FOREIGN DIRECT INVESTMENT MOOT

2021

IN THE ARBITRATION UNDER CHAPTER 9 OF THE

CEPTA AND THE

ICSID ADDITIONAL FACILITY RULES BETWEEN

Vemma Holdings Inc.

(Claimant)

and

The Federal Republic of Mekar

(Respondent)

MEMORIAL FOR RESPONDENT

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

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Abbreviations	**Citations**
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Frontier	*Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award, 12 November 2010
Glamis	*Glamis Gold, Ltd. v. The United States of America,* UNCITRAL, Award, 8 June 2009
Iberdrola	*Iberdrola Energía v. Guatemala*, UNCITRAL, Award, 26 April 2019
INVESTMART	*Invesmart v. Czech Republic*, UNCITRAL, Award, 26 June 2009
Lauder	*Ronald S. Lauder v. The Czech Republic,* UNCITRAL, Final Award, 3 September 2001
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NAFTA/UNCITRAL

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Vantage	*Vantage Deep Water Co. V. Petrobras Am.,Inc.*

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Abbreviation	Citation
CEPTA	*Comprehensive Economic and Trade Agreement (CEPTA) between Canada, of the one part, and the European Union and its Member States, of the other part*, 2017, OJ L 11, 14.1
ICSID CONVENTION	ICSID Convention: ICSID Convention, Regulations and Rules. Washington, D.C. International Centre for Settlement of Investment Disputes, 2003
ILC ART	*International Law Commission, Articles on State Responsibility for Internationally Wrongful Acts (including official Commentary*), 2001, Yearbook of the International Law Commission, Vol. II (Part 2)
ILC MFN	*International Law Commision, Articles on most-favored-nation clauses* (ILC Draft), 1978, in Yearbook of the international Law Commission, Vol. II, (Part 2)
ITALY-JORDAN BIT	*Agreement Between the Government of the Hashemite Kingdom of Jordan and the Government of the Italian Republic on the Promotion and Protection of Investments*, 1996, 3379 UNCTAD
UNCITRAL	*UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2014*, United Nations Commission on International Trade Law
VCLT	*Vienna Convention on the Law of Treaties*, 23 May 1949, 1155, U.N.T.S. 331

LIST OF ABBREVIATIONS

Abbreviation	Term
"Horizon 2020"	Bonooru's Horizon 2020 Scheme
¶	Paragraph
1994 BIT	Bonooru - Mekar Bilateral Investment Treaties
AoA	Articles of Association
BAK	Bakugo currency
BOD	Board of Directors
Bonooru	The Common Whealth of Bonooru
BPB	Bonoorian People's Bank
CA	Civil Aviation
CAA	Commercial Arbitration Act
Caeli	Caeli Airways
CBFI	The Consortium of Bonoori Foreing investors
CCM	Competition Commission of Mekar
CEPO	Union of Petrolium Exporting States
CEPTA	Bonooru – Mekar Comprehensive Economic Partnership and Trade Agreement
CFI	Corporate Finance Institute
CILS	Center of Integrity in Legal Services
Claimant	Vemma
CMP	Mekar's Common Man's Party
CRPU	Mekar's Committee on Reform of Public Utilities
FET	Fair and Equitable Treatment Standard
FMV	Fair Market Value
GDP	Gross Domestic Product
GNR	The Greater Narnian Region
HGLLP	Hawthorne Group LLP
IBA	International Bar Association
ICAO	List of Government Owned and Privatized Airlines, Report, International Civil Aviation Organization

ICSID	International Centre for Settlement of Investment Disputes
ICSID-AFR	International Centre for Settlement of Investment Disputes Additional Facility Rules
ICJ	International Court of Justice
IICRA	Investment Information and Credit Rating Agency
IIAs	International Investment Agreements
IIL	International Investment Law
IMF	Internarional Monetary Fund
ILC DARSIWA	International Law Commission Draft Articles on state Responsibility for Internationally Wrongful Acts
IL	International Law
IPO	Initial Public Offering
ISDS	Investor State Dispute Settlement
LoP	Law on Privatization of State Property
LPM	Labourer´s Party of Mekar
MA	Moon Alliance
Mekar	The Federal Republic of Mekar
MAS	Mekar Air Services
MET	Mekar Tele Systems
MFN	Most Favored Nation
MoA	Memorandum of Association
MoI	Memorandum of Incorporation
MON	Mekar’s currency
MRTPA	Monopoly and Restrictive Trade Practice Act
MTT	Ministry of Transport and Tourism
MV	Market Value
NOA	Notice of Arbitration
p.	Page
Phenac	Phenac International Airport
PO	Procedural Order
RNAO	Response to the Notice of Arbitration

Respondent	Mekar
SA	Shareholder's Agreement
SCC	Sinnoh Chamber of Commerce
SOEs	State-Owned Enterprises
UF	Statement of Uncontested Facts
UNCITRAL Rules	Rules on Transparency in Investors-State Arbitration
USD	US Dollars
Vemma	Vemma Holdings Inc.

STATEMENT OF FACTS

Dramatis Personae

1. Vemma is an airline holding company, product of a large-scale privatization project, incorporated in Bonooru, a nation located in the GNR. The company is owned in a 55% by Bonooru.

2. Mekar is a developing country located in the GNR, approximately 1.600 kilometers to the South of Bonooru. Mekar has endured various economic crises, placing the State in need of engaging high regulatory actions to gain stability.

Vemma's tender and acquisition of its participation in Caeli

3. As part of an Emergency Recovery Act, through a privatization campaign, Mekar opened a bidding process to sale 85% of Caeli, a stated-owned airline. The campaign aimed to release losses and regain financial standing.

4. Claimant submitted a tender valued at USD 800 million that succeeded. On 29 March 2011, Vemma entered into a purchase agreement for Caeli's 85% shares. The remaining 15% was held by Mekar. While approving the purchase, the CCM demanded an undertaking from Vemma to ensure that it would not engage in high cooperation with fellow MA members.

5. In 2011, Bonooru announced the "Horizon 2020" scheme. Under such plan, airlines would receive subsidies in order to boost Bonooru's tourism sector. Vemma received the first subsidy under this Scheme on 28 October 2011.

Vemma's risky and anticompetitive business strategies

6. After a rise in tourism, Caeli started to take risky financial business decisions against the advice of MAS. As Vemma relied on its temporary success, the fall-winter decline was more than Vemma could handle.

7. Against MAS advice of avoiding exorbitant costs associated with maintaining its fleet during seasons of low demand and hedge the liability of additional financing, the BOD decided to increase the number of Caeli's international routes to offset the losses incurred regionally during the fall-winter season.

8. In June 2014, oil prices around the globe crashed to a five-year low. Caeli capitalized on such a crisis to gain profit and retrieve Market Share.

9. Contrary to MAS advice, Vemma's representatives preferred fleet expansion and slashed airfares. Taking advantage of the cheap fuel, Caeli used its earnings to drive competitors out of the market by allegedly 'consolidating its consumer base' through cheap fares, loyalty programs and discount schemes.

10. Due to these measures, the CCM launched an investigation, to find whether Caeli had adopted predatory pricing strategies with the aim of hindering competition on the domestic market. The CCM, following the MRTPA, established caps in airfare prices as an interim measure.

11. In December 2016, a consortium of small regional airlines in GN, led by one of their Mekari members, brought another complaint before the CCM, alleging that Caeli's strategies in regional routes made it nearly impossible for them to penetrate the market linked to Phenac.

The currency crisis and Mekar's measures

12. Meanwhile, starting in late 2016, the MON began to nosedive. Due to the currency crisis, Mekari authorities approved the denomination of airfare in USD for all airlines operating in its territory in October 2017. However, the urgency to stabilize its currency demanded the State to remove this benefit, which it did on 30 January 2018.

13. Caeli, then, demanded the CCM to lift the caps, request that was denied. The CCM reasoned that the interim measures could not be removed until its investigations were complete, and that interference with inflation rates was beyond its competence. Caeli decided to seek judicial review of the caps. The claim was filed and registered on 27 March 2018.

14. By the end of August 2018, the CCM concluded its first investigation into the commercial activities of Caeli. The CCM Report found a breach of Mekar's antitrust legislation and noted that the subsidies received by Vemma under the Horizon 2020 scheme helped Caeli drastically reduce its airfare below its average avoidable costs. The CCM then imposed a total penalty of MON 150 million on Caeli.

15. On 1 January 2019, the CCM completed its Second Investigation, where it found that Caeli abused its dominant position. Consequently, a fine in of MON 200 million was imposed on Caeli.

16. On 20 January 2019, Caeli appealed both orders of the CCM in Mekari courts, consequently the fines could not be enforced, according to Mekari Law.

17. Caeli's market share in Mekar dropped below 40% by the third quarter of 2019. The CCM lifted the applicable airfare caps in October 2019.

Vemma's biased attempt at selling its stake in Caeli

18. Vemma's representatives announced their intention to sell their stake in Caeli in November 2019. Vemma secured an offer from HGLLP, a Sinnoh-based private equity firm with which it had ties due to the MA. However, this offer was a breach to the SA.

19. The offer was inflated and, due to HGLLP's MA membership, not arms-length. Due to the nature of this offer, it was rejected. After failed negotiations, MAS requested arbitration before the SCC. Due to the Parties' failure to agree upon a sole arbitrator, Mr. Cavanaugh

was appointed by the SCC Secretariat, who rendered an award in favor of MAS on 9 May 2020. The award declared that the HGLLP's offer was not, effectively, arm's length.

20. On 14 June 2020 a report, which authenticity was denied, allegedly proved that Mr. Cavanaugh was bribed. These allegations caused a motion to set aside the Award, which was granted by the Supreme Arbitrazh Court of Sinnograd On 1 August 2020.

21. On 23 August 2020, the High Commercial Court of Mekar issued a ruling recognizing and enforcing the 9 May 2020 award in Mekar. Vemma appealed this decision, but the High Court denied it.

22. Vemma failed to yield another buyer for its shares, which left the company with no other choice, in compliance with SA, than to sell at adequate price to the preferential buyer, MAS.

PART ONE: JURISDICTION

I. THE TRIBUNAL LACKS JURISDICTION

23. The Respondent respectfully challenges the Tribunal's jurisdiction over this dispute. Vemma is not an investor covered by the CEPTA (*ratione personae*) since (**A**) Vemma is a SOE; (**B**) Claimant cannot rely on the provisions from the 1994 BIT in order to extend the Tribunal's jurisdiction *ratione materiae*; (**C**) ICSID-AFR do not recognize SOEs as investors; and (**D**) should the Tribunal consider that a SOE has *ius standi*, the nature of Vemma's economic activity in Mekar would bar it from bringing any claim to arbitration.

A. Vemma is a SOE

24. CEPTA does not include SOEs in its definition of investor. The Tribunal should not adopt an expansive interpretation that would exceed the will of the parties, particularly when both Bonooru and Mekar decided to remove government owned or controlled enterprises from 1994 BIT.[1]

25. Tribunals have considered that this exclusion would be notorious if it were possible to establish that such was the will of the drafters.[2] The exclusion of previously incorporated terms such as 'Government owned' poses as a clear intention to reduce the scope of investment protection.

26. SOEs are enterprises controlled to some extent by the government, different from departments or other governmental institutions, as they have a separate legal identity, and their main objective is profiting from certain activity. They are, therefore, *less* controlled by the government, but not fully privately controlled.[3] SOEs represent a state's means of performing certain activities or profiting from it. SOEs intend to display, fulfill, and protect

[1] 1994 BIT, Article 1; *CEPTA,* Article 9.1
[2] *Beijing Shougang*¶412
[3] Shirley, p.1

the interest of the State.[4] In that regard, the risk that a SOE prioritizes or represents, the interest of the State abroad, is patent.[5]

27. The tribunal in *Maffezini* described some of its most recognized features, namely, the ownership, control, nature and purpose of the entity.[6] Vemma's characterization as a SOE derives from **(1)** Bonooru's minority -and subsequent majority- shareholding in Vemma, which clearly demonstrates the State's proprietary interest in the company, **(2)** its prerogative to define Vemma's BOD; and the fact that **(3)** Vemma is performing state functions and fulfilling a state obligation through its economic activity both in Bonooru and Mekar.

1. *Bonooru's minority -and subsequent majority- shareholding in Vemma, demonstrates the state's proprietary interest in the company*

28. Under Vemma's original MoA, Bonooru was entitled to a stake up to 30% shares. Both private and institutional parties from Bonooru and Goponga owned approximately 43.5% of the remaining shares.[7] The rest of the participation in Vemma was offered for public subscription. By then, Bonooru already had a significant participation in Vemma. Majority in equity participation is not always a requirement for State control, fundamentally if the other shareholders are dispersed and its shares allow for rights different from normal formal voting rights, which allow for a certain degree of control.[8]

29. Moreover, Bonooru's rights derived from its shares can be used to execute governmental actions, bearing in mind that one of Vemma's main objectives was to "assist in developing the aviation industry as well as the CA infrastructure in Bonooru for the benefit of its population in accordance with Article 70 of the Constitution Act, 1947".[9]

[4]CUI, p.112; Kowalski, p.15; Broches, p.26
[5]McLaughlin, p.243
[6]*Maffezini*¶¶819-830
[7]Annex IV
[8]Shirley, p.1**;** Kowalski, p.10
[9]Annex IV

30. Such a scheme changed when, in 2020, Bonooru bought 25% more shares, which means that, by now, it holds 55% of ordinary shares in Vemma.[10] This solely highlights the enlargement of Bonooru's influence in Vemma, notorious from the fact that Bonooru's representatives can easily form a majority of members make decisions.[11] All these circumstances lead to the conclusion that Vemma is a State owned and controlled.[12]

31. Besides its participation in the company, Bonooru has actively granted subsidies to Vemma with the objective of pursuing institutional goals. In that sense, Vemma enjoyed a continuous influx of funds under the Horizon 2020 scheme, which started on 28 October 2011.[13]

2. Bonooru has the prerogative to define the organization of Vemma's BOD

32. According to Vemma's AoA, Bonooru not only could influence the election of the BOD through the right to vote encompassed in its majority participation, but also has the right to appoint a non-executive director.[14] Currently, Ms. Sabrina Blue is head of Vemma's BoD and, concurrently, head of the Secretary of Transport and Tourism.[15] Then, under the AoA, not only Vemma's legal representative is a public official, but the composition of its decision-making authority is determined by Bonooru.

3. Vemma is performing State functions and fulfilling a State obligation through its economic activity

33. Currently, Vemma undertakes the fulfillment of one of Bonooru's positive obligations, i.e., granting its citizens air travel through the archipelago. Such obligation derives from article

[10]Annex IV; UF¶65
[11]PO3¶3
[12]*UAB E*¶828
[13]UF¶28
[14]Annex IV
[15]UF¶22

70 of the Constitution and its interpretation by the Constitutional Court through the decision rendered in 1964.[16] Such a purpose is expressly integrated in its MoI.[17]

34. Additionally, Vemma has been constantly instrumentalized by Bonooru to boost the country's tourism industry through the promotion and facilitation of international travel and the allocation of a part of Caeli's income for the aforementioned objectives. Particularly, Bonooru chose Vemma to implement its first subside seeking to boost the tourism industry, by stating that "*Vemma's expansion into Mekar will offer substantial benefits not only to Vemma but to all of Bonooru by enhancing the aviation network available to prospective tourists. This will boost the tourism infrastructure at our disposal*."[18]

35. For the reasons mentioned above, the Tribunal must recognize that Vemma is a SOE.

B. Claimant cannot rely on the provisions from the 1994 BIT in order to extend the Tribunal's jurisdiction *ratione materiae*

36. Even when CEPTA indicates that this dispute is outside of the jurisdiction of the Tribunal, Claimant may try to rely on the application of the 1994 Mekar-Bonooru BIT. This argument is flawed and shall not prosper.

37. Claimant's might rely on Articles I and XI (2) of the 1994 BIT. However, such instrument is no longer in force and is not applicable in any circumstance.

1. The 1994 BIT is terminated

38. The 1994 BIT ceased to have effect after its termination. Any reference to it by Claimant is unfounded.[19] According to Article 54(b) VCLT, to which both the Respondent and Bonooru are parties, a treaty might be terminated "*at any time by consent of all the parties*

[16] UF¶5
[17] Annex IV
[18] UF¶22
[19] CEPTA, Art.1.6.

after consultation with the other contracting States". [20] In this case, the cessation of the BIT's effects is a consequence of an express provision of a subsequent treaty in Article 1.6 CEPTA, where the parties consented to the termination explicitly of the 1994 BIT and to its replacement by CEPTA.

39. Claimant could argue that Article XI (3) of the 1994 BIT, which extends its application in time, might create a conflict between international norms. Nevertheless, such norm has ceased to have effect due to the termination of the Treaty by express consent of both parties.

40. From the will of the parties, crystallized through termination by mutual agreement, and the wording of the BIT, it is evident that it cannot conflict with the provisions of the CEPTA. Any effort by the Claimant in that sense is a mischaracterization of the provisions in both treaties and must be dismissed.

41. If the Tribunal decides that there is a conflict between norms, the Respondent submits that its resolution leads to the scenario where the BIT is inapplicable, for the reasons set out below.

2. Under the Lex Posterior principle, the provisions of the CEPTA prevail

42. Collisions of this nature are addressed by the law of treaties, which formulates two possible solutions: the application of the *Lex Specialis* or the *Lex Posterior* principles. Any submission by Claimant to uphold the application of the BIT would be based on the former, since it avails certain treaty provisions to apply based on the specificity of their content, regardless of their position in time and with special attention to the difference between treaty regimes.[21] Nonetheless, the principle that should be applied is the *Lex Posterior*.

43. Article 30.3 of the VCLT supports Respondent's earlier submission: the termination of the treaty renders it inapplicable, therefore a conflict between norms is inexistent. In any case,

[20]VCLT, Art. 54 (b)
[21]ILC-FIL¶56-60

this rule demands granting prevalence to the later treaty in case of an incompatibility between provisions.

44. According to the ILC, the application of the *lex posterior* requires to identify (i) successive treaties relating to the same subject matter and (ii) an incompatibility between certain provisions of the two related treaties.[22] Such an approach was confirmed in *Eskosol*, which analyzed and applied both requirements when dealing with an apparent conflict between Intra-EU provisions and a BIT.[23]

45. First, the CEPTA is *a successive agreement relating to the same subject matter*, as it (i) has a clear and intended relationship with the 1994 BIT, in the sense that it aims to supplant its provisions; and (ii) it belongs to the same treaty regime (investment protection and promotion), since the provisions of its investment chapter deal with the same substance that those contained in the 1994 BIT.

46. Second, there exists (iii) *a conflict between two provisions.* This scenario refers to the situation in which a party to two treaties cannot comply simultaneously with the obligations derived from such instruments due to an incompatibility between their provisions.[24] Such an incompatibility arises form article XI of the 1994 BIT, which expressly prorogates its applicability in time, and article 9.1 CEPTA, which terminates the 1994 BIT. In that scenario, prevalence should be given to the parties' intent to modify or terminate the treaty.

47. Consequently, the Tribunal should apply *Lex Posterioris* to address this conflict. Therefore, under the rule crystallized in article 30 of the VLCT, the provisions of the CEPTA (the *later* treaty) shall prevail, and any claim to apply the 1994 BIT, dismissed.

[22] *Koskenniemi* ¶251(25-26)
[23] *Eskosol* ¶140
[24] Vranes, p.3

C. ICSID-AFR do not recognize SOEs as investors

48. Vemma's claims under ICSID-AFR must be barred. ICSID-AFR are expressly reserved for investor-State arbitration, and there are no provisions which contemplate State-to-State arbitration.

49. Articles 2 and 4 of ICSID-AFR redirect to *Ratione Personae* requirements of ICSID Convention, Article 25. Under that rule, the Centre shall be authorized to administer proceedings between a State (or a subdivision or agency) and a national of another State *in lieu* of additional facilities, following the requirements provided in the aforementioned article. Such provision clearly reduces the scope of the Centre's jurisdiction as to only include disputes between States and nationals of other States, excluding SOEs from its jurisdiction.[25]

50. Additionally, as stated in the ICSID Convention's preamble, a goal of the Centre is to promote international investment "considering the need for international cooperation for economic development, and the role of private international investment therein".[26] The drafters of the ICSID Convention intended to move away from any inter-state approach[27] and the expansive view regarding a SOE's appearance as Claimant before this Tribunal should be disregarded.

D. Should the Tribunal consider that a SOE has *ius standi*, the nature of Vemma's economic activity would bar it from bringing any claim

51. If the Tribunal considers that SOEs are not excluded *per se* from the possibility of bringing a claim to arbitration under ICSID-AFR, there is consensus on the fact that SOEs acting as agents of the State or exercising governmental functions should be barred from bringing

[25]Rajavuori, p.1198
[26]ICSID Preamble
[27]Farchakh, p.3

claims to arbitration.[28] Consequently, the Respondent respectfully request the Tribunal to apply the *Broches test*.[29]

52. Under this test, a SOE could bring a claim to arbitration unless it is acting as an agent of the state or is discharging an essentially governmental function. It reflects a broader legal premise crystallized by the ILC, according to which the conduct of a private party that is empowered by the law of the State to exercise governmental authority shall be considered an act of the State, if the party is acting in governmental capacity in that particular moment.[30]

53. Under IL, the term 'agent' can be broadly defined. However, it should not be narrowed down to cover exclusively State institutions or subdivisions. In the words of Professor Schreuer "*the concept of 'agency' should be read not in structural terms but functionally (…) What matters is the performance of public functions on behalf of the Contracting State or one of its constituent subdivisions*."[31]

54. To determine if a SOE is acting as an *agent*, in accordance to arbitral practice, the relevant conclusion is not solely to establish a link between the corporate framework of the company and the State, but also to define if it is acting as an agent of the State in the *fact*-specific context. The tribunal in *BUCG* concluded that the claimant could bring a claim to arbitration as its activity as a contractor in Yemen was merely commercial and was executed consistently so.[32] In the present case, Vemma's commercial undertakings should not give rise to a similar conclusion, as in this context they are directly associated with Bonooru's decisions and policies.

55. Vemma poses as an instrument through which Bonooru fulfills its constitutional obligations[33], particularly those derived from its citizens mobility rights, and boosts its

[28] *BUCG*¶31; *CSOB*¶17; *Maffezzini*¶79
[29] Broches, p.202; Schreuer, p.161
[30] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Art. 5.
[31] Schreuer, p.153
[32] *BUCG*¶39
[33] Annex II

tourism industry. These actions are not merely commercial in nature. In fact, it is evident that the State would direct Vemma's conduct to the performance of a public function on its behalf.

56. Bonooru did not ignore this reality and recognized it with the implementation of the Caspian project and the Horizon 2020 initiative, reaffirming Vemma's character of agent when it restructured the company to maintain its operations and, consequently, the performance of such public function. This deliberate change in the corporate structure makes Bonooru's effective control over Vemma even more notorious, particularly, with the current shareholding scheme.[34]

57. In this regard, the tribunal in *BUCG* ruled that the claimant's public mandate -or the fact that its decision-making authority was the State- was too far from the facts to be relevant in order to determine if its function was Governmental.[35] Contrarily, Vemma's activities are significantly close to Bonooru's constitutional obligations and the causes of the dispute.

58. Consequently, under the relevant applicable law, (1) Vemma is a SOE which cannot bring a claim to arbitration, and therefore the tribunal lacks jurisdiction *ratione personae* and, in any event, (2) its claims would be barred since it is exercising a governmental function and acting in a governmental capacity.

[34] UF¶65
[35] *BUCG*¶43

PART TWO: AMICUS CURIAE

59. This section will address the legal and procedural reasons as to why the Tribunal should grant leave sought for filing an *amici* submission, according to the requirements set by Articles 9.19 CEPTA and 41(3) ICSID-AFR. When deciding on a leave sought for filing *amici* submission, the Tribunal must consider whether the non-disputing party would **(I)** bring a different perspective from the disputing parties; **(II)** address the matter within the scope of the dispute; **(III)** have a significant interest. Lastly, when addressing these kinds of requests, and (**IV)** the Tribunal shall ensure a proceeding without any disruption, unduly burden or unfair prejudice against either party.

I. NON-DISPUTING PARTIES SHOULD ASSIST THE TRIBUNAL BY BRINGING A DIFFERENT PERSPECTIVE FROM THE DISPUTING PARTIES

60. *Amicus curiae* assist the tribunal by providing expertise, perspectives, and arguments that the parties cannot provide,[36] leading to a fairer decision.[37] Non-disputing parties are normally barred from participating in the dispute if they hold any relationship with the disputing parties, whether direct or indirect, to avoid conflicts of interests.

61. CBFI does not comply with this requirement as the information it would provide is not different from the one provided by the parties. Furthermore, CBFI's lack of independence from Vemma arises a conflict of interest, as the company is one of its members in good standing.[38]

62. This raises doubts regarding the neutrality of their submission. CBFI is a non-profit industry association that represents Bonooru investors investing in the GNR and internationally.[39] Bearing in mind the nature of its activities and that Vemma aims to be considered an

[36]Miller, p.12; Levine, p.209
[37]Butler, p.48
[38]CBFI Submission¶520
[39]CBFI Submission¶500; PO3¶3200

investor from Bonooru in the present dispute (*quod non*), CBFI's submission could hardly contain any different information than the one provided by the Claimant.

63. On the contrary, CRPU's functions are, contrary to representation, of a technical nature, namely "*the analysis of the economic, technical, and financial performance of Caeli (…) preparation of a financing model and an information package on the airlines, as well as identification of potential investors".*[40] CRPU's submission provides information about Caeli's performance before the bidding process, which would help the Tribunal when assessing the falling-off of Caeli.

II. NON-DISPUTING PARTIES SHOULD ADDRESS THE MATTER WITHIN THE SCOPE OF THE DISPUTE

64. A non-disputing party should not broaden the dispute since it would be a burden to the parties.[41] Failure to comply with this requirement could delay the process. Therefore, any *amici* submission must be related to the subject matter of the dispute, and shall not be repetitive, but rather novel and useful.[42]

65. CBFI addresses public policy advocacy on national and international business issues in Bonooru, as well as the GNR,[43] it would not address the matter within the scope of the dispute, nor will it bring a new insight into the case. If it provided information concerning the Bonoori regulatory framework, it would exceed the scope of the dispute, lengthen the procedure, and affect the parties, against the transparency of the process and a fair and efficient resolution of the dispute.[44]

66. Conversely, CRPU provides information within the scope of the dispute. The *amici* assessed Caeli's performance before – and as one of its pillars of – the bidding process and

[40]CPUR Submission¶625, p.19
[41]*Vivendi*¶21-81
[42]Wiik, p.503
[43]CBFI Submission¶505
[44]*UNCITRAL*, p.6

this will be a useful contribution to the Tribunal, since it will allow for its members to compare the economic status of Caeli before and after the acquisition of Vemma, an important aspect of the issue of damages and compensation in the present arbitration. Such material falls within the scope of the dispute.

67. CRPU can also provide information regarding a bribe by Vemma to the Chairperson of the CRPU during the bidding process. The tribunal in *Infinito* stated that, even though none of the parties had alleged corruption, under their BIT, investment is defined as being *"... in accordance with the latter's law"*. On this account they decided to accept a similar claim as it could have an important role in the assessment of the dispute.[45] Furthermore, the tribunal in *Gran Colombia* stated that, even though neither party raised any allegation of corruption, this allegation was within the scope of the dispute as it was related with the obtention of a mining title that was core to the arbitration. Thus, any allegation on the matter could be of relevance to the tribunal's assessment of its duties.[46]

68. Similarly, CEPTA's preamble states that the parties will *"PROMOTE transparency, ... the rule of law, and eliminate bribery and corruption in ... investment"*. Therefore, CRPU's submission in this regard falls within the scope of the dispute as it has irreplaceable and important exclusive information that the parties cannot provide.

III. NON-DISPUTING PARTIES SHOULD HAVE A SIGNIFICANT INTEREST IN THE PROCEEDING

69. Significant interest is defined as a "*legitimate, significant and able* [interest] *to be conclusively represented in the arbitration.*[47] A non-disputing party can make submissions in the arbitration if it has a 'significant interest' in the matter and will assist the tribunal in a determination of fact or law.[48] In *Vivendi*, the tribunal stated that tribunals tend to accept

[45] *Infinito*¶33
[46] Deepak, p.2
[47] Fach, p.558
[48] Ribeiro, p.15

the intervention of *amicus curiae* when there are issues regarding public interest, as decisions could affect directly or indirectly others beyond the disputing parties.[49]

70. While CBFI could have an interest, it would not be conclusive nor significant, since it is not independent from one of the parties.[50] CBFI does not have a contractual relationship with Vemma that stands out for its gratuity. It receives payments for Vemma's membership, and it rather represents an equal, or similar to say the least, to that of the Claimant.

71. CRPU's submission stands for public interest, which should be interpreted as an *"aim to protect important public interests such as environmental and health protection, human rights, workers' rights, sustainable development, cultural heritage, the fight against corruption and governmental policies"*[51], as it not only represents a general interest, but that of the non-parties who could be affected by the outcome of this dispute. They display this interest by assisting those affected by the litigation, other than the disputing parties, and ensuring that their concerns are heard in some way.

IV. THE TRIBUNAL SHALL ENSURE A PROCEEDING WITHOUT ANY DISRUPTION, UNDULY BURDEN OR UNFAIR PREJUDICE AGAINST EITHER PARTY

72. In *Vivendi*, the tribunal stated that an *amicus curiae* submission should be accepted from those who have the expertise, experience, and independence.[52] Therefore, a non-disputing party may attend the Tribunal with valuable information that the parties are unable to bring to the proceeding, which the *amici* may bring due to its knowledge.[53]

73. CBFI's appearance is inefficient, as it does not bring new information and there is nothing in the scope of the dispute it analyzes, resulting in unnecessary delays. Conversely, CRPU's

[49] *Vivendi*¶19
[50] CBFI Submission¶520, p.16
[51] Levine, p.14
[52] *Vivendi*¶21
[53] Butler, p.162

submission is within the scope of the dispute, contains relevant and irreplaceable information, entails a public and significant interest in the proceeding, and would furnish a different perspective to the Tribunal, all of which will help assess the legal and substantial questions raised by the parties, making the process more efficient and effective.

74. In light of the above, the Respondent respectfully requests the Tribunal to: (i) reject CBFI's application for leave to file a non-disputing party submission; and (ii) grant CRPU's application for leave to file a non-disputing party submission.

PART THREE: MERITS

I. MEKAR'S ACTIONS FALL UNDER ITS RIGHT TO REGULATE

75. Not every measure taken by the State can be subject to scrutiny under the FET standard as the Claimant pretends to claim in this case. Fundamentally, not an action which coherently and naturally falls within the scope of the State's right to regulate.

76. Arbitral practice has consistently affirmed that the FET standard implies a high threshold, and that it even comprises the need to recognize that the State has a margin of error; it is not a standard that demands perfection in public action.[54] As the tribunal in *Levy* stated, tribunal's tasks do not encompass second-guessing State's actions in order to assess them as if it were an appeal tribunal or an institution of the sort.[55]

77. State's prerogative has a meaningful role in investment arbitration and has been studied as a manifestation of what the *S.D Myers* tribunal named a "*high measure that IL generally extends to the right of domestic authorities to regulate matters within their own borders*."[56] Among others, tribunals such as *Tecmed* have even affirmed that its existence (alongside with the exclusion of any compensation sought to a harmed investor as its natural consequence) is undisputable.[57]

78. Article 9.8 of CEPTA states the parties' right to regulate in order to achieve the protection of public objectives, expressly stating that "*the mere fact that a Party regulates (...) in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section*".[58] The actions questioned by the Claimant do not pass the threshold established by Article 9.8.

[54] *Biwater*¶597; *Eastern Sugar*¶272; *AES*¶9.3.40
[55] *Rose Levy*¶161
[56] *S.D. Myers*¶263; *Saluka*¶¶255-262; *Antin*¶531
[57] *Tecmed*¶119
[58] *CEPTA,* Article 9.8.2.

79. The Respondent respectfully requests the Tribunal to consider (**A**) the legitimacy of Mekar's objectives; and **(B)** Mekar's regulatory steps under the relevant identifiable tests for the right to regulate.[59]

A. The legitimacy of Mekar's objectives

80. Respondent will establish why and how the measures taken by the state shall be considered legitimate, referring specifically to the (**1**) application of the MRTPA by the CCM; and (**2**) the Government's decision ordering airlines to offer goods and services in MON instead of USD.

1. The application of the MRTPA by the CCM serves a legitimate objective

81. CEPTA includes in its preamble the mandate to '*benefit consumers'*, which embraces the idea of consumer protection and its relevance in the protection and promotion of investment.[60] Moreover, the MRTPA's objective is to "*to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in Mekar, and for matters connected therewith or incidental thereto*".[61]

82. Investment arbitration tribunals have also recognized consumer protection as a legitimate objective.[62] The tribunal in *AES* determined that, as the State's objective was to avoid over-profit from energy companies by regulating prices and other matters to align its market with EU's consumer protection guidelines, there was a rational policy objective.[63]

[59]Levashova, pp.174 - 175
[60]*CEPTA*, Preamble
[61]MRTPA, Preamble
[62] *AES*¶¶10.3.7-10.3.8; *Electrabel*¶214.
[63]*AES*¶¶10.3.7-10.3.8

83. The tribunal in *Electrabel*, concluded that Hungary's policy objective to align its 'electricity sector with the EU market' and to eliminate 'distortions to competition within and outside Hungary' was a legitimate government policy which had been taken in the public interest.[64]

84. In the present case, CCM's actions were taken following a legitimate objective: consumer protection in the form measures against restrictive trade practices. Such objective is duly backed with legislative provisions (namely, the MRTPA and the CEPTA). The legitimacy of this objective could only be questioned if the Claimant where to establish that the legislation lacks reasons to be enacted, or in the presence of bad faith.[65] This is not the case. The MRTPA has been reasonably drafted as a provision pursuing a public interest.[66]

2. Mekar's decision ordering airlines to offer goods and services in MON instead of USD backs another significant legitimate objective

85. Investment tribunals have analyzed measures taken amidst an economic crisis[67]. The tribunal in *AWG,* for example, highlighted the importance of these kind of situations when determining the legitimacy of the State's objectives.[68]

86. It must be noted that addressing and alleviating an economic crisis is indeed a legitimate objective. Just as the aim to stabilize certain sector of the economy through intervention, a legitimate interest recognized in *Saluka,*[69] the objective of strengthening domestic currency amidst a crisis should also be considered as a legitimate effort.

[64] *Electrabel*¶214
[65] *Morris*¶399
[66] *Glamis*¶803
[67] *AWG*¶257; *Saluka*¶27.
[68] *AWG*¶257
[69] *Saluka*¶275

87. In this sense, Respondent highlights its rationale in the RNOA: "a state's right to reduce reliance on foreign currencies, in order to mitigate against capital outflows and secure its macroeconomic situation, cannot be put on trial before this tribunal".[70]

88. The legitimacy of this objective can be traced to the recommendations made by the IMF regarding "*the need to establish credibility in the [local] currency to avoid a debilitating economic situation*".[71]

89. Therefore, a measure taken with the view to stabilize a state's currency[72] pursues a public interest that cannot be questioned.

B. Mekar's regulatory steps under the relevant identifiable tests for the right to regulate

90. Once the legitimacy of the objectives behind the Respondent's measures has been established, it is necessary to consider if the measures themselves comply with the requisites identified by arbitral practice as conditions to exercise the right to regulate. Tribunals such as *Total* and *Morris* have identified that such requisites are related with the principles of proportionality, reasonableness, non-discrimination, and the prohibition of arbitrary measures.[73]

91. Some tribunals have determined common steps to evaluate proportionality and reasonableness. Particularly, they have assessed the State's actions analyzing the relation between the measure and its objective, if the measure was necessary and, lastly, the impact of the loss suffered by the investor in contrast with the benefit obtained by the State.[74]

92. In this section, it will be explained why (**1**) the CCM's actions, both the decision to open an investigation and the consequence of its findings, were reasonable, proportional, and

[70]RNOA¶14
[71]UF¶39
[72]Ibid¶42
[73]*Total*¶162; *Morris*¶410
[74]*Glamis*¶803; *Mamidoil*¶791; *Morris*¶419; *Impregilo*¶¶330-331; EDF¶293; *AES*¶¶10.3.37-10.3.53

consequently, non-arbitrary; and how **(2)** Mekar's actions to tackle the economic crisis meet the same thresholds.

1. CCM's actions were reasonable, proportional, and consequently non arbitrary

93. CCM's actions were conducted in accordance with the principles of reasonableness and proportionality and 'appropriate correlation' between measures and objectives as referred to by the tribunal in *AES-Summit*[75] or, in the words of the *Mamidoil* tribunal, "*the State's conduct bore a reasonable relationship to some rational policy*"[76], while causing only the necessary impact on the Claimant's investment.

94. *First*, in relation to the opening of CCM's first investigation, it is noted that, under the MRTPA, opening an investigation to an agent with less than 50% market share is not forbidden. It was rational and necessary, as the aviation industry, where these kinds of practices which were considerably beneficial for Caeli through the MA and that other agents did not enjoy are so common, qualifies as one of those industries that require special attention, i.e., the investigation was an available measure fitted into the rationality of the policy itself: the act provided the possibility of doing so. Moreover, the opening of the investigation was the only alternative to act against any findings on restrictive trade practices as to arrive at the level of appreciation of the authority to which the tribunal in *Philipp Morris* referred to when assessing the existence of alternative measures.[77]

95. The opening of an investigation in and on itself did not cause the Claimant any identifiable harm. The first challenged measure falls, thus, under the veil of reasonableness and proportionality.

[75] *AES*¶¶10.3.7-10.3.9
[76] *Mamidoil*¶791
[77] *Morris*¶419

96. *Second*, The placement and establishment of caps during the investigation was also a reasonable and proportional measure. They were, effectively, reasonable measures, not contested by the Claimant. As interim measures, they have its foundation in legislation,[78] were even subject to judicial review[79] and effectively lifted after they were no longer necessary.[80]

97. *Third*, There is no way to establish any harm derived from CCM's fines which did not even gain force. The imposition of the fines bears a rational relation with a rational policy as they are the natural consequence for restrictive practices established in the MRTPA, which Caeli, as concluded by the CCM, had infringed.[81]

98. Finally, it is impossible for the Tribunal to ascertain whether there was a *better* alternative, as the Claimant sold its stake in Vemma before any payment occurred, and the company ended up changing its position and behavior in the market for reasons beyond the measures taken by the CCM.

99. In conclusion, the measures taken by the CCM effectively and legitimately meet the conditions to be considered an expression of the right to regulate.

2. Mekar's actions to tackle the economic crisis meet the same thresholds

100. The decision to shift back to MON is also aligned with the principles of reasonableness and proportionality. the tribunal in *Impregilo* emphasized on the fact that the 'pesificación' during the Argentine crisis was necessary, and that it did not constitute a violation of the BIT by itself.[82] There are no easily identifiable alternatives in order 'to reduce reliance on foreign currencies, in order to mitigate against capital outflows and secure its macroeconomic situation'[83] which are not related to strengthening domestic currency.

[78]MRTPA, Chapter III
[79]UF¶54
[80]UF¶55
[81]UF¶50
[82]*Impregilo*¶366
[83]RNAO¶14

101. The relation between Mekar's measure and its objective is clear: to strengthen the national currency in order to restore credibility, by offering goods and services in MON. This economic formula was, as highlighted above, the result of institutional recommendations. The rationality of the relation with its objective lies there.

102. Amidst an economic crisis, an impact on the investment was inevitable. This consequence cannot be attributed solely to the Respondent's action. In that sense, this measure is also coherent with reasonableness and proportionality.

103. Considering the above, the Tribunal should bear in mind the regulatory power embodied in the sovereign existence of every state an recognize actions that are coherent with such principles, such as the ones studied in this section, need to be excluded from any analysis regarding the liability of the Respondent.

II. MEKAR HAS NOT VIOLATED ITS OBLIGATIONS CONTAINED IN ARTICLE 9 OF THE CEPTA

104. In this Section it will be demonstrated that **(A)** denial of justice cannot be proven in this case; **(B)** Mekar's measures and actions cannot be considered arbitrary; **(C)** Mekar's measures and actions cannot be considered discriminatory; **(D)** Mekar did not made any specific representation to Vemma that created legitimate expectations; and **(E)** Vemma could expect Mekar's measures from a duly due diligence.

A. Denial of Justice cannot be proven in this case

105. Denial of justice does not amount simply to an error by a court,[84] but to a "*failure of a national system as a whole*".[85] A standard of denial of justice requires is, thus, a high one. The actions taken would have to be extended, as defined by Focarelli, to a "*gross*

[84] *Agility*¶209
[85] *Morris*¶500

misadministration of justice by domestic courts" or a "*clear evidence of and outrageous failure of the judicial system*".[86] Likewise, the tribunal in *Chattin*[87] interpreted that unless the "*wrong committed amounts to an outrage, bad faith, willful neglect of duty*" the claim would fail.

106. Furthermore, in *Unglaube,*[88] the tribunal clarified that a clear error in procedural matters must be proven, since the claim is procedural in nature and the obligation of the State consists of its ability to avoid or correct a mistake, as no judicial system is perfect.[89]

107. Mekar's courts and officials acted in accordance with its legislation and procedures and provided a system that allowed the investor to have access to justice. This section will address how Mekar's actions do not amount to a denial of justice, as the claim would not succeed by invoking any of the following scenarios: **(1)** a refusal to entertain a suit by relevant courts; **(2)** subjection to undue delay; or **(3)** irrational or abusive outcomes going beyond mere misapplication of the law.[90]

108. Lastly, this section will address how **(4)** the enforcement of the arbitral award rendered on 9 May 2020 is consistent with Mekar's international obligations.

1. Mekar's courts did not refuse to entertain a suit

109. In *Iberdrola,* the tribunal found that denial of justice could amount to the act of refusing to entertain a suit without justification when the matter falls within the court's competence.[91] Additionally, for a claim regarding the refusal to entertain a suit to succeed, Mekar would have had to deny the registration of the suit, refuse to schedule the hearings and avoid a final decision, conditions that were not met in this case.[92] As explained in the

[86]*Krederi*¶451
[87]*Chattin,* p.286
[88]*Unglaube*¶¶272-273
[89]Paulsson, p.5
[90]*Azinian*¶¶102-103
[91]I*berdrola*¶432
[92] Krederi ¶451

right to regulate section, Caeli resorted to Mekar's courts in three instances, where it was granted appropriate access to courts, and where the regular procedures that correspond to the registration of the claims, access to a hearing and a substantiated conclusion in accordance with Mekari law were effectively carried out,

110. Finally, Vemma appealed the judgment before the SCM, instance that recognized the enforcement of the Award.[93] However, the appeal was dismissed on the grounds that there were no reasons to avoid enforcement based on the evidence at hand.[94] This issue will be addressed through an independent section below.

2. The claims were not subject to undue delay

111. In *Kreder*i the tribunal stated that the efficiency and the length of a procedure must be calculated considering the various factors that may contribute to its duration.[95] The proceedings that took place in Mekar were resolved in the shortest amount of time regardless of the various factors that led to possible extensions, independently from the judicial system crisis.[96]

112. As was well known before Vemma's investment, only criminal matters were scheduled with urgency. Vemma could not have gotten a privileged treatment. In any case, there was not an undue delay. By analogy, the US Model Time standard for State trial courts released by the National Center for State Courts gave an average time from 12 to 24 months regarding civil cases.[97] Moreover, and in contrast, in *Nul* a period of 10 years to obtain a first instance judgment did not rise to the level of denial of justice because of the complexity and highly technical aspects surrounding the case, hence, a non-immediate response considering the facts of each case does not constitute a denial of justice.[98]

[93] UF ¶*1385*
[94] Annex XV ¶*2340*
[95] *Krederi*¶457-458
[96] UF¶950
[97] MTS, p.3
[98] *Nul*¶204

113. Regarding the specific timeframes of the case, Vemma registered two claims. The first one, concerning the airfare caps, on August 2018[99] and appealed the decision on January 2019[100]. Both were scheduled for April 2019[101] and May 2020.[102] However, in order to accelerate the final decision, which was previously requested by Vemma, the judge dismissed the claim on the merits and issued a final decision.[103] The entire process was concluded in eight months, which is considerably low timeframe for administrative procedures.

114. In conclusion, the time that all the proceedings lasted was reasonable and there was no subjection to undue delay.

3. There was not an irrational or abusive outcome going beyond mere misapplication of the law

115. The decisions taken by Mekar's government were not imposed in a malicious misapplication of the law, neither in an abusive manner.

116. All the decisions taken by Mekar's courts and authorities were well grounded, and permitted Caeli to be treated fairly, leaving no foundations to claim bath faith or an illegitimate objective.

117. Mekar complied with its obligations framed in the principle of legality, which establishes that every action or decision must be contemplated in the legal framework in a clear and non-ambiguous language.[104] In accordance with the MRTPA, the CCM has sole competence to initiate an investigation and impose any measure necessary to prevent and

[99]UF¶1235
[100]UF¶1290
[101]UF¶1235
[102]UF¶1295
[103]UF¶1330
[104]Chen p.1

sanction practices which might negatively impact the market.[105] Likewise, the tribunal has the power to impose any interim or final remedy it deems necessary to ensure its objectives.[106]

118. Regarding the first investigation, opened "*suo moto*", it is the Respondent's submission that the CCM complied with the requisites to do so. Firstly, because the market share of Caeli cannot be calculated by itself, since the capacity to compete in the market, and the profits obtained thereof, are a result of two determining factors: its membership in the MA, which allowed for, among others, practices such as preferential secondary slot trading, and the subsidies received by the Horizon 2020 program. In that context, Caeli's market share surpasses 50%. Thus, the CCM had the ability to initiate the investigation. This is further explained in the upper section on the right to regulate.

119. The second investigation was launched in accordance with Article 3 subparagraph A of the MRTPA. These provisions allow the CCM to initiate an investigation if a claim is brought by a direct competitor in the market against another. Both investigations concluded that there is an active participation of Caeli in activities that had an adverse effect on its competitors and, therefore, on Mekar's economy.

4. The enforcement of the arbitral award rendered on 9 May 2020 is consistent with Mekar's international obligations.

120. Claimant challenges the enforcement of the award rendered 9 May 2020. It is the Respondent's submission that the enforcement decision, and its posterior confirmation, are compatible with Mekar's obligations.

121. In essence, and pursuant to Article V(e) of the NYC, local courts have the discretion of enforcing an award that has been set aside. To do so does not breach or amounts to a

[105]MRT¶1590
[106]MRT¶1615

violation of due process.[107] For instance, England,[108] The Netherlands[109] and the United States of America[110] recognized and enforced awards that had been set aside.

122. France has a long-standing history of enforcing awards that had been set aside based on the article cited above, in conjunction with article VII of the NYC. Usually, French courts rely on limited grounds for refusing the enforcement of awards[111] and have a high burden of proof in order for a claim regarding a violation to public policy to proper.[112] French courts have maintained the position of allowing the enforcement of awards that had been set aside since the Hilmarton case, as "*the country cannot be denied of enforcing a legitimate control over its territory*". [113]

123. In *Yukos* both English and Dutch courts enforced an award not withstanding that it had been set aside by Russian courts.[114] Both courts recognized the discretion a state holds to enforce an award that had been annulled.

124. Moreover, as per article VII of the NYC, that a party has the right to be avail from an award regardless of international provisions if the law of the place where it is sought to be enforced allow it to do so. In that sense, provisions regarding the enforcement and annulment of awards do not have a preclusive effect on the internal law of the place of enforcement. Such principle has been consistently recognized by, for example, US Courts.[115] Besides, the Court in *Vantage* reaffirmed that when dealing with 'public policy' concerns amidst an attempt to vacate an international award, the relevant 'public policy' definition is that of the forum, namely, the one of that country where the award aims to be enforced in. [116]

[107] Annex XV¶2345
[108] *Hilmarton*¶27
[109] *Yukos-The Netherlands Court*¶3.3
[110] *Chromalloy*¶913
[111] *Hilmarton French Court*¶2
[112] Enforcing Award, p.46
[113] Awards in France, p.6
[114] *Yukos*¶64
[115] *Chromalloy*, ¶¶ 900-913.
[116] *Vantage*, p. 3.

125. The Claimant challenges the confirmation of the enforcement decision on 'Public policy' grounds. In its submission seeking the set aside of the award in Mekar, Vemma aimed at convincing the court of the existence of public policy concerns of such dimensions that justified not enforcing the award.

126. Particularly, US Courts in cases such as *Baker Marine* have established that there should be an 'adequate' reason to deny the enforcement of an award.[117] Judges in other cases have extended the analysis to the presence of 'extraordinary circumstances.'[118]

127. Following the same line of argument, the Superior Court of Mekar has previously affirmed, through a long-standing jurisprudence, that a high standard must be met in order to refuse the enforcement of an arbitral award. In this sense, the award would have to violate a basic notion of morality and injustice or be contrary to public policy. In order to avoid the enforcement of the award because of public policy concerns, the decision must have to be, as explained by Hong Kong courts "so fundamentally offensive to notions of justice" that the conduct contrary to public policy could not be overlooked.

128. Moreover, as stated by the Court, Mekar's public policy would not allow to recognize the setting aside of an award on the grounds fabricated by an organization of doubtful behavior, recognized by its attempts to interfere with one country's sovereign decisions.[119]

129. In conclusion, in the present case, Mekar's public policy shall prevail. As explained above, the enforcement of the award was a founded and procedurally adequate decision which is neither inconsistent with international practice nor lacks legal foundation. It is far, thus, from being the manifestation of denial of justice.

[117] *Baker Marine*, p. 3.
[118] See *Spier*, p. 5 and *Termo Rio* ¶¶51-54.
[119] Annex XIV ¶2290.

B. Mekar's measures and actions cannot be considered arbitrary

130. Tribunals such as *Enron* stated that the existence of arbitrariness would not be recognized if the measures adopted were those the government believed and understood were the best response to the unfolding crisis.[120]

131. Each one of the measures and conducts taken by Mekar and challenged by the Claimant served a public interest by **(1)** changing its economic policy, attending the economic crisis and **(2)** invalidating HGLLP's offer in accordance with Art. 39 of the SA.

1. Mekar changed its economic policy attending the economic crisis

132. Mekar's decision to modify its economic policy and reinstate the MON attends sufficient factual considerations and reasonableness. This measure was adopted due to the fragile state of the currency, in order to secure its macroeconomic situation by reducing dependence on foreign exchange, providing economic security. Certainly, it does not breach the obligation to grant FET on the basis that it seeks a legitimate public policy which is, again, to stabilize the economy. A thorough submission regarding these measures, rests in the upper right to regulate section.

2. The invalidation of HGLLP's offer is in accordance with Article 39 of the SA

133. Article 39 of the SA enshrines the condition for the offer to be a "*bona fide written offer for a Third-Party arm's length Transaction*." Bearing in mind that the "*arm's length*" principle states that the profit or benefit of a transaction between related parties must be in the same range as would have been obtained in a comparable transaction between independent parties,[121] the invalidation of the HGLLP offer was not arbitrary. The parties, HGLLP and Vemma, were not independent, and the offer was artificially inflated.

[120] *Enron*¶281.
[121] *Barbosa*, p.52

Therefore, Mekar's invalidation of the HGLLP offer was justified by the absence of character on the offer, compliant with the SA.

C. Mekar's measures and actions cannot be considered discriminatory

134. Vemma might challenge Mekar's measures on the basis of an alleged discriminatory intent. However, two key issues must be discussed around this allegation. One, concerning the required comparison for a claim on discrimination, and the other regarding the intent to discriminate as a requirement to find unequal treatment.

135. In *Occidental* the tribunal rejected a narrow comparison aimed only at the same economic sector or activity.[122] In *Enron,* the tribunal analyzed the question whether there had been any capricious, irrational, or absurd differentiation in the treatment of different sectors of the economy[123] and in *Reinhard*, the tribunal compared within the same proceedings whether there was indeed discrimination by setting a benchmark[124]. Favoring parties from one sector vis-à-vis the other, the lack of foundations for a differential treatment nor the setting of a point of reference are conducts attributable to Mekar. Respondent's actions cannot be considered as discriminatory since the purpose behind denying subsidies to Vemma was to prioritize and support the most economically precarious companies.

136. Executive Order 9-2018 vested discretion with respect to grant of subsidies to the Secretary of Civil Aviation.[125]

137. Denying subsidies to Vemma is not discriminatory. Such subsidies were denied on various basis, being one of them the fact that another State was the airline's majority shareholder, from which it also received governmental aid. The subsidies aimed at supporting economically precarious companies. In *Genin,* the tribunal confirmed that there is no

[122] *Occidental Exploration*¶¶167-176
[123] *Enron*¶282
[124] *Reinhard*¶626
[125] UF¶46

universal obligation to treat all aliens equal or treat them as favorably as nationals,[126] a consideration that becomes way more evident in lieu of the fact that there were companies in worst conditions.

138. Similarly, the tribunal in *Goetz* stated that discrimination implies a differential treatment applied to people in similar situations, and that equality is not sought by giving everyone the same, but by balancing the playing field.[127] Since Vemma is majority state-backed, it could be seen more as an economic benefit than as an aid to receive a subsidy from Mekar.

139. As highlighted by Mekar's deputy Minister of Transportation "State-owned companies have unique advantages over other companies that enable them to outcompete privately-owned firms. It would be unfair to grant certain State-owned companies even more of an advantage in the airline market".[128]

140. Furthermore, to shed light over Vemma's (CA) concrete advantages, the Respondent refers to Bonooru's concrete support at the margin of the Horizon 2020 and the Caspian project.[129] Actually, CA was one of the only two airlines owned in any significant part by a foreign government operating in Mekar at the time, the other being the wholly government-owned Larry Air. Neither received subsidies under Executive Order 9-2018. Therefore, Mekar's actions cannot be considered discriminatory.

141. Claimant has failed to establish how discrimination could be found in the assignation of the aid. The criteria to grant subsidies, alongside Caeli's condition with Vemma as the majority shareholder, allow for the Tribunal to consider this measure as what it effectively is: one consistent with the CEPTA.

[126] *Genin*¶123
[127] *Goetz*¶121
[128] UF¶46
[129] UF¶28

D. Mekar did not make any specific representation to Vemma that created legitimate expectations

142. Article 9.9.3 CEPTA delimits the criterion for the Tribunal to assess the existence of legitimate expectations amidst the analysis on the State's compliance with the FET obligation, limiting them to specific representations made by the Host State. In this specific case, **(1)** Vemma could not have a legitimate expectation that the legal framework would remain unchanged; and **(2)** Mekar did not make any other specific representations to Vemma. Finally, **(3)** Vemma could expect Mekar's measures from a duly due diligence.

1. Vemma could not have a legitimate expectation that the legal framework would remain unchanged

143. It is important to highlight that in Mekar, from the moment of Vemma's investment to the present, the economic and politic panorama has completely changed. As recalled in *El* paso, it is reasonable to foresee that a small change in circumstances might entail minor changes in the law, while a complete change might entail major changes in the law.[130] As explained by the tribunal in *Starret,* investors from all countries must assume the of changes in the economic and political systems.[131] Mekar approached the changes in a reasonable manner, as no fundamental feature or condition has been eliminated.

144. It is unreasonable for Vemma to expect that the circumstances prevailing at the time of its investment would remain totally unchanged. Such right has been labelled by the tribunal in *Parkerings* as undeniable due to the present circumstances.[132] It is inconceivable for a State to be unable to modify its legislation to deal with internal economic challenges.[133]

145. Therefore, the Claimant could not have any expectations as to the unchangeability of the legal framework.

[130] *El paso*¶363
[131] *Starret*¶73
[132] *Parkerings*¶332
[133] *El Paso*¶365

2. Mekar did not make any other specific representations to Vemma

146. The existence of specific representations could generate legitimate expectations, when fulfilling two elements. First, that the undertaking, commitment, or representation is done by a competent state representative. Second, that they are directed to the investor or investment.[134]

147. In addition, the investor's expectations should have two qualifications: first, that the investor should not be shielded from the ordinary business risk of the investment and, second, that the investor's expectations must have been reasonable and legitimate in the context in which the investment was made.[135]

148. Also, tribunals have noted that expectations may be reasonably or legitimately created for a private person by the constant behavior and/or promises of its legal partner when this partner is the public administration on which this private person is dependent.[136] *In casu*, there is neither a constant behavior, nor a promise from Mekar to Vemma, as **(a)** Vemma unreasonably expected to be allowed to perform anticompetitive practices; **(b)** Mrs. Rose statement does not constitute a specific representation; and **(c)** Vemma could not have reasonably expected stability in the airfare currency denomination.

a. Vemma unreasonably expected to be allowed to perform anticompetitive practices

149. The marketing of Caeli core assets under Goeffrey Hoytsman direction of MAS[137] cannot be considered as a specific representation. Such offer was directed to all possible bidders, not exclusively Vemma. Claimant could not expect that when purchasing Phenac's rights, it would be allowed to breach the law. The legal framework under which it invested encompasses the promotion and protection of competition. For similar reasons, the Tribunal

[134] *Revere Copper*¶37; *Methanex*¶7; *Waste Management*¶98
[135] *National Grid*¶130
[136] *Total*¶122; *Toto*¶192
[137] UF¶21

in *Toto* reaffirmed that FET does not depend on the perception of the frustrated investor, but that IL and comparative domestic public law should be used as a benchmark. [138]

150. Caeli has abused its dominant position to extract significant additional privileges in terms of airport service fees from Phenac, which allowed it to undercut ticket fares and eventually push other competitors off the market. Mekar's antitrust legislation sanctions such conduct. If an investor would expect concrete legislation not to be applied to its investment, such expectation could not be covered by the CEPTA.

b. Mrs. Rose's statement does not constitute a specific representation

151. The Claimant could not argue that the declaration of Ms. Moira Rose, indicating that the CCM would be an autonomous body, independent from government influence,[139] generated legitimate expectations. The CCM acted following its objectives, which include preventing practices with adverse effects on competition and promoting and sustaining fair competition. It would be unreasonable to expect the CCM not fulfilling its functions, regardless of any political statement, mostly of one which upholds the importance of this institution.

152. *El Paso* and *Saluka* tribunals stated that if the terms of a statement were to be taken too literally, they would impose upon host State's obligations which would be inappropriate and unrealistic.[140] As in the present situation, the CCM had the obligation, regardless the political circumstances, to investigate Caeli.

c. Vemma could not have reasonably expected stability in the airfare currency denomination

[138] *Toto*¶166
[139] UF¶19
[140] *El paso*¶305

153. Under its right to regulate, Mekari authorities approved the denomination of airfare in US dollars for all airlines operating in its territory.[141] It is important to highlight that the airfare denomination was not a determining point for Vemma to maintain its investment. The Tribunal should consider the reasoning *Saluka* award, according to which, an investor cannot expect economic stability as their economic success depends on fluctuating economic conditions.[142] The economic situation of Caeli was the result of the risky investment approach it had.

154. To demand companies to denominate their services and products in MON was reasonable. Mekar was not only going through an economic crisis, but its decisions were made considering the recommendations from the IMF. As mentioned before, such change was necessary for the maintenance of Mekar's economic stability within the meaning of CEPTA.[143]

155. In conclusion, the representations argued by the Claimant do not meet the criteria to be considered as specific representations.

E. Vemma could expect Mekar's measures from a duly due diligence

156. According to several tribunals, a prudent investor should possess knowledge about relevant national law and judicial decisions and consider different sources of information at the time of investing.

157. The claims submitted by the Claimant denote a lack of knowledge of Mekar's national law, its judicial system, and the background of its economic and political circumstances. It is not reasonable for Vemma, investing in a highly volatile political and economic environment to assume that the investment will no longer be affected by further

[141] UF¶40, Part III, Section I *supra*
[142] *Saluka*¶366
[143] *Continental*¶372

disruptions.[144] As mentioned above, it is expected that the investor considers the business risk.[145]

158. The tribunal in *Stadtwerke*, determined that, for an investor's expectation to be reasonable, they must be backed by a due diligence process.[146] Therefore, whether Vemma undertook or not due diligence serves as a starting and limiting point on the protection of its alleged expectations.

159. On the other hand, in *Parkerings* the tribunal decided that, considering the socio-political and economic transition in the host State, the investor should have anticipated changes to the regulatory framework.[147] The expectations of an investor can be significantly reduced if it can be demonstrated that the changes to a regulatory framework were foreseeable. For the present case, the political background[148] and the current economic crisis[149] made Mekar's conduct significantly predictable.

160. In conclusion, Vemma could not expect that the alleged expectations would be protected, as Mekar's reasonable and lawful measures which impacted the investment would have been foreseeable for a diligent investor.

[144]Cfr. Viñuales, p.363
[145]Ibid, p.79
[146]*Stadtwerke*¶264
[147]*Parkerings*¶335
[148]UF¶12-13
[149]PO3¶4

PART FOUR: COMPENSATION

161. If the Tribunal finds that Mekar did violate Article 9.9 of CEPTA (*quod non*) the Respondent respectfully requests the Tribunal to conclude that **(I)** Mekar has already purchased the Claimant's investment at "market value" and award the Claimant no compensation. In the alternative, **(II)** that any compensation awarded to the Claimant should be reduced based on the existence of mitigating factors.

I. MEKAR HAS ALREADY PURCHASED THE CLAIMANT'S INVESTMENT AT "MV" AND NO COMPENSATION SHOULD BE AWARDED TO CLAIMANT

162. Mekar did not breach the CEPTA, thus, the Tribunal should not award any compensation to Vemma.[150] However, if the Tribunal considers that Vemma is entitled to compensation, the Respondent respectfully requests the Tribunal to apply the MV standard contained in Article 9.21 CEPTA, since **(A)** MV is the benchmark for compensation chosen by the parties in CEPTA and **(B)** Claimant cannot avail the FMV compensation standard. In any case, **(C)** if the Tribunal considers that Mekar owes compensation to Vemma, it should find that Mekar has already paid the MV for Claimant's investment by purchasing its stake in Caeli for USD 400 million[151] and, therefore, that Claimant is, currently, owed no compensation.

A. MV is the benchmark for compensation chosen by the parties in CEPTA

163. Paragraph 1 (a) of CEPTA 9.21[152] provides that "[w]here a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination: (a) monetary damages at a MV, except as otherwise provided for in Article 9.12; (…)" [emphasis added]. As agreed by the Parties on CEPTA, the Tribunal may award any damages – except those

[150] See Section III supra
[151] UF¶40
[152] *Line* 3020¶82

damages involved derived from expropriation – at MV. In conclusion, according to the CEPTA, the Tribunal should apply MV method for any type of compensation.

B. Claimant cannot avail the FMV compensation standard

164. The MFN clause in CEPTA does not allow Claimant to derogate the standard expressly prescribed in CEPTA. The MFN clause in CEPTA does not include substantive obligations, as provided for in Article 9.7(2) of CEPTA. Concretely, the article reads "*[s]ubstantive obligations in other international investment treaties and other trade agreements* ***do not in themselves constitute "treatment"****, and thus cannot give rise to a breach of this Article …*" [emphasis added].

165. MFN clause applies only to cases in which investors of different nationalities were treated differently. Therefore, the parties decided that substantive standards of treatment are not to be applied through MFN had the parties not adopted or maintained any measure pursuant to comply with such substantive obligations for other investors.[153] Recent IIAs as CEPTA, clarify that the MFN clause cannot be used to import those substantives obligations from other treaties.[154]

166. Compensation is understood as an essential principle, which seeks to reestablish the situation prior to the occurrence of an internationally wrongful act.[155] The obligation to compensate is principal, substantive, and could not be considered as treatment under CEPTA.

167. Likewise, the ICJ has recognized that compensation is a substantive obligation.[156] In the field of ISDS, for instance, the tribunal in *Metalclad,* reasoned that the duty to pay compensation has been interpreted as a substantial guarantee vis-à-vis harm on the foreign

[153] *Içkale*, ¶. 386
[154] *CETA*, Art.8.7
[155] *Chorzow*, p 47.
[156] *Nicaragua v Costa Rica*¶41

investment.[157] In fact, beyond being considered a remedy under the effects of Article 36 of the ILC, in situations of state responsibility, compensation acts as the content of the substantive obligation to repair.[158]

168. Compensation referred to in Article 13 of the Arrakis-Mekar BIT is a substantive obligation and, therefore, the MFN clause is not applicable. In that respect, even when it appears to be clear, requesting the Tribunal to alter the extent to which the MFN clause applies by directly excluding what is agreed in Article 9.7 of the CEPTA, could aggravate the uncertainties regarding the substantive and procedural aspects of investment protection.[159]

C. <u>If the Tribunal considers that Mekar owes compensation to Vemma, it should conclude that Mekar has already paid the MV for Claimant's investment</u>

169. Mekar has already paid the MV for Claimant's investment by purchasing its stake in Caeli for USD 400 million. Therefore, the Claimant is owed no compensation. As stated by the tribunal in *Azurix*, a previous payment by the respondent to the claimant may be deemed to cover the compensation owed.[160]

170. In this regard, MV should be understood as:

> *"(…) the result of the application of the but-for premise considering the prevailing economic circumstances affecting the business in both the actual and but-for situations, including situations of distress and economic crises (…)".*[161]

171. MV is the appropriate method of compensation in this case. Not only a treaty provision explicitly provides it, but also, while FMV requires an assessment of the price that is fair

[157] *Metalclad* ¶128
[158] *Cohen*, p.6
[159] Salacuse, p.76
[160] *Azurix* ¶155
[161] Trenor, p. 115.

between two identified parties, considering the respective advantage or disadvantage that each will gain from the transaction, it does not consider distress, threat, or economic crisis for the situation.[162] In contrast, MV requires any advantage that would not be available to market participants generally to be disregarded.[163]

172. As explained in Part Three, Mekar's offer to Claimant was an arm's length transaction for a price considered 2020's market expectations. Mekar paid Vemma USD $400 million for their stake at Caeli, following Claimant's inability to attract a suitable buyer for its shares in Caeli in an arm's length transaction.[164] A sale at a lower stake is not necessarily imprudent in case of a willing seller when the assets are "*in a market with falling prices at a price that is lower than previous market levels*".[165]

173. For the above-mentioned reasons, if the Tribunal considers that Mekar owes compensation to Vemma, it should conclude that Mekar has already paid the "MV" for Claimant's investment by purchasing its stake at CA for USD $400 million.

II. IN THE ALTERNATIVE, ANY COMPENSATION AWARDED TO CLAIMANT SHOULD BE REDUCED BASED ON THE EXISTENCE OF MITIGATING FACTORS

174. Even if the Tribunal finds that the Claimant must be awarded any compensation, this should be reduced considering **(A)** Claimant's contributory fault and **(B)** the dire economic situation in Mekar.

A. <u>Vemma's fault contributed to the outcome of its investment in Caeli</u>

175. Contributory fault in investment arbitration involves Claimant's contribution to the alleged wrongful conduct of the State. Investment tribunals have held that the contribution

[162] *Ibid.*
[163] IVSC, p.22
[164] *IVSC* ¶27
[165] Ibid

must be causal, material, and significant.[166] Vemma contributed to the Respondent alleged wrongful conduct by engaging in anticompetitive practices, as explained below.

176. In *MTD*, the tribunal declared claimant responsible for negligence prior to when the dispute had emerged[167] and thus, ordered it to assume, with the respondent, 50% compensation.[196] In its decision, the tribunal stated that: "[t]*he BITs are not an insurance against business risk and the Tribunal considers that the Claimants should bear the consequences of their own actions as experienced businessmen*".[168]

177. Even though Caeli signed an undertaking assuring that it would not engage in any kind of restrictive practices[169] it ended up doing so.

178. By taking advantage of the oil crisis, Caeli managed to gain market share by pushing competitors out of the market combining, for example, low prices, discounts and loyalty programs with new credit lines which joint allowed it to offer prices under costs and dominate the market.[170] It also capitalized its undercutting strategies, MA and Phenac privileges in order to invade regional routes and push small competitors out of the market.[171]

179. Respondent respectfully request the Tribunal – as occurred in *Occidental* where claimant's reticence contributed to Ecuador's actions – to recognize that the State's responsibility, if any, is lessened, and that such determination must also be reflected in the determination of compensation.

[166] *Occidental*¶ 670; MTD (A)¶101
[167] *MTD Chile*, ¶ 242, p. 89.
[168] *Ibid (*¶ 243, p. 90*)*
[169] UF¶25
[170]UF¶35
[171]UF¶38

B. The dire economic crisis in Mekar

180. First, it is noted that CEPTA does not expressly exclude liability following the state of necessity. Nevertheless, it has been established under international law as per article 25 of the ILC DARSIWA. Moreover, arbitral practice has recognized the application of necessity as a defense in the absence of a treaty source.[172]

181. The tribunal in *LG&E* concluded that "*discretion [shall be given] to the state itself to craft policies within a margin of international supervision*".[173] Regarding compensation as an obligation to make reparation for internationally wrongful acts, ILC DARSIWA recognized that defenses such as necessity pertain to the question of compensation for any material loss caused by the act in question, but it is on the tribunal to decide whether this compensation might be granted and in which form.[174] In *LG&E,* the tribunal decided that state of necessity is a ground for exclusion from wrongfulness and that, as a consequence, the State is exempted from liability and thus is not entitled to compensate.[175] In *El Paso*, the tribunal ruled that the amount of compensation should be reduced if there was a defense based on the rule of necessity from the host State.[176]

182. In addition, as pointed out by ILC Articles the defense of necessity provides that a State may not be liable for actions taken to "*safeguard an essential interest against a grave and imminent peril*".[177] In *ConocoPhillips,* the tribunal recognized the possibility of suspending the enforcement of the award in cases of economic crisis.[178]

183. During 2017, Mekar went through an economic crisis, enacting measures that necessarily affected the aviation and other industries. Among those was the issuance of the decree

[172]*LG&E*¶¶133-134
[173]*LG&E*¶214
[174]*ILC Articles,* Art 27. Commentaries; *CMS Gas (Ad hoc)* ¶147
[175]*LG&E*¶261
[176]*El Paso*¶¶716-737
[177]*ILC Articles,* Art.25
[178]*ConocoPhillips*¶52

requiring companies to offer their goods and services in MON.[179] These measures were duly supported in the impending rise in inflation rates and general declines in Mekari GDP.[180]

184. Second, this Tribunal should consider the irreparable damage that could be caused by the enforcement of an award considering Vemma's claims. As pointed out by *ConocoPhillips,* there are some situations where *"If the Respondent is condemned, allowing payment would frustrate its effort to achieve the consensual restructuring of its external debts.*[181] Due to its great inflationary crisis and its potential third debt default, to pay the USD 700 million that Vemma demands, Mekar would have to transfer about twice its consolidated annual public spending to Vemma.[182]

185. As a general conclusion, the Respondent owes no compensation to the Claimant. If the Tribunal considers otherwise, the Respondent request the Tribunal to conclude that MV is the applicable standard of compensation, as agreed by the parties in CEPTA, and that there is no legal basis for the application FMV neither under the MFN clause. Consequently, the Respondent requests the Tribunal to conclude that it has already paid MV to Vemma for its investment, so no compensation should be awarded. In the alternative, the Respondent requests the Tribunal to conclude that any compensation awarded to Vemma should be reduced considering its contributory fault and the dire economic crisis in Mekar.

[179] UF¶42
[180] PO3¶3165
[181] *ConocoPhillips*¶52
[182] Ibid

PRAYER FOR RELIEF

In light of the above, Respondent hereby respectfully requests the Tribunal to:

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

b. Deny the requested authorization for the filing of the CBFI submission and grant leave for sought for filing CRPU's submission as it complies with CEPTA and ICSID-AFR.

c. Find that Mekar did not violate Article 9.9 of CETPA, since:
   i. Mekar's actions fall under its right to regulate.
   ii. Vemma's negligence amounts to contributory fault.
   iii. Mekar has not violated its obligations contained in Article 9.9.2 of the CEPTA.
   iv. Mekar did not made any specific representation to Vemma that created legitimate expectations.

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

Respectfully submitted on 23 September 2021 by

Team ECER G
On behalf of the Respondent,
The Federal Republic of Mekar