sufficient in order to establish contributory negligence/fault. In this respect, an action or omission "*must represent negligent and reproachable behavior*".[146]

143. There is a sufficient causal link between any willful or negligent act or omission of Vemma and the loss Vemma ultimately suffered.[147] Since the company failed to find a decent *bona fide* purchaser in order to meet the arm's length transaction criteria. Furthermore, there is causation in the negligent behaviour towards Mekar Board Committee and the CCM recommendations on Vemma's crisis situation.

2. The compensation shall be reduced to nil in light of the Claimant's economic situation

144. Concerning the amount of compensation, states should not be required to pay an amount in compensation that would be "*crippling*" for the state in question.[148] Large economic upheaval in the State of Mekar led to impossibility to pay off the sum of compensation claimed by the Claimant.

145. As evidenced by relevant jurisprudence, the tribunal may and should take into account the economic situation in the Respondent State when assessing the amount of payment due. Thus, damages may not be calculated in a way that would excessively impoverish the host State, otherwise allowing such claims would amount to allowing abuse of rights on part of the investor.[149]

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[144] SoUF, ¶24.
[145] *Ibid*., ¶35.
[146] Marboe, 121.
[147] *Yukos Universal v. Russia*, ¶1599.
[148] Paparinskis, 1251
[149] *Himpurna v. PLN*; *Pathua v. PLN*.

146. Hence, due to aforementioned factors, if the Tribunal decides to award compensation, it shall be reduced on the basis of the Claimant's contributory fault and crippling economic situation in Mekar.

PRAYER FOR RELIEF

147. For all the reasons stated above, Respondent respectfully requests this Tribunal to:

I. Decline to exercise jurisdiction due to the Claimant's status as a State-owned enterprise;

II. Reject CBFI's *amicus* submission and grant the leave for EA's *amicus* submission;

III. Find that Mekar did not violate Article 9.9 of CETPA; and

IV. In case the Tribunal finds Mekar did violate Article 9.9, then the tribunal should conclude Mekar has already purchased the Claimant's investment at "market value" and award the Claimant no compensation; in the alternative, the Tribunal should reduce any compensation awarded considering the Claimant's contributory fault and the ongoing economic crisis in Mekar.

Respectfully submitted on 23 September 2021

by

Team MBAYE

On behalf of Vemma Holdings Inc.