TEAM BARWICK

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

VEMMA HOLDINGS INC.

Claimant

v.

THE FEDERAL REPUBLIC OF MEKAR

Respondent

MEMORIAL FOR RESPONDENT

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ICSID-AF	International Centre for Settlement of Investment Disputes Additional Facility Rules
MRTPA	Monopoly and Restrictive Trade Practice Act
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LIST OF ABBREVIATIONS	
Caeli	Caeli Airways
CBFI	Consortium of Bonooru Foreign Investors
CCM	Competitive Commission of Mekar
CEPTA	Comprehensive Economic Partnership and Trade Agreement
BIT	Bilateral Investor Treaty
FET	Fair and Equitable Standard
Hawthorne	Hawthorne Group
Mekar	The Federal Republic of Mekar
MRTPA	Monopoly and Restrictive Trade Practice Act, as Amended in 2009
SA	Shareholder's Agreement
SACS	Supreme Arbitrazh Court of Sinnograd
UN	United Nations

SUMMARY OF FACTS

PARTIES TO THE DISPUTE

1. The Claimant, Vemma Holdings Inc. ("Vemma"), is an airline holding company incorporated in the Commonwealth of Bonooru ("Bonooru").

2. The Respondent, the Federal Republic of Mekar, sits approximately 1,600 km to Bonooru's south. It was once part of the Pevensian empire. Following its fall-out, Mekar witnessed a period of prolonged political instability. High regulatory intervention and late economic reforms starting in 1994 affected Mekar's post-independence growth.

THE COMPREHENSIVE ECONOMIC PARTNERSHIP AND TRADE AGREEMENT

3. In April 2014, Mekar and Bonooru signed the Comprehensive Economic Partnership and Trade Agreement (CEPTA). The agreement entered into force on 15 October 2014. Mekar and Bonooru agreed to terminate the pre-existing BIT on 15 October 2014.

PRE-ACQUISITION PERIOD OF CAELI AIRWAYS

4. Following the enactment of the Emergency Recovery Act 2009, Mekar's new cabinet authorized large-scale privatization of SOEs. In a policy paper released by the Ministry of Finance, it designated Caeli Airways as one appropriate for privatisation.

5. Mekar's Monopoly and Restrictive Trade Practice Act was likewise revised in 2009—borne out of the said amendment was the creation of a Competition Commission of Mekar ("CCM"), armed with an independent enforcement directorate.

6. Mekar's first two attempts at restructuring failed. A third attempt was launched in September 2010. Mekar set-up a competitive bidding process, securing bids from various airlines. On 23 November 2010, Vemma submitted its bid for the purchase of Caeli.

7. In addition to being the highest bidder, Vemma was found to have proposed the most financially attractive business model for Caeli Airways' short and medium-run development. The Group's tender valued at 800 million USD was accepted on 5 January 2011. The CCM approved Vemma's acquisition of an 85% stake in Caeli Airways and the airline's participation in the Moon Alliance on 5 March 2011.

8. On 29 March 2011, Vemma Holdings entered into a Share Purchase Agreement with Mekar Airservices Ltd. to purchase an 85% stake in the company. The remaining 15% shares were beneficially owned by the Mekari State through Mekar Airservices Ltd.

POST-ACQUISITION PERIOD OF CAELI AIRWAYS

9. While it is undisputed that Vemma transformed Caeli into a venture generating net profit, representatives of Mekar Airservices cautioned the new Vemma-appointed management against taking an "extravagant approach" in at least three separate occasions. By June 2016, Caeli became the only consistently profitable carrier on over half the routes to and from its base airport, Phenac International.

10. Caeli's rapid expansion drew the attention of the Competition Commission of Mekar. It launched two investigations for this matter.

11. The first investigation was concluded by the end of August 2018. The CCM report found a breach of Mekar's antitrust legislation in the form of predatory pricing resulting from low airfares and loyalty programmes. Accordingly, it imposed a total penalty of MON 150 Million on Caeli.

12. The second investigation was completed on 1 January 2019. It was found out that Caeli had engaged in anti-competitive behaviour by abusing its dominant position in conducting its business activities in Phenac International Airport. Consequently, a fine in the amount of MON 200 million was imposed on Caeli Airways. The CCM also decided to continue

to impose airfare caps until Caeli Airways' market share, with its fellow Moon Alliance member factored in, were to fall below 40%.

THE CURRENCY CRISIS

13. Starting in late 2016 onwards, the Mekari Mon fell into a currency crisis. As of July 2017, Caeli was unable to secure a steady stream of revenue. It requested meetings with Mekar's Secretary of Civil Aviation to seek permission to denominate its airfare in US dollars instead of the Mon till the crisis abated. Mekari authorities approved this request in October 2017.

14. Come November 2017, the LPM was elected back and started re-nationalizing those which were once privatized. Mekar's government passed a decree requiring all companies operating in the country to offer goods and services denominated exclusively in Mon on 30 January 2018. Caeli protested this.

15. On 25 September 2018, the President passed Executive Order 9-2018, granting subsidies to airlines for each Mekari citizen travelling on board. Vemma's application for subsidies were dismissed. Mekar's deputy Minister of Transportation reasoned thus: "State-owned companies have unique advantages over other companies that enable them to outcompete privately-owned firms."

THE CHALLENGE

16. On 20 January 2019, representatives of Caeli appealed both orders of the CCM in the Mekari courts. Come 15 June 2019, Justice VanDuzer released his interim decision on the airfare caps, declining to remove them. Under Mekari law, Caeli Airways has no further appeal.

17. At the November 2019 meeting of Caeli Airways' board, representatives of Vemma announced their intention to sell their stake in Caeli Airways. Vemma secured an offer

from Hawthorne Group LLP. Vemma communicated the terms of this offer to representatives of Mekar Airservices— which in turn rejected the same. This prompted Mekar to file a Request for Arbitration with the Sinnoh Chamber of Commerce's Arbitration Institute. Mr Rett Eichel Cavanaugh adjudicated the dispute in favour of Mekar Airservices on 9 May 2020. Vemma filed to have the award of 9 May 2020 set aside at the court in Sinnoh—which the Court granted on 1 August 2020.

18. Mekar Airservices sought to enforce the 9 May award before the High Commercial Court of Mekar—which recognized and enforced the same.

19. Failing to find another buyer, Vemma was forced to sell its stake in Caeli to Mekar Airservices on 8 October 2020 for 400 million USD.

INSTITUTION OF ARBITRATION PROCEEDINGS

20. On 15 November 2020, Vemma filed a notice of arbitration against Mekar to seek compensation for its losses under the CEPTA.

ARGUMENTS

ISSUE A: THE TRIBUNAL DOES NOT HAVE JURISDICTION AND THE SUBMITTED CLAIMS ARE INADMISSIBLE

21. At the outset, the Respondent submits that the Claimant has failed to fulfill its burden of proving that: *first*, it satisfies the jurisdictional considerations provided for in Article 9.16 of the CEPTA[1] and the ICSID Additional Facility Rules[2], and *second*, its submitted claims distinctly fall within the ambit of the Tribunal's jurisdiction. Failure to overcome jurisdictional and admissibility barriers warrants the dismissal of the case *in limine*[3].

22. As such, the Respondent maintains that: first, the Tribunal does not have jurisdiction over the submitted claims (I), and second, the submitted claims are inadmissible (II).

I. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE SUBMITTED CLAIMS

Concise Statement of Federal Republic of Mekar's Position on Jurisdiction

23. Despite the Claimant's insistence, this Tribunal does not have jurisdictions— *ratione personae, ratione materiae,* and *ratione voluntatis*.

24. First, the Tribunal lacks jurisdiction *ratione personae* because: *first*, the definition clause of investor under Article 9.1 of the CEPTA does not include State-owned enterprises, and *second*, Article 2(1) of the ICSID Additional Facility Rules and investment jurisprudence bar the Claimant from bringing a claim because it acted as an agent for the government of Bonooru.

[1] Moot Problem, Article 9.16 CEPTA, p. 79
[2] ICSID-AF, Article 2
[3] Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007

25. Second, the Tribunal has no jurisdiction *ratione materiae* considering that the Claimant did not make a qualifying investment under Article 9.1 of the CEPTA[4] and the present case is not cognizable since it is not a legal dispute[5].

26. Lastly, the Tribunal is not empowered to hear and resolve the dispute since *ratione voluntatis* jurisdiction is wanting.

A. The Tribunal does not have Jurisdiction *Ratione Personae*

27. The Respondent disputes the Claimant's erroneous assertions and submits that the interacting provisions of the CEPTA and the ICSID-AF do not vest this Tribunal with jurisdiction *ratione personae.*

1. The CEPTA and the ICSID Additional Facility Rules are unavailable for State-to-State Arbitration

28. The Respondent maintains that the unavailability of the CEPTA and the ICSID Additional Facility Rules with respect to State-to-State arbitration is fatal to the Claimant's case.

29. Article 9.16(2) of the CEPTA enumerates the three rules under which a claim may be submitted for arbitration. Subsection (b) permits that a claim may be arbitrated under the ICSID Additional Facility Rules should the conditions for proceedings under the ICSID Convention do not apply.

30. This Tribunal should note that Article 2 of the ICSID Additional Facility Rules, and even Article 25 of the ICSID Convention, provide a dispute settlement mechanism only between States and nationals of another States[6]. The *travaux preparatoires* reveal the deliberate

[4] Moot Problem, Article 9.1 CEPTA, p. 73
[5] ICSID-AF, Article 2(a)
[6] Christoph H. Schreuer, The ICSID Convention: Commentary 290 (2001), p. 418

decision of the Convention to depoliticize disputes— thereby denying party status to States, State agencies, or international organizations on the investor's side[7].

31. In this case, the Respondent maintains that since the ICSID AF is the contractually agreed forum of the Parties, the Claimant has failed to demonstrate that the parties have satisfied the jurisdiction *ratione personae* under Article 2 considering that the analysis is not solely confined to the determination whether the "only one side is a Contracting State or a national of a Contracting State."[8] The Respondent clarifies that it does not dispute the nationality of the Claimant— rather, an examination of the nature of the Claimant's actuations and the degree to which the government has directed its investment activities in the Respondent State are attributable to the Commonwealth of Bonooru, and thus, transforming the Claimant from a private investor to an agent for the government.

32. Therefore, this Tribunal should find that both the CEPTA and the ICSID AF are unavailable as dispute settlement mechanism with respect to State-to-State arbitration.

2. The Claimant is Barred from Bringing a Claim under Article 2(a) of the ICSID Additional Facility Rules because it Acted as an Agent For the Government of Bonooru

33. The Respondent contends that the Claimant, in acting as an agent for the government of Bonooru, is barred from bringing a claim under Article 2(a) of the ICSID-AF and several investment jurisprudence.

34. The Broches' Test, advanced by Aron Broches, is the relevant test in ascertaining the standing of State-owned enterprises to bring a claim to arbitration.[9] As a general rule, "a mixed economy company or government-owned corporation should not be disqualified as a national of another Contracting State." There are two exceptions which would disqualify a government-owned corporation: first, if it is acting as an agent for the government, or

[7] Id.
[8] Christoph H. Schreuer, The ICSID Convention: Commentary 290 (2001), p. 335
[9] Paul Blyschak, State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protection, 6 J. INT'l L & INT'l REL. 1 (2011)

second, if it is discharging an essentially governmental function.[10] According to Prof. Christoph Scheuer, the Broches test envisions "to prevent claims that essentially amount to disputes between states rather than disputes between states and purely private entities"[11].

35. The first prong of the Broches test is the "government agent". According to Prof. Paul Blyschak, this "focuses on the degree to which the state has directed a SOE's investment actions or investment activities"[12]. The second prong is the "essentially governmental function" which "focuses on the degree to which a SOE may be performing investment activities with elements of governmental or regulatory authority.[13]"

36. In this case, the Respondent submits that Article 3(h) in relation to (a) of the Memorandum of Association[14] of the Claimant discloses that one of its objectives is "to assist in developing the aviation industry as well as the civil aviation infrastructure in Bonooru for the benefit of its population in accordance with Article 70 of the Constitutional Act, 1947 including servicing remote communities." Article 70 (2) specifically provides that "Bonooru shall ensure that every citizen is guaranteed travel to and from its many islands"[15]. Furthermore, Ms. Sabrina Blue, the erstwhile head of Vemma's board of directors, had been appointed as the Secretary of Transport and Tourism.[16]

37. Therefore, this Tribunal should find that even assuming that State-owned enterprises are not categorically excluded from the CEPTA and the ICSID-AF, the Claimant's claims essentially amount to a dispute between the Respondent State and the government of Bonooru.

[10] Vol. 136, Broches, A., The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Recueil des Cours, 345 (1972)
[11] Schreuer Art. 25, paras. 165-169 as cited in Paul Blyschak
[12] Paul Blyschak, State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protection, 6 J. INT'l L & INT'l REL. 1 (2011).
[13] Id.
[14] Moot Problem, Memorandum of Association of Vemma Holdings Inc., Annex IV, p.44
[15] Moot Problem, Bonooru Const., Annex I, Article 70
[16] Uncontested Facts, ¶ 22

B. The Tribunal does not have Jurisdiction *Ratione* *Materiae*

38. The Respondent submits that the Claimant has mischaracterized the subject-matter jurisdiction of this Tribunal when it argued that the definition clause of Article 9.1 of the CEPTA covers Vemma's investments. By extension, its claim that the submitted claim qualifies as a legal dispute is patently misplaced.

39. ICSID Additional Facility Rules have carved a dispute settlement mechanism out of ICSID Convention's subject matter jurisdiction. Article 2 (a) of the Additional Facility Rules specifically spells out the jurisdictional requirements for arbitration proceedings "for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State."

40. In other words, the *ratione materiae* or subject-matter jurisdictional requirement are as follows: (1) existence of an investment and (2) existence of a legal dispute.

1. The Claimant did not Make a Qualifying Investment under Article 9.1 of the CEPTA

41. For purposes of the CEPTA, Article 9.1 defines "investment" as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk[17].

42. The definition clause contained in Article 9.1 of the CEPTA is properly characterized as an "asset-based" definition. Said article likewise incorporates certain features of the Salini test which the Tribunal laid down in Salini v. Morocco[18], to wit: (1) the commitment of capital or other resources, (2) the expectation of gain or profit, or (3) the assumption of risk.

[17] Moot Problem, Article 9.1 CEPTA, p. 73
[18] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001

43. In this case, the Respondent submits that the Claimant has not sufficiently established that its business engagement in Mekar satisfies any of the criteria set out in *Salini* as a matter of fact and as a matter of law. With specific reference on the matter of commitment of capital or other resources, several Tribunals[19] have ruled that the mere ownership of shares may be insufficient in proving a contribution when the alleged investor did not actively allocate resources.

44. Absent any showing that the Claimant, on its own right as a private investor, has indeed shelled out a substantial contribution, its claim of investment does not hold water.

2. The Present Case is not a Legal Dispute Cognizable by this Tribunal

45. Turning now to the notion of "ordinary commercial transaction", the text of the ICSID Additional Facility Rules warrants ICSID's Secretary General's approval that "the underlying transaction has features which distinguish it from an ordinary commercial transaction"[20].

46. The Tribunal has clarified in *SCB (Hong Kong) v. Tanzania*[21] that "[t]he subject matter of the dispute must nevertheless still be an investment as contemplated by the ICSID Convention and consent by the Parties alone could not subject an ordinary commercial transaction or political dispute or non-legal dispute to ICSID for resolution."

47. In this case, one of the enumerated objectives provided for in its Memorandum of Association is that it is authorized "to acquire by subscription, purchase or otherwise … any company, society or undertaking the objectives of which are similar to those of this Company in whole or in part[22]." All that the Claimant has proven only points to the

[19] Standard Chartered Bank v. United Republic of Tanzania, ICSID Case No. ARB/10/12, Award, 2 November 2012; Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012
[20] ICSID-AF, Article 4(3)(b)
[21] See note 19.
[22] Moot Problem, Memorandum of Association of Vemma Holdings Inc., Annex IV, p.44

inevitable conclusion that its alleged "investment" is wanting in features that set it apart from an ordinary commercial transaction.

48. Since the Claimant did not make an "investment" within the purview of Article 9.1 of the CEPTA and its acquisition of the Caeli Airways is aptly considered as a mere ordinary commercial transaction, the Respondent submits that this Tribunal lacks the subject-matter or ratione materiae jurisdiction over the dispute.

C. The Tribunal does not have Jurisdiction Ratione Voluntatis

49. The Respondent submits that this Tribunal is bereft of jurisdiction to consider and rule on Vemma's claim on the basis that Article 9.17 of the CEPTA does not constitute a valid and effective consent to ICSID's arbitration.

i. Article 9.17 of the CEPTA Does Not Constitute A Binding Offer Of Consent By Mekar and Is Merely Mekar's Undertaking To Give Consent to ICSID's Jurisdiction In The Future

50. Article 9.17 of the CEPTA provides, "[e]ach Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement." While Mekar has given its consent to arbitration under this provision, it has only done so "in accordance with this Agreement." The Respondent is in the position that the language of the treaty in this provision is restricted. It is submitted that the qualifying phrase, "in accordance with this Agreement" limits the consent given to the jurisdictional considerations under Article 9.16 of the CEPTA.

51. Although the consent to international arbitration provided under Article 9.17 of the CEPTA is valid, the conditions specified in Article 9.16 of the CEPTA must first be completed in order to create legal consequences in connection to different arbitral fora. Article 9.16 par. 2(a) and par. 6(a) of the CEPTA contemplate ICSID arbitration, which at present is not available as Mekar is not a party to the ICSID Convention. Additionally, ICSID Additional

Facilities arbitration under Article 9.16 par. 2(b) and par. 6(b) is also not available since the present dispute constitutes state-to-state arbitration.

52. In light of the foregoing, the Respondent contends that Mekar's consent to arbitration under Article 9.17 of the CEPTA would provide for ICSID jurisdiction in the future if Mekar one day decides to sign and ratify the ICSID Convention.

ii. The Claimant Does Not Have An Immediate Right Of Access To The Centre, As Mekar May Still Refuse To Give Its Consent

53. The reference to ICSID's jurisdiction under Article 9.17 of the CEPTA amounts only to an undertaking by Mekar to give consent in the future, which may be achieved by providing that a future investment agreement between the host State and the investor shall include a provision for the submission of disputes to ICSID.

54. Clauses pertaining to future consent do not give the investor an immediate right of access to the Centre. In this case, the Respondent is in the position that Article 9.17 of the CEPTA does not constitute a valid and effective consent on the part of Mekar to be subjected ICSID's arbitration. Since Mekar is not a party to the ICSID convention and there is no other investment agreement between Mekar and Vemma that provides for submission of disputes to ICSID, there no standing consent from Mekar that is legally binding. Accordingly, Mekar may, in fact, still refuse to give its consent, thus denying Vemma to have an immediate right of access to the center.

II. THE SUBMITTED CLAIM IS INADMISSIBLE

A. Concise Statement of the Federal Republic of Mekar's Position on Admissibility

55. The Respondent submits that the submitted claim of the Claimant is inadmissible because it is formally and materially defective. These defects, taken individually and collectively, render the Tribunal not competent to admit the submitted claim and grant the reliefs sought, as the case may be.

56. First, the non-filing of the Request for Arbitration to the Secretariat of the Centre renders the Claimant's submissions formally defective. It specifically violates Articles 2 (1), 3 (c), and 4 of the Additional Facility Rules in relation to Article 9.16 of the CEPTA.

57. Second, as a matter of international public policy, the "unclean hands" doctrine bars the Claimant's submitted claims.

B. The Non-Filing of the Request for Arbitration to the Secretariat of the Centre Renders the Claimant's Submissions Formally Defective

58. The Respondent submits that the non-filing of the appropriate Request for Arbitration poses a procedural threat to the submitted claims of the Claimant. Its omission to do so specifically violates Articles 2 (1), 3 (c), and 4 of the Additional Facility Rules in relation to Article 9.16 of the CEPTA.

1. It violates Article 2 (1) of the Additional Facility Rules – Schedule C

59. Article 2 (1) of the Additional Facility Rules – Schedule C provides that:

> Any State or any national of a State wishing to institute arbitration proceedings shall send a request to that effect in writing to the Secretariat at the seat of the Centre. It shall be drawn up in an official language of the Centre, shall be dated and shall be signed by the requesting party or its duly authorized representative.

60. It is submitted that the Claimant fell short of this elementary requirement. Said article categorically mentions "request" to institute arbitration proceedings. Nowhere in the submissions of the Claimant nor in the entire case file was there a document to this effect. Absent any showing that the Claimant has indeed filed a Request for Arbitration or any instrument of the same import, it cannot be permitted to just barge in and claim foul.

2. It violates Article 3 (c) of the Additional Facility Rules – Schedule C

61. In relation to the Claimant's fatal omission discussed above, it likewise failed to "indicate the date of approval by the Secretary-General pursuant to Article 4 of the Additional Facility Rules of the agreement of the parties providing for access to the Additional Facility" as provided for in Article 3 (c).

62. The Respondent believes that the only conclusion to be drawn from the Claimant's omission to indicate the said approval by the Secretary-General is that there was no approval at all.

3. It violates Article 4 of the Additional Facility Rules – Schedule C

63. In Article 4 thereof, it is provided that the Secretary-General shall register the request in the Arbitration (Additional Facility) Register and on the same day dispatch to the parties a notice of registration.

64. The Respondent manifests unto the members of this Tribunal that it has not received a Notice of Registration from the Secretary-General. Absent any proof that the Secretary-General has indeed sent out notices to that effect, the Respondent cannot be dragged in litigation and be expected to shell out State resources to answer for the Claimant's baseless claims.

C. The Claimant's Claims Are Inadmissible As a Matter of International Public Policy Because of Its "Unclean Hands"

65. The Respondent submits that as a rule of international law and as a matter of international public policy, the "unclean hands" doctrine bars the Claimant's submitted claims. *Adler v. Federal Republic of Nigeria* conceptualizes the unclean hands doctrine as "clos[ing] the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant."

66. In *Phoenix Action Ltd v. Czech Republic*, the Tribunal posited that "the protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith is of utmost importance." In fact, it has been observed that the breach of the principle of good faith as applied to international investment arbitration led directly to dismissing jurisdiction.

67. In this case, the Claimant cannot seek refuge to the Center and plead unto the Tribunal to redress its grievances because he who comes to court must come with clean hands. In several instances, the Claimant has been the subject of CCM investigations on account of its anti-competitive practices and predatory pricing strategy. This violates Chapter 4 of the Monopoly and Restrictive Trade Practices Act, as amended.

68. Therefore, the Respondent implores upon this Tribunal to rely on the principle of good faith and the "unclean hands" doctrine in declaring that the Claimant's alleged investments cannot and should not benefit from the protection under the CEPTA.

PART TWO: AMICUS SUBMISSIONS

ISSUE B: THE TRIBUNAL SHOULD GRANT THE LEAVE SOUGHT BY THE EXTERNAL ADVISORS TO THE COMMITTEE ON REFORM OF PUBLIC UTILITIES ("CRPU") AND DENY THE LEAVE SOUGHT BY THE CONSORTIUM OF BONOORU FOREIGN INVESTORS ("CBFI")

69. Respondent Federal Republic of Mekar respectfully submits the following written statement in response to the application for leave to file a non-disputing party *amicus curiae* submission of External Advisors to the Committee on Reform of Public Utilities ("CPRU"), dated May 28, 2021[23], and the application for leave to file a non-disputing party *amicus curiae* submission of Consortium of Bonoori Foreign Investors ("CBFI"), dated April 19, 2021[24].

70. Respondent requests the Tribunal to accept the External Advisors to the CRPU's *amicus curiae* submission and requests to bar the *amicus curiae* submission of CBFI. Respondent contends that CRPU's *amicus curiae* submission presents relevant points for the Tribunal to consider. Additionally, Claimant's assertion that CRPU's submission raises a new jurisdictional question concerning the *ratione legis* jurisdiction of the Tribunal is without merit.

71. The parameters for appropriate participation of *amici curiae* are laid down in the interacting provisions of the ICSID Arbitration (Additional Facility) Rules and Article 9.19 of the CEPTA. The Tribunal may properly exercise the discretion granted it under the UNCITRAL Rules on Transparency in Investor-State Arbitration to consider *amicus* petitions, where, as here, the arbitration is against a sovereign state and implicates substantial public interest.

I. CRPU's application for leave to file a non-disputing amicus curiae submission should be granted.

A. CRPU's submission could potentially assist the tribunal in the determination of a legal or factual issue by bringing a new perspective

[23] Moot Problem, Amicus Submission by External Advisors to the Committee on Reform of Public Utilities, p.18-20

[24] Moot Problem, Amicus Submission by the Consortium of Bonoori Foreign Investors, p.15-17

1. The amicus curiae submission by CRPU is made in a timely manner and will not disrupt the arbitral proceedings

72. Article 4 of the UNCITRAL Rules on Transparency[25] provides that "[t]he arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty ("third person(s)"), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute." Thus, it is in the arbitral tribunal's discretion to accept *amicus* submissions in such a manner as it considers appropriate if they contribute insight into and experience with the issues before it. Since the CRPU's submission was made before the merits hearing, the tribunal may take into account the facts supplied by the *amicus curiae* in a way that does not disrupt the arbitral proceedings but is useful to them.

73. Additionally, under Article 4 (5) of the UNCITRAL Rules on Transparency[26], "[t]he arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party." For the present dispute, the Respondent contends that CRPU's *amicus curiae* submission is not in conflict with this provision since the request was presented in good time prior to the hearing on the merits, so as not to disrupt the arbitral proceedings.

2. The Amici are in the unique position to adduce unbiased facts that may not be obtained from either disputing party.

74. In determining whether to allow an *amicus curiae* submission by a third party, Article 4 (3) (b) of the UNCITRAL Rules on Transparency[27] provides that "the arbitral tribunal shall take into consideration xxx the extent to which the submission would assist the tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties."

75. As members of the Mekari civil society whose professional concentration is investment banking, the *Amici* have the capacity to examine the legality of Claimant's investment, which is critical to determining the Tribunal's competence. The *Amici* are external and independent advisors who are involved in the entirety of Caeli Airways' privatisation process. They are chosen for this role through a transparent and competitive process approved by the Cabinet Ministers of the Respondent State based on the Law on Privatisation of State property.[28] Their neutrality, knowledge, and competence put them in

[25] UNCITRAL Rules on Transparency, Article 4
[26] UNCITRAL Rules on Transparency, Article 4(5)
[27] UNCITRAL Rules on Transparency, Article 4(3)(b)
[28] Moot Problem, Amicus Submission by External Advisors to the Committee on Reform of Public Utilities, p.19

the unique position to present the Tribunal with unbiased facts that cannot be obtained from either disputing party.

76. Additionally, the *Amici* have been involved in the CRPU's deliberations in the run-up to Claimant's acquisition of an 85% share in Caeli Airways JSC. They are also entrusted with conducting an audit, which includes an analysis of Caeli Airways' economic, technical, and financial performance.[29] Accordingly, the *Amici* may offer the tribunal with background information regarding the issue of bribery that led to the acquisition of rights of the Claimant.

77. In the case of *Bear Creek Mining v. Peru*[30], the *amicus curiae* submission of the Association of Human Rights and the Environment (DHUMA) was held to have assisted the Tribunal *"by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties."* In the said case, DHMUA provided unique information and insights on the events in the Puno region, which resulted from the *Amici's* experience, extensive work in the Puno region with peasant communities, and knowledge of the Aymara culture, as well as their participation in some events involving the Claimant.

78. In the present dispute, given the CRPU's experience, knowledge, and involvement in the Caeli Airways' privatisation process, the *Amici* are likewise in a unique position to provide a perspective, particular knowledge or insight that is different from that of the disputing parties that will assist the Tribunal in the arbitral proceedings.

B. CRPU's submission has the capability of addressing matters within the scope of the dispute

79. The *Amici* respectfully appears before the Tribunal and recognizes the need for limiting its participation to matters within the scope of the dispute before the Tribunal in accordance with Article 41 of the ICSID Additional Facility Rules[31] and Article 4 (1) of the UNCITRAL Rules on Transparency.[32] CRPU will provide useful factual and legal information regarding the Claimant's investment, which is well-within the scope of the dispute and is intertwined with the determination of the jurisdiction of the Tribunal. As independent external and independent advisors that actively participated in the Caeli Airways' privatization process, the *Amici* are well qualified to present the tribunal extensive information with respect to:

a. the privatisation, liquidation, and/or restructuring of Caeli Airways

[29] Ibid.
[30] Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Award.
[31] ICSID AF, Article 41
[32] UNCITRAL Rules on Transparency, Article 4 (1)

b. the processes leading up to Caeli Airways' determination of future investors
c. the active role and participation of Vemma, Republic of Mekar, and the CRPU in those processes
d. the issue on bribery leading to Vemma's procurement of rights[33]

80. These are crucial facts and arguments for the Tribunal to make an informed conclusion in this case based on all the circumstances that led to this dispute.

C. CRPU has significant interest in the arbitration

1. CRPU Possess A General Interest In Promoting Fair Business Practices In The Respondent State

81. Under Article 4 (3) (a) of the UNCITRAL Rules on Transparency[34], the Tribunal shall consider "[w]hether the third person has a significant interest in the arbitral proceedings."

82. The external advisors to the CRPU appear before the Tribunal as members of Mekari civil society who have regularly acted as intervenors before federal courts in the Respondent State in relation to judicial proceedings concerning approval for privatisation projects.[35] Given the *Amici's* history as intervenors in cases of similar nature as the present dispute, it is evident that fostering fair business practice in the Respondent State is in their best interest.

83. In its *amicus curiae* submission, the *Amici* respectfully submits that its participation in this proceeding will provide the Tribunal with extensive information with respect to the subject matter of this case and the legal and factual issues that will be placed before the Tribunal for adjudication. Thus, the Respondent posits that the *amicus curiae* merits the Tribunal's consideration.

2. CRPU Regularly Advise Potential Investors Prospecting Opportunities In The Respondent State

84. It is contained in the CRPU's *amicus curiae* submission that the stagnation or anti-corruption measures in the Respondent State has an impact on the *Amici's* financial operations, as they often advise potential investors prospecting opportunities in the

[33] Moot Problem, Amicus Submission by External Advisors to the Committee on Reform of Public Utilities, p.19
[34] UNCITRAL Rules on Transparency, Article 4(3)(a)
[35] Moot Problem, Amicus Submission by External Advisors to the Committee on Reform of Public Utilities, p.19

Respondent State.[36] The administration of justice is in their best interests because the outcome of this arbitration will have an impact on future investor-disputes. Correspondingly, it is also in line with the CRPU's objectives to guarantee that the resolution of this matter will not adversely affect investor relations and that investors who want to invest in the Respondent State in the future may do so with confidence.

D. CRPU's Submission Crystalizes The Public Interest Dimension Of The Present Case

85. The determination on the allegations of corruption attributable to the Claimant in the process of investing is imbued with public interest. The CRPU recognizes the fact that this arbitration raises significant concerns about the effectiveness of investor-state dispute resolution to address public policy issues equitably and objectively while taking the State's regulatory interests into account. Because the nature of investor-State relations provides fertile ground for corruption, the amicus curiae brief underlines the value of the tribunal reaching a fair decision in this case in order to defend the public interest.

II. CBFI's application for leave to file a non-disputing amicus curiae submission should be denied.

A. CBFI's submission is not in pursuit of any public interest

86. While the CBFI's *amicus curiae* submission mentioned that the present arbitration could impact industries beyond aviation, it does not necessarily qualify as public interest. In making the case for why an amicus submission should be accepted, the arguments in the submission must be able to describe why the public interest features of the dispute in question are larger than those that arise simply because of the nature of investor-state arbitration. Additionally, it is also critical that the arguments are hinged on the possibility of infringement of legally enforceable rights. CBFI's submission, however, failed to establish such a connection.

B. Lapras Legal Capital's participation in the arbitration raises a conflict of interest

87. The participation of Lapras Legal Capital is a clear display of conflict of interest despite the disclosure of its involvement. An organization seeking amicus status can demonstrate its suitability if it possesses the following qualifications: (1) recognized expertise; (b) an established interest; and (c) independence. The last criterion is missing from CBFI's submission.

[36] Ibid.

88. The strict application of the independence requirement is illustrated in the case of *Border Timbers et al v. Republic of Zimbabwe.* In this case, the tribunal denied the *amicus* application after finding a central figure in the activities of the NULC was strongly allied with the respondent. This, according to the Tribunal, "gives rise to legitimate doubts as to the independence or neutrality of the Petitioners," and is sufficient to defeat the petition.

89. In the present case, both Lapras Legal Capital and the Claimant are members of the CBFI. It is mentioned in the *amicus curiae* submission that Lapras Legal Capital is advising Vemma on funding strategies for its claim against the Mekar.

90. Such affiliation between the Claimant and the Petitioners raises legitimate doubts as to the independence or neutrality of the petitioners. Hence, the *amicus* submission by the CBFI should likewise be denied.

ISSUE C: RESPONDENT DID NOT VIOLATE ARTICLE 9.9 OF THE CEPTA

I. The Respondent did not violate Article 9.9 of the CEPTA

91. The Claimant asserts that the Respondent violated Article 9.9 of the Comprehensive Economic Partnership and Trade Agreement (CEPTA) which provides that a party violates the obligation of fair and equitable treatment to the other if there is "*denial of justice in criminal, civil, or administrative proceedings"* or a "*fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings."*[37]

92. However, it is in the Respondent's view that there was neither a denial of justice nor a fundamental breach in due process and transparency in the Respondent's conduct because:
    a. The Claimant was given ample opportunity to raise their submissions before the Sinnoh Courts;
    b. The Claimant was able to bring actions before the domestic courts
    c. The Respondent was responsive to Claimant's concerns and employed measures to stabilize its economic development; and
    d. The grant of a subsidy was a discretionary exercise of the Secretary of Civil Aviation's functions

A. The Claimant was not denied justice before domestic courts and administrative bodies.

93. The tribunal in *L. Fay, H. Neer and Pauline Neer (USA) v. United Mexican States* discussed that in investment disputes,

> *"the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards..."* [38]

94. The Court likewise ruled in *Vivendi v. Argentina* that any claim on denial of justice could only arise from denied access to courts, unfair treatment in those courts, or if those courts denied rights guaranteed to the other party under the BIT.[39]

[37] Article 9.9, CEPTA
[38] L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States (15 October 1926)
[39] Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3

1. The Claimant was given ample opportunity to raise their submissions before the Sinnoh Courts.

95. Contrary to the Claimant's allegations, no such denial of justice was present in enforcing the 9 May 2020 award in Mekar as the Claimant's application to refuse enforcement of the award failed to meet the high standards needed to refuse the same.[40]

96. As similarly provided in the Respondent state's Commercial Arbitration Act and the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Article 36 of the *UNCITRAL Model Law* provides that the enforcement of an award may be refused if the court finds that the enforcement of the award is contrary to the public policy. [41]

97. It is clear from the language of the law that the enforcement of an award is permissive in character[42] with the use of 'may' in the language of the law. The respondent courts have discretion to enforce or refuse the enforcement of the arbitral award as the language of the law is permissive in character and does not bind the Respondent to enforce the same.

98. As discussed in the case of *Telcordia Technologies, Inc. v. Telkom SA, Limited* [43]

> "*The New York Convention allows a district court to 'adjourn' a decision on the enforcement of the arbitral award if an application for the setting aside or suspension of the award has been made to a competent authority."*

99. The Court in *Europcar Italia v. Maiellano Tours* discussed that "*a proper balancing of these concerns should lead a district court to consider several factors, including (1) the general objectives of arbitration; (2) the status of the foreign proceedings and the estimated time for those proceedings to be resolved; (3) whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review; (4) the characteristics of the foreign proceedings, (5) a balance of the possible hardships to each of the parties; and (6) any other circumstances that could tend to shift the balance in favor of or against adjournment."*[44]

100. In this case the Respondent courts exercised its discretion taking into consideration the credibility of the evidence presented by the Claimant before the court.

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[40] Annex XIV, FAO(OS) No. No. 285/2020 & CM No. 10351/2020, Par. 8
[41] Ibid. Par. 7
[42] Europcar Italia, S.p.A. v. Maiellano Tours
[43] Telcordia Technologies, Inc. v. Telkom SA, Limited, District Court, District of Columbia, United States of America, 9 April 2004, 02-1990
[44] Europcar Italia, S.p.A. v. Maiellano Tours

101. The Sinnoh Ruling setting aside the 9 May 2020 award was merely based on circumstantial evidence, specifically the Centre of Integrity in Legal Services (CILS)'s sole reports.[45] As admitted in the Sinnoh Ruling, the Sinnoh Chamber of Commerce (SCC) "*cannot rule on whether the bribery had actually taken place.*" [46] Such determination falls under the discretionary power of the Respondent's courts and a finding contrary to what was upheld by the Sinnoh Courts would allow the stay of enforcement of the arbitral award.

2. The Claimant was afforded the right to due process through the actions it brought before the courts.

102. In *Azinian v. Mexico,* the court stated that *"a denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way."* [47]

103. Claimant was not denied the right to due process and speedy trial since Mekari Courts prioritized the urgency of criminal cases to avoid prolonged detention of its citizens. Though delayed, the Courts have given their respective rulings on the actions filed by Vemma. [MFN Obligation]

104. Not only did the Respondent entertain actions commenced against them on the arbitral Tribunal but as well as those concerning the Competition Commission of Mekar (CCM) Investigations, fines and caps imposed, and the imposition of Mekari MON Currency for valuing services.[48]

105. The Respondent held two investigations in accordance with the *Monopoly and Restrictive Trade Practice Act (MRTPA),* on separate grounds. The *First Investigation* being held on suspicion that the Claimant's airline, Caeli Airways, has adopted a predatory pricing strategy which could hinder the competition with domestic airlines.[49] The *Second Investigation* being requested by the Claimant's competitors in Phenac International Airport.[50]

106. The Claimant asserts that qualifying the *First Investigation* by combining the market share of Caeli Airways with Royal Narnian's was arbitrary and violates their right

[45] Annex XIII, [2020] SACS 2058
[46] Ibid.
[47] Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States (ICSID Case No. ARB (AF)/97/2)
[48] Uncontested Facts,
[49] Uncontested Facts, Par. 36
[50] Uncontested Facts, Par. 38

to due process. However, under the first set of grounds of the *MRTPA*[51] which the *First Investigations* was based on, it was provided that *"the CCM may exercise discretion in industries that require special attention to open an investigation"*

107. As a result the CCM imposed caps to prevent it from earning supra-competitive profits in the future which were uncontested by the Claimant.[52] Neither were there concerns nor reports showing that such caps perjured the Claimant's profitability in 2016.[53]

108. The Claimant likewise asserts that the *Second Investigation* held does not qualify the standards set by the *MRTPA* such that those who filed a complaint were not direct competitors in the market. Furthermore, The Claimant argues that those who filed were airlines traveling domestic routes when the Claimant only took international routes, hence, were not direct competitors of the Claimant.[54]

109. The *MRTPA* makes no distinction between sub-market competitors. It must be understood that the main concern of the law is whether such complainant is within the same industry as the competitor and not whether they offer the exact same services.

110. Subsequently, the CCM also entertained the Claimant's concerns regarding the imposition of CCM Caps when the airline industry was subjected to comply with the law requiring Mekari MON valuation of their services.[55] Despite the Claimant's plea to lift such caps, the Respondent was obliged to practice proper administrative procedures before it could lift the CCM Caps.[56]

111. As such, none of the Respondent's conduct could be said to have "*refused to entertain a suit*" or "*provided inadequate administration of justice*" for the Respondent's administrative agencies were merely acting within their regulatory authority in such conduct.

112. Article 9.8 of the *CEPTA* likewise provides that regulatory actions of the Respondent which negatively affects the Claimant's investment do not amount to a breach of Section D or Investment protection.[57] Therefore, it is clear that the Respondent's exercise of regulatory authority cannot be considered as a breach of the standards set under Article 9.9 of the *CEPTA.*

[51] Moot Case, MRTPA, Annex V, Chapter III, 2 (a)
[52] Uncontested facts, Par. 37
[53] Uncontested Facts, Par. 38
[54] Id.
[55] Uncontested Facts, Par. 43
[56] ibid.
[57] Moot Case, CEPTA, Article 9.8

113. The Claimant's compliance with the CCM Caps was also in accordance with their oath to prohibit from engaging Anti-Competitive acts which the CCM sought from the Claimant before entering into the Shareholder's agreement.[58] Hence, the Claimant cannot now turn its back from the oath it undertook by the reason that such compliance unfavourably affected the Claimant.

114. The Claimant's submissions were heard both in the Sinnoh Courts and the Respondent State's domestic courts evidenced by the number of suits the Claimant was able to file against the Respondent.[59] As such, no denial of due process and denial of justice occurred given that the Respondent remained cooperative throughout the entire judicial process in accordance with their obligations under the Shareholder's agreement, the CEPTA, and the Respondent State's Commercial Arbitration Act which was based on the UNCITRAL Model Law. Indeed, the Respondent showed treatment no less favourable than such treatment it accords to investments in like situations.

B. Respondent's actuations were transparent and the Claimant was well informed.

115. The Respondent did not deprive the Claimant of reason behind their actuations and heeded to every remedy they sought before the domestic courts and administrative agencies

1. The Respondent was responsive to Claimant's concerns and openly employed measures to stabilize its economic development.

116. The Claimant was heard throughout the investigation process wherein the Claimant recognized that the Respondent was acting within its bounds in imposing the regulatory caps.[60] Compliance to such even after several years are clear implied admissions of its validity.

117. There was also no showing that such caps caused damage to Caeli's profitability.[61] It was clear that the imposition of caps served its purpose by allowing other airline companies to compete with the restricted price ranges of Caeli although Caeli had to limit its range with the caps imposed.

118. Likewise, the Claimant cannot argue that the removal of the Mekari MON exemption was in violation of their right to due process.

[58] Uncontested Facts, Par. 26
[59] Annex XIII, Annex XIV, Annex XV
[60] Uncontested Facts, Par. 37
[61] id.

119. The imposition of the Mekari MON regulation was in accordance with the Respondent's regulatory authority in light of the financial crisis it was suffering. The grant of such privilege to be exempted from the regulation should not have been understood as an absolute one.

120. As emphasized in the case of *Parkerings*[62],

> "*A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time."*

121. The Respondent, therefore, had the right to remove such exemption from the Mekari MON regulation to stabilize the financial condition of its State.

2. The Grant of a subsidy is under the discretion of the Secretary of Civil Aviation, and requires legislative actions, not judicial actions.

122. The problem at hand requires legislative actions and not judicial rulings. The grant of a subsidy is under the discretion of the Secretary of Civil Aviation, provided by Executive Order 9-2018.[63]

123. The Congress of Mekar has established that the government decision of providing taxpayers money to which company is solely upon their discretion. Mekar has no obligation under the CEPTA, nor under international law, to disburse its taxpayers' money to Claimant.

124. Moreover, it has also been proven that State-owned companies, such as Claimant, have an advantage, enabling them to outcompete privately-owned firms. Unlike other competitors of Claimant within Mekar, Claimant, in fact, enjoyed a benefit of continuous influx of foreign subsidies from its home State, Bonooru, under the Horizon 2020 Scheme, enabling Claimant to possess an edge over smaller competitors.

125. In this case, Claimant willingly signed into investing in Mekar knowing fully of the implemented policies that they adhered to.

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[62] Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (11 September 2007), Par. 332

[63] Moot Case, EO 9-2018, Annex VIII, Sec. 3101 (c)(1)

126. As an interim measure, it was necessary for Respondent through the CCM to impose caps on Caeli Airways' to serve as a prevention measure from earning supra-competitive profits. Moreover, the CCM has not investigated any other airlines alliance members active in Mekar. The measure undertaken by Respondent was to ensure the security of all investment companies within Mekar and was one of the exceptional cases provided by the ***MRTPA*** wherein such discretionary power of the CCM may be exercised[64]

127. Thus, in line with Article 9.9 (b) of the CEPTA, the Respondent exercised fair and equal treatment towards all companies within their jurisdiction as it would be unfair to grant certain State-owned companies even more of an advantage in the Respondent's airline market to the detriment of their people.

C. The Claimant displayed arbitrary conduct by taking advantage of the dire economic situation to the prejudice of the Respondent.

128. The Claimant was exceedingly favored based on their relations with other airline enterprises and their unrealistic forecasts for Caeli Airways. Such contention was clearly evidenced by the *amicus submission* of Mekar's External Advisors to the Committee on Reform of Public Utilities[65]

129. the Respondent was of the view that Claimant's proposal "*clearly relied on an overly optimistic forecast which did not account for serious volatility of fuel prices and potential takeover of the long-distance routes by competitors"* [66]

130. Furthermore, the Claimant sought to take advantage of Caeli's disposal and its "*unparalleled access to Mekar's airline market." [67]* the Respondent's choice of selecting the Claimant as investors is an unquestionable one, but the business strategy employed by the Claimant and their persistence in such business strategy was one which not only the Respondent's representatives warned the Claimant about but also one which the Claimant should have been able to foresee.

131. As prominent investors who are experienced in the airline business, the Claimant should have employed risk management strategies rather than relying heavily on the airline's existing facilities, benefits and market access.

[64] Moot Case, Annex V, Chapter 3
[65] Moot Case, Amicus - Mekar External Advisors, pg. 18
[66] Uncontested Facts, Par. 24
[67] Uncontested Facts, Par. 23

132. Having knowledge of the economic situation within the Respondent state, the Claimant even made proposals to refinance Caeli airways' liabilities.[68] Nevertheless, the Claimant insisted on the airline's expansion through the lease of Boeing 737 aircrafts[69], while inheriting the existing discounts on airport services, landing fees and navigation fees, as well as twelve A430 aircrafts[70] giving the Claimant a great advantage in the commencement of their operations.

133. Clearly, the Respondent was not obligated to finance the Claimant knowing the economic situation of the State. The Respondents even employed measure to ensure that its domestic companies do not suffer the consequences of the Claimant's undue advantage in the market by seeking the Claimant's undertaking to prohibit from practicing anti-competitive acts under the *MRTPA.*

134. As ruled in the case of *MTD*[71],

> "*their choice of partner, the acceptance of a land valuation based on future assumptions without protecting themselves contractually in case the assumptions would not materialize, including the issuance of the required development permits, are risks that the Claimants took irrespective of Chile's actions*."

135. The Claimant could not claim that there was a breach of obligations based on such legitimate expectations since these are actuations which were not absolute and the Claimant should have foreseen the risks that came with their choice of strategies.

II. The Respondent reasonably acted within their regulatory authority and afforded Claimant full protection and security as a foreign investor.

136. Freeman describes the standard of due diligence under the full protection and security clause as "*nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances.*" [72]

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[68] id.
[69] id.
[70] Uncontested Facts, Par. 26
[71] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, Award (25 May 2004) Par. 178
[72] A.F. Freeman, *Responsibility of States for Unlawful Acts of their Armed Forces* (1955) cited in Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Chapter 6, Minimum Standards of Treatment, pp. 233 - 298 (2009)

137. Clearly the due diligence required of the Respondent is limited by its capacity to act on such due diligence in order to afford the Claimant the full protection and security they are seeking.

138. In this case, such due diligence is limited by the fact that the Respondent state was still suffering the consequences of an economic crisis as well as the decreasing value of their currency. The Respondent's responsibility as to the Claimant's full protection and security may only be exercised for as long as it would not cause further harm to the already existing financial crisis of its domestic corporations in its people.

139. To heed the Claimant's requests on several matters, the Respondent was obliged to balance the same with the circumstances existing that time. This was done through several discussions with the Claimant as well as participation in cases brought by the Claimant before the domestic courts.

A. The Claimant and Respondent came into terms regarding the Respondent's regulatory authority before entering into the investment

140. Knowing fully well that the investment was subject to certain risks in light of the existing crisis the Respondent came from, the Claimant was made to undertake a prohibition against anti-competitive acts to give equal opportunity for domestic corporations and industries to grow.

141. Nevertheless, the Claimant's investment started on high income levels and benefits as they were granted several benefits, discounts and access to facilities which other corporations did not have.

142. Subjecting the Claimant to the *MRTPA* which includes investigations on anti-competitive acts prohibited and the imposition of fines and caps fall under the regulatory authority of the Respondent.

143. In the *BG case*, the tribunal held that "*the notions of 'protection and constant security' or 'full protection and security' in international law have traditionally been associated with situations where the physical security of the investor or its investment is compromised"*[73]

[73] BG Group Plc. v. Argentina, Final Award (24 Dec. 2007), Par. 324

144. Aside from the fact the Claimant did not contest the imposition of the caps, both the fines and caps cannot be said to have compromised the investment or the physical security of the Claimant.

145. As gleaned from the purpose of the *MRTPA*, it intends to protect the domestic corporations and could not be attributed as an act to compromise the investment of the Claimant. Likewise, it must be held that the claimant "*has not alleged physical violence or damage in the implementation of measures adopted by [the Respondent], nor does the Tribunal see that such violence or damage has in fact occurred."*[74]

B. The Claimant willingly invested with the Respondent despite their status as recovering from a financial crisis and fresh out of economic reforms.

146. The Claimant was clearly aware of such situation of the Respondent having invested in the Respondent's State in light of such events, taking advantage of such economic situation and even offering to answer for the debt of Caeli in its proposal when it entered into such investment agreement.[75]

147. Hence, the Claimant should have foreseen the possible risks that comes with investing in a recovering state. Instead, the Claimant was overly optimistic with the business strategy it employed and further expanded the enterprise.

148. The Respondent's representatives also warned the Claimant of the fall-winter decline which may render the excessive costs of the Claimant to be detrimental to its profits. Claimant's forecasts were too optimistic and should have been mindful in assessing the market value of Respondent

149. Despite the Claimant success in its first few years of managing Caeli, was purely coincidental with the global oil price drop. The Claimant should have sought for long-term strategies and measures to prevent their economic losses along with risk management strategies to secure them from possible risks their choices may result in.

2. The Claimant was aware of the devaluing currency in Respondent when they invested in Respondent; thus, the imposition of the Mekari MON was foreseeable considering Claimant is an established investor.

[74] Id. Par. 327
[75] Uncontested Facts, Par. 21

150. Respondent’s monetary stability had not been fully established as they were not of a stable economic environment

151. Though this may have been an unforeseeable event, the Claimant's contentions on the imposition of the Mekari MON Regulations were heard by the Respondent. By virtue of the exemption grant from the regulation, the Respondent was able resolve the grievances and losses the Claimant and other airlines may have suffered in imposing such monetary regulation.

152. On the other hand, such exemption grants were short-lived. However, this was without consideration of the airlines' contentions under the grant. The Subsidy grants were imposed to level the playing field for all airline enterprises.

153. As the Claimant was receiving subsidies from its home state, it was the Respondent's responsibility to make sure that those who were not receiving such subsidies would be compensated for the loss they suffered in the imposition of the Mekari MON currency regulation.

3. The Respondent possessed full right to purchase shares of Claimant as they were investing in the Respondent state.

154. The Respondent acted within the terms if their agreement when it declined the purchase of Hawthorne Group ("Hawthorne")

155. The Shareholder's agreement specifically provides that no affiliate could purchase the shares. Hawthorne is clearly within the definition of an affiliate company as it is also a company associated with the Moon Alliance.

156. Black’s Law Dictionary defines an “affiliate” as “*[a] corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation*."

157. Clearly, Hawthorne is one of the sister corporations of the Claimant it being affiliated through the Moon Alliance.

158. Furthermore, Article 39 of the Shareholder's agreements does not oige the Respondent to purchase the shares for the same amount as purchase by the Claimant or offered by the respondent.

159. Hence, the Claimant's contention that the Respondent should have purchased the stakes at a price equal or higher than that offered by Hawthorne is groundless and unreasonable.

160. As stated in the case of *Asian Agricultural Products*[76],

> ”The arbitral Tribunal is not aware of any case in which the obligation assumed by the host State to provide the nationals of the other Contracting State with "full protection and security" was construed as an absolute obligation which guarantees that no damages will be suffered, in the sense that any violation thereof creates automatically a "strict liability" on behalf of the host State.”

161. Therefore, the respondent should not be held in breach of Article 9.9 of the CEPTA as it properly exercised its regulatory authority in light of the unfortunate crisis it was suffering.

[76] Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award, 1990

ISSUE D: RESPONDENT IS NOT LIABLE TO PAY COMPENSATION. HOWEVER, IF THE TRIBUNAL FINDS THAT RESPONDENT IS, THE QUANTUM OF DAMAGES FORWARDED BY CLAIMANT IS INAPPROPRIATE.

I. The Respondent, as the investor country, does not possess a legitimate expectation on the part of Claimant; thus, they are not liable for compensation as contended by Claimant

162. Claimant contends that the actions undertaken by Respondent resulted in the deprivation of the Claimants' ability to generate revenue. However, Respondent submits that the Claimant should not be entitled to lost profits because the measures of Respondent are not the reason behind their losses.

163. The *S.D. Myers* tribunal held that damages may be awarded to the extent that there has been an established "sufficient causal link" between a breach of a provisions and the loss sustained by the investor.[77] Furthermore, ways to express a causal link might be that the breach of the specific provisions should be established as the *proximate* cause of the harm.[78]

164. In this case, Respondent is not liable to pay for lost profits and opportunity costs of the Claimant since a state's obligation to compensate is not an automatic consequence of finding a breach of international law, but is conditional upon the existence of a causal link between the wrongful act and the injury suffered.

A. Claimant was not gravely affected and was able to recover from their investment's loss through Bonooru's Airways Infrastructure Rescue Act and large-scale restructuring.

165. In ***LG&E v. Argentina***, this tribunal held that the investor was not entitled to future profits, because the harm for which the investor sought compensation was too remote from the host State's breaches of the BIT. Moreover, the tribunal states that the investor would be entitled to double recovery if lost profits were to be awarded.

166. As such, the Claimant having been subsidized by its home state is not entitled to the subsidies granted fpr those who suffered great loss from the imposition of the Mekari MON currency regulation.

[77] S.D. Myers, Inc. v. Government of Canada, NAFTA/UNCITRAL, First Partial Award ¶ 316 (Nov. 13, 2000).
[78] S.D. Myers, Inc. v. Government of Canada, NAFTA/UNCITRAL, Second Partial Award ¶ 140 (Oct. 21, 2002).

167. The subsidy grant was intended to aleviate the conditions of thos who suffered great loss under the imposition of the Mekari MON Regulation. The Claimant is not one of them.

168. The Claimant continued to receive subsidies from Bonooru under the Horizon 2020 Scheme and still somehow rendered income greater than those which other airlines did.

169. The Claimant still had a considerable share to make a recovery when it sold its stake. Having sold such, the Respondent no longer had any obligation to compensate the Claimant of its effects thereafter.

B. Claimant willingly sold their stakes to Respondent and failed to obtain a non-affiliated third party offer on their stake. Thus, the Respondent is not obligated to compensate Claimants' loss.

1. Article 39 of the Shareholder's agreement expressly provides that the shares must not be sold, directly or indirectly, to any affiliate

170. Claimant willingly signed into such agreement, thus, it is required to abide by the stipulated regulations. Claimant should not enter into any agreement or consummate any transaction relating to disposal of shares in the Corporation with any person other than mekar air services except in compliance with the terms established under Article 39.

2. Under Article 39, even if an offer was made, The Respondent is not obliged to accept the exact material terms of the offer if it cannot be fulfilled by them

171. Under Article 39 1(b), Mekar Airservices is not required to accept any non-financial terms or conditions in any Material Terms that cannot be fulfilled by Mekar Airservices as readily as any other person.

C. CCM's imposition of fines was within its regulatory authority

172. Moreover, as highlighted in ***Al Tamimi v. Oman***, this tribunal confirmed that *"[t]here is no question that State organs such as government ministries and the State police force operate as arms of the State, and indeed - unlike OMCO - such entities are characterized by their exercise of " regulatory, administrative or governmental " authority."*[79]

[79] Al Tamimi v. Oman, ICSID, Award, 3 November 2015, Par. 344

173. [change transition phrase], as stated in ***Chemtura v. Canada***, *"[i]rrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police power."*[80]

1. The Claimant took an oath to abide by the Anti-Competitive Act

174. Caeli rapidly expanded, which drew the attention of the CCM and the competitors of Caeli. In clear violation of Claimant's oath, the CCM were pressed to impose caps as an interim measure, and in the rightful and legitimate use of its faculties to prevent Caeli from earing supra-competitive profits.[81]

2. The Claimant did not contest the caps imposed by CCM

175. The CCM imposed caps were cooperated with by Caeli without protest, neither did it prove to have hurt Caeli's profitability in 2016.[82]

3. The Claimant was cooperative with both investigations

176. There was no established causal link between Claimant's loss and the actions of Respondent because the Respondent's regulatory actions cannot be considered a direct or proximate cause to the loss and injuries suffered by Claimant even if such actions were taken all together. The Claimant is subject to the laws of the Respondent's State under the exercise of their regulatory authority as evidenced by the Shareholder agreement as well as their oath to prohibit from practicing anticompetitive acts before the two parties came to an agreement.

177. In the context of investor-state relations, a state bears responsibility for injuries traceable to a breach of the applicable Bilateral Investment Treaty (BIT), rather than actions of third parties.

II. If the Tribunal finds breach on the Respondent's part, it must be computed according to its Market Value

[80] Chemtura v. Canada, PCA, Award, 2 August 2010, para.266
[81] Uncontested Facts, Par. 13.
[82] Uncontested Facts, Par. 37.

178. Respondent submits that awarding the compensation using the “fair market value” does not take into account the current costs of doing business in Mekar, and that the Respondent is only liable to pay the actual value of the investments actually taken.

179. The Quantum of damages forwarded by Claimant is inappropriate. Respondent submits that awarding the compensation using the “fair market value” does not take into account the current costs of doing business in Mekar, and that the Respondent is only liable to pay the actual value of the investments actually taken.

180. High probability of erroneous calculation can easily lead to unjust enrichment for investors. In Amoco v. Iran, this tribunal held that “one of the best settled rules of the law of international responsibility of states is that no reparation for speculative or uncertain damages can be awarded.”

181. Furthermore, in any valuation of damages, the Tribunal must take into account “the general risks, including political risks, of doing business in the particular country, as they applied on that date.”

182. Respondent’s measures have no direct bearing on the losses suffered by Claimant as the latter admitted that the imposed caps were reasonable.

183. Article XXI of the General Agreement of Trade Services provided that compensatory adjustment shall be made on a most-favored-nation basis therefore considerations on the state’s economic condition shall be made in the compensation awarded.

PRAYER FOR RELIEF

For the reasons stated herein, Respondent, The Federal Republic of Mekar, requests that the Tribunal:

a. **FIND** that this Tribunal does not have jurisdiction over the submitted claims;
b. **DENY** the submitted claims due to its inadmissibility;
c. **DECLARE** that the Respondent did not violate Article 9.9 of the CEPTA; and
d. **ORDER** that the Respondent is not liable to pay compensation and reimburse Claimant;

or in the alternative

e. **FIND** that the Respondent is only liable to pay compensation in the current Market Value.

Respectfully Submitted,

Team Barwick
Counsel for Respondents