ALBERT LUDWIG UNIVERSITY OF FREIBURG

Memorandum for CLAIMANT

On Behalf Of

Drone Eye plc
1899 Peace Avenue
Capital City, Mediterraneo
– CLAIMANT –

Against

Equatoriana Geoscience Ltd
1907 Calvo Road
Oceanside, Equatoriana
– RESPONDENT –

LEONARD HELBRECHT • CORDULA VON HEYL• CHRISTINE HOHENDORF • PAULINA KIEFNER
SONJA SOKO • JOHANN WIGGER • ANTONIA WINGLER • JANIS WINKLER

Freiburg, Germany

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%	Percent
Art./Arts.	Article
BGB	Bürgerliches Gesetzbuch (German Civil Code)
ch.	chapter
cf.	confer
ed.	editor/edition
et al.	et alii (and others)
etc.	et cetera
EUR	Euro, €
HGB	Handelsgesetzbuch (German Commercial Code)
Inc	Incorporation
LLC	Limited Liability Company
Ltd	Limited
No.	Number
NoA	Notice of Arbitration
p./pp.	page/pages
plc	Private Limited Company
para./paras.	paragraph
PO	Procedural Order
RNoA	Response to the Notice of Arbitration
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
v	versus
Vol.	Volume
vol. ed.	Volume editor

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CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980
Danubian Arbitration Law	Verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments
EC	Equatorianian Constitution
ICCA	International Commercial Contracts Act of Equatoriana, based on the UNIDROIT Principles of International Commercial Contracts 2016
ICSID Convention	Washington Convention on the Settlement of Investment Disputes
Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Conention")
PCA Rules	PCA Arbitration Rules 2012
Resolution IDI 1989	Resolution Institut de Droit International 1989
Swiss PILA	Swiss Private International Law Act of December 1987
ULIS	Convention Relating To A Uniform Law On The International Sale Of Goods

ULFC	Convention Relating To A Uniform Law On The Formation Of Contracts For The International Sale Of Goods
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2016
VCLT	Vienna Convention on the Law of Treaties

STATEMENT OF FACTS

The parties to this arbitration are Drone Eye plc [hereafter: CLAIMANT] and Equatoriana Geoscience Ltd [hereafter: RESPONDENT].

CLAIMANT is a medium-sized producer of Unmanned Aerial Systems [hereafter: UAS] based in Mediterraneo, whose systems are primarily used for geo-science exploration.

RESPONDENT is a private company entirely owned by the Ministry of Natural Resources and Development of Equatoriana [hereafter: Ministry]. RESPONDENT was set up in 2016 when the Government announced its "Northern Part Development Program" [hereafter: NP Development Program]. RESPONDENT's objective is to organize the exploration and possible development of expected natural resources in the Northern Part of Equatoriana as well as improving the infrastructure in that region.

In 2020, CLAIMANT and RESPONDENT [hereafter: Parties] entered into a Purchase and Supply Agreement [hereafter: Agreement]. It concerns the acquisition of six Kestrel Eye 2010 UAS [hereafter: Kestrel Eye] by RESPONDENT and the provision of maintenance services by CLAIMANT.

20 Mar 2020 RESPONDENT opens a tender process regarding the purchase of four state-of-the-art UAS for the collection of geological and geophysical data [*Exhibit C1, p. 9*]. Thereafter, CLAIMANT submits a successful bid [*NoA, p. 5, para. 5*].

Spring 2020 RESPONDENT enters into negotiations with two bidders: CLAIMANT and Air Systems plc [*Exhibit R1, p. 32, para. 3*]. The negotiations are led by Mr. Bluntschli, CLAIMANT's COO at the time [*Exhibit C3, p. 13, para. 2*], and by Mr. Field, RESPONDENT's COO at the time [*RNoA, p. 28, para. 8*].

Nov 2020 Due to the insolvency of a customer, CLAIMANT is able to make a better offer with a larger scope now including six drones under more favourable conditions [*NoA, p. 5, para. 5*]. As a result, RESPONDENT negotiates exclusively with CLAIMANT [*Exhibit R1, p. 32, para. 5*].

01 Dec 2020 The Agreement is concluded and signed by Ms. Queen, RESPONDENT's CEO, Mr. Cremer, CLAIMANT's CEO, and Minister Barbosa as representative for the Ministry of Natural Resources and Development in Equatoriana in an official signing ceremony [*Exhibit C2, pp. 10-12; Exhibit C3, p. 13, para. 4*].

Feb 2021 CLAIMANT launches the Hawk Eye 2020 [hereafter: Hawk Eye] [*NoA, p. 5, para. 10*]. Subsequently, the Parties renegotiate, which leads to RESPONDENT asking for an amendment of the Arbitration Clause [*Exhibit C7, p. 19, paras. 13-14*].

27 May 2021 The Arbitration Clause is amended on RESPONDENT's initiative, and now includes the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration [hereafter: UNCITRAL Transparency Rules] [*Exhibit C7, p. 22*].

03 Jul 2021 The journal "The Citizen" starts to publish articles in which corruption allegations are brought against officials involved in the NP Development Program [*Exhibit C5, p. 16*].

03 Dec 2021 The Prime Minister calls for early elections as a consequence of the public outcry following the published articles. These result in a new government [*NoA, p. 5, para. 11*].

27 Dec 2021 RESPONDENT informs CLAIMANT via email of a moratorium which the new government issued [*Exhibit C6, p. 17*].

30 May 2021 RESPONDENT terminates negotiations and declares that it no longer considers itself bound by the Agreement [*Exhibit C8, pp. 20-21*].

15 Jul 2022 CLAIMANT files for arbitration at the Permanent Court of Arbitration [*Letter Langweiler, p. 3*].

INTRODUCTION

The essence of this dispute lies within a simple maxim: *pacta sunt servanda*. In service of its previous government's interests, RESPONDENT signed the Agreement, RESPONDENT committed itself to the Arbitration Clause, and RESPONDENT cannot undo either, merely because it is now in service of a new government and its new interests. RESPONDENT *could* have rejected arbitration from the outset if it preferred domestic courts. It *should* have expressed a wish to exclude the CISG during the negotiations if it favoured its domestic sales law. Unfortunately, it only realized what it *would* have preferred after the time for such a change of heart had long been gone. Despite having knowingly and willingly agreed to the terms of the contract, RESPONDENT is now grasping at straws in an attempt to abide by its new government's agenda. However, the matter has long been decided by the Parties, regardless of any shift in political power. The Agreement was signed, the Arbitration Clause was explicitly included, and RESPONDENT is bound by its actions: *pacta sunt servanda*.

The Tribunal has jurisdiction as the Parties concluded a valid arbitration agreement. This is neither affected by any internal matters such as the proclaimed need for parliamentary approval nor by RESPONDENT's unsubstantiated allegations of corruption and misrepresentation. RESPONDENT's attempt to escape to the favouritism of Equatorianian domestic courts is, therefore, unsuccessful (**Issue 1**).

RESPONDENT cannot expect the Tribunal to stall the proceedings, especially not for the result of a criminal proceeding that has no proven connection to CLAIMANT or the Agreement. The delay that a stay or bifurcation would cause is unjustified, as no legal or factual grounds warrant such a measure (**Issue 2**).

To access favourable rulings of the Equatorianian Supreme Court, RESPONDENT is disputing the applicability of the CISG. Yet, the Parties chose Equatorianian law, of which the CISG is a part. The application of the CISG to the Agreement is not excluded under Art. 2(e) CISG, as the Kestrel Eye is not a means of transport and, thus, not an aircraft in the sense of this provision (**Issue 3**).

Lastly, RESPONDENT cannot rely on its domestic law to avoid the Agreement. The CISG governs the matter conclusively, leaving no space for RESPONDENT's domestic law. CLAIMANT offered a state-of-the-art drone that perfectly suits RESPONDENT's requirements and budget. Thus, lacking any fraudulent misrepresentation, there is no exception from the CISG's sole governance (**Issue 4**).

ISSUE 1: THE ARBITRAL TRIBUNAL HAS JURISDICTION TO HEAR THE DISPUTE

1 On 1 December 2020, CLAIMANT and RESPONDENT concluded the Purchase and Supply Agreement [hereafter: Agreement]. CLAIMANT immediately started production to deliver the drones from January 2022 onwards, as agreed upon by the Parties [*NoA, p. 5, para. 8; Exhibit C2, p. 10*]. However, after a new government took over in Equatoriana, RESPONDENT declared on 30 May 2022 that it did not consider itself bound by the Agreement, leading to the dispute at hand [*Exhibit C8, pp. 20-21*].

2 In Art. 20 of the Agreement, the Parties agreed that "Any dispute, controversy or claim arising out of or in relationship with the agreement, or the existence, interpretation, application, breach, termination, or invalidity thereof, shall be settled by arbitration." [hereafter: Arbitration Clause]. As late as 27 May 2021, the Parties added the following at RESPONDENT's request: "If the dispute, controversy or claim concerns an amount less than EUR 1,000,000, then it shall be submitted to arbitration under the UNCITRAL Expedited Arbitration Rules 2021. By contrast, if the dispute, controversy or claim concerns an amount equal to or larger than EUR 1,000,000, or where the amount concerned is unquantifiable, it shall be settled in accordance with the PCA Arbitration Rules 2012." [*Exhibit C9, p. 22*]. As the damages incurred by RESPONDENT's breach of contract are still unquantifiable [*NoA, p. 8, para. 24*], the Tribunal has jurisdiction to hear the dispute under the PCA Rules.

3 Contrary to RESPONDENT's point of view, the Tribunal does not need the approval of the Equatorianian Parliament to establish its jurisdiction (**A**). RESPONDENT's allegations of corruption and misrepresentation have no impact on the Tribunal's jurisdiction either (**B**).

A. Parliamentary Approval Is Irrelevant for the Tribunal's Jurisdiction

4 The approval of the Equatorianian Parliament is irrelevant for the Tribunal's jurisdiction. Under Art. 75 Equatorianian Constitution [hereafter: EC], in contracts concluded for administrative purposes, state entities may only submit to arbitration seated in a different state or with a foreign party with the consent of parliament [*RNoA, p. 30, para. 21*]. Since the Equatorianian Parliament did not formally consent to the Arbitration Clause, RESPONDENT claims that the Arbitration Clause is invalid [*RNoA, p. 30, para. 21*]. However, Art. 75 EC does not apply to the dispute at hand (**I**). Even if the Tribunal considered the provision applicable in principle, RESPONDENT would be estopped from invoking it to deny the Tribunal's jurisdiction (**II**).

I. Art. 75 Equatorianian Constitution Does Not Apply to the Dispute at Hand

5 Art. 75 EC does not apply to the dispute at hand. Restrictions on state-owned entities like the one in Art. 75 EC do not apply in international proceedings (**1**). Neither does it apply as a restriction on RESPONDENT's capacity to arbitrate under Art. 34(2)(a)(i) Danubian Arbitration Law or Art. V(1)(a) New York Convention [hereafter: NYC] as it only concerns RESPONDENT's subjective arbitrability (**2**). Lastly, the Agreement is outside the scope of Art. 75 EC in any case (**3**).

1. The Restriction on State-Owned Entities in Art. 75 Equatorianian Constitution Does Not Apply in International Arbitration

6 Restrictions on state-owned entities like the one in Art. 75 EC do not apply in international arbitration proceedings. As a general principle of arbitration, whether a state-controlled party can consent to an international arbitration agreement is not a matter governed by its own laws. The decision of the Cour d'Appel de Paris in *Gatoil v NIOC* [*CdA Paris 17 Dec 1991*] constitutes persuasive authority on this matter. *Gatoil*, a private Panamanian company and *NIOC*, an Iranian state-owned entity, concluded several contracts governed by Iranian law, including an arbitration agreement. After a dispute between the parties was settled by an arbitral tribunal, *Gatoil* filed an action to set aside the award based on the invalidity of the arbitration agreement, as *NIOC* lacked the necessary parliamentary approval required in Art. 139 of the Iranian Constitution. *Gatoil* argued that this was a matter governed by Iranian law.

7 The court rejected *Gatoil*'s claim on the grounds that in international arbitration proceedings, "the validity of the arbitration agreement must be reviewed exclusively with regard to the requirements of international public policy" [*emphasis added*]. The case concerned "international contracts entered into in order to satisfy the needs of, and in compliance with, the conditions of international trade". Thus, the arbitration agreement complied with international public policy, which is "not concerned with the conditions established by the national law in this field" [*CdA Paris 17 Dec 1991, as translated in Clay/Pinsolle/Voisin, p. 187*].

8 This principle has been codified and approved internationally by arbitral tribunals, courts and scholars [*Art. II European Arbitration Convention; Art. 177(2) Swiss PILA*; *Ad hoc 18 Nov 1983; ICC Case No. 6474; ICC Case No. 1939; Mitsubishi Motors v Soler Chrysler Plymouth, US Sup Ct 2 Jul 1985; Scherk v Alberto-Culver, US Sup Ct 17 Jun 1974; Bremen v Zapata, US Sup Ct 12 Jun 1972; CC 8 Jul 2009; CC 2 May 1966; CC 14 Apr 1964; CC 7 May 1963; CdA Paris 24 Feb 1994; CdA Paris 10 Apr 1957; Batiffol, CJTL, pp. 35, 40; Hanotiau, SAcLJ, p. 876; Fouchard et al., paras. 539-540; Lalive, CAPaPP, pp. 272-273; Chamlongrasdr, EBLR, pp. 277, 285; Fazilatfar, CityU LR, p. 303;*

Cheng/Entchev, SAcLJ, p. 948; Robert, RCDIP, p. 615]. Therefore, it "undoubtedly constitutes a general principle of international arbitration" [*Fouchard et al., para. 546*].

9 This principle applies in the case at hand. The validity of the Arbitration Clause is a matter of international public policy, which does not recognise domestic Equatorianian restrictions on RESPONDENT's ability to submit to arbitration. Consequently, Art. 75 EC does not apply.

2. Art. 75 Equatorianian Constitution Is Not Applicable Under Art. 34(2)(a)(i) Danubian Arbitration Law or Art. V(1)(a) NYC

10 RESPONDENT may argue that Art. 75 EC governs its capacity and, therefore, applies according to Art. 34(2)(a)(i) Danubian Arbitration Law, a verbatim adoption of the Model Law [*PO1, p. 43, III.3., para. 5*], or Art. V(1)(a) NYC. Under these provisions, a party's capacity to conclude an arbitration agreement is governed by the law applicable to it, i.e., the law of its incorporation or seat [*ICC Case No. 9899; ICC Case No. 7373; Sup Ct Lithuania 5 Mar 2007; Kapeliuk, MPEiPro, para. 3; Fouchard et al., para. 537; Lalive, CAPaPP, para. 137; Chamlongrasdr, EBLR, p. 277; Lew/Mistelis/Kröll, para. 6.50; Born, p. 774*]. Capacity refers to a natural or legal person's ability to conclude and be party to an agreement [*ICC Case No. 14203; Svenska Petroleum v Lithuania, EWCA 4 Nov 2005; UNCITRAL Secretariat, p. 135; Cheng/Entchev, SAcLJ, p. 945*].

11 However, Art. 75 EC does not govern the question of which parties have the capacity to participate in arbitral proceedings, but rather which disputes can be resolved by arbitration, i.e., the dispute's arbitrability. An arbitrable dispute relates to a subject matter which can be resolved by arbitration (objective arbitrability) and involves parties who are entitled to submit their disputes to arbitration (subjective arbitrability) [*CC 20 Dec 1993; Fazilatfar, CityU LR pp. 297, 300; Hanotiau, SAcLJ, p. 875; Lew/Mistelis/Kröll, para. 9.06; Mistelis/Brekoulakis/Mistelis, para. 1.6; Fouchard et al., paras. 532, 534; Kapeliuk, para. 3*].

12 By regulating subjective arbitrability through restrictions on its own ability to conclude an arbitration agreement and that of its entities, a state intends to prevent certain disputes from being brought before an arbitral tribunal, e.g., because it may distrust arbitration as an institution. Such regulations are, therefore, based on policy considerations. Contrarily, restrictions on legal capacity aim to protect vulnerable private parties, for instance in cases of insolvency or where a party is otherwise incompetent [*CC 20 Dec 1993; CC 14 Apr 1964; Binder, para. 7.018; Born, p. 768; Fouchard et al., paras. 539-540; Kapeliuk, paras. 1, 3; Mistelis/Brekoulakis/Mistelis, para. 1.15; Cheng/Entchev, SAcLJ, pp. 945-946; Batiffol, CJTL, p. 38; Drličková, ILR pp. 55-56; Chamlongrasdr, EBLR, pp. 276, 281; Audit, CILR, pp. 81, 93; Fazilatfar, CityU LR pp. 297, 300*]. Moreover,

self-imposed restrictions on subjective arbitrability can be waived at any time by the state on behalf of itself or its entities in case of a policy change. In contrast to that, defects in legal capacity go beyond the incapacitated party's control [*Cheng/Entchev, SAcLJ, p. 947; Audit, CILIR, p. 93*].

13 Accordingly, Art. 75 EC only imposes the restriction of parliamentary approval on arbitration agreements in administrative contracts [*RNoA, p. 30, para. 21*], that is, where the Equatorianian State has an increased public interest in their execution and judicial assessment. Thus, Art. 75 EC governs the dispute's arbitrability, not RESPONDENT's capacity. Consequently, Art. 75 EC cannot be applied under Art. 34(2)(a)(i) Danubian Arbitration Law or Art. V(1)(a) NYC.

3. The Agreement Does Not Fall Within the Scope of Art. 75 Equatorianian Constitution

14 In any case, the scope of Art. 75 EC does not extend to the Agreement. The provision states that "in contracts relating to public works or other contracts concluded for administrative purposes the State of Equatoriana or its entities may submit to arbitration only with consent of the respective minister. If the other party is a foreign entity or the arbitration is seated in a different state, Parliament has to consent to this submission" [*RNoA, p. 30, para. 21*]. So far, the existing case law only covers cases for the actual construction of infrastructure. There has been no decision on "preparatory" contracts [*PO2, p. 47, para. 29*].

15 The wording of Art. 75 EC itself prohibits an application to preparatory contracts. The Agreement, however, is a commercial sale of goods that can only be construed as preparatory work to any public works to be performed by RESPONDENT later. CLAIMANT's contractual obligation is only the delivery of the drones, it is not connected to any subsequent public works such as the exploitation of resources or the construction of infrastructure within the NP Development Program [*NoA, pp. 4-5, paras. 3-4; Exhibit C1, p. 9; Exhibit C2, p. 10*].

16 Such preparatory contracts cannot be considered public works or administrative contracts under Art. 75 EC, as, according to the wording, they can only be a subset of all contracts submittable to arbitration by state entities. The drafters opted to limit the statute to public works and administrative contracts. If this were meant to include preparatory contracts, one would be hard-pressed to come up with examples of contracts not requiring parliamentary consent. If the statute's drafters had intended this, they could have required parliamentary approval for all international arbitration agreements by state-owned entities. Thus, the wording of Art. 75 EC does not support an application to preparatory contracts. Accordingly, the Agreement falls outside of the scope of Art. 75 EC.

II. RESPONDENT Is Estopped from Invoking Art. 75 Equatorianian Constitution

17 Even if the Tribunal considered Art. 75 EC to be applicable in principle, RESPONDENT is estopped from relying on the provision to deny the Tribunal's jurisdiction. Pursuant to the doctrine of estoppel, a party that has created a legitimate expectation for the other party cannot later change its position simply because its interests have changed, especially if this would produce detriment to the other party [*Art. 7 CISG; Art. 1.8 ICCA; Art. 46 VCLT; Art. 42 ICSID Convention; ICC Case No. 14268; ICC Case No. 1939; ICC Case No. 1512; ICSID 6 Feb 2008; ICSID 27 Jul 2006; ICSID 20 Nov 1984; ICJ 15 Jun 1962; Davis v Wakelee, US Sup Ct 4 Mar 1895; Codrea, CESWP, p. 360; Fazilatfar, CityU LR, p. 293; Kotuby/Sobota, pp. 119-120*].

18 Consequently, it has long been established by tribunals, courts and scholars that a state entity is estopped from relying on domestic provisions in order to resist arbitration to which it has agreed [*Art. 5 Resolution IDI 1989; Ad hoc 18 Nov 1984; Ad hoc 14 Jan 1982; ICC Case No. 10623; ICC Case No. 7263; ICC Case No. 5103; ICC Case No. 4381; ICC Case No. 3896; ICC Case No. 3526; ICC Case No. 3493; ICC Case No. 3327; ICC Case No. 2521; ICC Case No. 2321; ICC Case No. 1803; ICC Case No. 1526; Trib PI Tunis 17 Oct 1987; Gatoil v NIOC, EWHC 21 Dec 1988; Redfern/Hunter, para. 328; von Mehren/Kourides, AJIL, p. 502; Wolff/Wilske/Fox, Art. V, paras. 103-104; Fazilatfar, CityU LR, p. 300, Lalive, CAPaPP, para. 138*].

19 Therefore, RESPONDENT, as a fully state-owned company [*RNoA, p. 27, para. 3*], is estopped from contesting the validity of the Arbitration Clause simply because its interests have changed. RESPONDENT created a legitimate expectation in the validity of the Arbitration Clause (**1**) and its change of position is detrimental to CLAIMANT (**2**).

1. CLAIMANT Had a Legitimate Expectation in the Validity of the Arbitration Clause

20 CLAIMANT had a legitimate expectation in the validity of the Arbitration Clause created by RESPONDENT's representatives (**a**) and the assurances of the Minister in charge (**b**), which must be attributed to RESPONDENT (**c**). Thus, RESPONDENT cannot invoke the Clause's invalidity now.

a. RESPONDENT's Representatives Created a Legitimate Expectation for CLAIMANT

21 RESPONDENT's representatives created CLAIMANT's legitimate expectation in the validity of the Arbitration Clause. RESPONDENT believed the parliamentary approval to be necessary and had asked the Ministry to approve the Agreement and arrange for parliamentary approval [*PO2, p. 47, para. 29*]. However, after the parliamentary debate had been called off, no efforts were made to hold another vote and gain the approval of Parliament [*PO2, p. 47, para. 30*]. Despite this, when RESPONDENT's COO, Mr. Field, was informed that CLAIMANT was under the impression that the

parliamentary approval was a mere formality and would not be an obstacle [*Exhibit R4, p. 35*], he did not object. Instead, RESPONDENT further affirmed CLAIMANT's expectation:

22 Firstly, RESPONDENT's CEO, Ms. Queen, signed the Agreement including the Arbitration Clause on 1 December 2020 at an official, formal signing ceremony together with the Minister [*Exhibit C2, p. 12*]. While the Agreement referenced the required approval of the Minister, parliamentary approval was not mentioned [*Exhibit C2, p. 10, Preamble*]. Secondly, RESPONDENT's CEO asked for an amendment of the Arbitration Clause on 27 May 2021 [hereafter: Amendment]. RESPONDENT made this request even after its discussions about avoiding the Agreement due to CLAIMANT's launch of the Hawk Eye [*Exhibit C7, paras. 13-14; Exhibit C9, p. 22*], i.e., when arbitral proceedings were already likely. Therefore, it can only be understood as a confirmation of the Arbitration Clause's validity.

23 Throughout this consistent conduct by RESPONDENT's legal representatives, CLAIMANT believed that the parliamentary approval could be granted retroactively, as it had been done before [*PO2, p. 47, para. 30*]. Thus, CLAIMANT had no reason to believe that RESPONDENT was opposed to arbitration proceedings or that the parliamentary approval was still a relevant issue, but instead had a legitimate expectation in the validity of the Arbitration Clause.

b. The Minister in Charge Reinforced CLAIMANT's Legitimate Expectation

24 The Minister in charge, Mr. Barbosa, further reinforced CLAIMANT's legitimate expectation in the validity of the Arbitration Clause. CLAIMANT is a foreign private company based in Mediterraneo that had never done any business in Equatoriana before the Agreement with RESPONDENT [*NoA, p. 4, para. 1; Exhibit C7, p. 18, paras. 3-4; Exhibit R1, p. 32, para. 7*]. While it was aware that RESPONDENT considered the approval necessary [*RNoA, p. 30, para. 22*], CLAIMANT did not have any insights into the internal political process of Equatoriana. Therefore, CLAIMANT had to rely on the assurances given by the Government and RESPONDENT as insiders regarding the legal and extra-legal conditions that had to be met. Any internal administrative liability that might arise concerning the Minister's conduct being perceived as *ultra vires* under Equatorianian law due to a lack of parliamentary consent [*RNoA, p. 28, para. 12*] is a purely domestic matter.

25 As Equatoriana's Minister in charge of the NP Development Program, within which RESPONDENT was founded and operated, Mr. Barbosa represented the Equatorianian State in matters concerning the contracts concluded within that program. Moreover, the Ministry fully owns RESPONDENT [*NoA, p. 4, para. 2*]. Mr. Barbosa not only has influence over RESPONDENT as the head of the Ministry, but also in his position as the chair of RESPONDENT's supervisory board, which selects the board of directors, approves the annual budget and must be involved in major

decisions [*PO2, p. 44, para. 5*]. Additionally, according to the statutes of RESPONDENT, contracts which involve a financial liability for RESPONDENT higher than EUR 25,000,000 must be signed by the Chairman of the supervisory board [*PO2, p. 48, para. 37*], i.e., Mr. Barbosa. Since he is integral in all financially and otherwise major decisions for RESPONDENT, CLAIMANT naturally placed its trust in his statements.

26 As Mr. Barbosa explicitly assured CLAIMANT that the parliamentary approval was merely a formality and would be obtained after the Christmas break [*Exhibit C7, p. 18, para. 9; Exhibit R4, p. 35*], CLAIMANT had reason to conclude that the appropriate internal political steps were taken to acquire the parliamentary approval.

c. The Minister's Assurances Must be Attributed to RESPONDENT

27 The Minister's assurances concerning the validity of the Arbitration Clause must be attributed to RESPONDENT as a state-owned entity. The participation of a state in international commerce through private state-owned entities should lead neither to discrimination nor to privileges for the state-owned entity [*Böckstiegel, Arb Int, p. 100; Audit, CILJR, p. 89*]. Consequently, a state-owned entity must decide whether to invoke provisions that apply due to its identity as a state entity and thereby acknowledge its connection to the state or forfeit any such privilege and be treated like a privately-owned company [*Audit, CILJR, p. 90*]. By invoking Art. 75 EC to deny the Tribunal's jurisdiction, a provision that exclusively applies to the Equatorianian State and its entities [*RNoA, p. 30, para. 21*], RESPONDENT chose to rely on the fact that it is fully owned by the state. Thus, it cannot be treated like a privately-owned company and must accept that the assurances of the Minister can be held against it.

2. RESPONDENT Changed its Position to the Detriment of CLAIMANT

28 CLAIMANT concluded the Agreement in the legitimate expectation of a neutral and enforceable method of dispute resolution. RESPONDENT's sudden attempts to withdraw from the arbitral proceedings two years later, which can only be attributed to the U-turn in Equatorianian politics, are a purely tactical move to bring the matter before the domestic courts to the detriment of CLAIMANT.

29 Firstly, CLAIMANT may lose access to a neutral dispute resolution if forced to sue RESPONDENT before Equatorianian state courts, which have a track record of deciding in favour of the state and its entities [*PO2, p. 46, para. 18*]. In contracts with a state-owned entity, an arbitration agreement enables the partner to ensure that the state will not at the same time be judge and party to a dispute [*Audit, CILJR, p. 77*]. Since RESPONDENT is fully owned by the Equatorianian State [*PO2,*

p. 44, para. 5] and part of the NP Development Program, which is of political importance and currently under public scrutiny [*Exhibit R2, p. 33*], neutrality cannot be guaranteed.

30 Secondly, CLAIMANT cannot be deprived of the reliable enforceability offered by the NYC. This Convention is globally recognized by a vast majority of states, including, Equatoriana, Danubia and Mediterraneo [*PO1, p. 43, III.3., para. 5; NoA, p. 4, paras. 1-2*]. Any state where enforcement of the award may be sought is, therefore, committed by international law to granting it. Reasons to refuse the recognition and enforcement of the award are limited to the ones in Art. V NYC. To deny CLAIMANT these unique benefits of arbitration would be a severe degradation of its legal position.

31 Since RESPONDENT created a legitimate expectation in the validity of the Arbitration Clause and changed its position to the detriment of CLAIMANT, it is estopped from invoking Art. 75 EC to deny the Tribunal's jurisdiction.

B. RESPONDENT's Allegations of Corruption and Misrepresentation Are Irrelevant to the Tribunal's Jurisdiction

32 RESPONDENT's allegations of corruption and misrepresentation are irrelevant to the Tribunal's jurisdiction. If the arbitrability of disputes could be obstructed or delayed by alleging corrupt practices or the misrepresentation of goods sold, this would create inappropriate incentives for parties seeking to evade arbitrations to which they had committed themselves. RESPONDENT's allegations, therefore, are not only unsubstantiated but also cannot affect the Tribunal's jurisdiction. The Arbitration Clause stands independently from the underlying contract (**I**) and has not been induced by corruption or misrepresentation (**II**).

I. The Arbitration Clause Stands Independently from the Agreement

33 The Arbitration Clause stands independently from the Agreement. In international arbitration, an arbitration clause has absolute legal autonomy and stands independently of the validity of the underlying contract. This doctrine of separability is broadly acknowledged by arbitral awards, case law and scholars [*Daesung v Praxair, HC Singapore 1 Jul 2019; Casa2 Stays v Delhi Prakashan Vitran, HC Delhi 6 Oct 2021; Tejswi Impex v R Tech Promoters, HC Delhi 15 Jul 2021; Sequedge Investment et al. v Lin Ming, HC Hong Kong 8 Mar 2012; Pacific International Lines v Tsinlien, HC Hong Kong 30 Jul 1992; Fung Sang v Kai Sun Sea, HC Hong Kong 29 Oct 1991; Ct App Sweden 17 Dec 2007; Redfern/Hunter, para. 2.96; Born, p. 376; Reithmann/Martiny/Hausmann, para. 7.294; Fouchard et al., para. 391*]. Moreover, the doctrine of separability is stipulated in the *lex loci arbitri* [*Art. 16(1) Danubian Arbitration Law; cf. Fung Sang v Kai Sun Sea, HC Hong Kong 29 Oct 1991*].

34 Art. 20 of the Agreement explicitly states that "questions relating to the validity of the contract" shall be submitted to arbitration [*Letter to Parties by PCA, p. 24*]. The Arbitration Clause therefore constitutes the basis for the Tribunal's jurisdiction, regardless of how RESPONDENT's allegations may affect the Agreement.

II. The Arbitration Clause Has Not Been Induced by Corruption or Misrepresentation

35 The Arbitration Clause has not been induced by corruption or misrepresentation. Since an arbitration clause stands independently from the underlying contract, a party's claim of the invalidity of an arbitration clause must be based on facts relating directly to the clause itself [*ICC Case No. 10329; ICC Case No. 4145; Fiona Trust v Privalov, UKHL 17 Oct 2007; BGer 2 Sep 1993; Crescent v NIOC, EWHC 4 Mar 2016; Huang/Lim, p. 63; Srinivasan et al., IJPLAP, p. 135; Böckstiegel lib am/Schlosser, p. 712; Stein et al./Schlosser, Art. 1040, para. 7*].

36 RESPONDENT claims that the Arbitration Clause was invalid since the underlying contract may be tainted by corruption or misrepresentation [*RNoA, p. 30, para. 20*]. However, there are no indications of misrepresentation or that any bribes were paid, neither for the Arbitration Clause nor the whole Agreement. Additionally, RESPONDENT reaffirmed its intention to include the Arbitration Clause when asking for an amendment on 27 May 2021 [*Exhibit C9, p. 22*]. Evidently, no bribes would have been needed as the Arbitration Clause corresponded to the will of both Parties. Consequently, RESPONDENT cannot demonstrate any form of bribery that would have influenced the Arbitration Clause. RESPONDENT's allegations of corruption and misrepresentation, therefore, do not impact the Tribunal's jurisdiction either.

CONCLUSION OF THE FIRST ISSUE

37 The Tribunal has jurisdiction to hear the dispute because the Parties concluded a valid Arbitration Clause. Art. 75 EC is not applicable in the dispute at hand. Even if it was, RESPONDENT is estopped from invoking the provision to deny the Tribunal's jurisdiction. RESPONDENT's allegations of corruption and misrepresentation do not impact the Tribunal's jurisdiction as they are unsubstantiated and do not relate directly to the Arbitration Clause. Therefore, the Tribunal has jurisdiction to hear the dispute.

ISSUE 2: THE ARBITRAL TRIBUNAL SHOULD DISMISS RESPONDENT'S APPLICATION FOR STAY OR BIFURCATION

38 In July 2021, the suspicion arose that Mr. Field, RESPONDENT's COO at the time, allegedly accepted payments for contracts he had negotiated [*Exhibit C5, p. 16*]. Thereafter, an Equatorianian public prosecutor began examining these contracts [*RNoA, p. 29, para. 15*]. Since Mr. Field had been involved in the negotiation of the Agreement with CLAIMANT as well [*RNoA, p. 28, para. 11*], RESPONDENT now alleges that the Agreement is also tainted by bribery. On this basis, it requests the Tribunal to stay or at least bifurcate the arbitral proceedings until any court proceedings are concluded [*cf. RNoA, pp. 30-31, para 23*].

39 According to Art. 17(1) PCA Rules "the tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and […] each party is given a reasonable opportunity of presenting its case. […] [I]n exercising its discretion, [it] shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process." On the one hand, the Tribunal is obliged to promote efficiency and, on the other hand, to ensure a fair trial. Thus, the greater the delay, the more substantiated the reasons must be for such a measure. Consequently, a delay must be warranted and based on concrete reasons [*Art. 17 PCA Rules*].

40 However, in the case at hand, there are neither legal (**A**) nor factual grounds for a delay (**B**). Additionally, a bifurcation does not constitute a suitable compromise (**C**).

A. There Are No Legal Grounds for a Delay

41 There are no legal grounds for a delay of the proceedings. The Tribunal can proceed without awaiting the end of the criminal proceedings (**I**), and continuing the arbitral proceedings as planned would not violate public policy (**II**). The Tribunal can, furthermore, address the allegations of bribery without relying on the outcome of any criminal proceedings (**III**). Finally, interrupting the arbitral proceedings would violate CLAIMANT's right of access to justice (**IV**).

I. The Tribunal Can Proceed without Awaiting the End of the Criminal Proceedings

42 The Tribunal can proceed without awaiting the end of the criminal proceedings. During parallel criminal proceedings, arbitral tribunals have full discretion to decide whether they deem a stay or bifurcation necessary and appropriate [*ICC Case No. 20952; ICC Case No. 20035; ICC Case No. 11961; ICC Case No. 11098; ICC Case No. 10983, ICC Case No. 9899, ICC Case No. 8459; BGer 19 Feb 2007; BGer 7 Sep 1993; CdA Paris 23 Mar 2002; De Ly/Sheppard,*

Arb Int, p. 32; para. 5.5; Mourre, Arb Int, p. 114; Mayer, Rev Arb, p. 111; Besson, ICC Dossiers p. 111]. The Tribunal has full discretion to decide if a stay or bifurcation is adequate.

II. Conducting the Proceedings as Planned Would Not Violate Public Policy

43 Conducting the proceedings as planned would not violate Equatorianian public policy. Public policy in the sense of Art. V(2)(b) NYC only includes the national law's most fundamental notions of morality, rather than any mandatory law [*Traxys v Balaji, FCA 23 Mar 2012; BGH 1 Feb 2001; BGH 15 May 1986; Ackermann v Levine, US Ct App 7 Apr 1986*]. Thus, only serious procedural errors which affect the integrity of the proceedings constitute a violation of public policy [*BGH 18 Jan 1990; Schreter v Gasmac, CoJ Ontario 13 Feb 1992*]. In Equatoriana, criminal court decisions are binding for civil courts, which leads to civil cases usually being stayed if their outcome depends on parallel criminal investigations [*PO2, p. 49, para. 46*]. This provision equals a former version of Art. 4 French Criminal Procedure Code. Based on this, the French Cour de Cassation dealt with an award in which the tribunal dismissed the respondent's request for a stay while parallel criminal proceedings were pending. It ruled that international arbitration is not bound by such domestic rules as it is autonomous, and that a stay would not violate public policy [*CC 25 Oct 2005; see also ICC Case No. 11961; ICC Case No. 7986; BGer 19 Feb 2007; BGer 7 Sep 1993; CC 15 Dec 1980; CC 25 Oct 1972; CC 17 Jul 1963; CdA Paris 23 Mar 2002*]. The same applies to the case at hand. In Equatoriana, civil proceedings are usually stayed until parallel criminal proceedings are concluded [*PO2, p. 49, para. 46*]. As the phrase "usually" implies that this practice is not obligatory for domestic courts, it does not constitute a mandatory law, let alone a fundamental notion of morality. Continuing the proceedings would not violate Equatorianian public policy.

III. The Tribunal Can Address RESPONDENT's Allegations Independently

44 The Tribunal does not depend on the Equatorianian investigations to address RESPONDENT's allegations. The Tribunal has the necessary means to address RESPONDENT's allegations (**1**). Further, RESPONDENT's right to present its case is respected (**2**).

1. The Tribunal Has the Necessary Means to Address RESPONDENT's Allegations

45 The Tribunal has the necessary means to address RESPONDENT's allegations. It can produce the relevant evidence to make an informed decision. According to Art. 27(3) PCA Rules, an arbitral tribunal may "require the parties to produce documents, exhibits or other evidence". If one party refuses to comply with the request, it must expect that this will be considered to its detriment in the decision [*ICC Case No. 20549; ICC Case No 19299; PCA 4 Sep 2020; PCA 22 Aug 2016; ICSID 28 May 2013; Mourre, Arb Int, p. 115*].

46 RESPONDENT alleges that CLAIMANT likely bribed Mr. Field during his time working for the former to conclude the Agreement [*RNoA, p. 30, para. 20*]. Accordingly, the potential pertinent evidence concerns the interactions between the Parties and can be provided by them at the request of the Tribunal. Compliance with this request is in the interest of both CLAIMANT and RESPONDENT as otherwise they risk an adverse award.

47 By examining the corruption allegations now, the Tribunal can rely on more accurate evidence. Over time, witness memories, as well as evidence, fade and get lost [*Hannich/Lohse/Jakobs, Art. 6 MRK, para. 26*]. This complicates the duty of the Tribunal to search for the truth. By examining the corruption allegations now, the Tribunal can rely on more accurate evidence.

48 In conclusion, the Tribunal has the necessary means to address RESPONDENT's allegations.

2. RESPONDENT's Right to Present Its Case Is Respected

49 RESPONDENT's right to present its case is respected. According to Art. 17(1) PCA Rules, an arbitral tribunal must ensure that each party has the right to present its case. Thus, it is necessary that the parties get sufficient time to prepare their case and to adduce evidence [*Balthasar/Solomon, p. 152, paras. 233-234; Poudret/Besson, p. 834, para. 910*]. However, "sufficient time" does not mean an indefinite period, but only a reasonable time [*Balthasar/Solomon, p. 152, para. 234; Wolff/Scherer, Art. V, para. 172; Mohtashami, DRI p. 130*]. By doing so, each party is entitled to provide evidence, appoint witnesses, and request the documents it deems necessary [*Art. 27(3) PCA Rules; PCA PO1 1 Apr 2019; ICSID 7 Feb 2020; cf. ICSID 6 Apr 2007; Daly et al., p. 101, para. 5.112*].

50 It is not necessary to await the outcome of the proceedings as RESPONDENT is, in either case, perfectly able to present its case. It can request the Tribunal to produce the documents and evidence it deems necessary. Additionally, it can provide evidence itself and appoint witnesses. Further, the question of whether the Agreement is tainted by corruption will be discussed in a hearing after the one scheduled for March 2023 [*PO1, p. 42, III 1*]. As the potential corruption became public in July 2021, RESPONDENT has had almost two years to gather and request evidence [*Exhibit C5, p. 16*]. Therefore, RESPONDENT had sufficient time and means to prepare and present its case.

IV. A Delay of the Proceedings Would Violate CLAIMANT's Right of Access to Justice

51 A delay of the proceedings would violate CLAIMANT's right of access to justice. Each party has the right to a timely decision to access effective judicial protection [*PCA 21 Dec 2020; Armstong v Manzo, US Sup Ct 27 Apr 1965; de Oliveira/Hourani/de Oliveira, p. 16; Cappelleti et al., RabelsZ, p. 676; Mohtashami, DRI p. 127; Redfern/Hunter, para. 5.23; cf. Gross, Ford L Rev, p. 2330*].

52 Waiting for a final conviction could lead to an indefinite delay of the proceedings. According to Ms. Fonseca, the investigations are supposed to be completed by the end of 2023 [*Exhibit R2, p. 33*]. The government promised that the court proceedings would take 6-7 months [*RNoA, p. 31, para. 24*], which, if not an empty promise, would raise serious doubts as to the independence of its courts. Therefore, the Tribunal cannot rely on the government's assurances regarding the expected duration of the proceedings. Also, the government's estimate does not account for a potential appeal which might adjourn a potential final conviction even further [*cf. PO2, p. 49, para. 47*]. Waiting for a final conviction could lead to an indefinite delay of the proceedings.

53 CLAIMANT needs legal certainty as soon as possible. The current situation is causing severe financial harm. The sale of six drones constitutes more than an entire year's turnover for CLAIMANT [*cf. NoA, p. 4, para. 1*]. As it had already customized three drones for RESPONDENT, it can only resell them with considerable price reductions [*NoA, p. 8, para. 23; PO2, p. 46, para. 24*]. CLAIMANT has continuous costs for its ongoing production [*cf. PO2, p. 45, para. 13*]. It needs legal certainty now. Justice delayed is justice denied. Delaying the proceedings would violate CLAIMANT's access to justice.

B. There Are No Factual Grounds for a Delay

54 There are no factual grounds for a delay as RESPONDENT does not provide any substantial allegations. According to Art. 27(1) PCA Rules, "each party shall have the burden of proving the facts relied on to support its claim". Therefore, RESPONDENT must prove that its allegations warrant a delay. When evaluating a request for delay, a tribunal should examine whether the allegations of the requesting party are substantial and likely to be accurate [*PCA 27 Jun 2018; PCA PO2 31 Jan 2018; PCA PO2 21 Apr 2017; PCA PO2 19 Apr 2017; ICSID PO3 7 Jun 2022; ICSID PO2 25 Feb 2022; ICSID PO2 26 Mar 2021; ICSID PO2 19 Oct 2020; ICSID PO3 28 Aug 2020; ICSID PO2 13 Aug 2020; ICSID 3 Aug 2020; ICSID PO3 17 Jan 2020; ICSID PO3 9 Oct 2019; ICSID PO3 5 Dec 2018; ICSID PO2 14 Dec 2017; Ad hoc 8 Jun 2009*].

55 Firstly, RESPONDENT relies on unproven corruption allegations by the Equatorianian prosecution. In a newspaper article the public prosecutor, Ms. Fonseca, alleged that she was able to prove Mr. Field's involvement in two cases of bribery [*Exhibit R2, p. 33*]. However, Mr. Field has neither been indicted nor convicted. The alleged corruption by Mr. Field is a mere unproven allegation incompatible with the presumption of innocence.

56 Secondly, the potential bribery cases that were discovered must be distinguished from the case at hand. Those contracts were concluded with small Equatorianian companies which were not able to provide the agreed-upon services [*Exhibit R2, p. 33*]. Furthermore, the companies were owned

by a cousin of Mr. Field [*Exhibit R2, p. 33*]. In contrast, CLAIMANT is a medium-sized company located in Mediterraneo [*NoA, p. 4, para. 1*] with no personal affiliation to Mr. Field. The potential bribery cases are not comparable, and no conclusion can be drawn about the Agreement.

57 Thirdly, RESPONDENT regards the changes in the Agreement's scope as an indicator of corruption [*RNoA, p. 28, para. 11*]. However, the final contract was very favourable for RESPONDENT. It saved more than EUR 10,000,000 in comparison to CLAIMANT's usual best price including maintenance [*Exhibit C2, p. 11; PO2, p. 46, para. 25; PO2, p. 47, para. 27*]. Even if Ms. Bourgeois assumption that additional maintenance costs would have to be spent [*PO2, p. 47, para. 27*] were correct, RESPONDENT would still save more than EUR 4,000,000. RESPONDENT's CEO, Ms. Queen, approved of these changes by signing the Agreement [*Exhibit C2, p. 12; Exhibit C7, p. 18, para. 8*]. She has been cleared from any corruption allegations [*PO2, p. 49, para. 44*]. Further, there is no indication of undue payments. CLAIMANT reviewed all payments made from its account to accounts in Equatoriana and found no indication of bribery [*Exhibit C3, p. 13, para 7*]. CLAIMANT had adopted clear ethical rules and an anti-corruption policy to prevent any illegal behaviour in its company [*PO2, p. 44, para. 3*].

58 Lastly, whether the results of the investigations are reliable is questionable. Ms. Fonseca has close entanglements with multiple individuals included in the investigations and the tender process. Her brother-in-law was the CEO of CLAIMANT's main competitor in the bidding process and due to the better offer from CLAIMANT not able to conclude a contract with RESPONDENT [*Exhibit R2, p. 33*]. Furthermore, Ms. Fonseca's future daughter-in-law is Ms. Bourgeois, who was Mr. Field's personal assistant [*Exhibit R2, p. 33*]. Only after the Equatorianian investigative journal "The Citizen" reported on these connections [*Exhibit R2, p. 33*] was Ms. Bourgeois removed from her position [*PO2, p. 49, para. 43*]. Ms. Fonseca's close relationships with different people involved in the Agreement raises doubts about her impartiality and therefore about the results of the investigation.

59 Thus, RESPONDENT does not provide any substantial allegations.

C. Bifurcating the Proceedings Is Not a Suitable Compromise

60 Bifurcating the proceedings is not a suitable compromise. Bifurcating the proceedings would be contrary to the Tribunal's duty to conduct efficient proceedings regarding costs and time. According to Art. 17 PCA Rules, the tribunal shall "avoid unnecessary delay and […] provide [for] an efficient process". This is supported by numerous tribunals [*PCA PO2 31 Jan 2018; PCA PO2 21 Apr 2017; PCA PO4 19 Apr 2017; ICSID PO3 7 Jun 2022; ICSID PO2 25 Feb 2022; ICSID PO3 1 Jun 2021; ICSID PO2 26 Mar 2021; ICSID PO2 19 Oct 2020; ICSID PO3 28 Aug 2020;*

ICSID PO2 13 Aug 2020; ICSID PO3 17 Jan 2020; ICSID PO3 9 Oct 2019; ICSID PO3 24 Jun 2019; ICSID PO3 5 Dec 2018; ICSID PO2 14 Dec 2017; ICSID 21 Jan 2015; ICSID PO8 22 Apr 2014; Ad hoc 8 Jun 2009].

61 However, a bifurcation would lead to the relevant witnesses being heard twice. The Tribunal would have to deal with the questions of whether CLAIMANT misrepresented the Kestrel Eye and whether there was corruption in separate hearings. Both questions concern the Agreement's conclusion. Thus, the Tribunal would have to question the individuals involved in this conclusion twice. This includes Ms. Bourgeois [*Exhibit R1, p. 32*] and RESPONDENT's CEO, Ms. Queen, who was in constant contact with CLAIMANT's CEO, Mr. Cremer [*Exhibit C2, p. 12; Exhibit C6, p. 17; Exhibit C8, p. 20*]. On behalf of CLAIMANT, the testimonies of Ms. Porter [*Exhibit C7, p. 18*] and Mr. Cremer are essential. Bifurcation would mean hearing them twice.

62 Further, both Parties chose arbitration to ensure efficient proceedings. RESPONDENT especially insisted on including the UNICTRAL Expedited Arbitration Rules in the Arbitration Clause [*NoA, p. 7, para. 16; Exhibit C9, p. 22*]. Shortly after, the Equatorianian Government emphasised that arbitration agreements by state-owned entities include rules which provide for cost efficient proceedings [*NoA, p. 7, para 16*]. Bifurcating the proceedings is not a suitable compromise.

CONCLUSION OF THE SECOND ISSUE

63 Taking all arguments into consideration, the Tribunal is respectfully asked to refuse RESPONDENT's request for a bifurcation or stay of the proceedings. There are no legal or factual grounds that would warrant a delay. On the contrary, an interruption of the proceedings would cause severe harm, as CLAIMANT's access to justice would be denied. Also, a bifurcation is not a suitable compromise as it only increases costs and constitutes undue delay. The Tribunal should therefore uphold its duty to provide efficient proceedings and continue them as planned.

ISSUE 3: THE PURCHASE AND SUPPLY AGREEMENT IS GOVERNED BY THE CISG

64 Following the new government's moratorium concerning all contracts in relation with the NP Development Program [*NoA, p. 5, para. 12*], RESPONDENT seems to expect an easier way out of the Agreement through Equatorianian domestic law. The Agreement, however, is governed by the CISG. Pursuant to Art. 1(1)(a) CISG, the CISG applies to contracts for the sale of goods between parties whose places of business are in different Contracting States. Both Parties are located in different Contracting States [*NoA, p. 4; PO1, p. 43, III.3, para. 1*]. The Agreement concerns the sale of Kestrel Eye drones, which are moveable and tangible. Therefore, the transaction between the Parties falls under the general scope of the CISG.

65 In RESPONDENT's view, the Kestrel Eye is excluded from the scope of the CISG under Art. 2(e) CISG, which stipulates, that the "Convention does not apply to sales […] of ships, vessels, hovercraft or aircraft". According to RESPONDENT, the Kestrel Eye is subject to registration in Equatoriana and, therefore, an aircraft in the sense of Art. 2(e) CISG [*RNoA, p. 31, para. 26*]. However, the CISG is not excluded in the present case. Neither does the Kestrel Eye qualify as an aircraft in the sense of Art. 2(e) CISG (**A**), nor did the Parties agree to exclude the CISG (**B**).

A. The Kestrel Eye Does Not Qualify as an Aircraft in the Sense of Art. 2(e) CISG

66 Art. 2(e) CISG does not exclude the application of the CISG to the Agreement, as the Kestrel Eye is not an aircraft in the sense of the provision. Contrary to RESPONDENT's claims, the drones' regulation under Equatorianian law must be disregarded when interpreting the CISG, as it must be interpreted autonomously in line with Art. 7(1) CISG (**I**). Rather, Art. 2(e) CISG is limited to aerial vehicles whose primary purpose is transport (**II**). The Kestrel Eye does not fulfil this condition (**III**).

I. The CISG Must Be Interpreted without Recourse to Equatorianian Domestic Law

67 The CISG must be interpreted autonomously according to Art. 7(1) CISG. Thus, Equatorianian domestic law is irrelevant for the interpretation of Art. 2(e) CISG. Art. 7(1) CISG states that when interpreting the CISG, "regard is to be had to its international character and the need to promote uniformity in its application […]". This requires terms of the CISG to be interpreted independently from varying national laws and understandings [*ICC Case No. 15313; NAI 15 Oct 2002; OGH 29 Jun 2017; BGer 2 Apr 2015; BGH 2 Mar 2005; Smallmon v Transport, HC New Zealand 30 Jul 2010; Gerechtshof Den Haag 22 Feb 2014; HGer Zürich 13 Sep 2013; Trib Ticino 20 Apr 2016; AP Valencia 7 Jun 2003; Ferrari et al./Saenger, Art. 7, para. 2; Kröll et al./Perales Viscasillas, Art. 7, para. 12*]. The

CISG's unificatory aim can only be ensured by interpreting the CISG in a way which can then be applied anywhere in the world [*Schlechtriem/Schwenzer/Hachem, Art. 7, para. 10*].

68 RESPONDENT claims that the Kestrel Eye should be seen as an aircraft under Art. 2(e) CISG by referring to Equatorianian domestic law [*RNoA, p. 31, para. 26*]. The definitions and registration requirements of the Aviation Safety Act [*Exhibit R5, p. 36*] are not globally standardised laws and understandings, but merely domestic law. Courts and tribunals cannot be allowed to apply Art. 2(e) CISG based on unstandardised national provisions as this would lead to different results in different places. The duty to have regard to the CISG's international character and the uniformity of the CISG's application as dictated by Art. 7(1) CISG would be infringed. Hence, Art. 2(e) CISG must be interpreted autonomously without recourse to Equatorianian domestic law.

II. Art. 2(e) CISG Only Applies to Aerial Vehicles Primarily Intended for Transport

69 The scope of application of Art. 2(e) CISG is limited to aerial vehicles whose primary purpose is transport. To begin with, the exclusion stipulated by Art. 2(e) CISG must be interpreted narrowly (**1**). Thus, a more limited definition which specifically caters to Art. 2(e) CISG must be established for the excluded objects. This specific definition of aircraft must be understood independently from any potential registration obligations (**2**) or the size of the object (**3**). Rather, the more suitable criterion is whether an object is primarily intended for transport (**4**).

1. Art. 2(e) CISG Is to Be Interpreted Narrowly

70 The exclusion of aircraft as provided for by Art. 2(e) CISG must be interpreted narrowly. This follows from the nature of any exception and the CISG's goal of unifying international sales law. A narrow interpretation especially applies to Art. 2(e) CISG [*UNCITRAL Digest, p. 18; MüKo-BGB/Huber, Art. 2, para. 2; Piltz, para. 2.48; BeckOK/Saenger, Art. 2, para. 11; cf. Ferrari et al./Saenger, Art. 2, para. 1*]. Firstly, because the exclusion of aircraft contradicts the general purpose of Art. 2 CISG itself (**a**). Secondly, because the wording of Art. 2(e) CISG demands a narrow interpretation (**b**).

a. The Exclusion of Aircraft Contradicts the Overall Purpose of Art. 2 CISG

71 The exclusion of aircraft contradicts the overall purpose of Art. 2 CISG. The aim of Art. 2 CISG is to exclude cases in which the application of the CISG would be unreasonable [*Kröll et al./Perales Viscasillas, Art. 2, para. 1*]. The drafters excluded aircraft because some legal systems subject them to registration and partially treat them as immovables [*Official Records, p. 16, Art. 2, para. 9; Canadian Report, Art. 2(e); Loewe, PILR, p. 83; Schlechtriem, pp. 15-16; regarding ULIS: Dölle/Herber, Art. 5, para. 10*]. This can be necessary for obtaining real rights or for

the transfer of ownership [*BBl 141/1, p. 760; Brunner/Meier/Stacher, Art. 2, para. 14*]. Hence, the reason for the exclusion of aircraft was mainly to avoid issues with property matters. However, Art. 4(b) CISG already excludes property matters from the CISG, which only governs the formation of sales contracts and obligations arising from the contracts [*Winship, J Air L Com p. 1059; Enderlein/Maskow, Art. 2, para. 7.1; Galston/Smit/Winship, ch. 1, p. 25; Staudinger/Magnus, Art. 2, para. 9; MüKo-BGB/Mankowski, Art. 2, para. 1; cf. Dölle/Herber, Art. 5, para. 9*]. Thus, the exclusion of aircraft is a redundant "double exclusion" of concerns already ruled out elsewhere.

72 Further, not only ships and aircraft are unique goods subject to special rules. This explanation overlooks other items, such as oil and gas supply contracts or sales of livestock [*Galston/Smit/Winship, Art. 2, chap. 1, p. 25; cf. Official Records, p. 201, para. 14*], which, for example, encumber special rules governing their quality. A proposal to exclude the sale of oil was rejected, despite UNCITRAL's conclusion that oil trade would be extremely difficult to regulate. It was objected that the CISG is not mandatory and special rules governing oil trade would take precedence over the CISG anyways [*Official Records, pp. 200-201, paras. 12, 16*]. It would also be difficult to define the term oil precisely, which would make an exclusion problematic [*Official Records, pp. 200-201, para. 16*]. All of these reasons are equally applicable to aircraft. Thus, the exclusion of aircraft, but not other unique goods is arbitrary and unjustified. In conclusion, applying the CISG to aircraft would not be unreasonable. Consequently, the exclusion of aircraft contradicts the purpose of Art. 2 CISG, so that Art. 2(e) CISG must be interpreted narrowly.

b. The Wording of Art. 2(e) CISG Confirms the Necessity of a Narrow Interpretation

73 The wording of Art. 2(e) CISG confirms that it was never intended to exclude all aircraft. Art. 2(e) CISG specifically names "ships and vessels", as opposed to all "boats" or all "watercraft". This wording implies that not all possible objects in the category of watercraft were intended to be excluded [*Brunner/Meier/Stacher, Art. 2, para. 14; von Caemmerer/Schlechtriem/Herber, Art. 2, para. 33; Piltz, para. 2.52; BBl 141/1, p. 760; Diez-Picazo/de León/Caffarena Laporta, p. 66; Rudolph, Art. 2, para. 6; Czerwenka, p. 154; Enderlein/Maskow/Strohbach, Art. 2, para. 7.2; Staudinger/Magnus, Art. 2, para. 46*]. Ships and aircraft must be interpreted under the same standards [*Piltz, para. 2.53; Diez-Picazo/de León/Caffarena Laporta, p. 67; von Caemmerer/Schlechtriem/Herber, Art. 2, para. 35; Schlechtriem/Schwenzer/Hachem, Art. 2, para. 33; Schlechtriem/Schwenzer/Schroeter/Ferrari, Art. 2, para. 42; BeckOK/Saenger, Art. 2, para. 11*]. The use of different terminology is inconsequential, as for aerial vehicles, there is no terminology capable of compartmentalising aircraft as neatly as "ships and vessels" does for watercraft. Besides "aircraft", any other term would be too specific regarding the type of vehicle, e.g., "plane", "helicopter". As the same standard must be applied, aircraft

cannot be understood to mean all aerial vehicles. The wording of Art. 2(e) CISG shows that not all objects that constitute aircraft in general language are excluded.

74 In conclusion, Art. 2(e) CISG must be interpreted narrowly. The unificatory aim of the CISG can only be upheld by the restricted application of Art. 2(e) CISG. This is predicated by the lack of a proper justification for the exclusion and the wording chosen by the drafters.

2. Potential Registration Requirements Are Irrelevant under Art. 2(e) CISG

75 RESPONDENT asserts that "[u]nder Equatorianian law, the drones have to be registered […], which justifies considering them aircraft in the sense of Art. 2(e) CISG" [*RNoA, p. 31, para. 26*]. It refers to Art. 10 Aviation Safety Act [*Exhibit R5, p. 36, Art. 10*]. However, registration is irrelevant for the classification of objects as aircraft under Art. 2(e) CISG. The wording of the provision's predecessors (Art. 5(b) ULIS and Art. 1(6)(b) ULFC) only excluded aircraft which were or would be subject to registration. This requirement was intentionally not adopted in Art. 2(e) CISG [*Documentary History, p. 242, para. C.2(e); UNCITRAL Yb, p. 51, para. 28*].

76 The reason behind this was that registration requirements differ between states. The same vehicle could be subject to registration in some states, but not in others. The CISG's application would hinge on unstandardised national law. The CISG could be applicable or inapplicable to the same aircraft, depending on where the dispute is taking place [*Staudinger/Magnus, Art. 2, para. 44; von Caemmerer/Schlechtriem/Herber, Art. 2, para. 33; Audit, p. 33; DiMatteo et al./Eiselen, ch. 5/F, para. 28; Documentary History, p. 242, para. C.2(e); Herber/Czerwenka, Art. 2, para. 13; Official Records, p. 16, Art. 2, para. 9; Reinhart, Art. 2, para. 7; Schlechtriem/Schwenzer/Hachem, Art. 2, para. 28; Schlechtriem, pp. 15-16; Schlechtriem/Schwenzer/Schroeter/Ferrari, Art. 2, para. 38; UNCITRAL Yb, p. 51, para. 28*]. Thus, the drafting history dictates that registration be left out of consideration [*Bianca/Bonell/Khoo, Art. 2, para. 2.6; Kröll et al./Spohnheimer, Art. 2, para. 41; Diez-Picazo/de León/Caffarena Laporta, p. 66; Piltz, para. 2.52*]. Applying the criterion nonetheless would neglect the CISG's international character and the need to promote uniformity as required by Art. 7(1) CISG. Therefore, national registration requirements cannot have any relevance for the classification of objects as aircraft under Art. 2(e) CISG.

3. Size Cannot Be Considered under Art. 2(e) CISG

77 Considering that Art. 2(e) CISG excludes "ships and vessels" and not boats, another conceivable criterion could be the size of the object. However, it is impossible to determine a workable, uniformly applicable minimum size [*Enderlein/Maskow/Strohbach, Art. 2, para. 7.2; von Caemmerer/Schlechtriem/Herber, Art. 2, para. 33; Ferrari, p. 152; Kröll et al./Spohnheimer, Art. 2,*

para. 44; MüKo-BGB/Huber, Art. 2, para. 22; MüKo-HGB/Mankowski, Art. 2, para. 28; Rudolph, Art. 2, para. 6; Schlechtriem/Schwenzer/Hachem, Art. 2, para. 28]. Thus, different courts could come to different conclusions due to the lack of a clear standard. Consequently, size cannot be applied as a criterion for Art. 2(e) CISG, as it would violate the principles of Art. 7(1) CISG.

4. The Primary Transport Purpose Is the Decisive Criterion

78 Only aerial vehicles whose purpose is transport are aircraft in the specific sense of Art. 2(e) CISG [*BeckOK/Saenger, Art. 2, para. 11; BeckOGK-CISG/Wagner, Art. 2, para. 17; Piltz, para. 2.52; Brunner/Meier/Stacher, Art. 2, para. 14; von Caemmerer/Schlechtriem/Herber, Art. 2, para. 33; Diez-Picazo/de León/Caffarena Laporta, p. 66; Ferrari et al./Saenger, Art. 2, para. 11; Honsell/Siehr, Art. 2, para. 19; Kröll et al./Spohnheimer, Art. 2, para. 46; MüKo-BGB/Huber, Art. 2, para. 23; Schlechtriem/Schwenzer/Schroeter/Ferrari, Art. 2, para. 42; Schlechtriem/Schwenzer/Hachem, Art. 2, paras. 31, 33*]. Transport is the movement of people or goods from one place to another [*Cambridge, "transport"; Oxford, "transport"*].

79 Because size and registration breach Art. 7(1) CISG, they are both inadmissible criteria [*see above, paras. 75-77*]. Contrarily, whether the primary purpose is transport is clearly definable and globally uniformly applicable. Whether or not transport is an object's primary purpose can be determined by simply examining the object's features to establish if it can reasonably be used as a means of transport in the long term. The contractual purpose can be reviewed subsidiarily. Several official translations of Art. 2(e) CISG underline the common understanding that aircraft are vehicles intended for transport. E.g., the Lithuanian translation of Art. 2(e) CISG reads as follows: "*vandens ir oro transporto laivų,* […]" [*emphasis added*]. In Latvian, the translation is "*gaisa un ūdens transporta kuģus,* […]" [*emphasis added*]. This translates to "air and water transport vessels". The same is true for Georgian and Azerbaijani.

80 In conclusion, only aerial vehicles that are intended for transport are aircraft in the specific sense of Art. 2(e) CISG. A transport purpose is the only standard that makes a uniformly applicable typification of aircraft under Art. 2(e) CISG, whose scope must be limited, possible.

III. The Kestrel Eye's Purpose is Not the Transport of Humans or Goods

81 The Kestrel Eye does not qualify as an aircraft under Art. 2(e) CISG. Transport is the movement of people or goods from one place to another. The Kestrel Eye cannot carry humans [*PO2, p. 45, para. 9*] and is unsuitable for cargo transport (**1**). The surveillance equipment installed is not "cargo" being transported (**2**). Lastly, the drones' main contractual purpose is exploration, not transport (**3**).

1. The Kestrel Eye Is Objectively Not Intended for Cargo Transport

82 The Kestrel Eye is objectively not intended to be used for cargo transport. An object's primary purpose is transport if it can be reasonably used for this purpose in the long term according to its technical features [*see above para. 79*]. The Kestrel Eye is clearly engineered towards surveillance purposes [*PO2, p. 45, para. 9*]. This is reflected by the shape and location of its payload bays and its excellent flight stability, which makes it 30% more expensive than drones designed for cargo transport [*PO2, p. 45, para. 9*]. The entire equipment used would have to be removed to fit cargo into the payload bays [*PO2, p. 45, para. 9*]. Even with the full payload capacity of 306 kg [*cf. Exhibit C4, p. 15; cf. PO2, p. 45, para. 10*], using a EUR 10,000,000 drone [*Exhibit R4, p. 35*] with its small payload bays [*PO2, p. 45, para. 9*] for line-of-sight transport [*cf. NoA, p. 5, para. 9*] makes little sense commercially [*PO2, p. 45, para. 9*]. The Kestrel Eye has only been used for transport in truly exceptional cases of emergency when no other means of transport were available for the delivery of medicine or urgently needed spare parts [*PO2, pp. 44, 46, paras. 9, 22*]. The Kestrel Eye is intended for long term use for exploration, not cargo transport.

2. The Surveillance Equipment Is a Part of the Drone, Not Cargo Being Transported

83 Once installed, the equipment is a part of the Kestrel Eye, not a good being transported. Transport implies that the goods are easily loaded onto and removed from the vehicle. Contrarily, equipment is fixed to the vehicle. It is part of the vehicle, despite its ability to be removed. The surveillance equipment is not intended to be removed and then re-installed before each mission. Likewise, a bell mounted onto a bicycle is not being transported by the bicycle. Therefore, the research equipment is part of the drone, not a good being transported.

3. The Main Subjectively Intended Purpose Is Exploration, Not Transport

84 The Kestrel Eye's primary use, as stated by RESPONDENT and the Agreement is surveillance, not transport. RESPONDENT bought six Kestrel Eyes "for providing high resolution pictures of the remote areas of the Northern Part" [*Exhibit R2, p. 33*], as reflected in the Call for Tender, the Agreement's preamble and statements made by RESPONDENT and its associates [*Exhibit C1, p. 9; Exhibit C2, p. 10; RNoA, p. 28, paras. 5, 6*]. The Kestrel Eye was supposed to be used as a tool to research in a very localised area in Equatoriana, rather than an aircraft for transport. Therefore, the subjectively intended purpose of the drones is exploration, not transport.

85 The Kestrel Eye is, thus, not excluded from the scope of the CISG, as it is not an aircraft in the sense of Art. 2(e) CISG.

B. The Parties Did Not Exclude the CISG Pursuant to Art. 6 CISG

86 The Parties did not exclude the CISG. Neither the choice-of-law clause (**I**) nor the occasional colloquial use of the term "aircraft" are implied exclusions of the CISG (**II**).

I. The Choice-of-Law Clause Does Not Exclude the CISG

87 The Parties choice-of-law clause in favour of Equatorianian law does not exclude the CISG. Under Art. 6 CISG, parties "may exclude the application of the CISG". The choice of a Contracting State's law is not an exclusion of the CISG [*CIETAC 28 Jun 2018; Sup Ct Sweden 29 May 2020; Sup Ct Poland 25 Jun 2015; OGH 2 Apr 2009; BGH 23 Jul 1997; Trib Vaud 26 May 2000; Nucap v Bosch, US DC Illinois 31 Mar 2017; Trib di Forlì 6 Mar 2012; Ajax v Can-Eng, US DC Illinois 29 Jan 2003; Asante v PMC-Sierra, US DC California 30 Jul 2001; Schlechtriem/Schwenzer/Hachem, Art. 6, para. 14*]. This is not changed by the fact that RESPONDENT is state-owned [*NoA, p. 4, para. 2*]. RESPONDENT's proximity to the state is already expressed in the choice of Equatorianian law, of which the CISG is a part. Hence, the choice-of-law clause does not exclude the CISG.

II. The Occasional Use of the Term "Aircraft" Is Not an Exclusion of the CISG

88 The Parties did not impliedly exclude the application of the CISG by inconsistently labelling the Kestrel Eye as "aircraft". An exclusion under Art. 6 CISG requires the parties' intention to be clearly recognisable [*Piltz, para. 2.114; Rudolph, Art. 6, para. 4; Brunner/Manner/Schmitt, Art. 6, para. 2; MüKo-HGB/Mankowski, Art. 6, para. 12; cf. Official Records, p. 17, Art. 5, para. 2*], hypothetical intent is irrelevant [*Rudolph, Art. 6, para. 2; Schlechtriem/Schwenzer/Schroeter/Ferrari, Art. 6, para. 18; Staudinger/Magnus, Art. 6, paras. 9, 20*]. The drone is described synonymously with different terms in the Agreement: "aircraft" (four times), "UAS" (eight times), "Kestrel Eye UAS" (three times) and "drone" (four times) [*Exhibit C2, pp. 10-11*]. An intentional use of the word "aircraft" to exclude the CISG is not recognisable. Thus, the Parties did not impliedly exclude the CISG.

CONCLUSION OF THE THIRD ISSUE

89 The Tribunal is respectfully requested to declare that the Agreement is governed by the CISG. The Agreement falls within the general scope of application and was not excluded by Art. 2(e) CISG or the Parties themselves. The autonomous and necessarily narrow interpretation of Art. 2(e) CISG results in the conclusion that the Kestrel Eye is not an "aircraft" in the specific sense, as its main purpose is not transport. This conclusion is unaffected by any national registration requirements, as they are irrelevant for the application of Art. 2(e) CISG. The choice-of-law clause refers to the CISG, while the inconsistent use of the term "aircraft" in the Agreement is not an exclusion under Art. 6 CISG. Therefore, the Agreement is governed by the CISG.

ISSUE 4: RESPONDENT CANNOT RELY ON ART. 3.2.5 ICCA TO AVOID THE PURCHASE AND SUPPLY AGREEMENT

90 Subsequent to its new government's moratorium, RESPONDENT has decided to reassert previous claims of fraudulent misrepresentation that it gave up pursuing more than a year before [*cf. Exhibit C7, p. 19, para. 16; Exhibit C8, pp. 20-21; RNoA, p. 31, para. 27*]. The CISG provides a set of rules and remedies suitable to address RESPONDENT's allegations. However, RESPONDENT sees its only chance of success in Art. 3.2.5 ICCA due to the extensive interpretation by the Equatorianian Supreme Court. Nevertheless, Art. 3.2.5 ICCA is not applicable, because the CISG governs the matter conclusively (**A**). Even if the CISG did not supersede Art. 3.2.5 ICCA, the ICCA's provisions on time limits and confirmation exclude the application of this article (**B**).

A. The CISG Supersedes Art. 3.2.5 ICCA in the Case at Hand

91 RESPONDENT cannot rely on Art. 3.2.5 ICCA as the CISG supersedes it in the case at hand. Wherever the CISG contains a conclusive regulation of a matter, it excludes the application of domestic law [*BGer 28 May 2019; OGH 29 Jun 2017; Nonwovens v Pack Line, Sup Ct New York 12 Mar 2015; Kröll et al./Djordjević, Art. 4, para. 6; MüKo-BGB/Huber, Art. 4, para. 7; Schlechtriem, ILJ, p. 469; Piltz, NJW, p. 3638*]. As per Art. 4 CISG, its legal scope extends to any issue expressly or implicitly settled by its provisions [*Achilles, Art. 4, para. 17; BeckOK/Saenger, Art. 4, para. 1; Staudinger/Magnus, Art. 4, para. 12*]. RESPONDENT's allegations fall under the CISG's scope (**I**). It governs the matter conclusively, as CLAIMANT did not fraudulently misrepresent any facts (**II**).

I. The CISG Governs RESPONDENT's Allegations

92 The CISG governs RESPONDENT's allegations. This is because it contains a comprehensive regulation of the legal consequences that stem from the characteristics of the sold goods. In Arts. 35–52 CISG, the CISG conclusively governs issues of non-conformity between the goods and the quality agreed upon as well as the buyer's respective remedies [*Achilles, Art. 4, paras. 4-5; Schlechtriem/Schwenzer/Hachem, Art. 4, paras. 14, 16*]. Art. 35 CISG states that "[t]he seller must deliver goods which are of the quantity, quality and description required by the contract […]". As a result, the required characteristics are determined by party agreement [*BGH 3 Apr 1996; Trib Sup 6 Jul 2020; Kröll et al./Kröll, Art. 35, para. 37; MüKo-HGB/Benicke, Art. 35, para. 2*]. If a characteristic mentioned during the negotiations has not become part of the agreement on quality, the CISG governs the matter nevertheless, as it concludes that a deviation from this characteristic does not constitute a breach [*Kingspan v Borealis, EWHC 1 May 2012; cf. Kröll et al./Kröll, Art. 35, para. 40*]. Thus, the CISG conclusively provides that in such a case the buyer has no remedies. In any case,

it is acknowledged that the CISG governs the legal consequences of pre-contractual misrepresentation regarding the characteristics of the goods [*OLG Köln 21 May 1996; cf. KG St. Gallen 13 May 2008; Schlechtriem/Schwenzer/Hachem, Art. 4, para. 19; MüKo-BGB/Huber, Art. 4, para. 29; Schlechtriem/Schwenzer/Schroeter, Intro to Arts. 14-24, para. 129; Schwenzer/Hachem, Am J Com L, p. 471; Müko-HGB/Mankowski, Art. 4, paras. 29, 33; Schlechtriem/Schwenzer/Schwenzer, Art. 35, para. 50; Schroeter, para. 241; Schwenzer, ASILP, p. 421; Schroeter, Vill L Rev, p. 582-583*].

93 All of RESPONDENT's assertions relate to the characteristics of the goods, which are governed by the CISG. Firstly, RESPONDENT claims that the Kestrel Eye does not meet its description in the Agreement as "state-of-the-art" and "newest model of Kestrel Eye 2010 UAS" [*Exhibit C8, p. 20*; *RNoA, pp. 29, 31, paras. 17, 27; cf. Exhibit C2, pp. 10-11, Preamble, Art. 2*]. Secondly, it alleges that Mr. Bluntschli misrepresented the Kestrel Eye's characteristics by describing it as "[CLAIMANT's] present top model for [RESPONDENT's] purposes" and "[CLAIMANT's] latest model of the Kestrel Eye 2010 family" [*Exhibit C8, p. 20; RNoA, p. 29, para. 17; cf. Exhibit R4, p. 35*]. The CISG governs the legal consequences of these statements, as it stipulates whether or not they constitute an owed quality and, thus, whether RESPONDENT has any remedies. In addition, the alleged misrepresentation is also governed by the CISG, since the statements relate to the characteristics of the Kestrel Eye. Thus, the CISG governs RESPONDENT's allegations.

II. The CISG Applies Exclusively as There Is No Fraudulent Misrepresentation

94 The CISG governs the matter exclusively, as there is no fraudulent misrepresentation. Only fraudulently conducted misrepresentation allows for additional recourse to national law [*KG St. Gallen 13 May 2008; cf. OLG Köln 21 May 1996; Müko-HGB/Mankowski, Art. 4, para. 33; Schlechtriem/Schwenzer/Schroeter, Intro to Arts. 14-24, para. 127*]. One must assess whether there was a fraudulent misrepresentation that allows recourse to Art. 3.2.5 ICCA under a uniform standard of the CISG (**1**). Under this standard, there was no fraudulent misrepresentation (**2**).

1. Fraudulent Misrepresentation Must Be Assessed under the CISG's Standard

95 Whether there was a fraudulent misrepresentation must be determined under a uniform international standard of the CISG before resorting to national law. In line with Art. 7(1) CISG [*see above, para. 67*], the CISG's scope of application must be assessed uniformly [*Kröll et al./Djordjević, Art. 4, para. 14; Witz/Salger/Lorenz/Lorenz, Art. 4, para. 3*]. National understandings are irrelevant in determining whether the CISG governs a certain situation [*Ferrari/Flechtner/Brand/Bridge, p. 244; Staudinger/Magnus, Art. 4, para. 11; Kröll et al./Djordjević, Art. 4, para. 14*].

96 Vice versa, it must be uniformly determined whether the CISG does not conclusively govern a matter [*Staudinger/Magnus, Art. 4, para. 11; Enderlein/Maskow/Strohbach, Art. 4, para. 3.1; Kröll et al./Djordjević, Art. 4, para. 14; Schlechtriem/Schwenzer/Schroeter, Intro to Arts. 14-24, para. 128; Schroeter, Vill L Rev, pp. 562-563; Witz/Salger/Lorenz/Lorenz, Art. 4, para. 3*]. National definitions of legal terms such as "fraudulent misrepresentation" cannot affect the CISG's application [*cf. BGer 28 May 2019; Honnold/Flechtner, Art. 4, para. 65; cf. Schlechtriem/Schwenzer/Schroeter/Ferrari, Art. 7, para. 9; cf. Schlechtriem/Schwenzer/Schroeter, Intro to Arts. 14-24, para. 128; cf. Staudinger/Magnus, Art. 4, para. 11*]. Hence, the exclusive application of the CISG must not simply be refused as soon as national law appears to categorise the conduct as fraudulent misrepresentation [*Schroeter, para. 239; cf. Schlechtriem/Schwenzer/Schroeter, Intro to Arts. 14-24, para. 128*]. Instead, to assess whether the CISG does not apply exclusively in a specific case because of fraudulent misrepresentation, one must apply an autonomous international standard under the CISG [*Schroeter, para. 239*].

2. There Has Not Been Any Fraudulent Misrepresentation

97 There has not been any fraudulent misrepresentation. Under the autonomous standard, fraudulent misrepresentation requires a party to intentionally misstate facts, either by act or by omission [*Schlechtriem/Schwenzer/Hachem, Art. 4, para. 19; Schlechtriem/Schwenzer/Schroeter, Intro to Arts. 14-24, paras. 126-129; Schlechtriem/Schwenzer/Schroeter/Ferrari, Art. 4, para. 25; cf. Schroeter, Vill L Rev, pp. 569, 583; Honnold/Flechtner, Art. 4, para. 65*]. CLAIMANT's statements are accurate (**a**). It had no obligation to disclose the development of the Hawk Eye (**b**). Additionally, RESPONDENT is unable to demonstrate that CLAIMANT could have had any intent to defraud (**c**).

a. CLAIMANT's Statements Were Accurate

98 CLAIMANT described the Kestrel Eye correctly. RESPONDENT alleges that CLAIMANT presented the Kestrel Eye as its "latest", "newest" and "top model" [*Exhibit C8, p.20; RNoA, pp. 29, 31, paras. 17, 27*]. These accusations take CLAIMANT's statements out of context. To clarify, CLAIMANT only made the following statements on the suitability and actuality of the Kestrel Eye:

- In the Agreement, the Parties described the Kestrel Eye as being "state-of-the-art" [*Exhibit C2, p.10, Preamble, Art. 2(f)*] (**aa**).
- In his email, Mr. Bluntschli advertised the Kestrel Eye as CLAIMANT's "present top model for your [RESPONDENT's] purposes" [*Exhibit R4, p. 35*] (**bb**).
- Furthermore, Mr. Bluntschli described the drone as the "latest model of the Kestrel Eye 2010 family" [*Exhibit R4, p. 35*]; similar wording is used in the Agreement, where the drone

is defined as the "newest model of the Kestrel Eye 2010 UAS" [*Exhibit C2, p.10, Art. 2(a)*]. This is undisputed, as the Kestrel Eye is the latest version of this very model.

aa. The Kestrel Eye Is a State-of-the-Art Drone

99 A reasonable person would conclude that the Kestrel Eye is "state-of-the-art". The Parties did not express any intended interpretation of this term. Pursuant to Art. 8(2) CISG, if no intent can be determined, "statements, made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances". State-of-the-art usually means using the most modern technology and meeting the level of development of its type [*cf. Merriam-Webster, "state-of-the-art"; Oxford, "state-of-the-art"; Cambridge, "state-of-the-art"*].

100 The Kestrel Eye is based on the most modern technology. Since its launch, it has been updated several times [*Exhibit C8, p. 20*]. The last improvement of its excellent flight stability took place in December 2018, only two years before the Agreement was concluded [*PO2, p. 45, para. 13; Exhibit C2, p. 12*]. Furthermore, the Kestrel Eye will be produced at least until the end of 2024 [*PO2, p. 45, para. 13*]. The development of a successor with such a "helicopter design" will only begin then at the earliest [*PO2, p. 45, para. 13*]. Consequently, the Kestrel Eye is based on the most modern technology.

101 The Kestrel Eye meets the level of development of its type, as it has not been succeeded by another model and, thus, is the newest of its type. At the conclusion of the Agreement, the Kestrel Eye was CLAIMANT's newest model on the market. The Hawk Eye had not been launched yet; in fact, it was still in its developmental phase [*PO2, p. 45, para. 14*]. In any case, the Hawk Eye belongs to an entirely different type of drones for the following two reasons:

102 Firstly, the two drones are based on different technologies and designed for different operations. While the Kestrel Eye uses the physics of a helicopter, the Hawk Eye resembles an airplane [*Exhibit C4, p. 15; Exhibit R3, p. 34*]. The Hawk Eye cannot ascend and descend vertically and needs an airfield to start and land [*NoA, p. 5, para. 10; Exhibit R3, p. 34*]. This is why it is designed for high-altitude operations [*Exhibit R3, p. 34*], whereas the Kestrel Eye is intended for flexible missions in remote territories [*Exhibit C4, p. 15; NoA, p. 5, para. 9*].

103 Secondly, the Hawk Eye and the Kestrel Eye will be produced simultaneously [*PO2, p. 45, para. 13*]. Similarly, nobody would argue that the latest iPhone is outdated just because Apple launched a new iPad. In the case at hand, both drones are the most modern of their respective types. Thus, the Hawk Eye does not succeed the Kestrel Eye but belongs to an entirely different type of drone.

As the Kestrel Eye uses the most modern technology and meets the level of development of its type, it is a state-of-the-art drone.

bb. The Kestrel Eye Is the Present Top Model for RESPONDENT's Purposes

104 The Kestrel Eye is the present top model for RESPONDENT's purposes. In November 2020, when Mr. Bluntschli described it in that way [*Exhibit R4, p. 35*], the Hawk Eye had not been launched and CLAIMANT had not yet registered any patents regarding its technology [*PO2, p. 45, para. 15*]. The development of Hawk Eye had not even been finished yet [*PO2, p. 45, para. 14*]. Instead, CLAIMANT was still testing the Hawk Eye's technology [*PO2, p. 45, para. 14*]. As the Kestrel Eye was CLAIMANT's only model on the market, the description as its present top model is accurate.

105 In any case, the Kestrel Eye is still the top model for RESPONDENT's purposes. This is because, unlike the Hawk Eye, the Kestrel Eye both fulfils the requirements set out in the Call for Tender and is covered by RESPONDENT's budget.

106 Firstly, the Kestrel Eye satisfies all requirements listed in the Call for Tender. While the Hawk Eye offers longer endurance and a satellite communication system [*PO2, p. 45, para. 17*], RESPONDENT never indicated that it needed these functionalities. In fact, it implied that it planned short-range missions within the line of sight by asking for radio communication links [*cf. Exhibit C1, p. 9; NoA, p. 5, para. 9*]. The Kestrel Eye is designed explicitly for this type of mission [*NoA, p. 5, para. 9; Exhibit C4, p. 15*]. Its helicopter-like design even enables it to start and land vertically at the area of usage. On the contrary, the Hawk Eye requires an airfield that is further away so that it would necessitate long flights to start and end each operation [*PO2, p. 45, para. 16*].

107 Secondly, unlike the Hawk Eye, the Kestrel Eye is covered by RESPONDENT's budget. In its Call for Tender, RESPONDENT explicitly asked for four drones. It's budget for the purchase was limited to EUR 45,000,000 [*PO2, p. 44, para. 7*]. Due to CLAIMANT's unique offer, RESPONDENT could even purchase six drones, as they cost only EUR 44,000,000 [*Exhibit C2, p. 11, Art. 3(1)(a); Exhibit R2, p. 33*]. One Hawk Eye, however, would have cost more than twice as much as one Kestrel Eye [*Exhibit C3, p. 14, para. 9*]. Thus, four Hawk Eyes would have exceeded RESPONDENT's budget by at least EUR 13,600,000. Accordingly, unlike the Hawk Eye, the Kestrel Eye is covered by RESPONDENT's budget. Hence, it was accurate to call the Kestrel Eye the present top model for RESPONDENT's purposes.

b. CLAIMANT Had No Obligation to Disclose the Unfinished Hawk Eye

108 CLAIMANT had no obligation to disclose the development of the Hawk Eye and, thus, did not misrepresent any facts by omission. It follows from Art. 35 CISG that the seller must disclose any

deviations from the contractually owed quality [*Benedick, paras. 265, 271; Köhler, p. 231; cf. Fleischer, p. 973; Jansen/Zimmermann/Kästle-Lamparter, Intro before Art. 2:401, para. 11*]. However, as seen before, the Kestrel Eye perfectly meets the contractual requirements [*see above, paras. 99-106*], rendering this disclosure obligation irrelevant in the case at hand.

109 In exceptional cases, the seller can nevertheless be obliged to disclose other information if that information is highly relevant to the other party's decision [*Fleischer, pp. 972-973, 985-989; Kötz, EJLE, p. 11; cf. Honnold/Flechtner, para. 100; Jansen/Zimmermann/Kästle-Lamparter, Art. 2:401, para. 9; Kötz, pp. 259-263; Mather, JLC p. 157; Schmid, p. 269*]. In general, however, the buyer primarily carries the risk of informing himself [*cf. OGH 13 Apr 2000; Fleischer, pp. 993-994; Schmid, p. 269; cf. Benedick, para. 293*]. Furthermore, the legitimate interests of the seller must be considered when determining disclosure obligations [*Jansen/Zimmermann/Kästle-Lamparter, Intro before Art. 2:401, para. 27, Art. 2:401, paras. 6, 9; Fleischer, pp. 1003-1004; cf. Kötz, EJLE, pp. 15-17*]. As a result, the disclosure obligation is limited to exceptional cases where, firstly, the information is highly relevant to the buyer's decision and, secondly, the information is difficult to obtain. Thirdly, the interest in disclosure must outweigh the legitimate interests of the seller.

110 Firstly, the information about the development of the Hawk Eye was not relevant to RESPONDENT. The Hawk Eye is financially unsuitable whereas the Kestrel Eye meets all of RESPONDENT's requirements [*see above, paras. 104-107*]. RESPONDENT also never showed any interest in fixed-wing drones throughout the entire tender process, even though there had already been similar drones to the Hawk Eye on the market in 2020 [*PO2, p. 45, para. 14*]. Instead of specifically targeting the Call for Tender at such fixed-wing drones, RESPONDENT was always pleased with rotary-wing drones [*cf. Exhibit C1, p. 9; PO2, p. 45, para. 13; Exhibit R1, p. 32, para. 3*]. Thus, the information about the development of the Hawk Eye was not relevant to RESPONDENT.

111 Secondly, the information that CLAIMANT developed a fixed-wing drone was easily obtainable. In its press release following Drone-Aircraft's acquisition in 2017, CLAIMANT announced that it wanted to enlarge its portfolio by using the acquired technology [*PO2, p. 45, para. 15*]. Drone-Aircraft had been developing fixed-wing drones [*NoA, p. 5, para. 10*]. Thereafter, it was generally known within the market that CLAIMANT was developing a new UAV [*PO2, p. 45, para. 15*]. Simple research would have brought up this information.

112 Thirdly, a disclosure obligation would have violated CLAIMANT's interests. It is legitimate to wait for the most favourable date to publish a new development. This allows it to be promoted as profitably as possible. Therefore, it would be against CLAIMANT's business interests to be forced to release the unfinished Hawk Eye earlier. This is particularly pertinent given that CLAIMANT had

not yet applied for patents covering the Hawk Eye's technology [*PO2, p. 45, para. 15*]. Thus, there was a serious risk that CLAIMANT's unprotected inventions could end up in the hands of competitors. Due to the public nature of the tender process [*Exhibit R2, p. 33*] and the familial entanglements of Mr. Field's assistant with one of CLAIMANT's competitors [*Exhibit R2, p. 33*], confidentiality could not be assured.

113 As information about the development of another model was neither relevant for RESPONDENT nor hard to obtain, and disclosure of the unfinished Hawk Eye would have violated CLAIMANT's interests, CLAIMANT had no such obligation. Thus, there was no misrepresentation by omission.

c. RESPONDENT Is Unable to Present Any Evidence of Intent to Defraud

114 RESPONDENT is unable to demonstrate that CLAIMANT could have had any intent to defraud. According to Art. 27(1) PCA Rules, "each party shall have the burden of proving the facts relied on to support its claim or defence". RESPONDENT has not presented any facts that indicate that CLAIMANT intentionally engaged in the alleged misrepresentation. Consequently, fraudulent misrepresentation is ruled out.

115 In conclusion, RESPONDENT's assertions concern the conformity of the goods, as regulated by Arts. 35–52 CISG. CLAIMANT neither misrepresented any facts nor had any intent to do so. Consequently, the CISG governs the matter conclusively. Art. 3.2.5 ICCA is not applicable.

B. The ICCA Itself Excludes the Application of Art. 3.2.5 ICCA

116 Even if the CISG did not conclusively govern the matter, Arts. 3.2.9 and 3.2.12 ICCA exclude the application of Art 3.2.5 ICCA. This is because RESPONDENT confirmed the Agreement according to Art. 3.2.9 ICCA (**I**). Additionally, RESPONDENT did not give the notice of avoidance within the time limit of Art. 3.2.12 ICCA (**II**).

117 These issues must be addressed and are in line with the Tribunal's order that "[o]nly the issue of whether or not Art. 3.2.5 ICCA can in principle be applied should be treated" [*PO2, p. 50, para. 53*]. Arts. 3.2.9 and 3.2.12 ICCA exclude avoidance under Art. 3.2.5 ICCA and do not deal with the requirements of Art. 3.2.5 ICCA.

I. Avoidance Is Excluded as RESPONDENT Confirmed the Agreement

118 RESPONDENT confirmed the Agreement and, thus, cannot avoid it. Pursuant to Art. 3.2.9 ICCA, "[i]f the party entitled to avoid the contract expressly or impliedly confirms the contract after the period of time for giving notice of avoidance has begun to run, avoidance of the contract is excluded". An implied confirmation may be derived from conduct through which it becomes

apparent that the party regards the contract as valid [*Ad hoc 21 Apr 1997; Ad hoc 10 Dec 1997; Vogenauer/Huber, Art. 3.2.9, paras. 7-8; cf. Kramer, ZEuP, p. 225*].

119 By requesting the Amendment of the Arbitration Clause and dropping the allegations of misrepresentation after CLAIMANT agreed to the Amendment [*Exhibit C9, p. 22; Exhibit C7, p. 19, para. 16*], RESPONDENT showed that it felt bound by the Agreement. While, under the doctrine of separability [*see above, para. 33*], an arbitration clause can also be modified to influence the arbitral proceedings concerning a void contract, this is presently not the case. Instead, the Amendment was intended to address minor disputes in the ongoing contractual relationship. This follows from the fact that the Amendment mainly regards disputes concerning an amount under EUR 1,000,000 [*Exhibit C9, p. 22*]. It was not aimed at disputes over the validity of the entire Agreement, as the amount in dispute would be much higher. Consequently, by requesting the Amendment and dropping the allegations of misrepresentation after CLAIMANT agreed to it, RESPONDENT confirmed the Agreement. Pursuant to Art. 3.2.9 ICCA, avoidance is excluded.

II. Avoidance Is Excluded as RESPONDENT Did Not Give the Notice in Due Time

120 RESPONDENT cannot avoid the Agreement because it did not give notice within the time limit. Under Art. 3.2.12 ICCA, "[n]otice of avoidance shall be given within a reasonable time, having regard to the circumstances, after the avoiding party knew or could not have been unaware of the relevant facts […]". RESPONDENT did not send the notice within a reasonable time (**1**). The decision of the Equatorianian Supreme Court is not applicable to the case at hand (**2**).

1. RESPONDENT Exceeded the Time Limit

121 RESPONDENT did not submit the notice of avoidance within a reasonable time. To determine the reasonable time, all circumstances of the case must be taken into account [*Vogenauer/Huber, Art. 3.2.12, para. 6*]. It is acknowledged that "the period should be shorter rather than longer because its commencement is determined by a subjective factor" [*Vogenauer/Huber, Art. 3.2.12, para. 6; cf. Brödermann, Art. 3.2.12, para. 1*]. However, it must be long enough to consider the matter and take legal advice [*Vogenauer/Huber, Art. 3.2.12, para. 6*]. The alleged reason that RESPONDENT is using to challenge the contract is the launch of the Hawk Eye. It has known about this at the latest since March 2021, when it first accused CLAIMANT of misrepresentation [*Exhibit C7, p. 19, para. 13*]. It is reasonable to assume that RESPONDENT could have sought legal advice and reached a decision within a few weeks. Consequently, the notice of avoidance would have been due, at the latest, after the negotiations following the launch of Hawk Eye ended in May 2021 [*Exhibit C7, p. 19, paras. 14, 16*]. RESPONDENT, however, waited over a year to submit the notice [*Exhibit C8, p. 20*]. Therefore, it did not send the notice of avoidance within a reasonable time.

2. The Time Limit Is Not Extended in Light of the Supreme Court Decision

122 The time limit is not extended due to the Equatorianian Supreme Court decision. In this ruling, the Supreme Court did not consider the avoidance time-barred, even though a government entity had given a declaration of avoidance following more than a year of unsuccessful negotiations with a private party concerning the consequences of a non-disclosure [*RNoA, p. 30, para. 18*]. The decision on the national Equatorianian contract law does not constitute a precedent since the ICCA must be interpreted autonomously (**a**). Furthermore, the time limit is not extended in light of the Supreme Court decision as it must be distinguished from the case at hand (**b**).

a. The Decision on the ICCA's National Equivalent Cannot Serve as a Precedent

123 The Supreme Court decision on the national equivalent of the ICCA does not constitute a precedent since the ICCA must be interpreted autonomously. As an identical adoption of the UNIDROIT Principles [*NoA, p. 7, para. 22; PO2, p. 49, para. 49*], the ICCA also contains Art. 1.6. Pursuant to Art. 1.6 ICCA, when interpreting the ICCA, "regard is to be had to [its] international character and to [its] purposes including the need to promote uniformity in [its] application". Accordingly, one cannot simply take recourse to purely national provisions to interpret legal terms of this international contract law [*Official Comments, Art. 1.6, para. 2; Brödermann, Art. 1.6, para. 1; Vogenauer/Vogenauer, Art. 1.6, paras. 57*]. Instead, one must keep in mind that it was created for sales contracts with parties from different countries [*Official Comments, Art. 1.6, para. 3; cf. Official Comments, Preamble, para. 1*]. Additionally, the UNIDROIT Principles aim for a uniform application in all countries which adopt them [*Official Comments, Art. 1.6, para. 3; Brödermann, Art. 1.6, para. 1*]. Consequently, the ICCA must not be interpreted in line with Equatoriana's national peculiarities, but conforming to international standards [*Official Comments, Art. 1.6, para. 2*].

124 The decision did not deal with the ICCA. Instead, the Supreme Court applied the provision on fraud in Equatoriana's law on national contracts [*RNoA, pp. 29-30, para. 18*]. Unlike this law, Equatoriana's ICCA governs international commercial contracts. The Supreme Court's decision dealt with a purely domestic setting as both parties were from Equatoriana [*Exhibit C7, p. 19, para. 17; RNoA, pp. 29-30, para. 18*]. Consequently, it cannot serve as a precedent for the interpretation of the ICCA, as this would contradict its autonomous international application.

b. The Cases Must Be Distinguished as They Are Not Comparable

125 In any case, the decision must be distinguished from the case at hand. In the Supreme Court's case, the parties negotiated for more than a year about the consequences of a misrepresentation [*RNoA, pp. 29-30, para. 18*]. When the negotiations failed, the notice of avoidance was submitted shortly after [*RNoA, pp. 29-30, para. 18*]. In light of these facts, the Supreme Court did not consider the

avoidance time-barred. It is reasonable to suspend the expiration of a deadline during negotiations. This is because the parties should be enabled to find an amicable solution under which they can adhere to the contract [*cf. Official Comments, Art. 1.3, para. 2; Vogenauer/Huber, Art. 3.2.2, para. 3*]. The time pressure created by a continuing deadline would unjustifiably restrict this possibility.

126 By contrast, in the present case the discussions about the alleged misrepresentation lasted less than two months and ended with RESPONDENT no longer iterating its allegations [*Exhibit C7, p. 19, paras. 13, 16*]. RESPONDENT then waited an entire year to give the notice of avoidance [*Exhibit C8, p. 20; Exhibit C7, p. 19, para. 16*]. Moreover, the negotiations did not fail like the ones in the Supreme Court's case but rather ended in the consensual agreement on the Amendment [*Exhibit C7, p. 19, para. 16*]. Thus, there were no ongoing negotiations that could have justified a suspension of the time limit. Consequently, the Supreme Court ruling must be distinguished from the case at hand and, thus, cannot extend the time limit.

CONCLUSION OF THE FOURTH ISSUE

127 RESPONDENT cannot rely on Art. 3.2.5 ICCA to avoid the Agreement. Firstly, the CISG supersedes Art. 3.2.5 ICCA since the dispute only concerns the conformity of the goods in the sense of Art. 35 CISG. Secondly, RESPONDENT did not give the notice of avoidance within the time limit of Art. 3.2.12 ICCA. Thirdly, RESPONDENT confirmed the Agreement according to Art. 3.2.9 ICCA. Therefore, RESPONDENT cannot rely on Art. 3.2.5 ICCA to avoid the Agreement.

REQUEST FOR RELIEF

128 In response to the Tribunal's Procedural Orders, Counsel makes the above submissions on behalf of CLAIMANT. For the reasons stated in this Memorandum, Counsel respectfully requests this Tribunal to declare that:

- The Arbitral Tribunal has jurisdiction to hear the case (**Issue 1**).
- The Proceedings will not be stayed until the investigations against Mr. Field have been concluded, or alternatively bifurcated (**Issue 2**).
- The CISG is applicable to the Agreement (**Issue 3**).
- RESPONDENT cannot rely on Art. 3.2.5 ICCA to avoid the Agreement (**Issue 4**).

CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.Our university is competing in both the Vis East Moot and theVienna Vis Moot. We are submitting two separately prepared, different Memoranda.

Leonard Helbrecht

Cordula von Heyl

Christine Hohendorf

Paulina Kiefner

Sonja Sotty

Johann Wigger

Antonia Wingler

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