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WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONG KONG, MARCH 2023

MEMORANDUM FOR RESPONDENT

PCA Case No. 2022-76

CHARLES UNIVERSITY

On behalf of	Against
Equatoriana Geoscience Ltd	**Drone Eye plc**
1907 Calvo Rd	1899 Peace Avenue
Oceanside, Equatoriana	Capital City, Mediterraneo
RESPONDENT	**CLAIMANT**

Ondřej Berta • Adam Crhák • Ota Cuřín • Josefína Landová •

Lada Reisnerová • Adam Vaňko • Johana Žižáková

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LIST OF ABBREVIATIONS

Agreement	Purchase and Supply Agreement concluded between the Parties on 1 December 2020
Arbitration Clause	Article 20 of the Agreement
Art.	Article, Articles
Award	The arbitration award to be issued by the Tribunal in the PCA Case No. 2022-76
CEO	Chief Executive Officer
Central Payload Bay	Payload Bay in the middle of the fuselage
CfT	Call for Tender
CLAIMANT	Drone Eye plc.
C *number*	Claimant's exhibit
COO	Chief Operations Officer
EUR	Euro
ICC	International Chamber of Commerce
Kestrel Eye	Kestrel Eye 2010 UAV, object of the Agreement
MoC	Memorandum of CLAIMANT
NoA	Notice of Arbitration
p.	Page
pp.	Pages
para.	Paragraph

paras.	Paragraphs
Parliament	Parliament of Equatoriana
Party/Parties	Claimant and Respondent
PCA	Permanent Court of Arbitration
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
q.	Question number
RESPONDENT	Equatoriana Geoscience Ltd.
RNoA	Response to NoA
R *number*	Respondent's exhibit
Sec.	Section, sections
SOE	State-owned entity
Tender	Tender opened by RESPONDENT on 20 March 2020
Tribunal	The arbitral tribunal in the PCA Case No. 2022-76
UAS	Unmanned Air/Aerial/Aircraft System
UAV	Unmanned Air/Aerial/Aircraft Vehicle

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LIST OF ABBREVIATIONS OF LEGAL ACTS

ASA	Aviation Safety Act of Equatoriana
Chicago Convention	Convention on International Civil Aviation 1944
CISG	United Nations Convention on Contracts for the International Sale of Goods 1980
Code of Federal Regulations	Code of Federal Regulations of the United States of America 2023
Constitution	Constitution of the state of Equatoriana
Danubian Arbitration Law	Danubian Arbitration Law (verbatim adoption of UNCITRAL Model Law)
FAA	Federal Aviation Act
ICCA of Equatoriana	International Commercial Contract Act of Equatoriana (references to Art. of the ICCA of Equatoriana presume that the designation of respective Art. corresponds to its designation in UNIDROIT Principles)
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
PCA Rules	Permanent Court of Arbitration Rules 2012
Polish Bankruptcy Law	Polish Bankruptcy Law (the Act of 28 February 2003 with amendments)

South African General Notice	General Notice n. 676/2000 of South Africa
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration with the 2006 Amendments
UNIDROIT Principles	UNIDROIT Principles on International Commercial Contracts 2016
United States Code	United States Code 2020
ULIS	Convention relating to a Uniform Law on the International Sale of Goods of 1964
Vienna Convention	Vienna Convention on the Law of Treaties 1969
WTO Report	United Sstates – Countervailing duty measure on certain products from China recourse to Art. 21.5. of the DSU by China: Final Report of the Panel 2018

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	Canada
Expedition Helicopters v Honeywell	Expedition Helicopters Inc. v Honeywell Inc. Court of Appeal for Ontario 14 May 2010 *in para 90*
	France
L & B v Pia	Société L & B Cassia v société Pia Investments Cour de cassation (1re Chambre civile) 10 July 1990 *in para 31*
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United Kingdom

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Foster v Wilson	John Forster Emmott v Michael Wilson & Partners Ltd Court of Appeal 2007 Folio 1521 12 March 2008 *in para 12*

USA

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	Partial Award on Jurisdiction and Admissibility on 1992 *in para 10, 17*

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PCA

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Bankswitch v Ghana	Bankswitch Ghana Ltd. v The Republic of Ghana acting as the Government of Ghana PCA Case No. 2011-10 Award Save as to Costs on 11 Apr 2014

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Cairn v India	Cairn Energy PLC and Cairn UK Holdings Republic of India PCA Case No. 2016-07 Procedural Order No. 3 - Decision on th Application for a Stay of the Proceedings *in para 68*
Philip Morris v Australia	Philip Morris Asia Limited v The Commonweal PCA Case No 2012-12 Procedural Order No 4, 26 October 2012 *in para 68*

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Swiss Fraud Case	Claimant and Counter-Respondent v Respondent 1 and Counter-Claimant, Respondent 2 and Respondent 3 SCAI Case No. 300273-2013 Procedural Order No. 15 on 10 July 2015 *in para 74*

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Cambridge Dictionary	Cambridge Dictionary Cambridge University Press 2023	168
CISG AC Op. n.13	CISG-AC Opinion No. 13 Inclusion of Standard Terms under the CISG CISG Advisory Council 2013	99
CISG AC Op. n.17	CISG-AC Opinion No. 17 Limitation and Exclusion Clauses CISG Advisory Council 2013	160
Cessna Technical Specifications	Cessna 172 Technical Specifications	119
Federal Aviation Administration	Helicopter Flying Handbook Federal Aviation Administration 2022	127
Merriam-Webster Dictionary	Merriam-Webster Dictionary Merriam Webster, inc. 2023	168
NASA	Nasa knows: What is a Helicopter National Aeronautics and Space Administration 2017	127

ICCA's Guide to the interpretation	International Council for Commercial Arbitration ICCA's Guide to the interpretation of the 1958 New York Convention: a b for judges 2011	8
Official Records on UN Conference on the CISG	United Nations Conference on Contracts for the International Sales of Goods: Official Records Vienna, 10 March – 11 April 1980 AlCONF.97/19 United Nations 1991	104, 132
Oxford Dictionary	Oxford Dictionary Oxford University Press 2023	123, 127
Rand Corporation	Rand Corporation website 2023	110
VIAC	Vienna International Arbitration Centre	37

STATEMENT OF FACTS

Drone Eye plc ("**CLAIMANT**"), is a producer of UAVs with output of five units a year, based in Mediterraneo. It concluded the Agreement with Equatoriana Geoscience Ltd ("**RESPONDENT**"), SOE based in Equatoriana, established with the purpose of organising parts of exploration works of the Northern Part Development Program.

March 2020	RESPONDENT initiated a tender process for choosing supplier to deliver four state-of-the-art UAVs for exploration and surveillance purposes as part of the Northern Part Development Program.
May – November 2020	RESPONDENT was negotiating with two bidders. The second bidder withdrew its offer and CLAIMANT was chosen to supply the UAVs.
27 November 2020	Parliamentary debate that was supposed to authorize the Arbitration Clause of the Agreement, as is required by the Constitution, was cancelled.
1 December 2020	During a formal ceremony, the Parties signed the Agreement. CLAIMANT promised to deliver six Kestrel Eye UAVs.
February 2021	CLAIMANT showcased its newest UAV, Hawk Eye, which was in development prior to conclusion of the Agreement. RESPONDENT had no active knowledge of the existence of such a model. Hawk Eye satisfies all requirements of the Tender, is qualitatively superior in all ways compared to Kestrel Eye, and is perfectly suitable for RESPONDENT's intended use.
3 July 2021	The Citizen reported about a severe corruption scheme involving several high-profile leaders of the Northern Part Development Program, one of which CLAIMANT negotiated the Agreement with.
3 December 2021	Equatoriana held early parliament elections.
27 December 2021	RESPONDENT informed CLAIMANT about the moratorium on the performance of the Agreement.
December 2021 – May 2022	The Parties negotiated about continuance of the Agreement.
30 May 2022	RESPONDENT informed CLAIMANT about terminating the Agreement.
15 July 2022	CLAIMANT submitted the Notice of Arbitration.

SUMMARY OF ARGUMENTS

Issue I: The Tribunal does not have jurisdiction because RESPONDENT did not have the capacity to enter into the Arbitration Clause and for that reason, the Arbitration Clause is not valid and cannot constitute a legal basis for the Tribunal‘s jurisdiction. Secondly, the separability principle is not applicable in the present dispute because the Arbitration Clause has the same defect as the Agreement. In addition, even if the Tribunal proceeded with the proceedings, it would not be procedurally efficient and the rendered award would not be recognized or enforced.

Issue II: If jurisdiction was to be established, it would also mean that the Tribunal does have the power to decide on staying of bifurcating these proceedings. The outcome of the investigation against Mr. Field has a significant impact on these proceedings, thus they should be stayed. Additionally, the Tribunal should not arbitrate bribery and even if it should, the award would not be enforceable.

Issue III: The Agreement is governed by the ICCA of Equatoriana, because Kestrel Eye is an aircraft and thus it is excluded from the otherwise applicable CISG based on Art. 2(e) CISG. The Parties understood the object of the Agreement as a UAV, which is a type of an aircraft, and did not concur any different understanding of the latter term. Moreover, Kestrel Eye is an aircraft within the meaning of the CISG. It complies with internationally accepted definition of an aircraft, it is big enough to be excluded, it is intended for continual movement and thus it is capable of transport, the operation system is like aircraft, and it is subject to aircraft registration, although the registration is irrelevant in the exemption of aircraft from the CISG applicability. Therefore, the CISG cannot govern the Agreement as sales of aircraft are excluded from the application of the CISG by Art. 2(e) CISG. Since the CISG is not applicable, the ICCA of Equatoriana applies to the Agreement.

Issue IV: Respondent may void the contract by invoking Article 3.2.5 ICCA of Equatoriana. Contrary to CLAIMANT's claims, the matter is not governed by the CISG because it concerns the validity of the contract and not the conformity of the goods. The issue matches the guidelines of validity because the quality of the goods does not convey the nature of RESPONDENT's complaint. Also, gap-filling mechanisms do not provide supplementrary application of the CISG with regard to fraud and misrepresentation. This matter does not constitute a breach of contract.

I. THE TRIBUNAL DOES NOT HAVE A JURISDICTION

1. Contrary to CLAIMANT's submission, the Tribunal does not have jurisdiction to hear the case [*MoC, p. 3*]. CLAIMANT attempts to evade the fact that it knew that the approval by the Parliament, which is a condition of RESPONDENT's contractual capacity, had not been given. CLAIMANT aims to prevent having the dispute resolved in front of public local courts and tries to hide its dubious actions behind the curtain of privacy of arbitration. That however is not possible because the Parties never entered into a valid Arbitration Clause, as RESPONDENT could not do so, thus the dispute cannot be resolved in this arbitral proceeding.

2. An arbitration agreement is null and void when a party lacks the capacity to enter into it [*Born, para. 5.03; Moses, p. 36; Redfern and Hunter, para. 2.31; ICC Case 12073, p. 65*]. Capacity is a matter of contractual ability, whether such party can enter into valid and bindings contracts, and therefore even to arbitration clauses [*Born, pp. 765 – 785; Girsberger, para. 78; Razumov, para. 260; Redfern and Hunter, p. 111; Vorburger, para. 144; Waincymer, p. 33, Sec. 2.3.1*].

3. The question as to which law applies to the capacity of a party to conclude an arbitration agreement is answered by the broadly accepted principle that it shall be either be the law of the state of its incorporation or where the company is based [*Bantekas, p. 37 and p. 85; Born p. 666; Kronke, p. 220; Moses, p. 2.35; Nacimiento, pp. 219-220; Redfern and Hunter, p. 82, para. 2.35; Waincymer, p. 151; Wolff, Art. II, para. 46 and Art. V, para 105*]. This requirement had been conveniently omitted by CLAIMANT in its memorandum [*MoC, p. 5, para. 3*].

4. In this case, the assessment of RESPONDENT's capacity to conclude arbitration agreements shall be governed and examined by the law of Equatoriana, as RESPONDENT is subjected to law of Equatoriana [*MoC, p. 1; NoA, p. 4, para. 2; RNoA, p. 27, para. 3*]. The Constitution prescribes mandatory approval by the Parliament if SOE intends to include an arbitration clause with an international element into its agreement relating to public works, the SOE may only do so with approval of the Parliament [*PO2, p. 47, q. 29; PO2, p. 48, q. 3; RNoA, p. 30, para. 21*]. The approval had not been given and the Arbitration Clause is thus null and void and it cannot constitute legal basis for Tribunal's jurisdiction.

5. Merits of the dispute are governed by the law of Equatoriana [*Agreement, p. 20, Art. 20*]. The lex arbitri in the Arbitration Clause is Danubian Arbitration Law [*Agreement, p. 20, Art. 20*]. The seat of the arbitration was proposed to be Danubia, and by virtue of that, the law of Danubia as the law governing the proceedings and the formal validity of the Arbitration Clause was chosen and must be applied by Tribunal [*NoA, p. 6, para. 16; Danubian Arbitration Law, Art. 35; Bantekas, p. 50; Bergsten*

& Kröll, p. 370; Born, p. 1654; Giuditta, p. 9; Greenberg & Kee & Weeramantry, p. 58, para. 2.13; Moses, p. 51; Redfern and Hunter, p. 80, para. 1.140].

6. RESPONDENT submits that (**1.**) it did not have the capacity to conclude the Arbitration Clause and it is thus void, and secondly (**2.**) the separability principle is not applicable in the present case. Lastly, (**3.**) if the Tribunal conducted proceedings, they would not be fair, nor the Award would be recognized or enforced.

1. RESPONDENT did not have the capacity to conclude the Arbitration Clause

7. CLAIMANT submits that RESPONDENT cannot invoke its national law, which limits its capacity to conclude arbitration agreements [*CoM, p. 7, para. 7*]. In the present case, the national law of RESPONDENT however can be invoked because CLAIMANT knew about the requirement prescribed by the Constitution, which is a requirement of RESPONDENT's contractual capacity.

8. Capacity is the power to conclude a valid contract [*Girsberger, para. 78; ICCA's Guide to the interpretation, p. 84; Razumov, para. 260; Vorburger, para. 144; Skyroad Leasing v Tajik Air, para. 27*]. Capacity is governed by the place of incorporation of a contracting party independently of the law governing the arbitration agreement [*see paras. 2-6; Girsberger, para. 79; Nacimiento pp. 219-220; Redfern and Hunter, para. 2.35*].

9. Domestic laws of SOEs might limit their capacity by requiring special approval before entering into an arbitration agreement to offer at least some public control and safeguard public finances [*Girsberger, para. 79; Moses, p. 36; Redfern and Hunter, p. 2.38; Lew, p. 734*]. Corporations owned by private persons can be under some domestic laws also limited when entering into an arbitration agreement or initiating arbitration – for example under Art. 142 of Polish Bankruptcy Law, which prescribes that a bankrupt entity cannot enter into arbitration clause [*Redfern and Hunter, para. 2.36; Scherer, para. 102*]. It is at the sphere of risk for the other party to verify whether that procedure had been followed, because otherwise the preferred dispute resolution mechanism cannot be initiated [*Lew, p. 735; Redfern and Hunter, para. 2.38; Leasing v Tajik Air, para. 30*].

10. The limits of party's capacity imposed by domestic law cannot be bypassed by a mere statement that reliance on domestic law would be a violation of international public policy (or as CLAIMANT refers to it international laws), as CLAIMANT attempts to do [*MoC, p. 7, para. 7; Radwan; Zarubezhstroy v GAL, para. 423*]. The argument of violation of international public policy does not apply when the opposing party was aware of the requirements prescribed by national law [*ICC Case 6474; Supplier v X, para. 109*]. That, however, was not the case in present dispute, even though CLAIMANT attempts to portray it that way now.

11. Art. 75 of the Constitution prescribes that any administrative contract with arbitration seated in a foreign country as a dispute resolution mechanism, which is concluded by SOE, must be approved by the Parliament [*C7, p. 18, para. 6*]. The Agreement is an administrative contract [*Agreement, p. 12; PO2, p. 47, q. 29; C7, p. 18, para. 6*]. The fact that the Agreement is administrative was mutually understood between the Parties as CLAIMANT's in-house counsel considered it as administrative during the negotiations and CLAIMANT treats it as such in its submission [*C7, p. 18, para. 6; CoM, p. 8, para. 9*]. For those reasons the requirement prescribed by the Constitution had to be followed for the Arbitration Clause to be valid.

12. The approval given by the Parliament is supposed to serve as a democratic legitimization for using arbitration and having at least some public control over the contractual process [*C7, p. 19, para. 15*]. Arbitration is confidential, therefore, it is not public and does not offer the same level of transparency and public control as court proceedings do [*Böckstiegel, para. 202; Born, § 20.01; Foster v Wilson, para. 60*]. For those reasons, the required approval is necessary when concluding administrative agreements paid for by public finances.

13. The negotiations on behalf of CLAIMANT had been conducted by its COO Mr. Bluntschli, who however had been arrested for tax evasion [*C3, p. 13, para. 2*]. CLAIMANT had been aware that the parliamentary discussion, during which the approval shall be discussed, had been called off, but it immediately started preparing the UAV according to the Agreement [*C3, p. 13, para. 4; CoM, p. 14, para. 26*]. There is a clear intention of not wanting to have the content and the conclusion of the Agreement, which had been done by a negotiator who tends to not obey the law, examined by the Parliament as CLAIMANT did not even attempt to wait for it.

14. The requirement prescribed by the Constitution is applicable and was not fulfilled. It thus makes the Arbitration Clause is void because (**1.1**) CLAIMANT knew that the approval by the Parliament was necessary, (**1.2**) the Parliament did not ratify the Arbitration Clause, and (**1.3**) Mr. Barbosa did not act as an agent of the Parliament.

1.1 CLAIMANT knew that the approval by the Parliament was necessary

15. CLAIMANT knew since the inception of negotiations that there are requirements prescribed by the Constitution, which limit the capacity of RESPONDENT to enter into the Arbitration Clause [*C7, p. 18, para. 6; MoC, p. 8, para. 9; RNoA, p. 30, para 21*]. RESPONDENT cannot thus be estopped from relying on its domestic law, contrary to CLAIMANT's submission [*MoC, p. 7, para. 7*].

16. Principle of estoppel is a general principle of law [*MacGibbon, para. 468; Brownlie & Crawford, p. 640*]. Estoppel prevents the inconsistent behavior of a party that in arbitral proceedings relies on defenses opposite to that party's previous actions [*Brownlie & Crawford, p. 420; Fraport v Phillippines, para. 346; Tunisia Case; ICC case No. 4381*].

17. In *Supplier v X* the tribunal held that the argument of international laws, which prevents respondent from relying on its national laws regarding capacity, does not stand if claimant knew about the limitations on capacity of SOE at the time of the conclusion of the contract [*Supplier v X, para. 112*]. This was confirmed by other tribunals [*Bankswitch v Ghana, para. 11.86; German buyer v Thai seller; ICC Case 6474*].

18. CLAIMANT alleges to claim that RESPONDENT, due to the principle of estoppel, cannot rely on its national laws to make the Arbitration Clause void [*MoC, p. 7, para. 7*]. CLAIMANT however had been aware of the necessary parliamentary approval requirement prescribed by the Constitution since the inception of negotiations as even CLAIMANT's inhouse council confirmed [*C7, p. 18, para. 6; MoC, p. 8, para. 9; RNoA, p. 30, para 21*]. Furthermore, CLAIMANT had been informed by RESPONDENT that the Parliament had not given its approval after the Agreement was signed [*C7, p. 18, para. 9; MoC p. 7, para. 8; R4, p. 35*].

19. CLAIMANT knew about the requirement during the negotiations and that the required procedure had not been followed. For those reasons, CLAIMANT cannot invoke the argument of international laws to prevent RESPONDENT from invoking its incapacity.

1.2 The Parliament did not ratify the Arbitration Clause

20. The Agreement was not approved by the prescribed procedure. CLAIMANT tries to argue that it did and that the subsequent ratification is sufficient [*MoC, p. 8, para. 9*]. That argumentation in the circumstances of the present dispute, however, has no basis in law.

21. The Constitution imposes an obligation to obtain approval from the Parliament in order to conclude agreements which have arbitration with a foreign seat as a dispute resolution mechanism [*NoA, p. 6, para. 14*]. There must be an express approval based on a formal vote, which can also be retroactive but no other option is possible [*PO2, p. 48, q. 34*]. The subsequent amendment of Arbitration Clause cannot remedy the validity of an agreement, which is void [*Lew, p. 740*].

22. The parliamentary debate had been scheduled for 27th November 2020 [*C7, p. 18, para. 7*]. However, it had been cancelled and no other debate regarding approval of the Agreement had been scheduled till this date [*PO, p. 47, q. 30*]. If a mere amendment of an invalid arbitration clause could

remedy the invalidity, it would be contrary to the reason of requiring the parliamentary approval in the first place, therefore such argumentation shall be refused.

23. The Parliament never gave its consent to RESPONDENT to conclude the Agreement. As consent is a prerequisite for RESPONDENT's capacity, the Agreement had not been lawfully concluded.

1.3 Mr. Barbosa did not act as an agent of the Parliament

24. Contrary to CLAIMANT's memorandum, RESPONDENT submits that Mr. Barbosa did not act as an agent of the Parliament and required authorisation cannot be implied [*MoC, p. 8 para. 10*].

25. Principles of agency law in most legal systems require some proof that the agent had received the authority to enter into the relevant contract by the principal [*Born, para. 10.02; Herbots, para. 239, 261, 460, 427, 621; Bridas v Turkmenistan, para. 345*]. Pursuant to Art. 2.2.2(1) ICCA of Equatoriana, principal's grant of authority to an agent may be express or implied. This authority shall appear in form of a written statement, clear conduct, or a combination of these two – a communication by the principal jointly to the third party and the agent [*Brödermann, para. 67*].

26. In the context of the conclusion of agreements with SOEs, when an individual has no authority to sign the agreement, it becomes void [*Lew, p. 738*]. CLAIMANT relies on the award Malicorp v Egypt, which however does not address the issue of agent and principal at all.

27. The Minister of Natural Resources and Development, Mr. Barbosa, is not even a member of the Parliament and he never attempted to portray himself to CLAIMANT that way [*PO2, p. 48, q. 35*]. There is no record in the case file that he would be able to act as an agent of the Parliament, or that the Parliament had stated so. The Parliament is the only body that could grant the required approval and Mr. Barbosa had not had express or implied authority to act on its behalf.

28. Furthermore, Mr. Barbosa signed the Agreement as Chairman of RESPONDENT's supervisory board, required by the statutes of RESPONDENT [*PO2, p. 48, q. 37*]. The Agreement states that the evidence of approval is evidenced by the signature of the Minister [*Agreement, p. 10*]. This approval is however linked to the approval required by the statutes and not the Constitution because the Constitution prescribes precisely the approval by the Parliament and not additional approval by the signature of a Minister. The approval of the Parliament, thus, cannot be replaced by the signature of Mr. Barbosa, being a mere Minister and not a member of the Parliament [*PO2, p. 48, q. 34*].

29. Mr. Barbosa did not act as an agent of the Parliament, he has never made CLAIMANT reasonably believe that he had any authority to replace the approval of the Parliament.

2. The separability principle is not applicable in the present dispute

30. The separability principle does not protect the Arbitration Clause in this particular case contrary to CLAIMANT's assertion [*CoM, p. 10, para. 14*]. The Arbitration Clause as well as the whole Agreement is tainted by corruption and for those reasons the separability principle does not apply.

31. The separability principle contained in Art. 16(1) of Danubian Arbitration Law, on which CLAIMANT relies, is not unlimited [*Born, para. 3.02 (B)(3)(e)*]. The arbitration clause shall be invalid if it is affected by the same defect as the principal contract [*Lawrence, p. 153; Fung Sang v Kai Sun para. 75; L & B v Pia, para. 42; SNE v Joc Oil*]. This is even stated in the case Fiona Trust which is cited by CLAIMANT [*Fiona Trust, p. 17*].

32. Mr. Field, COO of RESPONDENT, was the key figure during the negotiations with CLAIMANT [*RNoA, p. 28, para. 8*]. Mr. Field had been accused of severe cases of corruption and the Agreement is likely affected by corruption too (*see* **75.**) [*RNoA, p. 29, para. 16; CC3, p. 13, para. 5*]. The Arbitration Clause, included in Art. 20 of the Agreement, is an integral part of the contract as it not only provides the dispute resolution mechanism but also specifies the applicable law for the whole contract [*Agreement, p. 12*]. There is no indication that the Agreement would be based on a standardized contract and hence the whole content of the Agreement had been discussed and agreed.

33. As the Arbitration Clause is an integral part of the Agreement and it is not standardized it is likely tainted by corruption as well and should not be protected by the principle of separability, which does not protect arbitration clauses unlimitedly.

3. If the Tribunal conducted the proceedings, they would not be fair, nor the Award would be recognized or enforced

34. If the Tribunal would render an award, it could not be recognized or enforced against the losing party because RESPONDENT did not have the capacity to enter into the Arbitration Clause. Conducting the proceedings in such circumstances would be unfair to the Parties.

35. It is a fundamental principle of international arbitration that a tribunal should attempt to render an enforceable award [*Moses, p. 151; Balkan Energy v Ghana, para. 79*]. Tribunal also has an essential duty to ensure that the proceedings are fair towards the Parties [*Moses, p. 165; Libananco v Turkey, para. 78*]. The obligation of fairness of the process is anchored in Art. 17 of the PCA Rules, Art. 18 of Danubian Arbitration Law and in the NYC [*Part two: Recommendation regarding the interpretation of article II, para. 2, article VII; PCA Rules Commentary, p. 91*]. Additionally, in other various arbitration

laws and arbitral institutional rules [*Born, p. 2294; Shroff, p. 800; Gabriel & Schregenberger, p. 48; Luttrell, p. 3*].

36. Procedural fairness includes conducting the proceedings efficiently [*Banerjee & Murthy, p. 112; Mohtashami, p. 108*]. In accordance with Art. 17 PCA Rules and Chapter V of Danubian Arbitration Law, the Tribunal shall conduct proceedings so as to avoid unnecessary delay and expenses [*Schlabrendorff, p. 153; Fortese & Hemmi, p. 116; Florescu, p. 39; Menon, p.7; Landbrecht, p. 22*].

37. Even though the amount of this dispute is not quantified, the price to be paid under the Agreement is EUR 46,880,000, and with that price, the average arbitration cost would be between EUR 376,482 and EUR 504,236 exclusive of any costs for legal representation [*VIAC*]. Even though the registration fees might vary the arbitrators' fees, which generate 90 % of the overall cost, will likely reach the same level. Furthermore, resolving the dispute in arbitration is less efficient than in domestic courts due to the lack of investigative powers of the Tribunal. This is further developed in Issue 2 (*see* **3.1**)

38. If the Tribunal upheld its jurisdiction in these circumstances and conducted the proceedings it would not be contrary to the obligations arising out of the duty of procedural fairness. Parties would be required to pay costs for arbitration fees, which would not occur if the matter of corruption was resolved before domestic courts. As will be established, the potentially rendered award would not be recognized nor enforced and, thus, not even the prevailing party would have a chance to recover the arbitration costs or the awarded damages if they were awarded in the award.

39. Forcing to generate those additional costs would be contrary to fairness and efficiency, which are the fundamental obligations of arbitrators.

40. If an award was rendered it would not be enforced because (**3.1**) RESPONDENT was under incapacity and thus any potential award should not be enforced, and (**3.2**) recognition and enforcement of the Award would be contrary to public policy of Equatoriana.

3.1 RESPONDENT was under incapacity and thus any potential award should not be enforced

41. RESPONDENT, according to law of Equatoriana, did not have the capacity to conclude the Arbitration Agreement and for that reason the award would not be enforced.

42. Art. 34(2)(a)(i) Danubian Arbitration Law specified that award shall be set aside when a party to arbitral proceedings was under incapacity [*Born, p. 514*]. A similar safeguard is anchored in the Art. V(1)(a) NYC, which states that if a party was under some incapacity the award may be denied

recognition and enforcement [*NYC, Art. V(1)(a); Born, p. 666*]. It is sufficient that only one party to a contract was under incapacity and this applies also to SOEs [*Berg, p. 275; Nacimiento, p. 218; Ragno, para. 162; Fox & Wilske, p. 267*].

43. Such denial of recognition due to incapacity will occur when party did not comply with the requirements of its domestic law [*Anzorena, pp. 623-624*]. The incapacity of a party should be examined at the time of the conclusion of an agreement [*Anzorena, p. 615; Nacimiento, p. 205; Fox & Wilske, p. 267; Fougerollem v Ministry of Defence, pp. 515 – 517*].

44. Art. 75 of the Constitution prescribes that SOE must obtain approval from the Parliament to be able to enter into agreements which has arbitration seated in a foreign country as a dispute resolution mechanism [*NoA, p. 6, para. 14*]. RESPONDENT, however, did not have the capacity to conclude the Arbitration Clause (*see* **1**).

45. Not only the courts of Equatoriana but also other courts would deny enforcement and recognition of the award because RESPONDENT was under incapacity to conclude the Arbitration Clause.

3.2 Recognition and enforcement of the Award would be contrary to public policy of Equatoriana

46. The Constitution establishes the most fundamental principles which must always be followed. One of the principles is that SOE can only conclude agreements relating to public works with the approval of the Parliament. Violation of this rule is contrary to public policy of Equatoriana and prevents awards from being enforced and recognized.

47. In accordance with Art. V(2)(b) NYC the award shall not be recognized or enforced when it would contrary to public policy of a country where the recognition or enforcement is sought [*NYC, Art. V(2)(b); Wolff, p. 489; BCB v The Attorney, para. 23*]. The NYC is relevant as the seat of this arbitration is in a different country than the enforcement or recognition, which might also be sought [*Agreement, Art. 20*].

48. The term public policy is not defined, and it is an evolving concept [*Maurer, pp. 57-58; Wolff, p. 495*]. Public policy had been explained as guarding fundamental values and basic foundations of the legal system [*Mexicana v Pemex, para. 4; Northcon v Mansei, para. 2.2.3*].

49. The Constitution of every country states the most fundamental principles and obligations, which must always be preserved. The Constitution limits the capacity of SOE in order to safeguard public finances and also offer public control over the process because arbitrations are confidential and

there is no public control as in court proceedings. If such obligation would not be obeyed, it would be a violation of public policy of Equatoriana.

50. RESPONDENT is an SOE funded mainly by the government of Equatoriana, has its assets in Equatoriana and does not operate on any other market [*PO2, p. 44, q. 7*]. In the unlikely scenario that the Tribunal would render an award in favour of CLAIMANT, it would be reasonable to attempt to enforce the award in Equatoriana.

51. The award could not be enforced nor recognized under the NYC in Equatoriana because it violates its public policy.

52. **Issue I conclusion**: Contrary to CLAIMANT, RESPONDENT submits that it did not have the capacity to enter into the Arbitration Clause and for that reason, the Arbitration Clause is invalid and cannot constitute a legal basis for Tribunal's jurisdiction. Secondly, the separability principle is not applicable in the present dispute because the Arbitration Clause has the identical defect as the Agreement. In addition, even if the Tribunal proceeded with the proceedings, they would not be procedurally efficient and rendered Award would not be recognized nor enforced.

II. THE TRIBUNAL SHOULD STAY OR BIFURCATE THESE PROCEEDINGS

53. RESPONDENT is in a situation where it appears likely that CLAIMANT illegally incentivized Mr. Field, RESPONDENT's former COO and head negotiator, to conclude the Agreement with CLAIMANT under unfavourable terms for RESPONDENT, because both CLAIMANT and Mr. Field have a history of corrupt practices and the whole negotiation process is quite suspicious (*see* **80**. *below*).

54. In spite of these circumstances, CLAIMANT inadequately downplays the severity of the charges being brought Mr. Field, even though they would significantly impact these proceedings [*MoC, p. 21, para. 44*] (*see* **3.1** *below*).

55. As oppose to CLAIMANT's assumptions (**1.**) stay of proceedings and bifurcation are not interim measures; and even if stay and bifurcation were interim measures, they should still be granted.

56. Further, contrary to CLAIMANT's submission, (**2.**) the Tribunal does have the power to both stay or bifurcate these proceedings under Art. 17 PCA Rules; and (**3.**) the Tribunal should order a stay or bifurcation of these proceedings.

1. Stay of proceedings and bifurcation are not interim measures

57. CLAIMANT incorrectly assumes that stay and bifurcation are interim measures under Art. 17 of Danubian Arbitration Law [*MoC, p. 14, para. 26*]. RESPONDENT argues that these basic means

of conduct of the proceedings are not interim measures, therefore the standards presented by CLAIMANT are inapplicable.

58. Art. 17 Danubian Arbitration Law defines interim measures as temporary measures by the tribunal to order a party to: (a) maintain or restore the status quo pending determination of the dispute; (b) take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself; (c) provide a means of preserving assets out of which a subsequent award may be satisfied; or (d) preserve evidence that may be relevant and material to the resolution of the dispute [*UNCITRAL Model Law, Art. 17*].

59. Stay of arbitration is a temporary suspension of an arbitration proceedings, usually because there are other parallel proceedings, while bifurcation refers to the consideration of distinct issues for preliminary or independent determination in a separate phase of proceedings [*Groselj, p. 560; Nazzini, p. 894*; *Kinsella, p. 346; Vasani, p. 302; Greenwood, p. 105; Shirin, para. 1*].

60. Neither suspension of proceedings or separating different issues of a dispute into subsequent phases of proceedings aims at maintaining or restoring status quo pending determination of a dispute; preventing or refraining from taking certain actions; providing preservative means or preserving evidence. Therefore, neither stay nor bifurcation are interim measures under Art. 17 Danubian Arbitration Law.

61. To conclude, since stay and bifurcation are not interim measures under Art. 17 Danubian Arbitration Law, as they do not serve the purpose of interim measures, the standards presented by CLAIMANT for granting interim measures should not be applied.

62. Nevertheless, even if the Tribunal was to apply the conditions for granting interim measures under Art. 17A Danubian Arbitration Law, as does CLAIMANT, stay and bifurcation should be granted [*MoC, p. 14, para. 26*].

63. According to Art. 17A Danubian Arbitration Law, for an interim measure to be granted, firstly, the harm likely to result if the measure is not ordered should not be adequately reparable by an award of damages, and such harm should substantially outweigh the harm that is likely to result to the party against whom the measure is directed if the measure is granted. Secondly, there must be a reasonable possibility that the requesting party will succeed on the merits of the claim [*UNCITRAL Model Law, Art. 17; Brekoulakis & Ribiero, p. 872; Holtzmann, p. 160; Rab, p. 210; Sanchez, p. 54*].

64. What these conditions essentially entail is that there must be a threat that would cause considerable harm to the requesting party, which would also outweigh the harm that is likely to result to the

party against which the measure is directed should it be granted. Additionally, the possibility of prevailing in the dispute for the requesting party must not be unreasonably low.

65. In the present case, continuing with these unbifurcated proceedings could eventually result in an unenforceable award (*see* **3.3** *below*). RESPONDENT insists that not bifurcating these proceedings would entail great harm, because extensive arbitral proceedings that the Parties are committed to would result in spending considerable resources that would essentially be wasted because of unenforceability. Such harm would be considerably greater than harm caused by just staying or bifurcating the proceedings. Furthermore, there is no reason for the Tribunal to consider the chances of RESPONDENT prevailing in this dispute unreasonable, since there is a clear impact of the investigation of Mr. Field on these proceedings (*see* **3.1** *below*).

66. In summary, even if the Tribunal was to apply the conditions for granting interim measures under Art. 17A UNCITRAL Model Law per the request of CLAIMANT, stay and bifurcation are nevertheless a suitable measure and should be ordered.

2. The Tribunal does have the power to stay or bifurcate these proceedings under Art. 17 PCA Rules

67. CLAIMANT argues that the Tribunal does not have the power to stay these proceedings, while also claiming the Tribunal is competent to hear this case [*MoC, p. 11, para. 17*]. RESPONDENT asserts that the Tribunal has the power to stay or bifurcate these proceedings under Art. 17 PCA Rules. This power would remain even if the jurisdiction of the Tribunal was denied, because the Tribunal would still have to conduct the proceedings leading up to the render of an award declaring lack of jurisdiction.

68. Art. 17 PCA Rules gives the Tribunal broad discretion as to the conduct of arbitral proceedings, including whether to stay or bifurcate the proceedings [*PCA Rules Commentary, p. 87; Cairn v India, para. 109; Iran v USA, para. 59; Philip Morris v Australia*; *Burmilla Trust case; Berkowitz v Costa Rica*]. Therefore, the Tribunal has autonomy to decide on whether it will stay or bifurcate these proceedings or not.

69. In the present case, CLAIMANT attempts to argue that the Tribunal does not have the power to stay or bifurcate these proceedings, because it may not be advantageous for the business of CLAIMANT, suggesting that this somehow strips the Tribunal of its power to conduct the proceedings [*MoC, p. 11, para. 17*]. This approach is not reasonable, since CLAIMANT simultaneously argues that the Tribunal does have jurisdiction over this dispute, which does include the power to stay or bifurcate the proceedings [*MoC, p. 4, para. 1*]. Furthermore, it seems like

CLAIMANT is only trying to deny the power of the Tribunal to order a stay or bifurcation in order to minimize its business losses, while neglecting that it is very likely that the Agreement was tainted by bribery and that it should be a priority to resolve this dispute [*RNoA, p. 27, para. 1*].

70. To conclude, the Tribunal does have the power to stay or bifurcate these proceedings and CLAIMANT is only denying this because it tries to serve its business agenda.

3. The Tribunal should order a stay or bifurcation of these proceedings

71. CLAIMANT submits that the Tribunal should not stay or bifurcate these proceedings, while RESPONDENT insists that these proceedings should in fact be stayed until the investigation against Mr. Field is concluded or, alternatively, bifurcated into two phases [*MoC, p. 11, para. 16*, *RNoA, p. 31, para. 29*].

72. The Tribunal should stay or bifurcate these proceedings, because (**3.1**) the outcome of the criminal investigation against Mr. Field will have a significant impact on the proceedings; (**3.2**) the Tribunal cannot arbitrate issues tainted with bribery; (**3.3**) not staying or bifurcating the proceedings could result in an unenforceable award

3.1 Outcome of the criminal investigation against Mr. Field will have a significant impact on these proceedings

73. Contrary to what CLAIMANT argues, the result of the investigation against Mr. Field will have a significant impact on these proceedings, and therefore these proceedings should be stayed [*MoC, p. 13, para. 24*].

74. For a stay to be ordered, the reason for the stay has to have sufficient impact on the arbitration proceedings, namely the potential to influence the final award [*Groselj, p. 576; Poncet & Macaluso; Swiss Fraud Case, para. 26; E Holding v Z ltd, para. 43; ICC Case 13706; ICC Case 11961; Sofema v CMR Tunisie*].

75. In the current case, the outcome of the criminal investigation against Mr. Field will indeed have a sufficient impact on these proceedings, namely on the validity of the Agreement and the Arbitration Clause. If the criminal court in Equatoriana found that Mr. Field had been illegally incentivized by CLAIMANT to conclude the Agreement with it, RESPONDENT would be acting in breach of Art. 15 of Anti-Corruption Act of Equatoriana if it tried to comply with an order by the Tribunal to fulfil the Agreement. Hence, there is a clear significant impact of criminal proceedings on this dispute.

76. In conclusion, because the outcome of the criminal investigation against Mr. Field will have a significant impact on these proceedings, namely on the validity of the Agreement and the Arbitration Clause, the Tribunal should stay or bifurcate these proceedings.

3.2 The Tribunal cannot arbitrate issues tainted with bribery

77. Since it appears likely that CLAIMANT illegally incentivized Mr. Field resulting in unfavourable Agreement for RESPONDENT, it would be more reasonable to wait for the result of the investigation of Mr. Field, since if he was convicted, this case would not be arbitrable.

78. Arbitrability indicates whether a dispute is capable of being settled by arbitration [*Viscasillas I, p. 273; Eleni, para. 1; Crystallex v Venezuela, paras. 5-7*]. Tribunals have often refused to arbitrate issues regarding bribery, fraud or corruption [*Kerr & Williams; Vasudeva p. 399-408; Ayyasamy vs A. Paramasivam; Kumar p. 249 – 274; Philip p. 149; Norburg p. 106; Avari v Hilton; Hub Power v WAPDA; Sindh v Khan; Rrb Energy vs Vestas Wind Systems; Idornigie p. 279-287; Export & Chemical v Kaduna; Bernstein & Wood*].

79. *Lagergren* case involved a contract for supply and installation of equipment which was obtained by illicit payments to state officials. The arbitrator found that because one party committed bribery, it lost its right to have its dispute resolved via arbitration and declined jurisdiction over the dispute, stating that if one party is involved in bribery, arbitral jurisdiction should be refused [*Lagergren award*]. These disputes should thus be litigated via domestic courts instead.

80. In the present case, it appears likely that CLAIMANT illegally incentivized Mr. Field to conclude the Agreement with CLAIMANT under unfavourable terms for RESPONDENT. It is highly unusual that both CLAIMANT and Mr. Field have a history of corrupt practices and it does not seem coincidental that CLAIMANT negotiated the Agreement primarily with Mr. Field [*PO2, p. 44, q. 3; R2, p. 33; RNoA, p. 28, para. 8*]. This negotiation process had some rather strange particularities. Originally, there were two bidders for the Tender, CLAIMANT and Aerial Systems plc, and both were initially negotiated with [*R1, p. 32, para. 3; RNoA, p. 28, para. 8*].

81. Even though the offer from Aerial Systems plc was objectively better, in the absence of Ms. Bourgeois, who had also been involved in the majority of the negotiations on behalf of RESPONDENT, Mr. Field completely ceased negotiations with Air Systems plc and suddenly negotiated a much larger offer with CLAIMANT than previously planned [*R1, p. 32, paras. 3, 5, 6*]. These circumstances certainly raise suspicion and should be properly investigated by criminal courts in Equatoriana, which have broader investigative powers than the Tribunal [*see Caprasse & Tecqmenne, p. 521; Lemaire, p. 185; Mayer, p. 106*].

82. To summarize, because it appears likely that CLAIMANT illegally incentivized Mr. Field to conclude the Agreement with CLAIMANT under unfavourable terms for RESPONDENT, the Tribunal cannot arbitrate the present dispute. Accordingly, the Tribunal should stay or bifurcate these proceedings and wait for the result of the investigation against Mr. Field.

3.3 Not staying or bifurcating the proceedings could result in an unenforceable award

83. If the Tribunal was not to stay or bifurcate these proceedings, the award rendered by the Tribunal might be unenforceable. Provided that Mr. Field is convicted, the performance of the award would be contrary to Art. 15 Anti-Corruption Act of Equatoriana. To avoid such waste of significant time and resources, the Tribunal should stay or bifurcate these proceedings.

84. Under Art. V(2)(b) NYC and Art. 36(1)(b)(ii) UNCITRAL Model Law, an award is not enforceable if it is in conflict with respective public policy. Due to the international nature of arbitration, the correct standard to apply when determining public policy is international public policy [*Germany III ZR 269/88; Parsons & Whittemore v RAKTA; Luxemburg Public Policy case; Hwang & Lim, paras. 86, 166; Paulsson, pp. 110, 113*]. When it comes to public policy and corruption, there is broad international consensus that corruption and bribery are contrary to international public policy [*Mayer & Sheppard, p. 218; WDF v Kenya; Redfern and Hunter, paras. 3-20; Büchler & Müller-Chen & Schwenzer, p. 1380*]. Moreover, Art. 15 Equatoriana's Anti-Corruption Act also prohibits to either directly or indirectly perform a contract for the conclusion of which undue benefits were granted or promised [*MoC; p. 27; para. 2*].

85. Consequently, an arbitral award ordering a party to perform an action that is contrary to public policy, which includes corruption and bribery, would constitute grounds for not enforcing such award. Therefore, if bribery was proven in association with the Agreement by domestic courts in Equatoriana, an award already rendered by the Tribunal might become unenforceable, because if this award ordered RESPONDENT to perform under the Agreement, it would be contrary to Equatoriana's Anti-Corruption Act. Even though not every contradiction with state law should constitute a public policy violation, with corruption being contrary to public policy (*see* **84.** *above*) and Equatoriana being amongst the 20 % most corrupt countries, as well as actively trying to fight the corruption, the Anti-Corruption Act of Equatoriana is an extremely important instrument to maintain order in Equatoriana as it would be in any other state [*C3, p. 14, para. 11; RNoA, p. 31, para. 21*]. Therefore, such an award that would be contrary to public policy would not be enforceable under UNCITRAL Model Law and NYC.

86. In conclusion, if the Tribunal was not to stay or bifurcate these proceedings, there is a significant risk of non-enforcement of the arbitral award under UNCITRAL Model Law and NYC, which would be a severe waste of time and resources for the Tribunal and the Parties. Thus, the Tribunal should order a stay or bifurcation of these proceedings.

87. **Issue II conclusion**: The circumstances of this dispute raise suspicion as to whether CLAIMANT illegally incentivized Mr. Field to conclude the Agreement under unfavourable terms for RESPONDENT. Both CLAIMANT and Mr. Field, who negotiated the Agreement, have a history of corrupt practices and the whole negotiation process is suspicious. Additionally, as opposed to CLAIMANT's assumption stay of proceedings and bifurcation are not interim measures and even if they were, they should still be granted. Furthermore, contrary to CLAIMANT's submission the Tribunal does have the power to stay or bifurcate these proceedings. The Tribunal should exercise this power, because outcome of the criminal investigation against Mr. Field will have a significant impact on these proceedings. Moreover, The Tribunal cannot resolve whether the Agreement is tainted by bribery and there is a risk of a set-aside.

III. THE AGREEMENT IS GOVERNED BY THE ICCA OF EQUATORIANA

88. What lies at the core of this issue is the interpretation of the term *aircraft* under the CISG. The Parties concluded the Agreement for the sale of six Kestrel Eye UAVs, a type of an aircraft. Although the CISG would have governed an international sale of different goods between the same Parties, the CISG excludes aircraft from its scope of application. The Agreement is therefore governed by the ICCA of Equatoriana as the law of Equatoriana is established by the choice of law in the Agreement [*Agreement, p. 12, Art. 20*].

89. However, CLAIMANT tries to avert the application of the ICCA of Equatoriana and demands the application of the CISG, as it is more favourable for CLAIMANT. This demand is however unsubstaintiated and CLAIMANT is fully aware that under Art. 3.2.5 ICCA of Equatoriana RESPONDENT can avoid the Agreement (*see* **IV**). CLAIMANT incorrectly qualifies Kestrel Eye as not an aircraft to further its cause.

90. Art. 2(e) CISG excludes all aircraft, including Kestrel Eye. This has been confirmed in many arbitration awards: in *Ayers Aviation Holdings*, the CISG was not applicable to the contract, even though the governing law was of a signatory state to the CISG, as the object of the contract was an aircraft [*Ayers Aviation Holdings*]. In *Datron v Aeryon*, the object of the contract was a UAV, and the CISG was inapplicable, as it was in *Expedition Helicopters v Honeywell*, where the object of the contract was a helicopter [*Datron v Aeryon; Expedition Helicopters v Honeywell*]. Kestrel Eye is classified

as an aircraft, as it fits within the internationally accepted definition of an aircraft, meets all technical criteria of an aircraft, and does not depend on registration requirements. Since the Agreement is governed by the law of Equatoriana, the ICCA of Equatoriana applies to it instead of the CISG.

91. RESPONDENT asks the Tribunal to rule that the Agreement is governed by the ICCA of Equatoriana, not the CISG, as Kestrel Eye falls under the category of aircraft within the CISG with all its characteristics and by various different requirements. The CISG cannot govern the Agreement as (**1.**) Kestrel Eye is an aircraft; (**2.**) the CISG does not apply by default thus ICCA of Equatoriana therefore governs the Agreement.

1. Kestrel Eye is an aircraft

92. The Agreement is governed by the law of Equatoriana, which has incorporated the CISG as Equatoriana is a signatory state to the CISG [*Agreement, p. 12, para. 20; NoA, p. 7, para. 20; PO1, p. 43, para. 3; MoC, p. 26, para. 60*]. The CISG, as an internal part of the law of Equatoriana, applies to most international sales of goods sold under the law of Equatoriana, unless the application is hindered by the object of the contract, specified in Art. 1-6 CISG [*PO1, p. 42, para. 3; MoC, p. 26, para. 59*]. Such a situation occurred in this case, where the object of the Agreement is an aircraft, excluded by Art. 2(e) CISG.

93. CLAIMANT describes Kestrel Eye as a UAV and differentiates it from an aircraft thus Kestrel Eye would not be excluded by Art. 2(e) CISG and in consequence the Agreement would be governed by the ACISG. However, that is an incorrect interpretation of the provision, which leads to the wrong classification of Kestrel Eye as not an aircraft. The CISG excludes all aircraft. The term aircraft can be interpreted either subjectively, through the lenses of the Parties, and objectively, in the meaning of the CISG. Kestrel Eye classifies as an aircraft by both interpretations. Considering this analysis, the Agreement undoubtedly cannot be governed by the CISG, but, instead, the ICCA of Equatoriana, its Equatorianian alternative, which is based on UNIDROIT Principles [*PO1, p. 43, para. 3*].

94. Kestrel Eye is an aircraft as (**1.1**) The Parties viewed Kestrel Eye as an aircraft; (**1.2**) Kestrel Eye classifies as an aircraft under the CISG.

1.1 The Parties viewed Kestrel Eye as an aircraft

95. The CISG respects the importance of the assessment of the intent of parties, which is what constructs the contract [*Zeller I, p. 643*]. Therefore, had the Parties agreed to view Kestrel Eye differently to an aircraft, this subjective intent would have outweighed the objective interpretation of the term. Nonetheless, no such concurrence happened between the Parties, and the common

practice between the Parties did not establish any subjective intent of the Parties to view Kestrel Eye differently to an aircraft. CLAIMANT started to draw a distinction between Kestrel Eye and an aircraft only recently to secure the application of the CISG and avoid the application of the ICCA of Equatoriana, which is less favourable to CLAIMANT. The Parties, therefore, understood UAVs, including Kestrel Eye, as aircraft, in coherence with the universal understanding (*see* **1.2**).

96. To determine whether the Parties ever reached such subjective intent under the CISG, the provisions of Art. 8 CISG should be followed.

97. Considering Art. 8 CISG, statements and other conduct must be interpreted through the intent of the parties. Under Art. 8(1) CISG subjective intent of parties must be examined primarily and such intent must be properly expressed, otherwise, it cannot substantiate rights and obligations within the contract [*UNCITRAL Digest, p. 44, para. 4; MCC v D'Agostino, pp. 3-5; Swiss furniture case*].

98. If interpretation under Art. 8(1) CISG does not suffice, according to Art. 8(2) CISG 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 under the same circumstances [*Smythe, p. 11*]. Art. 8(2) CISG results in similar effects as the contra proferentem rule which states that an ambiguous contract term should be construed against the drafter of the contract, or the party that used the term first rule [*Huber & Mullis, p. 15, para. 2; Lookofsky, p. 43, para. 2.12; Schwenzer, p. 125, para. 47*].

99. Additionally, Art. 8(3) CISG expressly provides that to determine the intent of the parties, all relevant circumstances, including conduct of the parties, unilateral acts and the contract itself, must be considered [*Schwenzer, p. 153, para. 20; Schroeter II, p. 110; CISG AC Op. n. 13, para. 1-1.9; Smythe p. 8*].

100. CLAIMANT itself replied to the CfT with Kestrel Eye, fully aware the Tender was asking for an aircraft [*CfT, p. 9*]. Kestrel Eye is referred to as an aircraft in the Agreement four times, eleven times as a UAS, a term explained in the preamble as an "*aircraft in the form of Unmanned Aerial Systems (UAS)",* and five times as a drone [*Agreement, p. 10; Agreement, pp. 10-11; Art. 2- 4*]. In the negotiations between the Parties leading up to the signing of the Agreement and afterwards, and in the statements of their representatives, nothing suggests that the Parties concurred a subjective intent to view Kestrel Eye different to an aircraft, as the communication opts between aircraft, drone, UAV and UAS [*C3, pp.13-14, para. 7-10; C7, p. 18, para. 2-5; C8, p. 20; RNoA, p. 28, para. 6,7,9, 10, 17, 26; R1, p. 32, para. 3,5-7; R4, p. 35*].

101. Evidently, the common practise between the Parties does not establish any subjective intent of the Parties to view Kestrel Eye differently to an aircraft. By contra proferentem rule, expressed in Art. 8(2) CISG, the term UAV should be construed against the party that used the term first, which is CLAIMANT [*C4, p. 15*].

102. The Parties did not concur any subjective intent to view Kestrel Eye as different to an aircraft. The interpretation of the term should therefore be established through objective understanding of the term *aircraft*.

1.2 Kestrel Eye classifies as an aircraft under the CISG

103. CLAIMANT states that Kestrel Eye is not an aircraft within the meaning of the CISG [*MoC, p. 22, para. 45*]. However, Kestrel Eye is an aircraft, as it follows the internationally accepted definition of an aircraft, technical criteria to be defined as an aircraft and it classifies as an aircraft (under the CISG), regardless of whether the object is subject to registration duty, or not.

104. The CISG does not govern the sales of an aircraft as because such sales are often subject to highly specialized legislation which varies from country-to-country *e. g.* special rules on registration requirement. There is a need for an aircraft to be more controlled when manoeuvring in nations aviation space, which leads to special requests for marking an aircraft with signatory flags in some countries. In order not to raise questions of interpretation of the provision, the exclusion in Art. 2(e) CISG was agreed on by the signatories [*Official Records on UN Conference on the CISG; UNCITRAL Yearbook VII, p. 27*]. The interpretation of the term *aircraft* shall be conducted by provisions provided by CISG, which itself is interpreted through the Vienna Convention.

105. To help draw what is an aircraft under the CISG, and whether an object qualifies as an aircraft, three alternative criteria can be used. Firstly, whether the object meets the internationally accepted definition of an aircraft. Secondly, whether the object meets the technical criteria drawn from the analogical relation between ships and boats, thus its size, its intended use and its operation system. Lastly, whether the object is subject to registration duty, or not.

106. CLAIMANT describes Kestrel Eye as not an aircraft in the sense of the CISG, as "*specification of Kestrel Eye does not match with the necessary elements for the classification as an aircraft in sense of Art. 2(e) CISG*" [*MoC, p. 21, para. 45*]. Those necessary elements are according to CLAIMANT based on small size of Kestrel Eye, the intended use of Kestrel Eye is not transport, its operation system. However, Kestrel Eye is an aircraft, because (**1.2.1**) Kestrel Eye fits the internationally accepted definition of an aircraft; (**1.2.2**) Kestrel Eye meets the technical criteria of an aircraft and (**1.2.3**) sales of any aircraft, registered or not, are excluded from the CISG.

1.2.1 Kestrel Eye fits the internationally accepted definition of an aircraft

107. CLAIMANT states, that Kestrel Eye is not excluded by Art. 2(e) CISG, as it is not an aircraft [*MoC, p. 21, para. 45*]. This statement is a misinterpretation of exclusion by Art. 2(e) CISG, as Kestrel Eye meets the definition of an aircraft.

108. The CISG lacks the definition of aircraft [*Winship, p. 1059*]. Taking into account that one of the major purposes of the Convention is to provide legal certainty and the wording does not indicate any exemptions, all aircraft are excluded by Art. 2(e) CISG [*Schlechtriem, p. 36, para. 32*].

109. Equatoriana as one of the signatory states to the CISG cocreates the international standard by which aircraft is to be interpreted, in accordance with Art. 7 CISG. Art. 7 CISG enacts that the regard to the international character of the CISG must be maintained in the interpretation of the CISG and that matters which are not settled in by the CISG are to be settled in accord with general principles and applicable law. The CISG, and terms used in it, are also bound by provisions of the Vienna Convention, specifically in this case Art. 31 and Art. 32 Vienna Convention [*Schroeter III, p. 428; Zeller II, p. 11*]. Vienna Convention obliges to interpret a treaty in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and in the light of its object and purpose. To help to draw the definition of what is an aircraft, worldwide used definitions shall be applied.

110. Firstly, UAV is an abbreviation of Unmanned **Aircraft** Vehicle [*Fox, p. 684; Yanushevsky, p. 1; C1, p. 9*]. UAV, UAS, drone, RPV and pilotless aircraft are all synonymous terms used to describe the same remotely controlled aircraft as Kestrel Eye [*Yanushevsky, p. 1; Barnhart & Marshall & Shappee, p. 2*]. It is a pilotless **aircraft**, which is flown without a pilot-in-command on board [*Air Transport Operational Concept; Chicago Convention*]. The international standard is to classify UAVs as an aircraft, specifically as an aircraft that carry no human pilot or passengers [*Dictionary of Aeronautical terms, p. 730; Rand Corporation; Xingbang & Xuan, p.* 1]. An aircraft is any device, that is used or intended to be used for flight in the air [*FAA*]. The definition of an aircraft includes any machine that can derive support in the atmosphere from the reaction of the air, this definition also encompasses drones and any vehicle, with or without engine, that can fly, such as a plane or helicopter [*Marshall on Chicago Convention*; *Cambridge Dictionary; Merriam-Webster Dictionary*]. The enactment of the term aircraft is in different jurisdictions as "*any machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface*". And also "*civil, military, or public contrivance invented, used, or designed to navigate, fly, or travel in the air*" [*South African General Notice, p. 1, para. 13; United States Code, Title 49*]. Equatoriana treats UAVs correspondingly, as the explicit

inclusion of UAVs over a certain size under aircraft registration duty in ASA does not extract UAVs from aircraft, but rather shows that both are to be viewed and treated in the same manner [*R5, p. 36; PO2, p. 49, q. 51*].

111. Kestrel Eye is 6-meter-long helicopter-like UAV, with main and tail rotor design. It can fly up to 13 hours in the air with maximum speed 250 km/h [*C4, p. 15; NoA, p. 5, para. 9*]. Thus, in contradiction with CLAIMANT's statements, Kestrel Eye fits all the definitions, as it can derive the support in the atmosphere from the reaction of the air, it is pilotless, and intended to fly in the air. Moreover, the law of Equatoriana recognizes and treats UAVs accordingly to an aircraft [*R5, p. 36*].

112. As demonstrated, Kestrel Eye fulfils each of these definitions as an "*aircraft*" under any defining standard of what can be considered as an "*aircraft*" under CISG. Therefore, the Agreement is not governed by the CISG as it is excluded by Art. 2(e) CISG.

1.2.2 Kestrel Eye meets the technical criteria of an aircraft

113. CLAIMANT states that Kestrel Eye is not an aircraft since it does not meet technical criteria based on the analogy between ships and aircraft [*MoC, p. 22, para. 49*]. According to CLAIMANT's statements it is too small to be excluded, it is not intended for transport and it has different operational system than an aircraft.

114. As CLAIMANT correctly states, to come up with a technical definition of an aircraft under the CISG, the comparison between boats and ships will be used, as their interrelation is the same [*MoC, p. 22, para. 49; Schwenzer, p. 58, para. 32; Schlechtriem, p. 37, para. 35*]. Same as aircraft, ships are also excluded from the application of the CISG. However, it is possible to distinguish some boats from ships, due to their differences – they are small sized, their intended use is not continual movement, their operation system differs and they do not need to be registered. Based on these differences, there are boats that fall within the scope of the CISG [*Auto-Moto Styl v Pedro Boat*].

115. However, Kestrel Eye is an aircraft according to technical criteria, as (**1.2.2.1**) Kestrel Eye is big enough to be excluded by Art. 2(e) CISG, (**1.2.2.2**) Kestrel Eye is intended for transport thus it is excluded by Art. 2(e) CISG and (**1.2.2.3**) Kestrel Eye is operated like an aircraft.

1.2.2.1 Kestrel Eye is big enough to be excluded by Art. 2(e) CISG

116. Aircraft of all length are excluded by Art. 2(e) CISG. Even if there were exceptions to the rule and significantly small aircraft wouldn't be excluded by Art. 2(e) CISG, Kestrel Eye is not insignificant in size thus it is excluded.

117. CLAIMANT suggests that small aircraft are not excluded by Art. 2(e) CISG, as some small boats may not be excluded too [*MoC, p. 24, para. 54*]. However, it is not possible to focus on the size of the object when it comes to interpreting the Art. 2(e) CISG [*Schlechtriem, p. 36, para. 33; Kröll & Mistelis & Viscasillas, p. 51, para. 44; Schwenzer, p. 58, para. 29-30; Ferrari, p. 82*]. Even if size was considered, only objects of non-significant size are not excluded, such as model planes, since it would make no sense to exclude them as there is no need to control them in the aerial space [*Schlechtriem, p. 37, para. 35; Kröll & Mistelis & Viscasillas, p. 52, para. 44; Schwenzer, p. 58, para. 32*].

118. In the view of the provision's history, it is no longer possible to focus on the size of the objects in order to interpret the provision [*Schlechtriem, p. 36, para. 33; Kröll & Mistelis & Viscasillas, p. 51, para. 44; Schwenzer, p. 58, para. 29-30; Ferrari, p. 82*]. That is because one major purpose of the CISG is to provide legal certainty and the wording of the provision does not foresee a minimum size [*Kröll & Mistelis & Viscasillas, p. 51, para. 44*]. Moreover, it was not possible to create a workable distinction between large and small ships, since it was hard to unify the rule as all the signatories to the CISG had a different view [*Schwenzer, p. 57, para. 27*]. If the size criterion would be applied, only significantly small sized objects would not be excluded [*Schlechtriem, p. 36, para. 33; Schwenzer, p. 58, para. 32; Ferrari, p. 82*].

119. CLAIMANT points out that Kestrel Eye is a small aircraft, thus it is not excluded from the application of the CISG [*MoC, p. 22, para. 49; p. 28, para. 76*]. However, only significantly small aircraft, such as a model planes, would not be excluded by Art. 2(e) CISG under the size criterion. In any case, Kestrel Eye is not significantly small, as CLAIMANT tried to label Kestrel Eye by comparing it to one specific large Emirates model [*MoC, p. 23, para. 53*]. Kestrel Eye is 6,3-meter-long UAV. In comparison, Cessna 172, widely used small airplane, is only 8,72-meter long [*Cessna Technical Specifications*]. That does not make Kestrel Eye significantly smaller. On the contrary, model planes are usually around 0,2 m long. That is 31,5 times smaller than Kestrel Eye, which truly makes them significantly smaller. Even if the size criterion was used, Kestrel Eye is big enough to be excluded by Art. 2(e) CISG.

120. Kestrel Eye is considered as an aircraft under Art. 2(e) CISG since aircraft of all size are excluded. Even if the size would be considered as indicator for exemptions of application of this provision, Kestrel Eye is not small enough to fall within this criterion. The CISG thus does not apply to the Agreement.

1.2.2.2 Kestrel Eye is intended for transport, thus it is excluded by Art. 2(e) CISG

121. Kestrel Eye is an UAV invented to be capable to transport goods. While CLAIMANT's statement that it is equipped for surveillance purposes is correct, the ability to transport goods stays in its basic setup, as it is able to move continuously. Therefore, since its intended use is also transport, Kestrel Eye is excluded by Art. 2(e) CISG.

122. The ships, and therefore the aircraft, which can be used for transport of goods or people, are excluded by Art. 2(e) CISG [*Schlechtriem, p. 36, para. 33; Brunner & Gottlieb, p. 3, para. 14*]. Moreover, the decisive factor is whether the object in question is intended for continual movement, as that is what makes an object capable of transportion [*Schwenzer, p. 57, para. 28; Kröll & Mistelis & Viscasillas, p. 51, para. 44*].

123. CLAIMANT states, that ships and therefore by analogy aircraft intended for transport is excluded by Art. 2(e) CISG [*MoC, p. 22, para. 49-50*]. Transport is defined as "*a system for carrying people or goods <u>from one place to another</u> using vehicles, roads, etc.*" [*Cambridge Dictionary; Oxford Dictionary*]. Based on the definition CLAIMANT incorrectly interpreted the meaning of transport – ships and aircraft intended for continual movement, so even for transport, are excluded by Art. 2(e) CISG [*Kröll & Mistelis & Viscasillas, p. 51, para. 44*]. Applying this criterion, neither sports goods such as paddling boats, as they are designed specifically for the sporting use, nor house boats or inland vessels, as they are not intended for continual movement, fall within the exclusion stated in Art. 2(e) CISG [*Russian Vessel case; Kröll & Mistelis & Viscasillas, p. 51, para. 44; Schlechtriem, p. 36, para. 33; Schwenzer, p. 58, para. 30*]. In *Greece Efetio* case the CISG did not apply to a sale of a private leisure boat, selected by buyer for its features and light weight which would allow the buyer to participate in sailing races [*Greece Efetio case*]. Thus, the ship does not need to be used permanently for transport to be excluded by Art. 2(e) CISG, it can also be used differently (as for races in this case).

124. Kestrel Eye is designed to continuously fly through Northern Equatoriana Region and to surveil the landscape [*NoA, p. 5, para. 4; RNoA, p. 28, para. 6*]. Thus, it is intended for continual movement. Moreover, it is equipped with one Central Payload Bay with capacity up to 245 kg and can be equipped with another Payload Bay [*C4, p. 15*]. In those Payload Bays, Kestrel Eye is able to carry other cargo [*PO2, p. 44, q. 9; R2, p. 33*]. It has already transported cargo other than surveillance equipment several times [*PO2, p. 44, q. 9*]. CLAIMANT even intended to use Kestrel Eye for collecting and transporting minerals to enable their exploration [*CfT, p. 9*].

125. Kestrel Eye falls within the exclusion under Art. 2(e) CISG, as it is intended for continual movement and is capable of transporting goods.

1.2.2.3 Kestrel Eye is operated like an aircraft

126. CLAIMANT attempts to draw a distinction between aircraft and UAVs to prove Kestrel Eye does not fall in the category of objects excluded by Art. 2(e) CISG by defining Kestrel Eye as a pilotless remotely controlled "aircraft" and alleging that the CISG excludes only aircraft that require an on-board pilot. Furthermore, CLAIMANT argues that only UAVs, unlike aircraft, can be helicopter-like, suggesting that helicopters are not aircraft. Lastly, CLAIMANT expounds that the communication and navigation systems of Kestrel Eye rule out the ability for line-of-sight operation, which would prevent Kestrel Eye from falling under the category of aircraft under the CISG [*MoC, p. 25, paras 57-58*]. These arguments stand unconvincing as CLAIMANT omits to take into consideration the fact that the technical definition of aircraft is much wider.

127. Contrary to CLAIMANT's statement, aircraft can be both piloted and pilotless, and a helicopter is a type of aircraft [*Air Transport Operational Concept; Chicago Convention; Britannica; Dictionary of Aeronautical Terms; Federal Aviation Administration; NASA; Oxford Dictionary; MD Helicopters v McDonnell Douglas*]. The line-of-sight operation is not necessary for aerial surveillance, Kestrel Eye suffices for the needs of RESPONDENT in this regard [*PO2, p. 45, q. 12*].

128. The term aircraft composes of different variations of aircraft, pilotless, remotely controlled aircraft, helicopters, and aircraft with a limited line-of-sight operation are still aircraft. Kestrel Eye cannot be taken out of the aggregate for its unique characteristics, it is simply another category in the already wide "aircraft world." Kestrel Eye is an aircraft because it is operated like an aircraft.

129. The CISG does not apply to the Agreement, as Art. 2(e) CISG excludes aircraft from its scope of application, and Kestrel Eye is proved to be an aircraft as it meets the technical criteria of an aircraft by its size, intended use and operation.

1.2.3 Sales of any aircraft, registered or not, are excluded from the CISG

130. CLAIMANT, trying to discredit the registration of Kestrel Eye under the law of Equatoriana, explains that "*the exception of ships, vessels, hovercraft or aircrafts were subject to the requirement of registration at first, however, considering the provision's history, "it is no longer possible to focus on the size of the object which generally determines the obligation to register*", citing Schwenzer [*MoC, p. 24, para. 56; Schwenzer, p. 58, para. 30*]. However, the citation used refers not to the exclusion of aircraft required to register but to whether smaller boats are included in the term ships and vessels, as these terms indicate bigger size, which makes this argument wholly irrelevant.

131. Furthermore, CLAIMANT states that "*the requirement to register will not be considered to justify Kestrel Eye as an aircraft" due to the decision of the CISG's drafter to remove the appendix "which is or will be subject to registration*," which was included in the precursor to the CISG, ULIS [*MoC, p. 24, para 56*]. it is for this exact reason of the drafters' decision to remove the registration requirement that the term aircraft in Art. 2(e) CISG broadened to include all aircraft, registered or not [*UNCITRAL Yearbook VIII, pp. 25-64*].

132. Art. 2(e) CISG excludes sales of any aircraft. The CISG, unlike its precursor ULIS, does not limit excluded aircraft to only those registered [*Official Records on UN Conference on the CISG; Honnold, p. 3, para. 9; Ferarri, p. 68; UNCITRAL Yearbook VIII, pp. 25-64; Lookofsky, p. 16*].

133. Art. 2(e) CISG states that the CISG does not apply to sales of ships, vessels, hovercraft, and aircraft. The provision does not mention any registration, as; it clearly removes all aircraft out of the scope of the CISG.

134. All aircraft, regardless of whether they are subject to registration, are excluded from the application of the CISG, as the CISG drafters made the deliberate decision to broaden the term as much as possible.

1.2.3.1 Even if registration was deemed necessary in the definition of an aircraft, Kestrel Eye should be registered as an aircraft

135. Even if the Tribunal deemed that the registration duty of Kestrel Eye is necessary for Kestrel Eye to be excluded from the application of the CISG as an aircraft, Kestrel Eye would still be excluded as it is subject to registration duty. CLAIMANT mistakenly contends the alleged lack of registration duty "proves" Kestrel Eye cannot be treated as an aircraft [*MoC, p. 24, para. 56*]. In actuality, the fact that Kestrel Eye is subject to mandatory registration under the law of Equatoriana further reinstates that Kestrel Eye is or is treated as an aircraft and should be, by definition, excluded from the application of the CISG.

136. Kestrel Eye is subject to aircraft registration because RESPONDENT is a private entity and thus. according to ASA, must register all its owned or operated aircraft [*R5, p. 36*]. Art. 1 ASA establishes that regarding mandatory aircraft registration, UAVs are treated accordingly as aircraft if their overall length exceeds 90 cm or if their payload is higher than 50 kg. Art. 10 ASA clarifies that the registration duty applies only to aircraft owned and operated by private entities [*R5, p. 36*].

137. RESPONDENT is a SOE [*NoA, p. 4, para. 2; RNoA, p. 27, para 3*]. SOEs can be of private or public character, and the state ownership is marginal [*McLaughlin*]. The fact that RESPONDENT

carries out a governmental task is not indicative of anything, as "*simple ownership or control by a government of an entity is not sufficient to establish that an entity is a public body*" and in the past 20 years public tasks and obligations have been increasingly entrusted to private entities [*WTO Report, p. 35*; *Svendsen, p. 704*]. In other words, regardless of the owner of RESPONDENT, what establishes the nature of RESPONDENT is RESPONDENT itself. Private entity is any for-profit organization, or "*any person or private group, organization, proprietorship, partnership, trust, cooperative, corporation, or other commercial or non-profit entity, including an officer, employee, or agent thereof*" [*Code of Federal Regulations, 14 CFR § 1.1; United States Code, Title 6*]. A private company is a firm held under private ownership, whose shares inaccessible to the public exchanges [*Chen, p. 1; Gordon, p. 1*].

138. Kestrel Eye is more than 6 meters long and can carry up to 245 kg, the length and payload criteria for registration duty are therefore met [*C4, p. 15*]. Regarding the second criterion, RESPONDENT, both in its own words and words of CLAIMANT, is a state-owned private company, i.e., private entity, owned exclusively by the Ministry of Natural Resources and Development [*NoA, p. 4, para. 2; RNoA, p. 27, para. 3*]. RESPONDENT operates like a commercial company on a day-to-day basis and has generated its own revenues as early as 2019, making it independent of state funding [*PO2, p. 44, paras. 5, 7*].

139. Therefore, Kestrel Eye, operated by RESPONDENT, should be registered [*R1, p. 32, para. 7*].

140. The CISG does not apply to the Agreement, as Art. 2(e) CISG excludes aircraft from its scope of application. The Parties did not agree on a subjective understanding of the term; therefore, the objective understanding prevails. Kestrel Eye is proved to be an aircraft by the internationally accepted definition of the term, by meeting technical criteria of an aircraft. Kestrel Eye would always be excluded from the CISG, regardless of whether it is subject to registration duty.

2. The CISG does not apply by default, thus the ICCA of Equatoriana governs the Agreement

141. CLAIMANT further suggest the CISG applies to the Agreement by default. While CLAIMANT's argument that the states where Parties have their seats are signatories to the CISG is undisputed, the CISG is excluded on the basis of Art. 2(e) CISG, therefore CLAIMANT's argument has no merit [*MoC, p. 26, para. 59; Agreement, p. 10, Art. 1*]. As addressed in the choice of law clause, the law of Equatoriana governs the Agreement, thus ICCA of Equatoriana applies to it.

142. The Agreement is governed by the law of Equatoriana [*Agreement, p. 12, Art. 20*]. Even though the CISG is a part of the law of Equatoriana, it is excluded on the basis of Art. 2(e) CISG. The Agreement's scope including equipment does not affect the applicable law. In *Ayers Aviation Holdings* case, aircraft with two airplane engines (separated from the airplane) were sold, but the

CISG still did not apply since the sale of an aircraft is excluded by Art. 2(e) CISG [*Ayers Aviation Holdings*].

143. CLAIMANT presents that the Agreement is governed by the CISG by default [*MoC, p. 26, paras. 59-61*]. However, as the application of the CISG is excluded by the Art. 2(e) CISG, the Parties would have to agree on opting-in the CISG for its application, as is possible by the freedom of contracting laid down in Art. 6 CISG. That would have to be clearly expressed, e.g. mentioned in the choice of law clause or clearly agreed upon the parties [*Kröll & Mistelis & Viscasillas, p. 103, para. 7, p. 106, paras. 16, 18; Piltz, p. 220; Ferrari, p. 84, paras. 89-90; Brunner & Gottlieb, p. 1, paras. 1-6; Schwenzer, p. 105, para. 6; pp. 108-110, paras. 12-15; p. 111, para. 17; Schlechtriem, p. 55, para. 14*]. CLAIMANT in its submission correctly stated, that spare parts of aircraft (and thus equipment) may be governed by the CISG, but once the agreement is concluded upon a sale of goods excluded by Art. 2(e) CISG, it cannot apply by default [*MoC, p. 22, para. 46; Málev Hungarian Airlines*; *Ayers Aviation Holdings*].

144. The Parties never agreed on application of the CISG. Instead of, they agreed on law of Equatoriana governing the Agreement [*Agreement, p. 12, Art. 10*]. As the Agreement is a contract for the sale of an aircraft which is excluded by Art. 2(e) CISG. Therefore the CISG does not apply. Parties did not agree on opting-in the CISG. While the Agrement is also concluded for the sales of equipment, it does not affect the applicable law [*Agreement, p. 10, Art. 2*].

145. The Agreement is governed by the ICCA of Equatoriana, as the application of the CISG is excluded, since Kestrel Eye is an aircraft. Parties chose the law of Equatoriana governing the Agreement, thus ICCA of Equatoriana is applicable to it.

146. **Issue III conclusion**: The Agreement is governed by the ICCA of Equatoriana, because as Kestrel Eye is an aircraft and thus it is excluded from the otherwise applicable CISG based on Art. 2(e) CISG. The Parties understood the object of the Agreement as a UAV, a type of an aircraft, and did not concur any different understanding of the latter term. Moreover, Kestrel Eye is an aircraft within the meaning of the CISG. It complies with internationally accepted definition of aircraft, it is big enough to be excluded, it is intended for continual movement and thus it is capable of transport, the operation system is like of an aircraft, and it is subject to registration duty, although registration plays no role in determining the scope of application of the CISG. Therefore, the CISG cannot govern the Agreement as sales of aircraft are excluded from the application of the CISG by Art. 2(e) CISG. Since CISG is not applicable, the ICCA of Equatoriana applies to the Agreement.

IV. RESPONDENT IS ELIGIBLE TO INVOKE ART. 3.2.5. ICCA OF EQUATORIANA

147. RESPONDENT entered into the Agreement with CLAIMANT based on misrepresentation of Kestrel Eye. The supposed state-of-the-art quality of Kestrel Eye has been disproven by the prompt release of a new, vastly superior model with improved specifications shortly after the Agreement's conclusion. As a result of CLAIMANT's provision of misleading product specifications and suppression of essential information, RESPONDENT has agreed to obligations it would not have agreed to had it known the full picture.

148. CLAIMANT attempts to apply the CISG to the problem of contract validity to avoid its obligations under the ICCA of Equatoriana. RESPONDENT establishes its right to invoke Art. 3.2.5 ICCA of Equatoriana with the following arguments: (**1.**) the contested issue falls outside the scope of the CISG as it concerns the issue of validity, not the conformity of goods; (**2.**) in accordance with gap-filling principles, domestic law provisions govern the issue of fraud and misrepresentation; (**3.**) the issue shall not be considered a question of a breach of contract**.**

1. The contested issue falls outside the scope of the CISG as it concerns the issue of validity, not the conformity of goods

149. Contrary to CLAIMANT's reasoning, the issue does not involve the conformity of the products prior to the conclusion of the contract. It is not subject to the CISG since it falls within the "*validity exception*," which precludes the CISG's applicability. Instead, the question of validity is governed by Art. 3.2.5 ICCA of Equatoriana, which directly and thoroughly addresses the issue.

150. This is demonstrated by two arguments. Firstly, (**1.1**) the quality of goods does not reflect the nature of RESPONDENT's complaint, and secondly (**1.2**) the issue corresponds to the general definition of validity and as such is not governed by the CISG.

1.1 The quality of goods does not reflect the nature of RESPONDENT's complaint

151. The nature of the disagreement, according to CLAIMANT, lies upon the conformity of the goods. This approach, however, does not reflect the case facts nor is it a suitable response to RESPONDENT's complaints.

152. In accordance with Art. 35 CISG, conformity of goods is examined in cases where there is a disagreement between the goods supplied and the goods required by the contract, notably in terms of quality, quantity, and nature. When there is a disparity between what the goods actually are and what they were represented to be, Art. 35 CISG does not apply [*Henschel, pp. 9-10*].

153. CLAIMANT stated that RESPONDENT's dissatisfaction with the quality of the goods should be considered a conformity issue under Art. 35 CISG [*MoC, p. 31, para. 71*]. While Art. 35 CISG does specify what constitutes nonconforming items, this approach distorts the basis of RESPONDENT's objections. CLAIMANT had at least implicitly misled the quality of the items in question when entering the Tender procedure and when reaffirming the quality prior to the Agreement conclusion [*RNoA, p. 29, para. 17; CfT, p. 9; R4, p. 35*].

154. The quality of the goods did not alter from what was agreed upon to what was provided, not only because the goods were never delivered, but also because the object of the purchase was Kestrel Eye models in specific, and not just any state-of-the-art UAV [*Agreement, p. 10, Art. 2a*].

155. The quality requirement was not agreed upon in general, but only in relation to Kestrel Eye models. CLAIMANT stipulated a quality guarantee alongside the product offer, and RESPONDENT, having faith in the reliability of the information presented, decided to acquire Kestrel Eye models mentioned in the Agreement. As was subsequently shown, the absence of Kestrel Eye quality standard existed at the time the Agreement was signed [*RNoA, p. 29, para. 17; C3, p. 14, para. 8*].

156. As they were particularly required, the state-of-the-art nature of the goods must be regarded as a prerequisite for the Tender procedure and RESPONDENT's consideration [*CfT, p. 9*]. Due to the fact that these standards were not met, CLAIMANT should have been disqualified and no Agreement would have been accepted. In other words, RESPONDENT would never have selected Kestrel Eye without its state-of-the-art specifications.

1.2 The issue corresponds to the general definition of validity and as such is not governed by the CISG

157. While the CISG does not define the term validity, RESPONDENT's objections are encompassed by the doctrine's criteria of validity. Therefore, the subject should be viewed as a question of validity and adequately governed by the ICCA of Equatoriana.

158. The CISG does not define the term validity, nor is it used anywhere other than in Art. 4(a) CISG. The definition could, however, be derived from well-established doctrine. Generally, validity would indicate any issue by which the domestic law would render the contract void, voidable or unenforceable [*Schroeter II, p. 100; Geneva Corp v Barr, p. 42*]. Schwenzer offers a more elaborate definition of validity, stating "*if a contract is rendered void ab initio, either retroactively by a legal act of the state or of the parties such as avoidance for mistake or fraud […] the respective rule or provision is a rule that goes to validity and therefore is governed by domestic law and not by the CISG*" [*Schwenzer, p. 24; Schroeter I, p. 100*].

159. As RESPONDENT was unaware of newly discovered information, it seeks to void the Agreement. RESPONDENT is not concerned with the conformity of Kestrel Eye.

160. The CISG itself indicates a restriction on its applicability. Its relationship to questions of validity is described in the so-called "validity exception" in Art. 4(a) CISG [*CISG AC Op. n. 17, para. 4.6; Kröll & Mistelis & Viscasillas, p. 42; Quinn, p. 223; Mai, p. 233*]. The precise text of the Article and complementing well-established doctrine agree that validity questions should be relegated to other legal authorities outside of the CISG, *i.e.* domestic law, in this case the law of Equatoriana [*Schroeter II, p. 54; Mai, p. 234; Heiz, p. 654*]. The conclusion follows logically from the fact that the CISG exclusively addresses the creation of a contract and rights and responsibilities resulting from it. However, issues of validity, such as deception or fraud, arise during the contracting procedure and not in the contract itself [*Bar, p. 4; Heiz, p. 654*].

161. In conclusion, the conflict between the Parties can be described as a question of validity. Due to the exclusion of validity from the CISG's applicability, domestic law measures should be applied to address the disagreement.

2. In accordance with gap-filling principles, domestic law provisions govern the issue of fraud and misrepresentation

162. As part of its argument, CLAIMANT advocates for the application of the CISG to the matter of misrepresentation with disregard to any other sources. Gap-filling mechanisms contained within the CISG only apply to issues governed by the CISG and since the CISG specifically excludes validity issues from its application, alternative legal source must be used.

163. CLAIMANT contends that the CISG should be the primary legal source for misrepresentation disputes [*MoC, p. 33, para. 95*]. In general, the doctrine agrees on the exclusion of validity concerns from the CISG [*Smythe, p. 16; Kröll & Mistelis & Viscasillas, p. 42; Quinn, p. 223; Heiz, p. 640*]. Among these are concerns such as error, misrepresentation, and fraud [*Wander & Manna, p. 53; Schroeter I, p. 64*]. These areas, which are not expressly controlled by the CISG, are referred to as gaps and can be addressed by either "*generic principles*" or domestic law [*Garro, p. 259; Viscasillas II, p. 5*]. When in dispute, applicability can only be assigned to one party or the other [*Ferrari, p. 88*].

164. In assessing the applicability of legal provisions when a gap is encountered, it is necessary to evaluate the gap-filling method outlined in Art. 7(2) CISG. This way of interpretation distinguishes between internal gaps, where the CISG applies even if not stated, and external gaps, where appropriate domestic provisions must be applied instead [*Sica, p. 15; Gavori, p. 7*].

165. It is essential to emphasize, however, that Art. 7(2) CISG would only complement the implementation of the CISG with general principles in the CISG-governed, but not specifically settled questions. Regarding external gaps, they are resolved directly through domestic law [*McMahon, p. 1003*]. In other words, external gaps consist of topics that are outside the scope of the CISG and its intended applicability [*McMahon, p. 1002*].

166. This is justified by the need for some degree of flexibility to preserve the sovereignty of national jurisdictions [*McMahon, p. 1001; Viscasillas II, p. 17*]. The determination of whether a gap is internal or external is therefore complicated by the competing principles of uniformity and flexibility [*McMahon, p. 994; Torsello, p. 47; Viscasillas II, p. 5*]. The inclusion of a validity exception serves to bolster the latter by protecting fundamental domestic law interests [*Hartnell, p. 18; Bar, p. 3; Atanasov, p. 4*].

167. The scope of the CISG's applicability beyond where it is expressly given depends on the kind of matter it governs. Since all questions of validity have been excluded from its application by virtue of the validity exception, it is evident that the applicability of the CISG cannot be reinforced via the gap-filling mechanism of Art. 7(2) CISG [*Sica, p. 15*].

168. Fundamentally, a pre-contractual qualitative condition has been inserted into the contract, and its significance has been disputed. Therefore, the prevalence of misrepresentation is contingent on the meaning of the term state-of-the-art. Since there is no mutual understanding of this term within the Parties' business relationship, a reasonable, common interpretation of the term must be determined in line with Art. 8 CISG [*PO2, p. 45, q. 11*]. The commonly accepted definition of state-of-the-art is extremely modern and employing the most recent ideas and methods and/or at the level of development (as a device, procedure, process, technique, or science) reached at any particular time, typically as a result of modern methods [*Cambridge Dictionary; Merriam-Webster Dictionary*]. It is safe to state that models older than 10 years do not meet this description. Especially considering the concurrent presence of UAVs with significantly more advanced technology, such as Hawk Eye [*PO2, p. 45, q. 14*].

169. CLAIMANT's most recent model, Hawk Eye, was qualitatively superior in practically in all aspects. Hawk Eye met the conditions of the Tender, and the Agrement was finalized only two months ahead to its public debut [*NoA, p. 5, para. 10*]. This implies that Hawk Eye must have been in the final stages of development with production and manufacturing scheduled at the time the Agreement was signed. RESPONDENT was never given the opportunity to assess Hawk Eye

during negotiations, nor was RESPONDENT made aware of its existence, despite its apparent suitability for the intended purpose.

170. A mere reliance on RESPONDENT's knowledge of a new product is not sufficient to get rid of responsibility for non-disclosure of crucial information, especially when RESPONDENT had no active knowledge of such development [*PO2, p. 45, q. 15*]. Existing case law imposes extensive disclosure responsibilities on private parties working with newly constituted public entities [*RNoA, p. 29, para. 18*]. Whether or not it was legally binding for CLAIMANT, it was aware of its existence and impact on RESPONDENT's expectations [*C7, p. 19, para. 17*].

171. The potential difficulty in finding other buyers for out-of-date models, which was later demonstrated, suggests that the misrepresentation was made with fraudulent intent [*PO2, p. 45, q. 24*]. Although better options were available, CLAIMANT desired to repurpose already-manufactured, soon-to-be-obsolete Kestrel Eye by submitting it to RESPONDENT.

172. Since CLAIMANT would be able to deliver the same number of Hawk Eye models as Kestrel Eye models within the required time frame, further substantial development is highly improbable [*PO2, p. 45, q. 14*].

173. In conclusion, only domestic law provisions may govern the subject of misrepresentation. Due to the exclusion of questions of validity from the CISG, it does not contain rules regarding misrepresentations and/or fraud. The ICCA of Equatoriana is an applicable domestic legislation that expressly and completely addresses these issues.

3. The issue shall not be considered a question of a breach of contract

174. According to CLAIMANT's reasoning, the regulations governing breach of contract should apply to RESPONDENT's attempts to terminate the Agreement. While this technique would be appropriate for disputes arising from the Agreement itself or its performance, it cannot be used for disputes relating to the contracting procedure or events preceding it. This contrast is illustrated by the fact that RESPONDENT does not seek contract termination, but rather contract avoidance.

175. In the first place, clauses on the breach of contract presume the applicability of the CISG. Since its exclusion has been created pursuant to Art. 4(a) CISG, these regulations cannot be followed. This conforms to the generally accepted rule that the CISG only applies to rights and responsibilities that exist within and derive from a contract. Since they have no legal connection to relationship of the Parties, any difficulties that arise outside of it are governed by domestic law [*Bar, p. 4; Heiz, p. 644*].

176. While a right to terminate permits a party to withdraw from fulfilling its contractual responsibilities, it does not call into doubt the validity of the contract [*Hartnell, p. 23*]. Termination implies a legal contract and has the purpose of alleviating obligations or claiming the contract's rights. The CISG establishes rules that regulate when and how a contract may be terminated and what remedies are available as a result [*Walt, p. 12*].

177. However, avoidance is concerned with the much more fundamental issues of contract validity and consequent existence. This may be the result of a number of legal circumstances, including insufficient legal personhood, set legal restrictions, or misrepresentation and fraud. [*Schroeter I., pp. 58-70*]. These factors have generally been excluded from the scope of the CISG's applicability, as they are more basic and national jurisdictions are more sceptical of their uniformity [*Atanasov, p. 5; Bar, p. 6*]. Therefore, avoidance is not confined within the context of a contract, as it calls the legality of the contract into doubt. It is therefore not only legally but also logically consistent to see the situation as falling outside the scope of the CISG's applicability.

178. The disagreement revolves around the terms under which the Parties entered into the Agreement. Therefore, it depends on the information provided by one Party to another. Since the absence of the quality standard predates the conclusion of the Agreement, CLAIMANT misrepresented the nature of Kestrel Eye prior to the conclusion of the Agreement.

179. In conclusion, RESPONDENT seeks termination of the Agreement based on new knowledge on the nature of the products given by CLAIMANT. Due to the fact that the CISG governs only the right to terminate, the CISG cannot be applied in this case.

180. **Issue IV conclusion:** RESPONDENT is eligable to invoke Art. 3.2.5 ICCA of Equatoriana since the nature of RESPONDENT's concerns fall within the "*validity exception*" and are therefore outside the scope of the CISG's applicability. Validity issues in general are regarded as external gaps, hence the CISG is completely irrelevant even under Art. 7(2) CISG. In addition, avoidance of the Agreement cannot be governed by rules for termination because, by definition, it is not bound by contractual rights and duties.

REQUEST FOR RELIEF

On the basis of the submitted arguments RESPONDENT hereby respectfully requests the Tribunal:

1. to decide that the Tribunal does not have jurisdiction to hear the case and terminate the proceedings;
2. to rule that the proceedings shall be stayed, until the investigation of Mr. Field is concluded, or alternatively bifurcated;
3. to find that the CISG does not govern the Agreement;
4. to declare that the Agreement is invalid on the basis of Art. 3.2.5 ICCA of Equatoriana.