MEMORANDUM FOR CLAIMANT

PCA CASE NO. 2022-76

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

Counsel for CLAIMANT

SIMON FEREL • THOMAS HAMELIN • ELISA HENKE

CHARLENE LORENZ • CLEMENS WENDT • LIESE-LOTTE WIEPRECHT

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INDEX OF DEFINITIONS AND ABBREVIATIONS

Aircraft	The term aircraft in the sense of Art. 2(e) CISG
Arbitration Agreement	Arbitration Agreement contained in the Purchase and Supply Agreement
Art.	article
Arts.	Articles
cf.	Confer
Claimant	Drone Eye plc
COO	Chief Operating Officer
Drones	The Drones purchased under the Purchase and Supply Agreement
e.g.	exempli gratia; for example (Latin)
eds.	editors
et al.	et alia; and others (Latin)
et seq.	et sequens; and the following one (Latin)
et seqq.	et sequentia; and the following ones (Latin, pl.)
Equatorianian SC	Equatorianian Supreme Court
Ex. C	CLAIMANT's Exhibit
Ex. R	RESPONDENT's Exhibit
Hawk Eye Drone	Hawk Eye 2020
i.e.	id est; that is (Latin)
ibid.	ibidem; in the same place (Latin)
id.	idem; the same (Latin)
Kestrel Drone	Kestrel Eye 2010
NA	Notice of Arbitration
NP Development Program	Northern Part Development Program
No.	Number
p.	page
para.	paragraph
paras.	paragraphs
Parties	Drone Eye plc and Equatoriana Geoscience Ltd collectively
PO.	Procedural Order
PSA	Purchase and Supply Agreement
pp.	pages

Respondent	Equatoriana Geoscience Ltd
RNA	Response to the the Notice of Arbitration
UAS	Unmanned Aerial Systems
Scenario 1	Scenario in which Drone Eye plc sold the Kestrel Eye 2010 Drones
Scenario 2	Scenario in which Drone Eye plc sold the Hawk Eye 2020 Drones
Special Chamber	Special Chamber of the Equatorianian Criminal Court
Tribunal	Arbitral Tribunal in the PCA Case 2022-76
v.	versus

INDEX OF LEGAL TEXTS

ASA	Equatorianian Aviation Safety Act
CISG	UN Convention on Contracts for the International Sale of Goods
DAL	Danubian Arbitration Law
EC	Equatorianian Constitution
ICCA	International Commercial Contract Act of Equatoriana
Model Law	UNCITRAL Model Law on International Commercial Arbitration
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
OHADA UAA	Uniform Act on Arbitration Law of the Organisation pour l'harmonisation en Afrique du droit des affaires
PCA Rules	Permanent Court of Arbitration Arbitration Rules 2012
Swiss PILA	Swiss Federal Act on Private International Law
ULIS	Convention relating to a Uniform Law on the International Sale of Goods
UNCAC	United Nations Convention against Corruption
UNIDROIT principles	Unidroit Principles of International Commercial Contracts 2016

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STATEMENT OF FACT

The parties to this dispute are Drone Eye plc (**CLAIMANT**) and Equatoriana Geoscience Ltd (**RESPONDENT**), hereinafter collectively referred to as the **Parties**. CLAIMANT is a medium-sized producer of Unmanned Aerial Systems (**UAS**) based in Mediterraneo. RESPONDENT is a geo-science exploration company fully owned by the Equatorianian government.

The present dispute concerns the question of whether the Purchase and Supply Agreement (**PSA**) concluded between the Parties is still valid.

Mar 2020	RESPONDENT opened a tender process for the supply and servicing of drones to explore the natural resources of Northern Equatoriana. CLAIMANT's bid was successful.
Nov 2020	Following the contractual negotiations, the Parties drafted the PSA, agreeing on the sale and maintenance of six of CLAIMANT's Kestrel Eye 2010 drones (**Kestrel Drone / Drones**). The Parties included an arbitration agreement in the PSA (**Arbitration Agreement**). They chose the PCA Rules to be the institutional rules and chose Danubia as the seat of arbitration.
27 Nov 2020	The Equatorianian Parliament (**Parliament**) was scheduled to approve the Parties' Arbitration Agreement. This vote was cancelled on short notice due to COVID.
01 Dec 2020	The PSA was signed by both Parties' CEOs and the responsible minister, Mr Barbosa.
Feb 2021	CLAIMANT introduced its new drone model, the Hawk Eye 2020 (**Hawk Eye Drone**). Thereafter, RESPONDENT accused CLAIMANT of misrepresentation.
27 May 2021	The Parties amended their Arbitration Agreement. This amended version was praised for its provisions on transparency and efficiency during the Equatorianian Parliament's next debate.
03 Jul 2021	Mr Field, RESPONDENT's COO at the time, was implicated in a corruption scandal surrounding Equatorianian government enterprises.
30 May 2022	RESPONDENT sent CLAIMANT a letter, endeavouring to terminate the PSA, alleging misrepresentation and corruption by CLAIMANT.
Jul 2022	CLAIMANT commenced arbitral proceedings against RESPONDENT to obligate RESPONDENT to perform the PSA.

SUMMARY OF ARGUMENT

CLAIMANT should not suffer a loss due to an unstable political situation and underlying nepotism in Equatoriana. The Parties concluded the PSA to equip RESPONDENT with the drones required for its exploratory work within the Northern Part Development Program (**NP Development Program**). However, with a new government in power and the NP Development Program discontinued, RESPONDENT now seeks to terminate the PSA. Contrary to the Parties' agreement to arbitrate, RESPONDENT challenges the Tribunal's jurisdiction. Moreover, RESPONDENT seeks to delay a resolution of this dispute until the Equatorianian criminal court has rendered a decision on the corruption allegations against Mr Field.

Issue 1

The Parties concluded a valid Arbitration Agreement in December 2020. This Arbitration Agreement conferred jurisdiction on the arbitral tribunal (**Tribunal**). RESPONDENT's authority to conclude the Arbitration Agreement is governed by Danubian law. In any case, RESPONDENT is barred from invoking its national legislation to frustrate the arbitral proceedings.

Issue 2

RESPONDENT unnecessarily requests the stay or bifurcation of the proceedings regarding the corruption investigation against its COO. However, the decision by the Equatorianian criminal court is not a prerequisite for the arbitration to proceed. The relevant issues are too closely intertwined, such that RESPONDENT's proposed bifurcation would be inefficient and impractical.

Issue 3

All requirements for the applicability of the CISG are met. Therefore, the PSA is governed by the CISG. Contrary to RESPONDENT's contentions, the applicability of the CISG is not excluded. As the exception in Art. 2(e) CISG is construed narrowly and must be interpreted autonomously, the Kestrel Drone is not an Aircraft in the sense of this provision. Moreover, the CISG is not excluded under Art. 3(2) CISG as the sale of the Drones is the preponderant part of the PSA. The Parties' choice of law clause does not exclude the CISG. In conclusion, the PSA is governed by the CISG.

Issue 4

RESPONDENT cannot rely on Art. 3.2.5. of the International Commercial Contract Act of Equatoriana (**ICCA**) to avoid the PSA, as it is not applicable. In case RESPONDENT's erroneous attempt to displace the CISG fails, RESPONDENT seeks to apply its national provisions through the backdoor of Art. 4 CISG. To this end, RESPONDENT raises unsubstantiated allegations of fraudulent misrepresentation against CLAIMANT. However, CLAIMANT not only accurately described all features of the Drones, but also provided them at very favourable conditions. Thereby, RESPONDENT disregards the contractual avoidance regime set out in the PSA. In any case, the CISG contains express provisions on avoidance.

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

1. In Art. 20 PSA the Parties agreed to resolve their disputes through arbitration under the PCA Rules [*Ex. C2, p. 12*]. This is general practice in Equatoriana, since Equatorianian courts have such a bad reputation that even Equatorianian companies decide against settling their disputes before Equatorianian courts [*PO2, p. 47, para. 28*]. RESPONDENT even amended the Arbitration Agreement, thereby reaffirming its willingness to arbitrate [*Ex. C9, p. 22*].

2. Meanwhile, the new Equatorianian government lost its political interest in the projects performed by its state owned entities (**SOEs**) and accordingly terminated the NP Development Plan [*Ex. C3, p. 23*]. Following this, RESPONDENT now tries to challenge the PSA before the Equatorianian national courts as they are known to decide in favor of SOEs [*PO2, p. 46, para. 18*]. To do so, RESPONDENT alleges that the Tribunal lacks jurisdiction [*RNA, p. 30, paras. 20 et seqq.*]. However, the Tribunal does have jurisdiction as the Parties concluded a valid Arbitration Agreement on 1 December 2020.

3. In determining the validity of the Arbitration Agreement, the Tribunal may recur to the New York Convention (**NYC**). While the NYC's scope of application refers to the enforcement stage of an award [*cf. Art. I NYC*], it already applies before an award is rendered [*Kröll, 21 IHR, para. 50; UNCITRAL Rec. 2006, p. 2; Lew p. 119; Platte p. 312*].

4. Under Art. V(1)(a) NYC, the Tribunal may examine the Arbitration Agreement with regard to its substantive validity as well as the Parties' authority to conclude said Arbitration Agreement. In this regard, RESPONDENT claims that "*Parliament had not authorized the conclusion of the arbitration agreement*" and that "*the Agreement was tainted by corruption resulting in its invalidity*" [*RNA, p. 30, paras. 20, 21*].

5. However, RESPONDENT was authorised to conclude the Arbitration Agreement under any law this Tribunal may find applicable [**A**] and the Arbitration Agreement is substantively valid [**B**].

A. RESPONDENT was authorised to conclude the Arbitration Agreement under any law this Tribunal may find applicable

6. RESPONDENT argues it lacked authority to conclude the Arbitration Agreement. This is because Art. 75 of the Equatorianian Constitution (**EC**) stipulates that "*[SOEs]can only submit to foreign seated arbitration […] if there has been authorization by Parliament*" [*RNA, p. 30, para. 21*].

7. However, Equatorianian law does not govern RESPONDENT's authority to conclude the Arbitration Agreement. On the contrary, under the applicable Danubian law, RESPONDENT had full authority to conclude the Arbitration Agreement [**I**]. Even if the Tribunal were to find that Equatorianian law applies, RESPONDENT had full authority to conclude the Arbitration Agreement [**II**].

I. Under the applicable Danubian law, RESPONDENT was authorised to conclude the Arbitration Agreement

8. The limitations under Art. 75 EC are immaterial as Danubian law applies under the applicable choice of law mechanism.

9. There is no choice of law provision explicitly addressing questions of authority [*Born, p. 672; Fouchard/Gaillard/Goldmann, p. 317; Ragno, p. 174*]. Therefore, two approaches are considered to categorise authority and thus determine the applicable choice of law mechanism [*ibid.*]. Authority is either characterised as a question of subjective arbitrability or as a question of capacity. This categorisation is thus decisive to determine which law is applicable to the question of RESPONDENT's authority.

10. CLAIMANT submits that RESPONDENT's alleged lack of authority should be characterised as a question of subjective arbitrability which is governed by Danubian law [**1**]. Even if the Tribunal were to find otherwise, Danubian law still applies under the validation principle [**2**].

1. Danubian law applies to RESPONDENT's alleged lack of authority as it is a question of subjective arbitrability

11. RESPONDENT's alleged lack of authority is not a question of capacity [**a**]. Instead, it is a question of subjective arbitrability [**b**]. Therefore, Danubian law applies [**c**].

a) RESPONDENT's alleged lack of authority is not a question of capacity

12. According to Art. V(1)(a) NYC, an arbitration agreement may be unenforceable if a party was under some incapacity. Capacity is the ability to validly enter into legal relations in general [*Ragno, p. 172; cf. Born, p. 93 et seq.*; *cf. Redfern/Hunter, p. 81*]. However, if a party is restricted with regard to certain types of contracts, this is not a question of capacity [*Hanotiau, p. 149; Ragno, p. 171*]. The same holds true if a SOE is restricted from entering into contracts under their own law [*Hanotiau, p. 149*]. This is because such partial restrictions are "*not a true limitation on capacity*" [*Redfern/Hunter, p. 84; cf. Fouchard/Gaillard/Goldmann, p. 317*]. The rationale behind capacity is the protection of the party itself, such as persons under mental disability [*Fouchard/Gaillard/Goldmann, p. 317*; *Hanotiau, p. 149; Redfern/Hunter, p. 84*]. In contrast, the rationale behind restricting the authority of SOEs is "*based on public interest considerations*" [*Fouchard/Gaillard/Goldmann, p. 317*; *cf. Lew/Mistelis/Kröll, para. 27.7*]. Therefore, the question of the authority of SOEs is "*entirely unconnected with the rationale behind the law on capacity*" [*Fouchard/Gaillard/Goldmann, p. 317*].

13. In the present case, RESPONDENT's authority as an Equatorianian SOE is governed by Art. 75 EC [*RNA, p. 30, para. 21*]. The authorisation by Parliament under Art. 75 EC restricts RESPONDENT's authority solely in regard to certain types of contracts, specifically administrative contracts [*ibid.*]. In contrast, Art. 75 EC does not concern RESPONDENT's ability to validly enter into legal relations

in general. Therefore, the parliamentary approval or alleged lack thereof is not a question of capacity.

b) Instead, RESPONDENT's authority is a question of subjective arbitrability

14. Subjective arbitrability concerns cases where national laws prohibit SOEs from entering into arbitration agreements or require special authorisations to do so [*Lew/Mistelis/Kröll, para. 9.2*]. These restrictions are based on public policy considerations, which especially concern state sovereignty [*Fouchard/Gaillard/Goldmann, p. 318; Lew/Mistelis/Kröll, para. 27.7*]. Administrative contracts are related to public work projects [*PO2, p. 48, para. 31*]. Such projects are of particular public interest. Therefore, Art. 75 EC is based on public policy considerations. Thus, RESPONDENT's alleged lack of authority is an issue of subjective arbitrability.

c) Danubian law applies to subjective arbitrability

15. Subjective arbitrability of an arbitration agreement is governed by Art. V(2)(a) NYC. In principle, this rule only applies during the enforcement stage and thus does not expressly provide for a law applicable to the pre-award stage [*M v M, para. 2; cf. Lew/Mistelis/Kröll, para. 9.10*]. As the arbitral tribunal is under the duty to render an enforceable award, it must take account of the law of the seat to determine the arbitrability at the pre-award stage [*cf. Platte, p. 308*]. An award can be set aside at the seat of arbitration and thus would always be unenforceable if the dispute is not arbitrable under the law of the seat [*Moses, p. 78; cf. Arts. 34(2)(a)(i), 36(1)(a)(i) DAL*]. Therefore, the law applicable to subjective arbitrability during the pre-award stage is the law of the seat [*ICC Case 6162, p. 157*; *Matermaco Case, p. 675; Balthasar, p. 20; Moses, p. 77; cf. Lew/Mistelis/Kröll, paras. 9.29 et seqq.*]. Otherwise, the arbitrators would need to consider arbitrability under all jurisdictions of the New York Convention during the pre-award stage [*cf. Waincymer, p. 148*]. Therefore, Danubian law as the law of the seat applies at the pre-award stage.

2. Even if the Tribunal were to find otherwise, Danubian law still applies under the validation principle

16. Even if the Tribunal were to find that RESPONDENT's authority is a question of capacity, Danubian law would still apply in light of the validation principle.

17. Where different national laws may apply, the validation principle serves to determine the applicable law. The validation principle seeks to give full effect to the parties' agreement to arbitrate [*Enka v Chubb, para. 95 et seqq.; ILI (1989), Art. 4; Tweeddale, p. 240 et seqq.; cf. Bhattacharya/Rajurkar, p. 596*]. Therefore, the law that leads to the validity of the Parties arbitration agreement should be applied [*Born, p. 670; Koepp/Toerner, p. 387 et seqq.*].

18. Danubian law does not restrict the Parties authority to enter into arbitration agreements [*PO2, p. 48, para. 31*]. As such, it gives full effect to the Parties agreement to arbitrate. Therefore, Danubian law applies under the validation principle.

II. Even under Equatorianian law, RESPONDENT was authorised to conclude the Arbitration Agreement

19. Even if the Tribunal were to find that RESPONDENT's authority is a question of capacity, the applicable law is to be determined under Art. V(1)(a) NYC. Pursuant to this provision, capacity is to be determined under *"the law applicable to them"*. The law applicable to RESPONDENT is Equatorianian law. Nevertheless, RESPONDENT still had authority to conclude the Arbitration Agreement.

20. This is because RESPONDENT cannot invoke the incapacity defence under Equatorianian law [**1**]. In any case, the Arbitration Agreement required no parliamentary approval [**2**]. Even if the Tribunal were to find otherwise, the Parliament validly approved the Parties' Arbitration Agreement [**3**]. In any case, RESPONDENT is barred from invoking its own lack of authority [**4**].

1. RESPONDENT cannot invoke the incapacity defence under Equatorianian law

21. Domestic restrictions on capacity are incompatible with the international character of cross-border arbitration [*Kronke et al., p. 220; cf. Born, pp. 770, 777*]. In case government approval is needed for the validity of an arbitration agreement, domestic law would discriminate against arbitration agreements in violation of Art. II(3) NYC [*Born, pp. 762 et seqq.*]. Therefore, the restriction of RESPONDENT's authority under Art. 75 EC violates Art. II(3) NYC. Consequently, Equatorianian law cannot govern RESPONDENT's authority.

2. In any case, the Arbitration Agreement required no parliamentary approval

22. Even if the Tribunal was to apply Art. 75 EC, no parliamentary approval was necessary because the PSA is not an administrative contract. The approval requirement pursuant to Art. 75 EC only applies to "*administrative contracts*" [*RNA, p. 30, para. 21*]. Under Equatorianian law, a contract is administrative if it relates to public works [*PO2, p. 48, para. 31*]. Public work concerns, e.g., the "*actual construction of infrastructure*" [*PO2, p. 47, para. 29*].

23. The purpose of the parliamentary approval requirement is to subject certain contracts to greater state control. More specifically, those contracts relating to fundamental public interests, such as infrastructure. Contracts that concern preparatory work to the erection of infrastructure do not affect public interests to the same extent. Therefore, "*preparatory contract[s]*" are not administrative contracts. Accordingly, not subject to a parliamentary approval requirement [*cf. PO2, p. 47, para. 29*].

24. The PSA is such a preparatory contract. RESPONDENT started a tender process as part of the NP Development Program. The aim of this program was to explore and exploit the natural resources

in Northern Equatoriana [*Ex. C1, p. 9; Ex. C2, p. 10*]. In its Call for Tender, RESPONDENT asked for drones to collect "*the necessary data for locating and evaluating the most promising areas for future activities*" (emphasis added) [*RNA, p. 28, para. 5*]. The collection of data to locate and evaluate the most promising areas of northern Equatoriana does not concern the actual construction of infrastructure. Instead, the collection of data is used to exploit natural resources in Equatoriana [*RNA, p. 28., para. 6*]. The PSA is a preparatory contract, not related to public work. Therefore, the PSA is no administrative contract. Thus, no parliamentary approval was necessary under Art. 75 EC.

3. Even if the Tribunal were to find otherwise, the Parliament validly approved the Parties' Arbitration Agreement

25. Art. 75 EC requires a formal vote by Parliament to authorise arbitration agreements of SOEs. However, Art. 75 EC also allows for retroactive approval under extraordinary circumstances [*PO2, pp. 47 et seq., para. 30; 34*]. According to Equatorianian case law, a power outage before a plenary session is such as an extraordinary circumstance [*PO2, p. 47, para. 30*].

26. In the present case, even though Parliament could not formally vote on the Arbitration Agreement, Parliament gave its approval retroactively.

27. The formal vote requirement under Art. 75 EC is superseded by Art. II(2) NYC [*Born, p. 761*]. This is because the pro-arbitration approach under the NYC prohibits national form requirements from being discriminatory [*ibid.; Reiner, p. 90*]. Thus, national law cannot subject arbitration agreements or their authorisation to harsher form requirements than the Convention itself [*Reiner, p. 90*]. The NYC, however, only requires arbitration agreements to be *"in writing"* [*Art. II(2) NYC*]. Approval to conclude such agreements can be made implicitly [*Born, p. 728*].

28. On 27 November 2020, a significant number of parliamentarians were infected with COVID and could not attend the parliamentary debate [*RNA, p. 29, para. 13*]. Because of this, the debate had to be cancelled on short notice [*Ex. C7, p. 18, para. 9*]. A mass COVID infection in Parliament, much like a power outage, is an extraordinary event. Therefore, Parliament could grant its approval of the Arbitration Agreement retrospectively. This approval has been shown on two occasions.

29. First, on 1 December 2020 the Agreement was publicly signed by the government. Parliament was subsequently informed and did not object because it apparently saw no necessity to reschedule the debate [*Ex. C7, p. 19, para. 12*].

30. Second, in June 2021, Parliament held a debate on the participation of state-owned companies in arbitration [*Ex. C7, p. 19, para. 15*]. During this debate, the Arbitration Agreement was explicitly referred to as a positive example of transparency and efficiency, thereby demonstrating Parliament's approval [*ibid.*].

31. Therefore, Parliament validly approved the Arbitration Agreement.

4. In any case, RESPONDENT is barred from invoking its own lack of authority

32. Even if the Tribunal were to find that RESPONDENT lacked the authority to submit disputes to arbitration, the Arbitration Agreement should nevertheless be upheld. This is because RESPONDENT is barred from relying on its own legislation to evade a consensual Arbitration Agreement [**a**]. Moreover, RESPONDENT is estopped from invoking its own lack of authority [**b**].

a) RESPONDENT is barred from invoking its own national legislation

33. RESPONDENT, as a SOE, is barred from evading contractual obligations by relying on its own legislation. A state-owned enterprise may not invoke its own national law to deny its authority to conclude an arbitration agreement [*Born, p. 777; Ferrari/Rosenfeld, p. 178; Fouchard/Gaillard/Goldman, p. 329; Kronke et al., p. 220; Redfern/Hunter, p. 84*]. This is reflected in statuary law [*cf. Art. 2(2) OHADA UAA; Art. 177(2) Swiss PILA*] and upheld by tribunals and state courts worldwide [*Aquitaine v N.I.O.C., para. 24; ICC Case 7236, para. 23; Société Arabe v Gemanco, para. 19*].

34. In the comparable ICC Case 4381 for example, the ICC decided about the validity of an arbitration agreement between an Iranian SOE and a foreign private company. In this case, the Iranian Constitution provided for a governmental approval of arbitration clauses with foreign companies. The tribunal, however, concluded that SOEs are barred from relying on such national restrictions [*ICC Case 4381, p. 1106*]. The tribunal decided that no party should be able to disband an agreement to its own benefit, based on reasons that it itself has control over [*ibid.*].

35. This rationale also applies in the case at hand. RESPONDENT is a SOE [*RNA, p. 27, para. 3*] because "*[t]he state is the sole shareholder of [RESPONDENT]*" [*PO2, p. 44, para. 5*]. Moreover, the Equatorianian government makes up RESPONDENT's supervisory board and thereby exerts control over RESPONDENT's business dealings [*PO2, p. 44, para. 5*]. RESPONDENT invokes Art. 75 EC, its national law to deny its authority to conclude the Arbitration Agreement. This is it the detriment of CLAIMANT, a foreign private company [R*NA, p. 4, para. 4; RNA, p. 27, para. 21*].

36. Therefore, RESPONDENT may not invoke Art. 75 EC to evade the Arbitration Agreement.

b) RESPONDENT is estopped from invoking its own lack of authority

37. A party may not contest an arbitration agreement if doing so amounts to contradictory behaviour [*Virgin Islands Case, p. 503; cf. Bantekas, p. 75; cf. Greenberg et al., p. 167*]. This follows from the principle of estoppel which prohibits a party to benefit from its contradictory behavior [*Wolff, p. 108*]. Thus, a party may not deny its authority to conclude an arbitration agreement if it has previously relied on this agreement's very validity [*Virgin Islands Case, p. 50*].

38. In the present case, RESPONDENT has always assumed the validity of the Arbitration Agreement

39. First, RESPONDENT stated that its own chairman, the minister, "*[did] not consider the cancellation of the Parliamentary Debate […] to be an obstacle*" [*Ex. R4, p. 35*]. Moreover, RESPONDENT assured CLAIMANT that parliamentary approval was *"just a formality"* and would be *"forthcoming after the*

Christmas break" [*Ex. C7, p. 18, para. 9*]. Thereby, RESPONDENT made it clear that the approval requirement would not prevent the effective conclusion of the contract because the Arbitration Agreement was in principle already valid. Now, RESPONDENT challenges the validity of the Arbitration Agreement because of its alleged lack of authority. Thus, RESPONDENT's behavior is contradictory.

40. Second, RESPONDENT initiated the amendment of the Arbitration Agreement in May 2021 and even drafted the arbitration clause itself [*Ex. C9, p. 22*]. This was due to RESPONDENT's interest in maximising the transparency and efficiency of potential arbitrations [*Ex. C7, p. 19, para. 15*]. Thus, RESPONDENT relied on the validity of the Arbitration Agreement. Otherwise, RESPONDENT would not have seen the necessity to change it. Nonetheless, RESPONDENT now contests the validity of this very Arbitration Agreement.

41. Thus, RESPONDENT acts contradictory and is estopped from invoking its own lack of authority.

B. The Arbitration Agreement is substantively valid

42. In the present case, RESPONDENT challenges the Arbitration Agreement's validity on two grounds [*RNA, p. 30, para. 20*]. First, RESPONDENT claims that the Arbitration Agreement is null and void due to corruption. Second, RESPONDENT alleges that the Arbitration Agreement was rendered inoperable, as RESPONDENT tried to terminate the PSA. However, the Arbitration Agreement is substantively valid because of the doctrine of separability [**I**]. Should the Tribunal find otherwise, the Arbitration Agreement is substantively valid because there is insufficient evidence of corruption [**II**].

I. The Arbitration Agreement is substantively valid because of the doctrine of separability

43. Irrespective of whether RESPONDENT's claims of invalidity are substantiated, they solely pertain to the PSA. According to the doctrine of separability, an arbitration agreement's validity is independent from that of the underlying main contract [*Art. 16(1) DAL; Buckeye v Cardegna, p. 163; Fiona Trust, para. 17; Banifatemi, p. 20; Born, pp. 907 et seq.; Lew/Mistelis/Kröll, para. 6.9*]. Consequently, the arbitration agreement is valid even if the main contract were affected by illegality or termination [*ICC Case 7626, p. 137; Lew/Mistelis/Kröll, para. 6.9; Redfern/Hunter, p. 104; Feehily, p. 368*]. Thus, a party can only challenge the validity of an arbitration agreement directly [*Fiona Trust, para. 17; Born, p. 908; Hwang/Lim, p. 62*].

44. Both challenges raised by RESPONDENT only concern the PSA [*RNA, p. 30, para. 20*]. Therefore, the Arbitration Agreement remains valid.

45. First, RESPONDENT's allegation of corruption only concerns the PSA. RESPONDENT claims that corruption took place during the meeting of 4 November 2020 [*RNA, p. 28, para. 9*]. This meeting led to changes in the PSA, such as the inclusion of six rather than four UAVs and the extension of

maintenance obligations [*RNA, p. 28, para. 9*]. By contrast, the Arbitration Agreement remained unchanged. Thus, the Arbitration Agreement was not affected by the alleged corruption.

46. Second, the alleged termination only concerns the PSA. This is indicated by the termination letter where RESPONDENT states that it "*no longer considers itself bound by the [PSA]*" [*Ex. C8, p. 20*]. Moreover, RESPONDENT bases its termination on an alleged misrepresentation of the drones [*Ex. C8, p. 20*]. Therefore, RESPONDENT's termination only related to the PSA, not the Arbitration Agreement.

47. Therefore, even if the Tribunal were to find the PSA invalid by virtue of corruption or termination, the Arbitration Agreement is valid under the doctrine of separability.

II. The Arbitration Agreement is substantively valid because there is insufficient evidence of corruption

48. Even if the Tribunal were to find that corruption can in principle affect the substantive validity of the Arbitration Agreement, the Arbitration Agreement is still valid. This is because RESPONDENT is unable to substantiate its claims beyond assertions.

49. An arbitration agreement can only be contested if *"clear and convincing evidence"* of corruption is provided by the party alleging such corruption [*Himpurna Case, p. 43 et seq.; Hoepfner, p. 217; Hwang/Lim, p. 24*]. Otherwise, it would be too easy to allege bribery for parties wishing to avoid their obligations [*Garaud, p. 182*].

50. RESPONDENT asserts that its own COO Mr Field has been bribed [*RNA, pp. 28, 30, paras. 9;. 20*]. In the present case, however, RESPONDENT itself admits that currently *"there is no proof yet as to the payment of any bribes in relation to this contract […]*" [*Ex. C8, p. 20*]. The Equatorianian authorities have investigated for almost a year without producing evidence of corruption [*RNA, p. 29, para. 15*]. RESPONDENT itself has also not produced any additional evidence.

51. Hence, as RESPONDENT has failed to sufficiently substantiate its allegations, the Arbitration Agreement is substantively valid.

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52. In summary, RESPONDENT was authorised to conclude the Arbitration Agreement under any law this Tribunal may find applicable. CLAIMANT submits that Danubian law governs the question of RESPONDENT's authority. Even if the Tribunal were to apply Equatorianian law, RESPONDENT was still authorised to conclude the Arbitration Agreement. In any case, RESPONDENT is estopped from invoking its own lack of authority based on Equatorianian law. Moreover, the Arbitration Agreement is substantively valid. In conclusion, the Tribunal has jurisdiction to hear the case.

53.

ISSUE 2: THE PROCEEDINGS SHOULD NEITHER BE STAYED NOR BIFURCATED

54. Despite the Parties' consent to arbitrate, RESPONDENT requests the Tribunal to await the ongoing criminal investigations against Mr Field, RESPONDENT's former COO. These investigations will eventually be brought before a special chamber of Equatoriana's criminal court (**Special Chamber**) [*Ex. R2, p. 33; RNA, p. 31, para. 24*]. RESPONDENT claims that the Tribunal must consider the findings of this Special Chamber and therefore submits to stay or bifurcate the proceedings [*RNA, pp. 30, 31, paras. 23-25*].

55. RESPONDENT's request is nothing but a thinly veiled attempt to bring the dispute before Equatorianian courts that are known to decide in favour of SOEs [*PO2, p. 46, para. 18*]. As there is no more political backing for RESPONDENT's projects after the government of Equatoriana discontinued the NP Development Program, RESPONDENT has no more interest in a swift dispute resolution. Under the pretext of supposedly relevant findings of the Special Chamber, RESPONDENT ignores the impending loss of efficiency.

56. However, the findings of the Special Chamber are irrelevant for the arbitral proceedings and therefore staying the proceedings would cause unnecessary delay and expense. Similarly, the proceedings should not be bifurcated as RESPONDENT fails to refute the efficiency-based presumption against bifurcation.

57. When parties consent to arbitrate, any measure depriving the tribunal of the possibility to fulfill its mandate is *"justifiable only in extraordinary circumstances"* [*Born, p. 4167*]. Therefore, a tribunal is under no duty to stay or bifurcate its arbitration, even in the face of ongoing criminal proceedings [*Mourre, p. 114; Naud, p. 515; cf. Trapl, p. 270*].

58. Therefore, the Tribunal should reject both RESPONDENT's request to stay [**A**] as well as the request to bifurcate the present proceedings [**B**].

A. The arbitral proceedings should not be stayed

59. According to Art. 17(1) PCA Rules, the tribunal "*shall conduct the proceedings so as to avoid unnecessary delay and expense*" (emphasis added). In light of this efficiency principle, there is a general presumption against staying the proceedings [*Burmilla Trust Case, paras. 21, 26; Myers Case, para. 8; cf. Lévy, para. I. B.*]. RESPONDENT fails to refute this presumption: staying the proceedings would cause delay and expense [**I**] which are unnecessary [**II**].

I. Staying the proceedings would cause delay and expense

60. Staying the arbitral proceedings until the Special Chamber renders a decision would cause both delay and additional expense.

61. First, staying the proceedings would cause delay. Time efficiency is one of arbitration's core elements [*Paulsson/Petrochilos, p. 126; cf. Waincymer, pp. 87 et seq.*] and main motive for parties to

choose arbitration instead of national courts [*Myers Case, para. 8*]. Therefore, the tribunal must "*maximize the efficiency of the proceedings*" [*Daly et al., para. 5.04, Paulsson/Petrochilos, p. 126*]. The Equatorianian government has stated "*that a decision can be expected in July 2024*" [*RNA, p. 31, para. 24*]. Moreover, a possible appeal could cause further delay [*PO2, p. 49, para. 47*].

62. Second, staying the proceedings would cause additional expense for CLAIMANT. According to Art. 17(1) PCA Rules, a request for the stay of the proceedings should only be granted if the arbitral tribunal deems this necessary to decrease cost.

63. Ongoing legal proceedings lead to significant uncertainty for both CLAIMANT and RESPONDENT and they both have to form provisions in case the Tribunal decides in favour of the other party.

64. Moreover, the arbitral award concerns contractual obligations amounting to 60 % of CLAIMANT's yearly production [*RNA, p. 4, para. 1*]. CLAIMANT has already customised three Kestrel Drones for RESPONDENT [*RNA, p. 7, para. 23*] and will need to hold on to the drones until the Tribunal obliges RESPONDENT to perform its duties under the PSA. Therefore, staying the proceedings would cause significant financial risk for CLAIMANT.

65. Therefore, staying the proceedings would cause both delay and additional expense for both Parties.

II. Staying the proceedings is unnecessary

66. Staying the proceedings is only necessary if there are compelling reasons to do so, for example if factual or legal circumstances must be clarified beforehand [*Burmilla Trust Case, para. 22; Fund v A. Group, para. 6.1; Myers Case, paras. 11 et seqq.; Lévy, para. I. B.*].

67. However, staying the proceedings does not provide any procedural benefit. In particular, the Special Chamber's findings are irrelevant for the present arbitration [**1**]. Moreover, staying the proceedings is not required to ensure the enforceability of the final award [**2**].

1. The Special Chamber's findings are irrelevant for the present arbitration

68. RESPONDENT submits that the present proceedings should be stayed, so that the Tribunal can take into account the Special Chamber's future findings [*RNA, pp. 30 et seq., para. 23*].

69. RESPONDENT disregards that arbitration constitutes a dispute resolution mechanism independent from state jurisdiction [*cf. Born, p. 67; Mourre, p. 95*]. The tribunal has discretion whether to consider national criminal proceedings in its decision-making process [*Fund v A. Group, para. 6.1; Naud, p. 515*]. If it considers court rulings to be relevant, it further has discretion whether to stay the arbitral proceedings [*Fund v A. Group, para. 6.1; Greenberg/Foucard, p. 20*].

70. Under the efficiency principle set out in Art. 17(1) PCA Rules, proceedings should only be stayed if a national court's ruling is indispensable for the evidentiary record [*cf. Fund v A. Group, para. 6.1; Lévy, para. I. B.; Naud, p. 518*].

71. The criminal proceedings against Mr. Field are immaterial to the commercial dispute at hand [**a**]. Rather, the Tribunal is itself competent to ensure a comprehensive taking of evidence [**b**]. In any case, the findings of the Special Chamber are generally of reduced evidentiary value [**c**].

a) The criminal proceedings are immaterial to the commercial dispute at hand

72. RESPONDENT alleges that the findings of the Special Chamber may be relevant for the arbitral proceedings [*RNA, pp. 30 et seq., para. 23*].

73. However, the trial before the Special Chamber and the present arbitral proceedings focus on different subject matters governed by different legal regimes. Thus, the findings of the Special Chamber are irrelevant for the present arbitration.

74. Arbitral proceedings should only be stayed where the state court deals with a subject matter that affects the core of arbitration [*cf. Feris/Torkomyan, pp. 52 et seq., Naud, p. 518*]. By contrast, concurrent court proceedings bear no consequence on the arbitral dispute where the governing law or the legal consequences of the proceedings differ [*ICC Case 11961, p. 33*]. Legal consequences of criminal proceedings concern criminal liability, whereas the commercial proceedings deal with the validity of a contract [*cf. Sanader Case, para. 258*]. Accordingly, the outcome of the criminal proceedings, whatever it may be, has no impact on the arbitral proceedings [*ICC Case 11961, p. 33*].

75. This was held by the Croatian Constitutional Court in the *Sanader Case*. In that case, the court had to decide whether the findings of a criminal court with regards to corruption were binding for parallel commercial arbitration proceedings under the PCA Rules [*Sanader Case, para. 247*]. The Croatian Constitutional Court affirmed that the subject matter of the parties' commercial dispute and that of the criminal proceedings were entirely different [*Sanader, para. 258*]. Hence, the decision of the criminal court had no effect on the outcome of the arbitration [*Sanader, para. 259*].

76. In the present case, the Special Chamber is concerned exclusively with the criminal liability of Mr Field under Equatorianian criminal law [*RNA, p. 31, para. 24*]. In contrast, the arbitral proceedings concern the validity of the PSA under the applicable commercial law. Accordingly, the criminal proceedings before the Special Chamber do not affect the arbitral proceedings.

77. In conclusion, there is no reason for the Tribunal to consider the findings of the Equatorianian Special Chamber.

b) The Tribunal is competent to ensure comprehensive taking of evidence

78. Contrary to RESPONDENT's assertion, the Tribunal is as capable as the Special Chamber in investigating the assertions of corruption [*cf. RNA, pp. 30 et seq., para. 23*]. This also applies to the hearing of witnesses such as Mr Bluntschli and Mr Field, the former COOs of CLAIMANT and RESPONDENT and primary suspects in the corruption scandal [*Ex. C3, p. 13, para. 2; Ex. R2, p. 33; PO2, p. 49, para. 40*].

79. Pursuant to Art. 27(3) PCA Rules, the tribunal has broad investigative powers to gather evidence [*Waincymer, pp. 780 et seqq.*]. These powers include ensuring the attendance of witnesses located outside the country of the arbitral seat [*Bantekas et al., p. 726*]. This follows from the arbitral tribunal's right to request assistance from state courts in the taking of evidence if both countries are signatories to the Model Law [Art. 27 DAL; *cf. Moses, p. 119; Redfern/Hunter, p. 394*].

80. In the present case, all relevant jurisdictions have adopted the Model Law [*PO1, p. 43, para. 3*]. Thus, the Tribunal can ensure the compliance of witnesses, even if the latter are located outside the arbitral seat. Hence, RESPONDENT's concerns are unwarranted as the Tribunal is fully competent to investigate the facts of the case.

c) The findings of the Special Chamber are generally of reduced evidentiary value

81. Where a decision was rendered in "*a country with known judicial dysfunctions*", the "*persuasive force of a forthcoming decision of a criminal court*" is limited [*Naud, p. 515; cf. Kurkela, p. 290*]. This is the case where state proceedings favour domestic state entities over foreign private companies [*cf. Kurkela, p. 290*].

82. In the present case, state proceedings would favour RESPONDENT.

83. First, Equatoriana is amongst the 20 % most corrupt countries in the world, as ranked by the Transparency International's Corruption Index [*Ex. C3, p. 14, para. 11*]. This index considers to what extent "*government officials in the judicial branch […] use public office for private gain*" [*CPI 2021, p. 16*]. Due to the bad reputation of Equatorianian courts, even Equatorianian companies choose to opt-out of state court proceedings to settle their disputes by arbitration [*PO2, p. 47, para. 28*]. Moreover, courts in Equatoriana have the reputation of deciding in favour of SOEs [*PO2, p. 46, para. 18*].

84. Second, the specific authorities entrusted to lead the investigation against Mr Field have failed to meet basic standards of impartiality [*Ex. R2, p. 33*]. After a change of government in Equatoriana, there was strong political interest in terminating all contracts concluded under the previous government [*Ex. C3, p. 13, para. 5*]. In fact, the new government set up a Special Chamber to investigate all such contracts [*RNA, p. 31, para. 24*]. Special prosecutor Ms Fonseca leads the investigations [*Ex. R2, p. 33*]. Ms Fonseca's brother-in-law is the CEO of one of CLAIMANT's direct competitors and her son is engaged to the former personal assistant of Mr Field, Leonida Bourgeois [*Ex. R2, p. 33*]. Ms Bourgeois assisted Mr Field during the contract negotiations with CLAIMANT [*RNA, p. 28, para. 8*]. Subsequently, Ms Fonseca asked Ms Bourgeois to join her team at the public prosecutor's office investigating the corruption allegations [*PO2, p. 49, para. 43*]. Regarding this nepotism, the authorities investigating Mr Field are not impartial. RESPONDENT would hence be favoured by state proceedings.

85. In light of this, the findings of the Special Chamber are generally of reduced evidentiary value. By contrast, the arbitrators of this Tribunal do not have any personal connection to this case [*Letter by B. v. Suttner, p. 23; Letter by M. C. Asser, p. 39*].

2. Staying the proceedings is not required to ensure the enforceability of the final award

86. For an award to be enforced under the NYC and the DAL it must comply with the Parties' right to be heard and public policy. In the case at hand, staying the proceedings is not necessary to uphold RESPONDENT's right to be heard [**a**]. Furthermore, the award cannot be set aside on the ground of public policy [**b**].

a) Staying the proceedings is not necessary to uphold RESPONDENT's right to be heard

87. Continuing the proceedings does not violate RESPONDENT's right to be heard under Art. V(1)(b) NYC and Art. 34(2)(a)(ii) DAL. Pursuant to these provisions, an award may be rendered unenforceable or set aside if a party *"was unable to present his case"*. Awaiting the Special Chamber's decision is not necessary for RESPONDENT to present all its evidence.

88. A party is only deemed unable to present its case if there has been a severe violation of a party's right to be heard [*Fotochrome Case, p. 516; License Case p. 530; Reynolds Case, pp. 4, 7*]. In fact, even if a party was unable to present key evidence, due process is only violated if that evidence would have materially altered the outcome of the proceedings [*Baltic Harbour Case, para. 2.1; License Case, p. 530; Balthasar, pp. 153 et seq.; Born, pp. 3860 et seq.*].

89. In the present case, awaiting the decision of the Equatorianian Special Chamber would not produce any evidence relevant to the outcome of the arbitral proceedings [*supra, paras. 68 et seqq.*]. Therefore, the Special Chamber will not produce any evidence which could materially alter the outcome of the arbitral proceedings.

90. Thus, the future award cannot be contested under Art. V(1)(b) NYC and Art. 34(2)(a)(ii) DAL.

b) The award cannot be set aside on the ground of public policy

91. RESPONDENT argues that "*complying with an [award obligating RESPONDENT] to fulfil a contract obtained by bribery, [would put RESPONDENT] in breach of Art. 15 of Equatoriana's Anti-Corruption Act*" [*RNA, p. 27, para. 2*]. Such a breach would constitute a violation of national public policy. According to RESPONDENT, a violation of Equatorianian public policy would render the award unenforceable. However, a breach of national public policy does not lead to the award being unenforceable. Rather, the award would still be enforceable, even if a state court during enforcement procedure would differ from the Tribunal's findings on corruption.

92. If domestic courts were to set aside arbitral awards because of national public policy, this would conflict with the "*sacrosanct principle of international arbitration law that courts will not review the substance of arbitrators' decisions"* [*Born, p. 4069*]. Otherwise, countries could arbitrarily frustrate the finality and international enforcement of awards [*Born, p. 4002; Van den Berg, pp. 360 et seqq.*].

93. The same reasoning was upheld by the Privy Council of Mauritius in the *Betamax Case 2021*. In this case, the Privy Council reviewed the decision on the *Betamax Case 2019* of the Supreme Court. In the *Betamax Case 2019*, the Supreme Court set aside an award in which the tribunal did not follow

an SOE's allegations of corruption [*Betamax Case 2019, para. 1*]. However, the Privy Council revised and overruled this decision. It held that the principle of finality did not entitle the Supreme Court to re-examine the tribunal's decision about the alleged corruption [*Betamax Case 2021, pp. 1264, 1273*]. Accordingly, Equatorianian courts will not be able to set aside the award on the ground of public policy.

B. The arbitral proceedings should not be bifurcated

94. RESPONDENT alternatively submits that the proceedings should be bifurcated. The first stage of such bifurcated proceedings would solely focus on issues that do not extend to the question of the invalidity of the contract due to corruption [*PO2, pp. 50, 51, para. 51*]. The second stage of proceedings would only concern the invalidity of the contract due to corruption. This second stage of proceedings would begin after the Special Chamber has announced its verdict [*RNA, p. 30, para. 23*].

95. However, following the efficiency principle set out in Art. 17(1) PCA Rules, there is a general presumption against bifurcation [*Greenwood, p. 425*]. This presumption can only be refuted if all the criteria of a three-fold test are met [*Glencore Case, para. 39; Philip Morris Case p. 109; cf. Daly et al., para. 5.67*]. First, the reason leading to bifurcation must not be prima facie insubstantial. Second, the stages of the proceedings must not be inextricably linked. Third, bifurcation must be efficient.

96. In the present case, RESPONDENT's request for bifurcation fails to meet any criterion of this test. First, RESPONDENT's allegations of corruption are prima facie insubstantial [**I**]. Second, the two stages of the proceedings are too closely intertwined [**II**]. Third, bifurcating the proceedings would be inefficient [**III**].

I. RESPONDENT's corruption allegations are prima facie insubstantial

97. Under the first step, the tribunal should deny a request to bifurcate if the argument underlying this request is prima facie insubstantial [*Glencore Case, para. 39; cf. Daly et al., paras. 5.67*]. An argument is prima facie insubstantial if it is not backed by factual exhibits [*Glencore Case, paras. 35 et seqq.*].

98. In the case at hand, there is insufficent evidence that the conclusion of the PSA was induced by corruption [*supra, para. 50*]. In particular, there is no evidence that any of CLAIMANT's employees engaged in such behaviour. Rather, internal investigations found no indications that any of CLAIMANT's employees breached the clear ethical rules that are a part of CLAIMANT's company policy [*Ex. C3, pp. 13 et seq., paras. 7, 11*]. These rules prohibit CLAIMANT's employees from granting benefits to governmental employees [*Ex. C3, p. 14, para. 11*]. Moreover, RESPONDENT has not yet produced proof of corruption relating to CLAIMANT [*supra, para. 50*].

99. Rather, RESPONDENT has solely submitted evidence of corruption regarding two other contracts concluded by Mr Field. Those contracts were concluded with two Equatorianian companies owned

by Mr Field's cousin [*Ex. R2, p. 33; PO2, p. 49, para. 45*]. These two companies "*were obviously not able to provide the agreed services*" and are now already bankrupt [*Ex. R2, p. 33*].

100. By contrast, CLAIMANT is a long-established company operating internationally since 2000 [*NA, p. 4, para. 1; cf. Ex. R1, p. 32, para. 7*]. CLAIMANT has never operated in Equatoriana before and has no relations to the contracts tainted by corruption. Thus, no connection can be established to the cases in which corruption has already been proven. RESPONDENT is unable to prove any corruption directly related to CLAIMANT. Therefore, RESPONDENT'S allegations are prima facie insubstantial.

II. A bifurcation is impractical as the relevant issues are too closely intertwined

101. A request for bifurcation should be denied if the issues are too closely intertwined [*Glencore Case, para. 39*]. This is the case, when there is a close link between the legal questions [*Burmilla Trust Case, para. 47*] or between the facts [*Glamis Gold Case, para. 25; cf. Sabahi et al., p. 168, para. 6.59*].

102. First, the two procedural stages are legally closely intertwined. At the first stage, the Tribunal would decide whether RESPONDENT terminated the PSA. More specifically, the Tribunal would have to consider whether the alleged misrepresentation was causal for the conclusion of the PSA [*infra, para. 214*]. However, no such causality can be established if instead the corruption of Mr Field was causal for the contract conclusion. Therefore, the second procedural stage is decisive for the legal reasoning in the first stage.

103. Second, the two procedural stages are factually closely intertwined. RESPONDENT's allegations concerning the misrepresentation as well as the corruption are linked to CLAIMANT's negotiations with Mr Field on 28 November 2021. Therefore, the first and the second stage of the proceedings would have to investigate the same facts.

104. Hence, the two procedural stages are factually and legally too closely intertwined to be bifurcated.

III. Bifurcating the proceedings would be inefficient

105. Under the third step of the three-fold test, the tribunal should only bifurcate in exceptional cases if doing so increases procedural efficiency [*Glencore Case, paras. 38 et seq.; Philip Morris Case, para. 106*; *Greenwood, p. 425*]. This is only the case if there is a high chance that the results of the first procedural stage render the second stage unnecessary [*ibid.*].

106. In the present case, however, irrespective of the conclusion reached at the first procedural stage, the second stage would still remain necessary. This is because the first stage of such bifurcated proceedings would not come to a conclusion on the contract's validity. Rather, this first stage would solely focus on two issues: the Tribunal's jurisdiction, and the law applicable to the PSA as well as its termination [*PO2, p. 50, para. 52*]. On the contrary, the second stage would examine the repercussions of corruption on the conclusion of the PSA.

107. Therefore, none of the issues discussed at the first stage lead to a conclusive determination of the contract's validity. As such, the Tribunal would have to proceed to the second stage in any case. Therefore bifurcation would be inefficient.

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108. In summary, the findings of the Special Chamber are irrelevant to the arbitral proceedings and therefore staying the proceedings would cause unnecessary delay and expense. The proceedings should not be bifurcated as RESPONDENT fails to refute the efficiency-based presumption against bifurcation. In conclusion, the Tribunal should neither stay nor bifurcate the proceedings.

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

109. The PSA is an international sales contract. Therefore, the PSA is governed by the CISG.

110. However, RESPONDENT alleges that "*the contract is governed in its entirety by the Equatorianian ICCA*" [*RNA, p. 31, para. 26*]. By insisting on the application of its national law, RESPONDENT disregards the core premise of the CISG to provide a uniform set of laws to govern sales contracts internationally. In this setting, all parties are subject to the same provisions. Since uniformity is only effectively achievable if the CISG is applied as broadly as possible, exclusions must be interpreted restrictively. RESPONDENT not only interprets the exclusion of the CISG extensively, but also bases the exclusion on national law. However, there is no room for national law in an international context.

111. It follows that the CISG is applicable pursuant to Art. 1(1)(a) CISG [**A**]. The CISG is neither excluded under Art. 2(e) CISG [**B**] nor Art. 3 CISG [**C**] or Art. 6 CISG [**D**].

A. The CISG is applicable pursuant to Art. 1(1)(a) CISG

112. The CISG is applicable because the requirements set out in Art. 1(1)(a) CISG are fulfilled. According to Art. 1(1)(a) CISG, the CISG is applicable to "*contracts of sale of goods between parties whose places of business are in different States, when the States are contracting States (…)".* The PSA is concerned with the sale of drones [*Ex. C2, p. 10*]. The Parties' places of business are Equatoriana and Mediterraneo, which are contracting states of the CISG [*PO1, p. 43, para. 3*]. Therefore, the requirements for the application of the CISG under Art. 1(1)(a) CISG are met.

B. The CISG is not excluded under Art. 2(e) CISG

113. RESPONDENT alleges that the PSA is a sales transaction "*for an aircraft in the sense of Art. 2(e) CISG falling outside the CISG's sphere of application*" [*RNA, p. 31, para. 26*]. However, the PSA is not excluded from the CISG's sphere of application under Art. 2(e) CISG. According to Art. 2(e) CISG "*[the] Convention does not apply to sales of ships, vessels, hovercraft or aircraft*". The CISG does not provide an explicit definition of the term "aircraft" in the sense of Art. 2(e) CISG (**Aircraft**). RESPONDENT

bases its definition of Aircraft on its national provisions instead of the CISG [*RNA, p. 31, para. 26*]. However, in assessing the definition of Aircraft, the Tribunal should give weight to criteria which promote the uniform application of the CISG.

114. To ensure such a uniform approach, the purpose of an airborne vehicle is the only decisive criterion for the definition of Aircraft [**I**]. The Drones are not Aircraft under the decisive criterion, purpose [**II**]. The Drones are not Aircraft, even if this Tribunal would consider other criteria [**III**].

I. The purpose of an airborne vehicle is the only decisive criterion for the definition of Aircraft

115. When interpreting the meaning of a term under the CISG, precedence must be given to an autonomous interpretation of the CISG [*Lazerow, p. 376*]. According to Art. 7(1) CISG, "*[i]n the interpretation of this Convention, regard is to be had to its international character*". The international character of the CISG demands an interpretation autonomous from national law [*DiMatteo/Janssen, p. 52*; *Kröll/Mistelis/Perales Viscasillas, Art. 7, para. 18; Schlechtriem/Schwenzer, Art. 7, para. 9*]. This follows from the CISG's goal to create a uniform international sales law [*Guardian Case para. B2*; *Schlechtriem/Schwenzer, Art. 7, para. 15*].

116. Under an autonomous interpretation of the CISG, an Aircraft is a vehicle permanently intended for transport in the air [*Schlechtriem/Schwenzer/Schroeter, Art. 2, para. 42*]. Without a reasonable limitation of the term "aircraft", paper planes or kites could therefore also fall under Art. 2(e) CISG [*cf. MüKo HGB, Art. 2 CISG, para. 32*]. Such an excessive limitation would be incoherent with the "pro-convention principle" which states that the CISG must be applied as broadly as possible [*Kröll/Mistelis/Perales Viscasillas, Art. 7, para. 65*]. Hence, the limitation under Art. 2(e) CISG and therefore the term Aircraft must be interpreted restrictively [*AC Opinion 4, paras. 1.2, 4.; Brauner, p. 248; BeckOK BGB, Art. 2 CISG, para. 11*].

117. Under the CISG, three criteria are discussed to define Aircraft: the size of the vehicle, the existence of a national registration requirement and whether the vehicles' purpose is to carry goods or persons [*MüKo BGB, Art. 2 CISG, paras. 22 et seq.; Schlechtriem/Schwenzer/Schroeter, Art. 2, paras. 2, 38-41*]. However, only the criterion of purpose should be considered by this Tribunal to define Aircraft.

118. First, the size of an airborne vehicle is not suitable to define Aircraft, as it is inconsistent with the convention's history. The CISG's predecessor, the Uniform Law on the International Sale of Goods (**ULIS**) did not define airborne vehicles by their size, but rather by the existence of a registration requirement. The drafters of the CISG discussed the size criterion, but ultimately decided against including it [*UN YB VI, p. 51, para. 28*]. This was done to ensure a uniform

application of the CISG [*Schlechtriem/Schwenzer, Art. 2, paras. 27 et seqq.*]. Accordingly, size is not and should not be relevant for distinguishing whether a vehicle is an Aircraft.

119. Second, a registration requirement is not suitable for determining the definition of Aircraft. During the drafting process of the CISG, its drafters decided against adopting Art. 5(1)(b) ULIS [*Flechtner/Honnold, p. 67; UN YB VI, p. 90, para. 26*]. This provision excluded "*any ship, vessel or aircraft, which is or will be subject to registration*" (emphasis added). The drafters of the CISG decided not to adopt this wording in Art. 2(e) CISG, because it was unclear which domestic law would govern a registration requirement [*Schlechtriem/Schwenzer, Art. 2, para. 28*]. Therefore, a registration requirement would lead to a fragmented legal landscape and legal uncertainty [*Flechtner/Honnold, p. 67; UN YB VI, p. 51, para. 28; para. 26; Schlechtriem/Schwenzer, Art. 2, para. 28; Secretary Commentary, p. 16*].

120. Concluding, neither the size nor a possible registration requirement can be used to define Aircraft.

121. The criterion purpose, on the other hand, promotes uniformity of interpretation in the sense of Art. 7(1) CISG [*Schlechtriem/Schwenzer/Schroeter, Art. 2 CISG, paras. 41 et seqq.*]. This is because it focuses on the functional operation of vehicles as opposed to their superficial characteristics. Thus, the Tribunal should see a vehicle's purpose as decisive in qualifying it as Aircraft.

II. The Drones are not Aircraft under the decisive criterion, purpose

122. The Drones are not Aircraft as they are intended to collect geological and geophysical data and they are not built to transport goods or persons.

123. An airborne vehicle is an Aircraft, if its purpose is transporting goods or persons [*BeckOK BGB, Art. 2 CISG, para. 11; Schlechtriem/Schwenzer/Schroeter, Art. 2, para. 41*]. When examining the purpose of an airborne vehicle, both the Parties' intention [*cf. Schlechtriem/Schwenzer/Schroeter, Art. 2, para. 7*] and its objective function must be considered [*Case 1/1998; cf. MüKo BGB, Art. 2 CISG, paras. 22 et seq.*].

124. First, when considering the parties' intention, the relevant point in time is the contract conclusion. [*Kröll/Mistelis/Perales Viscasillas, Art. 2, para. 11*]. If the Buyer later intends to use the goods differently, this has no influence on the purpose of the goods [*Schlechtriem/Schwenzer/Schroeter, Art. 2, para. 8*].

125. According to the Parties' intention, the Drones were not intended to transport goods or persons. Instead, their intended purpose is collecting geological and geophysical data. This is evidenced by RESPONDENT's Call for Tender, where it stated that the Drones should be used for "*the collection of geological and geophysical data*" [*Ex. C1, p. 9*]. This purpose was also integrated in the preamble of the

PSA [*Ex. C2, p. 10*]. Accordingly, the seller's obligation under Art. 2(a) PSA is to deliver drones "*with state-of-the-art geological surveillance feature[s]"* [*Ex. C2, p. 10*].

126. The fact that the Minister of Natural Resources and Development stated that the Drones could be used for the transport of medicine or spare parts in Equatoriana has no influence on the intended use of the Parties [*Ex. R2, p. 33; PO2, p. 46, para. 22*]. This is because this statement was made after the conclusion of the PSA.

127. Second, the objective function of the Drones is not to transport goods or persons. Instead, they are built to collect geological and geophysical data. This is because the Drones are "*clearly engineered towards the use for surveillance purposes"* [*PO2, pp. 45, 46 para. 9*]. Moreover, the Drones are not able to carry humans and have very little weight and volume capacity left to transport goods [*PO2, pp. 45, 46 paras. 9, 10*]. Therefore, transporting goods is only possible if the surveillance equipment is removed [*PO2, p. 45, para. 9*]. In any case, using the Drones for cargo delivery makes commercially little sense [*PO2, p. 45, para. 9*].

128. Concluding, both the objective and subjective purpose of the Drones is not that of Aircraft. Therefore, the Drones are not excluded under Art. 2(e) CISG.

III. The Drones are not Aircraft even if this Tribunal would consider other criteria

129. Even if the Drones' registration requirement [**1**] or size [**2**] were considered, the Drones are not Aircraft.

1. The Drones are not Aircraft even if a registration requirement were considered

130. RESPONDENT alleges that "*[u]nder Equatorian law, the drones have to be registered as air vehicles, which justifies considering them as "aircrafts" [sic] in the sense of Art. 2(e) CISG*" [*RNA, p. 31, para. 26*]. However, the Drones are not Aircraft because the Drones do not have to be registered.

131. In the present case, the relevant national law is the Equatorianian Aviation Safety Act (**ASA**). Art. 1 ASA provides a definition for aircraft and that Drones shall be treated accordingly as aircraft [*Ex. R5, p. 36*]. Following, Art. 10 ASA states that "*aircraft owned or operated by a private entity in territory of Equatoriana shall be registered at the aircraft registry*" (emphasis added) [*Ex. R5, p. 36*].

132. RESPONDENT is not a private entity. Rather, RESPONDENT is a fully state-owned company [*RNA, p. 27, para. 3*]. As such, it is fully dependent on government representatives to conduct its business [*PO2, p. 44, para. 5*]. For instance, the Minister of Natural Resources and Development chairs a specially installed supervisory board composed of public officials [*PO2, p. 44, para. 5*]. This board elects the board of directors, which is in turn responsible for the day-to-day operations of RESPONDENT [*PO2, p. 44, para. 5*]. Furthermore, RESPONDENT was initially founded by the

government of Equatoriana [*RNA, p. 27, para. 3*]. In light of these structural dependencies on the Equatorianian government, RESPONDENT is not a "*private entity*" in the sense of Art. 10 ASA.

133. Moreover, there is no need for RESPONDENT to register the Drones. A registration requirement obliges the owner of the drone to register it at a public office, so that the government has an overview of the airborne vehicles on its territory RESPONDENT, however, is a fully state-owned company. The Minister even signed the PSA himself. The government was therefore already aware of the purchase of the Drones, so that a further registration would be redundant.

134. As the Drones are not subject to a registration requirement under Equatorianian law, they cannot be excluded from the application of the CISG.

2. The Drones are not Aircraft even if a size requirement were considered

135. Even if this Tribunal were to consider an arbitrary size requirement to define Aircraft [*quod non*, *supra, para. 118*], the Drones not are not Aircraft.

136. The size requirement under the CISG stems from the definition of ships and aims to provide a cutoff point for the exclusion of vehicles [*cf. Schlechtriem/Schnwenzer/Schroeter, Art. 2, paras. 40, 42*]. Since historically, the exclusion of Art. 2(e) CISG applies to both ships and aircraft, the principles developed for ships can be applied to aircraft [*Piltz, Art. 2 CISG, para. 53*]. Small boats, such as dinghies, are not excluded under Art. 2(e) CISG [*Swiss Federal Council, p. 760*]. In a consistent application of this rationale, ultra-light aircraft should not be excluded from the CISG [*cf. Piltz, Art. 2 CISG, para. 53*]. In this regard, according to their size, "*drones should not be considered aircraft at all*" [*Schlechtriem/Schwenzer, Art. 2, para. 33*].

137. The Drones are smaller than ultra-light aircraft and should therefore not be considered Aircraft under a size criterion. Compared to an average transport aircraft with up to 92 meters length, the Drones, with around 6.3 meters, are much smaller [*Ex. C4, p. 15*]. This holds even more true, when considering that an average ultra-light aircraft measures around 6.8 meters [*Aerospace Technology*].

138. As the Drones are even smaller than an average ultra-light aircraft, they cannot be excluded from the application of the CISG because of their size.

C. The CISG is not excluded under Art. 3 CISG

139. RESPONDENT might argue that the PSA is a service agreement and therefore excluded under Art. 3(2) CISG. However, the PSA is not a service agreement but a sales transaction.

140. Art. 3(2) CISG states that "*[t]his Convention does not apply to contracts in which the preponderant part of the obligations […] consists in the supply of labour or other services*". This stipulation presupposes that the contract which is excluded from the CISG is treated as a single contract [*MüKo BGB, Art. 3 CISG,*

para. 11]. In particular, a contract is uniform if all obligations can be derived from a single contractual document [*Huber/Mullis, p. 46*; *MüKo BGB., Art. 3 CISG, para. 11*].

141. The PSA is a uniform contract whose obligations are all contained in a single contractual document [*Ex. C2, pp. 10 et seqq.*].

142. This PSA is not a service agreement, as its preponderant part does not lie in services but rather in sales, regardless of whether that part is determined objectively [**1**] or subjectively [**2**].

1. The PSA is not a service agreement if the preponderant part is determined objectively

143. Under an objective analysis, the preponderant part of the PSA has to determined by comparing the economic value of the sale obligations to that of the service obligations [*cf. CISG Case 1156, para. 24; AC Opinion 4, para. 3.3*].

144. A part of a contract is preponderant when its economic value equals or exceeds 50% of the overall contract price [*Spinning Company Case, p. 17; Huber/Mullis, p. 46; Kröll/Mistelis/Perales Viscasillas, Art. 3, para. 18*].

145. The economic value of the sale of the Drones amounts to EUR 44 Mio. [*Ex. C2, p. 11*]. By contrast, the economic value of the maintenance obligation is EUR 17.44 Mio. [*Ex. C2, p. 11; PO2, p. 47, para. 27*]. The maintenance part consists of two services: the basic services part and the additional services part [*Ex. C2, p. 11; Ex. R1, p. 32, para. 6; PO2, p. 47, para. 27*].

146. The difference in economic value of the two parts is demonstrated in the chart below.

147. As shown by the chart above, the economic value of the sale exceeds that of the services by far. As such, the sale constitutes the preponderant part of the PSA.

2. The PSA is not a service agreement if the preponderant part is determined subjectively

148. Under a subjective analysis, the Parties intended for the PSA to be a sales transaction.

149. A part of a contract is preponderant when the parties intended that part to be the main focus of the contract [*MüKo BGB, Art. 3 CISG, para. 14*]. A part is not deemed the main focus of the contracts if its role is to achieve the main purpose of the contract [*ibid.*]. In determining the parties' intention, the following elements are to be considered: the circumstances of the formation of the contract, the wording and structure of the agreement [*Cylinder Case, p. 5; AC Opinion 4, para. 3.4*].

150. The circumstances of the formation of the contract show the Parties' intention to conclude a sales contract. The Parties concluded a "*Purchase and Supply Agreement*" (emphasis added), which RESPONDENT itself considers to be a "sales transaction" [*Ex. C2, p. 10*, *RNA, p. 31, para. 26*]. Additionally, the Parties are referred to as "*Seller*" and "*Buyer*" in the PSA [*Ex. C2, p. 10*]. Hence, the Parties used sales-specific wording to indicate the Agreement's nature. The maintenance offered to service the UAVs only aims to preserve the goods, the sale of which forms the main part of the PSA.

151. Therefore, the preponderant part of the PSA is the sale of the Drones according to the intention of the Parties.

D. The CISG is not excluded under Art. 6 CISG

152. Art. 20(d) PSA does not constitute an exclusion of the CISG under Art. 6 CISG.

153. Pursuant to Art. 6 CISG, parties can exclude the CISG through agreement [*Schlechtriem/Schwenzer, Art. 6, paras. 5, 12*]. Without an explicit agreement, there must be clear and unmistakable intent of the Parties to exclude the CISG [*Schlechtriem/Schwenzer, Art. 6, para. 18*]. Choosing the law of a CISG's contracting state to govern a contract, is no sign of a clear intent of the parties to exclude the CISG [*Broilers Case, para. 19; AC Opinion 16, para. 4.2*].

154. Art. 20(d) PSA states that "*[t]he agreement is governed by the law of Equatoriana*" [*Ex. C2, p. 12*]. Equatoriana is a contracting state of the CISG [*PO1, p. 43, para. 3*].

155. Therefore, no clear and unmistakable intent of the Parties to exclude the CISG is apparent. The Parties did not exclude the CISG by referring to Equatorianian national law.

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156. In summary, all requirements for the applicability of the CISG are met. Contrary to RESPONDENT's contentions, the applicability of the CISG is not excluded. As the exception in Art. 2(e) CISG is construed narrowly and must be interpreted autonomously, the Kestrel Drone is not an Aircraft in the sense of this provision. Moreover, the CISG is not excluded under Art. 3(2) CISG as the sale of the Drones is the preponderant part of the PSA. Lastly, the Parties' choice of law clause does not exclude the CISG. In conclusion, the PSA is governed by the CISG.

ISSUE 4: RESPONDENT CANNOT RELY ON ART. 3.2.5 OF THE INTERNATIONAL COMMERCIAL CONTRACT ACT OF EQUATORIANA TO AVOID THE CONTRACT

157. In its letter of 30 May 2022, RESPONDENT states that it "*no longer considers itself bound by the [PSA] concluded on 1 December 2020*" [*Ex. C8, p. 20*]. This is nothing but RESPONDENT's thinly veiled attempt to evade its contractual obligations under the PSA. With a new government in power and

the NP Development Program discontinued, RESPONDENT lost its political interest in the acquisition of the Drones.

158. RESPONDENT argues that CLAIMANT misrepresented the quality of the Drones and therefore seeks to avoid the PSA pursuant to Art. 3.2.5 of the International Commercial Contract Act of Equatoriana (**ICCA**) [*Ex. C8, pp. 20, 21*]. In particular, RESPONDENT bases its claim on the Equatorianian Supreme Court's (**Equatorianian SC**) interpretation of Art. 3.2.5 ICCA [*Ex. C8, p. 21*]. RESPONDENT tries to avoid the PSA under its national law because the Equatorianian SC's interpretation of Art. 3.2.5 ICCA is biased towards SOEs and therefore benefits RESPONDENT [*PO2, p. 46, para. 18*].

159. Thereby, RESPONDENT disregards the fact that the Parties' chose to contractually govern avoidance in the PSA. It also disregards that the CISG's provisions take precedence over national law.

160. When determining the rules applicable to the avoidance of a contract governed by the CISG, primarily, regard must be had to the parties' agreement [*cf. Kröll/Mistelis/Perales Viscasillas, Art. 6, para. 7*]. Where the parties' agreement falls short, the CISG's provisions apply [*cf. Kröll/Mistelis/Perales Viscasillas, Introduction to the CISG, para. 12*]. Only if neither the agreement nor the CISG govern the avoidance, national law is applicable [*Kröll/Mistelis/Perales Viscasillas, Art. 7, paras. 51 et seq.*].

161. As a result, the PSA governs the avoidance [**A**]. Should the Tribunal find otherwise, the avoidance of the PSA is governed by the CISG [**B**]. Even if the CISG does not govern the avoidance, RESPONDENT is barred from relying on Art. 3.2.5. ICCA [**C**].

A. The avoidance of the PSA is governed by the Parties' agreement

162. The Parties agreed on a conclusive avoidance regime in Art. 18 PSA. To give effect to the Parties' autonomy, the PSA can only be avoided pursuant to this rule.

163. According to Art. 6 CISG, "*the parties may […] derogate from or vary the effect of any of [the CISG's] provisions*". It follows from this principle of party autonomy that the application of the CISG itself is secondary to any agreement by the parties [*Schlechtriem/Schwenzer/Schroeter, Art. 7, para. 48*]. Such an agreement also reaches as far as to preclude all national law, even contradictory mandatory national law [*Filling Plant Case, para. 56; Schlechtriem/Schwenzer/Schroeter, Art. 6, para. 33*].

164. The parties' agreement is interpreted according to Art. 8 CISG [*Schlechtriem/Schwenzer, Art. 8, para. 3*]. First, regard must be had to the parties' intention according to Art. 8(1) CISG.

165. In case the parties' intention cannot be determined, a reasonable person test under Art. 8(2) CISG applies. According to this provision, statements and conduct of a party "*[…] are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances*". In accordance with Art. 8(3) CISG, in determining the understanding of a

reasonable third person, regard is to be had to all relevant circumstances such as prior negotiations of the parties [*Kröll/Mistelis/Perales Viscasillas, Art. 8, para. 29*].

166. A reasonable person would have understood Art. 18 PSA to conclusively govern the avoidance of the PSA. This results from the PSA's wording and prior negotiations of the Parties.

167. First, the wording of the PSA shows that the agreement contains a conclusive avoidance regime. Art. 18(1) PSA states that the "*BUYER is entitled to avoid the agreement in case SELLER commits a fundamental breach of contract [sic]*" (emphasis added) [*Ex. C2 p. 12*]. Art. 18(2) PSA lists breaches which the Parties defined as fundamental such as "*[i]nappropriate payments to any employee of BUYER*" or "*[d]elay in delivery of more than 200 days"* [*Ex. C2, p. 12*]. Art. 18(2) PSA therefore contains specific cases in which the Parties intended to emphasise the possibility of avoidance. Moreover, Art. 18(2)(c) PSA states that other breaches are fundamental "*which deprive the BUYER of what it is entitled to expect under the Agreement*".

168. Art. 18(2)(c) PSA covers all cases not specifically listed in Art. 18(2)(a), (b) PSA. Thereby, Art. 18(2)(c) PSA is a clause comprehensively governing the avoidance of the PSA. A reasonable person would have understood the deliberately chosen exact wording of Art. 18 PSA to conclusively govern the avoidance of the PSA "*for the avoidance of doubt*" [*Ex. C2, p. 12*]. This is because it would not be necessary to draft such a comprehensive avoidance regime if an external avoidance regime would be applicable to the avoidance of the PSA as well.

169. Second, the prior negotiations of the Parties show that the PSA is exhaustive. The Parties amended Art. 18(1) PSA, choosing to alter the wording of the clause from "*terminate*" to "*avoid*" [*PO2, p. 48, para. 38*]. Furthermore, the Parties changed the wording in Art. 18(1) PSA from "*fundamental non-performance*" to "*fundamental breach*" [*PO2, p. 48, para. 38; Ex. C2, p. 12*]. Both the term "avoidance" and the term "fundamental breach" are adoptions of the wording of Art. 25, 49 CISG. By amending Art. 18 PSA, the Parties adapted the wording of the CISG in order to create an equally conclusive and far-reaching avoidance regime.

170. Thereby, Art. 18(1) PSA can only be understood as intended to govern all cases of contract breaches. A reasonable person would therefore conclude that Art. 18(1) PSA governs avoidance conclusively.

171. Thus, by including Art. 18 in the PSA, the Parties chose to conclusively govern the avoidance of the PSA. Therefore, Art. 3.2.5 ICCA is inapplicable.

B. Should the Tribunal find otherwise, the avoidance of the PSA is governed by the CISG

172. RESPONDENT claims that the CISG is inapplicable pursuant to the idea underlying Art. 4 CISG and therefore persists on the application of Art. 3.2.5 ICCA [*RNA, p. 31, para. 28*].

173. However, contrary to RESPONDENT's allegations, Art. 4 CISG does not limit the legal scope of the CISG in the present case. Therefore, Art. 3.2.5. ICCA is not applicable.

174. Conceptually, Art. 4 CISG excludes certain subject matters from the legal scope of application of the CISG because the drafters couldn't reach an agreement on these questions. However, in light of the international character of the CISG and its aim to preserve a uniform application, the limitation of the legal scope set out in Art. 4 CISG has to be interpreted restrictively [*Kröll/Mistelis/Perales Viscasillas, Art. 4, para. 4*]. In accordance with this restrictive interpretation of Art. 4 CISG, it must be examined primarily whether the CISG contains express provisions governing the question at hand [*Janssen/Kiene, p. 261*; *MüKo BGB, Art. 4 CISG, para. 4*]. Only if this is not the case, the internal gap may be filled by a recourse to national law pursuant to Art. 7(2) CISG [*MüKo BGB, Art. 4 CISG, para. 4*].

175. The CISG expressly provides for the avoidance of the PSA in Arts. 35, 49 CISG [**I**]. Even if the CISG would not hold exhaustive stipulations, the CISG is not excluded under Art. 4 CISG [**II**].

I. The CISG expressly provides for the avoidance of the PSA in Arts. 35, 49 CISG

176. RESPONDENT claims that in the present case the CISG does not contain express provisions on the matter of avoidance [*cf. RNA, p. 31, para. 28*]. However, the CISG does expressly provide for the avoidance of a contract in its Arts. 35, 49 CISG. Therefore, the exception invoked by RESPONDENT does not apply and the avoidance of the PSA is governed by the CISG.

177. According to Art. 49(1)(a) CISG "*the buyer may declare the contract avoided if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract*". Such a breach may result from the obligation in Art. 35 CISG which states that the seller must deliver goods which are of the quantity and quality and description required by the contract [*Kröll/Mistelis/Perales Viscasillas, Art. 35, para. 9, cf.: Yovel p.2*]. Questions concerning the quality of goods must, therefore, be assessed in accordance with Art. 35 CISG [*Kröll/Mistelis/Perales Viscasillas, Art. 35, paras. 1 et seqq.*]. This is also referred to as "innocent" or "negligent" misrepresentation of the goods [*Schlechtriem/Schwenzer/Schroeter, Art. 35, para. 48; Schroeter, pp. 578, 582*].

178. In the present case, RESPONDENT seeks to avoid the PSA by its termination letter of 30 May 2021. It argues that the Drones do not match the features represented by CLAIMANT [*Ex. C8, pp. 20, 21*]

179. RESPONDENT bases this claim on the allegation that the Drones are neither "*state-of-the-art*" nor CLAIMANT's "*newest model*" [*RNA, p. 29, para. 17*]. This claim essentially asserts that the Kestrel Drone does not match the quality promised by CLAIMANT. RESPONDENT itself states that "*Claimant had significantly misrepresented the quality of the drones*" (emphasis added) [*RNA, p. 29, para. 17*]. The description of the Drones as state-of-the-art and newest model concerns the quality of the Drones

in the sense of Art. 35 CISG. As RESPONDENT essentially asserts that the Kestrel Drone does not match the quality promised by CLAIMANT, the remedy it seeks is that of avoidance under Arts. 35, 49 CISG.

180. This is not changed by the fact that RESPONDENT cites Art. 3.2.5 ICCA as the relevant provision for the avoidance of the PSA [*Ex. C8, p. 21*].

181. In conclusion, the CISG expressly provides regulations on avoidance in Arts. 35, 49 CISG. RESPONDENT cannot rely on Art. 3.2.5 ICCA to avoid the PSA.

II. Even if the CISG would not hold exhaustive stipulations, the CISG is not excluded under Art. 4 CISG

182. RESPONDENT asserts that CLAIMANT's conduct constitutes a "*misrepresentation in the sense of Art. 3.2.5 ICCA*" [*RNA, p. 31, paras. 27, 28*]. However, CLAIMANT's conduct does not constitute a misrepresentation in the sense of Art. 3.2.5 ICCA.

183. There are three types of possible misrepresentations: innocent, negligent and fraudulent [*Schroeter, p. 568*]. Both innocent and negligent misrepresentations are governed by the CISG, [*supra, para. 176 et seqq.; Schroeter, pp. 578, 582 et seq.*; *cf. Schlechtriem/Schwenzer/Schroeter, Art. 35, paras. 45 et seqq.*]. Therefore, the recourse to national law is dependent upon the existence of fraudulent misrepresentation in the present case.

184. The CISG itself does not define the term fraudulent misrepresentation. In accordance with Art. 7(2) CISG, fraudulent misrepresentation has to be defined by national laws [*Kröll/Mistelis/Perales Viscasillas, Art. 7, para. 51*]. The Parties agree that the PSA is governed by Equatorianian law [*Ex. C2 p. 11*]. Therefore, in the present case, fraudulent misrepresentation is defined by Art. 3.2.5 ICCA. The ICCA is a verbatim adoption of the UNIDROIT principles [*PO1, p. 43, para. 3*].

185. Art. 3.2.5 ICCA states that *"a party may avoid the contract when it has been led to conclude the contract by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, according to reasonable commercial standards of fair dealing, the latter party should have been disclosed".* Additionally, the defrauding party must act with a fraudulent intention [*Official Comment, Art. 3.2.5, p. 107*].

186. CLAIMANT accurately represented the features of the Drones [**1**]. CLAIMANT disclosed all information required under Equatorianian law [**2**]. Should the Tribunal find otherwise, the representation would not have led RESPONDENT to conclude the PSA [**3**]. CLAIMANT had no fraudulent intention to mislead RESPONDENT [**4**].

1. CLAIMANT accurately represented the features of the Drones

187. RESPONDENT alleges that CLAIMANT'S "*description of the drones as its "newest model" and "state-of-the-art" is a serious misrepresentation*" [*RNA, p. 31, para. 27*]. However, CLAIMANT's descriptions of the Drones are accurate, as they are state-of-the-art and even exceed the requirements set out in RESPONDENT's Call for Tender.

188. Art. 3.2.5 ICCA requires a representation, whether express or implied, of false facts [*Official Comment, Art. 3.2.5, p. 107*]. Art. 4.2(1) ICCA provides that statements and conduct of a party shall be interpreted according to that party's intention *"if the other party knew or could not have been unaware of that intention*". Furthermore, if Art. 4.2(1) is not applicable, Art. 4.2(2) ICCA stipulates that statements and conducts have to be interpreted according to "*the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances*".

189. CLAIMANT stated that the Kestrel Drone constitutes its present top model for the purpose of RESPONDENT [*Ex. R4, p. 35*]. Its advanced technology guarantees that the Drones are suitable for state-of-the-art data collection and aerial surveillance especially under the difficult weather conditions in the northern provinces of Equatoriana [*ibid*]. These representations of the Drones are accurate.

190. First, CLAIMANT's statements that the Drones constituted its present top model for RESPONDENT's purposes were accurate. Even though CLAIMANT later introduced its new product, the Hawk Eye Drone, at the time of the Call for Tender and the conclusion of the PSA, the Kestrel Drone was CLAIMANT's only model on the market [*NA, p. 5, para. 9*]. Therefore, RESPONDENT knew or could not have been unaware that the Kestrel Drone was CLAIMANT's newest model

191. Second, CLAIMANT states in its general product information on the Kestrel Drone that *"its state-of-the-art design enables it for flexible operations*" [*Ex. C4, p. 15*]. This representation by CLAIMANT is accurate when considering the meaning of the term "state-of-the-art". The term "state-of-the-art" must primarily be interpreted as set out by RESPONDENT in its Call for Tender. Namely, RESPONDENT asked for "*four state of the art unmanned aircraft systems […] for the collection of geological and geophysical data*" [*Ex. C1, p. 9*]. However, as RESPONDENT does not further define what it means by the requirement "state-of-the-art", its intention is unclear and one must recur to the understanding a reasonable person would have had in the same circumstances as CLAIMANT. In the Call for Tender, RESPONDENT also lists the requirements for the specifications of the drones, such as minimum payload, weight and flight endurance [*Ex. C1, p. 9*]. Therefore, a reasonable person in the same circumstances as CLAIMANT would have understood "state-of-the-art" to mean that these minimum requirements are at least fulfilled. In the present case, the Kestrel Drones not only fulfill, but exceed these requirements as shown in the table below [*Ex. C1, p. 9; C4, p. 15*].

	Service Ceiling	Communication Link	Endurance	Payload
Call for Tender	5 km	Radio	10 h	180 kg
Kestrel Drone	6 km	Radio	13 h	245 kg

192. Third, CLAIMANT's statements that the Drones were suitable for state-of-the-art data collection under the difficult weather conditions of Northern Equatoriana were accurate. This is because the shape and location of the payload bays in the Kestrel Drone as well as its excellent flight stability are clearly engineered towards the use for surveillance purposes [*PO2, p. 45, para. 9*].

193. Therefore, CLAIMANT's description of the Drones as "state of the art" and its "newest model" is accurate.

2. CLAIMANT disclosed all information required under Equatorianian law

194. CLAIMANT disclosed all information it was obliged to discolose under Art. 3.2.5 ICCA. Under Art. 3.2.5 ICCA a party is obliged to disclose information, "*which according to reasonable commercial standards of fair dealing, the latter party should have been disclosed*".

195. CLAIMANT disclosed all information which it was required to according to reasonable commercial standards of fair dealing [**a**]. Furthermore, CLAIMANT did not have to disclose more information because of the ESC ruling [**b**].

a) CLAIMANT disclosed all information which it was required to according to reasonable commercial standards of fair dealing

196. Under reasonable commercial standards of fair dealing, CLAIMANT was not required to disclose that the Hawk Eye Drone would be launched after the conclusion of the PSA.

197. According to Art. 3.2.5 ICCA a party may avoid the contract when it has been led to the conclusion of said contract "*by the other party's […] fraudulent non-disclosure of circumstances which according to reasonable commercial standards of fair dealing the other party should have disclosed*". A non-disclosure of circumstances is fraudulent if the fraudulent party was obliged to disclose them with respect to the circumstances of the contract [*Brödermann, Art. 3.2.5, p. 88*]. Relevant circumstances to determine the existence and scope of disclosure duties are the purpose of the contract and the nature of the information [*Brödermann, Art. 3.2.5, p. 88*]. The nature of the information specifically becomes relevant where the information in question is of confidential nature and a disclosure obligation would force a party to harm itself and its business [*Cooker Case, para. 18*]. Therefore, it is standard business practice that information about the release date and characteristics of a new product are kept strictly secret until its release [*ibid.*]. This holds especially true if there is no "*special relationship of trust and confidentiality*" due to former contractual relations between the parties [*Vogenauer, Art. 3.2.5, p. 88*].

198. The purpose of the PSA, as stated in RESPONDENT's Call for Tender, does not require CLAIMANT to disclose the launch of the Hawk Eye Drone. The purpose of the PSA is the "*collection of geological*

and geophysical data" under the difficult weather conditions of the northern provinces of Equatoriana [*Ex. C1, p. 9*]. The Kestrel Drone has excellent flight stability [*PO2, p. 45, para. 9*]. It therefore meets the necessary requirements set out by RESPONDENT [*Ex. C1, p. 9*]. The fact that the Kestrel Drone meets the purpose of the PSA means that CLAIMANT was not subject to a disclosure obligation concerning the launch of the Hawk Eye Drone.

199. With regard to the nature of the information, CLAIMANT could not be expected to disclose confidential details about the release of the Hawk Eye Drone. At the time of the PSA's conclusion, the new Hawk Eye Drone was only in the test flight phase [*PO2, p. 45, para. 14*]. Furthermore, CLAIMANT had not even "*applied for any patents concerning the technology used in the Hawk Eye 2020*" [*id., para. 15*]. In fact, they were only granted two and a half years later [*ibid.*]. In light of these facts, a disclosure of details about the upcoming Hawk Eye Drone could have forced CLAIMANT to harm itself and its business as all information was highly confidential.

200. Lastly, it was public knowledge on the market that CLAIMANT was developing a new drone, since it had bought Drone-Aircraft in 2017 [*PO2, p. 45, para. 15*]. RESPONDENT could therefore have generally been aware of this information and CLAIMANT did not have a duty to disclose the launch of the Hawkeye Drone to RESPONDENT explicitly.

201. According to reasonable commercial standards of fair dealing, CLAIMANT was not obligated to disclose the launch of the Hawk Eye Drone to RESPONDENT.

b) Furthermore, CLAIMANT did not have to disclose more information because of the Equatorianian SC's ruling

202. RESPONDENT states that "*the Equatorianian Supreme Court has held in 2010 that an experienced private party […] is under far-reaching disclosure obligations covering all information potentially relevant […]. That disclosure obligation also extends to planned improvements to the product*" [*RNA, pp. 29, 30, para. 18*]. This ruling establishes disclosure duties that would likely have required CLAIMANT to disclose the launch of the Hawk Eye Drone [*PO2, p. 46, para. 18*]. However, in the present case, the Equatorianian SC's ruling is not applicable.

203. A court ruling is transferable to a case if their facts are comparable [*Rutherford et. al., p. 204*].

204. In the Equatorianian SC's ruling, an experienced Equatorianian private party contracted with a newly formed Equatorianian government entity [*RNA, p. 29, para. 18*]. In light of these facts, the court found that the private party is under far reaching disclosure obligations relating to all information potentially relevant to the government entity [*RNA, p. 29, para. 18*]. These duties extend to planned improvements to the product [*RNA, pp. 29,30, para. 18*]. However, in the present case the facts are different and therefore, the underlying legal reasoning cannot be applied.

205. First, CLAIMANT is not an experienced Equatorianian private party. CLAIMANT is a medium-sized-company founded in 2000 in Mediterraneo [*PO2, p. 44, para. 1; NA, p. 4, para. 1*].

206. Second, RESPONDENT is not a newly formed government entity. Even though RESPONDENT is a government entity [*supra, para. 132*] it was founded in 2016 and is therefore not newly formed [*PO2, p. 44, para. 4*].

207. Third, the launch of the Hawk Eye Drone is not a planned improvement to the product. This is because the Hawk Eye Drone is a different product to the Kestrel Drone. The Kestrel Drone uses "*helicopter-technology, i.e. powered lift technology*" (emphasis added) [*PO2, p. 45, para. 13*]. It operates via radio communication link [*Ex. C4, p. 15*]. In contrast, the Hawkeye Drone employs an "*aerodynamic lift technology with two wings*" (emphasis added) [*PO2, p. 45, para. 13*]. It only operates via satellite communication [*Ex. R3, p. 34*].

208. Fourth, in the present case, the dispute is not in a domestic setting. CLAIMANT is a private entity whose place of business is Mediterraneo [*NA, p. 4, para. 1*]. RESPONDENT is an entity owned by the state of Equatoriana.

209. In light of these differences in fact, the reasoning of the Equatorianian SC 2010 case cannot be applied in the present case.

3. Should the Tribunal find otherwise, the representation would not have led RESPONDENT to conclude the PSA

210. Should the Tribunal find otherwise, the representation would not have been causal to the conclusion of the contract.

211. A representation has to be causal to the conclusion of the contract [B*rödermann, Art. 3.2.5, p. 88*]. It is causal when "*the party seeking avoidance has relied on the fraudulent act or omission*" to conclude the contract [*Vogenauer, Art. 3.2.5, para. 24*]. Such causality has to be proven by the party invoking the misrepresentation [*Vogenauer, Art. 3.2.5, para. 24*].

212. RESPONDENT did not rely on CLAIMANT's fraudulent omission to conclude the PSA. This is because RESPONDENT would have purchased the Kestrel Drones even if it had known about the launch of the Hawk Eye Drone.

213. RESPONDENT would have purchased the Kestrel Drones instead of the Hawk Eye Drone anyway since the Hawk Eye Drone would have been more expensive and the Kestrel drone would have been equally suitable. RESPONDENT was, furthermore, aware that similar drones to the Hawk Eye Drone existed on the market.

214. First, RESPONDENT could not have afforded four Hawk Eye Drones. In its Call for Tender, RESPONDENT asked bidders to submit an offer for "*four state-of-the-art unmanned aerial*

vehicles"(emphasis added) [*Ex. C1, p. 9*]. RESPONDENT's budget was EUR 45 Mio. [*PO2, p. 44, para. 7*]. The price of the Hawk Eye Drone is at least EUR 14 Mio. [*Ex. C3, p. 14, para. 9*]. Therefore, RESPONDENT could have only afforded three drones of this model. Thus, it would have concluded the PSA even if it had known about the launch of the Hawk Eye Drone.

215. Second, the Kestrel Drone would have been equally suited to RESPONDENT's purposes [*supra, paras. 191 et seq., 198*] RESPONDENT would have purchased the Kestrel Drone, even if it had known about the market release of the Hawk Eye Drone.

216. In conclusion the representation would not have been causal to the conclusion of the contract.

4. Even if CLAIMANT misrepresented the Drones, it had no fraudulent intention

217. CLAIMANT had no fraudulent intention to mislead RESPONDENT. Fraudulent misrepresentation must be intended to lead the other party into error and thereby gain an advantage to the detriment of the other party [*Official Comment, Art. 3.2.5 p. 107; Vogenauer, Art. 3.2.5, para. 6,9*]. CLAIMANT did not intend to lead RESPONDENT into error [**a**]. In any case, CLAIMANT did not gain an advantage to the detriment of RESPONDENT [**b**].

a) CLAIMANT did not intend to lead RESPONDENT into error

218. CLAIMANT did not have intent to cause error. The defrauding party must intend to lead the other party into error [*Official Comment, Art. 3.2.5 p. 107; Vogenauer, Art. 3.2.5, para. 6*]. A non-disclosure of circumstances deliberately leads the other party into error, if the defrauding party deliberately withholds information knowing that it is required to disclose them [*cf. ICC Case No. 19515; Mutual Energy Ltd v. Starr Underwriting Agents para. 81*]. According to Art. 4.2(2) ICCA, in determining a party's intention, "*statements and conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances*".

219. A reasonable person of the same kind as RESPONDENT would not interpret CLAIMANT's conduct to be intended to lead RESPONDENT into error. This is because CLAIMANT did not deliberately omit the information that the Hawk Eye Drone was going to be launched. This is because CLAIMANT was not aware of any disclosure duties, nor was it subject to any [*supra, paras. 194 et seqq.*]

220. In conclusion, CLAIMANT had no intention to cause error.

b) In any case, CLAIMANT did not gain an advantage to the detriment of RESPONDENT

221. Regardless of the Tribunal's decision with regard to whether CLAIMANT led RESPONDENT into error, CLAIMANT did not gain an advantage to the detriment of RESPONDENT.

222. The mistake must lead the misrepresenting party to gain an advantage to the detriment of the other party [*Vogenauer, Art. 3.2.5, para. 9*].

223. CLAIMANT, however, did not intend to benefit from not mentioning the upcoming launch of the Hawk Eye Drone. Rather, as shown below, CLAIMANT even waived additional profit by providing RESPONDENT with the more suitable Kestrel Drones [**Scenario 1**]. In fact, CLAIMANT would have gained EUR 1.74 Mio. more by selling the Hawk Eye Drones [**Scenario 2**].

224. In **Scenario 1**, CLAIMANT gained a profit of EUR 5.4 Mio. by selling six Kestrel Drones to RESPONDENT. This was possible because CLAIMANT had re-purchased three unused Kestrel Drones from another customer shortly before the PSA was concluded [*Ex. R4, p. 35*]. CLAIMANT did so in order to be able to make a favorable offer to RESPONDENT [*Ex. R4, p. 35*]. All in all, CLAIMANT had to spend EUR 38.6 Mio. to provide and equip the Kestrel Drones in exchange for the purchase price of EUR 44 Mio. [*Ex. C2, p. 10 Art. 3(1)(a); PO2, p. 46, para. 25*].

225. By contrast, in **Scenario 2**, CLAIMANT would have gained at least EUR 7.14 Mio. if it had sold three Hawk Drones to RESPONDENT [*Ex. C3, p. 14, para. 9; PO2, p. 46, para. 25*]

	Scenario 1	**Scenario 2**
Purchase price	+ EUR 44 Mio.	+ EUR 42 Mio.
Production cost	– EUR 38.6 Mio. – EUR 21 Mio. (Materials) – EUR 5.6 Mio. (Equipment) – EUR 12 Mio. (Repurchase)	– EUR 34.86 Mio. (83% of the purchase price)
CLAIMANT's profit	**EUR 5.4 Mio.**	**EUR 7.14 Mio.**

226. The table demonstrates that CLAIMANT would have gained a higher profit in **Scenario 2** if it had sold the Hawk Eye Drones instead of the Kestrel Drones to RESPONDENT. Therefore, CLAIMANT did not gain an advantage to the detriment of RESPONDENT when selling the Kestrel Drones.

227. Should the Tribunal find that the PSA would have been concluded to the advantage of CLAIMANT, RESPONDENT did not suffer a disadvantage as the Kestrel Drones exceed RESPONDENT's requirements under the Call for Tender [supra para. X].

Therefore, CLAIMANT did not gain any advantage and RESPONDENT did not suffer any detriment from concluding the PSA before the launch of the Hawk Eye Drones.

C. Even if there was fraud, RESPONDENT is barred from relying on Art. 3.2.5. ICCA to avoid the contract

228. RESPONDENT contravenes the principle of good faith and fair dealing in international trade by challenging the PSA through avoidance. Therefore, it cannot rely on Art. 3.2.5 ICCA to avoid the PSA.

229. According to Art. 1(7) ICCA a party is obliged to act in accordance with good faith and fair dealing in international trade. Art. 1(8) ICCA is a concretisation of this principle stating that a party cannot rely on its inconsistent behaviour, when the other party has acted in reliance on this behaviour to its detriment [*Brödermann, Art. 1.8, p. 32*]. When a party breaches the principle of good faith, the

consequence is the non-application of the norm on which it bases its claim [*Brödermann, Art. 1.7, p. 32*].

230. RESPONDENT acted inconsistently and caused CLAIMANT an understanding on which CLAIMANT relied and has acted to its detriment. Under the PSA, RESPONDENT was required to make an advance payment of EUR 10 Mio [*Ex. C2, p. 11*]. When RESPONDENT issued this payment, CLAIMANT understood that RESPONDENT felt bound by the PSA [*PO2, p. 47, para. 30*]. This was to the detriment of CLAIMANT, since it trusted that it could sell the Drones to RESPONDENT.

231. Therefore, RESPONDENT has acted inconsistently, causing CLAIMANT an understanding, on which CLAIMANT relied to its detriment. Therefore, pursuant to Art. 1(7) ICCA, Art. 3.2.5 ICCA is inapplicable.

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232. In summary, the avoidance of the PSA is governed by the Parties' agreement. Should the Tribunal find otherwise, the avoidance of the PSA is governed by the CISG. This is because the CISG governs avoidance and in the present case the CISG is not excluded under Art. 4 CISG. CLAIMANT never fraudulently misrepresented the Drones. In any case, RESPONDENT is barred from relying on Art. 3.2.5. ICCA. In conclusion, Art. 3.2.5. ICCA is not applicable. Thus, RESPONDENT cannot rely on Art. 3.2.5. ICCA to avoid the PSA.

REQUEST FOR RELIEF

233. In light of the above, CLAIMANT respectfully requests the Arbitral Tribunal to find that:

1) the Arbitral Tribunal has jurisdiction to hear the case;
2) there is a valid Purchase and Supply Agreement between the Parties;
3) RESPONDENT has breached that Agreement by refusing to take delivery of the drones and paying for them;
4) CLAIMANT is entitled to damages for this breach of contract in an amount to be quantified in due course;
5) RESPONDENT shall bear the costs of these proceedings including legal fees and expenditures; and
6) interest on full amount shall be awarded to CLAIMANT.

CERTIFICATE OF INDEPENDENCE

We hereby confirm that only the persons whose names are listed below have written this memorandum.

Simon Ferel

Thomas Hamelin

Elisa Henke

Charlene Lorenz

Clemens Wendt

Liese-Lotte Wieprecht

Berlin, 08 December 2022