**TEAM REDDY**

**FOREIGN DIRECT INVESTMENT MOOT COMPETITION**

**Seoul, 31 Oct. - 3 Nov. 2021**

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**IN THE MATTER OF AN ARBITRATION UNDER THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES ("ICSID") ARBITRATION (ADDITIONAL FACILITY) RULES**

**- between -**

**Vemma Holdings Inc. (CLAIMANT)**

**- and -**

**Federal Republic of Mekar (RESPONDENT)**

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# MEMORIAL FOR RESPONDENT

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

**Registry:**

**The International Centre For Settlement of Investment Disputes ("ICSID")**

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| §(§§) | Paragraph(s) |
| ANoA | RESPONDENT's Answer to the Notice of Arbitration |
| Art./Arts. | Article/Articles |
| BIT | Bilateral Investment Treatment |
| BPB | Bonoorian People's Bank |
| CAA | Civil Aviation Authority |
| CBFI | The Consortium of Bonori Foreign Investors |
| CCM | Competition Commission of Mekar |
| CEPTA | Comprehensive Economic Partnership and Trade Agreement |
| CILS | Centre for Integrity in Legal Services |
| CLAIMANT | Vemma Holdings Inc. |
| CRPU | Committee on Reform of Public Utilities |
| e.g. | *exempli gratia* (example given) |
| ed. | Edition |
| FET | Fair and Equitable Treatment |
| FMV | Fair Market Value |
| FTA | Free Trade Agreement |
| FTC | Federal Trade Commission |
| *i.e.* | id est (that is) |
| *ibid.* | ibidem (the same source) |
| ICSID | International Centre for Settlement of Disputes |
| ICSID AF Rules | ICSID Additional Facility Rules |
| ICSID Convention | ICSID Convention, Regulations and Rules |
| *id.* | idem (the same source another page) |
| ILC | International Law Commission |
| *infra.* | mentioned below |

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| ISDS | Investor-State Dispute Settlements |
| km | Kilometres |
| LPM | Labourers' Party of Mekar |
| Ltd | Limited |
| MFN | Most favored nation treatment |
| MON | National Currency of Mekar |
| Mr. | Mister |
| Ms. | Miss |
| NAFTA | North American Free Trade Agreement |
| NGO | Non-governmental Organization |
| No. | Number |
| NoA | Claimant's Notice of Arbitration |
| NYC | New York Convention |
| p./pp. | Page/pages |
| Parties | Vemma Holdings Inc.and The Federal Republic of Mekar |
| PCA | Permanent Court of Arbitration |
| PCIJ | Permanent Court of International Justice |
| PJSC | Private Joint Stock Company |
| PO1 | Procedural order No.1 |
| PO2 | Procedural order No.2 |
| PO3 | Procedural order No.3 |
| PO4 | Procedural order No.4 |
| Prof. | Professor |
| RESPONDENT | The Federal Republic of Mekar |
| Rules on Transparency | The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration |
| SCC | Sinnoh Chamber of Commerce |

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| SCC | Sinnoh Chamber of Commerce's |
| SOE | State-Owned Enterprise |
| *supra.* | mentioned above |
| UNCITRAL | United Nations Commission in International Trade Law |
| USD | United State Dollars |
| *v.* | Versus |
| VCLT | Vienna Convention on the Law of Treaties (1969) |

## STATEMENT OF FACTS

1. This arbitration concerns unfair and discriminatory treatment accorded to the investor and was brought to the International Centre for the Settlement of Investment Disputes ("ICSID") to seek justice and appropriate compensation.[1]

2. Vemma Holdings Inc. ("**Vemma**" or "**CLAIMANT"**) is an airline holding company incorporated in Bonooru with 100% ownership in Royal Narnian.[2] The Commonwealth of Bonooru "Bonooru" a developing country, which sits in Northen tip of Greater Narnia, a state of CLAIMANT. From the date of incorporation until March 2020, Bonooru retained the minority of shareholding in Vemma. Other shareholders in Vemma include private and institutional shareholders.[3]

3. The Federal Republic of Mekar ("**Mekar**" or "**RESPONDENT**") sits approximately to 1,600 km from Bonooru.[4] Mekar witnessed a period of prolonged political instability. On corruption perceptions index since this index's creation Transparency International has consistently scored Mekar 30/100 and 36/100. Currency of Mekar is Mekari Mon ("**MON**").

4. In January 2010, Mekari government passed a degree envisaging the priority of the privatization of Caeli Airways in its agenda. Vemma not only was the highest bidder among four companies participating in the tender, but it also had the most financially attractive business model for Caeli Airways' development. When accepting CLAIMANT's tender valued at 800 million USD, RESPONDENT considered the former's strong links to Bonooru as well as its participation in the Moon Alliance.

5. On January 5, 2011, CLAIMANT acquires an 85% interest in Caeli, and RESPONDENT kept 15 % ownership via Mekar Airservices Ltd. It only took the CLAIMANT three years to increase Caeli's profits. A short time later, namely in 2014, a CEPTA agreement was signed between RESPONDENT and CLAIMANT.[5]

6. It is undeniably true that Caeli Airways, after its acquisition by CLAIMANT, was able to generate a significant cash flow throughout the period between the years 2011 and 2013. Already in 2014, 35% of Mekar citizens were enjoying Caeli services which brought massive profits to CLAIMANT.

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[1] Record p.2 §5
[2] Record p.29 §10
[3] Record p.28 §2
[4] Record p.29 § 12
[5] Record p.32 §26

However, what cautioned RESPONDENT was the exorbitant approach taken by CLAIMANT. As soon as it won the tender, CLAIMANT already started announcing tenders for purchase and lease of aircraft for Caeli. As a result, 23 new Boeing 737 aircrafts were added to its fleet.

7. Moreover, Caeli expanded routes for cross-continental travel to Mekar and added 20 new destinations in 2012. RESPONDENT repeatedly warned CLAIMANT against "extravagant approach". When the economic downturn hit the Mekar, CLAIMANT indeed got into a dire financial situation. In such circumstances, CLAIMANT expected RESPONDENT to bail it out by granting subsidies or exclusively permitting it to conduct its business in USD.

## I. THE ARBITRAL TRIBUNAL CANNOT REVIEW THE CASE UNDER ART.9 OF CEPTA

13. RESPONDENT respectfully submits that this Arbitral Tribunal lacks jurisdiction to hear the case based on the following reasons. Firstly, Parties have agreed on a dispute settlement mechanism under CEPTA, which would fall within the meaning of the "dispute" enshrined in the either ICSID Convention or ICSID Additional facility Rules. As CLIAMANT has correctly noted in its NOA, ICSID Convention cannot be applied to the case at hand. RESPONDENT argues that ICSID AF Rules are neither applicable to the present dispute, which falls outside of the mentioned rules **(A.)**. Secondly, the claims put forward by a state-owned enterprise, who acts as an agent of its state, like CLAIMANT are inadmissible in their entirety and could not be considered by this Arbitral Tribunal **(B.)**

### A. The Arbitral Tribunal does not have jurisdiction to hear the present case.

14. CLAIMANT claims that even if the Tribunal considers Vemma a state-owned enterprise, the case still should be reviewed under Section E of the CEPTA. However, RESPONDENT submits that this Arbitral Tribunal does not have jurisdiction to hear the present case under the ICSID AF **(1.)**, ICSID Convention, CEPTA or any other dispute resolution mechanism created under ICSID **(2.)**.

#### 1. ICSID AF Rules apply only to Investor-State Arbitrations.

15. As this dispute is related to investment-treaty arbitration, RESPONDENT submits that this Arbitral Tribunal does not have jurisdiction under Section E – Settlement of Disputes (Art.9.16) and Section A – Definition and Scope (Art.9.1) of CEPTA.

16. According to Art.9.16(2) of CEPTA if a dispute arises between the Parties, a claim may be submitted under the ICSID AF Rules. The drafting history of ICSID Convention confirms its creation for the purposes of depoliticization of international investment arbitration and with an object to promote private international investment as opposed to public international investment by excluding disputes that were brought by states or other SOEs even in a segregation context. Therefore ICSID AF Rules, as well as ICSID Rules, have jurisdiction only over Investor-State disputes .

17. According to Art.9.1 "Investor" means "a natural person with the nationality of a Party or an enterprise with the nationality of a Party or seated in the territory of a Party" . This definition of the term "investor" does not match up with the reality of Vemma Holdings. The fact that Vemma

Holdings is a SOE are proved below[6]. Based on the above, RESPONDENT claims that this case is a State-State arbitration dispute, which falls out of the scope of Section E of the CEPTA.

### 2. Present dispute falls outside of the scope of any dispute resolution mechanisms created at the ICSID

18. This Tribunal would have a jurisdiction only if the Parties had confirmed it in their Agreement. According to Chapter 9 of CEPTA, Mekar has not consented to State-State Arbitration with Bonooru. The treaty points out Investor-State arbitration and addresses the claim to be submitted under ICSID Convention, ICSID AF Rules and CEPTA .

19. The history confirms that the purpose of creation of the ICSID and any of its rules was aimed at providing more convenient mechanisms for Investor-State disputes, excluding any forms of (a) totally State-State arbitration, (b) totally private arbitration or (c) between a Contracting State and one of its own nationals . Art.1 of Chapter 1 establishes that: "The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention". Due to the fact that RESPONDENT has not signed the ICSID Convention , it has no power over Mekar, and the country can not be considered as a Contracting State. The Arbitral Tribunal has no jurisdiction under the ICSID Convention.

20. ICSID AF Rules were developed to expand the limited ICSID jurisdictional scope, thus can be used to settle this dispute. The treaty, according to Art.2, can be applicable only to a State (or a constituent subdivision or Agency of a State) and a national of another State. Since Vemma is not a national of another Contracting state, but a SOE being an agent of Bonooru, which discharged governmental functions ,- ICSID AF Rules can not be applicable. These Rules forward the dispute to Investor-State Arbitration, not State-State Arbitration. So, the Arbitral Tribunal is not applicable to resolve this dispute because it has no jurisdiction under ICSID AF Rules.

21. CEPTA can be addressed in case if ICSID and ICSID AF Rules can not be used. Although the Arbitral Tribunal was appointed within the CEPTA's provisions and ICSID AF Rules, nonetheless the case at hand is between two states. So, the Arbitral Tribunal lacks competence and no jurisdiction to consider the CLAIMANT's claims.

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[6] *infra.,* §23-29

### B. The present dispute is inadmissible to be heard before the Arbitral Tribunal.

22. CLAIMANT is mistaken by stating that this dispute is admissible to be presented before the Arbitral Triunal as Vemma was not a state-owned enterprise at the time it made the investment in Mekar. However, in fact, the Vemma Holdings was a SOE from its very inception **(1.)**; Vemma is not an investor in a present dispute because it acts like an agent of the State of Bonooru **(2.)**. Moreover, Vemma performs an important governmental function for the State of Bonooru **(3.)**.

#### 1. Vemma has been a SOE from its very inception.

23. CLAIMANT is a national of Bonooru, which is an archipelagic state consisting of 109 islands, of which only four are 'major islands', covering an area of over 5,000 square km7. Due to its geographical nature, the state of Bonooru has always had a positive obligation to its people in terms of inter-island transport mobility, which is stated in Art.70 of the country's Constitutional Act8. This is the historical reason why Bonooru has always controlled aviation within its territory. In 1972, CAA, the arm of Bonooru's Ministry of Transport and Tourism, charted a scheme to sell up to 70% of stake in BA Holdings, which was a parent company of Bonooru Airways, the main national carrier and civil monopoly airline9. Bonooru Airways formed Vemma Holdings (CLAIMANT) where the State maintained a sizable stake (31-38%)10.

24. When BA Holdings was privatised, the citizens of Bonooru protested, to which the country's first Prime Minister, Ty Lee, responded that: "Our government plans to maintain a significant interest in Bonooru Air and always will. Bonooru Air's intended successor will be directed to ensure that it operates routes to our most remote islands, regardless of profitability". Moreover, the Constitutional Court of the State of Bonooru on the privatisation of BA Holdings stated that: "Combined with Bonooru continued, although minority, participation through Vemma Holdings Inc., we are sufficiently convinced that Bonooru will be able to ensure the utilisation of the Royal Narnian for public benefit"11. That illustrates the kind of pressure Bonooru Air's successor, which is Vemma Holdings, would be under. That is why Vemma holdings is a SOE from its very inception, it has always fulfilled crucial functions for the State of Bonooru – the state's constitutional obligations to its people. Thus, these arbitral proceedings are, in fact, between two states - The Commonwealth of Bonooru and The Federal Republic of Mekar, which turns it to

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[7] Record p.28, §5
[8] Record p.28, Annex I
[9] Record p.29, §7
[10] Record p.29, §10
[11] Record p.43, §59

State-State arbitration, RESPONDENT didn't agree to. A similar situation had happened in 2000 in the case of *Emilio Augustin Maffezini v. The Kingdom of Spain*[12], where the Arbitral tribunal had decided that Commercial acts of the state-owned company cannot be attributed to the Spanish State, while governmental acts should be so attributed.

### 2. The intention of the Parties should be taken into account with the regard to the jurisdiction

25. Consent is the cornerstone of jurisdiction of international courts and tribunals, including Investor-State Arbitration Tribunals (such as those established under the ICSID framework)13. Some Investor-State tribunals set out consent as a condition of a so-called jurisdiction ratione voluntatis14.

26. In the present case, Parties' intentions show that they did not consent to state-to-state Arbitration. RESPONDENT submits that both under Art. 2 of ICSID AF Rules and Chapter 9 of the CEPTA Mekar has only consented to arbitrate with certain covered investors and not with the State of Bonooru or SOEs of Bonooru.

27. CEPTA excludes SOEs. Although the BIT from 1994, which preceded the CEPTA, included SOEs in covered investors under Art.1:

28. For the purpose of this Agreement:

- "enterprise" means any entity constituted or organized under applicable law, whether for profit or not, whether privately-owned or government-owned, including any corporation, trust, partnership, sole proprietorship, joint venture, or other association; and a branch of any such entity;
- d) "investor" means a natural person possessing the citizenship of or permanently residing in one State in accordance with its laws, or any enterprise incorporated or duly constituted in accordance with applicable laws in that State, who makes the investment in the territory of the other State;

[12] ICSID Case No. ARB/97/7)
[13] http://arbitrationblog.kluwerarbitration.com/2019/02/12/relooking-at-consent-in-arbitration/
[14] https://jusmundi.com/en/document/wiki/en-consent-to-arbitration

29. Thus, the BIT concluded in 1994 included SOEs. On the other hand, this is deviated from CEPTA.. Art.9.1 involves only the definition of investors. Consequently, this fact precisely shows Parties' intention to exclude SOEs as a Party to Investor-State Arbitration.

### 3. Vemma's actions are attributable to State.

30. RESPONDENT submits that the actions of Vemma attribute to the State, and it acts as a SOE. Consequently, the current dispute should be transmitted to State-State Arbitration rather than Investor-State Arbitration.

31. International investment law provides two main scenarios in relation to SOEs: SOEs acting as Host States or as a foreign investor. By attributing the acts of SOEs to States, foreign investors may establish State liability, and, in doing so, gain access to treaty-based resolution mechanisms.

32. In the case of ICSID, for instance, a State could never qualify as a "national of another Contracting State" under Art.25(1) or (2)(b) of the ICSID Convention, and *ratione personae* jurisdiction should never be afforded to a claimant State.

33. To assert the (State or non-State) capacity in which a SOE is acting, Broches puts forward the following argument: *"*There are many companies which combine capital from private and governmental sources and corporations all of whose shares are owned by the government, but who are practically indistinguishable from the completely privately-owned enterprise both in their legal characteristics and in their activities.

34. It would seem, therefore, that for purposes of the Convention a mixed economy company or government-owned corporation should not be disqualified as a 'national of another Contracting State' unless it is acting as an agent for the government or is discharging an essentially governmental function[15]*."*

35. Therefore, it can be assumed that SOE cannot be qualified as a national when it meets the following criteria:

- it is discharging an essentially governmental function;
- it is acting as an agent of the state.

[15] https://jusmundi.com/en/document/wiki/en-state-owned-enterprises

36. These criteria are known as the Broches test, which is applied in order to determine the attribution of the State under International Law. In order to clarify whether SOE discharges governmental function and acts as an agent, scholars have established two methods - structural **(a.)** and functional analysis **(b.)**.

*a. Structural analysis*

37. In order to elaborate on the fact that Vemma is a SOEthat acts as an agent it is important to analyse the structure of Vemma. Vemma is a SOE which owns 31%-38% shares of Bonooru. It means that the majority of controlling stake pertains to Bonooru. Moreover, Ms. Sabrina Blue who was the head of Vemma's board of directors has been appointed as the Secretary of Transport and Tourism in a cabinet reshuffle in Bonooru. Further, it can be assumed that Ms. Sabrina Blue might have acted as an agent for Bonooru. This means that the government of Bonooru had control over Vemma.

38. With regards to the definition of control and ownership, the Arbitral Tribunal in *Plama Consortium Limited v. The Republic of Bulgaria case* gave a clear definition to them.

39. On the substantial business requirement, the Arbitral Tribunal held that the lack of substantial business activity *"cannot be made good with business activities undertaken by an associated but different legal entity", even where the latter owns or controls the claimant. The requirement of ownership and control by a third party is also difficult to determine and may prove highly controversial. In the Arbitral Tribunal's view, "ownership includes indirect and beneficial ownership; and control includes control in fact, including an ability to exercise substantial influence over the legal entity's management, operation and the selection of members of its board of directors or any other managing body". The burden of proof to establish the lack of substantial business activity falls with the respondent state.*

40. CLAIMANT may interpret *Romak v. Uzbekistan* as justification for attributability. However, according to the facts of the case, the Arbitral Tribunal concluded that jurisdiction of the Arbitral Tribunal *ratione personae* was not at issue in the arbitration. Besides, in that case the Arbitral Tribunal found that Romak did not own an investment. Consequently, Uzbekistan did not consent to arbitrate this dispute under the BIT.

*b. Functional analysis*

41. The fact that Vemma is a SOE that functions in favor of Bonooru can be concluded from the case. From the beginning one of the pillars of Caeli Airways' business model was catering travelling from Mekar to Bonooru.

42. Traditionally, Bonooru attracted business travellers from Mekar and other neighbouring countries, routes that Caeli Airways had flown frequently under State ownership. In 2011, Bonooru's Minister of Transportation and Tourism unveiled the "Horizon 2020" Scheme as part of the Caspian Project to "optimally tap the potential of Bonooru's emerald beaches, its fascinating national parks, and its human, cultural and historical treasures" [16].

43. RESPONDENT submits that under the "Horizon 2020" and Caspian project Vemma functioned in favor of Bonooru. In order to elaborate on the fact that Vemma fulfilled governmental function, rather than conducted commercial functions, the Arbitral Tribunal should apply the *Maffezini v. Spain case.*

44. The major issue in this case was the determination of whether the actions of the investor relates to commerce or navigation. Similarly, in the case at hand the Arbitral Tribunal through the *Maffezini test* should determine the actions of Vemma made for commercial purposes, and those used for governmental purposes.

45. Moreover, Bonooru's Secretary of Ministry of Transportation and the former head of Vemma's Board of Directors Ms. Sabrina Blue assumed before the House of Commons:

46. "Vemma's expansion into Mekar will offer substantial benefits not only to Vemma but to all of Bonooru by enhancing the aviation network available to prospective tourists. This will boost the tourism infrastructure at our disposal". Vemma received subsidies from Bonooru. The first one was received on 28 October 2011. Furthermore, Vemma was granted subsidies under Horizon 2020 programme[17]. By granting subsidies Bonooru benefited from Vemma.

47. The fact that Vemma acted for Bonooru's benefit is that Caeli Airways continued to carry out non-profitable flights[18]. Additionally, Caeli was financially protected by PJSC BPB - a nationalised bank in Bonooru in which the government hold a 58.96% stake[19].

48. Consequently, it can be assumed that Vemma functioned in favor of the Bonooru government.

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[16] Record p.32, §28
[17] Record p.37, §46
[18] Record p.55, lines 1857,1870
[19] Record p.31, §23

## II. The Arbitral Tribunal should grant the leave sought by External Advisors to the "CRPU" for filing amici submission

49. The main function of *amicus curiae* in investment arbitration includes assisting the Arbitral Tribunal in resolving the dispute, hence the term *"amicus curiae"* originated from Latin means a "friend of the court"[20]. For the last decade the intervention of non-disputing parties as *amici* have become more widespread in investment disputes.

50. On May 28, 2021 the application for leave to file an *amicus curiae* submission was attached by External Advisors to Mekar's Committee on Reform? of Public Utilities (hereinafter "External Advisors")[21]. RESPONDENT submits that it is appropriate to grant a leave thought for the *amicus* by External Advisors since this *amicus* will play a crucial role in the outcome of the dispute and meets all requirements of ICSID AF Rules, UNCITRAL Rules on Transparency (hereinafter "Rules on Transparency") and Art.9.19 of CEPTA.

51. However, CLAIMANT alleges that submission by External Advisors is inadmissible in the case at hand, but it favours the *amicus curiae* submission by the CBFI . CLAIMANT puts forward baseless allegations that External Advisors does not follow the requirements for *amicus* submission and will raise additional jurisdictional issues by broadening the scope of the dispute[22].

52. When a non-disputing party's request for the *amicus curiae* status is submitted, the admissibility of the submission in particular case and powers of the Arbitral Tribunal on *amicus* submissions should be addressed primarily. In this regard, *amicus curiae* submission is admissible in the case at hand **(A)**, the Arbitral Tribunal should grant leave to *amicu*s submission by External Advisors to the CRPU**(B)**, the Arbitral Tribunal should reject *amicus* submission by CBFI **(C)**.

### A. *Amicus curiae* submission is admissible in the case at hand.

53. The parties have provided their observations on *amicus curia*e submissions[23], and pursuant to the Art.9.19 of the CEPTA, the parties agreed that Arbitral Tribunal has discretion to accept *amicus* submission if it deems it necessary. Further, the power of the Arbitral Tribunal to grant the leave for filing *amicus curiae* submission can be found in Art.41(3) of ICSID AF Rules and Arts.4-5 of Rules on Transparency applicable to this dispute under Art.9.20(6) of the CEPTA. Moreover, it

[20] Amicus curiae in international investment arbitration - Jus Mundi
[21] Record p.18
[22] Record p.24
[23] Record p.16-19

was in the case *Biwater v. Tanzania* where the Arbitral Tribunal found its power under Art.37(2) of ICSID Convention which is identical with Art.41(3) of ICSID AF Rules. In that case the Arbitral Tribunal stated that it may allow *amicus* submission despite the objections of the disputing party[24].

54. Except that parties themselves indicated in Art.9.19 CEPTA that non-disputing party's *amicus* submission can be filed in this dispute, the Arbitral Tribunal, while deciding on *amici*'s intervention, may also consider the complexity of the case and its public nature. In most cases, the Arbitral Tribunal has accepted the *amicus* submission due to public interest involved in those disputes[25]. Hence, in the case at hand the Arbitral Tribunal may consider that the outcome of the dispute will affect persons beyond the parties involved in the dispute.

55. Following the above, the Arbitral Tribunal should exercise its power regarding *amicus* submissions since its intervention is admissible in the dispute.

### B. The Arbitral Tribunal should grant leave to *amicus* submission by External Advisors to the CRPU

56. In the present case the application for leave to file *amicus* submission was submitted by the CBFI[26] and External Advisors[27]. In accordance with the Art.41(3) of ICSID AF Rules, Art.9.19 of the CEPTA and Arts.4-5 of Rules on Transparency, the Arbitral Tribunal after consulting with the parties may decide to allow non-disputing party's written submissions. Even though the Arbitral Tribunal must consult with the disputing Parties, the final decision regarding the joinder of non-party's written submission still remains with the Arbitral Tribunal.

57. In doing so, the Arbitral Tribunal grant leave for the submission by External Advisors on the following grounds: the *amicus* submission by External Advisors follows the requirements of ICSID AF Rules, Rules on Transparency and Art.9.19 of CEPTA **(1)**; the External Advisors have made application in pursuit of "public interest"**(2).**

#### 1. The *amicus* submission by External Advisors follows the requirements of ICSID AF Rules, Rules on Transparency and Art. 9.19 of CEPTA.

58. As the potential *amicus* should assist the Arbitral Tribunal and be "a friend of the court", the Arbitral Tribunal considers the conditions that *amicus* should fulfill[28]. Under Art.9.19 of CEPTA,

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[24] ICSID case No.ARB/05/22
[25] Pac Rim Cayman LLC v. Republic of El Salvador
[26] Record p.16
[27] Record p.19
[28] Amicus curiae in investment arbitration - Jus Mundi

Parties agreed to empower the Arbitral Tribunal to decide on non-disputing party submissions. As in the case *Piero Foresti, Laura de Carli and others v. Republic of South Africa*[29], the Arbitral Tribunal admitted the *amicus curiae* participation since it followed the requirements of ICSID AF Rules,in the case at hand RESPONDENT submits that the Arbitral Tribunal should also admit *amicus* submission by External Advisors since it assists the Arbitral Tribunal **(a)** addresses the matters within the scope of the dispute **(b),** and has significant interest in arbitration **(c)**.

*a. Amicus submission by External Advisors will assist the Arbitral Tribunal.*

59. Pursuant to the Art.41(3)(a) of ICSID AF Rules and Arts.4-5 of Rules on Transparency the non-disputing party's submission must assist the Arbitral Tribunal by bringing perspective, particular knowledge or insight that is different from that of the disputing Parties.

60. When the Arbitral Tribunal evaluates the non-disputing party's submission for the *amicus curiae* status, it may consider the relevant experience, required expertise and independence of the potential *amici*[30]. External Advisors are focused on investment in banking and have years of experience in this area, besides they have an expertise, knowledge regarding the economic and financial performance of Caeli Airways, thus RESPONDENT submits that this non-disputing party will provide the Arbitral Tribunal with a new perspective independent from the disputing Parties' and with this will act as the *amicus* of the Arbitral Tribunal, not the party's [31].

61. Submission of External Advisors will not be affected by the Parties, since External Advisors do not pursue any personal or financial interest from this dispute. On this ground it is the *amicus* submission by External Advisors that will assist the Arbitral Tribunal in the case at hand.

*b. Amicus submission by External Advisors addresses matters within the scope of the dispute.*

62. CLAIMANT alleges that *amicus* submission by External Advisors fails to meet the principles of the Art.41(3)(b) of ICSID AF Rules and Art.9.19 of CEPTA, in particular the requirement of addressing "a matter within the scope of the dispute[32]". Contrary to these allegations, RESPONDENT submits that the non-disputing party may raise additional jurisdictional issues, and the Arbitral Tribunal may independently ensure it has jurisdiction on such matter[33]. The issue

[29] ICSID case No.ARB(AF)/07/01
[30] The ICSID Convention: a Commentary
[31] *Aguas Provinciales de Santa and others v. The Argentine Republic*
[32] Record p.24
[33] Itisaluna Iraq LLC and others v. Republic of Iraq, ICSID case No.ARB/17/10

raised by External Advisors in their submission on the bribery allegation[34]requires special importance. When the submission is proved, the allegation will invalidate the all investment itself and make all of the CLAIMANT's claim redundant. A similar result was held in the case the *World Duty Free v. Republic of Kenya,* where the Arbitral Tribunal decided to dismiss the claim[35].

63. Considering the importance of issue raised by the non-disputing party's submission, which will not "unduly burden" the Arbitral Tribunal rather play a crucial role in the outcome of the dispute, RESPONDENT submits that *amicus* submission by External Advisors addresses the matters within the scope of the dispute.

*c. Amicus submission by External Advisors has a significant interest in the arbitration.*

64. The presence of significant interest of the non-disputing party in arbitration is required by the Art.41(3)(c) and Art.4(3)(a) of Rules on Transparency. An analogous condition was observed in the *Eco Oro v. Columbia* case[36], where the petitioners demonstrated significant interest in arbitration as one of the grounds to allow their submission. Non-disputing party's significant interest in arbitration is often addressed in the brief description in petition for *amicus curiae* status. In framing its interest, the petitioner should ensure that its interest is not tangential to the dispute[37]. Similarly, in the case at hand the submission External Advisors follow this principle. In its application for *amicus curiae* status, External Advisors mentioned their significant interest in the form of ensuring fair business practices in Mekar. Moreover, financial interest of potential *amici* in the proceedings is not a special requirement of significant interest. Hence RESPONDENT submits that *amicus* submission by External Advisors matches this condition.

**2. The External Advisors have made an application in pursuit of public interest.**

65. Unlike private arbitration, international investment arbitration includes the interests of the public[38]. Hence, public interest is a crucial moment that should be considered by the Arbitral Tribunal. In most of its decisions, where the Tribunal allowed *amicus curiae* as in *Aguas Provinciales de Santa and*

[34] Record p.19, §635
[35] ICSID case No.ARB/00/7
[36] ICSID case ARB/16/41
[37] *id.*
[38] Alexis Mourre "Are *amici curiae* the proper response to the public's concerns on transparency in investment arbitration"

*others v. The Argentine Republic*[39]case, the Arbitral Tribunal emphasised the need to consider public interest in submissions.

66. The components of public interest' are mostly environmental problems, human rights related issues, labour standards, facts of bribery and corruption. Additionally, FTC Statements determined, among other things, the grounds for acceptance of *amicus curiae,* such as presence of public matters in the subject matter of arbitration[40]. RESPONDENTS submits that application by External Advisors is in pursuit of public interest", as CLAIMANT obtained through bribes paid to Chairman of Committee - Mr. Dorian Umbridge[41]. Impartiality of External Advisors is granted by their position regarding disputing parties. Independence of potential *amici* is obvious from the relations of the latter with disputing parties: External Advisors to CRPU on advisory basis involved in the entirely privatization process and only they can provide the Arbitral Tribunal with the facts on bribery involved in the dispute.

67. Consequently, the Arbitral Tribunal should accept *amicus* submission by External Advisors due to the presence of public interest.

### C. The Arbitral Tribunal should reject amicus submission by CBFI

**68.** If may-be *amicus curiae* does not comply with the requirements, listed in the Art.41(3) of ICSID AF Rules, the Arbitral Tribunal has a right to reject *amicus* submission at its discretion. Thus, the Arbitral Tribunal should reject *amici* submission by CBFI based on the following reasons: *amicus* submission by CBFI does not follow the conditions to allow amicus curiae's participation **(1)**; CBFI's submission is not in pursuit of public interest **(2).**

#### 1. *Amicus* submission by CBFI does not follow the requirements to allow amicus curiae's participation.

69. In the given case *amicus* submission was given by CBFI - a non-profit industry association that represents Bonoori investors investing in the Greater Narnian Region and internationally. The CBFI contains members, which fill issues against the Federal Republic of Mekar (SRB Infrastructure and Wiig Wealth Management Group) and advising Vemma on funding strategies

[39] ICSID case No.ARB/03/17
[40] §B.6. of the FTC Statement
[41] Record p.18

with respect to its claim against the Federal Republic of Mekar (Lapras Legal Capital). Moreover, Vemma Holdings Inc. is a member of CBFI in a good standing[42].

70. Potential *amicus curiae* has to prove its nomination of a non-disputing third party by presence of its own expertise, experience and independence within the scope of the dispute[43].

71. In the Order in Response to a Petition for Participation as *amicus curiae* in the *Aguas Provinciales de Santa and others v. The Argentine Republic* case, it was indicated that potential *amicus curiae* must provide the Arbitral Tribunal with following information:

- *the identity and background of the petitioner;*
- *the interests of the petitioner in the case;*
- *the petitioners' financial or other relationships with the Parties;*
- *the reasons why the Arbitral Tribunal should accept the petitioners' amicus curiae brief*

72. The close ties of CBFI, Vemma Holdings Inc, SRB Infrastructure and Wiig Wealth Management Group leads to a lack of impartiality of potential *amici curiae* from disputing parties, which causes a conflict of interests and raises other multiple issues complicating the case at hand.

73. As it noted in Art.4 of Rules on Transparency and Art.41(3) of ICSID AF Rules, a non-disputing party should not unfairly prejudice any party. *Amici* submission would unfairly prejudice External Advisors to CRPU and Federal Republic of Mekar.

74. Besides, to assist the Arbitral Tribunal CBFI must provide a perspective that differs from disputing Parties, as it was obliged by Art.41(3) of ICSID AF Rules. For these reasons[44], CBFI's *amicus* submission fails to provide a new perspective that differs from the disputing Parties'.

75. Thus, the Arbitral Tribunal should not allow *amicus* submission by CBFI that fails to correspond with conditions of ICSID AF Rules and Rules on Transparency.

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[42] Record p.16
[43] Benjamin Miller and others "Guide for Potential Amici in International Investment Arbitration"; ICSID Case No.ARB/03/17
[44] *supra., §72*

### 2. CBFI's submission is not in pursuit of public interest.

76. The Arbitral Tribunal should, before accepting *amicus curiae,* consider among other things the presence of public interest in arbitration and absence of prejudice to the disputing parties in receiving *amicus submission*[45]. In the case *Suez and others v. Argentine Republic* also it was supported:

77. "Courts have traditionally accepted the intervention of amicus curiae in ostensibly private litigation because those cases have involved issues of public interest and because decisions in those cases have the potential, directly or indirectly, to affect persons beyond those immediately involved as parties in the case"[46].

78. Besides, to assist the Tribnual must provide a perspective that differs from disputing parties, as it was obliged by Art.41(3) of ICSID AF Rules. For the reason that CBFI consists of members pursuing claims against Mekar, CBFI's amicus submission fails to provide a new perspective that differs from the disputing parties.

79. Thus, *amicus* submission by CBFI is inadmissible in this dispute and should be rejected by the Arbitral Tribunal.

## III. RESPONDENT respectfully submits that there has been no violation of Art.9.9 of CEPTA.

80. CLAIMANT desperately contends that RESPONDENT has violated the basic international principles implicated by the treaty between both parties, thereby showing a discriminatory attitude towards CLAIMANT[47]. However, RESPONDENT has not disregarded any of the standards referred to in CEPTA Art.9.9 **(A)**. Further, RESPONDENT did not breach requirements of due process and transparency in judicial and administrative proceedings **(B)**. Thereby, the lawful nature of the RESPONDENT's actions was respected.

### A. RESPONDENT did not breach the standards set out in the Art.9.9 of CEPTA.

81. None of the standards set forth in Art.9.9 of the parties' agreement was violated by RESPONDENT, as CLAIMANT falsely presented the picture to the Arbitral Tribunal. The basic principle of fair and equitable treatment was respected, namely, the Mekari courts did not deny justice to CLAIMANT. That is, the reasons cited by the latter in groundlessly accusing

[45] ICSID Case No. UNCT/02/1
[46] Guide for Potential Amici in International Investment Arbitration. o
[47] Record pp. 2-5

RESPONDENT of violating the investor's rights are invalid. Likewise, not a single investigation has discriminated against CLAIMANT.

82. CLAIMANT relentlessly tries to convince[48] the Arbitral Tribunal that RESPONDENT, through the actions and omissions of its state agencies, is intentionally violating the investment rights of the former. However, CLAIMANT, whether deliberately or not, neglects the fact that the State of Mekar is obliged to make decisions reasonably and in the interest of all its people, without violating anyone's rights.

83. It is important to note that the most serious shortcoming of the international investment law system is its imbalance: it protects foreign investors, while the scope of rights of nationals, investors from host states and those states themselves are very limited[49].

84. Despite this imbalance, the state authorities in the case at hand acted within their competence without violating the international rights of the investor **(1.)**. Among other things, the reasons cited by CLAIMANT for loudly asserting injustice against it are invalid. Thus, RESPONDENT, represented by the Mekari authorities, has detailed and reasonably justified that CLAIMANT's grievances are groundless **(2.)**. Lastly, the Arbitral Tribunal should also consider that the standard of denial of justice is extremely high for this case **(3.)**.

### 1. RESPONDENT regulated the economic situation in the country within its jurisdiction.

85. Mekar in no way violated the rights of the foreign investor, not forgetting the interests of its own prosperity and not sacrificing the welfare of the nation. CLAIMANT is desperately striving to put RESPONDENT in a bad light before the Arbitral Tribunal, pointing to the illegality of the CCM investigation[50] **(a.)** and to the ruthlessly discriminatory attitude of the public authorities towards the Presidential Order and the subsidies it grants[51] **(b.)**.

#### *a. CCM conducted investigations within the scope of its authority.*

86. For several years from the day Caeli entered the Mekari market, state authorities have not questioned Caeli's activities. Later, however, the CCM's attention was drawn to the company's meteoric expansion. The commission publicly and transparently stated[52] that it intended to

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[48] *ibid.*
[49] Justice for all? Protecting the public interest in investment treaties, pp. 2798–2799
[50] Record p.3, §§ 14-16
[51] *ibid.*
[52] Record p.34, §36

investigate the case. There was some consideration of predatory pricing strategies due to CLAIMANT having foreign subsidies through the Horizon 2020 program[53]. Caeli's share at the time was about half of the entire Mekari market, unfairly crowding out foreign and local small businesses. As such, despite CLAIMANT's contrary assertions, the airline was in fact doing everything it could to impede competition in the domestic market. CCM's next open and obvious move was a legal interim measure to cap airfares so that Caeli would not lower them below a set bar[54]. The purpose was justified – to prevent over-competitive actions aimed at market capture by abuse of dominant position, predatory pricing, and unfair subsidization.

87. Caeli audaciously and frivolously attempted to capture the domestic Mekari market by eliminating competitors, lowering ticket prices to appeal the most, arranging devious campaigns as a marketing ploy to gain greater trust from customers, and knowingly abusing its dominant market position to the fullest extent. An interesting moment comes when Caeli does not profit financially from its actions at all. Having suspected a predatory plan, CCM therefore legitimately and legally conducts an investigation, for which it is perfectly authorized even before this case occurred.

88. At the end of 2016, immediately after the fines were imposed, Caeli Airways launched local flights. Possessing privileges at the Phenac International airport, Caeli Airways used an attractive underpricing[55], which was a rather clever move to squeeze competitors out of these routes. Based on these facts, a second investigation consistently arises, once again loudly labeled unlawful by CLAIMANT.

89. This investment dispute, like the prevailing majority of them[56], directly concerns the exercise of state power and affects the public interest. That is, it should be taken into account that the state in any case expresses the interests of society as a whole, including business entities wishing to become its partners. Accordingly, Mekar, reasonably pursuing public interests (including the interests of investors), has the right to regulate and control foreign investment within its national jurisdiction[57], thereby regulating the economic situation in the country.

90. Under the Monopoly and Restrictive Trade Practice Act, CCM stands within its competence in initiating investigations against Caeli's anticompetitive conduct[58] on perfectly legitimate grounds:

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[53] *id.*
[54] *id.*
[55] *id.*
[56] Justice for all? Protecting the public interest in investment treaties, p.2804
[57] Charter of Economic Rights and Duties of States, Chapter II, Art.2(2)a)
[58] Monopoly and Restrictive Trade Practice Act, Chapter III(1)

gaining more than half of Mekar's market share and a high probability of forcing competitors out of the market[59]. This legislative act was created in 2009 to attract investors, as the establishment of a body independent of the state becomes an important step to earn their trust[60].

91. Therefore, CCM acted within its jurisdiction, not only under the general theory of state obligations, but also because it was empowered by RESPONDENT long before the case at hand arose. Consequently, Mekar's actions were directed toward the public interest, in no way neglecting CLAIMANT's private rights as a foreign investor.

*b. As an authorized representative, the government of Mekar has implemented measures that do not violate CLAIMANT's rights in any way.*

92. In its appeal CLAIMANT draws the Arbitral Tribunal's close attention to the denial of privileges by the government, loudly asserting that the denial was unreasonable[61]. Despite Caeli's highly competitive position in the domestic market and the generous subsidies welcomed from CLAIMANT[62], Caeli insisted on receiving additional subsidies from the Mekar. In other words, with its enormous amount of privileges, Caeli violated the Mekar antitrust laws and continued to demand benefits, pushing for the destruction of healthy competition in the marketplace.

93. Meanwhile, CLAIMANT omitted to mention that Caeli was not the only airline that was denied subsidies. On the same grounds, one of the state-owned airlines, Larry Air, did not receive subsidies[63]. Accordingly, the granting of unique benefits must be reasonable and consistent with financial realities. That's exactly what the Mekar government did.

94. Also, since late 2016, the local currency of Mekar began to fall at an immediate rate. Mekar tried to cope with the crisis during the year, and only in early 2018 decided to take extreme measures to artificially restore the economy. The decision to offer services exclusively in MON did not come to CLAIMANT's liking. However, a free fall of the national currency would have led to the collapse of the country including all its entrepreneurs. The state has a duty to act for the security of all the

[59] *id.*
[60] Record p.30, §19
[61] Record p.4, §18
[62] Record p.36, §45
[63] *id.*

people[64]. Therefore, the Arbitral Tribunal should consider that mitigating its macroeconomic situation was the direct responsibility of Mekar.

95. World experience and practice show that the need for state regulation of economic relations exists[65]. In other words, Mekar, represented by the relevant bodies, is included to a greater or lesser extent in almost all spheres of economic activity and, if necessary, adjusts it in order to protect the rights and legitimate interests of consumers and entrepreneurs, as well as to protect public interests.

96. Thus, it is proved that complete abandonment of state regulation in the sphere of economy is objectively impossible, since the state acts primarily in the public interest. In so doing, the Mekar government acted reasonably in the interest of the entire nation and could not violate CLAIMANT's rights. RESPONDENT was concerned with the economic stability of the country, attractive to the people as well as to investors.

97. Concluding the foregoing facts, however, it is apparent that CLAIMANT cannot proceed under its poorly reasoned scheme since the Mekari authorities acted solely within the scope of their competence.

### 2. CLAIMANT's reasons for denial of justice are invalid.

98. CLAIMANT cites several grounds for RESPONDENT's violation of the international standard of denial of justice. In its application, CLAIMANT alleged deliberate judicial delay by the local Mekari courts due to insufficient state funding[66]. Nevertheless, RESPONDENT has intelligibly pointed to objective and legitimate reasons for the slight delay in the litigation **(a.)**. In addition, CLAIMANT has not suffered irreparable harm as a result of the court's refusal of application for interim injunction **(b.)**. Enforcement of the award that was set aside by the seat of arbitration does not constitute a denial of justice by any means, as CLAIMANT erroneously believes **(c.)**.

*a. RESPONDENT expressly cited objective and legitimate reasons for the slight delay in the proceedings.*

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[64] Articles on State Responsibility
[65] Making investment arbitration work for all, p.2851; Towards a public interest-based justification of international investment law, p.33
[66] Record p.4, §20

99. According to CLAIMANT's vociferous assertions, RESPONDENT unreasonably and even deliberately delayed the trial date[67]. However, the latter had valid reasons, to which RESPONDENT pointed out directly and clearly to CLAIMANT.

100. For half a century Mekar has grown exponentially in population. The number of people grew by 80% in a small period[68], which inevitably resulted in significant increase of judicial precedents. Nonetheless, the judicial system could not develop in parallel with the growth of the population. Statistics indicate that CLAIMANT was not the only one whose case was delayed by coincidence. The average time from the start of the case to a final decision in the Mekari courts climbed from 9 to 22 months over the same period. Also worth noting is that commercial cases have taken longer, amounting to more than 2 years, since Mekar gives preference to criminal cases in order to avoid long detention of the accused.

101. Moreover, already overburdened, as is often natural in times of significant population growth and increasing cases, the Mekari courts provided CLAIMANT with everything it needed to make the case in court. There was even a reduction in the average time required for rendering decisions.

102. Accordingly, the reasons cited by RESPONDENT's Mekar courts are valid and clearly justifiable and do not constitute undue delay. Neither such a delay should be accorded as a form of discrimination.

*b. CLAIMANT has not suffered irreparable harm as a result of the court's refusal of application for interim injunction.*

103. After an initial investigation by the competent CCM authority, temporary measures were imposed in the form of caps on Caeli airfares in order to avoid market capture[69], which the airways company never protested. Subsequently, CLAIMANT requested a revocation of the commission's interim injunction. However, the court refused to grant it. The Arbitral Tribunal should consider this rejection as a measure of judicial protection aimed at the continuation of the price caps on the tickets.

104. Caeli was further denied a request by the CCM to revoke the price caps[70]. First, the provisional measures could not be waived until the end of the investigation. Second, the calculations of Caeli's

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[67] *ibid.*
[68] Record p.29, §13
[69] *supra,* §86
[70] Record p.36, §43

representatives, who suddenly consider themselves experts in estimating inflation level, are inadmissible since CCM has no authority to interfere with it. Thus, RESPONDENT has a consistent rationale for denying the appeal. Besides, Mekar cancelled the airfare caps as soon as Caeli's market share dropped below 40%[71].

105. CLAIMANT frantically casts all its strength in blowing dust in the eyes of the Arbitral Tribunal and wants it to accept damage as irreparable. It is crystal clear that the damage, even if present, was caused by Caeli through its own fault. In this way, the only escape from the proverbial financial decline seemed to CLAIMANT to be the sale of its own share. Even at this point, nevertheless, the investor still had a significant market share in Mekar[72], which would have allowed it to quickly recover its position after the recession. As a result, Caeli, an airway company, was driven to bankruptcy and abandoned later by its major investor.

106. Not to be forgotten, there was frequent pressure from CLAIMANT's desperate government officials to also force RESPONDENT to treat CLAIMANT favorably[73], pathetically attempting to turn a blind eye to the destruction and complete takeover of the market and competition. RESPONDENT was reluctant to acquiesce to government machinations and defied threats of detention of funds for a major project by Bonooru. Was this retaliation for refusing to yield to the pathetic demands of CLAIMANT's country? One thing remains certain, however, that a reasonable refusal did not result in an irreparable loss for the CLAIMANT.

107. As such, the denial of the application for a temporary injunction is legitimate and reasonable. Accordingly, even if CLAIMANT suffered damages, it was only through its own negligence. Considering also Caeli's acquired financial condition, the damage is definitely not irreparable.

*c. Enforcement of the award that was set aside by the seat of arbitration does not constitute a denial of justice by any means, as CLAIMANT erroneously believes.*

108. The Mekari courts enforced the decision, which was annulled by the seat of arbitration. At first sight, it may seem that some liberal practices of courts and legislators should not be taken into account by other countries when determining the possibility of recognition and enforcement of an arbitral award annulled at the place of rendering. However, this is not entirely true, since the decisions of the French and Luxembourg state courts, among other things, confirm the fact that

[71] Record p.38, §55
[72] Record p.8, §18
[73] Record pp.54-55

the setting aside of an arbitral award at the place of rendering does not entail its complete annulment[74]. Accordingly, although an international commercial arbitration award is set aside by state courts, it does not cease to exist, and the question of its further recognition and enforcement in other states must be decided on the basis of the law of the individual country.

109. Finally, it may be concluded that courts have the exclusive right to recognize and enforce an arbitral award overturned by the seat of arbitration[75]. Consequently, RESPONDENT, in exercising this discretion, did not violate the standard of denial of justice.

#### 3. Even if there was a denial of justice, this standard is much higher to be applied to the case at hand.

110. CLAIMANT, taking a weak accusatory position, cites the principle of denial of justice. Nevertheless, RESPONDENT insists that the standard for establishing a denial of justice is extremely high.

111. The inadmissibility of denial of justice is stated in the tribunal's decision in *Mondev v. United States*, which notes that this principle is the standard of treatment of aliens with respect to decisions of host state courts and tribunals.

112. One British barrister argues[76] that to claim a denial of justice one must present such an international offense as to amount to outrage, bad faith, wilful neglect of duty, or insufficient government action so inconsistent with international standards that every reasonable and impartial person would have no difficulty recognizing its insufficiency.

113. For the reasons stated above, the standard of FET, namely the denial of justice, is extremely high and inapplicable in the case at hand.

### B. RESPONDENT did not breach requirements of due process and transparency in judicial and administrative proceedings under Art.9.9 of CEPTA.

114. Under international law, the procedural due process and transparency are considered as one of the fundamental principles of FET standard, which impose on host states the obligations to grant foreign investors the right of a fair trial and to prevent the unlawfulness of administrative and judicial acts[77].

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[74] Unravelling the laws of the arbitration process
[75] Respecting Awards Annulled at the Seat of Arbitration
[76] The Rule of Law in International Affairs
[77] Principles of International Investment Law, pp.142-143

115. CLAIMANT is mistakenly accusing RESPONDENT of violation of FET by committing a fundamental breach of procedural due process and transparency. However, RESPONDENT asserts that its authorities did not infringe the fundamental requirements of due process **(1)** and acted in accordance with the basic elements of transparency in judicial and administrative proceedings **(2)**.

### 1. The acts of RESPONDENT do not constitute the breach, let alone fundamental breach, of procedural due process.

116. Number of scholars recognize that there are certain general principles established consensually by law of many "civilized nations" that serve as the "fundamentals of substantive justice and procedural fairness" and mostly applied by the international investment and commercial arbitration panels. They form the basic notion of international due process requirements and are addressed when a transnational case comes to a municipal court[78].

117. In both national and international proceedings, the general standard of due process is deemed as "justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world"[79].

118. In the US Supreme Court's case *Hilton v. Guyot* the judge stated that every foreign judgment or award, in order to have the legal effect to be enforced, "must have been rendered at a court having jurisdiction of the cause, and upon regular proceedings, and due notice"[80]. Furthermore, ALI/UNIDROIT Principles of Transnational Civil Procedure present an even clearer example of many of the core components of international due process: independence and impartiality of judges, due notice and right to be heard[81].

119. In the case at hand, CLAIMANT wrongfully argues that the sole arbitrator Mr. Rett Eichel Cavannaugh at Arbitration Institute of SCC did not meet the impartiality and independence requirement due to his previous acts as arbitration counsel for various RESPONDENT's entities, and allegedly received a bribe from representatives of Mekar Airservices for rendering a favourable decision. As a justification for such serious accusations, CLAIMANT presented merely the audio

[78] General Principles of Law, International Due Process, and the Modern Role of Private International Law, pp.412-413
[79] The Basis of Protection to Citizens Residing Abroad
[80] Hilton v. Guyot, (1895)
[81] ALI/UNIDROIT Principles

recording of a conversation between Mr. Cavannaugh and an unknown representative of Mekar Airservices which was produced by CILS[82].

120. It is worth to note the statement of the Mekari Ministry of Home Affairs about the recognition of the CILS as "an entity funded by foreign donations to interfere in Mekar's domestic affairs"[83]. Taking into account the suspicious origin of the CILS, RESPONDENT strongly denies the reliability of its allegation, since the results of the authenticity of the recording might have been falsified and mispresented. In such cases, most tribunals apply a higher standard of proof of corruption. For instance, in *EDF v. Romania* case the Arbitral Tribunal determined that solicitation of a bribe, as well as its receipt, violates the FET standard as long as the allegation is substantiated by clear and convincing evidence[84].

121. Next main principles of due process which were not neglected by RESPONDENT and were duly applied is notice of the proceedings and the right to be heard. First element imposes the obligation to inform a defendant of the procedure for response and afford them an opportunity to present their objections[85].

122. In the present case, RESPONDENT confirms that all necessary procedures of the notice requirement were properly made and thus there are no serious infringements on that matter. Likewise, the second element "right to be heard", which requires the judges to treat parties equally during the procedure and to provide them with the equal opportunity to present their case and to confront the opposing party's witnesses and evidence[86], was performed by CLAIMANT in a proper manner.

123. CLAIMANT might argue that it was deprived of the right to be heard when justice VanDuzer on 15 June 2019 dismissed the CLAIMANT's case on the merits regarding the request for temporary injunction on the airfare caps by way of summary judgment and, according to Executive Order 5-2014, passed by Mekar's President, CLAIMANT could not appeal this decision[87].

124. However, first of all, this line of argument cannot be upheld when considering the right of judges to dismiss on the merits of a case and to rule a summary judgment, after some reasonable time for

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[82] Record p.39, §60
[83] Record p.66, §13
[84] EDF v. Romania (2009), §221
[85] Richards v. Jefferson County (1996)
[86] Due process as minimal procedural safeguard in international commercial arbitration, p.10
[87] Record p.38, §54

discovery and upon motion, against a party who is not able to present sufficient evidence and sources to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at proceedings[88].

125. Secondly, ruling the Executive Order 5-2014 by RESPONDENT should be considered as an example of sovereign legislative power of a State to enact, modify or cancel law on its territory[89]. Art.9.8 of CEPTA determines that law regulation, including its modification, which may have a negative effect on investment, "*does not amount to a breach of an obligation under this Section*"[90].

### 2. CLAIMANT did not face the breach of transparency obligation under CEPTA.

126. CLAIMANT contends that the award of the arbitrator of SCC, Mr. Cavanaugh, relating to the CCM-imposed fines, hearings in respect of which were held in May 2020, was not released in written form to public[91] and that allegedly indicates the fundamental breach of transparency in judicial proceedings. However, a thorough analysis of the said principle shows that there are some conflicting approaches relating to the openness of various components of judicial proceedings.

127. First of all, transparency is not a full and absolute obligation in decision-making process. Many scholars state that total transparency of decisions by making them accessible to the public may deprive the parties' right to confidentiality and privacy of the information concerning their case. In general, court documents and decisions should be fully available for people but bearing in mind the interest of a party[92].

128. Secondly, in order to avoid the lack of transparency as an important component in decision making and to maintain the duty of judges to provide fair treatment of parties the principle of openness admits to make decisions available at least to people with a legal interest or making a responsible inquiry by imposing some requirements for accessing the decision they are interested in[93]. This approach is reflected in the case at hand when there were "*multiple publications emerged in paywall-secured arbitration reports that had obtained access to the award*" which shows that the award in consideration was available for acquiring with a legal interest.

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[88] Celotex Corp. v. Catrett (1986)
[89] Parkerings-Companiet AS v. Lithuania (2007), §332
[90] Record p.76
[91] Record p.40, §64
[92] ALI/UNIDROIT Principles, P-20A
[93] ALI/UNIDROIT Principles, P-20A.

129. Thus, RESPONDENT claims that though decision of May 2020 was not released in written form, there was no breach of transparency principle in decision-making process as it was still available for interested people.

130. Hence, CLAIMANT's inquiry on violation of the principle of fair and equitable treatment is unfounded, since RESPONDENT has not disregarded the rights of the investor. First, there was no violation of any standard mentioned in Art.9.9 of CEPTA concluded by the Parties. Rather, Caeli was miserably striving to capture the domestic Mekari market with every possible trick and illegal ploy. Second, RESPONDENT did not violate the due process and transparency requirements of judicial and administrative proceedings by any means, as CLAIMANT erroneously alleges. In fact, RESPONDENT not only defended its own state interests, but thereby attempted to protect the rights of foreign investors to the maximum extent possible. In so holding, the Arbitral Tribunal should find that CLAIMANT's spurious allegations and contrived evidence are void and insufficient to allege a breach of Art.9.9.

## IV. <u>There is no compensation payable by the RESPONDENT to the CLAIMANT.</u>

131. CLAIMANT is attempting to abuse privileges granted to investors by seeking unreasonable compensations for its risks undertaken as part of entrepreneurial activities as would have been taken by any business entity. The true reason behind the initiation of this arbitration is rooted in CLAIMANT's desire to have its cake and eat it too.

**132.** CLAIMANT should be prevented from raising its baseless claims on compensation, as its business was not damaged or injured by the RESPONDENT in any way. In view of the foregoing, RESPONDENT insists on rejecting the request of CLAIMANT to grant fair market value compensation, as there was no breach of the CEPTA in the first place **(A)**. However, even if the Tribunal rules in favor of compensation, it must not exceed a market value standard **(B)**. Finally, the MFN principle implied under the CEPTA does not allow for derogation from market value compensation **(C)**.

### A. The CLAIMANT's request on the compensation should be rejected.

133. In accordance with Are.31(1) of the Draft Articles, the compensation requirement is triggered in case there is an "injury" and a causal relationship between this injury and "an internationally wrongful act". However, in the case at hand CLAIMANT, although bearing a burden of proving the breach and the justification for compensation, failed to justify granting a compensation for its business risk. Particularly, CLAIMANT cannot be entitled for any type of compensation, as its

shares in the Caeli Airways has been purchased **(1)** and RESPONDENT cannot be imputable to for risks and market fluctuations, which were faced by CLAIMANT **(2)**.

### 1. CLAIMANT is not entitled for any compensation, as its shares have been purchased.

134. When referring to compensation, the regard should be given to the fundamental problem of "value", which can be measured only within a particular given legal framework[94]. However, the CLAIMANT sold its stake at Caeli Airways for USD 400 million, in other words, as of 8 October 2020 (date of sale), the CLAIMANT's investments were valued at the above price[95] and the CLAIMANT received a purchase price from the RESPONDENT. Therefore, in view of the economic crisis took place in Mekar, its investment could not have been estimated at an increased value, as economic conditions forced the CLAIMANT to sell its business, i.e. it was not a wrongful act of the RESPONDENT, thereby excluding the RESPONDENT's liability for the pending acquisition of the CLAIMANT's stake at Caeli Airways.

135. Thus, the CLAIMANT is not entitled to any form of compensation.

### 2. In any case, RESPONDENT does not bear the responsibility for CLAIMANT's losses.

136. CLAIMANT cannot blame RESPONDENT for the losses which were the direct result of its conduct of business. When assessing the damages a tribunal is ought to take into account the extent to which a claimant's own conduct contributed to its loss if that conduct was unreasonable, imprudent or unlawful[96]. In the case at hand, one of the main reasons lying behind CLAIMANT winning the tender was the fact that it had the most financially attractive business model for Caeli Airways' future development. CLAIMANT was heralded to get Caeli off the ground. It was supposed that CLAIMANT's imminent success and participation in the Moon Alliance would attract more passengers from Bonooru and enable the airline to offer improved and low-cost services[97].

137. It is undeniably true that Caeli Airways, after its acquisition by CLAIMANT, was able to generate a significant cash flow throughout the period between the years 2011 and 2013[98]. Already in 2014, 35% of Mekar citizens were enjoying Caeli services which brought massive profits to

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[94] Marboe, p.729
[95] Record p.40, §63
[96] GAR Guide, p.90
[97] Record p.30, §30
[98] Record p.32, §§24-25

CLAIMANT[99]. However, what cautioned RESPONDENT was the exorbitant approach taken by CLAIMANT. As soon as it won the tender, CLAIMANT already started announcing tenders for purchase and lease of aircraft for Caeli[100]. As a result, 23 new Boeing 737 aircrafts were added to its fleet[101].

138. Moreover, Caeli expanded routes for cross-continental travel to Mekar and added 20 new destinations in 2012[102]. RESPONDENT repeatedly warned CLAIMANT against "extravagant approach". When the economic downturn hit the Mekar, CLAIMANT indeed got into a dire financial situation. In such circumstances, it was unreasonable to expect RESPONDENT to bail it out by granting subsidie or exclusively permitting it to conduct its business in USD[103].

139. CLAIMANT cannot hold RESPONDENT accountable for its risky business strategies and choices. Similarly, pursuant to *MTD v Chile case,* the BITs are not an insurance against business risk and the Tribunal considers that the Claimants should bear the consequences of their own actions as experienced businessmen[104].

140. Therefore, losses incurred as result of CLAIMANT's own ill-strategised business plan ought not to fall on RESPONDENT's shoulders.

### B. Even if the Tribunal rules in favor of compensation, it must not exceed a market value standard.

141. In this regard, particular emphasis has to be made on the "but-for premise", when the Tribunal is to find an answer to a hypothetical evaluation of the breach and the actual situation with the breach[105]. RESPONDENT submits that CLAIMANT in no way can be entitled to compensation under the fair market value standard, as there is no any legal basis for such assertions. In particular, the best possible scenario of compensation is a market value standard by virtue of the CEPTA **(1)**. Additionally, severely detrimental economic conditions in Mekar point to the application of the market value standard **(2)**.

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[99] Record p.34, §16
[100] Record p.32, §26
[101] Record p.32, §27
[102] Record p.33, §29
[103] *supra,* §92
[104] MTD v Chile, Award, 25 May 2004, §§103–4
[105] GAR Guide, p.114

### 1. Market value standard should be applied by virtue of the CEPTA.

142. Investment treaties provide the rights and obligations of the parties as well as the standards that should be applied when according a treatment to investors. In other words, BIT is a *lex specialis* between parties designed to create a mutual regime of investment protection.[106] The *lex specialis derogat legi generali* is a doctrine relating to interpretation and conflict resolution in international law. According to it, when several norms might be applied to the same subject matter, the priority is to be given to a more specific one.

143. The principle might be applied when there is a conflict between:

- provisions within a single treaty;
- between a treaty and a non-treaty standard;
- between two non-treaty standards[107].

144. In the case at hand, CLAIMANT alleges that FMV standard should be applied when calculating the due compensation. However, the Art.9.21 (a) of CEPTA clearly stipulates that the monetary damages suffered by CLAIMANT shall be awarded at a market value. RESPONDENT submits that market value standard should be applied since CEPTA being a *lex specialis* overrides the non-treaty standards **(a)** and better reflects the intent of the parties **(b)**.

*a. The CEPTA prevails over non-treaty standards.*

145. Each treaty might be regarded as a *lex specialis* because the obligations contained within it can only be applied to certain parties. Similarly, a treaty might be considered as a *lex specialis* regime, as between the States that are party to them. The priority of *lex specialis* over general law may be explained by the fact that it takes into consideration the particular features of the context in which it is to be applied. The *lex specialis* should be applied since it generates a more equitable result.

146. With the suffering economy, RESPONDENT has welcomed foreign investment since 1994. However, saving its right to regulate its own internal affairs in the process was vital to RESPONDENT. With this view, RESPONDENT entered into the CEPTA in 2014. The Art.9.21 (a) expressly provides for an appropriate standard to be applied which is, in our case, market value

[106] Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, p.3
[107] Beagle Channel Arbitration *(Argentina v. Chile*) p.141, § §36, 38 and 39.

standard. The article stipulates that monetary damages are to be paid for in compliance with the market value, except as otherwise contained in Art.9.12 of CEPTA. Since expropriation did not occur in the case at hand, the damages ought to be paid at a market value.

147. Only the provisions of the CEPTA might take into account all the particular circumstances of the case at hand and have the most specific approach to the subject matter. For instance, according to the *Micula v. Romania* tribunal, the BIT prevailed over the EU law as *lex specialis*, because it was the treaty with a more precise delimited scope of application[108].

148. Moreover, it was put forward that parties shall apply general principles of international law only to issues which the treaty does not itself expressly cover[109]. Similarly, the AAPL tribunal found that both parties had agreed to apply the Sri Lanka/United Kingdom bilateral investment treaty as *lex specialis* and of the international or domestic legal relevant rules referred to "as a supplementary source" by virtue of the provisions of the treaty itself. In this case, the bilateral investment treaty was regarded as the primary source of applicable law by each of the tribunals.

149. Considering that the CEPTA clearly provides for the market value standard, it is not necessary to refer to non-treaty standards.

*b. The market value standard was the intent of the Parties by virtue of CEPTA.*

150. The Contracting Parties' intent constitutes a valid tool, especially when it comes to economic bilateral arrangements and party-driven commitments[110]. Under Art.11 of the VCLT, the consent of the parties to be bound by a treaty might be expressed through signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed[111].

151. The Federal Republic of Mekar and The Commonwealth of Bonooru signed the CEPTA in April 2014. It entered into force on October 15, 2014[112]. It appears from CEPTA that it was signed by the Minister of International Trade of the Mekar and Foreign Minister of Bonooru.

152. In accordance with Art.12 of the VCLT, the signature of parties' representatives expresses the intent of the parties to be bound by a treaty if the treaty provides that signature shall have such

[108] Micula v. Romania, p.88
[109] France v. United Mexican States, p.422
[110] Dixon and McCorquodale, 2003
[111] VCLT, p.331
[112] Record p.33, §32

effect, or it is otherwise established that the negotiating States were agreed that signature should have that effect. Since the last page of CEPTA contains the signatures of the States' representatives, it is clear that the parties' intent was to be bound by a treaty and its provisions. In other words, by signing the CEPTA they expressed their intention to be bound by all the provisions contained in it and, accordingly, by the market value standard, which they agreed to establish as an appropriate standard of compensation.

### 2. In any case, in mitigating the damages Tribunal should also take into account RESPONDENT's detrimental economic situation.

153. In accordance with Art.36(2) of the Draft Articles on the Responsibility of States for Internationally Wrongful acts, the compensation shall cover any financially assessable damage including loss of profits insofar as it is established[113]. The primary logic behind this provision is to cope with economic losses, which are actually caused[114]. However, it would be extremely unreasonable to estimate the losses, which the CLAIMANT ostensibly suffered in abstract from the economic juncture taking place in Mekar, because local economic conditions and government policies are deemed as more important than BITs in influencing the investment decision[115]. It is undisputed that the caps maintained by the CCM during adverse and fluctuating currency crisis and subsequent economic depletion of Mekar[116], which urged the Mekari Government to "dramatically" alter its economic policy[117].

154. When estimating market value of compensation, the Tribunal should assess the price information of the market, i.e. whether it is in high demand or inactive[118]. Therefore, it is paramount to define the valuation date, as due to inevitable market changes the estimated value may be incorrect and inappropriate at another time. The valuation time will reflect the time state and circumstances as of the valuation date[119], instead of hypothetical economic conditions when any party may claim its best possible profit.

155. In the *CMS v. Argentina* case, the Tribunal emphasized that the gravity of economic difficulties need to be measured when granting the compensation. Particularly, the Tribunal gave a due regard

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[113] Draft Articles, Art.36(2)
[114] Shaw, p.972
[115] Salacuse/Sullivan, p.96
[116] Record p.4, §16
[117] *Id*.
[118] IVS Definitions, p.10
[119] IVS Definitions, p.13

to the expected revenues when calculating the expected revenues, as this reflected an impact of the economic decline that took place in Argentina[120].

156. FMV standard sought by the CLAIMANT in principle omits to take into account special economic circumstances, which in fact makes the difference. Prominent professors in ISDS stressed out an important hypothetical example, when one might need to estimate a market value of the company in late September 2008 (following the global financial crisis), which led to deterioration of the stock market, closing of interbank lending, the increase in the probability of default of banks, and in a dramatic flight for liquidity and safety. Additionally, this severe crisis obviously led to further declines in companies' valuations, thus making application of FMV standard unjustified during these times, as the sellers were driven by either extreme liquidity or panic, while buyers were benefiting from "bottom feeding"[121].

157. In view of the foregoing, the Tribunal should take into consideration that the detrimental economic conditions favor application of the market value test.

### C. The MFN clause contained in CEPTA does not allow CLAIMANT to derogate from the market value standard.

158. The MFN treatment, being a comparative standard, has no proper analog in customary international law. Under MFN provision, foreign investor or its investment is compared to other foreign investors or their investments. In other words, the MFN principle applies to the relationship between foreigners and a host State, it is also applied in relation to the treatment accorded by the host State under its various treaties with every other State in the world[122].

159. In the case at hand, CLAIMANT believes that the FMV should be applied by virtue of MFN clause contained in CEPTA[123]. It alleges that RESPONDENT should compensate at a FMV in accordance with MFN clause contained in Art.9.7 of the CEPTA since Article 13 of 2006 Arrakis – Mekar Bit envisages that compensation equivalent to a fair market value of the investment shall be paid in case the measures inconsistent with the provisions therein were taken by the host State.

160. However, CLAIMANT obviously misinterpreted the CEPTA since the latter excludes the possibility of invoking MFN clause with respect to substantive obligations contained in the third

[120] CMS v. Argentina, p.130, §446
[121] Woss et. al. 260, §6.40
[122] Principles of International Investment Law Second Edition Rudolf Dolzer and Christoph Schreuer
[123] Record p.5, §30

BITs **(1)**. Moreover, RESPONDENT has always particularly promoted the "market value" standard in all its BITs **(2)**.

### 1. The CEPTA excludes the possibility of invoking MFN clause with respect to substantive obligations contained in the third BITs.

161. In the case at hand, CLAIMANT, in view of Art.13 of 2006 Arrakis – Mekar Bit, erroneously alleges that RESPONDENT violated the MFN clause contained in the CEPTA Art.9.7 by according to CLAIMANT less favorable treatment than that it accords investors from Arrakis[124]. However, what CLAIMANT fails to mention is that the MFN clause contained in CEPTA has the restrictive formulations that clarify its operation. In other words, the clause specifies the nature of treatment. Art.9.7(2) excludes the possibility of invoking MFN clause in relation to substantive obligations contained in the third BITs.

162. Art.9.7(2) of the CEPTA stipulates: *"Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations"*. In regard to treatment, it generally takes shapes of "measures", that is, State laws, practice, and any types of regulatory conduct[125]. Accordingly, unless the host State adopts or maintains the measures, the MFN standard might not be invoked by CLAIMANT with respect to the substantive obligations or guarantees contained in the third BITs.

163. It is clear from the wording of Art.9.7(2) that substantive obligations of RESPONDENT, envisaged by other international investment treaties and other trade agreements that it is party to, do not in themselves constitute treatment, and, thus, cannot give rise to an invocance of the MFN clause.

### 2. RESPONDENT promotes market value in its Model BITs.

164. Under Art.9.7(2), unless the host State adopts or maintains the measures, the MFN standard might not be invoked by CLAIMANT with respect to the substantive obligations or guarantees contained in the third treaties. In the case at hand, no measures were taken by the Mekari government that would even come close to adopting or promoting the measures pursuant to Art.13 of 2006 Arrakis – Mekar Bit.

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[124] Record p.84, Art.14.
[125] UNCTAD Series on Issues in International Investment Agreements II, p.15

165. Moreover, when claimant seeks to broaden the guarantees related to compensation by invoking the MFN clause, the tribunal should take into account the negotiation history of the third BIT concluded between the host State and the relevant state[126]. In the present case, Mekar's Model BIT leading up to the negotiations of this treaty referred to compensation at market value, which means that the true intent of RESPONDENT was to promote the very market value standard not FMV standard[127].

166. Therefore, CLAIMANT cannot invoke the MFN standard in the context of defining the appropriate standard of compensation.

[126] ICSID Case No. ARB/03/04.
[127] Record p.87, §15

## PRAYER FOR RELIEF

1. In light of the above submissions, RESPONDENT respectfully requests the unchallenged arbitrators to find that:

   (i) Decline to exercise jurisdiction due to the CLAIMANT's status as a SOE and its claims being inadmissible

   (ii) To accept *amicus curiae* submission by External Advisors and reject submission by CBFI

2. Also, RESPONDENT faithfully requests the Tribunal to find and declare that:

   (iii) RESPONDENT duly performed its obligations under Art. 9.9 of CEPTA;

   (iv) CLAIMANT is not entitled to any compensation since there was no breach of Art.9.9 of the CEPTA; However, even if the Tribunal rules in favor of compensation, it must not exceed a market value compensation standard.

Submitted on 23 September 2021 by TEAM REDDY

On behalf of RESPONDENT

The Federal Republic of Mekar.