THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
UNDER THE ADDITIONAL FACILITY ARBITRATION RULES

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

VEMMA HOLDINGS INC.

– Claimant –

v.

THE FEDERAL REPUBLIC OF MEKAR

– Respondent –

MEMORANDUM FOR RESPONDENT

SEPTEMBER 23, 2021

Mo team

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LIST OF ABBREVIATIONS

ARfA	Answer to Request for Arbitration
Arbitral Tribunal / Tribunal	Panel consisting of Ms. Twyla Sands (President of the Arbitral Tribunal), Mr. Long Feng and Professor Jaqen H'ghar
ARRAKIS – MEKAR BIT	2006 Treaty Between the Federal Republic of Mekar and the Kingdom of Arrakis for the Promotion and Protection of Investments
BIT	Bilateral Investment Treaty
BONOORU-MEKAR BIT	1994 Treaty Between the Federal Republic of Mekar and the Commonwealth of Bonooru for the Promotion and Protection of Investments
Caeli	Caeli Airways JSC
CLAIMANT/Vemma	Vemma Holdings Inc.
CBFI	Consortium of Bonoori Foreign Investors
CCM	Competition Commission of Mekar
CEPTA	Bonooru-Mekar Comprehensive Economic Partnership and Trade Agreement (CEPTA)
CILS	Centre for Integrity in Legal Services
CRPU	Committee on Reform of Public Utilities
FET	Fair and Equitable Treatment

ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ICSID AF Rules	International Centre for Settlement of Investment Disputes Additional Facility Arbitration Rules 2006
ICSID Rules	International Centre for Settlement of Investment Disputes Arbitration Rules 2006
ICJ	International Court of Justice
IMF	International Monetary Fund
New York Convention	New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards
Parties	Vemma Holdings Inc. & Federal Republic of Mekar
PCA	Permanent Court of Arbitration
PO1	Procedural Order Number 1 issued by the Tribunal on March 25, 2021
PO2	Procedural Order Number 2 issued by the Tribunal on July 1, 2021
PO3	Procedural Order Number 3 issued by the Tribunal on July 16, 2021
RfA	Request for Arbitration
RESPONDENT/ Mekar	Federal Republic of Mekar

SCC	Sinnoh Chamber of Commerce
VCLT	*Vienna Convention on the Law of Treaties*
Vemma	*Vemma Holdings Inc*

LIST OF AUTHORITIES

INTERNATIONAL DECISIONS

Cited as	*Official name*
Oscar Chinn	*Oscar Chinn*, PCIJ Series A/B. No 63, Judgment, 12 December 1934

ARBITRAL DECISIONS

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Apotex v. USA	*Apotex v. USA,* ICSID Case No. ARB(AF)/12/1, Procedural Order No. 4 on the Participation of Applicant Mr. Barry Appleton as a Non-Disputing Party, 4 March 2013
Arif v. Moldova	*Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013
AS PNB Banka and others v. Latvia	*AS PNB Banka, Grigory Guselnikov and others v. Republic of Latvia*, ICSID Case No. ARB/17/47, Procedural Order No. 3, 30 Oct 2018
Azinian v. Mexico	*Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, 1 November 1999
Beijing Urban Construction v. Yemen	*Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017
Biwater v. Tanzania	*AS PNB Banka, Grigory Guselnikov and others v. Republic of Latvia*, ICSID Case No. ARB/17/47, Procedural Order No. 3, 30 Oct 2018
Blount Brothers Corporation v. Iran	*Blount Brothers Corporation v. The Government of the Islamic Republic of Iran, Iran Housing Company*, IUSCT Case No. 52, Award (Award No. 215-52-1), 27 February 1986

CEAC v. Montenegro (I)	*CEAC Holdings Limited v. Montenegro (I)*, ICSID Case No. ARB/14/8, Decision on Annulment, 1 May 2018
CMS v. Argentina	*CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Ad hoc Committee on Argentina's Application for Annulment, 25 September 2007
CSOB v. Slovak Republic	*Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999
Cube Infrastructure v. Spain	*Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and a Partial Decision on Quantum, 19 February 2019
Daimler v. Argentina	*Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012
Eiser v. Spain	*Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017
Gas Natural v. Argentina	*Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005
Getma v. Guinea (II)	*Getma International and others v. Republic of Guinea* (II), ICSID Case No. ARB/11/29, Award, 16 August 2016
Glamis Gold v. USA	*Glamis Gold Ltd. v. United States of America*, Glamis Memorial, 5 May 2006
Glencore International and C.I. Prodeco v. Colombia	*Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019
Grace and others v. Mexico	*Alicia Grace and others v. United Mexican States*, ICSID Case No. UNCT/18/4, Procedural Order 4, 24 June 2019

InfraRed v. Spain	*InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Award, 2 August 2019
Lemire v. Ukraine (II)	*Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010
LG&E v. Argentina	*LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006
Maffezini v. Spain, Decision on Jurisdiction	*Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000
Maffezini v. Spain, Award	*Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000
Metal-Tech v. Uzbekistan	*Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013
Methanex v. USA	*Methanex Corporation v. United States of America*, UNCITRAL AD HOC Arbitration Rules, Decision of the Tribunal on Petitions from Third Persons to Intervene as "amici curiae", 15 January 2001
Mobil v. Argentina	*Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Award, 25 February 2016
MTD v. Chile	MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile, ICSID Case No. ARB/01/7, Award, 01 June 2005
Niko Resources v. BAPEX & Petrobangla	*Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No. ARB/10/11 and No. ARB/10/18, Decision on the Corruption Claim, 25 February 2019
Pac Rim v. El Salvador	*Pac Rim Cayman LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Procedural Order No. 8, 23 March 2011

Pey Casado v. Chile (I)	*Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Annulment, 8 January 2020
RFP v. Canada	*Resolute Forest Products Inc. v. Canada, PCA,* Case No. 2016-13, Procedural Order No. 6 on the Participation of Prof. Robert Howse and Mr. Barry Appleton as Amici Curiae, 29 June 2017
RREEF v. Spain	*RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018
Rumeli v. Kazakhstan	*Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008
Saluka v. Czech Republic	*Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006
Starrett Housing Corporation v. Iran	*Starrett Housing Corporation, Starrett Systems, Inc. and others v. The Government of the Islamic Republic of Iran, Bank Markazi Iran and others*, IUSCT Case No. 24, Final Award (Award No. 314-24-1), 14 August 1987
ST-AD v. Bulgaria	*ST-AD GmbH v. The Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013
Suez v. Argentina, Decision on Jurisdiction	*Suez, InterAguas Servicios Integrales del Agua S.A., Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic,* ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006
Suez v. Argentina, First Order on Amicus Curiae	*Suez, InterAguas Servicios Integrales del Agua S.A., Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, 17 March 2006

Suez v. Argentina, Second Order on Amicus Curiae	*Suez, InterAguas Servicios Integrales del Agua S.A., Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic,* ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006
Tecmed v. Mexico	*Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003
Tidewater v. Venezuela	*Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015
Tokios Tokelés v. Ukraine	*Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007
UAB v. Latvia	*UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award of the Tribunal, 22 December 2017
UPS v. Canada	*United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001, No. 4, 24 June 2019
Urbaser v. Argentina	*Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016
von Pezold and others v. Zimbabwe	*Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Procedural Order No. 2, 26 June 2012
Waste Management v. Mexico (II)	*Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004
White Industries v. India	*White Industries Australia Limited v. Republic of India*, UNCITRAL AD HOC Arbitration Rules, Final Award, 30 November 2011
Wintershall v. Argentina	*Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008

World Duty Free v. Kenya	*World Duty Free Company v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006

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Paulsson	Paulsson, J.*, Arbitration and State enterprises: Survey on the National and International State of Law and Practice by Böckstiegel Karl-Heinz,* Arbitration International, 1984

Yergin	*Yergin, D. and Stanislaw, J. The Commanding Heights-The Battle for the World Economy, 1998*
Ziadé	Nassib G. Ziadé*, Addressing Allegations and Findings of CorruptionThe Arbitrator's Investigative and Reporting Rights and Duties, in ICC Dossier - Addressing Issues of Corruption in Commercial and Investiment Arbitration,* 2015

MISCELLANEOUS

Cited as	*Complete citation*
World Bank Guidelines	*World Bank Guidelines on the Treatment of Foreign Direct Investments.*

STATEMENT OF FACTS

1. In early 2011, the Mekarian government, guarding the best interest of its citizens and its economy, arranged a competitive bidding process as part of a privatization program, securing bids from various airlines, among them Claimant, and, in Jan 5th, 85% of Caeli Airways' stake was sold to Claimant, in an questionable privatisation process, considering the knowledge brought by the CRPU regarding the possibility of inappropriate and illegal actions taken by Claimant to guarantee the success of its bid. [1]

2. Besides what is argued by Claimant, this acquired investment required significant capital in order to be productive, considering the inherited debt liabilities associated with Caeli Airways, a scenario known to Claimant due to Respondent's warnings.

3. Even being warned by Respondent about the possible challenge regarding the administration of the investment, Claimant took an extravagant approach to its investment activities, choosing a rapid, even il-strategied business plan for the expansion of Caeli, instead of a plan that thought of long-term financial health. This series of missguided decisions could only lead to the precarious financial situation that Caeli would find itself in a later time.[2]

4. The rapid expansion based on an extravagant plan caused the commercial decisions taken regarding Caeli to draw the attention of CCM and Caeli's competitors. Having a part of its shares owned by the mekarian government could never be a reason for the CCM to allow any anti-competitive behaviour or even to prevent the company from being investigated in an official and rightful manner.[3]

5. As a governmental agency with the purpose of assuring the health of the competitive market in Mekar, the CCM decided that the evidence regarding the abuse of dominant position, considering the market shares owned by Caeli Airways under Claimant's control, predatory pricing, due to the low prices offered as an apparently acceptable, but unfair, conduct, and unfair subsidization, as Claimant would present traces of being supported by a government foreign to the mekarian.[4]

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[1] Case Files, p. 19, ¶ 04.
[2] Case Files, p. 33, ¶ 31.
[3] Case Files, p. 34, ¶ 36.
[4] Case Files, p. 37, ¶ 49.

6. Claimant secured an offer from Hawthorne Group LLP, which was associated to Vemma Holdings through the Moon Alliance. [5] As it is of Respondents shareholder rights, Claimant should offer to Respondent the opportunity to buy its participation for the same price as was offered by the third party. Due to their participation in the Moon Alliance, Respondent disputed the validity of the offer given and it did an offer at what it considered a fair price. [6]

7. Not being able to accept the fair offer given by Respondent, Claimant caused the discussion of the issue at arbitration, under the rules of Sinnoh Chamber of Commerce, seated at Sinnoh, in which Respondent asked for the tribunal to consider the offer to be untenable. [7]

8. With the failure of the parties to agree on the candidacy of an arbitrator in good time, the SCC secretary elected Mr. Rett Eichel Cavannaugh as the sole arbitrator and, in May 9th 2020, the award was released, ruling in favor of Respondent's request, in virtue of the existing membership of both Claimant and third party in the Moon Alliance. [8]

9. Again, not being able to accept the consequences of its actions, Claimant made a case, based on weak allegations of fraud, asking the Supreme Arbitrazh Court of Sinnograd to set aside the award and found unreasonable success on August 1th 2020.[9]

10. On 23 August 2020, the Respondent's Court issued a ruling recognizing and enforcing the 9 May 2020 award in its territory. [10] After this event, on 8 October 2020, Claimant sold its participation in Caeli to Respondent and initiated the present arbitration.[11]

11. On 2 March 2021, Bonooru increased its shareholding in Vemma to 55%, performing a large-scale restructuring that replaced its board of directors with government functionaries, its functions were expanded to include paramilitary activities, and its legal team was equipped with lawyers from Bonooru's justice department to assist in the present arbitration. [12]

[5] Case Files, p. 38, ¶ 56.
[6] Case Files, p. 39, ¶ 57.
[7] Case Files, p. 39, ¶ 57.
[8] Case Files, p. 39, ¶ 58.
[9] Case Files, p. 39, ¶ 61.
[10] Case Files, p. 39, ¶ 62.
[11] Case Files, p. 40, ¶ 63.
[12] Case Files, p. 40, ¶ 65.

SUMMARY OF ARGUMENTS

12. First, the Tribunal does not have jurisdiction under Chapter 9 of CEPTA, because (I) Claimant is a State-owned entity and (II) Claimant is not an investor under Chapter 9 of CEPTA or Article 2 of ICSID Additional Facility Rules.

13. Second, the Tribunal should consider (I) CBFI's submission is not admissible as *Amici* and (II) CRPU's is admissible as *Amici*, considering it complies with the requirements established by (i) Art. 41(3) of the ICSID AF Rules and (ii) Art. 19(3) of CEPTA, as it does not cause and unduly burden to the proceedings.

14. Third, Respondent did not violate Article 9.9 of the CEPTA, considering that (i) Respondent did not deny justice to Claimant, since (i) Respondents Courts properly addressed Claimant's lawsuit and (ii) the recognition of an award annulled in the seat of arbitration does not amount to denial of justice; also (II) Respondent did not act arbitrarily or discriminatorily (i) by penalizing Claimant for predatory pricing, (ii) by imposing the use of its currency, (III) by granting subsidies to other airlines operating on its territory.

15. Fourth, Respondent did not breach Claimant's legitimate expectation (I) regarding the shareholder agreement or (II) by imposing the use of its currency.

16. Fifth, the Tribunal should decide that no compensation is due to Claimant, considering that (I) the valuation of damages must be at the market value, (II) the MFN clause does not apply.

ARGUMENTS

PART ONE: JURISDICTION

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

17. The Tribunal does not have jurisdiction because (I) Claimant is a State-owned entity and (II) Claimant is not an investor under Chapter 9 of CEPTA.

I. CLAIMANT IS A STATE-OWNED ENTITY

18. A State-owned enterprise is a commercial enterprise predominantly owned or controlled by the State or by State institutions. It enables the State to take part in commercial activities separately from its public administrative functions.[13] In this sense, Yergin makes reference to the famous declaration "getting a State-owned enterprise to 'imitate' a private firm was much like trying 'to make a mule into a zebra by passing stripes on its back" made by Margaret Thatcher and her Secretary of State, Keith Joseph.[14]

19. Claimant has always been an extension of Bonooru. Even before its privatisation, in 1980, the Prime Minister of Bonooru stated that "*Our government plans to maintain a significant interest in Bonooru Air and always will*".[15] In 2016, after Bonooru's recurring payments made to Vemma under the Horizon 2020 scheme, Ms Sabrina Blue, Ministry of Transport and Tourism, stated "*Vemma has certainly lived up to the standards set by its predecessor in Bonooru*".[16]

20. Bonooru has always retained a share of which ranged between 31% to 38%.[17]

21. Nowadays, since 2 March 2021, Bonooru increased its shareholding in Vemma to 55%, together with a large-scale restructuring that includes: the board of directors replacement for government functionaries, its functions were expanded to

[13] Paulsson, pp. 40-49; Muchlinski, p. 3.
[14] Yergin, p. 96.
[15] Case Files, p. 29, ¶ 8.
[16] Case Files, p. 89, ¶ 6.
[17] Case Files, p. 29, ¶ 9.

include paramilitary activities, and its legal team was equipped with lawyers from Bonooru's justice department to assist in its arbitration against Mekar.[18]

22. In conclusion, Claimant is a State-owned enterprise because it is controlled by Bonooru.

I. CLAIMANT DOES NOT QUALIFY AS NATIONAL OF FOREIGN STATE UNDER ART. 2 OF ICSID AF RULES

23. Art. 2 of ICSID AF Rules provides that the Rules are applicable to a dispute between a State and national of a State. It is only applicable to disputes between State and investor. Accordingly, when a state-owned company exercises governmental functions, it will be unable to resort to investor-State arbitration.[19]

24. According to the reasoning in *Maffezini v. Spain*, a corporation that, even if operating for profit, is discharging essentially governmental functions delegated to it by the State is considered as an organ of the State and thus engages the State's international responsibility for wrongful acts.[20]

25. As demonstrated above, since 2 March 2021, Bonooru increased its shareholding in Vemma to 55%, together with a large-scale restructuring that includes: board of directors replacement with government functionaries, its functions were expanded to include paramilitary activities, and its legal team was equipped with lawyers from Bonooru's justice department to assist in its arbitration against Mekar.[21] Moreover, Vemma's Board of Directors passes decisions by a majority vote, its articles of incorporation require 50 percent of voting shares for a quorum at regular meetings, which includes meetings for electing directors, this means that now, Bonooru definitely controls Claimant.[22] Even before March 2020, Bonooru's representatives on Vemma's board were present for every meeting, forming, consequently, in many meetings, the majority of members present and voting when not all other shareholders attend.[23]

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[18] Case Files, p. 40, ¶ 65.
[19] *Beijing Urban Construction v. Yemen*, ¶ 31; *CSOB. v. Slovak Republic*, ¶ 80; *Rumeli v. Kazakhstan*, ¶ 212.
[20] *Maffezini v. Spain*, Decision on Objections to Jurisdiction, ¶ 80.
[21] Case Files, p. 40, ¶ 65.
[22] Case Files, p. 86, ¶ 3.
[23] Ibid, ibidem.

26. Thus, Claimant does not qualify as a national of foreign State under Article 2 of ICSID Additional Facility Rules because it is controlled by Bonooru and it exercises government functions, such as paramilitary activities.

I. CLAIMANT DOES NOT COMPLY WITH CHAPTER 9 OF CEPTA

27. According to the VCLT Art. 31, a treaty must be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Moreover, Art. 32 of VCLT provides that when interpreted under Art. 31 (ordinary meaning, objective and purpose) leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable

28. Art. 9.2 of CEPTA only provides that Chapter 9 will apply to matters related to "an investor of the other Party". In this sense, it must be emphasized that the fact that a company is a separate legal entity does not on itself make it not an arm of the State.[24]

29. As seen above (II), Claimant is controlled by Bonooru and exerts public functions for it. Additionally, Art. I(a) of the BONOORU-MEKAR BIT defined "enterprise" including government-owned enterprises in 1994. However, in 2014, both States negotiated CEPTA to create a more comprehensive trade and investment agreement with Bonooru which adequately balanced investors' and host States' rights.[25]

30. Therefore, as Claimant is an arm of Bonooru and CEPTA was supposed to adequately balance investors' and host States' rights, being a more restrictive treaty as the Bonooru-Merka BIT. This means that Claimant cannot be considered as "an investor of the other Party" under Art. 9.2 of CEPTA.

PART TWO: ADMISSIBILITY OF *AMICUS CURIAE*

B. <u>The admissibility of *Amicus Curiae* submissions</u>

[24] *Blount Brothers Corporation v. Iran*, ¶ 20.
[25] Case Files, p. 87, ¶ 14.

31. The Tribunal should consider (I) CBFI's submission is not admissible as (I) *Amici* and (II) CRPU's submission is admissible for the following reasons.

I. CBFI SUBMISSION IS NOT ADMISSIBLE AS *AMICI*

32. The Tribunal should admit the submission proposed by the CBFI because it does not comply with the requirements established by the ICSID AF Rules and CEPTA as (i) it is not independent, and it does not bring a different perspective from the parties; and (ii) it does not pursue an public interest.

i. CBFI does not comply with Art. 41(3) ICSID AF Rules as it is not independent, and it does not bring a different perspective from the parties

33. Art. 41(3) of the ICSID AF Rules and Art. 37 ICSID Rules set the criteria that the Tribunal should consider to admit or not the *amicus curiae*, which are: if (i) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (ii) the non-disputing party submission would address a matter within the scope of the dispute; (iii) the non-disputing party has a significant interest in the proceeding. These criteria are not exhaustive.[26]

34. Among the criteria usually considered to admit an *Amici* under Art. 41(3) of the ICSID AF Rules the independence and ability to provide a different perspective from the parties are essential.[27]

35. A lack of independence has been recognized to exist where one of the parties have the capacity to intervene in the possible *Amici*, as well when there is a strong professional or financial relationship.[28]

36. Additionally, according to the finds in *Suez v. Argentina, First Order on Amicus Curiae*, the lack of demonstration of independence, expertise, different view,

[26] *Grace and others / Oro Negro v. Mexico*, ¶54.
[27] *von Pezold and others v. Zimbabwe*, ¶56*; Suez v. Argentina, First Order on Amicus Curiae,* ¶ 23.
[28] *von Pezold and others v. Zimbabwe*, PO2, ¶53; *Suez v. Argentina, First Order on Amicus Curiae*, ¶ 32.

or ability to assist in the arbitral tribunal decision making leads to the denial of participation of the possible *Amici*.[29]

37. CBFI is composed of many entities that are in conflict with Respondent. Two of its members, besides Claimant, SRB Infrastructure and Wiig Wealth Management Group, are currently pursuing claims against the Respondent under Chapter 9 of CEPTA.[30] Moreover, the Executive Committee member Horatio Velveteen, CFO of Lapras Legal Capital, an entity that advises the Claimant on funding strategies with respect to its claim against the Respondent, participated in the vote on the *amicus* submission.[31]

38. In conclusion, CBFI does not comply with Art. 41(3) ICSID AF Rules because it is affiliated with Claimant and, consequently, it is not independent, and it does not bring a different perspective from the parties.

ii. CBFI does not comply with Art. 41(3) ICSID AF Rules because it does not pursue a public interest

39. Another implied requirement of Art. 41(3) ICSID AF Rules is the pursuit of a public interest.[32]

40. Public interest, in the sense of *amici*, derives from a possible impact that an award could have on individuals or entities beyond the Disputing Parties.[33] In this sense, the arbitral tribunal in *Apotex v. USA*, recognized that a particular and professional interest does not amount to public interest under the ICSID AF Rules.[34]

41. Not only are three of CBFI members currently pursuing claims against the Respondent under Chapter 9 of CEPTA, but, in total, thirty-eight members of the CBFI hold investment rights in Respondent.[35] Additionally, all these members can influence the remaining members due to their participation in networking events, payment of memberships to CBFI and sharing collective advocacy.[36]

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[29] *Suez v. Argentina, First Order on Amicus Curiae*, ¶¶ 23, 32, 38.
[30] Case Files, p. 16, ¶ 6.
[31] Case Files, p. 87, ¶ 12.
[32] *Vivendi v. Argentina (II),* ¶18; *Methanex* v. *USA,* ¶49; *Biwater v. Tanzania*, ¶ 53.
[33] *Apotex v. USA*, ¶ 42; *RFP. v. Canada*, PO6, ¶4.7; *Biwater v. Tanzania*, ¶ 53.
[34] *AS PNB Banka and others v. Latvia*, ¶ 52.
[35] Case Files, p. 16, ¶ 6.
[36] Case Files, p. 87, ¶ 11.

42. Therefore, CBFI pursues a particular interest and, consequently, should be admitted as *Amici* under Art. 19(3) CEPTA and Art. 41(3) ICSID AF Rules as it does not pursue a public interest.

II. CRPU'S SUBMISSION SHOULD BE ADMITTED

43. The submission proposed by the external advisors to the CRPU should be admitted because it complies with the requirements established by (i) Art. 41(3) of the ICSID AF Rules; and (ii) Art. 19(3) of CEPTA.

i. CRPU's submission complies with Art. 41(3) of the ICSID AF Rules as it address a matter within the scope of the present dispute

44. As seen above, Art. 41(3) of the ICSID AF Rules set the criteria that the Tribunal should consider to admit or not the *amicus curiae*, which are: if (i) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (ii) the non-disputing party submission would address a matter within the scope of the dispute; (iii) the non-disputing party has a significant interest in the proceeding. The same concept is applied by the ICSID Rules, Art. 37(2) of the ICSID Arbitration Rules.

45. (i) Relating to the assistance the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties, CRPU was engaged as external advisor to the Committee on Reform on Public Utilities set up under the Law on Privatization of State Property to advise on the privatization, liquidation, and/or restructuring of Caeli Airways. Its competence was recognized through a transparent and competitive process approved by Respondent and had actively participated in the deliberations of the Committee in the process leading up to the acquisition of Claimants investment.[37] Additionally, CRPU is in the unique position to assist the Tribunal in the determination of the facts related to the acquisition of

[37] Case Files, p. 19, ¶ 3.

Claimant's investment as it was an independent advisor involved in the entirety of the privatization process.[38]

46. (ii) about the requirement of addressing a matter within the scope of the dispute, a matter is considered to be within the scope of the dispute if it assists the arbitral tribunal to understand and resolve such issues.[39] Specifically, the arbitral tribunal in *Suez v. Argentina, Second Order on Amicus Curiae*, found that the role of an *amicus curiae* is assist the arbitral tribunal arrive at its decision by providing the decision maker with *arguments, perspectives, and expertise* that the litigating parties may not provide, what includes new factual elements and new legal arguments.[40]

47. In this sense, the fight against corruption is considered as a matter of transnational public policy in investment arbitration and must be addressed by the arbitral tribunal.[41] On this matter, the tribunal in *Metal-tech v. Uzbekistan*, stated that "*it is the duty of a tribunal established on the basis of a treaty to verify its jurisdiction under that treaty, even if the parties have not objected to it*".[42]

48. In the present case, CRPU alleged that Claimant acquired its shares of Caeli Airlines by paying bribes to Mr. Dorian Umbridge, the Chairperson of the Committee.[43] Respondent scored Mekar between 30/100 to 36/100 by Transparency International on its corruption perceptions index since the index's creation.[44] Corruption and privatization are synonymous in Mekar, and some estimate that its economy has lost MON 238 million since 2009.[45]

49. Moreover, the acceptance of *amici* submissions have the additional desirable consequence of increasing the transparency of investor state arbitration established by Art. 9.20, CEPTA.[46] This benefit is considerable in the present case, especially considering the global public policy to fight corruption which could be analyzed by the Tribunal *sua sponte*.[47]

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[38] Case Files, p. 19, ¶ 5.
[39] *Apotex v. USA*, PO5, ¶¶ 27-30; *UPS v. Canada*, ¶ 60; *Grace and others v. Mexico*, ¶ 51.
[40] *Suez v. Argentina, Second Order on Amicus Curiae*, ¶ 20.
[41] *World Duty Free v. Kenya*, ¶ 139; *Getma v. Guinea (II)*, ¶ 178; *Niko Resources v. BAPEX & Petrobangla*, ¶¶ 431-433.
[42] *Metal-Tech. v. Uzbekistan*, ¶ 123.
[43] Case Files, p. 19, ¶ 4.
[44] Case Files, p. 29, ¶ 12.
[45] Case Files, p. 87, ¶ 13.
[46] *Biwater v. Tanzania*, ¶ 54; *Methanex v. USA*, ¶ 49.
[47] *Metal-Tech. v. Uzbekistan*, ¶ 241; *World Duty Free v. Kenya*, ¶ 52; *Glencore International and C.I. Prodeco S.A. v. Colombia*, ¶ 664; Ziadé, p. 124.

50. (iii) Finally, CRPU has a significant interest in the proceedings as it possesses a general interest in promoting fair business practices in Mekar.[48] Such interest is also related to the ability of investor-State dispute settlement to address public policy issues fairly and to assist in the fight against corruption.

51. Therefore, CRPU's submission is within the scope of the dispute as corruption is a matter of transnational public policy that affects the jurisdiction of the Tribunal.

ii. CRPU complies with Art. 19(3) CEPTA and Art. 41(3) of the ICSID AF Rules as it is not disruptive, and it does not cause an unduly burden to the proceedings

52. *Amicus Curiae* are not a disputing party in the arbitration proceedings but are participants that have interest in the dispute. Regarding its definition, the traditional role of an *amicus curiae* in an adversary proceeding is to assist the arbitral tribunal by providing arguments, perspectives, and expertise that the litigating parties may not produce.[49] Such an offer to assist is free to be accepted or rejected by the decision maker. An *Amicus Curiae* is a volunteer, a friend of the court, not a party.[50]

53. Art. 19(3) CEPTA and Art. 41(3) of the ICSID AF Rules confirms the Tribunal power to accept or reject, while also establishes the Tribunal duty to ensure that the submissions do not disrupt or unduly burden the arbitral proceedings and to provide the disputing parties with an opportunity to respond to such submissions.[51] In this sense, according to *Glamis Gold v. USA*, there is no undue burden when the arbitral tribunal limits the participation of the *Amici* and swiftly incorporates any *Amici* submissions to the proceedings.[52]

54. CRPU presented its request prior to the hearing on the merits.[53] Even more, the Tribunal already incorporated the opportunity to discuss the content of any *amici* submissions in the proceedings.[54]

55. Additionally, if a serious jurisdictional issue is wrongly not addressed, it could constitute a ground for annulment, like excess of power, Art. 52(b) or breach

[48] Case Files, p. 19, ¶ 6.
[49] *Suez v. Argentina*, ¶ 13; *Pac Rim v. El Salvador*, PO8, ¶ 1.
[50] *Apotex v. USA*, PO5, ¶ 17.
[51] *Pac Rim v. El Salvador*,, PO8, ¶ 1.
[52] *Glamis Gold. v. USA*, ¶ 286.
[53] Case Files, p. 19, ¶2.
[54] Case Files, p. 26, ¶¶4-5.

of public policy Art. V, 2(b), in particular considering the harm caused by an award that, due to its circumstances, promotes corruption.[55] This situation is even worse when considering some *indicia* of corruption like a pending investigation of corruption and estimation of a damage amounting to MON 238 million all present in the case at hand.[56]

56. Therefore, CRPU complies with Art. 19(3) CEPTA as it does not disrupt, and it does not cause an unduly burden to the arbitral proceedings.

PART THREE: THE MERITS OF THE DISPUTE

C. <u>Respondent did not violate Article 9.9 of the CEPTA</u>

57. Respondent did not breach the FET obligation under (I) Art. 9.9(2)(a), (II) Art.9.9(2)(c), and (III) Art. 9.9(3) of CEPTA.

I. RESPONDENT DID NOT BREACH ART. 9.9(2)(A) CEPTA

58. Respondent did not breach its obligation under Art. 9.9(a) of CEPTA because (i) its Courts properly addressed Claimant's lawsuit, and (ii) the recognition of an award annulled in the seat of arbitration does not amount to denial of justice.

i. Respondent properly addressed Claimant's lawsuit on the airfare caps

59. According to the Tribunal in *White Industries v. India*, a judicial delay amounts to a denial of justice will depend on four factors: (i) the complexity of the case, (ii) the need for swiftness, (iii) the behavior of the litigants involved and (iv) the behavior of the court themselves.[57]

60. Regarding the first factor, (i) the complexity of the case, the matter before the Mekari court was not straightforward. The fact that Justice VanDuzer had reserved his judgment for a written decision to be delivered on a subsequent date, after Mekar's High Court heard Claimant's and CCM's submissions concerning a stay on the imposition of airfare caps indicate the complexity of the case.[58] About (ii) the

[55] *Pey Casado v. Chile (I)*, ¶ 210; *CEAC v. Montenegro (I)*, ¶ 84.
[56] Case Files, p. 87, ¶13.
[57] *White Industries v. India*, ¶ 10.4.10.
[58] Case Files, p. 38, ¶ 52.

need for swiftness, the need for urgent resolution of this case was not compelling, since Caeli's viability was at risk because of its own anticompetitive matters and its debt structure that provides it with little financial flexibility.[59] Regarding (iii) the behavior of the litigants involved, Claimant took steps that would disrupt the proceedings, on 26 January 2019, Claimant requested to include in the already settled hearing on its proceedings against CCM regarding the interim measures (airfare caps), to add an almost complete different claim regarding the CCM report that concluded that Caeli had engaged in anti-competitive behaviour, which, if allowed would considerably delay the proceedings as the CCM would have to be afforded time to respond to Caeli's notice.[60] On the (iv) the behavior of the court themselves, the Mekari Courts did not cause an unreasonable delay because the Court took less time to issue a final decision (from 27 March 2018 to 15 June 2019)[61], as it normally does (27 months to issue a final decision on commercial matter)[62]. Moreover, Claimant's request for an immediate hearing to secure a stay on airfare caps, was denied as normally it would be, as Respondent's Courts prioritized criminal cases to avoid prolonged detention for the accused.[63]

61. Therefore, Respondent Courts addressed Claimant's lawsuits in an adequate and reasonable matter.

ii. The recognition of an award annulled in the seat of arbitration does not amount to denial of justice

62. The Host State can be held responsible for an unfair and inequitable treatment of a foreign investor under Art. 9.9(a) of CEPTA when the judiciary breached the standard by fundamentally unfair proceedings and outrageously wrong, final and binding decisions.[64]

63. It is internationally recognized that there is no obligation of the contracting parties of the New York Convention to deny recognition.[65] The New York Convention,

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[59] Case Files, p. 57, ¶ 4.
[60] Case Files, p. 37, ¶50.
[61] Case Files, pp. 36, 38, ¶¶44, 54.
[62] Case Files, p. 30, ¶13.
[63] Case Files, p. 30, 36, ¶¶13,44.
[64] *Arif v. Moldova*, ¶ 445; *Rumeli v. Kazakhstan*, ¶ 653; *Azinian v. Mexico*, ¶ 102.
[65] Berg, p. 265; Born, pp. 3428-33; Cheng, pp. 679, 680.

Art. V(1)(e), provides that recognition and enforcement of the award *may* be refused if it has been set aside in the Courts of the seat of arbitration.

64. Claimant attempted to disrupt the proceedings by challenging the appointment of the sole arbitrator in the Sinnoh Chamber of Commerce and it had its challenge rightfully dismissed under Art. 31 of Arbitration Rules of the Sinnoh Chamber of Commerce. After setting aside the award on Sinnoh, based upon mere hearsay evidence, Claimant attempted to resist recognition and enforcement in Respondent Courts, which correctly recognized and enforced the award on the grounds that the challenge of the award based on hearsay evidence and that Article V(1)(e) of the New York Conventions and Section 36(2) of the Commercial Arbitration Law allowed for recognition and enforcement of an award set aside in the seat of arbitration.[66] Respondent's Courts merely recognized and enforced an international arbitral award in accordance with the New York Convention.[67]

65. Therefore, Respondent did not breach the CEPTA provision on FET by recognizing the Award as Claimant was not subject to fundamentally unfair proceedings or to an outrageously wrong, final and binding decision.

II. RESPONDENT DID NOT BREACH ARTICLE 9.9(2)(C) OF CEPTA

66. Respondent did not act arbitrarily or discriminatorily (i) by penalizing Claimant for its predatory pricing, (ii) by imposing the use of its currency, (iii) and by granting subsidies to other airlines operating on its territory.

i. Respondent did not act arbitrarily or discriminatorily by penalizing Claimant for its predatory pricing

67. Respondent did not breach Article 9.9(c) of CEPTA, by investigating Claimant since Respondent did not grant immunity to airline alliances.

68. According to *Tecmed v Mexico* a foreign investor must obey the laws of a Host State in order to set up an investment in its territory and there is a presumption of the investor that the law may be applied.[68] In this sense, the tribunal in *Tokios*

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[66] Case Files, p. 67, 68, ¶ 6.
[67] Case Files, p. 39, 40, ¶ 62.
[68] *Tecmed v. Mexico*, ¶¶133 & 173; in this sense: *MTD v. Chile*, ¶¶ 105–106.

Tokelés v. Ukraine, it is not for the State to prove that a company investigated by official and autonomal authorities is guilty of economic offenses and the hypothesis of arbitrarily or discriminatorily behavior shall not be considered while there exists other entirely plausible alternatives due to the investigated company's own economic actions and decisions.[69]

69. Although, the CCM approved Claimant's acquisition of an 85% stake in Caeli Airways and the airline's participation in the Moon Alliance on March 2011, the CCM also sought an undertaking from Caeli that it would not engage in high-level co-operation on competition parameters such as prices, schedules, capacity, facilities, and other sensitive information with Moon Alliance members.[70] On 1 January 2019, the CCM completed its Second Investigation into Caeli, concluding that Caeli had engaged in anti-competitive behaviour in conducting its business activities in Phenac International Airport. It found that Caeli had 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 and that Caeli had introduced excessively low prices only on routes to and from Phenac International and that its strategy did not assist in the creation of new customers or increase of revenue, but that it could only assist in harming competitors out of the market.[71]

70. Therefore, Claimant was not arbitrarily or discriminatorily penalized by Respondent, because Claimant actions were harming free competition in Respondent's territory.

ii. Respondent did not act arbitrarily or discriminatorily by imposing the use of its currency

71. According to the tribunal in *Maffezini v. Spain*, "Bilateral Investment Treaties are not insurance policies against bad business judgments".[72]

[69] *Tokios Tokelés v. Ukraine*, ¶ 136.
[70] Case Files, p. 32, ¶ 25.
[71] Case Files, p. 37, ¶ 49.
[72] *Maffezini v. Spain*, Award, Decision on Objections to Jurisdiction ¶ 64; *Waste Management v. Mexico*, ¶¶ 967, 989.

72. Claimant took risks when administering its investment. Claimant is known by its looming liquidity crunch, risky investments, and exposure to external risks business strategy and its debt structure that provides it with little financial flexibility and leaves insufficient funds for overall sustainable growth financial strategy.[73] Additionally, Respondent is known for its prolonged political instability.[74] This means that a measure aimed to stabilize its currency, like the decree issued in January 2018 requiring all companies operating in the country to offer goods and services denominated exclusively in its currency, was predictable.[75]

73. In June 2019, Aviation Analytics, a leading international quarterly, pinned Caeli's fate to fail under Claimant administration, as almost any industry expert would agree, due to its inability to deal with the rising fuel prices and having to shut down.[76] Claimants risk management can be observed back in 2015 when, instead of injecting profits into outstanding debt and improving financial health, Claimant preferred to purchase forty five Boeing 737 MAX aircrafts.[77] Which were grounded due to technical failure that causes a crash after take-off.[78]

74. Therefore, because Claimant took an extreme risk when managing its investment, which was made in an unstable economy, there is no breach of FET under Chapter 9 of CEPTA.

iii. Respondent did not act arbitrarily or discriminatorily by granting subsidies to other airlines operating on its territory

75. Respondent did not violate the FET obligation established in Art. 9.9 CEPTA by granting subsidies for some airlines operating in Mekar.

76. A discrimination will only be consider as a breach of FET if specifically target the foreign investor, not affecting other investors operating under the same or similar circumstances, and if they are not justified by sufficient reasons.[79] According to the tribunal in *Saluka*, although State aid tends to distort competition and to

[73] Case Files, p. 89, ¶ 5.
[74] Case Files, p. 29, ¶ 5.
[75] Case Files, p. 35, ¶ 42.
[76] Case Files, p. 57, ¶ 4.
[77] Case Files, p. 34, ¶ 35.
[78] Case Files, p. 37, ¶ 48.
[79] *Urbaser v. Argentina*, ¶ 1088; *Lemire v. Ukraine (II)*, ¶ 261; *LG&E v. Argentina*, ¶ 147

undermine the level playing field for competitors, such a tool is currently used by States and is not prohibited by international law.[80]

77. The Executive Order 9-2018 of September 2018, granted subsidies to airlines for each Mekari citizen travelling on board.[81] Although, two foreign airlines that received these subsidies had also received a one-time lump sum payment from their home State in 2017, this was not a discrimination against Claimant as the predominant recipients of subsidies under Executive Order 9-2018 were airlines operating important domestic routes within Mekar with less than 5% market share on these routes.[82] Requirement that Claimant did not fulfill as it held a greater market share.[83]

78. Therefore, the Respondent used a legal instrument not prohibited by international law.

III. RESPONDENT DID NOT BREACH CLAIMANT'S LEGITIMATE EXPECTATION UNDER ART. 9.9(3) OF CEPTA

79. Respondent did not breach Claimant's legitimate expectations by (i) by penalizing Claimant for its predatory pricing and (ii) by imposing the use of its currency.

i. Respondent did not breach Claimant's legitimate expectations regarding the shareholder agreement

80. There will only be a breach of the investor's legitimate expectation if the State is obliged to act in good faith; - the State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process.[84] In this sense, the PCIJ in *Oscar Chinn Case*, held that the investor must take the conditions of the host State as he finds them. It cannot base a complaint if his investment fails merely because of laws, policies or practices which were in place at the time of investment, and which were, or ought to have been, well known to him before making the

[80] *Saluka v. Czech Republic*, ¶ 445.
[81] Case Files, p. 36, ¶ 46.
[82] Case Files, p. 89, ¶ 7.
[83] Case Files, p. 38, ¶ 55.
[84] *Rumeli v. Kazakhstan*, ¶ 609; *UAB v. Latvia*, ¶ 835.
Cube Infrastructure v. Spain, ¶ 393.

investment.[85] Moreover, the legitimate expectations under a shareholder agreement are limited by the commitment of the host State.[86]

81. Respondent committed to allow Claimant's acquisition of an 85% stake in Caeli Airways and the airline's participation in the Moon Alliance, but such approval was conditioned to Caeli not engaging in high-level co-operation on competition parameters such as prices, schedules, capacity, facilities, and other sensitive information with Moon Alliance members.[87] However, on 1 January 2019, the CCM concluded that Caeli had engaged in anti-competitive behaviour in conducting its business activities in Phenac International Airport, as it found that Caeli had abused its dominant position by introducing excessively low prices (absent any increase of revenue or creation of new customers) and by extracting even more additional privileges in terms of airport service fees from Phenac International Airport.[88]

82. In summary, Respondent did not breach Claimant's legitimate expectations regarding the shareholder agreement because it never committed to allow Claimant to harm free competition.

ii. Respondent did not breach Claimant's legitimate expectations by imposing the use of its currency

83. According to the Tribunal in *CMS v Argentine*, a change in the legal framework and in its various components that were crucial for the investment decision is considered a breach of an investor's legitimate expectations.[89]

84. At the moment Claimant decided to invest in Respondent, it knew that Respondent's economy has suffered as both people and resources have left the nation.[90] Also, considering Claimant's experience with the airline industry in its home State and globally, it could not have been blind to the volatility of its field of operations.[91] But, even with its experience, Claimants is known by its looming liquidity crunch, risky investments, and exposure to external risks business strategy and its debt structure that provides it with little financial flexibility and leaves

[85] *Oscar Chinn*, page. 88; *McLachlan, Shore, Weiniger*, p. 238.
[86] *RREEF v. Spain*, ¶ 545.
[87] Case Files, p. 32, ¶25.
[88] Case Files, p. 37, ¶ 49.
[89] *CMS v Argentine Republic*, ¶1235.
[90] Case Files, p. 29, ¶ 5.
[91] Case Files, p. 29, ¶¶ 10-11.

insufficient funds for overall sustainable growth financial strategy.[92] Posture that was adopted by Claimant in Caeli, as seen in Aviation Analytics, a leading international quarterly, that in June 2019 already saw that Caeli was destined to fail under Claimant administration, as almost any industry expert would agree, due to its inability to deal with the rising fuel prices and having to shut down.[93]

85. Therefore, Respondent did breach Claimant's legitimate expectations by keeping the use of its currency.

D. No compensation is due to Claimant

86. In case the Tribunal finds that there was a breach of FET under Chapther 9 of CEPTA, then it should not award compensation because (I) the valuation of damages must be at the market value, which was already paid (II) the MFN clause does not apply, and (III) Even if the MFN clause was applicable to compensation, the fair market price was already paid to Claimant.

I. THE MARKET VALUE WAS ALREADY PAID

87. Art. 9.21(1)(a) of the CEPTA provides for monetary damages at a market value. Usually, the market value is the value a willing buyer would pay for the investment, having knowledge of the applicable circumstance.[94] In this sense, according to the tribunal in *Amoco International Finance v Iran*, "market value" means the current value an investment has in the market.[95]

88. Caeli is established in Respondent, a State that is known for economic instability and by its loss of people and resources.[96] Caeli was not administered to overcome economic distress, as identified by experts in the field.[97] Actually, it was a company that held many losses, such as the purchase and leasing of more than forty five Boeing 737 MAX aircrafts which were grounded due to technical failure that causes

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[92] Case Files, p. 89, ¶ 5.
[93] Case Files, p. 57, ¶ 4.
[94] *Starrett Housing Corporation v. Iran*, ¶ 277; *Tecmed v. Mexico*, ¶ 191; *Mobil v. Argentina*, ¶ 123.
[95] *Amoco International Finance Corporation v. Iran*, ¶ 218
[96] Case Files, p. 29, ¶ 5.
[97] Case Files, p. 57, ¶ 4.

a crash after take-off.[98] Even the Claimant admitted that it was unable to find a willing buyer for Caeli.[99]

89. Therefore, the correct value of Claimant's investment is the value that the investment was sold.

II. THE MFN CLAUSE DOES NOT APPLY

90. The scope of applicability of MFN clauses differ from treaty to treaty. Its provisions must be considered in ascertaining its scope of application.[100] According to the tribunal in *Wintershall vs. Argentina*, when the contracting parties of an investment treaty did not "have in mind" the extension of a MFN clause to certain matter, *in casu*, a limitation provision in the MFN clause, such clause cannot be extended to other provisions.[101]

91. In the present case, the contracting parties limited the matters subject to the MFN clause in Art. 9.7(1): "with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory". Moreover, Art. 9.7(2) of the CEPTA provides that the MFN provision shall not be extended to substantive obligations.

92. On the other hand, Claimant may argue that the MFN clause could be extended to dispute resolution matters such as Art. 13 ARRAKIS – MEKAR BIT, based upon cases in which the MFN was interpreted as including dispute settlement provision, such as *Maffezini v. Spain*, *Gas Natural v. Argentina*, and *Suez-InterAguas v. Argentina*. However, in those cases the relevant MFN clause provided that it would be applicable to all matters subject to that treaty.[102] This is not compatible with the present case as Art. 9.7(1) clearly limits the scope of the MFN clause.

93. Therefore, the MFN clause cannot be expanded to encompass the power of arbitrators in the dispute resolution clause.

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[98] Case Files, p. 37, ¶ 48.
[99] Case Files, p. 40, ¶ 63.
[100] *ST-AD v. Bulgaria*, ¶ 394; *Daimler v. Argentina*, ¶ 236; *ICS v. Argentina (I)*, ¶ 296.
[101] *Wintershall vs. Argentina*, ¶ 193.
[102] *Maffezini v. Spain*, Award, ¶ 49; *Gas Natural v. Argentina*, ¶ 26; *Suez v. Argentina*, *Decision on Jurisdiction*, ¶ 55.

III. EVEN IF THE MFN CLAUSE WAS APPLICABLE TO COMPENSATION, THE FAIR MARKET PRICE WAS ALREADY PAID TO CLAIMANT

94. According to the World Bank Guidelines when an investment demonstrates a lack of profitability, the liquidation value, the current value a willing buyer would accept, is the most appropriate valuation method.[103]

95. Claimant, on its own Notice of Arbitration, admitted that his investment in Caeli was not profitable.[104] Even more, Claimant itself confessed that it could not find another buyer.[105] It is also worth mentioning, that since Claimant asks for USD 700 million as compensation in this arbitration, which is about twice its consolidated annual budget.[106] The amount paid to Claimant, USD 400 million, is already a considerable amount to an unprofitable business with huge debts, it is almost equivalent to Respondent's annual public spending.

96. Moreover, as provided by the tribunal in *Tidewater et al. v. Venezuela*, one core element that a willing buyer would consider is the risk associated with investing in a particular country.[107] In this sense, the Respondent has been facing an economic crisis since 2016.[108]

97. Therefore, the current value of the investment is the most adequate to the present case.

[103] *World Bank Guidelines; McLachlan, Shore, Weiniger,* p. 320.
[104] Case Files, p. 5, ¶ 21.
[105] Case Files, p. 40, ¶ 63.
[106] Case Files, p. 86, ¶ 4.
[107] Tidewater v. Venezuela, ¶ 186.
[108] Case Files, p. 35, ¶ 39.

REQUEST FOR RELIEF

98. In light of the above submissions, RESPONDENT respectfully requests this Tribunal to:

I. Declare that it has jurisdiction over the present case

   a. To find that it does not have jurisdiction *ratio personae* as Claimant is an investor under Chapter 9 of CEPTA.

II. To find that the *Amici* submission of:

   a. CBFI is not admissible;

   b. CRPU is admissible.

III. To find that Respondent treated the Claimant's investment fairly and did not breach Chapter 9 of the CEPTA

IV. In case it finds that there was a breach of CEPTA, then:

   a. To declare that Respondent has already purchased the Claimant's investment at "market value"

   b. To declare that Claimant has no right of further compensation;

V. In the alternative, the Tribunal should reduce any compensation awarded considering the Claimant's contributory fault and the ongoing economic crisis in Mekar.

VI. To order Respondent to bear all costs and expenses associated with this arbitration.

Submitted on September 23, 2021, by Team Mo

On behalf of RESPONDENT
THE FEDERAL REPUBLIC OF MEKAR