INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

IN THE MATTER OF AN ARBITRATION UNDER THE UNDER CHAPTER 9 OF THE BONOORU – MEKAR CEPTA AND THE ICSID ARBITRATION ADDITIONAL FACILITY RULES

BETWEEN:

VEMMA HOLDINGS, INC.

Claimant

v.

THE FEDERAL REPUBLIC OF MEKAR

Respondent

RESPONDENT'S STATEMENT OF DEFENSE

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

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LIST OF AUTHORITIES

TREATIES, CONVENTIONS, ARBITRATION RULES	
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1966)
AF Rules	ICSID Additional Facility Rules (2006)
Articles on State Responsibility	ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)
VCLT	Vienna Convention on the Law of Treaties (1969)
NY Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
Corruption Convention	United Nations Convention Against Corruption (2005)
Bribery Convention	Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)
Transparency Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014)
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TABLE OF ABBREVIATIONS

1994 BIT	Treaty Between the Federal Republic of Mekar and the Commonwealth of Bonooru for the Promotion and Protection of Investments (1994)
AF Rules	ICSID Additional Facility Rules
Caeli	Caeli Airways JSC
CBFI	Consortium of Bonoori Foreign Investors
CBFI's Amicus	CBFI's Application for Leave to File a Non-Disputing Party Amicus Curiae Submission
CCM	Competition Commission of Mekar
CEPTA	Comprehensive Economic Partnership Agreement between the Commonwealth of Bonooru and the Federal Republic of Mekar
CEPTA Parties	The Federal Republic of Mekar and the Commonwealth of Bonooru
Claimant	Vemma Holdings, Inc.
CRPU	Committee on Reform of Public Utilities
EACRPU	External Advisors to the Committee on Reform of Public Utiltities'
EACRPU's Amicus	External Advisors to the Committee on Reform of Public Utiltities' Application for Leave to File a Non-Disputing Party Amicus Curiae Submission.
FNPB	First National Phenac Bank
IICRA	Investment Information and Credit Rating Agency
LPM	Labourers' Party of Mekar
MRTPA	Monopoly and Restrictive Trade Practice Act
NoA	Notice of Arbitration
Parties	Vemma Holdings, Inc., and the Federal Republic of Mekar
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
PO3	Procedural Order No. 3
PO4	Procedural Order No. 4
Respondent	The Federal Republic of Mekar
RNoA	Response to Notice of Arbitration
Superior Court	Superior Court of Mekar at Phenac
SoC	Statement of Claim
SOE	State-owned enterprise
Uncontested Facts	Statement of Uncontested Facts
Vemma	Vemma Holdings, Inc.

INTRODUCTION

1. Pursuant to Article 38 of the ICSID Additional Facility Rules, The Federal Republic of Mekar hereby submits its Counter-Memorial, accompanied by all factual evidence and legal authorities relied upon herein.

2. Bonooru, through Vemma, Claimant blatantly questions Respondent's right to regulate, especially during times of economic turmoil. However, Respondent has complied with its international and domestic legal obligations, especially those arising under the CEPTA.

3. Respondent did not violate any obligation to Claimant under the CEPTA because Claimant is not a proper investor under the Treaty, and Respondent properly balanced the interests of its population, foreign and domestic investors, and the state's interests in exercising its right to regulate, acting in full compliance with its obligations under the CEPTA.

STATEMENT OF FACTS

4. Bonooru is an archipelagic State in the Greater Narnian region with a GDP greater than the five largest countries in the region combined. In 2010, Bonooru's government launched the Caspian Project with the goal of redefining trade patters in the region.

5. Bonooru's Constituon imposed a duty on the government to ensure mobility rights to its population. Accordingly, Bonooru to set up BA Holdings Bonooru Air's parent company, a state-owned holding company set up to hold the airline for Bonooru and assist in the transportation mandate.

6. Due to global spikes in oil, BA Holdings faced losses and Bonooru restructured it. In the mid-1980s, Bonooru incorporated Vemma as BA Holdings' successor and the holding company of Royal Narnian, Bonooru's flag carrier. Despite Vemma being owned by Bonooru and other minor, private investors, the Bonoori people held rallies to demand their mobility rights be safeguarded. The Constitutional Court of Bonooru examined the issue and determined that Vemma appropriately protected the Bonoori population's mobility rights.

7. In 1991, Royal Narnian formed the Moon Alliance with five other major airlines the world over.

8. Mekar and Bonooru entered into a BIT in 1994.

9. Until 1994, Respondent had a state-run monopoly over the air transportation sector through two state-owned enterprises: Aer Caeli (domestic) and Caeli Airways (international). In an effort to streamline costs and increase profits, Respondent merged the two companies into Caeli Airways in 2003.

10. In 2004, extenuating economic circumstances forced Respondent to bail out Caeli but Caeli's financials did not improve, especially due to the Global Financial Crisis of 2008. Respondent was forced to seek investors for Caeli. To attract foreign investment, Mekar amended the MRTPA and created the CCM. The CCM sought to ensure market safety and guarantee protection to legal investors' interests.

11. Later, Mekar awarded Vemma the bid for Caeli in January 2011. Mekar also valued Vemma's proposal which included improving Caeli's finances, expansion plans, aircraft renewal, and Caeli's membership in the Moon Alliance. However, some people expressed concerns that Vemma's projections were overly optimistic. Specifically, the CRPU noted that Vemma's

projections ignored volatility in fuel prices and heavy competition. At that same moment, Bonooru named Vemma's Chairperson as Secretary of Transportation and Tourism.

12. In March 2011, the CCM approved Bonooru's purchase of an 85% stake in Caeli as long as Caeli did not engage in high level cooperation with Moon Alliance members. Vemma accepted the terms. As a result, Vemma inherited discounts on airport services, and landing and navigation fees at Phenac International.

13. Bonoori politicians justified the subsidies under Horizon 2020 scheme by claiming that they benefited Bonooru by drawing in tourists and boosting infrastructure in Bonooru through Vemma's ownership of Caeli.

14. Vemma failed to turn a net profit from its investment at first. This failure was due to Vemma's business plan.

15. After Mekar and Bonooru negotiated another investment treaty, they signed the CEPTA, which entered into force in October 2014.

16. In 2015, Mekar's representatives on Caeli's board warned Vemma of the possibility of economic crisis. Claimant decided that Caeli should place orders for 45 Boeing 737 MAX aircraft and invest earnings and credit lines into consolidating its consumer base.

17. Pursuant to subsidies and a price-cutting strategy, Claimant's expansion drew the attention of the CCM. On 9 December a *suo moto* investigation was launched. CCM merged Royal Narnian and Caeli's market share because of the high collaboration between the two companies, an unprecedented action in Mekar's airline industry. CCM alleged that the collaboration and the subsidies given under Horizon 2020 program enabled Caeli to undercut prices and harm competitors. As a result of the investigation, Caeli was imposed airfare caps to protect its competitors.

18. In December 2016, small regional airlines in Greater Narnia complained to the CCM that Caeli's actions made it nearly impossible for them to penetrate the market linked to Phenac International, which effectively became a "fortress hub" for Caeli. The CCM as a result launched a second investigation.

19. In 2016, Mekar was afflicted by an economic crisis and the IMF urged Mekar to establish credibility in the local currency.

20. Meanwhile, Bonooru's Ministry of Transport and Tourism recorded recurring payments made to Vemma between October 2011 and June 2016 justifying the subsidies by stating Bonooru's benefits from them.

21. In November 2016, Vemma valued its investment in Mekar at 1.1 Billion USD. A report released by Aviation Analytics later that month noted that this valuation was accurate.

22. As of July 2017, Caeli requested to denominate its airfare in US Dollars instead of the MON till the crisis abated. In October 2017, Mekar approved this request for all the airlines operating in its territory.

23. In November 2017, Mekar started to execute an agenda of reasonable and necessary actions to face the economic crisis, including nationalization of industry and bailouts. The government also stopped all privatization programs.

24. Given the MON's volatility, on 30 January 2018, Respondent saw the necessity to pass a decree requiring all companies in the country to offer goods and services denominated exclusively in MON.

25. In September 2016 Caeli requested CCM to remove the airfare caps. Alternatively, they requested to raise its fares due to rising inflation. The CCM denied these requests and Caeli sought judicial review on 8 March 2018.

26. In August 2018, the CCM concluded the first investigation on Caeli. It found that Caeli breached Mekar's antitrust legislation when Caeli pursued a predatory pricing strategy composed of low airfares and loyalty programs. The CCM's report specifically noted that Bonooru's subsidies allowed Caeli to drastically reduce its airfare, which was below its average avoidable costs. Accordingly, the CCM imposed a total penalty of MON 150 million on Caeli.

27. In September 2018, an executive order was passed in order to grant loans and subsidies to eligible airlines. Foreign airlines received subsidies which were greater than the subsidies that Vemma received under the Horizon 2020 Scheme. Government-owned airlines such as Larry Air and Caeli were not eligible for these subsidies.

28. On 1 January 2019 the CCM completed Caeli's second investigation and found that Caeli engaged in anti-competitive behavior through its business activities in Phenac International Airport. Consequently, a fine in the amount of MON 200 million was imposed on Caeli.

29. On 20 January 2019 Caeli appealed both orders of the CCM.

30. Caeli applied for a 200 million USD loan to FNP. On 8 February 2019 the FNP offered a credit line at a high interest rate. The Bank relied on IICRA's CCC+ rating on Caeli. Fitch's assigned Vemma BB+ credit score. On 8 June 2019 Aviation Analytics announced that Vemma had reached valuation of USD 1.1 Billion.

31. From May through June 2019, Caeli was forced to shut down several operations. Aviation Analytics pinned Caeli's fate in enthusiastic overexpansion and unforeseen financial situation in Mekar. On 15 June 2019 Justice VanDuzer declining to remove the airfare caps though an interim decision.

32. By the third quarter of 2019, Caeli's market share in Mekar dropped below 40% with its operation on most routes generating deep losses. The CCM lifted the airfare caps in October 2019.

33. However, Vemma announced its intention to sell their stake in Caeli and secured an offer from Hawthorne Group LLP. On 9 December 2019 Vemma communicated the terms of this offer to Mekar. Respondent considered the price to be artificially inflated and that the transaction was not arm's length *bona fide* offer made at a reasonable commercial price.

34. After failed negotiations between Vemma and Mekar, Mekar filed a request for arbitration on 11 February 2020. On 9 May 2020, the Sinnoh Chamber of Commerce Secretariat appointed a sole arbitrator, R. Eichel Cavannaugh, who rendered an award in favor of Mekar Airservices.

35. After allegations of wrongful reasoning by a non-profit, Bonooru sought to set aside the award. The Supreme Court of Arbitrazh of Sinnoh set aside the award due to reasons of public policy. In August 2020, the High Commercial Court of Mekar recognized and enforced the SCC Award of 9 May 2020. After appeal, the Superior Court of Mekar affirmed the award's recognition and enforcement.

36. Vemma sold its stake in Caeli to Mekar Airservices on 8 October 2020 for 400 million USD and Claimant filed a Notice of Arbitration against Respondent on 15 November 2020. Subsequently, Bonooru acquired 55% stake in Vemma, flooded Vemma's board of directors with governmental officials and gave Vemma paramilitary duties.

SUMMARY OF ARGUMENTS

37. ***Issue 1 – Jurisdiction:*** This Tribunal lacks jurisdiction to determine the claim presented because this is effectively State-to-State arbitration as Vemma is a state enterprise owned by Bonooru. The AF Rules and the CEPTA governing this proceeding both exclude state-owned enterprises like Vemma from their scope.

38. Although Vemma is a corporation organized under Bonoori law, Vemma's public functions and Bonooru's control in the company lead only to the conclusion that Vemma is effectively a state-owned enterprise. Accordingly, Claimant's actions are directly attributable to Bonooru both in the course of Claimant's investment and for the purposes of this proceeding.

39. ***Issue 2 – The Applications for Leave to File Amicus Curiae Submissions:*** The Tribunal should consider the EACRPU as an *amicus curiae* because the EACRPU's submission will aid this Tribunal by rendering a perspective distinct from that of the parties regarding this Tribunal's jurisdiction.

40. The Tribunal should not consider the CBFI as an *amicus curiae* because it does not meet any of the requirements stipulated in PO1, the CEPTA, the AF Rules. Moreover, the CBFI also attempts to exercise prerogatives reserved to Claimant.

41. ***Issue 3 – Fair and Equitable Treatment:*** Respondent has not acted in breach of the CEPTA. Instead, Respondent fulfilled its international and domestic legal obligations. Respondent adequately and indiscriminately exercised its right to regulate according to the standard of treatment established by the terms of the CEPTA.

42. Respondent's investigations into the investment were justified, proper and reasonable under Mekari law. The airfare caps placed on Claimant, which did not harm Claimant, were also justified, proper, and reasonable. There is no cumulative breach or composite act constituting a breach of Respondent's obligations in Article 9.9.

43. ***Issue 4 – Damages:*** Claimant significantly contributed to its losses allegedly arising under the CEPTA as Claimant's actions were ill-advised and pursuant to a willfully negligent business plan. Therefore, Respondent is not liable for any damages.

44. Even if Respondent is found liable for some of Claimant's damages, the only appropriate standard for compensation would be market value according to the ordinary meaning of Art. 9.21 of the CEPTA, and to the CEPTA Parties' intention to limit the application of Fair Market Value to claims of unlawful expropriation arising under Art. 9.7 of the CEPTA.

I. THIS TRIBUNAL LACKS JURISDICTION BECAUSE THESE PROCEEDINGS REPRESENT STATE-TO-STATE ARBITRATION.

45. This Tribunal lacks jurisdiction to hear the claim because (**A**) Vemma is a state-owned enterprise, (**B**) The CEPTA excludes state-owned enterprises from its scope, and (**C**) The AF Rules excludes state-owned enterprises such as Vemma from its scope.

A. Claimant is a State-Owned Enterprise.

46. The point of departure for this Tribunal is that Vemma is a State-Owned Enterprise (SEO). According to the World Bank, SEOs are "government owned or government controlled economic entities that generate the bulk of their revenues from selling goods and services."[1] Arbitral tribunals and scholars have similarly defined SEOs as "any commercial company denominated or predominantly controlled by the State."[2] Arbitral tribunals determine that a company is state-owned by looking at the company's structure and functions.[3]

47. Structurally, a company is state-owned if a state holds an influential position in the company's shareholder meetings and board of directors. In *Salini*, the tribunal found that Morocco structurally controlled a company by looking at Morocco's stake in the company, as well as the influence exerted by the state in the company's board of directors.[4] Some of the factors considered by the *Salini* tribunal as indicative of state-ownership include the majority ownership by the state of a company's shares, and specific to that case, the fact that cabinet members of the Moroccan government were members of the company's board of directors.[5]

48. Functionally, a company is state-owned if it carries out activities for the benefit of a state. In *Salini*, the tribunal determined that Morocco functionally controlled the company at issue because the company's Articles of Association included activities, such as the operation of highways, that fell within the province of public utilities that corresponded to the needs of Moroccan infrastructure.[6]

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[1] McLaughlin, at 605 (citing to World Bank, at 26).
[2] *Salini* ¶ 31; Bouchez, at 81 – 115.
[3] *See Salini* ¶ 31; *see* also *Mafezzini* ¶¶ 77, 80.
[4] *See Salini* ¶ 32.
[5] *See Id*.
[6] *See Id*. at 33.

49. Here, Claimant, like the company in *Salini*, satisfies the structural requirement to be considered an enterprise owned by Bonooru. From a shareholder perspective, Bonooru has always maintained a dominant position in Vemma through its dominant stake. While Bonooru's stake in has historically oscillated between 31% to 38%,[7] no other shareholder held more than a 7% stake in Vemma.[8] This entails that Bonooru held a dominant position in all shareholder meetings, especially when other shareholders were not present in those meetings.[9] From a board of directors' perspective, Bonooru has always maintained at least one governmental official in Vemma's board of directors, the Secretary of Transportation – who not only is the Chairman of Vemma's Board of Directors, but also Vemma's legal representative.[10]

50. Likewise, Vemma satisfies the functional requirement to be considered an enterprise owned by Bonooru. Vemma's Memorandum of Association explicitly states as Vemma's objective to support Bonooru's civil aviation infrastructure for the benefit of Bonooru in accordance with Bonooru's constitutional mandate.[11] Additionally, Bonooru's Secretary of Transportation has twice declared Vemma's contribution to the Bonoorean people.[12]

51. Thus, Vemma is a state enterprise owned by Bonooru because it fulfils the structural and functional requirements discussed in *Salini*. Additionally, recent changes to Vemma's structure and functions make it even clearer that Vemma is a state-owned enterprise. Structurally, Bonooru presently holds a 55% stake in Vemma and Vemma's board of directors is composed entirely of government officials.[13] Functionally, Vemma not only serves to support Bonooru's civil aviation infrastructure according to Bonooru's constitutional mandate but now also conducts paramilitary activities.[14]

B. The CEPTA only Covers Privately Owned Investors and Claimant is Therefore Excluded from the Scope of its Protection.

52. Now that it has been established that Vemma is a SOE, this Tribunal should find that it lacks jurisdiction to determine the claim because the contracting parties to the CEPTA only

[7] Uncontested Facts ¶ 10.
[8] PO4 ¶ 2.
[9] PO3 ¶ 3.
[10] Id. at 22, 65; Annex IV, Art. 152.8.
[11] Annex IV, Art. 3.h.
[12] Uncontested Facts ¶ 28; PO4 ¶ 6.
[13] Uncontested Facts ¶ 65.
[14] *Id*.

intended to include private investors within the scope of protection under the agreement. This interpretation of the CEPTA is confirmed by Art. 31.1 of the VCLT.

53. Article 31.1 of the VCLT provides that

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

Under Art. 9.1 of the CEPTA, an investor is "an enterprise with the nationality of a Party … that seeks to make, is making or had made an investment in the territory of the other Party".[15] A systematic interpretation of the term "enterprise with nationality of a Party" using the CEPTA's objectives, context and purpose demonstrates that the CEPTA Parties intended to only include private enterprises within the definition of investor.

54. An interpretation that includes state-owned enterprises within the definition of "enterprise with the nationality of a Party" contradicts the objectives of the CEPTA. Art. 1.3(b) of the CEPTA establishes that an objective of the CEPTA is to "promote conditions of fair competition in the free trade area."[16] SOEs such as Claimant typically receive economic support from their home State through large initial investments, subsidies, and other benefits that place SOEs in a privileged position relative to other private participants that struggle to remain competitive in a free trade area.[17] Including SOEs within the scope of the CEPTA contradicts this objective because SOEs thwart competition, instead of incentivizing it.

55. Similarly, the preamble demands the exclusion of SOEs from the definition of "enterprise with the nationality of a Party". The CEPTA's preamble articulates the intention of the contracting parties to "[create] an expanded and secure market for [the CEPTA Parties'] goods and services through the reduction...of barriers to trade...."[18] and recognizes "the differences in level of development and diversity of economies [of the contracting parties]."[19] The effect of the operation of these two preambular sentences is to exclude SOEs from the scope of protection afforded to legitimate investors under the CEPTA. SOEs from Bonooru, a dominant capital exporter with a

[15] CEPTA, Art. 9.1.
[16] CEPTA, Art. 1.3(b).
[17] *See* Chiang at 877 (discussing how an SOEs' home State may be held accountable for granting subsidies so the SOE can dump prices).
[18] CEPTA, Preamble.
[19] *Id*.

GDP greater than the next five largest countries in the region combined[20], have the ability to monopolize entire industries from weaker countries like Mekar. Accordingly, the preamble demands the exclusion of SOE's from the CEPTA.

56. The CEPTA's departure from the 1994 BIT provides contextual confirmation that the CEPTA excludes SOE's from its scope. The 1994 BIT, unlike the CEPTA, included government-owned entities within its definition of enterprise.[21] The 1994 BIT's explicit inclusion of SOEs from its scope and the CEPTA's departure from this definition confirm that the CEPTA Parties' intended to exclude SOEs from its scope.

C. The AF Rules Exclude State-Owned Enterprises Like Claimant from Its Scope.

57. This Tribunal not only lacks jurisdiction on this case because the CEPTA does not include SOEs in its scope, but also because the ICSID Additional Facility is not authorized to administer proceedings involving SOEs like Vemma. Art. 2(a) of the AF Rules states that

> "The Secretariat … of the Centre is … authorized to administer … [arbitration] proceedings between a State … and a national of another State … for the settlement of legal disputes … 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."[22]

58. The Secretariat's authorization to administer arbitration proceedings under the AF Rules, therefore, hinges on whether the proceedings arise from a mixed dispute (*i.e.*, a dispute between a State and a foreign national).[23] The proceedings here cannot be characterized as a mixed dispute because (1) Vemma's actions throughout its investment in Caeli are attributable to Bonooru or (2) Vemma's actions in these proceedings are attributable to Bonooru.

1. Vemma's Actions Throughout Its Investment in Caeli Are Attributable to Bonooru.

59. This Tribunal should find that the close nexus between Vemma and Bonooru leads to the conclusion that Vemma's investment in Mekar was in fact an act of Bonooru. To such end, this Tribunal should refer to the Articles of State Responsibility to determine that Vemma's investment

[20] Uncontested Facts ¶ 4.
[21] 1994 BIT, Art. I (a).
[22] AF Rules, Art. 2 (a).
[23] *Scheuer*, Art. 25 ¶ 11.

actions can be imputed to Bonooru because "well-developed customary international law attribution rules are available to inform such determinations."[24]

60. Claimant may attempt to argue that the appropriate test to determine Vemma's ability to access the AF Rules is determined by the Broches Test, a test created by one of the drafters of the ICSID Convention that states that mixed enterprises may submit a claim under the ICSID Convention unless it is acting as an agent for the government or is discharging an essentially governmental function."[25] However, Art. 3 of the AF Rules state that "none of the provisions of the Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein."[26] Because the Broches Test is a recommendation to the ICSID Convention, Art. 3 of the AF Rules requires this Tribunal to reject the Broches Test and apply the general rules of attribution under international law.

61. Under the Articles on State Responsibility, Claimant's actions can be attributed to Bonooru because (**a**) Vemma was exercising elements of Bonooru's governmental authority throughout its investment in Caeli and (**b**) Vemma was acting under the direction or control of Bonooru throughout its investment in Caeli.

a. Claimant was Exercising Elements of Bonooru's Governmental Authority Throughout its Investment in Caeli.

62. Art. 5 of the Articles on State Responsibility state that an entity

> "which is empowered by the law of [a] State to exercise elements of … governmental authority shall be considered an act of [that] State under international law, provided the … entity is acting in that capacity in the particular instance.".[27]

According to the commentaries to Articles of State Responsibility, Art. 5 contemplates the phenomenon where State corporations have been privatized but the new semi-public entity retains certain public functions.[28] The commentaries also state that what is "governmental" hinges on what a particular society – a jurisdiction's history and traditions – considers governmental.[29] It is irrelevant whether the governmental function might be classified as "core" or "non-core".[30]

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[24] *See Feldman*, at 24 – 35.
[25] *See* Yannaca-Small, ¶ 10.94.
[26] AF Rules, Art. 3.
[27] Articles on State Responsibility, Art. 5
[28] *See Crawford*, at 100 ¶¶ 1-2.
[29] *See Id. at* 101, ¶ 6.
[30] Yannaca-Small, ¶ 14.40.

63. In this sense, an entity may exercise governmental functions when providing airport-related services when the government delegates that function. In *Flemingo*, the arbitral tribunal found that a mixed enterprise was exercising governmental functions when it was modernizing and operating an airport.[31] The court reached that conclusion after determining that a law and the government's Ministry of Transport delegated such a function to a company.[32]

64. Moreover, the governmental delegation determines when an entity is acting in that capacity in a particular instance. The *Flemingo* tribunal found that a company was exercising a governmental function when the company decided to terminate lease agreements with Claimant. The tribunal there reasoned that the termination of the agreements was part of the company's governmental functions because the relevant law envisaged that action within the scope of the company's delegated, governmental activities.[33]

65. As the company in *Flemingo* was exercising its home State's governmental function pursuant to a statutory delegation, so was Vemma exercising Bonooru's governmental functions pursuant to a constitutional delegation. As Bonooru's Constitutional Court recognizes, Bonooru has a positive obligation to assist and ensure provision of air transportation in Bonooru.[34] This governmental function was delegated to Vemma when Vemma was partially privatized.[35] Bonooru's Constitutional Court recognizes that Vemma provides transportation benefits *for the benefit* of Bonooru's population despite its privatization.[36] Moreover, Vemma's Memorandum of Association also recognizes Vemma's governmental function where it recognizes that Vemma's objective is to develop civil aviation infrastructure for the benefit of Bonooru's population.[37] Accordingly, Vemma exercises governmental functions as a holding of airline companies.

66. Similarly, as the company in *Flemingo* was acting within its governmental authority when it cancelled an agreement because the action was within the scope of its delegation. Vemma was exercising Bonooru's governmental function throughout its investment in Caeli. Vemma's Memorandum of Association requires Vemma to invest in companies when it is calculated to advance Vemma's objectives (*i.e.*, invest in companies that will further fulfill Vemma's

[31] *Flemingo* ¶ 436.
[32] *Id*.
[33] *Id*. at 443 – 445.
[34] Uncontested Facts ¶ 5.
[35] Uncontested Facts ¶¶ 6 – 9.
[36] Annex III, ¶ 59.
[37] Annex IV, Art. 3.h.

governmental function of providing air travel services pursuant to the constitutional mandate).[38] Accordingly, Vemma invested in Caeli because it was calculated to improve Vemma's governmental function of providing air travel services. This analysis is confirmed by Bonooru's Secretary of Transportation who stated that Bonooru granted subsidies to Vemma because Vemma's investment in Caeli offered substantial benefits to *Bonooru* by enhancing the aviation network available.[39]

67. Therefore, Vemma was performing governmental functions throughout its investment in Caeli.

b. Claimant was Acting Under the Direction or Control of Bonooru Throughout its Investment in Caeli.

68. Art. 8 of the Articles of State Responsibility states that

> "The conduct of a person … shall be considered an act of a State under international law if the person or group of persons is in fact acting on the … control of [] that State in carrying out the conduct.".[40]

According to the Commentaries to the Articles of State Responsibility, when a State uses its ownership interest or control of a corporation to achieve a particular result, the conduct in question is attributed to that State.[41] The degree of control required from attribution under Art. 8 of the ILC Articles is "effective control".[42]

69. The effective control is twofold: first, a State must exert corporate control over a corporation and second, a State must use that corporate control in a specific activity to achieve a particular state purpose.[43] In *Tulip Real*, the tribunal found that the first limb of the effective control test was satisfied when it found that the State controlled a company because it held the majority of the company's shares and had State officials in the company's Board of Directors. For the second limb of the test, however, the tribunal found that a newspaper article was not sufficient evidence to determine that the State had exerted its control over the corporation to carry out a

[38] Annex IV, Art. 3.l, Art. 3.q,
[39] Uncontested Facts ¶ 28.
[40] ILC Articles, Article 8.
[41] *See* Crawford at 112-113 ¶ 6.
[42] *Id*. at at 110 – 111, ¶ 4 (citing to *Nicaragua v. United States* ¶ 308); *Tulip Real* ¶ 308.
[43] *Tulip Real* ¶ 308.

specific activity.[44] Instead, the tribunal found that the evidence suggested that the corporation acted in its best commercial interest.

70. Here, there is sufficient evidence to find that Bonooru complies with both prongs of the effective control test. The first prong of the effective control test is met because Bonooru controls Claimant's corporate functions. Throughout the investment in Caeli, Bonooru was the dominant shareholder: Bonooru's share in Claimant oscillated between 31 to 38%[45] while none of the other shareholders held more than a 7% stake in it. Moreover, Bonooru also controls Claimant's board of directors, and the Secretary of Transportation is not only the head of Claimant's board of directors[46] but also, Vemma's legal representative.[47] Finally, Bonooru controls Claimant because it has a constitutional mandate. As Bonooru's Constitutional Court expressed, and Vemma's Articles of Incorporation confirmed, Claimant is accountable to Bonooru because it must ensure that Vemma's actions are for public benefit.[48]

71. Likewise, the second prong of effective control is met because there is evidence here that Bonooru exerted its corporate control over Claimant for the benefit of the mobility rights Bonooru's population. When Vemma initially invested in Mekar, Ms. Blue declared that Claimant's investment in Caeli served to enhance Bonooru's aviation network.[49] In 2016, Ms. Blue stated that Claimant contributed to enhancing the mobility rights of Bonooru's population internationally.[50] Ms. Blue gave these statements in connection with subsidies given by Bonooru to Vemma. Because Ms. Blue is simultaneously Bonooru's Secretary of Transportation and head of Vemma's Board of Directors, this Tribunal should make a logical inference: Claimant received subsidies from Bonooru because Claimant was obediently fulfilling Bonooru's mandate, which included investing in Caeli for the benefit of Bonooru.

72. Moreover, evidence that Bonooru exerted its corporate control over Claimant throughout the investment in Caeli is also supported by Claimant's poor judgement in pursuing its best commercial interest. Vemma placed significant resources in flights between Mekar and Bonooru even though these routes were neither profitable for Claimant nor for Caeli.[51] Caeli's rapid

[44] *Id*. at 310.
[45] Uncontested Facts ¶ 10.
[46] Uncontested Facts ¶ 22.
[47] Annex IV, Art. 152.8.
[48] Annex III, ¶ 59, Annex IV, Art. 3.q.
[49] Uncontested Facts ¶ 28.
[50] PO4 ¶ 6.
[51] Annex VII.

expansion was ill-advised, as almost any industry expert would agree.[52] However, this expansion and trading routes were beneficial only to Bonooru.[53]

73. Therefore, this Tribunal should find that Bonooru had effective control over Vemma when it administered its investment in Caeli.

2. Alternatively, this Proceeding Is not a Mixed Dispute Because Claimant's Actions in this Proceeding Are Attributable to Bonooru.

74. Recent changes made to Claimant's corporate structure pursuant to Bonooru's 2001 Airways Infrastructure Rescue Act require this Tribunal to find that it lacks jurisdiction because Bonooru is exercising effective control over Claimant in this proceeding. As previously discussed, the Articles of State Responsibility establish that an action of a corporation is attributable to a State when a state exercises effective control over a corporation in carrying out a specific action.

75. Here, the effective control test has been met. As for the first limb of the effective control test, it is presently clearer that Bonooru exercises corporate control over Vemma. Bonooru now holds 55% of Vemma's shares, making Bonooru the majority shareholder.[54]Additionally, Vemma's board of directors is now 100% composed of government functionaries,[55] which entails that Vemma's autonomy to take commercial-oriented decisions has been largely diminished. Likewise, Vemma's objectives were expanded to include paramilitary activities,[56] meaning that Vemma not only operates as a holding company but now receives quasi-military orders. Moreover, the second prong of the effective control test is met because Bonooru equipped Vemma with lawyers from Bonooru's justice department to assist in this arbitral proceeding,[57] which entails that Bonooru is actively involved in the proceeding in search of a specific result. Accordingly, this proceeding is not a mixed dispute between a State and a private investor, but instead is a State-to-State arbitration.

76. Claimant may refute by arguing that jurisdiction is determined at the moment the claim is filed. However, neither the CEPTA nor the AF Rules state that a tribunal's jurisdiction is determined at the time a claim is submitted. Instead, Paragraph 2 of Art. 1.3 of the CEPTA states

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[52] Annex IX.
[53] Annex VII.
[54] Uncontested Facts ¶ 66.
[55] *Id*.
[56] *Id*.
[57] *Id*.

that the "Parties shall … apply the provisions of [the CEPTA] … in accordance with applicable rules of international law.".[58] Accordingly, this Tribunal should find that jurisdiction must also be satisfied at the date of the resolution of the claim.

77. In *Loewen,* an Additional Facility case, the tribunal held that a claimant's nationality requirements had to be continuously met from the date of the events giving rise to the claim, through the date of the resolution of the claim.[59] The *Loewen* tribunal reasoned that international investment arbitration served a specific purpose: to protect foreign claimants. The tribunal further reasoned that the purpose of an international investment arbitration fails when Claimant acquired the nationality of the respondent State in a proceeding.[60] Therefore, the tribunal held that unless a treaty says otherwise, the continuous nationality rule applies.[61]

78. Here, as in *Loewen*, the international investment arbitration lost its purpose when Bonooru began exerting effective control over Vemma in this proceeding. Proceedings under the AF Rules are designed to entertain mixed disputes. After Bonooru started exercising effective control over Claimant, this proceeding lost its mixed nature. Accordingly, absent a treaty provision stating otherwise, the mixed nature of the dispute needs to exist until the date of the resolution of the claim. Therefore, this tribunal lacks jurisdiction to hear this claim.

[58] CEPTA, Art. 1.3.
[59] *Loewen* ¶ 225.
[60] *Id*. at 229.
[61] *Id.*at 230.

II. THE TRIBUNAL SHOULD ACCEPT THE AMICUS SUBMISSION BY THE EXTERNAL ADVISORS TO THE COMMITTEE ON REFORM OF PUBLIC UTILITIES AND REJECT THE SUBMISSION BY THE CONSORTIUM OF BONOORI FOREIGN INVESTORS

79. This Tribunal has the duty to entertain the EACRPU's *Amicus* Submission and reject the CBFI's *Amicus* Submission, because only the EACRPU's submission satisfies the requirements of the CEPTA and ICSID Additional Facility Rules. This Tribunal is empowered to make these decisions because: **(A)** The CEPTA and ICSID Additional Facility Rules allow the Tribunal to entertain *amicus* submissions, as do previous arbitral decisions; **(B)** The Tribunal should entertain the EACRPU's Amicus since it satisfies the requirements and **(C)** The Tribunal should reject the CBFI's submission because it fails to satisfy the guidelines.

A. The CEPTA and ICSID Additional Facility Rules Allow the Tribunal to Entertain *Amicus* Submissions, as do Previous Arbitral Decisions.

80. Through Procedural Order No. 1, the Tribunal recognized its power to receive *amicus* submissions.[62] This grant of power for the Tribunal is found in CEPTA Article 9.19 (3)[63] and Article 41(3) of the ICSID Additional Facility Rules,[64] which lay out the minimum guidelines for the Tribunal to determine the circumstances in which to entertain *amicus* submissions.

81. CEPTA Article 9.19 (3) mandates that a prospective *amicus* would have to identify itself to the Tribunal in depth, including stating the nature of its activities, as well as disclosing the *amicus'* affiliation with the disputing parties, identifying parties supporting the submission's preparation, a statement regarding the *amicus'* interest in the arbitration, and reasons for the Tribunal to accept the submission.[65]

82. AF Rules Article 41 (3) states that *amicus* submissions must refer to matters within the scope of the dispute, while the submission must aid the Tribunal in determining a legal or factual issue related to the proceedings and must be filed by a party with significant interest in the proceeding.

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[62] PO1 ¶ 19-21.
[63] CEPTA, Art. 9.19 (3).
[64] AF Rules, Art. 41 (3).
[65] *Id.* at 56.

83. ICSID and ICSID AF Tribunals have previously found grants of power both in the investment treaties and in the selection of the AF Rules.[66] Here, the Tribunal found that both the CEPTA and the selection of the AF Rules empower them to entertain *amicus* submissions where the submissions meet the requirements.[67]

B. The Tribunal Should Entertain the EACRPU's Amicus Submission.

84. The EACRPU's *Amicus* has adequately fulfilled all the requirements in the CEPTA, AF Rules, and the relevant cases, and should be entertained by the Tribunal. The Tribunal will find that: **(1)** The EACRPU are adequately identified, including the nature of their activities and objectives; **(2)** The EACRPU have disclosed their affiliation with the disputing parties and those supporting the preparation of the submission; **(3)** The EACRPU have clearly expressed their interest in the arbitration; and **(4)** The EACRPU's submission is connected to a matter within the scope of the dispute and will aid the Tribunal in determining issues of fact or law.

1. The EACRPU are Adequately Identified, Including the Nature of Their Activities and Objectives.

85. The EACRPU have stated the identities of the submitting advisors to the Tribunal, together with the nature of their activities and their objectives. The EACRPU have informed the Tribunal that they work for McGuinnessey & Company[68] as investment bankers.[69] The EACRPU has stated that the nature of their activities as investment bankers includes not only advising clients but intervening regularly in judicial proceedings regarding privatization projects.[70]

86. While the EACRPU may have been, in some manner, affiliated with the Committee on Reform of Public Utilities, the EACRPU are not acting as *amicus* in any official capacity, simply as people related to the process that led to Caeli's privatization. The EACRPU have continued to work in a professional capacity as investment bankers and members of Mekari civil society.[71]

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[66] *Apotex, Joint ICSID Cases, Suez & InterAguas, Lion Mexico.*
[67] *Id.* at 57.
[68] EACRPU's Amicus, Signatures.
[69] *Id.* at Para. 2.
[70] *Id.* at Para. 5.
[71] *Id.* at Para. 2.

2. The EACRPU Have Disclosed their Affiliation with the Disputing Parties and those Supporting the Preparation of the Submission.

87. As stated before, the EACRPU have been clear about their relationship with the parties, especially given they were hired through a transparent and competitive process, to participate in Caeli's privatization process. The EACRPU were engaged by Respondent to assist as investment bankers in assessing Vemma's tender for Caeli.[72] The EACRPU have therefore disclosed to the Tribunal their affiliations with both Vemma and Mekar, but that no person or entity has participated in the preparation of the *amicus* submission filed with the Tribunal.[73]

88. As leading investment bankers in Mekar, the EACRPU are not new to providing opinions in sorts of judicial proceedings, seeing as they are regular interveners before Mekari federal courts regarding the approval of privatization projects.[74]

3. The EACRPU have clearly expressed their interest in the arbitration.

89. The EACRPU's interest in this arbitration regards, first, the pursuit of fair business practices in Mekar, and second, to contribute facts regarding how Vemma's acquisition of an 85% stake in Caeli was made by means of corruption.

90. The EACRPU are concerned with the way that Vemma, and subsequently Caeli, engaged in business in Mekar. Caeli was fined twice for engaging in anti-competitive behavior, such as predatory pricing[75] and abuse of their dominant position at Phenac International.[76] This sort of behavior was rightly barred by the CCM, applying the MRTPA in good faith.

91. The EACRPU, due to their unique and privileged position in the assessment of Vemma's investment into Caeli, were able to gain a unique and distinct perspective that resulted in the corruption allegations brought before this Tribunal.[77] Specifically, it is noteworthy that Mr. Dorian Umbridge is being investigated by the Constitutional Court of Bonooru for the allegations of corruption.[78]

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[72] *Id.*
[73] *Id.* at para. 7.
[74] *Id.* at para. 5.
[75] Uncontested Facts ¶ 45.
[76] Uncontested Facts ¶ 49.
[77] EACRPU's Amicus, para. 4.
[78] PO3 ¶ 13.

92. During their assessment of Vemma's tender, the EACRPU found out that Mr. Umbridge was bribed by Vemma.[79] Mr. Umbridge was a vocal supporter of selecting Vemma to invest into Caeli throughout the bidding process.[80]

93. Any decision by the Tribunal regarding jurisdiction should consider at least fundamental principles of international law, as required by VCLT Art. 31 (3)(c),[81] or CEPTA Art. 1.3, which contains a statement regarding transparency, as well as the CEPTA Preamble, seeking the promotion of "transparency, good governance, and the rule of law, and eliminate bribery and corruption (…)".

94. While the Tribunal should consider the legality requirement of the investment solely on the basis of the CEPTA Preamble as a guideline for interpreting the Tribunal as it sets out to establish the case, the Tribunal may also choose to rely on general or fundamental principles of international law[82] or even the Transparency Rules.[83] Some now consider transnational public policy to have become a part of those principles, since it policy was defined in *World Duty Free* as an "international consensus as to universal standards and accepted norms of conduct that must be applied in all fora."[84] "These rules are widely accepted by the public policies of most states that make their application imperative when deciding a case."[85]

95. Here, the Tribunal must comply with the implicit fundamental principles of international law,[86] and/or the explicit requirements of the treaty[87], i.e., the CEPTA, as part of its own findings on the question of jurisdiction and the principle of competence-competence. "(…) the question of the existence of jurisdiction based on consent must be examined proprio motu (…)".[88]

96. The Tribunal should review its findings on jurisdiction while guided by a standard of proof where circumstantial evidence and "red flags" were used to satisfy the evidentiary burden regarding corruption, since there may be little to no physical or direct evidence of corruption, but rather an accumulation of circumstantial evidence.

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[79] *Id.* at 77.
[80] Uncontested Facts ¶ 24.
[81] VCLT Art. 31 (3)(c).
[82] Moloo, at 1475.
[83] *Transparency Rules.*
[84] *World Duty Free*, ¶ 139.
[85] See Lamm, at 708.
[86] *Id.* at 80.
[87] *Plama*, para. 138.
[88] *Mihaly*, para. 56.

4. The EACRPU's Submission is Connected to a Matter Within the Scope of the Dispute and Will Aid the Tribunal in Determining Issues of Fact or Law.

97. The EACRPU have filed a submission that refers to a matter of both fact and law within the narrowed scope of the dispute. Specifically, the EACRPU aim to provide the Tribunal with insight regarding Claimant's standing as an investor, by which it is an inadequate Claimant under the CEPTA.

98. The EACRPU have made relevant statements related to the way that Claimant entered into its investment, as well the allegations of corruption that surround the investment itself, not to mention the anti-competitive behavior already fined by the CCM on the investment. Since the Tribunal has the duty to *proprio motu* assess its own jurisdiction, this submission will be of aid to this assessment, since the Tribunal can, pursuant to the submission, make a more informed determination.

C. The Tribunal Should Reject the CBFI's Submission Because it Fails to Satisfy the Guidelines.

99. In assessing CBFI's *Amicus*, the Tribunal will find that the submission fails to satisfy the requirements mentioned previously, in these ways: **(1)** CBFI has failed to adequately identify themselves, including the nature of their activities and objectives; **(2)** CBFI has failed to adequately disclose their affiliation with the parties and other parties regarding the preparation of the submission; **(3)** CBFI has failed to adequately state their interest in the arbitration; and **(iv)** CBFI's Amicus is not connected to a matter within the scope of the dispute that will aid the Tribunal's determination of issues of fact or law.

1. CBFI has failed to adequately identify themselves, including the nature of their activities and objectives

100. CBFI has failed to identify itself adequately, as well as its objectives and the nature of its activities. While CBFI has in fact made statements that it is a non-profit industry association hailing from Bonooru, the nature of its membership, activities, and objectives remains unclear.

101. CBFI has gone as far as to state that Vemma is a member of the Consortium, but no reasonable proof has been given as regards the amount that Vemma pays, on what basis, and what

percentage of CBFI's income is derived from Vemma. Further, CBFI seeks to illustrate the Tribunal on requirements or bars to access ISDS, while the information they provide is simply related to Claimant's corporate framework, rather than actually on ISDS doctrine.

102. Additionally, there is no clarity regarding who may become a member of the CBFI, what the bars to membership are, and there is only a quite broad statement regarding the CBFI's objectives which in plain English, does not help go anywhere.

103. Further, CBFI never states who was directly involved with the preparation of their submission, it is merely signed by a Director of Aviation Policy, without identifying CBFI's Executive Committee -the decision makers for CBFI.

2. CBFI Has Failed to Adequately Disclose their Affiliation with the Parties and Other Parties Regarding the Preparation of The Submission.

104. CBFI has informed the Tribunal that they are affiliated with Claimant, since Claimant is a "member in good standing" of CBFI.[89] Further, CBFI has informed the Tribunal that it is also affiliated with other parties in arbitration against Mekar.

105. While CBFI has stated it has guidelines for submitting *amicus* briefs, this should hardly be acknowledged by the Tribunal, since CBFI showed that it will disregard any such guidelines[90] in pursuit of Mekar and to avoid its "members" being subjected to the rule of law.

106. In *Joint ICSID Cases*, the Tribunal found that even the appearance of a lack of independence or neutrality is enough grounds "to deny (…) the Application".[91] There, the applicants were granted connectivity and other services by a non-party unaffiliated with the dispute itself, and this was merit enough for the Tribunal to understand that there was an unconnected party to the dispute, or the application involved, and who had proven animosity towards Claimant in that case.

107. Here, Claimant is actually affiliated directly with the party seeking to participate as *amicus curiae*. That fact and allowing the director of a company advising Claimant to vote on the Executive Committee for this *amicus* to be filed, prove much more of a lack of independence and

[89] CBFI's Amicus ¶ 7.
[90] PO3 ¶ 12.
[91] *Joint ICSID Cases* ¶ 40 & *ss.*

neutrality than the arbitrators in *Joint ICSID Cases* found. This affiliation should be enough for this Tribunal to reject CBFI's Amicus.

3. CBFI Has Failed to Adequately State their Interest in The Arbitration.

108. CBFI appears to be acting as an additional Claimant in this arbitration, rather than as a friend of the Court. As it has stated, CBFI represents the interests of its members, however, CBFI does not actually have any interest of its own in the arbitration.

109. Claimant alone has the duty to prove the issues necessary as regards jurisdiction, as stated in *Spence*[92] and *Pac Rim.*[93] Therefore, CBFI's framing of issues such as it raises, is a matter solely to be handled by Claimant and not a figure that is actually retained by Claimant and other enterprises to further their interests.

110. In *Joint ICSID Cases*, the Tribunal found that for the requisite interest to be met by an *amicus*, the submission's content, that which the *amicus* alleges, must be within the *amicus'* expertise and experience. Here, CBFI may be a non-profit in charge of advocacy, training, and capacity building activities, however, that does not qualify CBFI to make legal arguments regarding an issue such as standing in ISDS.

4. CBFI's Amicus is not Connected to a Matter Within the Scope of the Dispute that Will Aid The Tribunal's Determination of Issues of Fact or Law.

111. CBFI has filed an *amicus* which relates to the law and legal standards of Bonooru. However, the scope of the dispute relates directly to the application of Mekari law. As stated before in *Spence* and *Pac Rim*, the Tribunal must see Claimant prove jurisdiction, rather than have an *amicus* raise any issues regarding jurisdiction.

112. While the nature of Claimant -a state owned entity- is an issue which must be clarified to the Tribunal, the complete regulatory framework of Claimant's home country regarding corporations, the nature of activities of enterprises in Bonooru, and "the uncertainty generated by the invalidation of the standing"[94] of companies **like** Claimant to voice grievances, are not within the scope of the dispute.

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[92] *Spence* ¶ 239.
[93] *Pac Rim* ¶ 2.8 – 2.15.
[94] CBFI's Amicus ¶ 10.

113. The Tribunal must deal with the issue at hand, and the scope of the dispute has been precisely narrowed by agreement of the parties because Claimant sees that it has no case. Claimant's allegation to be a private company is unsubstantiated, as proven further by this *amicus* application by CBFI.

III. RESPONDENT HAS NOT ACTED IN BREACH OF THE AGREED UPON STANDARD OF TREATMENT.

114. The measures taken by Respondent did not violate Art. 9.2.2. of the CEPTA because (**A**) Respondent has the right to change its legal framework, regulate its local currency, and decide which airline companies could receive loans and subsidies, (**B**) Respondent's investigations and airfare caps were reasonable under Mekari Law, (**C**) Claimant is using this tribunal to appeal Respondent's domestic decisions, and (**D**) there is no cumulative breach or composite act in breach of the FET standard.

115. The tribunal in *RREEF* recognized that the main criterion to be applied for the interpretation of the FET standard of treatment is that of reasonableness,[95] which the tribunal noted is closely linked to proportionality.[96] Reasonableness in the exercise of regulatory power includes:

- legitimacy of purpose, in as much as it represents interests of the society as a whole and does not alter the substance of the rights affected by regulation;
- necessity, which implies the existence of a pressing social need. The threshold for necessity is more demanding than the one for "useful" or "desirable"; and
- Suitability, in that it must make it possible to achieve the legitimate objective pursued.[97]

116. Here, Respondent's actions followed a rational policy and Respondent has acted proportionally and reasonably to that end. Respondent's actions served a legitimate purpose for the benefit of the public, and these actions were necessary to safeguard competition in the aviation industry and prevent further destabilization of the MON. The actions taken by Respondent served to protect these important interests for consumers and businesses alike, and therefore, the actions were only ever an appropriate execution of Respondent's sovereign right.

A. The Losses Alleged Stem from Respondent's Reasonable Exercise of the Right to Regulate.

117. Article 9.8 of the CEPTA recognizes Respondent's broad regulatory power. Article 9.8 (1) of the CEPTA provides that

[95] *RREEF* ¶ 263.
[96] *Id.* ¶ 463.
[97] *Id.* ¶ 464.

> "the Parties recognize their right to regulate in their territories in order to achieve legitimate public policy objectives, such as national security, the protection of public health, safety, the environment, public morals, social and consumer protection, or the promotion and protection of cultural diversity."

118. Besides, Article 9.8 (2) of the CEPTA provides that

> "for greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with and investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section."

Pursuant to these two provisions, Respondent's measures were a legitimate exercise of the power recognized in Art. 9.8 of the CEPTA. Thus, there is no violation as alleged by Claimant.

119. In *Gas Natural*, the tribunal found that

> "States are not obliged to pay compensation to investors for damages arising out of regulatory actions taken in good faith, and (…) the BIT does not prevent a Contracting Party from adopting or maintaining measures destined to preserve public order." (Unofficial Translation).[98]

Here, CEPTA provides for Mekar's "right to regulate", which allowed Respondent to take legitimate action to protect the public interest and therefore negates Claimant's request for compensation.

120. A policy that is proportional to a state's public policy objectives is not unjust and thus does not violate FET.[99] A measure is proportional if there is "an appropriate correlation between the state's public policy objective and the measure adopted to achieve it."[100]

121. Article 9.8 of the CEPTA is similar to Article XI of Argentina-United States BIT, which provides:

> "this Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations concerning the maintenance or restoration of international peace or security, or the protection of its essential security interests.".[101]

122. Here, Respondent's actions were reasonable and proportional based on the conditions at the time Claimant invested.[102] Mekar's economy was already fragile when Claimant participated in the bidding process, and upon becoming majority shareholders, Claimant knew that the 2008

[98] *Gas Natural* ¶ 7.
[99] *AES* ¶ 10.3.9; *Stadtwerke* ¶ 264.
[100] *AES* ¶ 10.3.9; *Micula [I]* ¶ 525.
[101] Argentina-US BIT, Art. XI
[102] *LG&E* ¶ 130; *AES* ¶ 9.3.8; *Duke Energy* ¶ 340.

financial crisis pushed Caeli to greater distress. Caeli ended operations on routes it had operated for several decades due to dwindling passenger numbers and increasing airport taxes.[103]

123. Information about Caeli's poor financial health, the critical state of Mekar's economy, efforts to stabilize the MON, and the trade agreement obligations is not proprietary information. This information provided the context and the background for Claimant's acquisition of Caeli, and as such, Claimant had full notice of the relevant facts, policies, guidelines, and legal framework that contextualized their potential investment. It was not an expectation but an assumption of risk that Claimant took to invest in Caeli.

1. The CEPTA does not Prohibit Respondent from Changing its Legal Framework.

124. The CEPTA does not prohibit Respondent from changing its legal and economic framework because the measures taken by Respondent were for the protection of the public interest.

125. Tribunals, such as in *Micula*, have consistently recognized that the FET standard should "not be understood to amount to a stabilization clause but will leave a measure of governmental space for regulation."[104]

> "Investors must expect that the legislation will change from time to time, absent a stabilization clause or other specific assurances giving rise to a legitimate expectation of stabilization."[105]

126. Mekar's actions were proportional, because first, Mekar made no specific commitments to Claimant that Respondent's business and legal framework in the aviation sector, as well as the currency, would not change. Second, reasonable and proportional actions were taken by Mekar to protect public interest. Third, the measures adopted by Respondent were the only way to safeguard the public's essential interests during the economic crisis.

127. Generally, a legitimate expectation in the context of foreign direct investment arises when a specific representation made by the host state to an investor induces the investment, or, the investor assumes that the general regulatory framework relied upon at the time the investment was

[103] Uncontested facts ¶ 17.
[104] *AES* ¶ 528; *El Paso* ¶ 350 (explaining that the BIT's purpose is not that the "States guarantee that the economic and legal conditions in which investments take place will remain unaltered *ad infinitum*.").
[105] *Micula [I]* ¶ 527.

made will remain stable.[106] However, if an economic and financial crisis occurs during the course of an investment in the host state, the foreign investor's expectations can and should be managed according to the public interest.

128. As explained in *El Paso*, a reference to "the stability of the legal and business framework" is not a guarantee that the economic conditions prevailing at the time of the investment will not change.[107] Indeed, "it is unthinkable that a State could make a general commitment to all foreign investors never to change its legislation whatever the circumstances, and it would be unreasonable for an investor to rely on such a freeze."[108] Moreover, investment treaties are not insurance policies against normal commercial risks and business judgments.[109]

129. Here, absent specific assurances, Claimant had no legitimate expectation that the legal and business framework of the airline sector would stay stable and never change. The Tribunal should find that regulations affecting the aviation sector and the MON were foreseeable to a reasonable investor such as Claimant. Claimant already knew that the economy was fragile at the time of the investment, and no matter what, Claimant assumed the risk of doing business in these circumstances.

130. Furthermore, the conditions that CEPTA mentions are the framework within which the investment took place, not a stability clause.

> "Legal framework by definition is subject to change as it adapts to new circumstances day by day, and the state has the sovereign right to exercise its powers which include legislative acts."[110]

Changes in the legal framework do not breach the FET standard.[111]

131. To establish a breach of legitimate expectations, Claimant must show that Respondent made specific commitments to Claimant, upon which Claimant reasonably relied.[112] Claimant cannot establish this. Claimant had the duty to conduct its due diligence regarding the highly regulated market it was entering.[113] Investors' expectations should be evaluated based on their due diligence.[114]

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[106] Levashova, at 235.
[107] *El Paso* ¶¶ 365, 372.
[108] *El Paso* ¶ 372, *Micula* ¶ 687.
[109] *Maffezini* ¶ 64, *CMS* ¶ 29.
[110] *AES* ¶ (9.3.29).
[111] *Id.* ¶ (9.3.35).
[112] *Stadtwerke* ¶ 264.
[113] *Invesmart* ¶ 254.
[114] *Id.*

132. The *Invesmart v. Czech Republic* tribunal observed that:

> "[a] putative investor, especially one making an investment in a highly regulated sector . . . has the burden of performing its own due diligence in vetting the investment within the context of the operative legal regime.".[115]

133. Here, due diligence would have revealed that the aviation sector was already shifting due to problems occurring since the time the investment was made.

134. First, based on the information available at the time of investment, Claimant could weigh the risk of a change in the aviation sector and the implementation of policies promoting MON. Claimant miscalculated: but the cost of that miscalculation is not for Respondent to bear.[116]

135. Second, Claimant assumed the risk of possible changes in the currency and invested in Caeli during fragile economic times.

136. In order to support to economy, Executive Order 9-2018 was passed and granted subsidies for airlines for airlines operate in Mekar.[117] Claimant did not qualify for subsidies because Vemma is a SOE, and Claimant has access to substantial benefits such as monetary support from its home state which gives it an unfair advantage over competing airlines in Respondent's aviation sector.

137. Finally, Caeli expanded while oil prices crashed to a five-year low, while its regional competitors adjusted to the economic crises by offering low-fare flights between Bonooru and Mekar. Furthermore, at the end of 2015, Caeli placed orders for 45 Boing 737 MAX aircraft and increased flying hours.[118] Thus, instead of making business decisions to protect the company from the economic crisis, Claimant took decisions that made the company more vulnerable to the economic fluctuations, and as such Respondent's economic policies and orders were not the factor affecting the investment.

138. Due to the above-mentioned overspending and negligence behaviors of Claimant, Respondent cannot be held responsible for Claimant's loss and damages.

2. Regulating MON was Necessary to Solve the Economic Crisis

139. Respondent did not execute an arbitrary decision against Claimant. Claimant argues that the measures taken to stabilize Mekar's economy were arbitrary under CEPTA 9.9.2.(c). However,

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[115] *Id.*
[116] *Maffezini II* ¶ 64.
[117] Uncontested facts ¶ 46.
[118] Uncontested facts ¶ 35.

States have a right to regulate their local currency, and the CEPTA grants that right in an express way.

140. The tribunal in *AES* held that a measure would not be arbitrary if it was reasonably related to a rational policy. It emphasized that this required two elements:

> "The existence of a rational policy: and reasonableness of act of the state in relation to the policy. A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter…. A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and measure adopted to achieve it….".[119]

141. The tribunal in *El Paso*[120] stated that,

> "The fixing of an exchange rate and deciding the mechanism by which the national currency may be exchanged for foreign currency and its conditions, including the possibility of maintaining accounts and deposits denominated in a foreign currency within the country, pertain to the monetary sovereignty of each State."

142. After the devaluation of the MON and the economic crisis in Mekar, Respondent needed certain measures and incentives for corporations to revive the economy. Respondent followed the IMF's recommendation to "… establish credibility in the [local] currency to avoid a debilitating economic situation"[121] and made MON mandatory for the transactions that took place in Mekar.[122]

143. Respondent's government pursued measures that were expected to aid the country's economy and financial viability, [123] exercising Respondent's inherent sovereign right to self-determination to do so. The decision to denominate airfare prices in USD had established an unsustainable precedent with widespread consequences for Respondent's economy, and as such, Respondent reasonably modified this policy in line with its sovereign authority to do so and in compliance with Respondent's treaty obligations under the CEPTA.

144. Like As in *El Paso* and *Continental*, Respondent's actions have no direct effect on the devaluation of the local currency. The presidential order that let airline companies to use US currency for the airfare caps was not permanent. It was an exemption for the airline sector before

[119] *AES* ¶ 10.3.7-10.3.9.
[120] *El Paso* ¶ 222 (citing to Continental ¶ 278).
[121] Uncontested Facts ¶ 39.
[122] Uncontested Facts ¶ 42.
[123] Uncontested Facts ¶ 41.

any regulations about the local currency. However, the decree passed on January 30, 2018, was not a direct regulation against Claimant, it was a regulation for every company operating in the country.[124]

145. Caeli is a company operating in Mekar, and accordingly, Claimant must follow the rules and legitimate policies set out by Respondent. Since the decision on MON is reasonable, Mekar did not breach its obligation under CEPTA 9.9.2.(c).

3. Vemma is a State-Owned Enterprise and was Therefore Ineligible to Receive Additional Subsidies

146. Respondent did not discriminate against Claimant in its treatment of Claimant relative to the rollout of subsidies for airlines operating domestically in Mekar. Vemma is a SEO and Claimant was therefore ineligible to receive the subsidies in question. Claimant argues that they were discriminated under CEPTA 9.9.2.(c) when Mekar offered loans and subsidies during the economic crisis.

147. Claimant was not discriminated against because, as the tribunal in *Saluka* held,

> "The standard of 'reasonableness' therefore requires, in this context as well a showing that the State's conduct bears a reasonable relationship to some rational policy, whereas the standard of 'non-discrimination' requires a rational justification of any differential treatment of a foreign investor."[125]

148. The *Lemire* tribunal specifically relied on *Saluka* and other cases to define "discrimination" by "requiring more than different treatment": "to amount to discrimination, a case must be treated differently from similar cases without justification;".[126]

149. When Mekar passed Decree 9-2018 to provide subsidies and loans to airlines operating in Mekar[127], Claimant was deemed ineligible, as was Larry Air. Both of these airlines were state-owned.[128] Therefore, Claimant's argument that they were discriminated against[129] is unsubstantiated, as it was reasonable to make such a denial- SEOs were denied subsidies due to their reception of support from their home states.

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[124] Uncontested *Facts* ¶ 42.
[125] *Saluka* ¶ 460.
[126] *Lemire* ¶ 261.
[127] Uncontested Facts ¶ 46.
[128] Uncontested Facts ¶ 47.
[129] SoC ¶ 92.

150. Subsidies given to Star Wings and Jet Green do not support Claimant's discrimination argument[130] even though they received more subsidies than Vemma received between 2016-2017.[131] Star Wings and JetGreen received subsidies from their home countries due to the economic crisis.[132] However, Vemma received subsidies even before the crisis. Due to this distinction, Vemma was not eligible for subsidies and any treatment of the Claimant that differs from that afforded to other investors is justified.

151. In addition to the subsidies, the state provided loans to eligible companies. Claimant applied for this loan, which was offered by the First National Phenac. It was Claimant that decided not to take the loan, which was approved.[133]

152. Also, Claimant is responsible for its unfavorable credit score. Since Claimant took over Caeli, Claimant's investment strategy was considered aggressive by the Board. Even Mekar Airservices gave cautionary advice regarding the expansion and market volatility.[134] Low oil prices played a significant part in the profits of the company and the experts were expecting a rise in oil prices.[135]

153. Claimant ignored these signs and continued their rapid expansion of Caeli instead of preparing for the economic crisis. After Bonooru cut the subsidies under the Horizon 2020 Scheme,[136] Caeli could not maintain its profitable business structure. In the end, the profitable business appearance was an illusion rapidly burst when the subsidies stopped and oil prices rose.

154. Claimant also argues that Mekar's bailouts of Caeli in 2004 and 2021 are clear discrimination.[137] However, the goal of privatization is to reduce the financial strain that state owned commercial enterprises place on governments. After privatization, Mekar had no obligation to bail out Claimant, however, Mekar still offered Caeli a loan according to Claimant's credit score. Every bad business decision by Claimant grew debt liabilities, and the unpaid fines to the CCM contributed to the bad financial standing.

155. Claimant argues further than using a domestic credit score different to an international one when offering Claimant the bank loan was prejudicial and discriminatory. However, the IICRA

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[130] SoC ¶ 94.
[131] PO4 ¶ 7.
[132] PO4 ¶ 7.
[133] Uncontested Facts ¶ 51.
[134] Uncontested Facts ¶ 29.
[135] Uncontested Facts ¶ 33.
[136] PO4 ¶ 6.
[137] SoC ¶ 93.

evaluated Caeli's credit score based on its financial records, the large fines Caeli was still due to pay, and not on Vemma and Caeli's cumulative financial standing. Even if the loan was not offered on the terms a AAA+ credit scoring company would get, Caeli still was offered a loan which Claimant decided not to take.

B. The CCM Investigations and Airfare Caps were Justified Under Mekari Law

156. Claimant argues that the CCM investigations were arbitrary under CEPTA 9.9.2.(c) but investigations and the airfare caps were reasonable and justifiable under Mekari Law.

157. In *EDF Limited*, the tribunal identified unreasonable measures as follows:

> "a measure that inflicts damage on the investor without serving any apparent legitimate purpose"; "a measure that is not based on legal standards but on discretion, prejudice, or personal reference; "A measure taken for reasons that are different from those put forward by decision maker"; "a measure taken in willful disregard of due process and proper procedure".[138]

158. *Schreuer* analyzed the actions by the tribunal in *Helnan*, finding that

> "While the tribunal noted that the inspection did not follow the "customary practice, was carried out with no previous warning", and "by exceptionally large team" it also noted that the investor did not seriously challenge most the observations of the inspection committee. In the end, the tribunal found that the inspection did not amount to a breach of FET. [139]

159. Also, in regard to the second inspection, which the tribunal in *Helnan* characterized as "very suspicious"[140] and as "carried out as a mere formality deprived of any substance and part of the implementation of an already taken decision to immediately downgrade the Shepheard Hotel",[141] the tribunal did not find a breach because the allocation of responsibility for the downgrading was of a contractual nature outside the scope of jurisdiction of this tribunal.[142]

160. In *Tokios Tokeles* the tribunal held that a deliberate state campaign to punish an investor must surely be the clearest infringement one could find of provisions and aims of the applicable treaty.[143] However, the claim was rejected as unproven since "the claimant is in error in asserting

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[138] *EDF Limited* ¶ 303.
[139] Reinisch, Schreuer at 431 *(citing to Helnan at* ¶ 138, ¶140, ¶143.)
[140] *Id. ¶ 144.*
[141] *Id. ¶ 146.*
[142] *Id. ¶ 147.*
[143] *Tokios Tokeles* ¶ 1273.

that the events have credible alternative explanation other than a concerted malicious and politically inspired campaign."[144] Here, there was never a state campaign to punish the Claimant but rather to hold the investment accountable to laws preexisting the investment.

1. The CCM Investigations Were Proper and Reasonable under Mekari Law.

161. After Vemma's economic growth accelerated beyond what the market seemed to allow for, the CCM started a *suo moto* investigation on 9 September 2016. While the market share for Caeli was below the 50%, together with that of Royal Narnian and the Moon Alliance, it was well over that percentage. However, the CCM was rightfully pursuing its investigation due to the cooperation engaged in by the Moon Alliance members.[145] This included secondary slot-trading with Royal Narnian as well as foreign subsidies that allowed predatory pricing.[146]

162. The investigations are far from being arbitrary and discriminatory against Claimant. The MRTPA was in force before the time of investment[147] and CCM is an autonomous body independent of government influence.[148] Claimant knew which actions were prohibited in Respondent's territory at all times relevant to the investment, but Claimant nevertheless violated Respondent's domestic competition law.

163. The CCM approved Vemma's acquisition, with an undertaking from Caeli that it would not engage in high-level co-operation on competition parameters such as prices, schedules, capacity, facilities, and other sensitive information with Moon Alliance members, which was duly submitted.[149]

164. Similar to *Helnan*, just because the CCM never investigated airline alliances, does not mean that CCM cannot investigate Caeli and Royal Narnian together. Here, CCM combined two companies' market share for the first time. It is not customary practice to combine two companies' shares in the same alliance but cooperation between Caeli and Royal Narnian was beyond the customary cooperation in airline alliances, and they were sister companies under the roof of Vemma. Unprecedented actions require new measures.

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[144] *Id.* ¶ 136.
[145] Uncontested Facts ¶ 36.
[146] *Id.* ¶ 36.
[147] *Id.* ¶ 14.
[148] *Id.* ¶ 19.
[149] *Id.* ¶ 25.

165. In terms of the Second Investigation, Caeli's competitors stated that Caeli launched flights on specific regional routes with the sole purpose of pushing them off these routes, capitalizing on its undercutting policies and the privileges it enjoyed at Phenac International.[150] Caeli's actions made it nearly impossible for them to penetrate the market linked to Caeli's "fortress hub" at Phenac International.[151]

166. Actions of Caeli counterpose every element stated at Chapter IV of the MRTPA. According to this section, Caeli has substantial control over through Phenac Int'l, engaged in anti-competitive acts by price undercutting and cooperating with Royal Narnian, as well as preventing other airlines from entering the market by saturating specific regional routes.

167. An application of the standard articulated in *EDF* demonstrates that: (i) the investigations did not damage the investor without a legitimate reason; (ii) the investigations are standard for violators of the MRTPA; (iii) the mere absence of prior investigations does not mean the investigations would not be carried out;" and (iv) the investigations were executed in accordance with due process of the law.

2. The Airfare Caps did not harm Claimant.

168. After the initiation of the First Investigation, the CCM also imposed airfare caps on Caeli. These caps were higher than Caeli's prices, and there is "no evidence the caps hurt its profitability.[152]

169. Claimant argues that Respondent's actions after the election were motivated by the renationalization of the investment,[153] but Respondent merely acted in accordance with their sovereign right to enforce national anti-competition legislation, with the aim of providing a fair playing field for the entire aviation sector (including Caeli).

170. Claimant did not challenge the airfare caps in the first place. They waited almost two years to object to the airfare caps. Subsequently, the hearing was set for later dates due to this late objection. Similar to the Claimant in *Helnan*, Claimant here did not take the airfare caps seriously.

[150] Uncontested Facts ¶ 38.
[151] *Id.* ¶ 37.
[152] Uncontested Facts ¶ 37.
[153] *SoC* ¶ 91.

171. In addition, airfare caps did not harm Claimant. After the investigation in 2016, Vemma valued its investment USD 1.1 billion with confirmation from Aviation Analytics.[154] After conclusion of the Second Investigation, in June 2019, Aviation Analytics stated that the company reached a peak valuation of USD 1.1 billion.[155] In the end, the airfare caps were lifted in October 2019. These valuations show that Caeli's value did not drop during the investigations. Therefore, the airfare caps were reasonable.

C. Claimant Cannot Use This Tribunal to Appeal the Decision on the Enforcement of the Award.

172. There is not a violation to the denial of justice obligation. Claimant argues that enforcement of the Sinnoh award and the final decision on CCM investigations during airfare caps hearing supposes a denial of justice under CEPTA 9.9.2.(a).

173. When investment tribunals evaluate the local agencies and courts, they exercise a kind of international control over the national judiciary. This follows from generally accepted principles of state responsibility according to which the state is internationally responsible for the acts and omissions of its courts.[156]Any international review cannot assess the correctness of the outcome of judicial proceedings. Rather, it has to evaluate whether the outcome is in conformity with international law.[157]

174. The ICSID tribunal in *Helnan* stated that

> "ICSID tribunal will not act as an instance to review matters of domestic law in the manner of a court of higher instance. Instead, the tribunal will accept … as long as no deficiencies, in procedure or substance, are shown in regard to local proceedings which … deficiencies unactable from viewpoint of international law…"[158]

175. Although The High Commercial Court does not have the right to re-evaluate the merits of the arbitration as a principle of the international law, it has the right to review and decide on the award's enforceability.

176. As held by the Superior Court, the language of the New York Convention is permissive on the enforcement of the awards which have been set aside.[159] The permissive language of the

[154] PO4 ¶ 3.
[155] PO4 ¶ 4.
[156] *Reinisch*, *Schreuer* ¶ 646.
[157] *Id.*
[158] *Helnan* ¶ 106.
[159] Annex XV, ¶ 18.

New York Convention gives national courts the discretion to decide whether to enforce or not the arbitral award under scrutiny. Therefore, this decision is also within the judicial discretion of the Mekari courts.

177. Also, this decision is consistent with previous decisions held by the Superior Court. There was not an element of surprise on the part of the national courts enforcing the Sinnoh Award.

178. Besides, similar to *Helnan*, Claimant cannot use this tribunal as an appellate review to the discretionary use of adjudicative power of Mekar's national courts.

179. In addition, the Supreme Arbitrazh Court of Sinnograd did not rule on bribery. Even though, the court held that there is a "grave, precise, and consisted indicia that Mr. Cavannaugh accepted bribes".[160] It was a conclusion based on mere indicia of corruption, which is not sufficient to deny the enforcement or validity of the award. As such, to amount to a denial of justice, substantial evidence is required, and allegations are not enough, thus those are not a treaty violation. Therefore, Mekar did not deny justice.

D. Respondent did not Cumulatively Breach CEPTA's FET Provision.

180. The tribunal should find that the allegations by Claimant do not constitute a cumulative breach of any treaty obligations by Respondent, and as such, there is also no cumulative breach of any applicable FET obligations under the CEPTA.

181. The legal standard for a cumulative breach by a State of an international obligation is stipulated per Article 15(1) of the Articles on State Responsibility. Accordingly, composite acts give rise to continuing breaches and are necessarily limited to breach of obligations which concern acts and omissions that can only be considered wrongful in their aggregate.[161]

182. Here, Claimant has not passed the factual threshold required to establish a claim of cumulative breach by Respondent. The Tribunal should consider the terms of the FET provisions in the CEPTA and determine whether the facts and evidence truly indicate that Respondent's actions constitute a wrongful act in their aggregate. Not a single act or omission taken by Mekar can be construed to give rise to a breach of the FET standard in the CEPTA. Because a country engulfed in economic crises cannot reasonably be expected to cater to the arbitrary demands of a foreign investor.

[160] Annex XIII, ¶ 14.
[161] Articles on State Responsibility, Art. 15(1).

183. Bearing in mind that Claimant's allegations are therefore unsubstantiated by the record, the Respondent should not be held liable to compensate Claimant for any losses or damages alleged, including Claimant's allegation that it is entitled to $700 million in this proceeding.

IV. RESPONDENT IS NOT LIABLE TO PAY ANY DAMAGES

184. Respondent is not liable to pay any damages for the losses alleged by Claimant. Respondent has already paid $400 million to Claimant as market value for the relevant shares in Caeli previously held by Vemma. Any additional amount compensated would constitute an unjust enrichment of Claimant because, by demanding damages in excess of their $400 million market value, Claimant aims to rectify the consequences of its own poor business practices that have led to its present state of financial disarray. Therefore, the tribunal should hold that it would be inequitable to demand a Respondent state be held liable for the bad business practices of a foreign investor, particularly because of the public policy implications in future similar circumstances.

185. Moreover, the tribunal must also take into account the applicability of Article 39 of the ILC Draft Articles, which provide that, "In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.[162] The facts and evidence on the record clearly indicate that there were multiple instances where Claimant could have either mitigated, or entirely prevented, the losses it now seeks to attribute to Respondent, but in its analysis, the tribunal should pay particular attention to the impact of Claimant's core business model, as well as Claimant's negligent operations of Caeli, in determining if any damages should be awarded to Claimant.

A. The Applicable Legal Standard for The Measure of Damages Is Full Reparation.

186. In the event of an internationally wrongful act attributable to the actions of a State, the applicable legal standard for the measure of damages is well-established under international law and calls for full reparation with the aim of wiping out the consequences of the State.[163]

187. However, the facts giving rise to this standard in *Chorzow Factory* are also relevant, as they demarcate a threshold for what should be considered an internationally wrongful act attributable to a State. Crucially, the *Chorzow Factory Case* arose from the seizure by Poland of a factory controlled by German nationals in Upper Silesia, and crucially, the seizure was recognized

[162] ILC Articles, Article 39.
[163] *Chorzow Factory Case.*

by the PCIJ as an unlawful expropriation, which as will be examined, is distinct from the violation alleged by Claimant in these proceedings.[164]

B. Claimant is not Entitled to Full Quantum of Damages Due to Their Significant Contribution to The Losses Allegedly Arising Under CEPTA.

188. Claimant contributed significantly to the losses allegedly arising under CEPTA and this tribunal should determine that Claimant's contribution to its loss is so significant that Respondent is not liable to compensate Claimant in full for any damages owed. Article 39 of the Articles on State Responsibility provides that in the determination of reparation for the internationally wrongful act of a State, "account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought."[165] The tribunal should therefore also consider the facts on the record examined below that indicate Claimant materially contributed to the damages and losses alleged as breaches of Respondent's treaty obligations under the CEPTA.[166]

1. Claimant's Core Business Model was Ill-Advised and Willfully Negligent.

189. Claimant alleges losses be payable by Respondent for the consequences of a core business model that was ill-advised and discouraged by reasonable third parties. At the time that Claimant entered the investment, Vemma had full notice as to the financial health of Caeli after competing in a bidding process that emerged entirely out of Caeli's precarious financial condition, at a time when Caeli had been deemed a "zombie enterprise" incapable of salvaging through a second national bailout plan.[167]

190. Throughout the course of Claimant's investment, they were warned about their proposed business model and unsustainable growth forecasts for the airline. Over the course of 2012, Claimant attempted to capitalize on growing interest in Respondent's territory because of the Eldin volcanic eruption, as part of which Claimant decided to offer low-fare, long-distance flights into

[164] *Id.*
[165] ILC Articles, Article 39.
[166] Articles on State Responsibility at 110.
[167] Uncontested Facts ¶ 17.

Mekar.[168] This was Claimant's unilateral decision contrary to the advice offered at the time by representatives of Mekar Airservices, who during the first annual shareholders' meetings, advised Claimant about the volatility of demand in the region and the risk that this volatility posed to Claimant's proposal.[169]

191. Although Caeli was able to capitalize on demand between August 2011 to December 2013, once its revenues fell in response to a substantial decline in demand, representatives from Mekar Airservices once again cautioned Claimant that Caeli's expansion should be controlled so as to avoid exorbitant costs associated with maintaining its fleet during seasons of low demand and to hedge the liability of additional financing.[170] Yet again, Claimant chose to ignore the advice of Caeli's other shareholders and instead continued its path of unsustainable growth for the company. Although the other shareholders requested Claimant consider the impact of demand on the company's operational costs, Claimant ignored this request and decided to increase the number of Caeli's international routes thereby adding to Caeli's losses at the time.[171]

192. Claimant alleges that it was able to transform Caeli after this decline and in the aftermath of the global oil price crash in June 2014. However, at the time, Caeli's profits were merely a consequence of the airline's access to cheap oil prices, while the airline's losses were particularly concentrated in the high-traffic route between Bonooru and Mekar. Ms. Misty Kasumi, a high-ranking employee within Bonooru's Ministry of Tourism noted at the time that these routes were not profitable to maintain and potentially a strategy employed by Bonooru and Claimant to ensure Caeli operated these routes to the benefit of Bonooru.[172]

2. Therefore, Respondent cannot be Held Liable for Claimant's Alleged Losses.

193. Respondent is not liable for any of the losses now alleged by Claimant as arising under the CEPTA obligations because any deprivation of enjoyment of the investment has been the consequence of Claimant's particular business model, including their expansion of Caeli and

[168] Uncontested Facts ¶ 29.
[169] *Id.*
[170] *Id* at ¶ 31.
[171] *Id.*
[172] Annex VII, l.1866.

several executive decisions by Claimant as majority shareholder, as well as Claimant's possible negligence in the operation of the airline.

194. The underlying aim of any award of damages is to provide a remedy for a loss, however, Claimant has failed to establish that their own actions did not contribute significantly to the deprivation of the investment allegedly suffered. The "fundamental concept of 'damages' is satisfaction, reparation for a *loss* suffered, a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole."[173] Moreover, in the application of the principle conveyed in Article 39 of the Articles on State Responsibility, the conduct of Claimant should be taken into account in assessing the form and extent of reparation.[174]

195. In *Hulley Enterprises,* one of the Yukos shareholders cases, the tribunal concluded that although there was a breach that had been committed by Russia against Claimant, there was also a sufficient causal link between Claimant's abuse of the tax system and its demise which triggered a finding of contributory fault on the part of Claimant.[175] The damages were therefore reduced by 25% to reflect Claimant's contributory fault and misconduct.[176]

196. Claimant has yet to address the inevitable impact of the various decisions it executed in the course of its majority ownership of Caeli, particularly how the consequences of those decisions eventually forced Claimant to sell its shares and cut its losses in the airline. Here, as has been applied by other tribunals, any quantum awarded to Claimant should be reduced in order to reflect Claimant's wilful conduct that contributed materially to the losses alleged.

[173] *Lusitania Cases* at 19.
[174] Articles on State Responsibility at 110.
[175] *Hulley Enterprises* at 1615.
[176] *Id.*

V. IF AN AWARD OF DAMAGES IS GRANTED, THE ONLY APPROPRIATE COMPENSATION STANDARD IS MARKET VALUE.

A. The Ordinary Meaning of Article 9.21 is that Monetary Damages are to be Awarded at Market Value.

197. State responsibility for breach of a treaty obligation depends upon the precise terms of the treaty provision alleged to have been infringed, and as such, any interpretation by the tribunal of the appropriate compensation standard in this case should be guided by the precise terms of the FET provisions that Claimant relies upon for their allegations.[177] But the tribunal must also apply the general rule of treaty interpretation, whereby, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[178] Article 9.21 of the CEPTA specifically states that where a tribunal makes a final award of monetary damages against a respondent, the tribunal may award the monetary damages "at a market value.[179]

198. Here, the ordinary meaning of the treaty text clearly indicates that the parties agreed upon the market value standard of compensation in the event of a final award against a respondent. Claimant merely seeks to rectify the consequences of its own actions by insisting upon the fair market value standard of compensation.

B. Article 9.7 of the CEPTA Intentionally Limits the Application of Fair Market Value to Claims of Unlawful Expropriation.

199. The exclusion of the fair market value approach in the language of Article 9.7 of the CEPTA was a deliberate choice by Respondent and the Commonwealth of Bonooru in drafting the terms of the agreement. Article 9.7 intentionally limits the application of fair market value, so that only claims for expropriation qualify for compensation at fair market value.

200. Article 9.21 of the CEPTA states that where a tribunal makes a final award against a respondent, the tribunal "may award, separately or in combination: (a) monetary damages at a

[177] *AIG Capital Partners* ¶ 12.1.1
[178] Article 31, VCLT.
[179] Article 9.21, CEPTA.

market value, except as otherwise provided for in Article 9.12."[180] Article 9.12 is the Expropriation and Compensation clause of the agreement, whereby the contracting parties stipulate that compensation for expropriation" shall amount to the fair market value of the investment at the time immediately before the expropriation..."[181]

201. This Tribunal has been asked to award the Claimant "700 million USD in compensation corresponding to the 'fair market value' of the investment prior to the violation by Mekar, according to both principles of international law and the most favoured nation obligation contained in the CEPTA."[182] However, the MFN clause expressly states that most favoured nation treatment under the terms of the treaty "does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements."[183] Claimant cannot invoke the applicability of the fair market value approach by operation of the MFN clause contained in Article 9.7 of the CEPTA, as to do so would contravene the terms of the MFN clause itself.

[180] Article 9.21.1(a), CEPTA.
[181] Article 9.12.2, CEPTA.
[182] NOA, ¶ 30.
[183] CEPTA, Art. 9.7(2).

VI. VALUATION OF ANY DAMAGES DETERMINED TO BE PAYABLE TO CLAIMANT.

202. Respondent maintains it has not committed a breach of its obligations under the terms of the CEPTA. However, if an award of damages for Claimant is to be determined by this tribunal, the valuation of any damages payable to Claimant should be calculated according to either a market value approach or an asset-based approach and accounting for Claimant's aforementioned contributory fault.

203. There are generally three valuation approaches to determining the market value of a business—the income-based, market-based, and asset-based valuation approaches.[184] The choice among these approaches depends largely on the financial situation of the business being assessed, with the asset-based approach being relevant to loss-making enterprises.[185] However, all three of these approaches result in a market value of the business.[186]

204. An important distinction to be made, which Claimant has altogether ignored, is that the claims for damages so far alleged derive only from Claimant's investment as shareholders in Caeli, which is distinct from a claim by the collective entity. In another proceeding whereby claimants (shareholders in a concessionaire) sought compensation from a Respondent state, the tribunal noted that Claimant's shareholder basis for the claim was relevant to determining whether future profits could be calculated in damages, noting, "The exercise required of this Tribunal is the valuation of Claimants' lost investments in the form of their shares in the Concessionaire and not, as such, the lost profits incurred by the Concessionaire under the Concession Agreement."[187]

205. Here, therefore, Claimants cannot argue that they are entitled to damages in excess of the $400 million already paid to Claimants for their relevant shares in Caeli, in particular because they are only entitled to the value corresponding to their shares individually, and not to the value of Caeli as a whole. Whilst Respondent maintains that it acted in conformity with its obligations under the terms of the CEPTA at all times relevant to Claimant's majority ownership of Caeli, in the event that a quantum is awarded in favor of Claimant, the award should reflect the market value

[184] Kantor at 12.
[185] *Id* at 13.
[186] *Id.*
[187] *Gemplus* ¶15.14.

of Caeli at the time of the acquisition on 29th March 2011 with a deduction to be calculated by the tribunal to account for contributory fault by Claimant.

VII. REQUEST FOR RELIEF

206. Respondent hereby respectfully requests the Arbitral Tribunal to render an award in favor of the Respondent and:

1. FINDS that Claimant has no standing in this arbitration,
2. FINDS that it lacks jurisdiction to hear Claimant's claims,
3. DECLARES that the Federal Republic of Mekar, its agencies and any other representative government entities, treated Claimant's investment fairly and equitably,
4. DECLARE that Claimant is not entitled to damages as to the amount requested due to Vemma's contribution to the loss incurred,
5. ORDER that Claimant is only entitled to market value.

Counsel for Claimant

/signed/

23 September 2021