

**TEAM 1630 RAO G**



INTERNATIONAL CENTRE FOR  
SETTLEMENT OF INVESTMENT DISPUTES

**Vemma Holdings Inc.**  
**(Claimant)**

**-and-**

**The Federal Republic of Mekar**  
**(Respondent)**

**ICSID case N. ARB (AF) / 20/78**

**MEMORIAL FOR RESPONDENT**

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## LIST OF AUTHORITIES

### References to Legislation

Abbreviation	Citation
CEPTA	Comprehensive Economic Partnership and Trade Agreement between the Commonwealth of Bonooru and the Federal Republic of Mekar (2014).
ICSID Convention	Convention on the Settlement of Investment Disputes Between States  and Nationals of Other States
UNCITRAL ML-ICA	UNCITRAL Model Law on International Commercial Arbitration (1985), as amended in 2006
MRTPA	Monopoly and Restrictive Trade Practice Act, as Amended in 2009 (Mekar)
ICSID-AFR	ICSID Additional Facility Rules
UNCITRAL-AR	UNCITRAL Arbitration Rules, 2010 revised version; the 2013 version which incorporates the UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration.
The Constitution	Constitution Act of Bonooru, 1947
Arbitration Rules of the Sinnoh	Arbitration Rules of the Sinnoh Chamber of Commerce (effective 28 December 2017)
BIT-1994 Mekar- Bonooru	Treaty between the Federal Republic of Mekar and the Commonwealth of Bonooru for the Protection of Investments. (1994).
BIT-2006 (Mekar- Arrakis)	Treaty between the Federal Republic of Mekar and the Kingdom of Arrakis for the Promotion and Protection of Investments. (2006).
RSIWA (2001)	Responsibility of States for Internationally Wrongful Acts 2001, Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.

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### References to Cases

Abbreviation	Citation
Mobility Rights	Constitutional Court of Bonooru on Mobility Rights
Privatisation of BA Holdings	Constitutional Court of Bonooru on Privatisation of BA Holdings
Court of Sinnograd	Supreme Arbitrazh Court of Sinnograd Ruling, CASE NO: CO/1052/2020, APPROVED JUDGMENT
High Commercial Court of Mekar	High Commercial Court of Mekar ruling- 23 August 2020
Superior Court of Mekar	Superior Court of Mekar at Phenac FAO(OS) No.285/2020 & CM No.10351/2020
Chorzow (1928)	Factory at Chorzow (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13), Publications of the Permanent Court of International Justice Series A - No. 17; Collection of Judgments A.W. Sijthoff's Publishing Company, Leyden, 1928.
Case No. 1981-17, Annex 3	Constitutional Court of Bonooru on Privatisation of BA Holdings (excerpts) CCB Case No. 1981-17, Annex 3
Case No. ARB/97/7	<i>Emilio Agustín Maffezini v. The Kingdom of Spain</i> , ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000.
Caso CCB. N° 1981-17	Extractos de la sentencia del Tribunal Constitucional de Bonooru Caso CCB. N° 1981-17 [59]
Case No. ARB/05/7	Saipem S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007.
Case No. ARB/03/11.	Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11. Historical Saviors of Malaysia v. Malaysia, Jurisdiction Decision, 17 May 2007. Mitchell v Congo, Decision on Annulment, 1 November 2006.

Case No. ARB/06/5	Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5
Case No. ARB/10/7	<i>Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay</i> , ICSID Case No. ARB/10/7, Award, 8 July 2016
Case No. 062/2012	Charanne B.V. and Construction Investments S.A.R.L. v. Spain, SCC Case No. 062/2012.
Case No. ARB/07/19	Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19.
Case No. ARB/03/15	El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15.
Case No. 2016-39	Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia, PCA Case No. 2016-39.
Case No. ARB/06/11	Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11.

#### Arbitral Decisions

Abbreviation	Citation
Saipem (2007)	Saipem S.p.A. v. People's Republic of Bangladesh, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007.
In Cana (2004)	<i>In Cana Corporation v. Republic of Ecuador</i> , LCIA Case No. UN3481, Partial Award on Jurisdiction, 27 February 2004.
Tunari (2005)	Aguas del Tunari v. Bolivia, ICSID Case No. ARB/02/3, Decision on Jurisdiction dated 21 October 2005.
Global (2020)	Global Telecom Holding S.A.E. v. Canada, ICSID Case No. ARB/16/16, Award, 27 March 2020,
Tecmed (2003)	Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003.
Waste (2000)	Waste Management Inc. v. United Mexican States ICSID Case No. ARB(AF)/98/02, Award 2000.

Azurix (2007)	Azurix Corp. v. The Argentine Republic (I), ICSID Case No. ARB/01/12, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 28 December 2007.
Biwater (2008)	Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB / 05/22, para. 729. Award 2008.
Metalclad (2000)	Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, award 2000.
CMS (2005)	CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8) Award 2005.

#### Online Articles

Abbreviation	Citation
Wälde (2004)	Wälde, Thomas; <i>"Energy Charter Treaty Based Investment Arbitration; Controversial Issues"</i> . OGEL 5 (2004), Published in: J InvestTrade. Available at: <a href="http://www.ogel.org/article.asp?key=1663">http://www.ogel.org/article.asp?key=1663</a>
De la Cerda (2007)	De la Cerda Olivos, Cristóbal and Goldenberg Peñafiel, Mónica; <i>"Trato Justo y Equitativo en materia de inversión extranjera"</i> ,(2007) Available at: <a href="http://repositorio.uchile.cl/bitstream/handle/2250/112476/de-cerda_c.pdf?sequence=1">http://repositorio.uchile.cl/bitstream/handle/2250/112476/de-cerda_c.pdf?sequence=1</a>
Ampuero (2007)	Ampuero, Miranda Ana A.; "Trato nacional, Trato de la nación más favorecida, Nivel mínimo de trato y Expropiación en los acuerdos internacionales de inversión" Disponible en: <a href="http://www.oas.org/es/sla/ddi/docs/publicaciones_digital_xxxiv_curso_derecho_internacional_2007_ana_a_ampuero_miranda.pdf">http://www.oas.org/es/sla/ddi/docs/publicaciones_digital_xxxiv_curso_derecho_internacional_2007_ana_a_ampuero_miranda.pdf</a>

#### Miscellaneous

Abbreviation	Citation
Memorandum Vemma	Memorandum of Association of Vemma Holdings Inc.

Shareholders' Agreement	Shareholders' Agreement relating to Caeli Airway
EO 9/18	Executive Order 9-2018 (Mekar)
Business Today	Phenac Business Today Podcast Transcript, 17 November 2014
Aviation Analytics	Aviation Analytics June 7, 2019
Right of First Refusal	Right of First Refusal Offer Notice
The report	14 June 2020 Centre for Integrity in Legal Services Report
Article XI (1) (2)	ARTICLE XI (1) The present Treaty shall be ratified, and the instruments of ratification shall be exchanged as soon as possible. (2) The present Treaty shall enter into force one month after the date of exchange of the instruments of ratification. It shall remain in force for a period of ten years and shall continue in force thereafter for an unlimited period unless notice of termination is given in writing by either Party one year before its expiry. After the expiry of the period of ten years, <b>the present Treaty may be terminated at any time by either Party giving one year's notice.</b>
Article IX	ARTICLE IX. (1) In the event of disputes as to the interpretation or application of the present Treaty, the Parties shall enter into consultation for the purpose of finding a solution in a spirit of friendship. (2) If no such solution is forthcoming, the dispute shall be submitted (a) to the International Court of Justice if both Parties so agree; or (b) if they do not so agree to an arbitration tribunal upon the request of either Party. (3) The tribunal referred to in paragraph (2) (b) above shall be formed in respect of each specific case and it shall consist of three arbitrators. Each Party shall appoint one arbitrator and the two members so appointed shall appoint a chairman who shall be a national of a third country.
Aron Broches	Aron Broches: "The Convention on the Settlement of Investment Disputes between States and nationals of other

	States”, Recueil des Cours de l’Academie de Droit International, 1972.
1994 Bonooru - Mekar BIT	1994 Bonooru - Mekar BIT. Treaty between the Federal Republic of Mekar and the Commonwealth of Bonooru for the Promotion and Protection of Investments.
ICSID Case	Answer, citing Suez, Sociedad General de Aguas de Barcelona SA, and Servicios 1Y11PUrñip del Agua SA v. La Argentina CSuez v. Argentina”), ICSID Case n° Decision on 30 July 2010 on report "UNCTAD Series on Issues in International Investment Agreements. Expropriation", 2012, (RL-I p. EnCana v. la de Ecuador, case LCIA nO UN348 I, UNCITRAL, Final Award, February 3, 2006 c. Ecuador”) (RL-174).

#### TABLE OF ABBREVIATIONS

Bonooru	The Commonwealth de Bonooru
Mekar / the Respondent	The Federal Republic of Mekar
Vemma / the Claimant	Vemma Holdings Inc. (BA Holdings’ successor)
CCM	The Competition Commission of Mekar
The Alliance	Moon Alliance
(SOE’s)	State-owned enterprises
BAK	Bakugo (Bonooru’s currency)
MON	Mekari MON (Mekar’s currency)
CAA	The Civil Aviation Authority
BA	State-Owned Bonooro’s Air ( Bonooro’s Air’parent company).
Caeli	Caeli Airways
CMP	Mekar’s Common Man’s Party
LPM	Labourer’s Party of Mekar
SCC	Sinnoh Chamber of Commerce’s
CILS	Centre for Integrity in Legal Services

Mekar Air	Mekar Air Services Ltd
Hawthorne Group	Hawthorne Group LLP
Amicus	AMICUS CURIAE
CBFI	Consortium of Bonoori Foreign Investors
CRPU	External Advisors to the Committee on Reform of Public Utilities / External advisors to Mekar's Committee on Reform of Public Utilities
FET	Fair and Equitable Treatment
NT	National Treatment
BPB	Bonoorian Peoples Bank
MTS	Mekar TeleSystems
LCP	Lapras Legal Capital
IMF	International Monetary Fund
SUF	Statement of Uncontested Facts
FPS	Full Protection and Security
IICRA	Investment Information and Credit Rating Agency

## STATEMENT OF FACTS

### Parties

- [1] The Federal Republic of Mekar ("Mekar", or the "Respondent"), is a state located approximately 1,600 km to Bonooru's south, with a population of 10.8 million in 2015. Mekar's currency is the Mekari Mon ("MON"). Mekar's civil aviation industry consisted of two state-owned enterprises, Aer Caeli and Caeli Airways, they merged in 2003.
- [2] Vemma Holdings Inc ("Vemma", or the "Calimant"), is a national airline and air

transport company, engaged in commercial activities. It provides air transport services for passengers and cargo. The registered office of the Company is 4, Navalny Drive, 0934 Szeto.

- [3] Vemma is an airline holding company incorporated in the Commonwealth of Bonooru ("Bonooru") with 100% ownership in Royal Narnian, the flag carrier of Bonooru. Royal Narnia is a leading global airline. In 1991, together with five major airlines from Europe, Asia, Latin America, and North America, the Royal Narnian created the Moon Alliance.
- [4] Vemma holdings include private and institutional shareholders from Bonooru and Goponga, a central-Aslanian nation. That means, Vemma counts among its shareholders the State of Bonooru.
- [5] The Commonwealth of Bonooru ("Bonooru"), is a developing country, sits at the northern tip of Greater Narnia region (an unevenly populated area in the Eastern Ocean which spans 7.9 million square kilometers). Bonooru is an archipelagic State comprising 109 islands, of which only four are major islands. Its civil aviation contributes to nearly 13% of Bonooru's GDP and accounts for 11.6% of its total employment.

### **Privatization of Caeli Airways**

- [6] Following the merger of Aer Caeli and Caeli Airways, said state-owned aviation company had an increase in debt, loss in market share, and projected decrease in future profits. In the aftermath of the unfavorable merger, in 2004 attempts were made to privatize Caeli. However, this attempt of privatization failed, and Mekar bail-out (rescued) Caeli, absorbing its debt.
- [7] The 2008 financial crisis pushed Caeli to greater distress, there was a second bailout plan, but it failed to receive the required support. In 2009, a privatization plan was created, and all bailouts were rescinded. To inspire investor confidence, the

Competition Commission of Mekar ("CCM") was created.

### **Negotiations between Bonooru and Mekar**

- [8] Starting in early 2010, Bonooru and Mekar began negotiations towards a comprehensive trade agreement, with the intention to include a chapter on investment protection, seeking to replace the Treaty between the Federal Republic of Mekar and the Commonwealth of Bonooru for the Promotion and Protection of Investments of 1994 ("BIT")

### **Tendering Process called by Mekar.**

- [9] Given its precarious financial condition, the privatization of Caeli Airways took priority. After Mekar's first two attempts at restructuring failed, a third attempt was launched in September 2010, in which influenced the leadership of the managing director of Mekar Airservices Ltd., a state-owned and controlled transition vehicle to which Caeli Airways' assets and part of its liabilities were transferred. Mekar Airservices Ltd. marketed Caeli Airways' core assets to potential bidders.
- [10] Four companies, including Vemma, participated in the tendering process. On November 23, 2010, Vemma submitted its bid for the purchase of Caeli. Vemma Holdings' bid proposal was considered very promising, for seeking fleet renewal and expansion, as well as route expansion, in addition to refinancing the remainder of Caeli's debt liability from Bonoorian People's Bank ("BPB"). A nationalized bank in Bonooru in which the government holds a 58.96% stake. Vemma was found to have proposed the most financially attractive business model for Caeli Airways' short and medium-run development.
- [11] Vemma's offer was valued 800 million USD, which were accepted on January 5, 2011.

### **Acquisition of Caeli Airways**

- [12] The CCM approved Vemma's acquisition of an 85% stake in Caeli Airways and the

airline's participation in the Moon Alliance on March 5, 2011. With the only commitment not to engage in a high-level cooperation on competition parameters such as prices, schedules, capacity, facilities, and other sensitive information with the Moon Alliance members.

[13] On March 29, 2011, Vemma Holdings entered into a Share Purchase Agreement with Mekar Airservices Ltd. to purchase an 85% stake in the company. The remaining 15% shares were beneficially owned by the Mekari State through Mekar Airservices Ltd. Simultaneously, Vemma and Mekar Airservices Ltd. entered into a Shareholders' Agreement. This Agreement establishes that any dispute, controversy, or claim, shall be finally settle by international arbitration, administered by the Sinnoh Chamber of Commerce Arbitration Institute.

[14] This in the framework of the appointment of Ms. Sabrina Blue, the erstwhile head of Vemma's board of directors, as the Secretary of Transport and Tourism of Bonooru. Even under the warning of the Mekar's Committee on Reform of Public Utilities of considering the serious volatility of fuel prices and potential take-over on long-distance routes by competitors.

### **Mekar and Bonooru**

[15] Over the course of 2012, Vemma decided to offer low-fare, long-distance flights into Mekar, and concentrated efforts on expanding routes for cross-continental travel to Mekar, against the advice of Mekar Airservices representatives, of taking an "extravagant approach", given the volatility of demand in the region, and especially in Mekar, during fall and winter months.

[16] Caeli losses were observed on routes between Bonooru and Mekar, so representatives of Mekar Airservices cautioned that Caeli's expansion should be controlled to avoid exorbitant costs associated with maintaining its fleet during seasons of low demand and hedge the liability of additional financing. Conversely,

Vemma's representatives on Caeli's board continued to project optimism, and decided to continue with the expansion.

- [17] In April 2014, Mekar and Bonooru signed the Comprehensive Economic Partnership and Trade Agreement ("CEPTA"), which entered into force on October 15th, 2014. Mekar and Bonooru agreed to terminate the pre-existing BIT on the same day.

### **First and Second investigation against Caeli**

- [18] Caeli's rapid expansion drew the attention of the CCM, which launched a *suo moto* investigation into its activities ('*The First Investigation*'). In the year of 2016, the CCM indicated its intention to investigate whether Caeli had adopted predatory pricing strategies with the aim of hindering competition on the domestic market. As an interim measure, the CCM placed caps on Caeli Airways' airfare to prevent it from earning supra-competitive profits in the future. Caeli did not protest the airfare caps, and there is no evidence the caps hurt its profitability in 2016.
- [19] In December 2016, due to a complaint by a consortium of small regional airlines in Greater Narnia, led by one of their Mekari members, the CCM launched another investigation ('*The Second Investigation*'), focusing specifically on price undercutting on certain routes to and from Phenac International. Caeli Airways maintained that it did not enjoy any dominance on these short-distance routes, since it was competing with train, car, and bus journeys rather than the said regional airlines alone.
- [20] Late in 2016, the Mon began to nosedive. By March 2017, a currency crisis ensued in Mekar. The IMF emphasized "the need to establish credibility in the [local] currency to avoid a debilitating economic situation". Mekar authorities set airfare in "Mon" and not in US dollars.
- [21] As of July 2017, Caeli was unable to secure a steady stream of revenue. It requested meetings with Mekar's Secretary of Civil Aviation to seek permission to denominate its airfare in US dollars instead of the Mon till the crisis abated. Having received several similar requests, Mekar authorities approved the denomination of airfare in

US dollars for all airlines operating in its territory in October 2017.

### **Caeli breached of Mekar's antitrust legislation**

[22] By the end of August 2018, the CCM concluded its First Investigation into the commercial activities of Caeli Airways finding that there was a breach of Mekar's antitrust legislation in the form of predatory pricing resulting from low airfares and loyalty programmes. The CCM also found that the subsidies received by Vemma under the Horizon 2020 scheme helped Caeli drastically reduce its airfare below its average avoidable costs. Accordingly, the CCM imposed a total penalty of MON 150 Million on Caeli.

### **Caeli had engaged in anti-competitive behaviour.**

[23] On January 1, 2019, the CCM completed its Second Investigation into Caeli. Its report concluded that Caeli had engaged in anti-competitive behaviour in conducting its business activities in Phenac International Airport. Consequently, a fine in the amount of MON 200 million was imposed on Caeli Airways.

[24] On January 20, 2019, representatives of Caeli appealed both orders (fine and airfare caps) of the CCM in the Mekari courts. The registrar scheduled an initial hearing on the Competition Authority's fines for May 2020.

[25] From April 25, 2019, to April 27, 2019, Mekar's High Court heard submissions from Caeli Airways and the CCM concerning a stay on the imposition of airfare caps. An interim decision on airfare caps was released till June 15, 2019, declining to remove them. The CCM lifted the applicable airfare caps in October 2019.

### **Vemma intends to sell its stake in Caeli**

[26] In November 2019, representatives of Vemma announced their intention to sell their stake in Caeli Airways. Vemma secured an offer from Hawthorne Group LLP, a Sinnoh-based private equity firm with stakes in numerous low-cost airlines, for Vemma's entire stake in Caeli Airways. Vemma communicated the terms of this offer

to representatives of Mekar Airservices on December 9, 2019.

[27] On December 17, 2019, Mekar Airservices rejected the offer, deeming the price offered to be artificially inflated and not an arm's length commercial price; in addition, it noted that Hawthorne Group could not be considered *bona fide* third-party purchaser, since it is associated to Vemma Holdings through the Moon Alliance. After failed negotiations between the two parties, Mekar Airservices filed a request for arbitration on 11 February 2020 with the Sinnoh Chamber of Commerce's ("SCC") Arbitration Institute.

[28] On May 9, 2020, an award was rendered in favor of Meka AirseVICES. The award declared that the Hawthorne Group's offer in respect of Vemma's shares in Caeli could not be considered as one received from a "bona fide third party" due to its "affiliation" with Vemma via the Moon Alliance. Vemma filed for the set aside the award. On August 1, 2020, the Supreme Arbitrazh Court of Sinnograd set aside the award pursuant to Vemma's application.

[29] On October 8, 2020, not finding another buyer for its shares, Vemma sold its stake in Caeli to Mekar Airservices for 400 million dollars. On November 15, filed a notice of arbitration against Mekar to seek compensation of its losses under the CEPTA.

## SUMMARY OF ARGUMENTS

[30] **JURISDICTION:** This Arbitration Tribunal lacks jurisdiction over the present dispute because the parties do not meet the following requirements. First, there is no consent to access the ICSID Mechanism, since it is not in force. Second, this Tribunal has no jurisdiction *ratione personae* because it is a dispute arising between a State and another State, and the claimant is not legitimized. Third, this Tribunal has no jurisdiction *ratione materiae* considering that the dispute does not have a legal nature, and it is an issue of internal politics. Fourth, this Tribunal lacks jurisdiction *ratione temporis* since the BIT is still in force.

[1] **ADMISSIBILITY OF AMICUS:** The *amicus curiae* submission by the “CBFI” does not comply with the requirements to be admitted, as established in article 9.19 of the CEPTA, and those established in article 41(3) of Schedule C, of ICSID Additional Facility Rules.

[31] **LIABILITY (MERITS):** The Federal Republic of Mekar has never violated the “fair and equitable treatment and full protection and security” standard as established in the CEPTA; it has never breached its principles and rules, including national treatment, and transparency; Mekar acted with good faith because it put all the elements and warnings for Vemma's consideration so that it would have the opportunity to get to know in depth both the social, legal and economic problems of the State.

[32] **COMPENSATION:** The Respondent must be absolved of paying 700 million USD plus interest requested by the Claimant, since Vemma's detriment was due to its own decisions despite the warnings made since the beginning of the negotiations.

## **LEGAL ARGUMENTS**

### **PART ONE: JURISDICTION**

#### **1. Lack of jurisdiction of this Arbitration Tribunal regarding the dispute between Vemma Holdigns and Mekar.**

[33] This Tribunal lacks jurisdiction over the Claimant’s petitions because it is a State-to-State arbitration, in accordance with the following:

[34] ICSID is a *sui generis* institution that has a restricted scope of jurisdiction; that is, even if the parties to it so agree, not any type of arbitration may be followed in accordance with the rules of ICSID. However, there must exist consent to access

the ICSID mechanism. Consent by the parties is the cornerstone of ICSID's jurisdiction.

[35] There are four requirements to be satisfied for ICSID jurisdiction to exist:

- 1.- Consent
- 2.- *Ratione personae* Requirement
- 3.- *Ratione materiae* Requirement
- 4.- *Ratione temporis* Requirement

### **1.1 Consent**

[36] The lack of this requirement is observed as a result of the incorrect application of CEPTA. Since, despite the fact that Bonooru and Mekar signed said Treaty in 2014, it is not observed from that document that either Party has complied with the requirement established in the BIT of giving notice of termination in writing one year before its expiry<sup>1</sup>, therefore, the CEPTA cannot take effect.

[37] In accordance with the above, if the CEPTA is not in force, the BIT must be applied, in which the parties do not grant their consent to submit their disputes to ICSID, but rather it is established that the disputes will be heard in the International Court of Justice or before an arbitration tribunal that is formed in respect of each specific case<sup>2</sup>.

[38] It is important to mention that the consent to submit to arbitration before ICSID is the cornerstone for this procedure to be carried out, therefore, if there is no instrument of which it is observed that the parties granted said consent, and due to the lack of validity of the CEPTA, it is clear that there is no consent.

### **1.2 *Ratione Personae* Requirement**

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<sup>1</sup> ARTICLE XI.

<sup>2</sup> ARTICLE IX.

[39] Notwithstanding the fact that the CEPTA is not valid, in the event that it is applicable, the breach of the requirement of jurisdiction *ratione personae* is also noted by virtue of the fact that the dispute constitutes a State-to-State arbitration.

[40] The Respondent respectfully requests for this Tribunal to decline its jurisdiction because the Claimant does not qualify as "a national of another Contracting State" under the ICSID Convention Article 25(1). Mekar has not consented to State-to-State arbitration with Bonooru under Chapter 9 of CEPTA either.

[41] The claimant has no right to initiate the Investor State Arbitration against the Respondent because it is not an investor within the meaning of Article 25(1) of the ICSID Convention. The present dispute constitutes arbitration between the State of Bonooru and the State of Mekar, since Vemma is a state division acting on behalf of the Commonwealth of Bonooru, in other words it is part of the State.

[42] Governance in Bonooru has been organized based on central planning, based on State-Owned Enterprises. Until 1979, the Civil Aviation Authority (CCA), an arm of Bonooru's Ministry of Transport and Tourism was also responsible for management of Bonooru's national carrier and monopoly civil airline. In 1980 a scheme of privatization for Bonooru Air/ BA Holdings was approved contemplating the exclusion of domestic carrier competitors emerging from a potential breakup of Bonooru Air as bidders.

[43] In 1984 Bonooru Air was split into three airlines. Among these, the Royal Narnian was chosen as the flag carrier of Bonooru, owned and operated by Vemma Holdings Inc., BA Holdings' successor, with 100% ownership in Royal Narnian. Government officials from Bonooru have publicly acknowledged that Bonooru has historically held a considerable stake in the company.

"In a political rally held at Bonooru's capital, Szeto, on 10 November 1980, the then Prime Minister responded:  
...Our government plans to maintain a significant interest in Bonooru Air and

always will. Bonooru Air's intended successor will be directed to ensure that it operates routes to our most remote islands, regardless of profitability..."<sup>3</sup>

[44] Even the higher courts of Bonooru say they are convinced that "...the primary successor to BA Holdings, ensures that Royal Narnian will continue to operate routes to remote communities... Bonooru's continued, although minority, participation through Vemma Holdings Inc., we are sufficiently convinced that Bonooru will be able to ensure the utilisation of the Royal Narnian for public benefit."<sup>4</sup>

[45] Whether or not Vemma is a state entity effectively controlled by the Bonooru government must be examined from a formal or structural point of view. A presumption arises when the purpose or objectives of an entity are to carry out functions of a governmental nature, or that are normally reserved to the State, or that because of their nature are not usually performed by private companies or natural persons.

[46] The relevance of these standards is clearer when the entity is administered and controlled directly by the State, as in the case of a dependency or division of a Ministry, but it will be less evident when the State decides to act through a mechanism of the private sector, such as a corporation or other type of corporate structure.

[47] It has already been resolved that a State may not necessarily evade its responsibility for acts or omissions that cause harm by hiding behind a private corporate veil, when the State chooses to act through a private sector mechanism, such as a corporation or some other corporate structure.<sup>5</sup> And in the same vein, Article 7, paragraph 2, of the Draft Articles Responsibility of States for Internationally Wrongful Acts, prepared by the International Law Commission, confirms this position:

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<sup>3</sup> SUF p.29 ¶18

<sup>4</sup> Case No. 1981-17, Annex 3, p.43 ¶59

<sup>5</sup> Case No. ARB/97/7, p. 78

*“2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial public entity, but which is empowered by the domestic law of that State to exercise prerogatives of public authority, shall be deemed to be an action of the State under international law, where that organ has acted in such capacity in the case in question.”*

[48] In the case of the Claimant, Vemma is not only owned by the state, but is under the control of the state and is administered as a tool for the purposes of the economic development of the Bonooru region. It is clear that behind the corporative veil of Vemma is the State of Bonooru acting to exercise prerogatives of public authority.

[49] Although this structural test by itself may not always be a conclusive determination whether Vemma is an organ of Bonooru or whether its acts may be attributed to the State, there is an additional test has been developed, a functional test, which looks to the functions of or role to be performed by the entity.

[50] Vemma acted as an agent of the Government, performing government functions in making his investments in Mekar, acting under the direction and control of the Government. It has been publicly acknowledged for Bonooru authorities that Vemma, “as Bonooru Air’s successor **will be directed** to ensure that it operates routes to our most remote islands, regardless of profitability...”<sup>6</sup>

[51] The Bonooru high courts in that same vein refer to being convinced that “*Bonooru’s continued, although minority, participation through Vemma Holdings Inc., ... sufficiently convinced that **Bonooru will be able to ensure the utilisation of the Royal Narnian for public benefit.***”<sup>7</sup> It is clear that Bonooru’s participation in Vemma was retained to continue to fulfill government functions.

[52] Additionally, the founding documents of Vemma Holdings Inc. indicate that it exercises its functions under the entrustment and direction of the Bonooru

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<sup>6</sup> SUF p.29 ¶18

<sup>7</sup> Caso CCB. N° 1981-17 [59] p.43

government. In the Memorandum of Association of Vemma Holdings Inc. point 3 states the objectives for which the Company is established, one of them is:

*(h) To assist in developing the aviation industry as well as the civil aviation infrastructure in Bonooru for the benefit of its population in accordance with Article 70 of the Constitution Act 1947, including servicing remote communities;*

[53] As one leading authority on the interpretation of the Convention explained, "*a mixed economy enterprise or a State-owned company should not be excluded as a 'national of another Contracting State' unless it is acting as an agent of the government or is performing a function that is essentially governmental*"<sup>8</sup>

[54] *Contrariu sensu* a company that is acting as an agent of the government or is performing a function that is essentially governmental of the supposed "national of another State" must be excluded, since in this case it is the State itself whose intention was to use the company as an instrument of State action.

[55] In the case of Vemma, both objectives and functions are typically governmental tasks and, therefore, cannot be considered to have a commercial nature, therefore, according to the functional test, the Bonooru State could not be separated from Vemma, since its functions have been delegated by the State and these will continue to be governmental in the light of international law.

[56] One proof of this is the relation of Bonooru with Vemma's board of directors, on 23 November 2010, the same day as Vemma submitted its bid for the purchase of Caeli, the Szeto Times reported that Ms. Sabrina Blue, erstwhile head of Vemma's board

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<sup>8</sup> Aron Broches, 1972, pág. 355.

of directors, was appointed as the Secretary of Transport and Tourism in a cabinet reshuffle in Bonooru.<sup>9</sup>

[57] In addition, there is an effective control, because despite the fact that the State of Bonooru refers that until 2020 it retained minority stake in Vemma (between 31 and 38%), the truth is that in the decision-making of Vemma, Bonooru's representatives form a majority of members present and voting when not all other shareholders attend. Vemma's Board of Directors passes decisions by a majority vote and Vemma's articles of incorporation require only 50 per cent of voting shares for a quorum at regular meetings, which includes meetings for electing directors.<sup>10</sup>

[58] A majority stake does not necessarily imply control but a minority stake can provide effective control (through specific voting rights, for example). This is the case of Bonooru with respect to Vemma, even the Bonooru's stake in Vemma is less than 40%, Bonooru's representatives form a majority of members present and voting when not all other shareholders attend, that it is enough to provide control through voting with a quorum of only 50%.

[59] Finally, Vemma officially acquired the status of a state-owned company by March 2021, when Bonooru increased its interest in Vemma to a 55% controlling stake. This fact, alone or considered in combination with Vemma's existing ties with the Government of Bonooru, indicates that Vemma qualifies as a State-owned enterprise. Therefore, this arbitration would in effect be between Bonooru and Mekar.

### **1.3 *Ratione Materiae* Requirement**

[60] The *ratione materiae* requirement or objective encompasses that the dispute or difference derives directly from an investment. The objections to jurisdiction relating

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<sup>9</sup> SUF p.31 ¶22

<sup>10</sup> P.O. n.3 (3) p.86

to this aspect consist in determining whether the claim raised is a difference of legal nature and if it arises directly from an investment, within the limits of Article 25(1) of the ICSID Convention.

[61] In its relevant part, Article 25(1) of the ICSID Convention <sup>11</sup> provides that "the jurisdiction of the Center shall extend to any legal dispute arising directly out of an investment."

[62] For its part, the CEPTA defines investment in Article 9.1 as follows:

*Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:*

*(a) an enterprise;*

*(b) shares, stock, and other forms of equity participation in an enterprise;*

*(c) bonds, debentures, other debt instruments and loans;*

*(d) futures, options, and other derivatives;*

*(e) turnkey, construction, management, production, concession, revenue-sharing and other*

*similar contracts;*

*(f) intellectual property rights;*

*(g) licences, authorisations, permits, and similar rights conferred pursuant to the Party's law; and*

*(h) other tangible or intangible, movable, or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.*

[63] To determine whether Vemma Holdings Inc. has made an investment within the meaning of Article 25(1) of the ICSID Convention and 9.1 of the CEPTA, the ICSID Tribunals have developed criteria in similar cases, which are known as the "Salini test". According to that test, the notion of investment implies the presence of the following elements: (a) a contribution of money or other assets of economic value, (b) a certain duration; (c) an element of risk; and (d) a contribution to the economic development of the host state.<sup>12</sup>

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<sup>11</sup> Viewed at: <http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partA-chap02.htm>

<sup>12</sup> Case No. ARB/05/7, 21 March 2007.

[64] In the present case, Vemma Holdings Inc. since acquiring Caeli Airways, began a process of renewal and expansion of the fleet, as well as expansion of the air routes. Vemma also signed leasing for Boeing 737 aircraft and secured Caeli Airways' membership in the Moon Alliance. It also refinanced the remainder of Caeli's debt liability with PJSC Bonoorian People's Bank ("BPB"). Vemma Holdings made an important contribution of money and assets of economic value in the investment in Caeli Airways. The Group's tender was valued at 800 million USD, and it was accepted on January 5, 2011.

[65] Likewise, the investment of Vemma Holdings, lasted from 2011 and until the Federal Republic of Mekar systematically made the airline's operations unaffordable. And regarding the risk element of the investment, the Claimant faced the risks of its project.

[66] However, the contribution to the development of the host State must not be observed in a plain and simple way, rather, it must be significant<sup>13</sup> and translated into wages for employees, development policies and social commitment, infrastructure creation and many other schemes that translate as growth.

[67] This last element cannot be proven by the Claimant, since, contrary to contributing to the development of Mekar, Vemma Holdings took advantage of Caeli's contracts with Phenac International Airport, as well as the repair and storage facilities available to Caeli, all of this for the benefit of Bonooru and not Mekar.

[68] In addition, the contribution of money or other assets must be invested in accordance with the laws of the host State and must be invested in good faith<sup>14</sup>. However, as can be seen, Vemma Holdings does not make its investment in good faith since its objectives are based on the control that Bonooru carries out over the company.

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<sup>13</sup> Case No. ARB/03/11., 17 May 2007.

<sup>14</sup> Case No. ARB/06/5

[69] Likewise, it is noted that Vemma Holdings failed to comply with Mekar's laws, since it adopted predatory pricing strategies with the aim of hindering competition on the domestic market, which is why an investigation was even initiated by the "CCM" and imposed airfare caps on Caeli Airways, as well as fines for such conduct.

#### **1.4 Ratione Temporis Requirement**

[70] Since 1994, the promotion and protection of investments between Mekar and Bonooru was governed by the BIT<sup>15</sup>, which was signed at Phenac on August 24, 1994. This Treaty states that in the event of disputes as to its interpretation or application, the Parties shall be subject to the provisions of article IX, which in relevant part provides that:

*Article IX*

*(1) In the event of disputes as to the interpretation or application of the present Treaty, the Parties shall enter into consultation for the purpose of finding a solution in a spirit of friendship.*

*(2) If no such solution is forthcoming, the dispute shall be submitted*  
*(a) to the International Court of Justice if both Parties so agree; or*  
*(b) if they do not so agree to an arbitration tribunal upon the request of either Party.*

*(3) The tribunal referred to in paragraph (2) (b) above shall be formed in respect of each specific case and it shall consist of three arbitrators. Each Party shall appoint one arbitrator and the two members so appointed shall appoint a chairman who shall be a national of a third country.*

[71] Now, Article XI, specifically in its second numeral states:

*(2) The present Treaty shall enter into force one month after the date of exchange of the instruments of ratification. It shall remain in force for a period of ten years and shall continue in force thereafter for an unlimited period unless notice of termination is given in writing by either Party one year before its expiry. **After the expiry of the period of ten years, the present Treaty may be terminated at any time by either Party giving one year's notice.***

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<sup>15</sup> 1994 Bonooru - Mekar BIT, pp. 69-70.

[72] In 2014, the commonwealth of Bonooru and the Federal Republic of Mekar signed the COMPREHENSIVE ECONOMIC PARTNERSHIP AND TRADE AGREEMENT<sup>16</sup> better known as the CEPTA, as established in article 1.1:

*Article 1.1: Name*

*The short name of this agreement shall be the CEPTA.*

*This document as part of Annex XV, leaves the previous Treaty in disuse, since article 1.6 of the CEPTA provides that:*

*Article 1.6: Term of the Bilateral Investment Treaty*

*The Parties hereby agree that the Bilateral Investment Treaty, as well as all the rights and obligations derived from the said Treaty, **will cease to have effect on the date of entry into force of this Agreement.***

*1. Investments made under the 1994 Bilateral Investment Treaty shall be governed by this Agreement starting from the date of entry into force of this Agreement.*

*2. No investor has the right to bring a claim under the Bilateral Investment Agreement following the entry into force of this Agreement.*

[73] The CEPTA was signed in April 2014 and entered into force on October 15, 2014. The above mentioned might be interpreted as if Mekar and Bonooru agreed to terminate the pre-existing BIT on October 15, 2014. However, the Claimant left aside that in order for the BIT to expire, it was necessary to comply with the obligation that either Party gives written notice of termination one year before its expiry.

[74] That is, if either Party did not comply with the requirement established in the last part of Article XI of the BIT of giving written notice of termination one year before its expiry; although the CEPTA states that the BIT will cease to have effect on the date of entry into force of this Agreement; this last situation does not validate the first, under the *pacta sunt servanda* principle that governs the Treaties.

[75] Consequently, the CEPTA has not yet entered into force, and the BIT remains in force. This is due to the failure to comply with the form established in the BIT.

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<sup>16</sup> (Cepta), p. 79.

Situation that affects the settlement of investment disputes, since as the BIT remains in force, it establishes the way in which disputes must be resolved, and it does not accept the jurisdiction of ICSID, so it is clear that this dispute cannot be aired under these rules.

[76] In accordance with the foregoing, in the absence of consent or compliance with the requirements of *ratione personae*, *ratione materiae*, and *ratione temporis*, this Tribunal lacks any jurisdiction and, therefore, must refrain from hearing this dispute.

## **PART TWO. ADMISSIBILITY OF AMICUS**

### **Rejection of the request for the presentation of Amicus Submission by the Consortium of Bonoori Foreign Investors ("CBFI")**

[77] In investment arbitration, the intervention of third parties who have an interest in the outcome of the process is allowed: the *amicus curiae*. Their intervention consists in giving a particular perspective, knowledge or vision different from those of the parties in dispute, with the purpose of helping the court to make a decision.

[78] This procedural figure is regulated in article 9.19 of CEPTA:

*"Article 9.19: Conduct of the arbitration [...]*

*2. A non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.*

*3. After consulting with the disputing parties, the tribunal may accept and consider in writing amicus curiae submissions on a matter of fact or law within the scope of the dispute that may assist the tribunal in evaluating the disputing parties' submissions and arguments. of a person or entity that is not a disputing party but has a significant interest in the arbitration proceeding.*

*Each submission will identify the author; reveal any affiliation, direct or indirect, with any disputing party; and identify any person, government or other entity that has provided, or will provide, any financial or other assistance to prepare the presentation. Each presentation will be written in a language of the arbitration and will comply with the page limits and deadlines*

*established by the court. The tribunal shall provide the disputing parties an opportunity to respond to such submissions.”*

[79] The Schedule C Arbitration (Additional Facility) Rules, in Article 41.3 also regulates *amicus curiae* in the following terms:

*“(3) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Article called the “non-disputing party”) 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.*

*The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.”*

[80] In accordance with the referred regulations, the presentation of *amicus curiae* must satisfy the following requirements to be admitted:

- 1) That the presentation be on a matter of fact or law of the controversy.
- 2) That the presentation helps the court to evaluate the presentations and arguments of the parties.
- 3) That contributes a particular perspective, knowledge or vision different from those of the parties in the dispute
- 4) That the non-disputing party has a significant interest in the arbitration procedure.

- 5) That the submissions do not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.
- 6) That the author be identified.
- 7) That reveals any affiliation, direct or indirect, with any disputing party.
- 8) Identify any person, government or other entity that has provided, or will provide, any financial or other assistance in preparing the submission.

[81] In this sense, the amicus submission by CBFi fail to comply with the aforementioned requirements to be admitted as amicus curiae in this procedure due to the following:

[82] CBFi maintains a clear interest in favor of Vemma since Lapras Legal Capital (LLC), member of this consortium, is advising Vemma on funding strategies with respect to its claim against the Federal Republic of Mekar. An essential attribute of amici curiae is independence from the disputing parties. The participation of Lapras Legal Capital in this arbitration through CBFi raises a conflict of interest.

[83] CBFi also have thirty-eight (38) members that hold investment rights in Mekar. Two of such members, are currently pursuing claims against the Federal Republic of Mekar under Chapter 9 of CEPTA.<sup>17</sup> That shows that members of CBFi maintain a clear position of support for Vemma and in detriment of Mekar.

[84] That same inclination is seen in the CBFi objective that is focused on fostering a strong, competitive economic environment that facilitates growth and development of Bonooru.<sup>18</sup> Then, in addition to the fact that some members of CBFi are pursuing claims against Mekar, this consortium also collaborates directly in benefit of Bonooru, situation that reveals a direct affiliation with one of the disputing parties.

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<sup>17</sup> Amicus by CBFi, ¶ 6, p.16.

<sup>18</sup> Amicus by CBFi, ¶ 2, p.16.

[85] In that regard, it is worth mentioning that in the case of Philip Morris v. Uruguay the Court rejected the request for written submission of a third party on the grounds that there was insufficient independence of one of the disputing parties, and held that:

*...the Tribunal must not only consider whether the person or organization that seeks to intervene has the required expertise or experience, but also whether it is sufficiently independent from the disputing parties to be of assistance to the Tribunal. Prior ICSID tribunals have already recognized the importance of the lack of connection between the petitioner and the disputing parties for the tribunal's determination to accept or deny non-disputing parties' submissions.*

*The Respondent has brought to the Tribunal's attention, the "close relationship between ASIPI and Claimants," by identifying the participation of Claimants' lawyers on the management board and on specific thematic committees of ASIPI. The Tribunal cannot ignore this detailed information.<sup>19</sup>*

[86] This is a very similar case because the close relationship between members of CBF1 and the Claimant, in the case at hand this fundamental requirement is undeniably breached, therefore the presentation of the amicus by CFBI is totally inappropriate.

[87] In addition CBF1 does not file its *amicus* application in pursuit of any “public interest” or advance any novel arguments. An essential attribute of *amici curiae* is independence from the disputing parties. The participation of LLC in this arbitration through CBF1 raises a conflict of interest. *Amici curiae* must also be able to assist the tribunal by offering a different point of view from that of the disputing parties, which the CBF1’s application fails to do.

[88] Now, regarding to the presentation of Amicus Submission by the External Advisors to the Committee on Reform of Public Utilities, CPUR had actively participated in the deliberations of the Committee in the process leading up to the acquisition of an 85% stake in Caeli Airways JSC by Vemma, as independent advisors involved in the entirety of the privatisation process, are in the unique position to adduce unbiased

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<sup>19</sup> Case No. ARB/10/7, Award, 8 July 2016, p. 55

facts to this effect before the Tribunal that may not be obtained from either disputing party.

[89] The assessment of the legality of Vemma's investment is crucial to the determination of the Tribunal's competence-competence. This arbitration raises important issues regarding the ability of investor-State dispute settlement to address public policy issues fairly and in an unbiased manner, taking the regulatory interests of the State into account. The nature of investor-State relations provides fertile ground for acts of corruption. To prevent this 'insidious plague' from upending investor-State arbitration, caution must be exercised in assessing Vemma's claims that remain tainted by allegations of corruption.

[90] Respondent believes that the *amicus* submission by the external advisors to Mekar's CRPU reflects valuable perspectives that merit the Tribunal's attention because the public interest inherent, and by the information that offer a different point of view from the disputing parties.

[91] Mekar supports openness and transparency in arbitration proceedings under Chapter 9 of the CEPTA, including through the appropriate participation of *amici curiae*. However, the parameters of such participation are those laid down in the interacting provisions of the ICSID Arbitration (Additional Facility) Rules and Article 9.19 of the CEPTA. Further, pursuant to Article 9.20(6) of the CEPTA, Mekar asks that the Tribunal apply the UNCITRAL Rules on Transparency in Investor-State Arbitration to these proceedings.

[92] Thus, the respondent request the Tribunal to reject the CBF's submission and admit that submitted by the external advisors to Mekar's Committee on Public Utilities Reform, recognising the public interest inherent in only the latter.

## PART THREE: MERITS

### FIRST ISSUE. Mekar did not violate Article 9.9 of CETPA.

[93] Without prejudice to the Respondent's position on the lack of jurisdiction of the Tribunal over the present dispute, explained in previous paragraphs, the merits of the case are answered *ad cautelam* in the following terms:

[94] Mekar has not violated its obligations contained in Article 9.9 of the CEPTA. To successfully argue that its rights under the CEPTA have been breached, the Claimant must demonstrate that Mekar's actions exceed the regulatory authority that the CEPTA secures for its contracting parties.

[95] Mekar is committed to the protection of investments through the Minimum Standard of Treatment, according to article 9.9 of the CEPTA which states the following:

#### *Article 9.9: Minimum Standard of Treatment*

1. *Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7.*

2. *A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or measures constitute:*

*(a) Denial of justice in criminal, civil or administrative proceedings;*

*(b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;*

*(c) arbitrary or discriminatory conduct;*

*(d) abusive treatment of investors, such as coercion, duress, and harassment;*

*(e) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with Article 9.22.*

3. *When applying the above fair and equitable treatment obligation, a Tribunal may consider whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and*

*upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.*

*4. For greater certainty, "full protection and security" refers to the Party's obligations relating to the physical security of investors and covered investments.*

*5. For greater certainty, a breach of another provision of this Agreement does not establish a breach of this Article.*

*6. For greater certainty, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article. In order to ascertain whether the measure breaches this Article, the Tribunal must consider whether a Party has acted inconsistently with the obligations in paragraph 1.*

*7. The provisions of this Article shall not apply to invoke a more favourable treatment accorded by either Party under bilateral investment treaties or other agreements containing provisions relating to investments signed prior to the entry into force of this Agreement.*

[96] From the literalness of that precept, it follows that fair and equitable treatment (hereinafter the FET) must be guaranteed by the States receiving the investment according to the parameters of International Law, in order to offer a wide protection.

[97] In this regard, arbitral tribunals have held the criteria that the clause creates an obligation on the host state to provide "commercial" and/or "legal" protection and security, in particular access to an effective judicial remedy against the investor's deficiencies and/or the covered investment.

[98] These tribunals relied heavily on the ordinary meaning of the adjective "full", full protection and security, contextual (and historical) proximity to the standard of fair and equitable treatment.

[99] The records of the case demonstrate the fulfillment of the obligation according with the elements of the FET standard by the receiving State as will be explained below:

[100] First, it has been established in the following criterion that the principle of good faith implies that "*the host state of the investment shall conduct itself in a consistent, unambiguous and transparent manner in its relations with the foreign investor*"<sup>20</sup>.

[101] In light of the principle of good faith established by international law, it obliges the Contracting Parties to treat international investments in a manner that does not affect the basic expectations that were taken into account by the foreign investor in making the investment.

[102] In this regard, in 2009, Mekar enacted the Emergency Recovery Act of 2009, which authorized large-scale privatization of state-owned enterprises and rescinded bailout proposals. As the IMF cut Mekar's growth forecast by 2.8 percent for 2009, the Ministry of Finance issued a policy paper designating the telecommunications company MTS, the state-owned railway, Mekar Lines, and Caeli Airways as suitable for privatization.<sup>21</sup>

[103] In addition, to inspire investors confidence, the new legislature revised the Mekar Restrictive Trade Practices and Monopoly Act in 2009 and the Competition Commission of Mekar ("CCM"), fully independent of the State, was established.

[104] In this context, in January 2010 a decree was issued authorizing the privatization of Caeli Airways, given its precarious situation.

[105] Vemma submitted its bid for the purchase of Caeli on 23 November 2010, the proposal envisaged *inter alia* fleet renewal and expansion, as well as route expansion. Vemma also promised to sign leasing contracts for Boeing 737 aircraft on favourable terms and secure Caeli Airways' membership in the Moon Alliance.

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<sup>20</sup> Tecmed (2003), ¶ 154.

<sup>21</sup> SUF, ¶ 985

[106] Caeli's contracts with Phenac International Airport would be lucrative to any investor, because the repair and storage facilities at Caeli's disposal were the largest of any airline currently operating out of Phenac International, the largest airport in Mekar.

[107] Under these conditions Vemma's bid was successful, and on 5 January 2011, Vemma acquired an 85% stake in Caeli Airways. Mekar maintained 15% ownership through Mekar Airservices Ltd.

[108] Under these conditions on January 5, 2011, Vemma's tender valued at 800 million USD was successfully accepted. The CCM approved the acquisition of Vemma with an 85% stake in Caeli Airways, the remaining 15% of the shares belonging to the state of Mekar through Mekar Airservices Ltd. In respect of the alliance, the CCM noted that Caeli's partnership with Moon Alliance members would enable the airlines to offer new and improved services, as well as low-cost services due to economies of traffic density, boosting consumer welfare.

[109] The Claimant states that on 9 September 2016, the CCM indicated its intention to investigate whether Caeli had adopted predatory pricing strategies with the aim of hindering competition on the domestic market. Also, the CCM did not investigate any other airlines alliance members active in Mekar, alone or in combination.

[110] The Claimant also points out that expects the host State to act consistently, free of ambiguities and with full transparency in its relations with the foreign investor, so that it can know each and every one of the rules and regulations that will govern its investments, as well as the goals of the relevant administrative or directive policies and practices, to be able to plan the investment and comply with said regulations.

[111] Despite the arguments above, the claimant fails to consider that, at the moment when the CCM approved Vemma's bid, also sought an undertaking from Caeli that it would not engage in high-level co-operation on competition parameters such as

prices, schedules, capacity, facilities, and other sensitive information with Moon Alliance members, which was duly submitted.

[112] Also, Vemma omitted the opinion of select members of Mekar's Committee on Reform of Public Utilities who noted that Vemma's proposal relied on an overly optimistic forecast which did not account for serious volatility of fuel prices and potential takeover of the long-distance routes by competitors.

[113] Likewise, in 2014, Mekar's representatives in Caeli asked Caeli to control the expansion it was carrying out to avoid exorbitant costs and, in addition, to apply capital to the debt and reduce the routes between Bonooru and Mekar, in which the greatest losses originated.

[114] Similarly, Vemma had prior knowledge of Mekar's political instability, and even the State of Bonooru was aware of this, since article 9.8 of CEPTA established as follows:

*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.*

[115] Thus, the obligation of the receiving State of the investment is limited to having effective mechanisms, that is, it imposes on the State the duty to provide a legal framework that guarantees investors effective resources for the realization and protection of their investments.<sup>22</sup>

[116] However, there is no obligation whatsoever to establish a certain way in which its judicial system is organized, it being sufficient that an adequate system of laws and institutions that function effectively be established.<sup>23</sup>

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<sup>22</sup> Case No. 062/2012.

<sup>23</sup> *Ditto*.

[117] This is corroborated even by the opportunity that the Claimant had to go before the internal courts of Mekar to appeal the imposition of fines issued at the conclusion of the first and second investigation by the CCM.

[118] On the other hand, it was the Claimants obligation to verify the way in which Mekar's judicial system is organized, having to examine the legal system as a whole and carry out a diligent analysis of the legal framework of their investment, prior to carrying it out, events that did not occur despite the multiple warnings of Mekar's representatives.

[119] It is important to establish that Mekar has not failed to comply with the principles of transparency and good faith because, as indicated, Mekar put all the elements and warnings for Vemma's consideration so that it would have the opportunity to fully understand both the social, legal and economic problems of the State.

**SECOND ISSUE. Mekar has failed to comply with the Full Protection and Security standard established in Article 9.9 of the CEPTA.**

[120] Article 9.9: Minimum Standard of Treatment, in its relevant part establishes:

*1. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7.*<sup>24</sup>

[121] As Wälde pointed out, the guarantee of full protection and security...

*would not only be violated by the abusive exercise of state power but also by the failure of the State to intervene when it could and should do so to protect the normal development of the investor so that his company develops (...) this obligation to use state power so that foreign investment develops normally, without suffering the political and economic attacks of the State.*<sup>25</sup>

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<sup>24</sup> (Cepta), p. 76.

<sup>25</sup> Wälde, 2004, p. 390.

- [122] In that regard, the Respondent has not failed to comply with the full protection and security standard – hereinafter, FPS – required by the Treaty, since contrary to what the Claimant says, Mekar complied with the commitments it offered to Vemma.
- [123] It should be mentioned that the Claimant alleges lack of protection, pointing out that the Respondent's attitude has been changing and contradictory with respect to that initially adopted.
- [124] However, as United Nations Conference on trade and Development (UNCTAD) has even interpreted,<sup>26</sup> the rules must give rise to legitimate expectations and, in that sense, for there to be a security violation alleged by the Claimant, several assumptions must be established:
- [125] That the commitments are specific and personally adopted in front of the investor through a stabilization clause. Assumption that does not operate in the present dispute, since, as can be observed, there is no stabilization clause in the CEPTA, but, on the contrary, the right to modify the laws was established, despite affecting the investment or profit expectations.
- [126] That there are rules aimed at a particular investor with the specific objective of inducing investment. Element that is not fulfilled either, since the offer was not made to a single investor, but was made public, leaving Vemma among the investors with the greatest advantages and resulting the buyer of the shares in Caeli.
- [127] Therefore, an investor cannot have the legitimate expectation, as consequence of a specific commitment, that the existing regulation or laws will not be modified. The equity requirement should not be understood as the immutability of the legal framework but rather implies that changes are made in a fair, coherent, and predictable manner considering the circumstances.<sup>27</sup>

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<sup>26</sup> ICSID Case p. 448, February 3, 2006

<sup>27</sup> Case No. ARB/07/19.

- [128] Evolution is an intrinsic element of economic and legal life, so the fair and equitable treatment does not imply the stability of the legal and business framework.<sup>28</sup>
- [129] In this context, it can be observed that the changes made to the legal framework by the Respondent were not made with the intention of affecting Vemma's investment, but were due precisely to the economic circumstances that the State of Mekar was going through, such as the volatility of fuel prices, the country's economic crises, the depreciation of the currency, among others.
- [130] Situation that in no way can be taken as a lack of legal protection to Vemma, because for this to occur, that is, for changes in the regulations to violate the legitimate expectations of the investor, the regulatory measures must not have been reasonably foreseeable at the time of the investment.
- [131] However, from the beginning of the negotiations, Mekar's representatives warned Vemma about the political, social, and economic context that the State was going through, in addition to the fact that they even made recommendations regarding the investment, so that it would not be affected in the future, warnings that did not resonate the Claimant.

#### **PART FOUR: COMPENSATION**

##### **1. Mitigating factors regarding the compensation that may be appropriate in favor of Vemma.**

- [132] The compensation that Vemma requests is inappropriate because Mekar has never violated the BIT, or the CEPTA, or any other Treaty or investment principle, nor has it caused any damage or prejudice, but rather, as it has been proved, Vemma's detriment was due to his own decisions despite the warnings made since the beginning of the negotiations.

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<sup>28</sup> Case No. ARB/03/15.

- [133] Notwithstanding the foregoing, and for the undue case that this Arbitration Tribunal determines that this Respondent must pay compensation to the Claimant, the amount thereof cannot be based on the criterion of “fair market value”, nor on the principle that reparation should restore the situation that would have occurred if the act had not been committed, since it is not the commission of an unlawful act by Mekar.
- [134] This is so, since in this dispute there are extenuating circumstances in favor of Mekar that prevent the Claimant from receiving the compensation requested at fair market value.
- [135] These extenuating circumstances include the remote connection of the damage, the intervening or concurrent causes, the existence of concurrent fault by the investor and the principle of proportionality.
- [136] The remote connection of the damage implies that the causality between the wrongful or illegal act and the damage is close<sup>29</sup>. However, as can be seen from the facts and arguments established in previous sections, Mekar has not committed any wrongful or illicit act against Vemma and, on the other hand, in any case, the damages suffered by Vemma were caused by market forces and the special circumstances of volatility in the price of fuel, currency depreciation, and the socio-political instability of the State, which were known to the Claimant from the beginning of the negotiations.
- [137] Consequently, if the damage suffered by Vemma is not a direct cause of some wrongful or illicit act committed by the Respondent but, on the contrary, was derived from market forces in combination with the socio-political context of the State, it cannot be understood that there is a proximate causality between the wrongful act and the damages, therefore, if the connection of the damage is remote, this

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<sup>29</sup> Micula c. Rumania, Laudo de 11 de diciembre de 2013.

mitigating factor should be applied at the time of declaring the amount of compensation.

[138] The existence of concurrent fault by the investor (the Claimant) implies that the victim of the offense has not exercised due diligence in relation to its assets or rights<sup>30</sup>, or that the investor (the Claimant) has committed a serious wrongful act such as the violation of the laws of the receiving State.<sup>31</sup>

[139] In the present dispute it is clear that Vemma ignored the warnings of the Mekar's Committee on Public Utilities Reform (CPUR) at the beginning of the negotiations; and the recommendation of the representatives of Mekar Airservices regarding the volatility in the region, the control of the expansion to avoid exorbitant costs, the reduction of operations in the routes between Bonoory and Mekar, and the suggestion of injecting capital to benefit the debt.

[140] By acting contrary to said recommendations even having knowledge of the context and circumstances, Vemma failed to act with due diligence in relation to its assets and rights.

[141] Likewise, it is observed from the report of the first and second investigation carried out by the CCM against Vemma, that it violated Mekar's antitrust legislation in the form of predatory pricing resulting from low airfares and loyalty programmes.

[142] The Claimant engaged in anti-competitive behavior in conducting its business activities in Phenac International Airport. Specifically, abusing of its dominant position to extract significant additional privileges in terms of airport service fees, undercut ticket fares and pushed other competitors off the market.

[143] Therefore, it is evident that the Claimant violated Mekar's antitrust legislation, which translates into the commission of a serious offense, consequently, there is

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<sup>30</sup> Case No. 2016-39.

<sup>31</sup> Case No. ARB/06/11.

concurrent guilt on the part of the investor (the Claimant), which is considered an extenuating circumstance in favor of the Respondent.

[144] Thus, if in fact more than one mitigating factor has been configured in favor of Mekar, the compensation that, although undue, is established as payment for Claimant, should not be made in terms of fair market value as requested, but, on the contrary, these mitigating factors must be taken into consideration, being appropriate to determine that there is no amount that Mekar must pay to Claimant for said concept.

[145] Likewise, it should be noted that Claimant's exponential growth was never interrupted by Mekar's actions, but rather, as has been shown, said growth decreased as a consequence of the Claimant's own decisions, who was irresponsible by not attending the context and the recommendations that were timely made, therefore, there is no consequential damage or any loss of profit.

### **CONCLUSION OF THE SUBSTANTIAL PART**

[146] The Federal Republic of Mekar has not violated the CEPTA, has never violated the "fair and equitable treatment full protection and security" standard; and has provided a Non-Discriminatory Treatment compared to its national investors; furthermore, the lack of jurisdiction of this Arbitration Tribunal to settle the present dispute is confirmed, therefore, the present case must be dismissed and/or this Respondent must be absolved of the Claimants requests.

### **PRAYER FOR RELIEF**

[147] WHEREFORE, we respectfully request this ICSID Arbitration Tribunal:

[148] FIRST. To dismiss the present dispute since this Tribunal has no jurisdiction.

[149] SECOND. To declare that the Federal Republic of Mekar did not violate the “fair and equitable treatment”, nor the “full protection and security” standards, established in Article 9.9 of CEPTA, in the event this instrument is considered current and applicable.

[150] THIRD. To absolve this Respondent of paying the 700 million USD plus interest requested by the Claimant.