**Team Fernandez G.**

**The International Centre for the Settlement of Investment Disputes**
**Additional Facility**

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

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**VEMMA HOLDINGS, INC** **CLAIMAINT**

**V.**

**THE FEDERAL REPUBLIC OF MEKAR** **RESPONDENT**

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# MEMORIAL FOR RESPONDENT

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| CEPTA | Bonooru-Mekar Comprehensive Economic Partnership and Trade Agreement, Bon.-Mek., Oct. 15, 2014, 34 U.N.T.S. 243. |
| Bonooru – Mekar BIT | Treaty Between the Federal Republic of Mekar and the Commonwealth of Bonooru for the Promotion and Protection of Investments, Aug. 24, 1994, 45 U.N.T.S. 350. |
| ICJ Statute | Statute of the International Court of Justice, Oct. 24, 1945, U.S.T.S. 993. |
| ICSID Convention | Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159. |
| Canada Model BIT | Agreement between Canada and _____ for the Promotion and Protection of Investments, 2004. |
| U.S. Model BIT | Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment, 2012. |
| Uruguay – U.S. BIT | Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, Apr. 11, 2005, T.I.A.S. 06-1101. |
| NAFTA | North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289. |

| Rules and Resolutions | |
|---|---|
| ICSID-AF Rules | International Center for the Settlement of Investment Disputes, *Additional Facility Rules*, Apr. 2006, ICSID/11. |
| ILC Draft Articles | International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, 2001. |
| G.A. Res. A/56/83 | United Nations General Assembly Resolution A/56/83, Jan. 28, 2002. |

| Arbitral Decisions and Awards | |
|---|---|
| Abaclat Dissent | Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v. The Argentine Republic), Dissenting Opinion, Georges Abi-Saab (2011). |
| Bosnia | Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. V. Serb.), 1996 I.C.J. Reports 595 (July 11). |
| Nicaragua | Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.), 1986 I.C.J. Rep. 14 (June 27). |
| Thunderbird | International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL (1976). |
| Vacuum Salt | Vacuum Salt Products Ltd. V. Republic of Ghana, ICSID Case No. ARB/92/1 (1994). |
| CSOB | Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4 (1999). |
| Maffezini | Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7 (2000). |
| Tokios | Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18 (2007). |
| Siemens | Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/08, Award (2007). |
| Phoenix | Phoenix Action, Ltd. V. The Czech Republic, ICSID Case No. ARB/06/5, ICSID Case No. ARB/06/5 (2007). |
| Jan de Nul | Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13 (2008). |
| Hamester | Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, Award, |

| | |
|---|---|
| | ICSID Case No. ARB/07/24 (2010). |
| Pezold | Bernhard von Pezold et al. v. Zimbabwe and Border Timbers et al. v. Zimbabwe, ICSID Case No. ARB/10/15, Procedural Order No. 2, (June 26, 2012). |
| Vivendi | Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19 (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic) (2015). |
| Lao | Lao Holdings N.V. v. Lao People's Democratic Republic, ICSID Case No. ARB(AF)/12/6 (2015). |
| BUCG | Beijing Urban Construction Group Co. Ltd. V. Republic of Yemen, ICSID Case No. ARB/14/30 (2017). |
| World Duty Free | World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7 (2006). |

| Secondary Sources: Books | |
|---|---|
| Schefer | Krista Nadakavukaren Schefer, INTERNATIONAL INVESTMENT LAW: TEXT, CASES AND MATERIALS, SECOND EDITION (2016). |
| Schreuer | Christoph H. Schreuer et al., *Jurisdiction*, *in* THE ICSID CONVENTION: A COMMENTARY 71–347 (2009). |

| Secondary Sources: Articles | |
|---|---|
| Blyschak | Paul Blyschak, *State-Owned Enterprises and International Investment Treaties: When are State-Owned Entities and Their Investments Protection*, 6 J. INT'L L & INT'L REL. 1–52 (2010). |
| Cortesi | Giulio Alvaro Cortesi, *ICSID Jurisdiction with Regard to State-Owned Enterprises – Moving Toward an Approach Based on General International Law,* 16 L. & PRACT. INT'L CTS. AND TRIBS. 108–138 (2017). |
| Broches | Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 135 HAGUE REC. D. COURS 331 (1972). |
| Sourgens | Frederic G. Sourgens, *By Equal Contest of Arms: Jurisdictional Proof in Investor-State Arbitrations*, 38 N.C. J. INT'L L. 875 (2012). |
| Afilalo | Ari Afilalo, *Meaning, Ambiguity and Legitimacy: Judicial (Re-) construction of Nafta Chapter 11*, 25 NW. J. INT'L L. & BUS. 279 (2005). |
| Yackee | Jason Webb Yackee, *Investment Treaties and Investor Corruption: An Emerging Defense for Host States,* Essay, 52 VA. J. INT'L L. 723–746 (2011). |

| Miscellaneous | |
|---|---|
| Second Restatement | Restatement (Second) of Agency § 1 (1958) |
| Black's Law Dictionary | AGENCY, Black's Law Dictionary (11th ed. 2019) |

**TABLE OF DEFINITIONS**

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| Articles of Association | Articles of Association of Vemma Holdings, Inc. |
| Aviation Analytics | Annex IX: Aviation Analytics June 7, 2019 |
| BAK | National currency of the Commonwealth of Bonooru |
| BIT | Bilateral Investment Treaty |
| Bona Fide Offer | A Third-Party arm's length transaction that Mekar Airservices desires to accept |
| Bonooru | Commonwealth of Bonooru |
| CAA | Civil Aviation Authority: The regulatory arm of Bonooru's Ministry of Transport and Tourism. Until 1979 the CAA was responsible for management of Bonooru's national carrier and monopoly civil airline. |
| CBFI Application | Application for Leave to File a Non-Disputing Party Amicus Curiae Submission, Amicus Submission by the Consortium of Bonoori Foreign Investors ("CBFI") in the Matter of an Arbitration under Chapter 0 of the Bonooru – Mekar Comprehensive Economic Partnership and Trade Agreement and the International Center for the Settlement of Investment Disputes (ICSID) – Additional Facility Rules, ICSID Case No. ARB(AF)/20/78, April 19, 2021. |
| CCM | Competition Commission of Mekar |
| CEPO | Union of petroleum-exporting states: CEPO coordinates petroleum supply policies of member States to ensure international price stability. The Commonwealth of Bonooru is a member of CEPO. |
| CEPTA | Bonooru-Mekar Comprehensive Economic Partnership and Trade Agreement |
| CILS | Centre for Integrity in Legal Services |
| CRPU | Committee on Reform of Public Utilities: Members of Mekari civil society whose professional focus is investment banking and who performed an audit, economic, technical, and financial analysis of Caeli Airways. |
| Constitution Act of Bonooru | Constitution Act of Bonooru, 1947 |
| Corruption Perceptions Index | An index published annually by Berlin-based Transparency International since 1995 which ranks countries on a 0-100/100 scale "by their perceived levels of public sector corruption, as determined by expert assessments and opinion surveys." |
| Executive Order 9-2018 | Mekari Executive Order granting subsidies to airlines for each Mekari citizen travelling on board. |

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| External Advisors' Application | Application for Leave to File a Non-Disputing Party Amicus Curiae Submission, Amicus Submission by External Advisors to the Committee on Reform of Public Utilities in the Matter of an Arbitration under Chapter 9 of the Bonooru-Mekar Comprehensive Economic Partnership and Trade Agreement and the International Center for the Settlement of Investment Disputes (ICSID) – Additional Facility Rules, ICSID Case No. ARB(AF)/20/78, May 28, 2021. |
| Facts | Statement of Uncontested Facts |
| FET | Fair and Equitable Treatment |
| ICSID | International Centre for the Settlement of Investment Disputes |
| ICSID CONVENTION | Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington on 18 March 1965 |
| LPM | Labourer's Party of Mekar |
| Mekar | Federal Republic of Mekar |
| MoA | Memorandum of Association of Vemma Holdings, Inc. |
| MON | National currency of the Federal Republic of Mekar |
| National Ferry Workers | National Ferry Workers Union v. Bonooru (Minister of Transportation), CCB Case No. 1964-08 |
| New York Convention | New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) |
| People's Council | People's Council of the Island of Kyoshi v. Bonooru (Attorney General), CCB Case No. 1981-17 |
| Phenac Business | Annex VII: Phenac Business Today Podcast Transcript, 17 November 2014 |
| SCC | Sinnoh Chamber of Commerce Arbitration Institute |
| Vemma | Vemma Holdings, Inc. |
| Vemma's Application to Bar External Advisors | Vemma's Application to Bar the Amicus Submission by the External Advisors to the Committee on Reform of Public Utilities, June 15, 2021. |

## STATEMENT OF FACTS

### Parties to the Dispute

1. Claimant, Vemma Holdings Inc. ("Claimant"), is an airline holding company incorporated pursuant to the laws of the Commonwealth of Bonooru ("Bonooru") since December, 1984. Respondent is the Federal Republic of Mekar ("Mekar"). Claimant purchased a controlling stake in Caeli Airways ("Caeli") from Mekar in 2011.

### Claimant

2. Claimant is the successor company to the Bonoori state-owned national airline, Bonooru Air.[1] Claimant is also the sole shareholder of Royal Narnian, the "flag carrier" of Bonooru.[2] Royal Narnian is a leading global airline and a founding member of the Moon Alliance, a heavyweight airline alliance in the global aviation industry.[3]

3. Bonooru is an island nation, and its Constitution provides that every citizen has the right to "enter, remain in, and leave its territory."[4] Bonooru's highest court has held that this provision imposes a positive obligation on the Bonoori State to fulfil citizens' mobility rights by providing affordable means of travel, including by air.[5]

4. Claimant's Memorandum of Association ("MoA") obligates the company to assist the government in upholding the mobility rights of Bonoori citizens.[6] The Bonoori State owned between thirty-one and thirty-eight percent of Claimant's shares from 1984 until

[1] Facts ¶ 6, 10.
[2] Facts ¶ 9.
[3] Facts ¶ 11.
[4] Constitution Act of Bonooru Article 70(1); Facts ¶ 5.
[5] National Ferry Workers ¶ 25-26.
[6] *Id.* ¶ 3(h). The MoA also ties Vemma's mission to the national airline industry. *Id.* ¶ 3(a). Further, Vemma may enter merge with other companies, but only if they align with or advance Vemma's objectives. *Id.* ¶ 3(l), 3(m), 3(q).

March 2021.7 At that time, shortly after Claimant submitted this arbitration claim, Bonooru increased its ownership stake in Claimant to a majority fifty-five percent.[8]

5. Claimant was formed during the Bonoori government's partial privatization of the Bonoori airline industry in 1984.[9] The privatization process involved both the Bonoori Civil Aviation Authority and the national parliament.[10] Ultimately, in response to public protests and legal action to uphold mobility rights, both the Bonoori Prime Minister and the Constitutional Court stepped in to endorse and approve the transition

6. The state-owned Bonoorian People's Bank financed Vemma's Caeli acquisition and later refinanced it at more favorable rates.[11]

7. Out of eight directors on Claimant's Board of Directors ("the Board"), the Bonoori Ministry of Transport and Tourism holds one permanent seat.[12] Individuals have moved regularly between the Ministry and both Claimant's and Caeli's boards.[13] The Board passes decisions by majority; fifty percent of voting shares must be present for a quorum at regular meetings, including meetings to elect directors.[14] Bonooru's representatives are present for every Board meeting.15 As a result, at meetings where other shareholders are not present, Bonoori representatives form a majority of members present and voting.16

8. Since March 2021, Claimant's Board of Directors has been comprised entirely of Bonoori government functionaries.[17]

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[7] *Facts* ¶ 10.
[8] Facts ¶ 63, 65. Claimant submitted this claim on November 15, 2020. *Id.* ¶ 63. Vemma's remaining shares are privately owned. *Id.* ¶ 10.
[9] Facts ¶ 9.
[10] *Id.* ¶¶ 6-9.
[11] Facts ¶¶ 23, 30.
[12] Id. ¶¶ 152.2, 152.4.
[13] Facts ¶¶ 22, 42.
[14] Procedural Order No. 3 ¶ 3.
[15] *Id.*
[16] *Id.*
[17] Facts¶ 65.

9. On January 5, 2011, Claimant acquired an eighty-five percent interest in Caeli Airways ("Caeli") during Mekar's privatization of the airline. ").[18] Mekar maintained fifteen percent ownership through Mekar Airservices Ltd.[19]

**Respondent**

10. Mekar is a developing country where persistent instability, foreign occupation, and exploitation have hampered economic growth since independence from the Pevensian empire.[20] The country has witnessed a prolonged period of political, economic, and judicial instability.[21] Mekar has consistently scored between 30 and 36 out of 100 on Transparency International's Corruption Perceptions Index, which measures public corruption; by way of comparison, in 2020 New Zealand scored 88/100, Somalia scored 12/100, and Russia scored 30/100.22 In 2019, the International Monetary Fund predicted 2020 would being declining economic growth in Mekar, an eight per cent fall in GDP, a 2600 per cent average inflation rate, and a third debt default in three decades.23 During 2020, bank loan defaults rose more than twenty percent and Fitch downgraded the Mekar's credit rating to CCC.24

**Historical Background**

11. The Commonwealth of Bonooru and the Federal Republic of Mekar sit at opposite ends of the Greater Narnian Region.[25] Both were once part of the Pevensian Empire.[26] Since the Empire's dissolution, Bonooru's rich oil deposits and well-developed aviation, mining, and finance sectors have allowed it to cultivate the highest GDP in the region.[27] As a result,

[18] Facts ¶¶ 14, 20-22, 26.
[19] *Id.* ¶ 16.
[20] Facts ¶¶ 2, 12.
[21] Facts ¶ 12.
[22] Facts ¶ 12; Corruption Perceptions Index 2020.
[23] Procedural Order No. 3.
[24] Id.
[25] Facts ¶¶ 2, 12.
[26] *Id.* ¶ 2.
[27] *Id.* ¶ 4.

Bonooru has in recent years become the dominant economic power and capital exporter in the Greater Narnian region.[28]

12. An archipelagic state, Bonooru's unique geography requires advanced transportation infrastructure to ensure the population's access to public facilities. These facilities include healthcare and education services, which are concentrated on a few major islands. The Bonoori constitution protects mobility rights as a means to ensure far-flung populations have access to transportation and basic services.

13. In 2010, the Bonoori state launched the Caspian Project, an initiative to consolidate Bonooru's dominant position in the region by facilitating the movement of goods, people, services, and knowledge among neighboring States.[29] Bonooru planned to spend approximately 100 Billion BAK between 2010 and 2030 to build infrastructure in Narnian States, with the long-term goal of redefining trade patterns.[30]

14. Critics of the global development strategy have accused Bonooru of using economic leverage as a diplomatic tool.[31] Nonetheless, in 2011, Bonooru's Minister of Transportation and Tourism announced the "Horizon 2020" Scheme as part of the Caspian Project to "optimally tap" Bonooru's tourism potential.[32] The scheme included subsidies to companies investing in tourism-related infrastructure in Bonooru.[33]

15. Until 2003, Mekar's airline industry consisted of two state-owned airlines: Aer Caeli and Caeli Airways.[34] Due to corruption allegations against Laborer's Party of Mekar ("LPM") for its running of the airlines, Aer Caeli and Caeli Airways merged in 2003.35 The merged

[28] *Id.* ¶ 4.
[29] *Id.* ¶ 4.
[30] *Id.*
[31] *Id.*
[32] *Id.* ¶ 28.
[33] *Id.*
[34] *Id.* ¶ 14.
[35] *Id.* ¶ 15.

entity, Caeli Airways ("Caeli"), experienced a hydra of hindrances from 2003 to 2008: increased debt, lost market share, decreased profits, new corruption allegations, shifting strategies, budgetary constraints, governmental interference, and the 2008 recession.36

16. In 2008 elections, the opposition Common Man's Party forced the Mekari government to privatize several state owned enterprises, including Caeli.37

17. The Mekari legislature revised the Monopoly and Restrictive Trade Practices Act in 2009, creating an independent competition enforcement body, the Competition Commission of Mekar ("CCM"), to repair Mekar's reputation as a dismal host of private investments.38

18. In April, 2014, Bonooru and Mekar signed the Comprehensive Economic Partnership and Trade Agreement ("CEPTA"), a Treaty intended means to promote trade and economic ties, including through investment.[39] During the CEPTA negotiations, the Mekari senate considered acceding to the ICSID Convention, ultimately rejecting the proposal on the belief that ICSID rules favor developed countries and foreclose domestic review of awards.

19. Meanwhile, after two failed restructuring attempts, the state-controlled Mekar Airservices Ltd. took ownership of Caeli and began to market the airline's extensive branding and infrastructure assets. Claimant tendered a bid, representing that it would not cooperate with Moon Alliance members on competition parameters such as prices, schedules, capacity, facilities, and other sensitive information. Mekar accepted Claimant's bid.

[36] *Id.* ¶¶ 16-18.
[37] *Id.* ¶ 18.
[38] *Id.* ¶ 19.
[39] *Id.* ¶ 32.

**Origins of the Dispute**

20. On January 5, 2011, Claimant acquired an eighty-five percent interest in Caeli Airways ("Caeli") during the privatization of the airline by the Republic of Mekar ("Mekar").[40] Mekar maintained fifteen percent ownership through Mekar Airservices Ltd.[41]

21. While advising on the privatization of Caeli, Mekar's Committee on Reform of Public Utilities ("CRPU") noted that Claimant's proposal relied on overly-optimistic forecasts that overlooked fuel price volatility and potential competition for long-distance routes. Yet the Chairman of the CRPU, Mr. Dorian Umbridge, endorsement of Claimant's Caeli bid in part because he welcomed Bonoori involvement in Caeli.[42]

22. Between 2011 and 2013, despite high fuel prices, Caeli's revenue exceeded costs, in large part due to cooperation with Moon Alliance Members on aircraft purchases, lounge access, terminals, IT platforms, check-in operations, and code sharing.

23. Vemma pushed through the rapid expansion of Caeli's routes and fleet, overruling the cautious approach Mekar Airservices urged.[43] While Mekar Airservices prioritized domestic flights, Claimant sought additional market share by offering low-fare, long-distance flights into Mekar despite. Even during the usual fall-winter slump in air travel, Claimant ignored its debt obligations and further slashed airfares and expanded the fleet.

24. At the same time, the CCM became aware that Caeli's joint market share with Royal Narnian exceeded the statutory threshold of fifty percent for the CCM to open an investigation. The CCM launched a *suo moto* investigation into Claimant's erratic and predatory business practices, capping Caeli's airfares as an interim measure. In response to the 2017 economic crisis, Mekar also changed its currency policy to require all

[40] Facts ¶¶ 14, 20-22, 26.
[41] *Id.* ¶ 16.
[42] Facts ¶ 24.
[43] *Id.* ¶¶ 29, 31, 35.

companies operating in Mekar to offer goods and services denominated only in Mekari MON.[44] The CCM's investigation found Caeli breached Mekari antitrust law and benefitted unfairly from Bonoori subsidies, resulting in a MON 150 million penalty.

25. As the economic crisis continued, Mekar's Secretary of Civil Aviation attempted to alleviate the airline industry's woes by granting subsidies to airlines carrying Mekari citizens. The Secretary rejected Claimant's application for subsidies because Caeli was already receiving foreign support. As the Mekari Deputy Minister of Transportation stated in October 2018, "State-owned companies have unique advantages over other companies that enable them to outcompete privately owned firms."[45]

26. The CCM then launched a second investigation into Caeli, which concluded Caeli's business practices at Phenac International Airport were anti-competitive. It imposed airfare caps until Caeli's market share, with Alliance members factored in, fell below forty percent.

27. Given the failing economy and Caeli's growing liabilities, Claimant sought to sell its stake. Caeli's shareholders agreement provided that Mekar Airservices could reject any offer, and that only a *bona fide*, arms-length third party could purchase the company. Mekar rejected an offer from the Hawthorne Group because it was not an arms-length third-party.[46]

28. In February 2020, Mekar initiated arbitration in the Sinnoh Chamber of Commerce, requesting a finding that Claimant failed to secure a *bona fide* third-party offer. The tribunal found for Mekar. The Supreme Arbitrazh Court of Sinnograd set aside the award due to claims that Mekar improperly influenced the arbitrator's decision. Claimant appealed to the Supreme Court of Mekar, which enforced the award.

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[44] *Id.* ¶ 42.
[45] Facts, ¶45
[46] Facts, ¶57. The right to offer shares at "the price proposed by a *bona fide* third party purchaser" does not extend to offering them at a price proposed by the Hawthorne Group or its affiliates, which are associated to Vemma Holdings through the Moon Alliance.

29. From February to September 2020, Claimant failed to secure a buyer for its Caeli shares. It therefore sold its stake to Respondent for $400 million USD.

30. Simultaneously, Bonooru implemented a bail-in program to shore up Claimant after its Caeli losses, increasing its ownership to a majority fifty-five percent, inserting its officials at all levels of management, and deploying Claimant's aircraft into paramilitary activities.[47]

31. On 15 November, 2020, Claimant filed a notice of arbitration before the International Centre for the Settlement of Investment Disputes ("ICSID") Additional Facility.

[47] *Id.* ¶¶ 10, 65.

**SUMMARY OF ARGUMENTS**

*I. The Tribunal Lacks Jurisdiction to Hear Claimant's Claim*

32. This case represents the Bonoori State's attempt to use CEPTA's investor-state dispute settlement provisions to seek compensation for losses incurred through its own risky investment strategies. Mekar will demonstrate that this Tribunal lacks jurisdiction to hear Claimant's claim, for two reasons.

33. First, credible evidence exists that Claimant's investment in Caeli was procured by means of corruption. The Tribunal should not allow use of CEPTA's investor-state dispute settlement arrangements to adjudicate a claim based on an unlawful underlying investment. The Tribunal should dismiss the case on grounds of illegality.

34. Second, if the Tribunal turns a blind eye to the evidence of corruption, the Tribunal still lacks jurisdiction *rationae personae* because Claimant's actions are attributable to the State of Bonooru. Under customary international norms of state responsibility, Claimant's actions should be attributed to Bonooru because the company exercised governmental powers and acted under the State's direction and control throughout its management of Caeli. Mekar did not consent to arbitrate with an entity of the Bonoori state under CEPTA.

*II. The Tribunal should Allow the External Advisors to the Committee on Reform of Public Utilities to File an Amicus Submission but Should Deny the Amicus Request by the Consortium of Bonoori Foreign Investors*

35. If the Tribunal determines it has jurisdiction to hear this claim, Mekar urges the Tribunal to allow the External Advisors to the Committee on Reform of Public Utilities to file an *amicus curiae* submission. The External Advisors will provide unbiased factual information that relates directly to the issue of the legality of Claimant's Caeli investment. They can also ensure that the Mekari public interest is brought to bear in these proceedings.

36. On the other hand, the Tribunal should deny the *amicus* application by the Consortium of Bonoori Foreign Investors ("CBFI") because the CBFI represents Claimant's interests and offers no other significant perspective on these proceedings.

### *III. Respondent Did Not Violate the Fair and Equitable Treatment Provision Contained in Article 9.9 of CEPTA*

37. Respondent never exceeded its internationally-recognized authority to regulate internally for legitimate public purposes; hence, Mekar's enforcement of the Sinnoh arbitral award, the CCM's investigations, and Mekar's non-subsidization of Claimant, did not violate the Fair and Equitable Treatment Standard under CEPTA Article 9.9.[48] Moreover, Respondent never made any specific representation to Claimant that it would not regulate anti-competitive behavior within its borders; to the contrary, the only legitimate expectation created in the present dispute is Mekar's legitimate but frustrated expectation that Claimant would not engage in high-level cooperation with Moon Alliance members.[49]

### *IV. If the Tribunal Finds Respondent Violated Article 9.9, the Tribunal Should Award No Compensation to Claimant*

38. In the event of a finding of liability, the Respondent submits that the only measure of compensation available to Claimant is market value. Therefore, Claimant is owed no additional compensation because Mekar has already paid the market value of $400 Million for its shares in Caeli Airways.[50] Alternatively, Mekar submits the Tribunal should consider Claimant's fault for its own losses and the certainty that any award approaching Claimant's extortionate demand will cripple the Mekari economy. This would amount to a regime change enforced improperly through mistaken application of international law.[51]

[48] Record, 76, CEPTA Treaty, Art. 9.8.
[49] Record, 76, CEPTA Treaty, Art. 9.9(3).
[50] Record, 82, CEPTA Treaty, Art. 9.21(1)(a)
[51] Procedural Order 3.

**ARGUMENTS ADVANCED**

## I. THIS TRIBUNAL LACKS JURISDICTION TO HEAR CLAIMANT'S CLAIM

39. Mekar respectfully submits that this Tribunal lacks jurisdiction to hear the case before it.[52] The record contains recently-submitted evidence that Claimant's investment in Caeli was procured by means of unlawful corruption.[53] The Tribunal should act *proprio motu* to consider and rule on its own jurisdiction *rationae materiae*, and should dismiss the case because of the illegality of the underlying investment.

40. Second, in submitting this claim, Claimant relies on its status as an investor that acted in a private, commercial capacity in making an investment under CEPTA.[54] But the record flatly contradicts this portrayal. Instead, the uncontested facts show that Claimant is, and always has been, a state-controlled entity.[55] The dispute therefore constitutes State-to-State arbitration, and the Tribunal lacks jurisdiction *ratione personae* to hear Claimant's case.[56] Allowing a state entity to proceed under the ICSID AF Rules would contravene ICSID's intent, as reflected in CEPTA's Article 9.16, to provide a forum to settle disputes between States and investors acting in a commercial capacity.[57]

41. This case has serious implications for the global investment protection regime. Rather than denying protection to state-owned enterprises, a finding that the Tribunal has jurisdiction over this dispute would mean that States themselves, operating through state-controlled entities, can bypass the traditional rules of State-State dispute settlement.

42. Mekar wishes to remind the Tribunal that the Mekari State has not acceded to the ICSID Convention.[58] As a developing country, Mekar opted out of ICSID precisely to avoid being

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[52] Response to Notice of Arbitration ¶ 2.
[53] External Advisors' Application.
[54] Notice of Arbitration ¶ 1 (describing Vemma as "an airline holding company incorporated pursuant to the laws of the Commonwealth of Bonooru.").
[55] Infra pp. 9-20.
[56] Response to Notice of Arbitration ¶ 2.
[57] ICSID Convention Preamble; CEPTA Article9.16(2); Cortesi at 111; Schreuer at 161.
[58] Facts ¶ 20. Vemma claims this provides jurisdiction under the ICSID AF Rules. *Id.*

targeted by attacks on its sovereignty by more powerful neighbors under the guise of investment disputes.[59] CEPTA Article 9.17 makes clear that Mekar consented only to be brought to arbitration in accordance with Article 9.16.[60] Consent is the "cornerstone" of ICSID jurisdiction, and as Article 9.16 contains no provision for state-state dispute settlement, Mekar has not consented to arbitrate with the Bonoori state.[61]

43. In considering its jurisdiction to hear this case, Mekar urges that both customary international law and CEPTA's own provisions should guide the Tribunal's decision.[62] Accordingly, Mekar will demonstrate that the Tribunal lacks jurisdiction because: 1.) The Tribunal lacks jurisdiction *rationae materiae* because Claimant's investment in Caeli was unlawful; 2.) Claimant's actions are attributable to Bonooru under customary international norms of state responsibility; and 3.) Under CEPTA, Mekar did not consent to arbitrate with an entity of the Bonoori State.

### *1.1 The Tribunal Lacks Jurisdiction* Rationae Materiae *because Claimant's Investment was Unlawful*

44. On May 28, 2021, the Tribunal received credible evidence that Claimant's investment in Caeli was procured by means of corruption.[63] The External Advisors to the Committee on Reform of Public Utilities ("External Advisors") are a group of investment banking professionals who served as independent advisors to Materia Mekar's Committee on Reform on Public Utilities ("CRPU") during the 2010 privatization of Caeli Airways.[64] The External Advisors seek to intervene in these proceedings as *amici curiae*, or non-disputing parties ("NDPs").[65] The External Advisors seek to provide the Tribunal with evidence that the Chairman of the CRPU, Mr. Dorian Umbridge, received bribes in return

[59] *Id.*
[60] CEPTA Article 9.17.
[61] CEPTA Article 9.16; Schreuer at 190; Abaclat Dissent ¶ 8.
[62] ICJ Statute Article 38.
[63] External Advisors' Application.
[64] Id.
[65] Id.

for his endorsement of Claimant's Caeli bid.[66] Mr. Umbridge was an influential advocate for Claimant's bid, in part because of Bonoori involvement in Caeli.[67] Since the External Advisors' *amicus* application became public, the Constitutional Court of Bonooru has taken *suo moto* cognizance of the allegations against Mr. Umbridge.[68]

45. It is well established that international arbitral tribunals should rule on their own jurisdiction *proprio motu*, even if neither party to a dispute advances a jurisdictional challenge.[69] Accordingly, Article 36(1) of the ICSID AF Rules states that "[t]he Commission shall have the power to rule on its competence."[70]

46. It is also well-recognized that international investment dispute settlement mechanisms should not be available where an investment was made in violation of their the host state's laws, of international public policy, or in bad faith.[71] As the tribunal stated in *Phoenix Action, Ltd. v. The Czech Republic*, "[t]he purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments made in violation of the laws of the host State or investments not made in good faith, obtained for example through misrepresentations, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system."[72]

47. For example, in *World Duty Free Company v Republic of Kenya* ("World Duty Free"), the claimant informed the tribunal that it made a substantial donation to the re-election campaign of Kenya's president as part of its efforts to win a contract to operate duty free

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[66] *Id.*
[67] Facts ¶ 24.
[68] Procedural Order No. 3 ¶ 13.
[69] Abaclat Dissent ¶ 8 (explaining perception that "the first task of an international tribunal is to ascertain its jurisdiction . . . international tribunals take [great care] in establishing from the outset, the existence and limits of the consent of the parties before them, on which their jurisdiction is founded."); *see also* Scheffer at 479-80 (explaining competence-competence principle, whereby tribunals in investor-state disputes must determine own jurisdiction).
[70] ICSID AF Rules Article 36(1).
[71] Phoenix ¶¶ 101, 106.
[72] Id. ¶ 100.

stores in airport terminals.[73] The Tribunal found that the donation was a bribe, and dismissed the case because it could not uphold a claim based on contracts obtained by corruption.[74] The tribunal based its decision on the universal condemnation of bribery under domestic laws, international corruption conventions, and the decisions of courts and arbitral tribunals.[75] Even in countries where such bribery is routine and part of doing business, law and public policy still condemn the practice.[76]

48. Similarly, in *Siemens A.G. v. Argentine Republic* ("Siemens"), after a tribunal awarded Siemens a significant judgment against Argentina, American and German anticorruption agencies uncovered evidence that Siemens executives had bribed Argentine public officials.[77] After Siemens paid fines in the United States and Germany, it was forced into a post-award settlement with Argentina, walking away from a USD $218 million award.[78]

49. In this case, the External Advisors have advanced evidence that Claimant's investment in Caeli was secured by means of bribes paid to the Chairman of the CRPU, Mr. Umbridge.[79] In return, Mr. Umbridge advocated for Claimant's bid.[80] The Constitutional Court of Bonooru has confirmed the credibility of the allegations by initiating its own investigation.

50. Like the Kenyan business environment in *World Duty Free*, corruption in Mekar is considered a friendly custom and "part and parcel of doing business."[81] However, public tolerance of corruption does not authorize this Tribunal to endorse corrupt practices. Bribery is illegal under the domestic laws of most countries and under international law.[82]

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[73] World Duty Free ¶ 167; Yackee at 729-30.
[74] World Duty Free ¶ 136, 157.
[75] Id. ¶ 157.
[76] Id.
[77] Yackee at 724; Siemens at ¶
[78] Yackee at 725.
[79] *Id.*
[80] Facts ¶ 24.
[81] Procedural Order No. 3 ¶ 13.
[82] World Duty Free ¶ 142 ("bribery or influence peddling, as well as both active and passive corruption, are sanctioned by criminal law in most, if not all, countries."); ¶¶ 143-56 (summarizing international conventions

The Tribunal cannot ignore the evidence offered by the External Advisors, which casts serious doubt on the legality of Claimant's investment. Like previous tribunals that have confronted a corrupt or unlawful investment, this Tribunal should dismiss the case on grounds of illegality.

51. Claimant correctly points out that Mekar did not challenge the legality of the Caeli investment at an earlier stage of these proceedings.[83] However, this does not put the issue outside the scope of the dispute. The evidence of Mr. Umbridge's corrupt behavior only came to Mekar's attention on May 28, 2021, several months after Mekar submitted its response to Claimant's notice of arbitration.[84] Mekar therefore had no opportunity, until now, to raise an objection to the Tribunal's jurisdiction *rationae materiae*. Mekar has challenged the Tribunal's jurisdiction *rationae personae* from the outset.[85]

### *1.2 The Tribunal Lacks Jurisdiction* Rationae Personae *because Vemma's actions are attributable to the Bonoori state under customary international norms of state responsibility*

52. Claimant submits its claim pursuant to Article 9.16 of CEPTA and Article 2 of the Additional Facility Rules of the International Center for the Settlement of Investment Disputes ("ICSID AF Rules").[86] Article 9.16 provides that a dispute may be submitted to arbitration by "an investor of a Party."[87] CEPTA Article 9.16 and Article 2 of the ICSID AF Rules permits the Additional Facility to administer proceedings "between a State . . . and a national of another State."[88] For this Tribunal to have jurisdiction therefore, the panel

prohibiting corruption and arbitral decisions dismissing cases because of investments discovered to be illegal because of corruption).
[83] Vemma's Application to Bar External Advisors.
[84] External Advisors' Application.
[85] Response to Notice of Arbitration ¶ 2 ("The Tribunal does not have jurisdiction to hear the Claimant's case, given that the present dispute constitutes State-to-State arbitration.").
[86] Notice of Arbitration ¶ 1.
[87] CEPTA Article 9.16(1)(a).
[88] ICSID AF Rules Article 2.

must be persuaded that Claimant is both "an investor of a Party" under CEPTA and a "national of another State" under the ICSID AF Rules.[89]

53. The International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts ("ILC Draft Articles"), endorsed by the United Nations General Assembly in 2002, codify the customary international law of state responsibility.[90] If an entity is not a state organ, its conduct can be attributed to a state under ILC Draft Article 5 if the entity exercises governmental powers in carrying out the acts, or under Article 8 if the entity carried out the act under the direction or control of the state.[91]

54. ILC Draft Articles 5 and 8 are mirrored by generally-accepted Broches test, which provides that a government-controlled corporation may be a "national of another Contracting State" under the ICSID Convention unless it is "acting as an agent for the government or is discharging an essentially governmental function."[92] Mekar submits that Claimant's actions while managing Caeli Airways were an exercise of governmental authority, meaning its acts are attributable to the Bonoori state under ILC Draft Article 5 and the second prong of the Broches Test.[93] Claimant also acted as an agent of the Bonoori government, under the state's direction and control, making its actions attributable under ILC Draft Article 8 and the first prong of Broches.[94] Claimant therefore may not bring a claim to arbitration under CEPTA or the ICSID AF Rules.[95]

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[89] Sourgens at 879 (to be satisfied that it has jurisdiction, a Tribunal must determine that the weight of arguments in favor of jurisdiction is preponderant).
[90] GA Resolution A/56/83; Schefer at 70.
[91] ILC Draft Articles 5, 8; Jan de Nul ¶ 157.
[92] Broches at 354-55; BUCG ¶ 34. In practice, tribunals have applied both the ILC Draft Articles and the Broches Test to assess the responsibility of states for the acts of entities they partially own or control. Cortesi at 112-13.
[93] ILC Draft Article 5.
[94] ILC Draft Article 8.
[95] *Id.* Mekar also notes that Article 9.13 of CEPTA provides that the acts of a state-owned enterprise are attributable to the state under certain circumstances. CEPTA Article 9.13(1).

*1.2.a. Claimant Exercised Governmental Powers throughout its Management of Caeli*

55. According to both the Broches test and ILC Draft Article 5, "[t]he conduct of a person or entity which is not an organ of the State . . . but which is *empowered by the law of that State to exercise elements of the governmental authority* shall be considered an act of the State . . . provided the person or entity is *acting in that capacity in the particular instance*."[96]

56. The tribunal in *Emilio Agustín Maffezini v. The Kingdom of Spain* ("Maffezini") applied ILC Draft Article 5 to address whether the actions of SODEGA, a Spanish regional development agency, were attributable to the state.[97] The tribunal took both a structural and a functional approach.[98] The structural test considered whether the entity was directly or indirectly owned or controlled by the State, while the functional test assessed whether it carried out functions that were governmental in nature.[99] The tribunal found SODEGA met the structural test because the Spanish state created it by decree, the highest organs of government were involved in its creation, and the state contributed more than half its initial capital and owned eighty-eight percent of its shares.[100] SODEGA met the functional test because its goal was to promote regional development, a core governmental function.[101] As a result, the tribunal found the claimant had made out a *prima facie* case that SODEGA was a state entity.[102]

57. In Gustav *F.W. Hamester GmbH and Co KG v. Republic of Ghana* ("Hamester"), the tribunal similarly considered whether the actions of a Ghanaian cocoa board were

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[96] ILC Draft Article 5 (emphasis added); Broches at 354-55 (phrasing test as "discharging an essentially governmental function.").
[97] Maffezini ¶¶ 72-73.
[98] *Id.* ¶ 77.
[99] *Id.* The tribunal noted a range of factors that underpin both tests, including "ownership, control, the nature, purposes and objectives of the entity . . . [and] the character of the actions taken." *Id.* ¶ 76.
[100] *Id.* ¶ 83.
[101] *Id.* ¶ 85.
[102] *Id.* ¶ 89.

attributable to the state when the board was a minority shareholder in a joint venture with a German company.[103] The tribunal took a functional approach under ILC Draft Article 5, and found the cocoa board was a government entity because it regulated and promoted the cocoa industry.[104] The tribunal then assessed whether "the precise act in question was an exercise of [] governmental authority and not merely an act that could be performed by a commercial entity."[105] This assessment focused on the cocoa board's use of governmental power or prerogatives, not merely whether it generally supported the public interest.[106] Ultimately, the tribunal in *Hamester* concluded that in setting pricing, delivering goods, and managing the venture, the cocoa board acted as any other private, minority shareholder would and did not exercise the power of government.[107]

58. Tribunals applying the Broches test have taken a similar approach. In *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic* ("CSOB"), for example, the tribunal assessed whether the actions of CSOB, a Czech commercial bank with sixty-five percent state ownership, were primarily commercial or primarily governmental.[108] The tribunal found that CSOB's lending and attempts to attract private capital were not governmental in nature, because any private bank might take the same steps to strengthen its financial position.[109]

59. In the case before this Tribunal, Claimant's actions are attributable to the Bonoori state because: 1.) The company is structurally intertwined with the state; and 2.) The company functionally exercised governmental power throughout its management of Caeli Airways.

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[103] Hamester ¶ 98.
[104] *Id.* ¶ 192.
[105] *Id.* ¶ 193.
[106] *Id.* ¶ 202.
[107] *Id.* ¶ 283; *see also* Jan de Nul (finding Suez Canal Authority was clearly a state entity, but in conducting its tender process, the SCA acted as a private, commercial entity, not pursuant to governmental power or authority).
[108] *Id.* ¶¶ 18, 20.
[109] *Id.* ¶¶ 24-25; *see also* BUCG ¶ 40 (Chinese state-owned construction company was neither state agent nor exercising governmental functions because it acted in commercial capacity as general contractor).

60. Claimant is, and always has been, structurally intertwined with the Bonoori state. Claimant was established during the 1984 privatization of Bonooru Air, a wholly state-owned national airline.[110] As in *Maffezini*, where the highest organs of the Spanish government were involved in SODEGA's creation, the transfer Bonooru Air to Claimant involved the Bonoori Civil Aviation Authority, the national parliament, and ultimately the Prime Minister.[111] Claimant succeeded Bonooru Air only after the Bonoori Constitutional Court approved the transition, and on condition that Claimant was obliged to protect Bonoori citizens' right to travel.[112] Further, the Bonoori Ministry of Transport and Tourism is guaranteed a seat on Claimant's Board of Directors at all times and Bonoori representatives can form a majority of voting members on major decisions such as electing members.[113] The former head of Claimant's board became Bonooru's Secretary of Transport and Tourism during Claimant's Caeli bid, and the Deputy Chairman of Caeli's board was also a senior director of Claimant.[114] Throughout Claimant's management of Caeli, the Ministry maintained a significant minority ownership stake, and leading up to this claim, increased its interest to a majority 55% of shares.[115] Based on the factors outlined in *Maffezini*, this Tribunal should find that Claimant is structurally part of the Bonoori state.[116]

61. Claimant also functionally exercised elements of governmental authority throughout its management of Caeli Airways. Past tribunals have emphasized that if an entity's acts are primarily commercial in nature, they are not attributable to the state, even if they generally support state policies.[117] However, Claimant's ownership and management of Caeli Airways was not primarily commercial; it consistently exercised governmental powers.

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[110] Facts ¶ 9.
[111] *Id.* ¶¶ 6-9.
[112] People's Council ¶ 55.
[113] Articles of Association ¶ 152.4.
[114] Facts ¶¶ 22, 42.
[115] *Id.* ¶ 10.
[116] *Id.* ¶ 83.
[117] Hamester ¶ 193; Jan de Nul ¶ .

62. In Bonooru, air services are an essential governmental function. Article 70(1) of the Bonoori Constitution provides that "[e]very citizen of Bonooru has the right to enter, remain in, and leave its territory."[118] Article 70 recognizes Bonooru's geography as an archipelago where citizens must travel to access healthcare and other facilities.[119] Article 70 goes on to obligate the Bonoori state to "ensure that every citizen is guaranteed travel to and from its many islands."[120]

63. Bonooru's Constitutional Court has held that Article 70 imposes a positive obligation on the state to fulfill this right by ensuring citizens can travel at affordable rates.[121] The Constitutional Court later held that the privatization of Bonooru Air did not impede the state's obligation to ensure mobility rights, but only because the state guaranteed Claimant would serve remote communities.[122]

64. Claimant's MoA, its founding document, obligates the company to assist the government in upholding the mobility rights of Bonoori citizens by "developing the aviation industry as well as the civil aviation infrastructure in Bonooru for the benefit of its population in accordance with Article 70 . . . including servicing remote communities."[123] During the privatization process, the Bonoori Prime Minister made clear that the state did not intend to cede control of the airline industry, stating that "Bonooru Air's successor [would] be directed to ensure that it operates routes to [Bonooru's] most remote islands, regardless of profitability."[124] On this basis, just as SODEGA's promotion of regional development was

[118] Constitution Act of Bonooru Article 70(1).
[119] Facts ¶ 5.
[120] Constitution Act of Bonooru Article 70(2).
[121] National Ferry Workers ¶ 25-26.
[122] People's Council ¶ 55. Notably, both decisions provided for citizens' right to travel both inside and outside the country. National Ferry Workers ¶ 25; People's Council ¶ 55.
[123] *Id.* ¶ 3(h). The MoA also ties Vemma's mission to the national airline industry. *Id.* ¶ 3(a). Further, Vemma may merge with other companies, but only if they align with or advance Vemma's objectives. *Id.* ¶ 3(l), 3(m), 3(q).
[124] Facts ¶ 8.

an essentially governmental function in *Maffezini*, Claimant's core function is to provide constitutionally-mandated air services and develop the air industry in Bonooru.[125]

65. ILC Draft Article 5 focuses not only on whether an entity is governmental, but also whether it exercises state power in the particular events at issue.[126] In *Hamester* and *CSOB*, the tribunals found the disputes arose from the entities' primarily commercial, not governmental, activities: pricing, deliveries, and management in *Hamester*; and bank lending and restructuring in *CSOB*.[127] The tribunals reasoned the entities acted as any private company would like circumstances.[128]

66. In contrast, throughout Claimant's management of Caeli Airways, the company exercised governmental powers. The Bonoorian People's Bank, a state-owned bank, financed and later refinanced Claimant's ownership of Caeli.[129]

67. The Caeli acquisition advanced Bonooru's "Caspian Project," a regional infrastructure and trade initiative, and its "Horizon 2020" scheme, aiming to promote Bonoori tourism.[130] As noted by a high-ranking Bonoori tourism official, "[i]f you look at Caeli Airways' flight patterns, significant resources are put into flights between Mekar and Bonooru . . . [these] routes are actually not profitable for Caeli Airways. You need to contextualize Claimant's investment in the context of Bonooru's Caspian Project and the Horizon 2020 scheme."[131]

68. Indeed, Claimant continued its investment in Caeli for several years despite not making a profit, shored up by Bonooru.[132] Bonooru subsidized Claimant under Horizon 2020 for the express reason that Caeli would improve both Bonooru's tourism and aviation

[125] Maffezini ¶ 85; MoA ¶¶ 3(a), 3(h).
[126] ILC Draft Article 5.
[127] Hamester ¶ 193; CSOB ¶¶ 24-25; *see also* Jan de Nul ¶ 168.
[128] *Id.*
[129] *Id.* ¶¶ 23, 30.
[130] Facts ¶ 28.
[131] Phenac Business; *see also* Aviation Analytics ("Vemma has near assurances that Bonooru would step in if anything bad were to happen . . . it is no wonder Vemma has taken bold, and often risky, investments . . . .").
[132] Facts ¶¶ 40, 51, 53.

infrastructure systems.[133] In acquiring Caeli, Claimant gained access to Phenac International Airport, a central hub that improved access to global air traffic flows and regional connections for Claimant and the Bonoori state.[134] The subsidies contributed to Caeli's ill-advised rapid growth and dominant position in Mekar's airline industry, triggering the CCM's investigations.[135]

69. Claimant's actions throughout its management of Caeli are entirely unlike those of the state-owned entities in *Hamester* or *CSOB*. Those disputes arose from ordinary business activities such as pricing, delivering goods, managing a venture, and bank lending.[136] In contrast, Claimant's actions time and again indicated its role in Caeli was strategic and governmental, not purely commercial.[137]

70. Even if the Tribunal finds Claimant did not exercise governmental powers from 2011 to 2021, it unquestionably did so by the time it submitted this claim in 2021. Bonooru's bail-in program led to Claimant taking on paramilitary activities, suggesting support for core military functions.[138] Bonooru also consolidated control of the company by increasing to a majority fifty-five percent ownership, filling the board with state officials, and staffing the legal team with government lawyers.[139] Whether in 2021 or previously, Claimant's acts in relation to Caeli are attributable to the Bonoori state under ILC Draft Article 5.

*1.2.b. Claimant acted under the direction and control of the Bonoori state in its dealings with Caeli Airways*

71. It is well-established under international law that the acts of entities outside the state can be attributed to the state if directed and controlled by the government.[140] As summarized

[133] *Id.* ¶ 36.
[134] Facts ¶ 26.
[135] *Id.*
[136] Hamester ¶ 193; Jan de Nul ¶ 168.
[137] Supra ¶ 34-38.
[138] Facts ¶ 65.
[139] *Id.*
[140] Nicaragua ¶ 109; Genocide Case ¶ 400.

in Article 8 of the ILC Draft Articles, the conduct of such an entity "shall be considered an act of a State under international law if the [entity] is in fact *acting on the instructions of, or under the direction or control of*, that State in carrying out the conduct."[141] The first prong of the Broches test also finds state responsibility where an entity acts as a government agent.[142] According to commonly-accepted definitions, an agency relationship exists when "two parties manifest[] that one of them is willing for the other to *act for him subject to his control*, and that the other consents so to act."[143]

72. A government's ownership of shares does not automatically create responsibility for a company's acts.[144] Majority ownership also is not essential to control, since even a minority shareholder could drive or block major decisions.[145] Past tribunals have emphasized that acting as a state agent means acting pursuant to government decisions, not on purely commercial interests.[146] As such, the first prong of the Broches test aligns closely with Article 8 of the ILC Draft Articles.

73. In *International Thunderbird Gaming Corporation v. United Mexican States* ("Thunderbird"), the Tribunal had to decide whether Thunderbird had control over EDM, a group of subsidiaries where it owned between thirty-three and forty percent.[147] Although not a case of government control, the tribunal's analysis of corporate control is instructive. The tribunal noted the ordinary meaning of "control" can apply to various means of control, and that legal control was not necessary if effective control exists.[148] Thunderbird had control because it was "the consistent driving force" behind EDM's business endeavor in

[141] ILC Draft Article 8 (emphasis added).
[142] Broches at 354-55.
[143] Restatement of Agency § 1 (emphasis added); *see also* AGENCY, Black's Law Dictionary.
[144] Lao ¶ 70; Schefer at 82.
[145] Blychak at 46.
[146] BUCG ¶ 40; CSOB ¶ 21.
[147] Thunderbird ¶ 85.
[148] *Id.* ¶ 106.

Mexico."[149] The parent company was centrally involved in planning, capital acquisition, hiring of suppliers, consultations with government entities, and other major decisions.[150]

74. In *Vacuum Salt Products Ltd. v. Republic of Ghana* ("Vacuum Salt"), the tribunal addressed whether a Greek national with twenty percent ownership had control over a Ghanaian company.[151] The tribunal noted the share of ownership is not the dispositive factor, but whether the controlling interest could block major changes or decisions.[152] The tribunal reasoned that the smaller the share of ownership, the more other indicators of control should be weighted.[153] In that case, the tribunal found the minority owner did not control the company: He was an influential advisor, manager, and board member, but he did not steer the company's fortunes.[154]

75. In *Lao Holdings NV v. Lao Peoples Democratic Republic* ("Lao"), the tribunal this time assessed whether the government of Laos had control over a project where it had thirty percent ownership.[155] The tribunal reasoned that thirty percent of shares and a minority of seats on the board certainly did not, standing alone, confer control.[156] The government representatives on the board played only a passive role, did not approve major decisions, and had no input on the project.[157] On these facts, the tribunal found no government control.[158]

76. Throughout most of its involvement with Caeli Airways, the Bonoori state was a minority owner of between thirty-one and thirty-eight percent of Claimant's shares, similar to the

[149] *Id.* ¶ 107.
[150] *Id.* ¶ 109.
[151] Vacuum Salt ¶ 41; ICSID Convention Article 25(b)(2).
[152] *Id.* ¶ 43.
[153] *Id.*
[154] *Id.* ¶ 53.
[155] Lao ¶ 39.
[156] *Id.* ¶ 70.
[157] *Id.* ¶¶ 72-73, 76-77, 83-84.
[158] *Id.* ¶ 67; see also Hamester ¶ 198 (government was informed of board's actions, but no evidence of effective government control).

minority owners in *Thunderbird*, *Vacuum Salt*, and *Lao*.[159] As those tribunals reasoned, however, ownership must be weighed alongside other factors indicating effective control.[160] These factors include active involvement in the management and planning of business activities, including expenditures, capital acquisition, government consultations, and other major decisions.[161]

77. The record in this case contains ample evidence that the Bonoori state was the driving force behind Claimant's actions. Like the parent company in *Thunderbird*, the Bonoori state, acting through Claimant, dominated Caeli's decision-making, operations, interactions with the Mekari government, and access to capital.

78. As previously described, the Bonoori state has a permanent seat on Claimant's board and there has been significant overlap of personnel between Claimant's and Caeli's boards and the Bonoori Ministry of Transport and Tourism.[162]

79. While Mekar Airservices urged a cautious approach, Claimant representatives pushed through the expansion of the airline's routes in both 2012 and 2014, and expansion of the fleet and fare cuts in 2015.[163] Claimant drove Caeli's rapid expansion as a means to strengthen Bonooru's air services and tourism industries.[164] Claimant representatives also led Caeli's interactions with the Mekari government: in 2018, a senior director of Claimant, also Deputy Chairman of Caeli, spoke out against Mekar's currency policies and called an urgent board meeting to address them.[165] In 2019, deputy CEO of Claimant, also a member of Caeli's board, led calls for meetings and aid measures from the Mekari Secretary for

[159] Facts ¶ 10.
[160] Thunderbird ¶ 106; Vacuum Salt ¶ 43.
[161] Thunderbird ¶ 109; Lao ¶ 67; see also Blychak at 46 (control is assessed through "a multiplicity of criteria, including voting rights, management powers, executive influence, access to capital and other resources, and unofficial but authoritative sources of power."
[162] Facts ¶¶ 22, 42; Articles of Association at ¶ 152.4.
[163] Facts ¶¶ 29, 31, 35.
[164] Supra ¶¶ 16-26.
[165] Facts ¶ 42.

Civil Aviation.[166] Government officials from Bonooru have frequently put pressure on Mekar to treat Claimant favorably, including by threatening to hold back funds promised to rebuild Phenac's port as part of the Caspian Project.[167]

80. Caeli also had consistent access to capital through Bonoori subsidies to Claimant through Horizon 2020.[168] Perhaps most notably, when Claimant suffered due to its Caeli losses, Bonooru shored up the company by increasing its ownership to fifty-five percent.[169] Claimant's and Bonooru's influence at all levels of Caeli's decision-making was far greater than the minority owners in *Vacuum Salt* or *Lao*. The facts show that Claimant's actions are attributable to Bonooru, because the state controlled Claimant's and Caeli's decision-making, exactly like the parent company in *Thunderbird*.[170]

### *1.3 Mekar has not consented to be brought to arbitration by an entity of the Bonoori state*

81. Consent is the "cornerstone" and fundamental principle of jurisdiction in investor-state arbitration.[171] Like any international adjudicatory body, this tribunal has a limited, attributed jurisdiction that depends on the consent of the parties.[172] Mekar submits that it has not consented to the jurisdiction of this Tribunal because: 1.) Chapter 9 of CEPTA contains no provision for state-state dispute settlement; and 2.) CEPTA specifically excludes protection of state-controlled enterprises.

[166] *Id.* ¶ 53.
[167] Response to Notice of Intent to Submit a Claim to Arbitration ¶ 18.
[168] Facts ¶ 45.
[169] *Id.* ¶¶ 10, 65.
[170] *Id.* ¶ 102.
[171] CEPTA Article 9.16; Schreuer at 190.
[172] Abaclat Dissent ¶ 13-15 (describing three layers of consent Tribunal must find are satisfied).

*1.3.a. Chapter 9 of CEPTA contains no provision for state-state dispute settlement*

82. Article 9.16 of CEPTA provides that a dispute may be submitted to arbitration by "an investor of a Party."[173] Under Article 9.17, each party consents to arbitrate only "in accordance with this Agreement."[174]

83. Mekar submits that the ordinary meaning of the phrase "an investor of a Party," in light of the context, object, and purpose of CEPTA, excludes a state-controlled enterprise.[175] Bonooru and Mekar intended CEPTA to serve as a comprehensive agreement to promote trade and economic integration, including through investment.[176] Claimant brings this claim under Chapter 9, the chapter on "investment."[177] Chapter 9 is similar to Chapter 11 of NAFTA: a chapter intended to protect private, commercial investment activity within a broader treaty regulating trade between states.[178]

84. Moreover, other BITs, such as the Uruguay – United States BIT, specifically provide for state-state dispute settlement.[179] Because CEPTA contains no such provision, Mekar's consent to dispute settlement under Chapter 9 is limited to investors acting in a commercial capacity. Mekar did not consent to the use of Chapter 9 by the Bonoori state.

*1.3.b. CEPTA specifically excludes protection of state-controlled enterprises*

85. Article 9.1(a) of CEPTA defines "an enterprise of a party" to include "an enterprise that is constituted or organized under the laws of that Party . . . ."[180] In contrast, Article 1 of CEPTA's predecessor, the 1994 Bonooru – Mekar BIT, provided that an "enterprise" meant

[173] CEPTA Article 9.16(1)(a).
[174] *Id.* Article 9.17.
[175] VCLT Article 31(1) ( "[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.").
[176] CEPTA Preamble.
[177] CEPTA Chapter 9.
[178] Afilalo at 279.
[179] Uruguay-U.S. BIT.
[180] CEPTA Article 9.1(a).

"any entity constituted or organized under applicable law, whether for profit or not, *whether privately-owned or government-owned . . . .*"[181]

86. The 1994 Bonooru – Mekar BIT is similar to other BITs that specifically protect government-controlled enterprises. The 2012 U.S. Model BIT and Canada's 2004 Model BIT both cover a range of entities, "*whether privately or governmentally owned or controlled . . . .*"[182]

87. Mekar submits that the omission of the phrase "whether privately-owned or government-owned" from CEPTA was not a casual error. Previous tribunals have found that an omission from a treaty should be read as a deliberate choice and a conscious limitation on that provision.[183]

88. Bonooru and Mekar also specified that all rights and obligations under the 1994 BIT would cease to have effect when CEPTA entered into force.[184] Mekar therefore did not consent to resolve disputes under CEPTA Chapter 9 with a state-controlled enterprise such as Claimant.

## II. THE TRIBUNAL SHOULD ALLOW THE EXTERNAL ADVISORS TO THE COMMITTEE ON REFORM OF PUBLIC UTILITIES TO FILE AN AMICUS SUBMISSION BUT SHOULD DENY THE AMICUS REQUEST BY THE CONSORTIUM OF BONOORI FOREIGN INVESTORS

89. Before the Tribunal are two requests to submit *amicus curiae* briefs from two very different groups. The External Advisors ("External Advisors") to the Committee on Reform on Public Utilities ("CRPU") offer a unique, independent perspective on Caeli's 2010

[181] Bonooru – Mekar BIT Article 1 (emphasis added).
[182] U.S. Model BIT Article 1 (emphasis added); Canada Model BIT Article 1.
[183] Tokios ¶ 36 (because Ukraine-Lithuania BIT did not include a "denial of benefits" provision, tribunal "regard[ed] the absence of such a provision as a deliberate choice of the Contracting Parties."); Vivendi ¶ 175 (because the word 'full' was absent from the "full protection and security" provision in the BIT, the state's obligation was limited to physical protection and legal remedies, not a broader duty to ensure a stable legal and commercial environment).
[184] CEPTA Article 1.6(1); *see also id.* Article 1.4(2) ("in the event of any inconsistency between this Agreement and . . . other agreements, this Agreement shall prevail . . . except as otherwise provided in this Agreement.").

privatization, having served as advisors to Mekar's CRPU.[185] In contrast, the Consortium of Bonoori Foreign Investors ("CBFI") is a trade group where Claimant and several of its associates are members.[186] If this case proceeds, Mekar urges the Tribunal to permit the External Advisors' *amicus* submission and deny that of the CBFI.

90. The Tribunal has discretion to accept *amicus curiae* submissions under Article 9.19(3) of CEPTA, if they are: 1.) Relevant to the evaluation of a matter of fact or law within the scope of the dispute; and 2.) From a person or entity that has a significant interest in the proceedings.[187] If this case proceeds, the ICSID AF Rules would apply, and Mekar notes that Article 41(3) of those rules contains similar requirements to CEPTA Article 9.19(3), with even greater emphasis on *amici* bringing a perspective, knowledge, or insight different from that of the disputing parties.[188]

91. Further, pursuant to Article 9.20(6) of CEPTA, Mekar considers that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("UNCITRAL Rules") do not apply here because this case does not qualify as investor-state arbitration.[189] However, Mekar notes that the UNCITRAL Rules reflect both CEPTA and the ICSID AF Rules, emphasizing that a non-disputing party ("NDP") must represent a significant, independent, and unique interest.[190]

92. Previous tribunals have found that an arbitral panel has complete discretion to accept or reject an *amicus* submission, if the submission clearly meets the criteria set out in the

[185] External Advisors' Application.
[186] CBFI Application ¶ 2.
[187] CEPTA Article 9.19(3).
[188] ICSID AF Rules Article 41(3) ("After consulting both parties, the Tribunal may allow a [NDP] to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding.").
[189] CEPTA Article 9.20(6). Mekar agreed to consider case-by-case whether the UNCITRAL rules apply. *Id.*
[190] UNCITRAL Rules Article 41(3).

applicable rules.[191] In *Bernhard von Pezold et al. v. Zimbabwe and Border Timbers et al. v. Zimbabwe* ("Pezold"), for example, the tribunal emphasized the importance of NDPs being fully neutral and independent of either party.[192] The tribunal also noted the tension inherent in requiring independence, since a significant interest will often be aligned with one or other party.[193]

93. In *Suez & Vivendi v. Argentina* ("Vivendi"), the tribunal offered further clarification on the kind of "interest" a qualified NDP should represent under ICSID rules.[194] There, the case had potential to affect the operation of water systems that served millions of people in a major city.[195] The tribunal found that the public interest in the case was sufficient that amicus submissions would not only provide useful perspective to the tribunal, they would also improve overall perceptions of the transparency of investor-state arbitration.[196]

### *2.1. The External Advisors Offer Evidence that is Central to the Tribunal's Jurisdiction*

94. The External Advisors offer unique insights on allegations of bribes paid to the Chairman of the CRPU.[197] The External Advisors therefore meet CEPTA's first criterion for NDP submissions because, as previously shown, this evidence is central to the Tribunal's jurisdiction.[198] The *amici* should be allowed to submit this evidence in full.

95. Moreover, the External Advisors meet the second criterion in CEPTA Article 9.19(3) because they are independent of any party to this dispute, having been outside advisors on the privatization of Mekar's airline industry.[199] The External Advisors also represent the

[191] Schefer at 574.
[192] Pezold ¶ 62.
[193] *Id.*
[194] Vivendi, Order in Response to a Petition for Transparency and Participation as Amicus Curiae ¶ 5 (citing ICSID Arbitration Rule 32(2)).
[195] *Id.* ¶ 19.
[196] *Id.* ¶ 21-22
[197] *Id.*
[198] Vemma's Application to Bar External Advisors.
[199] *Id.*

interests of the Mekari public in this case, given the pervasive nature of corruption in Mekar, including in investment transactions.[200] As in *Vivendi*, this Tribunal should welcome an NDP submission representing the significant public interest in this case.

### *2.2 The CBFI lacks a significant interest in the proceedings and will not bring independent perspective or insight*

28. Unlike the External Advisors, the CBFI submission does not meet the requirements of CEPTA or the ICSID AF Rules because it lacks both independence and a significant interest in the proceedings.[201] Like the proposed NDPs in *Pezold,* the CBFI is not a disinterested party because Claimant is one of its members.[202]

96. Two other CBFI members are pursuing their own CEPTA claims against Mekar.[203] Another member, Lapras Legal Capital, is advising Claimant on financing for this arbitration. The CBFI has already acted contrary to its own "Amicus Brief Submission Guidelines," by allowing Lapras' executive to vote in relation to this amicus submission despite his inherent conflict of interest.[204]

97. Moreover, CBFI admits in its application that its submission would provide only contextual background information, similar to the tangential positions advanced by the NDPs in *Pezold*.[205] A CBFI submission would therefore offer no new knowledge or insight that is not already available to the Tribunal from Claimant itself.

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[200] Facts ¶ 12; External Advisors' Application.
[201] CEPTA Article 9.19(3), ICSID AF Rules Article 41(3).
[202] CBFI Application ¶ 7.
[203] *Id.* ¶ 6.
[204] Procedural Order No. 3.
[205] CBFI Application ¶ 10 (CBFI seeks to provide "context regarding the business climate of Bonooru, the existing corporate framework in which enterprises operate, the nature of the aviation industry in Bonooru, and the impact of uncertainty on access to capital in Greater Narnia."); Pezold ¶ 61.

## III. RESPONDENT HAS NOT BREACHED ITS OBLIGATIONS UNDER CEPTA

98. Mekar submits that the CCM investigations and their consequences, the non-subsidization of Claimant, and the enforcement of the Sinnoh Arbitral award, taken individually or as a whole, have not breached Article 9.8 or Article 9.9 of CEPTA.[206]

### *3.1.a Respondent Has Not Breached Article 9.9 of CEPTA*

*3.1.b To constitute a breach, an established violation of any Article under Section D of CEPTA must also exceed the Limitation on Liability contained in Article 9.8(b) of CEPTA*

99. Claimant asserts that actions taken by Respondent violated Claimant's right to FET under Article 9.9 of CEPTA. However, analysis of liability under Article 9.9 requires initial consideration of the text of Article 9.8, however. Article 9.8 qualifies the circumstances in which a breach of an obligation under Section D—including Article 9.9—can occur by recognizing Mekar and Bonooru's respective rights to regulate internally to achieve legitimate public policy objectives.[207] Article 9.8(2), specifies that 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 an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section (Section D).[208]

100. The Commonwealth of Bonooru and the Federal Republic of Mekar are signatories to the VCLT.[209] They agree, therefore, that in compliance with §3, Article 31 of the Vienna Convention, the CEPTA treaty shall be interpreted by this tribunal *" ...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."*[210] Importantly, the preamble to CEPTA memorializes Bonooru and Mekar's recognition "of the differences in their levels of development and diversities

[206]Notice of Arbitration, ¶29.
[207] CEPTA Treaty, Art. 9.8(1)
[208] CEPTA Treaty, Art. 9.8(2)
[209] Facts, ¶66
[210]Vienna Convention on the Law of Treaties, §3, Art. 31

of economies."[211] Moreover, and more importantly, in CEPTA's preamble the Parties explicitly recognize their respective rights "to regulate within their territories and the Parties' flexibility to achieve legitimate policy objective, such as public health, safety, environment, public morals, and the promotion and protection of cultural diversity."[212] Analyzed as context for determining CEPTA's purpose, the CEPTA preamble plainly prioritizes and preserves the signatory States' respective flexibility to regulate internally. In other words, the goals of CEPTA should not be construed to supersede the Parties' respective interests in retaining their Sovereign authority to regulate internally.

101. Section D of CEPTA comprises the investment protection section of the BIT. Section D begins with Article 9.8, which qualifies what constitutes a breach of an obligation under Section D:

> (1) For the purpose of this Chapter, the Parties recognise 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.
> (2) 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 an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section*. (Emphasis added).[213]

102. Read in light of the CEPTA preamble's preservation of the Parties' respective regulatory rights, subsection (1) of Article 9.8 can sensibly be read as a restatement of the specific legitimate regulatory interests enumerated and preserved in the preamble. The predicate to Article 9.8(2)—"For greater certainty"—indicates the Parties' awareness that internal regulations in one state may negatively affect the foreign investments of the other state's citizens. This preface also expresses the Signatory States' intention to clarify

[211]Record, 71, CEPTA Treaty, Preamble, ¶¶2500-2505.
[212]*Id.*
[213]Record, 76, CEPTA Treaty, Art. 9.8(1-2)

precisely how their preserved right to regulate internally, respectively, shall operate upon the remainder of Section D.[214] The operative clause of Article 9.8(2) limits the Parties' liability under Section D in circumstances where State regulation negatively affects a foreign investment or interferes with an investor's expectations.[215]

103. Notably, Article 9.8(2)'s reference to "investor's expectations" is repeated in Article 9.9(3), which permits arbitral tribunals to consider legitimate investor expectations in determining unfair and inequitable treatment under Article 9.9.[216] The limitation on State liability for regulatory action contained in Article 9.8(2) and the matching phraseology present in 9.9(3) legitimate expectations liability provision strongly supports the inference that the Parties to CEPTA intended to safeguard themselves from liability where their right to regulate internally for legitimate purposes negatively affects the investments of the other Party's investors such that a breach of Article 9.9 or another Article under Section D might have otherwise arisen.

104. Respondent submits that when interpreted according to its ordinary meaning and in light of the purposes outlined in the preamble to CEPTA, Article 9.8 immunizes Host States from liability under all of Section D—including Article 9.9—where Host State regulation negatively impacts foreign investments and the regulation, or change in regulations, is rationally related to any of the legitimate regulatory purposes enumerated in Article 9.8(1).

105. Thus, even if, *arguendo*, Claimant succeeds in establishing a breach under Article 9.9, Claimant cannot prevail unless it can also demonstrate that Respondent's inequitable or unfair conduct bears no rational connection to any of the legitimate purposes enumerated in Article 9.8(1). Claimant cannot establish either. Both the preamble and Article 9.8(1)

[214] *Id.*
[215] *Id.*
[216] *Compare*, Record, 76, CEPTA Treaty, Art. 9.8(2) *with* Record, 76, CEPTA Treaty, Art. 9.9(3)

CEPTA explicitly affirms Mekar's right to regulate internally "in order to achieve legitimate public policy objectives, such as...consumer protection."[217]

106. Through its low airfares and Moon Alliance loyalty programs, Claimant sought to increase its' market share by undercutting competitors' fares, thereby driving them from the Mekari market.[218] If Mekar allowed Claimant's predatory pricing strategy to go unchecked, Claimant would eventually achieve a monopoly on Mekari air travel and by extension the unencumbered power to dictate fares to Mekari travelers. The imposition of price caps, therefore, represent a proportionate, mitigatory response to Claimant's predatory strategy. Significantly, the clearly stated purpose of the Monopoly and Restrictive Trade Practices Act (which established the CCM) was to "prevent practices having adverse effect on competition, 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."[219] Considering the certainty that Mekari consumers would have no protection against extortionate fares imposed at Claimant's whim if Claimant's predatory strategies were allowed to succeed, the decision to initiate an investigation and to impose price caps was clearly within the CCM's mandate under Mekari law as well as within the ambit of the Right to Regulate terms contained in Article 9.8(b) CEPTA.

#### *3.2.a The First and Second CCM Investigations were not arbitrary or discriminatory because the Investigations were legal under Mekari domestic law*

107. Claimant asserts that the fines associated with the First CCM investigations along with the consequences of the Second CCM Investigation constituted unfair and arbitrary conduct under Article 9.9(2)(c).[220] Claimant's argument is premised on a flawed interpretation of

[217] CEPTA, Art. 9.8(1)
[218] *See* Facts, ¶45
[219] Annex V, Monopoly and Restrictive Trade Practice Act, as Amended in 2009.
[220]Record, 3, Notice of Arbitration, ¶15.

Mekari domestic law—that the CCM can only initiate *suo moto* investigatory proceedings when the subject of the investigation holds at least a 50% market share.[221]

108. However, Claimant's construction of Mekari law is verifiably false. Chapter III, §2 of the Monopoly and Restrictive Trade Practices Act as Amended in 2009 permits the CCM to initiate a *suo moto* investigation into anti-competitive behavior if each of the following circumstances are met:

> a) [the]corporation obtains a market share greater than 50%. *The CCM may exercise discretion in industries that require special attention to open an investigation where a corporation owns a lower market share*. The use of discretion should be exceptionally rare; [Emphasis added]
> b) the corporation poses a unique threat to the competition in a particular market; and
> c) there is evidence the corporation's actions have, or are likely to in the near future, push competitors out of the market.[222]

109. Claimant does not dispute CCM's finding of evidence of Caeli's potential to push competitors out of the market nor has Claimant objected to the CCM's finding that Caeli Airways posed a threat to competition in the Airline industry; Claimant's argument that the Investigations were illegal—and therefore arbitrary— consists of the sole assertion that because Caeli Airways' market share was only 43% at the time the First Investigation began, the CCM has no authority to initiate a *suo moto* investigation.[223]

110. Contrary to Claimant's contentions, however, the CCM acted within the discretionary limits afforded to it under Chapter III, §2 of the Monopoly and Restrictive Trade Practices Act as Amended in 2009.[224] §2(a) addresses the initiation of investigations where the market share threshold is not met and authorizes the CCM to investigate corporations with lower market shares in industries requiring special attention.[225] Thus, the question of the first Investigation's legality turns on whether the Mekari aviation industry requires such

[221] *Id*. at ¶13.
[222] Record, 47, Annex V, Chapter III, §2(a)-(c)
[223] *See* Notice of Arbitration, ¶15.
[224] Record, 47, Annex V, Chapter III, §2(a)-(c)
[225] *Id.*

special regulatory attention that opening an investigation is justified even when the subject corporation's market share falls below 50%.

111. Given Mekar's recent troubled history, particularly Mekar's political fluctuations pertaining to the viability of Caeli Airways, it is difficult to name an industry requiring more special attention than the Mekari aviation industry.[226] Indeed, between 2012 and now, the tourism and hydrocarbon sectors—both of which have crucial ties to the aviation industry as fare and fuel, respectively—have emerged as touchstones of Mekari regulation. Apart from the fact that Caeli Airways' anti-competitive and collusive behavior under Claimant's ownership justified the consideration of its market share in conjunction with its Alliance partners, the decision to do so was well within the CCM's expressly delegated discretionary authority and clearly served the compelling policy interests of Mekari consumers.[227]

*3.2.b A breach of domestic law does not, in and of itself, trigger a breach of Article 9.9*

112. Without prejudice to arguments presented above, even if the CCM's *suo moto* investigation of Caeli Airways was, in fact, illegal under Mekari law, this hypothetical fact would not, in and of itself, establish a breach of Article 9.9. Article 9.9(6) of CEPTA specifies that that if a government measure breaches domestic law, this fact "does not, in and of itself, establish a breach of Article 9.9; to ascertain whether the measure breaches Article 9.9, the Tribunal must consider whether a Party has acted inconsistently with the fair and equitable treatment obligations in paragraph 1 [of Article 9.9.][228]

113. Put plainly, Article 9.9(6) stipulates that the illegality of a State measure does not, by virtue of both the measure's illegality and the measure's negative effects on investors,

[226]*See Generally*, Record, 29-30, Statement of Uncontested Facts, ¶¶12-19.
[227]Record, 76, CEPTA Treaty, Art. 9.8(1-2)
[228]Record, 76, CEPTA Treaty, Art. 9.9(6)

automatically trigger a breach of the regulator/Host State's obligations under Article 9.9 of CEPTA. The Parties to CEPTA have expressly agreed, therefore, that more is required, beyond mere illegality under domestic law, for a Host state action to constitute unfair and inequitable treatment.

#### *3.3.a Respondent created no legitimate expectation that Claimant and it's Airline Members would not be regulated.*

114. Understanding that more than mere unlawfulness under Mekari law is required to establish arbitrary treatment in violation of Article 9.9, Claimant will likely argue that Article 9.9(3) permits this Tribunal to consider whether Mekar made a specific representation to induce Claimant's investment that created a legitimate expectation upon which Claimant relied in making or maintaining its' investment, but that Respondent subsequently frustrated.[229] It is therefore probable that Claimant will note Mekar accepted Claimant's bid to purchase Caeli Airways, in part, because of the advantages that would flow from Claimant's Moon Alliance membership.[230] However, no fact concerning Mekar's acceptance of Claimant's bid supports the inference that Respondent viewed Claimant's bid as so potentially lucrative and so critically necessary to Caeli Airways' resurrection that Respondent would be willing to forbear its right to regulate anti-competitive business behavior in its own jurisdiction.

115. On the contrary, as an ostensibly well-informed international investor, Claimant has no excuse for not knowing the Mekari State intended to retain its oversight authority as the Mekari aviation industry privatized. The Mekari legislature expanded Respondent's authority to regulate anti-competitive business practices at the exact same time it announced its intention to privatize Caeli Airways.[231] Considering new, robust regulatory

[229]Record, 76, CEPTA Treaty, Art. 9.9(3)
[230]Record, 32, Statement of Uncontested Facts, ¶25.

[231] Record, 30, Statement of Uncontested Facts, ¶15.

legislation would presumably influence any savvy investor's decision to invest (or not) in the domestic industry being regulated, it would be non-sensical for Claimant to construe Respondent's mere acceptance of its' bid as a representation that Respondent was willing to waive its' recently expanded oversight authority to secure the sale of Caeli Airways.

116. Even if some expectation that Respondent would look favorably upon Claimant's Moon Alliance membership was created after the execution of the Purchase Agreement in 2011, with the passage of CEPTA in 2014, Claimant was constructively notified—six years before the commencement of these proceedings— that Respondent intend to preserve and prioritize its regulatory authority with respect to foreign investors for substantially the same reasons discussed in paragraph three of this Memorial.[232] Thus, any illusion that in its acceptance of Claimant's bid, Respondent created an expectation that it would forbear its right to regulate internally was swiftly dispelled when Respondent reaffirmed its right to regulate in the plain language of the preamble and Article 9.8 of CEPTA. Claimant is a savvy investor with significant interests in the global aviation industry; it cannot plead ignorance as to these significant developments in intra-Narnian investment law.

117. Since privatization, the overall trend in State oversight of the Mekari aviation industry has been towards more, and not less, regulation.[233] Not only did Respondent create no legitimate expectations that it would not regulate anti-competitive behavior in the domestic aviation industry but the plainly observable sequence of events pertaining to the Mekari aviation industry shows a trend towards more government oversight. Because of this, Claimant has no legitimate expectations upon which it can rely in its plea for relief.

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[232] *See* Record, 33, Statement of Uncontested Facts, ¶32; *See also,* Record, 76, CEPTA Treaty, Art. 9.8(1-2); *and* Record, 71, CEPTA Treaty, Preamble, ¶¶2500-2505.

[233] *See Generally* Record, 30-31, Statement of Uncontested Facts, ¶¶18-19 (After privatizing aviation industry, Respondent's legislature created "independence enforcement directorate" in order to "inspire investor confidence" in light of Respondent's low CPI score.

### *3.4.a Mekar's non-subsidization of Claimant was non-discriminatory and non arbitrary*

118. Claimant asserts that, in the midst of Mekar's deteriorating economic situation, Mekar's decision to subsidize all non-state owned airlines arbitrarily discriminated against Claimant.[234] In light of Claimant's breach of Mekari anti-trust law in August 2018, Respondent's decision not to subsidize Claimant represents a sound policy decision by the Mekari Ministry of Transportation, which explained its decision by noting that state-owned companies have unique advantages over other companies that enable them to out-compete privately owned firms.[235]

119. The Ministry exercised sound judgement because for all practical reasons, Claimant is not independent of the Bonoori government. Recently, a former high-ranking member of the Bonoori Ministry of Tourism stated in no uncertain terms that Bonoori corporations tend not to independent of the Bonoori government.[236] The official encouraged listeners to contextualize Claimant's investment in Caeli Airways in the context of Bonooru's Caspian Project and the Horizon 2020 scheme; the official speculated that Caeli's routes under Claimant's ownership seem to more benefit Bonooru than Claimant or Caeli.[237] Indeed, in 2012 Bonooru initiated a USD $30 Billion investment in in Greater Narnian infrastructure as part of the Caspian Project; part of the funds were dedicated to updating Mekar's Phenac International Airport but once the CCM completed its Second Investigation into Caeli in the first week of January, 2019, the Bonoori government pulled funding. The unfinished heavy infrastructure projects now collect dust.[238]Thus, the Bonoori State proved the Mekari Transportation Minister's point for him when it, in essence, retaliated against Mekar for its investigation of Claimant by cutting funding for the updates at Phenac International and

[234] *See* Notice of Arbitration, ¶18.
[235]Record, 37, Facts, ¶47.
[236]Record, 55, Annex VII, ¶1860.
[237]I*d.* at ¶1870.
[238] S*ee* Procedural Order No. 4, ¶1.

the Port of Mekar; privately owned firms typically lack the unique ability Claimant has to induce sovereign governments to cut funding to international infrastructure investments in retaliation for Respondent's regulation of Claimant.

120. Such intimate governmental entanglement in private businesses makes sense in light of Bonooro's relatively recent move towards a mixed economy and away from a state-run and regulated economy.[239] Still, state-owned companies enjoy unique advantages over privately owned companies and such advantages may prompt legislative action to level the competitive playing field vis-à-vis the two. Here, the Ministry of Tourism's decision not to subsidize Claimant and one other wholly state-owned airline for its stated reasons was not only well within Respondent's expressly preserved regulatory authority but also supported by a voluminous factual record.

121. It is critical to note that Bonooru has sufficient representatives on Claimant's Board of Directors such that, so long as the Board is quorate, the Bonoori government can pass decision for Claimant on its own.[240] Moreover, no shareholder in Claimant—aside from the Commonwealth of Bonooru—holds more than a 7% stake in Claimant.[241] In its' ability to influence corporate decisions and its' demonstrated capacity to retaliate against any regulatory action it deems a hinderance to its global development strategy, The Bonoori State exercises control over Claimant that is unparalleled on the private market. These circumstances are clearly distinguishable from the facts of *Occidental Exploration and Production Company vs. Ecuador*, where the Tribunal found Ecuador violated Claimant's right to freedom from discriminatory treatment by rejecting Claimant's request for a VAT refund but approving the requests of other foreign investors.[242] Critically, here, Respondent

[239]Record, 29, Facts, ¶9.
[240]Record, 86, Procedural Order No. 3, ¶3.
[241] Record, 89, Procedural Order No. 4, ¶2.
[242] Occidental Exploration and Production Company vs. Ecuador at ¶ 167-73

has not drawn lines between foreign and domestic exporters as Ecuador did but, rather, drawn lines between state-owned and non-state owned business entities operating within Mekari jurisdictions. Of equal importance is the fact Respondent never imposed additional taxation on Clamant, as Ecuador did in Occidental, but merely declined to subsidize; the denial of a benefit is distinct from the imposition of a penalty.

122. Additionally, given Claimant's status as the spearpoint of Bonooro's global development strategy, it comes as no surprise that Claimant also benefits from Bonoori state subsidies. For example, Claimant received subsidies from the Bonoori government as part of the Horizon 2020 scheme. Sabrina Blue—Bonoori Secretary of Transportation and former chairperson of Claimant's Board of Directors—justified Bonooro's subsidization of Claimant by stating: "Claimant's expansion into Mekar will offer substantial benefits not only to Claimant but to all of Bonooru by enhancing the aviation network available to prospective tourists. This will boost the tourism infrastructure at our disposal."[243] The emphasis placed by Ms. Blue on how Bonooro's subsidization Claimant's investment in Mekar will benefit Bonooru is worth dwelling on here. Specifically, it is worth considering whether Respondent was within its regulatory authority to not double subsidize the Claimant when it understood that Bonooru was also subsidizing Claimant and that approving Claimant's application would be tantamount to an endorsement of Bonooro's global development strategy.[244]

123. It's plainly clear that the Bonoori government desires greater control and integration in the Greater Narnian region.[245] Nonetheless, the other Narnian States retain their right to actively or passively support or oppose this policy. Mekar has taken a clear position on the issue and made no representations that it would subsidize the Horizon 2020 project with

[243]Record, 32-33, Statement of Uncontested Facts, ¶28.
[244]*See* Record, 76, CEPTA Treaty, Art. 9.8(1).
[245]Record, 55, Annex VII, ¶1875.

the funds of Mekari taxpayers.[246] The decision not to subsidize Claimant, therefore, was non-discriminatory and reflected sound policy judgement supported by publicly available facts.

124. Finally, it is worth reiterating that Article 9.8 immunizes Host States from liability under all of Section D—including Article 9.9—where Host State regulation negatively impacts foreign investments and the regulation, or change in regulations, is rationally related to any of the legitimate regulatory purposes enumerated in Article 9.8(1).[247] With respect to Claimant's second theory of recovery, it is clear that the decision not to subsidize was within Respondent's expressly reserved regulatory authority, that the decision not to subsidize was taken with domestic policy concerns in mind, and that this regulatory decision was rationally related to several legitimate interests for which a sovereign may regulate.

#### *3.5.a Mekar's enforcement of the arbitral award complied with 9.8 and 9.9 CEPTA*

125. Claimant submits that the Mekari judiciary violated Article 9.9 of CEPTA by enforcing an arbitral award set aside by the tribunal in Sinnograd due to allegations of bribery.[248] During the early negotiations of CEPTA, Mekar's government considered acceding to the ICSID convention but ultimately chose not to in part because the foreclosed possibility of domestic review of awards under ICSID conflicted with Mekar's public policy.[249] Claimant and the Bonoori government therefore knew, far before the facts giving rise to these proceedings occurred, that Mekar had expressly preserved its right to review international arbitral awards by not acceding to ICSID. Still, Bonooru signed and ratified CEPTA when

[246]Record, 37, Statement of Uncontested Facts, ¶47
[247] *See* Record, 76, CEPTA Treaty, Art. 9.8.
[248] *See* Notice of Arbitration, ¶27.
[249] Record, 31, Statement of Uncontested Facts, ¶20

it did not have to and Claimant still initiated foreign investment in Mekar, knowing full well that Mekar could initiate review of any future awards.

126. Most importantly, however, Mekar's enforcement of the arbitral award was in compliance with Respondent's obligations as a signatory to the New York Convention. Pursuant to Article III of the New York Convention, Contracting States are required to recognize arbitral awards as binding and enforceable.[250] If, as is the case here, an award as been set aside by a competent authority the country in which the award was made, Articles V and VI of the New York Convention vest discretion in the Contracting State authority to, if it considers it proper, adjourn enforcement or refuse enforcement of the award as well.[251] Significantly, the verbiage in Article III—"shall"—creates a strong presumption in favor of enforcement, *requiring* that States enforce arbitral awards rendered abroad but the permissive verbiage in Articles V and VI, "may", vests discretion of whether or not to enforce the award after an arbitral award is set aside by a competent authority in the jurisdiction in which it was rendered. Under the present circumstances, the New York Convention thus left it to Mekar's courts to decide whether or not to enforce the award. The Mekari court's even considered the evidence that we before the Court in Sinnoh but found that it lacked sufficient credibility.[252]

127. Moreover, Claimant received a speedy appeal in accordance with its due process rights in a country with a famously sluggish judiciary. From 1980 to 2015, the average time taken from commencing an action to receiving a final decision in Mekari courts rose from 9 months to 22 months; in commercial matters, actions take even longer to reach resolution (~27 months), as Mekar prioritized criminal cases to avoid prolonged detention for the

[250] New York Convention Article III
[251] New York Convention Article VI
[252] Footnote on CILS

accused.[253] Notably, Claimant's appeal of the Mekari Court's enforcement of the Sinnograd Award took only one month from commencement to resolution.[254] Thus, not only were Claimant's due process rights respected in accordance with Respondent's fair and equitable treatment obligation, but Respondent exceeded its own standards in facilitating Claimant's due process rights.

128. Ultimately, the decision to enforce the award was well within the discretionary authority vested in Mekari Courts under the New York Convention to decide whether or not to enforce awards set aside in another country. The fact that Respondent's exercise of that authority negatively impacted Claimant does not establish a breach of Article 9.9.[255]

#### *3.6.a. Mekar did not breach Article 9.9 or 9.8 with all alleged violations considered individually and as a whole.*

129. Even with all of Mekar's actions and their respective consequences taken into consideration cumulatively, Mekar never breached Article 9.8 or 9.9 of CEPTA. Indeed, the concept of a "creeping" violation of the fair and equitable treatment standard is relatively novel and by no means well-established among international arbitral tribunals.[256] The concept first emerged in *El Paso v. Argentina*, where the Tribunal held that the cumulative effects of actions taken by the Argentinian State amounted to a breach of the FET standard, reasoning that a breach of the FET standard can occur through process extending over time and composed of a succession of measures that, when viewed as a whole, lead to a violation of the standard.[257] However, even taking the *El Paso* Tribunal's decision at face value, their reasoning is simply inapposite in the case at bar. In particular, the *El Paso* Tribunal's anomalous ruling was "directed solely to the question of whether

[253] Record, 29-30, Statement of Uncontested Facts, ¶13.
[254] Record, 39-40, Statement of Uncontested Facts, ¶62
[255] Record, 76, CEPTA Treaty, Art. 9.8.
[256] FET Article
[257] El Paso v. Argentina, , at ¶ 230

the investor's legitimate expectations had been violated through changes made to the legal and economic framework in which the investment was made."[258] Here, the facts are demonstrably different. As previously discussed, Mekar never made any specific representation to induce Claimant to make its investment. On the contrary, any expectations created by Mekar's initial acceptance of Claimant's bid were promptly qualified and limited by the aforementioned undertaking submitted by Claimant wherein Claimant pledged not to engage in high-level cooperation with Moon Alliance members. Critically, Claimant submitted the undertaking before completing its purchase of Caeli. It follows, then, that Claimant retained the ability to back out of its deal with Mekar if it deemed the requested undertaking too draconian. Claimant took no such action and executed the purchase agreement despite having a clear eyed understanding of Mekar's desire to regulate internally for legitimate public purposes. Accordingly, the limited persuasiveness and narrow scope of the *El Paso* analysis is unavailable here.

130. Mekar is a developing country just recently emerging from a history of exploitation by various occupiers. The Bonoori government is no stranger to this as it too was forced to make difficult and often painful economic decision when it moved from a state-controlled economy to a mixed economy in the 20th century.

131. Every action taken by Mekar—be it initiating investigatory proceedings against claimant, subsidizing only non-state owned airlines, or reviewing arbitral awards in domestic court—was not only well within Mekar's regulatory authority as defined and recognized in Article 9.8 but also warranted based on Claimant's frequent anti-competitive business practices. Put simply, Claimant is the architect of its own misfortunes and Mekar has no obligation under CEPTA or international law to cushion that blow.

[258] Scott Vessel FET article

## IV. IF THE TRIBUNAL FINDS MEKAR VIOLATED ARTICLE 9.9, THE TRIBUNAL SHOULD AWARD NO COMPENSATION TO CLAIMANT

### *4.1.a. "Market value" is the appropriate measure of compensation*

132. In the event of an adverse finding of liability, Mekar submits that, under CEPTA, the only measure of compensation available to Claimant is market value and therefore, Claimant is owed no additional compensation because Mekar has already paid Claimant the market value of $400 Million for its shares in Caeli. Under Article 9.21 CEPTA, the Parties have agreed that where a tribunal makes an award against a respondent, the tribunal may award damages at market value except as otherwise provided in Article 9.12.[259]

133. Compensation under Article 9.12 stipulates "fair market value" compensation of directly expropriated property.[260] However, no direct expropriation occurred here because Claimant voluntarily sold its stake in Caeli Airways to Mekar.[261] And as for indirect expropriation, the Parties to CEPTA have agreed that investors are not protected against measures that may be considered to indirectly expropriate an investment under Article 9.12(1)(d).[262] Interestingly, the Parties foreclosed the possibility of compensation for indirect expropriations explicitly due to the evolving economic structures of the parties.[263]Consequently, because no direct expropriation occurred and indirect expropriations are not protected under CEPTA, this Tribunal cannot award compensation based on fair market value as provided for in Article 9.12.

### *4.1.b Most favored nation treatment is not available to Claimant*

134. Mekar respectfully submits that the tribunal award cannot compensation in this matter based on fair market value , through application of the Favored Nation provision in Article 9.7 CEPTA. Article 9.7 permits Most Favored Nation treatment only with respect to the

[259] Record, 82, CEPTA Treaty, Art. 9.21(1).
[260] Record, 77-78, CEPTA Treaty, Art. 9.12(1-2).
[261] Record, 40, Statement of Uncontested Facts, ¶63.
[262] Record, 77-78, CEPTA Treaty, Art. 9.12(1)(d).
[263] *Id.*

establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment, and sale or disposal of investments in the Host State's territory.[264] Notably, Article 9.7(2) of CEPTA qualifies the circumstances in which most favored nation treatment can apply, excluding procedures for investment disputes and substantive obligations in other international investment treaties from the definition of "treatment." Such treatment does not include the compensation standard that might be applied by the tribunal in this case, should the Tribunal determine that Mekar has violated Article 9.9 CEPTA (which Mekar has not).

135. The Tribunal's reasoning in *Bayindir v. Islamic Republic of Pakistan* is also inapplicable here. In *Bayindir*, the BIT between Turkey and Pakistan had no clause addressing FET and so the Tribunal imported the FET clause from the Turkey-UK BIT into the dispute via the MFN clause in the Turkey-Pakistan BIT[265]. Under CEPTA, however, there are significantly fewer gaps for the Tribunal to fill. CEPTA has clauses addressing Fair and Equitable Treatment ; more importantly, the MFN clause in Article 9.7 delimits the discrete circumstances in which a provision contained in another treaty may be applied. The plain language of CEPTA addresses this question and this Tribunal need not venture outside the four corners of the treaty to resolve it.

136. Accordingly, the question of whether Claimant can import a more favorable measure of compensation from the Mekar-Arrakis BIT turns on whether a compensation standard qualifies as a substantive obligation and whether such compensation, if awarded by this Tribunal, constitutes "treatment"; the answer to the first question is a resounding yes and the answer to the second, a resounding no. The simplest way of addressing whether or not an obligation is substantive is to determine whether the obligation affects the rights and

[264]Record, 77, CEPTA Treaty, Art. 9.11.
[265] Bayindir v. Islamic Republic of Pakistan, at ¶148

obligations of an entity or whether the obligation governs the process for determining those rights. Here, the difference is clear. Compensation measures directly affect the amount that one party has the right to receive and the amount the other party is obligated to pay. The compensation standard is not merely a quantum for determining what amount a party is obliged to pay but the determinative factor in the weight of a party's burden post-award. This is determinable simply by forecasting Mekar's future under two scenarios: one in which the Tribunal holds that compensation standards are substantive obligations and one in which the Tribunal holds they are not. In the former, even in the event of an adverse finding of liability, Mekar will owe nothing to Claimant and Respondent will continue to serve the Mekari people. In the latter, Mekar will owe twice its consolidated annual public spending to Claimant.[266] Put simply, if this Tribunal deems compensation measures to not be substantive obligations, it will, in effect, take two years' worth of public money from Mekar's 11 million people and transfer it to the coffers of a more powerful and more exploitative people. The historically wealthy and powerful Bonooru will become wealthier and more powerful while Mekar's long history of foreign exploitation will continue. Surely this decision would be of some substance to the Mekari people.

#### *4.2.a Applying market value as the appropriate measure of compensation, the Tribunal should award no compensation to Claimant*

137. Having established that market value is the appropriate quantum of compensation, the tribunal should award no additional compensation because Respondent already paid Claimant $400 million for its stake in Caeli Air.

138. $400 million reflects the value of Caeli Air because it reflects the maximum amount any arms-length buyer was willing to pay between February and September of last year. This should not be surprising when we consider that Caeli Airways was likely much more

[266] Procedural Order #3, page 86, paragraph 4.

valuable in the hands of Claimant or one of its Alliance Partners than it would be in the hands of a private owner because a private owner would not benefit from Horizon 2020 subsidies and an arms-length buyer would not benefit from collusive and anti-competitive airline alliances. Accordingly, the tribunal should award no additional compensation but if it chooses to, it should reduce its award by Claimant's culpability for its own losses and consider Respondent's dire economic conditions.

## V. PRAYER FOR RELIEF

Mekar respectfully asks this Tribunal to:

1. Dismiss this case because the Tribunal lacks jurisdiction over Claimant's claim;

   or, if the Tribunal insists on hearing this claim:

2. Accept the External Advisors' proposed *amicus* submission; and reject the *amicus* submission proposed by the CBFI; and

3. Find Mekar did not violate the fair and equitable provision treatment contained in Article 9.9 CEPTA; or,

4. In case of an adverse finding, apply market value as the appropriate measure of compensation and award no compensation to Claimant; and

5. Entitle Mekar to all costs and fees arising out of these proceedings, including all legal and other professional fees and disbursements.

*And pass any other order that it may deem fit.*