NINETEENTH ANNUAL
WILLEM C. VIS EAST INTERNATIONAL COMMERCIAL
ARBITRATION MOOT

MEMORANDUM FOR RESPONDENT

RUPRECHT-KARLS-UNIVERSITÄT HEIDELBERG

CASE REFERENCE: AIAC/INT/ADM-123-2021

ON BEHALF OF:	**AGAINST:**
JAJA Biofuel Ltd	ElGuP plc
9601 Rudolf Diesel Street	156 Dendé Avenue
Oceanside	Capital City
Equatoriana	Mediterraneo
RESPONDENT	CLAIMANT

MORITZ F. BÖBEL • LEA DEGER • NOËMI SIMON • ELENA STEGMANN • TOBIAS THOMER

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TABLE OF ABBREVIATIONS

Abbreviation	Explanation
AIAC	2021 AIAC Rules – Global Solution
Art.	Article
Artt.	Articles
cf.	*confer* (compare)
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980
CISG-online	Internet database on CISG decisions and materials, available at http://www.cisg-online.ch
DCL	Danubian Contract Law
ed.	edition
emph. add.	emphasis added
et al.	*et alii* (and others)
et seq.	*et sequens* (and following)
et seqq.	*et sequentes* (and following; more than one page/paragraph)
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
GCoS	CLAIMANT's General Conditions of Sale
ibid.	*ibidem* (the same place)
ICC	International Chamber of Commerce
infra	See below
MCL	Mediterranean Contract Law

Abbreviation	Explanation
MfC	Memorandum for CLAIMANT
No.	Number
NoA	Notice of Arbitration
NYC	Convention on the Recognition and Enforcement of foreign arbitral awards
p.	page
para.	paragraph
paras.	paragraphs
PO1	Procedural Order Number 1
PO2	Procedural Order Number 2
pp.	pages
Response	Response to the Notice of Arbitration
RSPO	Roundtable on Sustainable Palm Oil
supra	See above
Tribunal	Arbitral Tribunal
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules
UNIDROIT	International Institute for the Unification of Private Law
UPICC	Unidroit Principles of International Commercial Contracts

Abbreviation	Explanation
UTR	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
v	versus
Vorb.	Vorbemerkung (Intro to)
Vol.	Volume

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STATEMENT OF FACTS

The Parties to this Arbitration are ElGuP plc ("**CLAIMANT**"), based in Mediterraneo and JAJA Biofuel Ltd ("**RESPONDENT**"), based in Equatoriana (the "**Parties**"). CLAIMANT is one of the largest producers of RSPO-certified palm kernel oil. RESPONDENT is a well-established producer of biofuel and since 2018 part of the Ruritanian multinational conglomerate Southern Commodities.

The Arbitration relates to whether the Parties have entered into a sales contract for the delivery of 20,000t RSPO-certified palm oil *per annum* for the years 2021-2025 (the "**Sales Contract**").

2010 – 2018	Mr Chandra, representing CLAIMANT, and Ms Bupati, then representing Southern Commodities, concluded several contracts for the delivery of palm kernel oil.
Late 2018	Southern Commodities acquired RESPONDENT and transferred parts of its palm oil unit to RESPONDENT.
28/3/2020	At the Palm Oil Summit (the "**Summit"**), Ms Bupati, now representing RESPONDENT, and Mr Chandra considered a long-term contract under which CLAIMANT was to deliver RSPO-certified palm oil to RESPONDENT.
1/4/2020	RESPONDENT requested the documents for a contract under which it was required to deliver 20,000t *per annum* of RSPO-certified palm oil as considered at the Summit for the years 2021-2025.
9/4/2020	CLAIMANT signed the contractual documents that declared CLAIMANT's General Conditions of Sale ("**GCoS**") applicable and sent the documents to RESPONDENT. The accompanying email stated that Mediterranean law governs the Sales Contract as discussed at the Summit. The GCoS were not attached.
Early May 2020	RESPONDENT, that never signed or returned the documents, requested a list of acceptable banks for a letter of credit that it was required to open under the Sales Contract.
30/5/2020	RESPONDENT contacted several acceptable banks for quotations as to the terms for a letter of credit but never opened it.
30/10/2020	RESPONDENT terminated the negotiations with CLAIMANT via letter.
15/7/2021	CLAIMANT initiated the Arbitral Proceedings.

SUMMARY OF ARGUMENT

The Sales Contract that CLAIMANT alleges is a trick, a shadow on the wall. When the Arbitral Tribunal turns its gaze from the wall towards the light, it will find nothing of substance but rather CLAIMANT's attempt to recover its failing business at RESPONDENT's expense: CLAIMANT recently lost its largest customer due to its questionable business practices and the proven violation of ecological and ethical standards. Consistently, for a responsible company, RESPONDENT terminated negotiations with CLAIMANT before a single piece of paper was signed.

Part I: The Parties Did Not Agree on the Jurisdiction of the Arbitral Tribunal

CLAIMANT tries to drag RESPONDENT before an arbitral tribunal whose jurisdiction it did not agree to. The Tribunal lacks jurisdiction to hear the case because the Parties did not conclude a valid Arbitration Agreement. By choosing Mediterranean Law to govern the Sales Contract the Parties implicitly chose the same law to govern the Arbitration Agreement. The CISG applies to the Arbitration Agreement. Under this law, the Parties did not conclude a valid Arbitration Agreement. Even if the CISG does not apply, under MCL the parties did not validly agree on arbitration either. Even if Danubian Law governs the Arbitration Agreement, it holds invalid.

Part II: The Parties Did Not Conclude a Contract for the Delivery of Palm Oil

The Parties did not conclude the Sales Contract in 2020. As RESPONDENT did not have the intention to be legally bound, its email from 1 April 2020 is not an offer. Even if the Tribunal were to find that the email was an offer, CLAIMANT did not accept it: In its reply, CLAIMANT added a reference to the GCoS and ignored RESPONDENT's contractual condition to apply the UNCITRAL Transparency Rules ("**UTR**"). This materially changed RESPONDENT's offer. Thus, it constitutes a counteroffer. RESPONDENT did not accept this counteroffer: The request for a list of acceptable banks is not an acceptance. RESPONDENT also did not accept the counteroffer silently. The Parties did not conclude the Sales Contract.

Part III: The Parties Did Not Include the GCoS in the Alleged Sales Contract

CLAIMANT argues for the inclusion of the GCoS in the Sales Contract to circumvent the CISG's rules. CLAIMANT not only disregards the requirements of the GCoS to include standard terms in a contract but also failed to fulfill them: First, mere references do not suffice. Second, CLAIMANT did not meet the requirement—or its exceptions—to make the GCoS available to RESPONDENT. Third, RESPONDENT did not even have a reasonable opportunity to obtain awareness of the GCoS. Therefore, the Parties did not include the GCoS in the alleged Sales Contract.

ARGUMENT

PART I: THE PARTIES DID NOT AGREE ON THE JURISDICTION OF THE ARBITRAL TRIBUNAL

1 RESPONDENT requests the Tribunal to find that the Tribunal has no jurisdiction to hear the case. The Parties did—contrary to CLAIMANT'S submission [*MfC, paras. 1, 19 et seqq.*]—not conclude a valid Arbitration Agreement. Without a valid Arbitration Agreement, any award issued by the Tribunal is unenforceable under Art. V(1)(a) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**NYC**") [*cf.* SCHMIDT-AHRENDTS/SCHMITT, *p. 522*].

2 On 7 October 2021, the Parties chose the 2021 AIAC Rules – Global Solution ("**AIAC**") as the rules governing the Arbitral Proceedings ("**Proceedings**") [*PO1-II, p. 46*]. Pursuant to Rule 20.1 AIAC, the Tribunal has "[…] *the power to rule on its own jurisdiction including any objections with respect to the existence and the validity of the arbitration agreement* […]". This provision expresses the generally recognized competence-competence [*cf. Born, p. 1051*; *ICC Award 6515/1994*].

3 Mediterranean law governs the Arbitration Agreement [**I**]. Within Mediterranean law, the United Nations Convention on Contracts for the International Sale of Goods ("**CISG**") applies to the Arbitration Agreement [**II**]. Under the CISG, the Arbitration Agreement is invalid [**III**]. This result holds true, even if the CISG does not apply to the Arbitration Agreement and therefore either Mediterranean General Contract law ("**MCL**") or Danubian General Contract law ("**DCL**") applies [**IV**].

I. MEDITERRANEAN LAW GOVERNS THE ARBITRATION AGREEMENT

4 Mediterranean law governs the Arbitration Agreement. This follows from the application of the relevant conflict of laws provision: Art. V(1)(a) NYC. CLAIMANT is based in Mediterraneo, RESPONDENT is based in Equatoriana. Any award, whether on the costs of the Proceedings or on the merits, would have to be enforced in either state. As both states are member states of the NYC [*PO1-III(3), p. 47*], the Tribunal should apply Art. V(1)(a) NYC as the relevant conflict of laws rule [*cf. PO2-32, p. 52*].

5 According to Art. V(1)(a) NYC, a court may refuse recognition and enforcement of an award if the arbitration agreement is invalid under the law that governs the arbitration agreement. CLAIMANT might argue that this can only become relevant at the enforcement stage or in setting-aside proceedings because courts will not concern themselves with the validity of the alleged

Arbitration Agreement any sooner [*cf.* WOLFF/*Borris/Hennecke*, *Art. V para. 85*]. Instead of applying Art. V(1)(a) NYC, CLAIMANT proposes to apply a three-stage test [*MfC, paras. 2, 14*]: (i) express or (ii) implied choice of law, or (iii), if none, closest connection [*cf. Enka v Chubb, paras. 156 et seq.*]. This approach however does not apply here. The courts in both Danubia and Mediterraneo apply Art. (V)(1)(a) NYC to determine the law governing the arbitration agreement [*PO2-32, p. 52*]. Their approach to determine the law governing the arbitration agreement governs the process at the recognition and enforcement stage [*cf.* WOLFF/*Borris/Hennecke, Art. V para. 85*]. The Tribunal should follow courts, tribunals, and scholars to determine the law governing the Arbitration Agreement under Art. V(1)(a) NYC [*cf. Bevrachting v Fallimento*; *Ground Mace Case, p. 21 para. 51*; BORN, *p. 531*; WOLFF/*Wilske/Fox, Art. V para. 111*; SCHERER, *p. 668*; SCHWENZER/BEIMEL, *p. 52*]. Only by that, the Tribunal can ensure uniformity throughout the Proceedings. To prevent different courts from applying different laws to the same agreement, the Tribunal should follow the approach of the state courts at the seat of arbitration. They will apply their approach in a later stage of the proceedings.

6 Mediterranean law governs the Arbitration Agreement as per Art. V(1)(a) NYC. Art. V(1)(a) NYC provides for two steps: primarily, the Tribunal must recognize the Parties' agreement. If there is no indication of a (valid) party agreement, the law of the seat of arbitration applies as a default rule [*cf.* BORN, *p. 1051*; TARAWALI/GERARDY, *p. 213*]. Furthermore, Rule 13.5(a) AIAC confirms that primarily the parties' agreement determines the applicable law. All approaches give legal effect to the Parties' explicit or—in absence of such—implicit agreement [*cf. MfC, paras. 2 et seqq.*].

7 Mediterranean law governs the Arbitration Agreement because the Parties implicitly chose the law of Mediterraneo to govern the Arbitration Agreement [**A**]. The choice of seat in the GCoS does not qualify as an implicit choice of law [**B**].

A. THE PARTIES CHOSE THE LAW OF MEDITERRANEO IMPLICITLY

8 Mediterranean law governs the Arbitration Agreement as per the Parties choice of law. The Parties did not explicitly choose a law to govern the Arbitration Agreement [*cf. MfC, paras. 3 et seqq.*]. However, when the Parties chose Mediterranean law to govern the Sales Contract, they implicitly chose Mediterranean law to govern the Arbitration Agreement [**1**]. The UK Supreme Court recently confirmed the approach to apply the law of the main contract in its 2020 *Enka v Chubb* case [*Enka v Chubb*]. In this regard, the prerequisites to apply the

Validation Principle, an exception mentioned by *Enka v Chubb*, are not fulfilled [**2**]. Furthermore, applying the same law to the Sales Contract and the Arbitration Agreement serves the Parties' interest in an efficient decision-making process and is therefore reasonable [**3**].

1. The Parties Implicitly Chose Mediterranean Law to Govern the Arbitration Agreement

9 The Parties' choice of law for the Sales Contract extends to the Arbitration Agreement which is thus governed by the same set of laws. The Parties agree that Mediterranean law governs the Sales Contract [*PO2-33, p. 52*; *MfC, para. 77*]. According to scholars and jurisprudence, parties generally want the law of the main contract to govern their arbitration agreement [*cf. BCY, paras. 51-54, 62-64*; *ICC 6752*; *Sulamérica, para. 26*; REDFERN/HUNTER, *p. 166 et seq.*; BORN, *pp. 515, 581*; LEW/MISTELIS/KRÖLL, *pp. 107, 120*]. Anything else would be surprising [BRIGGS, *para. 14.39*].

10 CLAIMANT submits that the Parties did not want the choice of law for the Sales Contract to extend to the Arbitration Agreement which is part of the GCoS [*MfC, para. 15*]. CLAIMANT argues that "*Sales Agreement*" does not include the Arbitration Agreement because the Arbitration Agreement is a separate and independent conflict resolution contract [*MfC, paras. 15 et seqq.*]. Even if the Tribunal were to agree with this rather formalistic argument, it can be assumed that the Parties implicitly wanted the Arbitration Agreement to be governed by the same law. This is due to the following reasons:

11 First, the Arbitration Agreement is not completely independent from the Sales Contract. The fact that the acceptance of the contract entails the conclusion of the clause without any other formality [*cf.* DERAINS, *p. 16-17*]. To assume that an arbitration agreement included as a standard term will be governed by another set of law solely because it happens to be the arbitration clause is unreasonable [*cf.* REDFERN/HUNTER, *para. 3.12*].

12 The Parties' implicit choice of Mediterranean law is, secondly, further evidenced by the fact that the explicit choice of law of the Sales Contract was an individual agreement altering CLAIMANT's GCoS. If the Parties had included the GCoS—*quod non* [*infra, paras. 79 et seqq.*]—their Art. 9 GCoS would have provided for Danubia as seat of arbitration and Danubian law to govern "*this contract*" [*Exh. R4, p. 32*]. Under Art. 9 GCoS, the legal relationship would uniformly have been subject to Danubian law [*Exh. R4, p. 32*]. CLAIMANT now tries to convince the Tribunal that the Parties intended to give up this uniformity and to subject specific parts of their legal relationship—namely the Sales Contract—to another law [*cf. Exh. C4, p. 17*]. By

contrast, a reasonable person would have understood CLAIMANT's proposal of a deviating individual agreement to the effect that the Parties' entire legal relationship would from now on be uniformly governed by Mediterranean law [*Exh. C5, p. 18*]. Mediterranean law was not supposed to be added to but to change the choice of law clause in Art. 9 GCoS [*PO2-15, p. 50*].

2. The Validation Principle Mentioned in *Enka V Chubb* Does Not Apply

13 CLAIMANT refers to the 2020 *Enka v Chubb* case before the UK Supreme Court [*MfC, paras. 10 et seqq.*]. In this decision, the UK Supreme Court ruled on the law governing the arbitration agreement. In *Enka v Chubb*, there was neither a choice of law for the arbitration agreement nor an explicit choice of law for the main contract. Instead, the court applied the law of the seat as the law with the "*closest and most real connection*" [*Enka v Chubb, paras. 149 et seqq.*].

14 However, the UK Supreme Court explicitly emphasized that if there was a choice of law for the main contract, this law would also govern the arbitration agreement [*Enka v Chubb, paras. 53 et seq.*]. In this regard, the UK Supreme Court found that: "[…] *construing a choice of law to govern the contract as applying to an arbitration agreement set out in a clause of the contract* […] *avoids artificiality*." [*Enka v Chubb, para. 53(iv)*]. CLAIMANT and RESPONDENT explicitly chose a law governing the Sales Contract, namely Mediterranean Law [*Exh. C4, p. 17*; *Exh. C2, p. 12*]. Consequently, this principle applies here.

15 CLAIMANT cannot rely on the exception *Enka v Chubb* established: Under the Validation Principle, the UK Supreme Court held that the law of the main contract does not apply if there is (i) a clear intention of the parties to arbitrate and (ii) if a serious exists risk that the arbitration agreement would be invalid under the law of the main contract [*Enka v Chubb, para. 170(vi)*]. According to this principle, an arbitration agreement should be assessed under the law under which it is valid to respect the parties' intention to arbitrate [*Enka v Chubb, paras. 95 et seqq.*].

16 CLAIMANT submitted that the invalidity of the Arbitration Agreement is due to the applicability of Mediterranean Law [*MfC, para. 15*]. First, this is not true because the Arbitration Agreement lacks consent under any law [*infra, paras. 36 et seqq.*].

17 Second, if the Tribunal were to follow CLAIMANT's approach, the Tribunal can still not rely on the alleged clear "*intention to arbitrate*" [*MfC, para. 12*]. RESPONDENT did not want to submit its disputes with CLAIMANT to arbitration. In Ms Bupati's email on 1 April 2020, she told CLAIMANT that submitting to arbitration was a problem for RESPONDENT [*Exh. C2, p. 12*]. In Equatoriana there is a strong opposition to arbitration *inter alia* due to the lack of transparency [*ibid.*]. Therefore, Ms Bupati wanted to apply certain transparency rules. She

made it clear that without applying such transparency rules, RESPONDENT was not open to arbitration [*Exh. C2, p. 12*]. In its answer, however, CLAIMANT did not address RESPONDENT's concerns about this issue at all [*cf. Exh. C3, p. 13-16*; *Exh. C4, p. 17*]. Hence, this issue remained open during the entire negotiations. The Tribunal therefore cannot rely on a "*clear intention to arbitrate*". Rather, the Parties simply negotiated about arbitration. Those negotiations could have resulted in the alleged Arbitration Agreement. However, they did not because the Parties did not agree on the issue of transparency. Thus, the Parties never had a common intent to arbitrate.

18 Hence, the Validation Principle mentioned in *Enka v Chubb* does not apply. On the contrary, the main principle set up by the UK Supreme Court provides the Tribunal with guidelines. Since the Parties explicitly chose a law for the Sales Contract, according to the ruling of the UK Supreme Court, this law should also govern the Arbitration Agreement.

3. Reasonable Parties Prefer their Relationship to Be Governed by One Law

19 As CLAIMANT and RESPONDENT are reasonable parties, they intended to apply the same law to the Sales Contract and the Arbitration Agreement. Recent jurisprudence has shown that it is reasonable to assume that "[…] *parties intended the whole of their relationship to be governed by the same system of law*." [*Sulamerica, para. 11*; *cf. Cruz City, para. 8*; *Owerri Commercial v Diellel*]. In terms of the parties' consent, the arbitration clause is just another clause among many within the sales contract and the parties normally do not divide their consent as to the rules within one legal document [FLECKE-GIAMMARCO/GRIMM, *p. 49*].

20 Furthermore, applying the same law to the main contract as well as to the arbitration agreement supports the main advantages of arbitration: simplicity and speed [*cf.* BORN, *p. 2*]. Applying two different laws to one contract leads to unwanted complications of the procedure. One example are claims of damages that can arise from violations of the main contract as well as the arbitration agreement [BETANCOURT I, *p. 512*; BREKOULAKIS ET AL./*Baltag, p. 267*]. When different laws apply to those claims, potential damages would be subject to different prerequisites and calculation methods. Solving such complications is very time consuming and expensive especially because lawyers competent in all relevant jurisdictions would be required [*cf.* FERRARI/KRÖLL/*Graffi, p. 29*]. Applying the same law to the Sales Contract and the Arbitration Agreement therefore ensures the efficiency of the Proceedings. Therefore, the choice of law for the Sales Contract extends to the Arbitration Agreement as an implied choice.

B. THE CHOICE OF SEAT IS NOT AN IMPLIED CHOICE

21 The choice of seat is not an implied choice for the law governing the Arbitration Agreement. As CLAIMANT submits, according to the Doctrine of Separability, an arbitration agreement is a separate and independent agreement [*MfC, paras. 15 et seqq.*; FEEHILY, *pp. 356 et seq.*]. Therefore, applying Mediterranean law to the Sales Contract and Danubian Law to the Arbitration Agreement is theoretically possible. However, the Doctrine of Separability itself cannot be used as an argument that different sets of law must apply [*BCY para. 49*; BORN, *pp. 464, 476*; BETANCOURT II, *pp. 95, 96*; GREENBERG/KEE/WERAMANTRY, *p. 160*]. The Doctrine of Separability does not apply to determining the law governing the Arbitration Agreement. "[…] [*T*]*he fact that an arbitration agreement survives the demise of the main contract does not mean that the arbitration agreement and the main contract must be governed by distinct bodies of law*" [BERMANN, *p. 152*].

22 CLAIMANT submits that the Seat of Arbitration *ipso iure* determines the law governing the Arbitration Agreement in absence of a Parties' choice. Even if the Tribunal were to find that there is no choice of Mediterranean law the alleged choice of Seat Danubia would not have that effect.

23 First, the fact that CLAIMANT has been told by its lawyer not to change the Seat of Arbitration [*PO2-15, p. 50*] is irrelevant. CLAIMANT gave RESPONDENT no indication that it did not intend to uphold the uniformity of the law governing their legal relationship. RESPONDENT rather could have expected that the proposed change of law also includes the Seat of Arbitration. Reasonable parties submit their entire legal relationship to one law that corresponds the seat of arbitration [*supra, para. 19*]. In the past, this was CLAIMANT's corporate policy [*cf. PO2-15, p. 50*]. Even if CLAIMANT intended to change that policy, it gave RESPONDENT no indication thereof. By contrast, RESPONDENT justifiably assumed that the entire legal relationship was now to be governed by Mediterranean law. In RESPONDENT's view, this change of law was meant to obtain the former uniformity. Accordingly, this change includes the change of the Seat of Arbitration from Danubia to Mediterraneo.

24 This interpretation, under which the Parties chose Mediterraneo as Seat of Arbitration, is in line with two of the most fundamental principles of civil law: (i) the principle that individual agreements must obtain primacy over general terms [SCHWENZER/HACHEM/KEE, *para. 12.25*; SCHLECHTRIEM/SCHWENZER/*Schmidt-Kessel, Art. 8 para 67*] and (ii) the *contra proferentem* rule. According to the *contra proferentem* doctrine, the interpretation of an ambiguous term is

preferrable which works against the interest of the party that provided the wording [SCHLECHTRIEM/SCHWENZER/SCHROETER/*Schmidt-Kessel Art. 8 para. 47*]. CLAIMANT's case—that Danubian law governs the proceedings based in Danubia—rests on Art. 9 GCoS that provides for Danubia as Seat of Arbitration. If the Tribunal were to hold that the GCoS were included in the Contract, *quod non* [*infra, paras. 79 et seqq.*], the Parties deviated from the choice of Seat. Their individual agreement that the Sales Contract will be governed by the law of Mediterraneo shaped their legal relationship in a manner that extends to the Seat of Arbitration. The alternative for the Tribunal would be to consider is the unwanted coincidence of not corresponding systems of law that reasonable parties ought to avoid. Under the *contra proferentem* doctrine, the Tribunal must not allow CLAIMANT to rest its case on the ambiguity of its own proposal to change the law nor to rely on the mental reservation it may have had to leave the Seat of Arbitration untouched.

II. THE CISG APPLIES TO ARBITRATION AGREEMENTS

25 The CISG applies to the Arbitration Agreement as part of Mediterranean law. Contrary to CLAIMANT's submission [*MfC, para. 35*], arbitration agreements fall within the scope of application of the CISG. Although Art. 1 CISG refers to contracts of sale, scholars and jurisprudence almost uniformly apply the CISG to arbitration agreements [SCHLECHTRIEM/SCHWENZER/SCHROETER/*Schroeter, Vorb. zu Artt. 14-24 para. 50*; SCHWENZER/TEBEL, *p. 746*; PILTZ, *para. 2-128*; *Ground Mace Case, para. 35*]. The CISG itself presupposes its applicability by addressing the settlement of disputes in Art. 19(3) CISG and Art. 81(1) CISG [**A**]. Moreover, the CISG provides for a toolset that is suitable to govern not only the Sales Contract but the entire legal relationship uniformly [**B**]. Furthermore, the Tribunal should apply the CISG to the Arbitration Agreement to ensure a coherent interpretation throughout the Arbitral Proceedings [**C**].

A. ART. 19(3) CISG AND ART. 81(1) CISG MENTION ARBITRATION AGREEMENTS

26 In its submission, CLAIMANT only refers to Artt. 1-3 CISG when arguing that the CISG does not apply to arbitration agreements [*MfC, para. 36*]. However, CLAIMANT completely withheld that dispute resolution mechanisms are dealt with in Art. 19(3) CISG and Art. 81(1) CISG. These provisions refer to arbitration agreements, thereby showing that the CISG itself presupposes its applicability [SCHLECHTRIEM/SCHWENZER/*Schroeter, Intro to Arts. 14-24 para. 18*].

27 Art. 19(3) CISG states that "[*a*]*dditional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.*" [*emph. add.*]. Scholarship and jurisprudence agree that the term "*settlement of dispute*" encompasses both courts and arbitral tribunals [*PERALES VISCASILLAS/RAMOS MUNOZ, p. 1356*; *MÜKO/Gruber, Art. 19 Rn. 6*; SCHLECHTRIEM/SCHWENZER/SCHROETER/*Schroeter, Art. 19 para. 34*]. Art. 19(3) CISG provides that different terms relating to the settlement of disputes are considered to alter the terms of an offer materially. Corresponding party declarations would have to make such a clause an integral part of the contract [*Ground Mace Case, para. 35*; PILTZ, *para. 2-128*]. Characterizing such additions as a material alteration only makes sense if this clause is considered a part of the sales contract and thus governed by the CISG provisions on contract formation [SCHWENZER/TEBEL, *p. 746*]. If the CISG did not govern such clauses, an acceptance with the addition of a dispute resolution clause would not be an alteration of the original offer at all. Rather, the sales contract would be concluded in combination with an additional offer to conclude a dispute settlement agreement [*ibid.*]. Consequently, Art. 19(3) CISG mentioning dispute resolution clauses evidences that the CISG generally applies to arbitration clauses.

28 Art. 81(1) CISG confirms the result found above: Art. 81(1) CISG recognizes the principle of independence of some provisions of the contract. When the contract is avoided, clauses on the settlement of disputes might survive that avoidance [PERALES VISCASILLAS/RAMOS MUNOZ, *p. 1356*]. This provision would be superfluous, if arbitration agreements were not part of the sales contract and also governed by the CISG [*Ground Mace Case, para. 35*; BECKOGK/*Buchwitz, Art. 14 para. 27*; SCHWENZER/JAEGER, *p. 103*].

B. THE CISG PROVIDES FOR A TOOLSET THAT IS SUITABLE TO GOVERN THE CONCLUSION OF ARBITRATION AGREEMENTS

29 The CISG provides for a toolset that is suitable to govern the conclusion of arbitration agreements. Arbitration agreements should not be subjected to special requirements regarding their formation [PERALES VISCASILLAS/RAMOS MUNOZ, *p. 1367*; KRÖLL/MISTELIS/PERALES VISCASILLAS/*Perales Viscasillas, Art. 11 para. 13*]. The CISG sets uniform rules on the formation of a contract [FLECKE-GIAMMARCO/GRIMM, *p. 49*]. Both, arbitration agreements and sales contracts are achieved through the same means, offer and acceptance [*cf.* KRÖLL/MISTELIS/PERALES VISCASILLAS/*Perales Viscasillas Art. 11 para. 13*; PERALES VISCASILLAS/RAMOS MUNOZ, *p. 1367*]. Hence, if the CISG finds that the parties consented to

a sales contract it is not easy to conceive why the parties did not also agree on the arbitration clause within that contract [FLECKE-GIAMMARCO/GRIMM, *p. 49*]. To the parties, the arbitration clause is just another clause among many within the sales contract [*ibid.*]. Parties normally do not divide their consent as to the rules within one legal document [*ibid.*]. Thus, in a contract of sale both this contract and the arbitration clause are concluded by the same means [PERALES VISCASILLAS/RAMOS MUNOZ, *p. 1367*]. This position confirms the expectations of businesspersons dealing internationally [*ibid.*]. There is no practical need to involve another law besides the CISG.

30 Moreover, the procedural nature of arbitration agreements and their legal separability do not prevent the CISG's application. The procedural nature only implies that the arbitration agreement can be governed by its own law but does not necessarily have to be [SCHLECHTRIEM/SCHWENZER/SCHROETER/*Schroeter, Vorb. zu Artt. 14-24 para. 53*]. Contrary to CLAIMANT's submission [*MfC, paras. 36, 38*], the CISG itself decides autonomously which questions it covers, regardless of whether domestic laws characterize them as procedural and/or substantive in nature [SCHWENZER/TEBEL, *p. 745*]. Whether a matter is considered substantive or procedural may vary from jurisdiction to jurisdiction and may depend on the circumstances of a particular case [*CISG-AC No. 6, Comment 5.2*].

31 Furthermore, CLAIMANT submits that there is "[…] *wide jurisprudence around the world that the CISG is not suitable for the conclusion of arbitration agreements*." [*MfC, para. 36*]. Instead of citing case law, CLAIMANT only refers to scholarship. However, the cited scholars almost commonly agree that the CISG's rules on contract formation generally apply to arbitration clauses [SCHLECHTRIEM/SCHWENZER/*Schwenzer/Hachem, Art. 4 para. 11*; SCHWENZER/TEBEL, *p. 745*]. According to them, the CISG is not only suitable for but also intended to apply to dispute resolution clauses [SCHWENZER/TEBEL, *p. 745*]. Moreover, the authorities CLAIMANT refers to for arguing that arbitration agreements are only included within the "*sphere of application*" [*MfC, para. 39*] do not even mention arbitration agreements but only refer to the CISG's scope of application in general [*cf.* BELL, *p. 237*; FARNSWORTH, *p. 19*].

C. THE TRIBUNAL SHOULD APPLY THE CISG TO ENSURE A COHERENT INTERPRETATION THROUGHOUT THE ARBITRAL PROCEEDINGS

32 Furthermore, the Tribunal should apply the CISG to the Arbitration Agreement to ensure a coherent interpretation throughout the Proceedings. If an award were issued, CLAIMANT would need to enforce it in Equatoriana where RESPONDENT is based. An Equatorianian state court

will—in line with the jurisprudence in Equatoriana—interpret the Arbitration Agreement under the CISG [*PO1-III(4), p. 47*]. The court will assess as per Art. V(1)(a) NYC whether the award is based on a valid Arbitration Agreement before issuing an enforcement order. And whilst the Tribunal is not bound to the interpretation of the enforcement court, neither the Tribunal nor the Parties are interested in an award that is unenforceable. Accordingly, the Tribunal should adopt the position of the jurisprudence in Equatoriana and apply the CISG.

III. UNDER THE CISG, THE ARBITRATION AGREEMENT IS INVALID

33 Under the CISG, the Parties did not conclude a valid Arbitration Agreement. The Arbitration Agreement was not included in the alleged contract [**A**]. Furthermore, the Parties did not agree on the Arbitration Agreement [**B**].

A. UNDER THE CISG, THE ARBITRATION AGREEMENT WAS NOT INCLUDED IN THE ALLEGED CONTRACT

34 Under the CISG, the Arbitration Agreement was not validly included in the alleged contract. The alleged Arbitration Agreement is a clause in CLAIMANT's GCoS. The Arbitration Agreement could not have been included into a contract, as the Parties did not conclude a valid Sales Contract under Mediterranean law [*infra, paras. 46 et seqq.*]. This result is not changed by the Doctrine of Separability: The Doctrine of Separability is a legal fiction that becomes only virulent to save the arbitration clause if the contract is "*null and void*" under Art. 16(1) Model Law [*BCY*; BORN, *pp. 377-378, 405*; HOLTZMANN/NEUHAUS, *p. 480*; LEW/MISTELIS/KRÖLL, *pp. 102, 104*]. In the present case, there is no Sales Contract that could maybe become "*null and void*" because the Parties never concluded a contract in the first place [*infra, paras. 46 et seqq.*].

35 Even if the Tribunal were to find that the Parties concluded the Sales Contract, to bind the Parties the clause must have been validly included in the Sales Contract. The Parties did not validly include the GCoS [*infra, paras. 79 et seqq.*].

B. IN ANY EVENT, THERE WAS A LACK OF AGREEMENT REGARDING THE ISSUE OF TRANSPARENCY WHICH INVALIDATES THE ARBITRATION AGREEMENT

36 Even in the event the Tribunal were to find that the GCoS were validly included, the Arbitration Agreement was not. There was a lack of agreement that invalidates the Arbitration Agreement. RESPONDENT wanted to subject disputes to litigation because of the strong public opinion against arbitration in Equatoriana [*cf. Exh. C2, p. 12*]. As a well-established and sustainable company, RESPONDENT wanted to avoid being dragged into any scandal: RESPONDENT's

concern was that activist groups would blame it for a contractors' violations and accuse RESPONDENT of concealing everything in secret arbitral proceedings. Full transparency is crucial for RESPONDENT. CLAIMANT had recently been in the middle of a scandal due to its questionable relationship to ecological and ethical standards [*Exh. C1-5, p. 9*]. As soon as RESPONDENT learned about CLAIMANT's newest misconduct, revealed by the movie "*Saving Lucy*", it terminated all negotiations [*cf. Exh. C6, p. 19*], although the market price for palm kernel oil has increased by over 35% [*Market Price Palm Oil*].

37 Consequently, RESPONDENT demanded a dispute settlement mechanism providing for full transparency. RESPONDENT insisted on guaranteeing a level of transparency, for example by applying the UTR [*Exh. C2, p. 12*; *cf. Response-3, p. 25*; *Exh. R3-5, p. 31*]. Ms Bupati's wording "*at least*" [*Exh. C2, p. 12*] made the application of a transparency mechanism a legal condition for both, an Arbitration Agreement and the Sales Contract [*cf. infra, para. 62*]. CLAIMANT however completely ignored RESPONDENT's concerns. According to CLAIMANT's GCoS, the AIAC Rules were supposed to apply [*Exh. R4, p. 32*]. As per Rule 44 AIAC, the arbitral proceedings are kept confidential. They provide for no transparency at all. RESPONDENT never agreed to that.

38 Furthermore, the Parties also did not resolve this issue at a later stage of the negotiations. In her email on 3 May 2020, Ms Fauconnier made it clear that there were two more issues to be discussed [*Exh. R2, p. 30*]. One of them was the issue of transparency [*cf. Exh. C5-5, p. 18*]. In their subsequent phone call in early May 2020, the Parties merely agreed that the UTR have a different scope of application [*Exh. C5-5, p. 18*]. As RESPONDENT only mentioned the UTR as an example of what kind of rules it wanted [*Exh. C2, p. 12*], CLAIMANT had no reason to assume that RESPONDENT was suddenly open to arbitration. As the Parties did not agree, the Arbitration Agreement never came into existence.

IV. EVEN IF THE TRIBUNAL WERE TO FIND THAT THE CISG DOES NOT APPLY TO THE ARBITRATION AGREEMENT, IT REMAINS INVALID

39 Even if the Tribunal were to find that the CISG does not apply to the Arbitration Agreement, the Tribunal lacks jurisdiction. Under MCL, the Parties did not conclude a valid Arbitration Agreement [**A**]. Even if the Tribunal were to find that DCL governs the Arbitration Agreement, the Tribunal lacks jurisdiction as also under this law the agreement remains invalid [**B**].

A. EVEN UNDER MCL, THE ARBITRATION AGREEMENT IS INVALID

40 Under MCL, the Parties did not conclude a valid Arbitration Agreement. There has been no valid Sales Contract [*infra, paras. 46 et seqq.*]. The question whether the Parties concluded a contract is subject to the Law of Mediterraneo including the CISG. Even if MCL *excluding* the CISG governs the Arbitration Agreement, this holds true. As per Art. 2(1) Mediterranean Conflict of Laws Rules, which is a verbatim adoption of the Hague Principles, the question which law governs the Sales Contract is subject to the Parties' choice of law. The Parties agree that Mediterranean Law including the CISG governs the Sales Contract [*PO2-33, p. 52*]. Under this law, the Parties did not conclude a valid Sales Contract [*infra, paras. 46 et seqq.*]. The Arbitration Clause could not have been validly included. This is not changed by the Doctrine of Separability [*supra, para. 34*].

41 Even if the Tribunal were to find that a Sales Contract has been validly concluded, *quod non,* the Parties did not include the Arbitration Clause. Artt. 2.1.19 *et seqq*. MCL govern the question whether the inclusion of standard terms is valid. CLAIMANT submits that according to the Official Commentary on Art. 2.1.19 MCL a standard term in a separate document "[…] *may be admitted only if there exists a practice established between the Parties or usage to that effect*." [*MfC, para. 43*]. CLAIMANT made an express reference to the GCoS, hence a practice to substitute a reference is not needed [*Exh. C2, p. 12*; *Exh. C4, p. 17*; *Exh. R2, p. 30*]. This result is not changed by the fact that the reference is not contained in the offer itself [VOGENAUER/*Naudé, Art. 2.1.19 para. 13*].

42 CLAIMANT conceals that the standard terms' user is required to take reasonable steps to bring the content of the terms to the attention of the other party [VOGENAUER/*Naudé, Art. 2.1.19 para. 20*; EISELEN, *CISG-AC No. 13 para. 2.3*], because this requirement is not met. Furthermore the exceptions in which a mere reference to the terms is sufficient are not fulfilled in the present case: the GCoS are not widely used as CLAIMANT customized them and CLAIMANT did not expressly make clear that the terms are available upon request [*cf.* VOGENAUER/*Naudé, Art. 2.1.19 paras. 25, 26*]. CLAIMANT did not hand the terms over previously [*cf.* VOGENAUER/*Naudé, Art. 2.1.19 para. 27*; *Response-13, p. 27*].

B. EVEN UNDER DCL, THE ARBITRATION AGREEMENT REMAINS INVALID

43 Even under DCL, the Arbitration Agreement remains invalid. CLAIMANT opens its submission by assessing the conclusion of the Sales Contract under DCL [*MfC, paras. 20 et seqq.*]. However, the question whether the Parties concluded a contract is subject to the Law of

Mediterraneo including the CISG [*supra, para. 40*]. This holds true even if DCL governs the Arbitration Agreement since the Danubian Conflict of Laws Rules are also a verbatim adoption of the Hague Principles [*PO2-36, p. 53*]. Under this law, the Parties did not conclude a valid Sales Contract [*infra, paras. 46 et seqq.*].

44 In any case, under DCL, the Parties did not validly include the Arbitration Agreement in the Sales Contract. Under DCL, a reference to standard terms suffices to include them in the contract [*PO1-III(3), p. 49*]. However, individual agreements always prevail over standard terms [*PO2-35, p. 53*]. Thus, if there is a conflicting declaration of intent of the opposing party the standard terms are not included. Otherwise, the opposing party would have no chance to avoid clauses it does not agree with. RESPONDENT did not consent to the Arbitration Agreement as it was proposed. Hence, there was a lack of agreement due to which this term was not included [*supra, para. 36*].

V. CONCLUSION ON PART I

45 The Tribunal lacks jurisdiction to hear the case because the Parties did not conclude a valid Arbitration Agreement. By choosing Mediterranean Law to govern the Sales Contract, the Parties implicitly chose the same law to govern the Arbitration Agreement. The CISG applies to the Arbitration Agreement. Under this law, the Parties did not conclude a valid Arbitration Agreement. Even if the CISG does not apply, under MCL the Parties did not validly agree on arbitration either. Even if the Tribunal were to find that Danubian Law governs the Arbitration Agreement, it is still invalid.

PART II: THE PARTIES DID NOT CONCLUDE A SALES CONTRACT IN 2020

46 RESPONDENT requests the Tribunal to hold that the Parties did not conclude the Sales Contract in 2020. The Parties agree that the CISG governs the formation of the Sales Contract [*PO2-33, p. 52*]. CLAIMANT solely argues that the Parties have concluded the Sales Contract because in other proceedings, a competent tribunal did not grant CLAIMANT with damages from its former customer [*cf. PO2-14, p 49*; *MfC, paras. 57 et seqq.*]. As CLAIMANT therefore finds itself in a precarious position, it attempts to compensate for these losses through an alleged contract with RESPONDENT. However, RESPONDENT`s email from 1 April 2020 did not constitute an offer [**I**]. Even if the Tribunal were to find that the email constituted an offer, CLAIMANT altered the terms of this offer materially. Thus, CLAIMANT placed a counteroffer. RESPONDENT did not accept this counteroffer [**II**].

I. Respondent's Email on 1 April 2020 Was Not a Legally Binding Offer

47 RESPONDENT's email from 1 April 2020 is only an invitation to submit an offer, not a legally binding offer. To constitute an offer, Art. 14 CISG requires the offeror's proposal to be sufficiently definite and to indicate its intention to be bound in case of acceptance [*MfC, para. 79*; ACHILLES, *Art. 14 para. 2*].

48 RESPONDENT's proposal did not indicate its intention to be legally bound. Art. 8 CISG determines this intention [HONNOLD, *Art. 14 para. 134*]. As per Art. 8(2) CISG, the understanding of a reasonable person of the same kind as the other party is relevant to examine statements and conduct. From Ms Bupati's email from 1 April 2020 [**A**] and the negotiations between Ms Bupati and Mr Chandra at the Summit on 28 March 2020 [*MfC, para. 84*] [**B**], this reasonable person would have inferred that RESPONDENT did not have the intention to be legally bound.

A. Respondent's Email from 1 April 2020 Shows That It Did Not Have the Intention to Be Legally Bound

49 From RESPONDENT's email, a reasonable person would have inferred that RESPONDENT did not have the intention to be legally bound: First, RESPONDENT stated that it is "[…] *at least strongly interested in securing a long-term supply* […]" [*cf. Exh. C2, p. 12*]. A general interest in securing a long-term supply does not equate to the intention to be legally bound [*cf.* VURAL, *p. 129*]. RESPONDENT's addressed issues regarding the contract template and the issue of transparency further show that RESPONDENT was merely interested in concluding a contract and did not want to place a legally binding offer [*cf. Exh. C2, p. 12*]. RESPONDENT even explicitly

emphasized its need to discuss open issues by stating that Ms Fauconnier "[…] *will take care of further discussions, if any* […]" [*Exh. C2, p. 12*]. The fact that RESPONDENT used the term "*strong*" to describe its interest does not change this [*cf. Exh. C2, p. 12*]. After all, any interest remains a mere interest without legal weight.

50 Second, a contract usually comes into existence when parties sign the contractual documents. This is particularly the case because some states sanction violations of national form requirements [*Secretariat Commentary, Art. 10 para. 2*]. These sanctions can be issued against a party even if the contract itself is enforceable [*ibid.*]. Besides that, companies need contractual documents for evidence purposes, taxes, and customs [*cf. Exh. C5-23, p. 18*]. Therefore, RESPONDENT's request to prepare the contractual documents shows that the Parties are still in a preparatory phase. In contrast to CLAIMANT [*MfC, paras. 84 et. seq.*], a reasonable person would not infer RESPONDENT's intention to be legally bound from this inquiry. A reasonable person of the same kind as CLAIMANT would have understood RESPONDENT's email as part of pure contract negotiations.

B. THE NEGOTIATIONS AT THE SUMMIT SHOW THAT Respondent DID NOT HAVE THE INTENTION TO BE LEGALLY BOUND

51 The negotiations between Ms Bupati and Mr Chandra at the Summit show that RESPONDENT did not have the intention to be legally bound. At the Summit, on 28 March 2020, Ms Bupati and Mr Chandra agreed that Ms Bupati would get back to CLAIMANT within three days after she received management confirmation [*MfC, para. 84*]. CLAIMANT alleges that Ms Bupati came back to RESPONDENT within three days [*ibid.*]. This is wrong: Ms Bupati approached CLAIMANT on 1 April 2020, thus, *four* days after the Summit [*Exh.C2, p. 12*]. Therefore, the negotiations demonstrate that RESPONDENT did not have the intention to be legally bound. Thus, RESPONDENT's email on 1 April 2020 was not an offer.

II. EVEN IF THE TRIBUNAL WERE TO FIND THAT THE EMAIL WAS A LEGALLY BINDING OFFER, Claimant ALTERED THE TERMS OF THIS OFFER MATERIALLY

52 Even if the Tribunal were to find that RESPONDENT's email on 1 April 2020 was a legally binding offer, *quod non*, CLAIMANT did not accept this offer. CLAIMANT's reply contained additions and limitations in the sense of Art. 19(1) CISG. As these alterations were material, CLAIMANT did not accept the offer but placed a counteroffer [**A**]. RESPONDENT did not accept this counteroffer [**B**].

A. Claimant Did Not Accept the Offer but Placed a Counteroffer

53 CLAIMANT's reply altered the offer materially and constituted a counteroffer. CLAIMANT's reference to the GCoS is an alteration [**1**]. The alteration was material [**2**]. Additionally, CLAIMANT ignored RESPONDENT's contractual condition to apply the UTR [**3**].

1. The GCoS Altered RESPONDENT's Offer Materially

54 The Parties lack agreement regarding the GCoS. CLAIMANT altered the terms of RESPONDENT's alleged offer materially by referring to the GCoS in the contractual documents. As per Art. 19(2) CISG, every element not mentioned in the offer is an addition [KRÖLL/MISTELIS/PERALES VISCASILLAS/*Ferrari, Art. 19 para. 6*]. CLAIMANT submits that the GCoS did not alter the offer because RESPONDENT could not have been unaware of their application [*MfC, para. 92*]. CLAIMANT argues that RESPONDENT knew about the GCoS' application because the Parties mentioned them at the Summit [*MfC, para. 92*]. However, the Parties have only addressed the GCoS superficially [*PO2-13, p. 49*].

55 RESPONDENT did not know that CLAIMANT had always included the GCoS. Only Southern Commodities knew that contracts with CLAIMANT always included the GCoS [*cf. MfC, para. 92*.]. However, this fact is irrelevant because under the fundamental *principle of* ***separate corporate personality,*** a company—RESPONDENT—is an independent legal entity, separate from its shareholders—Southern Commodities—and other companies in the corporate group [*cf.* WILSON, *p. 126*; PICKERING, *p 481*; SEET, *p. 124*]. This principle applies to the attribution of knowledge [FLEISCHER/GOETTE/*Liebscher, para. 227*; WAGNER, *p. 247*]. The attribution of knowledge remains limited to the legal entity for which the agent worked while acquiring knowledge [WAGNER, *p. 247*]. Therefore, the knowledge about the Party Practice that Ms Bupati acquired for Southern Commodities is not attributed to RESPONDENT.

56 The principle of separate corporate personality applies especially considering the very circumstances of the present case [**a**]. Additionally, the principle of separate corporate personality still applies, regardless of whether the same natural person—namely Ms Bupati—is acting [**b**].

a. The Principle of Separate Corporate Personality Applies Especially in This Case

57 The principle of separate corporate personality applies especially in the present case. First, Southern Commodities and RESPONDENT employed different personnel: Only 10 out of 40 employees that worked at Southern Commodities' palm kernel oil unit were transferred to RESPONDENT [*cf. PO2-5, p. 48*]. Thus, Southern Commodities has not transferred a complete

business unit to RESPONDENT. Second, Ms Bupati took on a new function at RESPONDENT. At Southern Commodities, she was responsible for the purchase of palm kernel oil [*Exh. R3-2, p. 31*]. At RESPONDENT, she is now Head of Purchasing [*Exh. C2, p. 12*]. Third, as RESPONDENT produces palm oil-based biofuel and Southern Commodities produced palm kernel oil, the companies have different customers [*cf. Exh. C1-8, 9, p. 10*; *Response-18, p. 28*]. Lastly, RESPONDENT and Southern Commodities are located in different countries with different political climates [*Exh. R3-5, p. 31*]. Therefore, the companies must respond to different external influences. The Tribunal should thus apply the principle of separate corporate personality.

b. The Principle Of Separate Corporate Personality Still Applies, Although the Same Natural Person is Acting

58 The principle of separate corporate personality applies, regardless of whether the same natural person—namely Ms Bupati—is acting. Art. 79(1), (2) CISG define a general principle that attributes the knowledge of the debtor's employees to the debtor [SCHLECHTRIEM/SCHWENZER/*Schwenzer, Art. 79 para. 41*; *Coke Case, p. 7*; HONSELL/DORNIS, *Art. 40 para. 7*; STAUDINGER/*Magnus, Art. 79 para. 35*]. Knowledge is attributed to another company only if the agent acquires knowledge for more than one principal simultaneously [WAGNER, *p. 247*]. Ms Bupati never simultaneously acted for Southern Commodities and RESPONDENT [*PO2-2, p. 31*]. The companies furthermore never claimed to profit simultaneously from Ms Bupati. The fact that one company holds shares of the other does not make the employees of the subsidiary agents of the parent company [WAGNER, *p. 247*.].

59 Additionally, if knowledge were to move from one employer to another with the employee changing its position, employers would be purchasing knowledge in an uncontrolled manner. This would give rise to incalculable liability risks and affect confidentiality. Changing one's employer triggers a "reset" of the employee's knowledge. Therefore, RESPONDENT did not know that CLAIMANT always included its GCoS. Consequently, CLAIMANT's reference to the GCoS altered RESPONDENT's offer.

2. The Alteration of RESPONDENT's Offer Is Material

60 The alteration of RESPONDENT's offer is material: Scholarship and jurisprudence agree that the reference to general terms is a material alteration irrespective of whether they contain provisions on issues listed in Art. 19(3) CISG [SCHLECHTRIEM/SCHWENZER/SCHROETER/*Schroeter, Art. 19 para. 44*; *Italian Knitwear Case I, para. 22*; ACHILLES, *Art. 19*

para. 2; KRÖLL/HENNECKE, *p. 739*]. Even if the Tribunal were to regard the inclusion of general terms irrespectively of its specific provisions as non-material, the GCoS constitute a material addition. As per Art. 19(3) CISG, additional or different terms relating to the extent of one party's liability to the other and the settlement of disputes are considered to alter the terms of the offer materially. Art. 4 GCoS relates to the extent of one party's liability to the other [*NoA-20, p. 28*]. Art. 9 GCoS contains the Arbitration Agreement and concerns the settlement of disputes [*Exh. R4, p. 32*]. Thus, the presumption in Art. 19(3) CISG covers Art. 4 GCoS and Art 9 GCoS. As the Parties did not agree on the GCoS, CLAIMANT altered the terms of RESPONDENT's offer materially when it included the GCoS.

3. The Lack of Agreement on the UTR Prevented the Sales Contract's Conclusion

61 The lack of agreement on the issue of transparency prevented the valid conclusion of the Sales Contract. RESPONDENT made a consensus on the issue of transparency a condition for the contract [**a**]. However, the Parties failed to agree on applying the UTR [**b**], thus hindering the Sales Contract to come into existence.

a. RESPONDENT Made the Issue Of Transparency a Condition for the Sales Contract

62 RESPONDENT made solving the issue of transparency a condition for concluding the Sales Contract: At the Summit, CLAIMANT made it clear that agreeing on any other dispute resolution mechanism than arbitration would be very difficult [*Exh. C1-11, p. 10*]. By contrast, RESPONDENT demanded a dispute resolution mechanism providing for full transparency. The Parties came to no conclusion on this issue [*supra, paras. 36 et seqq.*].

63 Influential activist groups in Equatoriana are opposed to arbitration castigating its lack of transparency [*Exh. C2, p. 12*]. In its email RESPONDENT made it clear that it did not want to give this opposition room to attack RESPONDENT [*ibid.*]. Therefore, the Tribunal should not rely on CLAIMANT's submission that the issue of transparency does "[…] *in no way affect the Contract and its ability to be performed*" [*MfC, para. 95*]. RESPONDENT did everything that could reasonably be expected to ensure a standard of transparency. The Tribunal cannot render RESPONDENT's condition ineffective and must consider that any continuation of the Proceedings harms RESPONDENT's public image.

b. The Parties Did Not Agree on the Issue of Transparency

64 The Parties did not agree on the Issue of Transparency. As the agreement on that matter was a condition RESPONDENT validly imposed at the time it allegedly made its offer [*supra, para. 62*], the conclusion of the Sales Contract was impossible. Under the doctrine of party autonomy—

the CISG's main principle [KRÖLL/MISTELIS/PERALES VISCASILLAS/Kröll/*Mistelis/Perales Viscasillas, Intro. CISG, para. 18*]—the Parties may subject their legal relationship to any set of rules [GÜL, *p. 80*; WETHMAR-LEMMER, *p. 431*]. CLAIMANT presents the Tribunal with a formalistic argument that the UTR have a different scope of application [*MfC, para. 95*]. The Parties can however apply the material provisions of the UTR in the Arbitral Proceedings.

65 Contrary to CLAIMANT's submission [*MfC, para. 97*], RESPONDENT's request to "[…] *provide for some sort of transparency for example applying UNCITRAL's Transparency Rules."* is definite [*MfC, para. 97*]. This is because the UTR establish a certain level of Transparency. The Parties, in case they do not agree on the UTR, can thus ensure a comparable level of transparency.

66 In conclusion, even if the Tribunal were to hold that RESPONDENT placed an offer with CLAIMANT on 1 April 2020, the contractual documents CLAIMANT sent in return do not correspond with that offer. This is why RESPONDENT never signed them. It is unreasonable to assume that a business party like RESPONDENT would not sign and return contractual documents without good reason. CLAIMANT altered RESPONDENT's conditions regarding arbitration materially when it did not provide for an adequate transparency mechanism. This is why the contractual documents sent are a counteroffer.

B. Respondent DID NOT ACCEPT Claimant'S COUNTEROFFER

67 The Parties did not reach an agreement afterwards. RESPONDENT neither accepted CLAIMANT's counteroffer by silence [**1**] nor by conduct [**2**].

1. RESPONDENT Did Not Accept the Counteroffer Silently

68 RESPONDENT did not accept the counteroffer silently. According to Art. 9(1) CISG party practices displace the CISG [KRÖLL/MISTELIS/PERALES VISCASILLAS/*Perales Viscasillas, Art. 9 para. 4*]. Due to Art. 9(1) CISG, CLAIMANT submits that the Parties concluded the Sales Contract "[…] *following a process different to the one prescribed under the CISG*." [*MfC, para. 62*]. This is misleading. CLAIMANT tries to state that RESPONDENT's silence after receiving the contractual documents constitutes an acceptance [*cf. ibid.*]. However, Southern Commodities and CLAIMANT never established a corresponding practice [**a**]. Even if CLAIMANT and Southern Commodities established this practice, the practice is not binding for the relationship between CLAIMANT and RESPONDENT [**b**].

a. CLAIMANT and Southern Commodities Did Not Establish the Practice That Silence Amounts to an Acceptance

69 CLAIMANT and Southern Commodities have never established the practice to conclude a contract without signed contractual documents unless Ms Bupati objects to them within a week. Silence alone can only constitute an acceptance when it coincides with circumstances assuring the offeree's assent [*Secretariat Commentary, Art. 16 Example 16a*]. Although party practice can be such a circumstance [*Teta Case I, para. 13*; *Calzados Magnanni v Shoes General International, p. 2 para. 11*], there is no practice in the present case. As per Art. 9(1) CISG, practices are behaviors that occur with a certain frequency over a certain period of time [SCHLECHTRIEM/SCHWENZER/SCHROETER/*Schmidt-Kessel, Art. 9 para. 8a*]. CLAIMANT could not rely on the fact that Southern Commodities accepted offers silently. This is because CLAIMANT and Southern Commodities concluded approximately 35 contracts in which CLAIMANT explicitly accepted the offer using a signed version of the contract [*Exh.C1-5, p. 9*]. Southern Commodities only did not return a signed version five times [*Exh. R3-3, p. 31*]. There is no reason for the Tribunal to assume that in the case of the other five contracts, the contracts were valid from the beginning. Rather, the parties treated them as valid after they have been completely performed: The retrospective view CLAIMANT rests its argument on is irrelevant for the Sales Contract because the Parties never performed it. What CLAIMANT tries to frame as a practice is nothing but a mere exception of the actual practice.

b. The Alleged Party Practice Is Not Applicable

70 Even if CLAIMANT and Southern Commodities had established the practice that RESPONDENT's silence constitutes an acceptance, this practice is not binding. CLAIMANT submits that the Parties intended to follow the established practice [*MfC, para. 64*]. Art. 8 CISG determines the intention of parties [KRÖLL/MISTELIS/PERALES VISCASILLAS/*Zuppi, Art. 8 para. 1*]. CLAIMANT uses Art. 8(1) CISG and Art. 8(2) CISG as the legal standard [*MfC, paras. 64 et seqq.*]. Since CLAIMANT applies Art. 8(1) CISG in conjunction with 8(3) CISG, CLAIMANT in fact applies Art. 8(2) CISG. As per Art. 8(2) CISG, the understanding of a reasonable person of the same kind as the other party is relevant to examine statements and conduct. This reasonable person would neither assume that RESPONDENT had the intention to apply the practice established between Southern Commodities and CLAIMANT [**aa**] nor would the reasonable person assume that CLAIMANT had the intent to abide by the practice [**bb**].

aa. A Reasonable Person Would Not Assume That RESPONDENT Had the Intention to Apply the Practice

71 A reasonable person of the same kind as CLAIMANT would not understand RESPONDENT's conduct and its statement as an expression of its intention to apply the established practice. First, Ms Bupati's statement to "[…] *catch-up and re-establish* [*the*] *long lasting and successful business relationship* […]" [*cf. Exh. C2, p. 12*] is just a friendly phrase. While Ms Bupati may have seen her connection to Mr Chandra as a gateway to contract negotiations, CLAIMANT cannot tie legal relationships to the exchange of pleasantries. Contrary to CLAIMANT's submission [*MfC, para. 67*], a flippant remark cannot revive a party practice.

72 Second, at the Summit, Ms Bupati and Mr Chandra explicitly agreed to an extended period for RESPONDENT to open a letter of credit [*PO2-23, p. 51*]. From this agreement, CLAIMANT assumes RESPONDENT's intention to apply the party practice [*MfC, para. 67*]. However, this agreement was part of the former party practice [*PO2-23, p. 51*.]. This shows that the Parties deemed it necessary to explicitly agree on parts of the former party practice. Had they wanted and expected the party practice to continue, they would have agreed explicitly.

73 Third, the party practice cannot be attributed from Southern Commodities to RESPONDENT as a subsidiary. This follows from the principle of *separate corporate personality* [*supra, para. 55*]. The Tribunal should not make an exception of this bedrock principle simply because RESPONDENT hired Ms Bupati and replaced the previous CEO with Ms Lever and produced palm oil for biofuel [*MfC, para. 72*]. There is no legal basis for such an exception. Therefore, a reasonable person would not assume that RESPONDENT had the intention to apply the party practice.

bb. A Reasonable Person Would Not Assume That CLAIMANT Had the Intention to Apply the Practice

74 A reasonable person would also not assume that CLAIMANT had the intention to apply the party practice. CLAIMANT never reacted to Ms Bupati's statement regarding the re-establishment of a business relationship. CLAIMANT tries to derive its intent from Mr Rain's email on 9 April 2020 [*MfC, para. 70*]. CLAIMANT alleges that it "[…] *specifically pointed out to Ms Bupati that they would be deviating from one aspect of their established practice*" [*ibid*]. This is misleading: Mr Rain explicitly stated that "*Mr Chandra asked me to point out that in deviation from the* ***previous*** *practice established between Ms Bupati and Mr Chandra the sale will be governed by the law of Mediterraneo*." [*Exh.C4, p. 17, emph. add.*]. By explicitly speaking of

a previous practice, Mr Rain expresses that he is aware that the change of the contractor is a break in time, even if the acting persons have remained the same. Otherwise, CLAIMANT would have used the term "current practice" and have omitted the word "previous" already on 9 April 2020.

75 Contrary to CLAIMANT's submission [*MfC, para. 70*], the fact that CLAIMANT was not concerned about the missing contractual documents cannot refute this. If the Tribunal were to see this differently, it would unjustifiably reward CLAIMANT for its unreasonable expectations. In conclusion, the Parties did not intend to apply the Party Practice. The Tribunal cannot make an exception of Art. 18(1) CISG's principle that silence alone does not amount to acceptance.

C. Respondent Did Not Accept the Offer by Conduct

76 RESPONDENT did not accept CLAIMANT's counteroffer by conduct. Art. 8 CISG determines whether an act constitutes conduct equivalent to an explicit acceptance [*Insulating Material Case, pp. 10 et seq., MfC, paras. 68 et seq.*]. A reasonable person in CLAIMANT's position would not assume that RESPONDENT's inquiry about the names of the acceptable banks for the letter of credit evidences its intention to accept CLAIMANT's counteroffer. Only the actual opening of a letter of credit equals an explicit acceptance.

77 The *Magellan v Salzgitter Handel* case before the U.S. District Court for the Northern District of Illinois under the CISG supports RESPONDENT's argument. In this case, an Illinois' distributor negotiated with a German steel trader. *Salzgitter*, the steel trader, opened a letter of credit. This opening affected the relationship between the parties: The court held that the opening of a letter of credit amounts to an explicit acceptance [*Magellan v Salzgitter Handel, p. 2*]. Transferring this rationale to the present case, the Tribunal may not construe RESPONDENT's conduct as an acceptance. In contrast to the *Magellan v Salzgitter* case, RESPONDENT solely contacted several of the acceptable banks to get quotations as to the terms of the letter of credit [*PO2-23, p. 51*]. In fact, RESPONDENT did not open a letter of credit [*ibid.*]. Contacting the banks purely concerns the internal relationship between RESPONDENT and the banks because it is only a preparatory act for the actual opening of a letter of credit. The final selection of a bank was still pending. This does not make RESPONDENT's conduct equivalent to *Salzgitter*'s. The Tribunal should qualify RESPONDENT's conduct as a mere preparatory act.

III. Conclusion on Part II

78 The Parties did not conclude a Sales Contract in 2020. AS RESPONDENT did not have the intention to be legally bound, its email from 1 April 2020 is not an offer. Even if the Tribunal

were to find that the email was an offer, CLAIMANT did not accept it. In its reply, CLAIMANT added a reference to the GCoS and ignored RESPONDENT's contractual condition to apply the UTR. This materially changed RESPONDENT's offer. Thus, it constitutes a counteroffer. RESPONDENT did not accept this. The request for a list of acceptable banks is not an acceptance. RESPONDENT also did not accept the counteroffer silently.

PART III: THE PARTIES DID NOT INCLUDE THE GCOS IN THE ALLEGED SALES CONTRACT

79 RESPONDENT requests the Tribunal to find that even if the Parties concluded the Sales Contract, *quod non*, the Parties did not include the GCoS. Therefore, Art. 4 GCoS—which grants CLAIMANT an additional period to remedy a breach of contract—and Art. 9 GCoS—which contains the alleged Arbitration Agreement—did not become a part of the Sales Contract. CLAIMANT solely submits that the Parties included the GCoS because CLAIMANT tries to avoid litigation and wants to profit from the additional period in Art. 4 GCoS to remedy a breach of contract [*cf. NoA-21, p. 7*; *Exh. C1-11, p. 10*].

80 CLAIMANT argues that the Parties included the GCoS in the alleged Sales Contract based on two reasons: First, CLAIMANT refers to an alleged practice between the Parties [*MfC, paras. 104 et seqq.*]. Second, CLAIMANT submits that the GCoS were included under the provisions of the CISG [*MfC, paras. 113 et seqq.*].

81 However, the GCoS were not included because the alleged practice between CLAIMANT and RESPONDENT does not exist [*supra, paras. 70 et seqq.*]. Consequently, this practice cannot suffice to include the GCoS in the Sales Contract.

82 Moreover, CLAIMANT disregards the requirements to include standard terms in a contract under the CISG and unlawfully disadvantages RESPONDENT [**I**]. In addition, CLAIMANT's references to the GCoS are insufficient [**II**]. Further, CLAIMANT did not fulfill the requirement to make the GCoS available to RESPONDENT [**III**]. In addition, if CLAIMANT were to rely on the minority opinion—which allows to include standard terms via a mere reference and a reasonable opportunity to become aware of their content—even then CLAIMANT does not fulfill these requirements [**IV**].

I. Claimant DISREGARDS THE REQUIREMENTS TO INCLUDE STANDARD TERMS IN A CONTRACT UNDER THE CISG AND UNLAWFULLY DISADVANTAGES Respondent

83 CLAIMANT's approach to include the GCoS by mere reference [*MfC, para. 113*] fails to recognize the requirements to include standard terms in a contract under the CISG. CLAIMANT's submission would leave RESPONDENT with a disproportionate disadvantage. Artt. 14-24 CISG in conjunction with Art. 8 CISG govern the incorporation of standard terms [*MfC, para. 103*; SCHWENZER/HACHEM/KEE, *para. 12.05*; KRÖLL/MISTELIS/PERALES VISCASILLAS/*Ferrari, Art. 14 para. 38*; *Propane Gas Case, para. 25*; *Tantalum Powder Case II, para. 11*]. Contrary to CLAIMANT's assumption [*cf. MfC, para. 103*], these provisions provide for two requirements:

First, the user must make a reference to the standard terms in its offer. *Second*, the user must transmit the terms or make them available to the other party in another way. Jurisprudence in civil and common law jurisdictions [*Roser Technologies v Carl Schreiber, para. 22*; *Mansonville Plastics v Kurtz, para. 72*; *Shelving System Case, para. 44*; *Takap v Europlay, p. 14*; *Steatite Grinding Balls Case, para. 17*] as well as scholars [EISELEN, *CISG-AC No. 13, comment 2.4*; SCHLECHTRIEM/SCHWENZER/*Schroeter, Art. 14 para. 47*; HUBER/KRÖLL, *p. 311*] confirm both requirements. Thus, CLAIMANT cannot simply rely on its alleged contract acceptance to include the GCoS [*MfC, para. 113*]. Instead, CLAIMANT must have met both aforementioned requirements and carries the burden of proof [*infra, para. 95*].

84 If the Tribunal agrees to CLAIMANT's submission to include the GCoS by mere reference [*MfC, para. 113*], RESPONDENT is not protected from the risk of unknown standard terms. The rationale of the requirement to make the terms available is to protect the other party from the risks and disadvantages of unknown terms [*Machinery Case, para. 16*; FERRARI/KIENINGER/MANKOWSKI/*Mankowski*; *intro to Artt. 14-24 para. 28*]. CLAIMANT has never transmitted the GCoS to RESPONDENT [*MfC, p. 3*; *Response-13, p. 27*]. Ms Bupati only ever received the prior version of the GCoS in 2011 when she was still working for Southern Commodities [*PO2-18, p. 50*]. Currently, she does not have access to this first version [*PO2-18, p. 50*]. Additionally, Ms Bupati was not aware of the GCoS' content [*cf. Response-12, p. 27*]. Thus, RESPONDENT must be protected from the GCoS' possible risks and disadvantages. The requirement to transmit the terms to RESPONDENT is not a mere formality [*cf. MfC, para. 108*]. CLAIMANT disregards RESPONDENT's need for protection although CLAIMANT could have easily made the GCoS available to RESPONDENT.

II. Claimant's References to the GCoS Are Insufficient

85 CLAIMANT's references to the GCoS do not suffice. The Parties have no practice to apply the latest GCoS [**A**]. Additionally, CLAIMANT's explicit references to the GCoS were too late [**B**].

A. The Parties Have no Practice to Apply the Latest Version of the GCoS

86 Applying the latest version of the GCoS was at no time part of any practice. With an established practice, the offeror's reference to its standard terms can no longer be necessary [SCHLECHTRIEM/SCHWENZER/*Schroeter, Art. 14 para. 76*]. However, CLAIMANT still had to explicitly refer to the GCoS because no practice of any kind exists between the Parties [*supra, paras. 70 et seqq.*].

87 Even if the alleged practice between CLAIMANT and Southern Commodities is also binding here, applying the latest GCoS was not part of that practice. CLAIMANT disregards [*cf. MfC, paras. 104 et seqq*] the fact that to make the inclusion of standard terms part of a practice, the user must include the terms in the contracts that originally established the practice [*Tantalum Powder Case II, paras. 13 et seqq.*; *Industrial Equipment Case*; SCHLECHTRIEM/SCHWENZER/*Schroeter, Art. 14 para. 78*].

88 CLAIMANT did not include the latest GCoS in the respective contracts between CLAIMANT and Southern Commodities because CLAIMANT had never transmitted them. If the user modifies the terms' content and wants to include the revised version in future contracts, it must transmit that version to the other party [FERRARI/KIENINGER/MANKOWSKI/*Mankowski, intro to Artt. 14-24 para. 40*]. CLAIMANT changed the GCoS in 2016 [*Exh. C1-4, p. 9*] and in 2020 [*Exh. C1-13, p. 10*] but did not transmit the revised GCoS to Southern Commodities [*infra, paras. 95 et seq.*]. Thus, applying the latest GCoS never became part of the alleged practice. In consequence, CLAIMANT had to make an explicit reference to the GCoS.

B. ANY EXPLICIT REFERENCES TO THE GCOS WERE TOO LATE

89 CLAIMANT's explicit references to the GCoS were too late. The user must reference its standard terms before the acceptance of the contract [SCHWENZER/HACHEM/KEE, *para. 12.06*; HONSELL/DORNIS, *intro to Artt. 14 et seqq. para. 9*; *Dutch Plants Case I, para. 21*]. References, as part of the acceptance, do not suffice because then the parties cannot reach consensus about their inclusion [FERRARI/KIENINGER/MANKOWSKI/*Mankowski, intro to Artt. 14-24, para. 26*]. CLAIMANT argues that it made references to the GCoS in its email from 9 April 2020 and in the contract template attached to the email [*MfC, para. 122*]. Accordingly, CLAIMANT did not refer to the GCoS until it accepted RESPONDENT's alleged offer [*MfC, paras. 86, 122*]. CLAIMANT confirmed this: "*In this particular case, the **offeree**, as the user of the GCoS, introduces them by reference into the contract.*" [*MfC, para. 120, emph. add.*]. Consequently, CLAIMANT made its references too late. For this reason alone, CLAIMANT did not include the GCoS in the Sales Contract.

III. Claimant DID NOT FULFILL THE REQUIREMENT TO MAKE THE GCOS AVAILABLE

90 CLAIMANT did not fulfill the requirement to make the GCoS available to RESPONDENT because CLAIMANT did not transmit the GCoS [**A**]. CLAIMANT also cannot rely on any exceptions of the requirement to make the standard terms available [**B**].

A. Claimant DID NOT TRANSMIT THE GCOS

91 CLAIMANT never transmitted any version of the GCoS to RESPONDENT [**1**]. Any transmission of the GCoS to Southern Commodities is irrelevant [**2**]. Even if the transmission of the oldest version of the GCoS to Southern Commodities affects the case at hand, CLAIMANT in any case did not transmit the 2016 version of the GCoS to Southern Commodities [**3**].

1. CLAIMANT Never Transmitted Any Version of the GCoS to RESPONDENT

92 CLAIMANT never transmitted any version of the GCoS to RESPONDENT [*Response-13, p. 27*]. This is undisputed between the Parties [*MfC, p. 3*].

93 The fact that RESPONDENT did not object to the missing transmission after 9 April 2020 [*PO2-18, p. 50*] does not relieve CLAIMANT of its duty to transmit the GCoS. If the other party simply does not object to the missing transmission, the terms' user is still required to transmit the terms [MÜKO/*Gruber, Art. 14 para. 33*; *Italian Knitwear Case III, paras. 15 et seqq*]. Such a view is compelling as the CISG does not set out an obligation of the offeree to ask for the other party's standard terms [*Machinery Case, paras. 16 et seq.*; SCHLECHTRIEM/SCHWENZER/*Schroeter, Art. 14 para. 50*]. CLAIMANT never transmitted any version of the GCoS to RESPONDENT although CLAIMANT was required to do so.

2. Any Transmission of the GCoS to Southern Commodities is Irrelevant

94 The fact that CLAIMANT transmitted the GCoS' first version to Southern Commodities in 2011 [*Response-11, p. 27*] is irrelevant for the Parties' relationship. Southern Commodities and RESPONDENT are two different legal entities [*supra, para. 57*]. Therefore, the Tribunal should only focus on whether RESPONDENT received the GCoS, *quod non*.

3. CLAIMANT Did Not Transmit the 2016 Version of the GCoS to Southern Commodities

95 Even if the transmission of the oldest GCoS to Southern Commodities were relevant, CLAIMANT did not transmit the 2016 version of the GCoS to Southern Commodities. CLAIMANT repeatedly argues that Southern Commodities might have received the 2016 version [*MfC, paras. 45, 107, 108, 110, 123*] without providing any evidence for this assertion. However, CLAIMANT as the terms' user must prove that the requirements to include them are met [SCHLECHTRIEM/SCHWENZER/SCHROETER/*Schroeter, Art. 14 para. 168*; *MITEC Automotive v Ford Motor, para. 25*; *Pelliculest v Morton International*]. Therefore, CLAIMANT is obligated to present evidence that it transmitted the latest GCoS. Contrary to CLAIMANT's

assertion [*cf. MfC, para. 107*], the fact that Southern Commodities and CLAIMANT concluded eight contracts after the GCoS had changed in 2016 [*PO2-7, p. 48*] is no such evidence.

96 Moreover, CLAIMANT simply assumes that the standard terms are available to the other party at the time of contracting if they have previously been used between the parties [*MfC, para. 106*]. This does not only lack authority, but CLAIMANT also fails to fulfill its own prerequisite. For CLAIMANT's assertion to be true, CLAIMANT presupposes that the standard terms were previously included in contracts between the respective parties [*MfC, para. 106*]. As just the transmission of the 2016 GCoS is in dispute, CLAIMANT relies on a circular reasoning. All in all, CLAIMANT cannot prove the transmission of the 2016 version [*cf. MfC, para. 107*; *Exh. C1-4, p. 9*]. Consequently, the Tribunal must hold that CLAIMANT did not transmit the GCoS to Southern Commodities.

B. Claimant CANNOT RELY ON ANY EXCEPTIONS OF THE REQUIREMENT TO MAKE THE STANDARD TERMS AVAILABLE

97 CLAIMANT cannot rely on any exceptions from the above–mentioned requirement [*cf. supra, para. 83*] to make the standard terms available. Two exceptions lower the requirements to make the terms available [MAGNUS, *p. 321*; SCHLECHTRIEM/SCHWENZER/*Schmidt-Kessel, Art. 8 para. 58*]. First, the user does not have to make the terms available again if the other party is already aware of their content [*Spacers Insulation Glass Case*; EISELEN, *CISG-AC No. 13, comment 2.6*; SCHLECHTRIEM/SCHWENZER/*Schroeter, Art. 14 para. 46*]. Second, the same holds true when applying the standard terms is part of a party practice [*Tantalum Powder Case I, para. 41*; *Dutch-Italian Sales Contracts Case, paras. 33 et seqq.*; SCHWENZER/HACHEM/KEE, *paras. 12.13 et seq*]. CLAIMANT meets neither requirements: RESPONDENT was not aware of the GCoS' content [**1**]. Even if the alleged practice between CLAIMANT and Southern Commodities applied, the alleged practice does not replace the requirement to make the GCoS available [**2**].

1. RESPONDENT Was Not Aware of the GCoS' Content

98 CLAIMANT did not transmit the GCoS to RESPONDENT [*MfC, p. 3*] and no knowledge is attributed between Southern Commodities and RESPONDENT [*supra, paras. 55 et seq.*]. Therefore, CLAIMANT relies on the alleged awareness of Ms Bupati. However, Ms Bupati was not aware of the GCoS' content and CLAIMANT could not assume her awareness [**a**]. Ms Bupati was also not obligated to be aware of the GCoS' content [**b**].

a. Ms Bupati Was Not Aware of the GCoS' Content and CLAIMANT Could Not Assume Her Awareness

99 CLAIMANT cannot refer to Ms Bupati's alleged awareness to include the GCoS because she was not aware of the GCoS' content. Ms Bupati did not have the required actual und positive awareness of the GCoS' content [**aa**]. Furthermore, CLAIMANT could not justifiably assume her awareness [**bb**].

aa. Ms Bupati Did Not Have the Required Actual and Positive Awareness of the GCoS' Content

100 Ms Bupati was not aware of the GCoS' content. If the terms' user wants to rely on the other party's awareness, the other party must be positively aware of the terms' content [*Spacers For Insulation Glass Case*; SCHLECHTRIEM/SCHWENZER/*Schroeter*, *Art. 14 para. 46*; MÜKO/*Gruber*, *Art. 14 para. 32*; MAGNUS, *p. 322*]. The decisive point in time is the moment the other party receives the contractual offer [*ibid.*]. Further, the terms' user must prove that the other party was positively aware [*ibid.*].

101 CLAIMANT fails to do so. Ms Bupati was not aware of the Arbitration Agreement in the GCoS while she wrote her email on 1 April 2020 [*Response-12, p. 27*]. When CLAIMANT argues that Ms Bupati was aware of the amendment simply due to a phone call in 2016 [*MfC, para. 110*] or because she concluded eight contracts including the amended GCoS [*MfC, para. 93*], CLAIMANT twists the facts of the case: the case file states in cold print that she was not positively aware [*cf. Response-12, p. 27*].

102 The same holds true for CLAIMANT's assumption that Ms Bupati must have been aware of the amendments to the GCoS simply because the Parties discussed all amendments at the Summit [*MfC, paras. 108, 121*]. In fact, Ms Bupati and Mr Chandra only discussed the change of the law governing the Sales Contract. They did not discuss the Arbitration Agreement in the GCoS [*Exh. C1-13, p. 10*; *Exh. C2, p. 12*; *Response-10, p. 26*]. CLAIMANT's statement that "[*o*]*ne can reasonably understand that Ms. Bupati had* ***knowledge of the content of the entire GCoS****, which largely remains unchanged*." [*cf. MfC, para. 93, emph. add.*] lacks evidence. Contrary to CLAIMANT's assertion [*cf. MfC, para. 107*], the fact that Ms Bupati and Mr Chandra signed approximately 40 contracts does not prove her present, positive awareness.

103 Moreover, CLAIMANT later contradicts itself by stating that "[…] Ms. Bupati was **likely** aware of all the GCoS' terms […]" [*MfC, para. 111, emph. add.*] and that "[…] *it cannot be excluded that Ms Bupati*, […], *does not know about the contents of the GCoS as it was sent to her*." [*MfC,*

para. 123]. CLAIMANT thereby concedes that it cannot prove her positive awareness. However, the mere possibility of the other party's awareness does not suffice [*cf. supra, para. 100*]. Ms Bupati did not have the required actual and positive awareness of the GCoS' content.

bb. CLAIMANT Could Not Justifiably Assume Ms Bupati's Awareness

104 Furthermore, CLAIMANT could not justifiably assume Ms Bupati's awareness of the GCoS to fulfill the requirement to make the GCoS available. In the case of constant business relationships, the circumstances of each case determine if the terms' user can assume the other party's awareness [SCHLECHTRIEM/SCHWENZER/*Schroeter, Art. 14 para. 59*]. The Parties did not maintain a constant business relationship in the first place [*cf. PO2-3, p. 48*]. Furthermore, the circumstances of the case prevent CLAIMANT from justifiably assuming Ms Bupati's awareness:

105 First, Ms Bupati's conduct showed CLAIMANT that she was not aware of the GCoS. In 2016, Mr Chandra informed Ms Bupati about the new arbitration clause which opts for a non-industry related arbitration institution [*MfC, para. 53*; *Exh. C1-4, p. 9*]. In her email from 1 April 2020, Ms Bupati proposed to select a non-industry related arbitration institution [*Exh. C2, p. 12*] although the GCoS already provided for such an institution. CLAIMANT must have understood Ms Bupati's email as proof that she was not aware of the new arbitration clause.

106 Second, even though Ms Bupati received the GCoS once, this had happened nine years before she met Mr Chandra at the Summit [*cf. Response-11, p. 27*]. The last time she had a closer look at the GCoS was seven years ago [*PO2-18, p. 50*]. To assume that a person remembers the specifics of every standard term he or she receives in his or her career is unrealistic. After all, Ms Bupati is a human, not a robot.

107 Third, Ms Bupati had no access to the pre-2016 copy [*PO2-18, p. 50*]. RESPONDENT cannot reasonably be held responsible for documents its employee received at a former employer nine years ago.

108 Finally, Ms Bupati and Mr Chandra—in contrast to their previous behavior [*cf. Exh. C1-2, p. 9*]—have not contracted for two years [*PO-2-8, p. 48*]. Therefore, CLAIMANT cannot justifiably expect Ms Bupati to remember the GCoS' content any longer. Consequently, CLAIMANT could not assume Ms Bupati's awareness.

b. Ms Bupati Was Not Obligated to Be Aware of the GCoS' Content

109 The fact that Ms Bupati was unaware must not be at the expense of RESPONDENT. Ms Bupati was not obligated to be aware of the GCoS' content. Nobody must remember the content of standard terms which never became legally binding [SCHLECHTRIEM/SCHWENZER/*Schroeter*, *Art. 14 para. 58*; *cf. Sour Cherries Case I, paras. 28 et seq.*]. CLAIMANT never transmitted the 2016 version of the GCoS to Southern Commodities [*supra, para. 95*] although CLAIMANT was required to do so [*supra, para. 88*]. Therefore, the latest GCoS never became legally binding. Thus, Ms Bupati was not obligated to be aware of their content.

2. The Alleged Practice Does Not Suspend the Requirement to Make the GCoS Available

110 Even if the alleged practice between CLAIMANT and Southern Commodities is also binding for the Parties, *quod non*, this practice does not suspend the requirement to make the GCoS available. Although practices can have the effect that it is no longer necessary to make the terms available [SCHLECHTRIEM/SCHWENZER/*Schroeter, Art. 14 para. 76*; *Tantalum Powder Case II, para. 14*; *Dutch-Italian Sales Contracts Case, p. 2*], CLAIMANT's alleged practice [*cf. MfC, paras. 107 et seq.*] does not have this effect. In the two cases which acknowledged a respective practice the standard terms' user transmitted the terms three respectively four times before the courts identified a practice which suspended the requirement to make the standard terms available [*cf. Dutch-Italian Sales Contracts Case, p. 2*; *Tantalum Powder Case II, para. 14*]. CLAIMANT can only prove that it transmitted the GCoS to Southern Commodities once [*cf. MfC, paras. 45, 107, 108*; *Response-11, p. 27*]. However, a practice requires more than just a single repetition of the relevant actions [FERRARI/KIENINGER/MANKOWSKI/*Saenger, Art. 9 para. 3*]. Thus, the alleged practice does not suspend the requirement to make the GCoS available.

IV. Claimant Does Not Even Fulfill the Requirements of the Minority Opinion on How to Include Standard Terms in Contracts

111 CLAIMANT can also not rely on a minority opinion to include the GCoS because RESPONDENT did not have the required reasonable opportunity to become aware of the GCoS. Contrary to the prevailing opinion [*supra, para. 83*], some argue that a mere reference combined with a reasonable opportunity to obtain awareness of the terms' content suffices to include them [*Vine Wax Case, p. 12*; *Gantry v Research Consulting Marketing, paras. 23 et seq.*; SCHLECHTRIEM/SCHWENZER/*Schmidt-Kessel, Art. 8 para. 59*]. CLAIMANT failed to meet those requirements. First, its references to the GCoS were insufficient [*supra, paras. 85 et seqq.*].

112 Second, RESPONDENT did not have a reasonable opportunity to obtain awareness of the GCoS' content. Such an opportunity exists if the other party can easily take notice of the terms [SCHLECHTRIEM/SCHWENZER/*Schmidt-Kessel, Art. 8 para. 60*]. CLAIMANT did not make the GCoS easily accessible on its website [*PO2-18, p. 50*]. If CLAIMANT was to refer to RESPONDENT's possibility to request a copy of the GCoS, CLAIMANT would construct an obligation the CISG does not set out [*supra, para. 93*]. Also, CLAIMANT could not rely on Ms Bupati's alleged awareness of the GCoS. She had no access to the pre-2016 or the current version of the GCoS [*PO2-18, p. 50*] and is not aware of their content [*supra, paras. 100 et seqq.*].

113 CLAIMANT argues that a reasonable opportunity to become aware of the terms exists if the parties have had prior agreement subject to the same terms [*MfC, para. 105*]. However, CLAIMANT omits the fact that the Parties had never concluded a contract before [*PO2-3, p. 48*]. Therefore, RESPONDENT did not have a reasonable opportunity to become aware of the GCoS. Under the requirements of both, the prevailing as well as the minority opinion, CLAIMANT failed to include the GCoS in the Sales Contract.

V. CONCLUSION ON PART III

114 CLAIMANT argues that the Parties included the GCoS in the Sales Contract to circumvent the CISG's rules. CLAIMANT not only disregards the requirements of the CISG to include standard terms but also failed to fulfill them: First, CLAIMANT's references were insufficient. Second, CLAIMANT did not meet the requirement—or its exceptions—to make the GCoS available. Third, RESPONDENT did not even have a reasonable opportunity to obtain awareness of the GCoS. Therefore, the Parties did not include the GCoS in the Sales Contract.

REQUEST FOR RELIEF

Based on the aforesaid, RESPONDENT respectfully requests the Tribunal to grant the relief set out herein below:

1) To declare that the Tribunal lacks jurisdiction to hear the case.
2) Alternatively, to declare that the Parties never entered into a Sales Contract in 2020 for the delivery of 20,000t *per annum* of RSPO-certified palm oil for the years 2020-2025 and
3) to declare that the GCoS were not included in that alleged Sales Contract.

On these grounds, RESPONDENT respectfully requests the Tribunal to dismiss all of CLAIMANT's claims and order CLAIMANT to bear the costs incurred in this Arbitration.

Heidelberg, 27 January 2022

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