THIRTIETH ANNUAL

WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT

19 TO 26 MARCH 2023

MEMORANDUM FOR RESPONDENT

LUDWIG-MAXIMILIANS-UNIVERSITÄT MÜNCHEN

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

COUNSEL:

Alina Damm · Louisa Högl · Till Jülicher

Lara Peters · Sophie Völkl · Theodor Ziegelhöffer

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LIST OF ABBREVIATIONS

%	Percent
&	and
§(§)	paragraph(s)
AAA	American Arbitration Association
Art(t).	Article(s)
BGer	Bundesgericht (Swiss Federal Supreme Court)
BGH	Bundesgerichtshof (Federal Court of Justice)
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court)
BVerwG	Bundesverwaltungsgericht (Federal Administrative Court)
CAM	Camera Arbitrale di Milano (Chamber of Arbitration of Milan)
CAS	Court of Arbitration for Sport
CdA	Cour d'Appel (Court of Appeal)
CdC	Cour de Cassation (Court of Cassation)
CEO	Chief Executive Officer
cf.	confer
CISG/Convention	United Nations Convention in the International Sale of Goods, Vienna 11 April 1980
Cl. Exh. C	Claimant's Exhibit C
CLAIMANT	Drone Eye plc
Contract	Purchase and Supply Agreement, concluded on 1 December 2020
COO	Chief Operating Officer
CRCICA	Cairo Regional Centre for International Commercial Arbitration
CSC	Corte Suprema di Cassazione (Supreme Court of Cassation)
DAL	Danubian Arbitration Law
EC	Equatorianian Constitution
ECHR	European Courts of Human Rights
ECJ	European Court of Justice
EFTA	European Free trade Association Court

ESC	Equatorianian Supreme Court
et al.	et alia/ aliae/ alii (and others)
et seq(q)	et sequential/ sequentes (and following)
EU	European Union
EUR	Euro(s)
Exh.	Exhibit
FATF	Financial Action Task Force
GH	Gerechtshof
HE2020	Hawk Eye 2020
HvB	Hof van Beroep (Court of Appeal)
ibid.	ibidem (the same)
ICC	International Chamber of Commerce and Industry
ICCA	International Commercial Act of Equatoriana
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
Investigation	Investigation conducted in Equatoriana against Mr Field
Iss.	Issue
IUSCT	Iran United States Claims Tribunal
JAMS	Judicial Arbitration and Mediation Services (formerly)
KE2010	Kestrel Eye 2010
kg	Kilogram
LCIA	London Court of International Arbitration
LG	Landgericht (District Court)
LSAG	Legal Sector Affinity Group
Ltd	Limited
Memo.	Memorandum
Mr	Mister
Ms	Miss
NH	Noregs Høgsterett (Norwegian Supreme Court)
No.	Number
NoA	Notice of Arbitration
NPDP	Northern Part Development Program
OGH	Oberster Gerichtshof (Federal Supreme Court of Austria)

OLG	Oberlandesgericht (Court of Appeal)
p(p).	page(s)
Parties	CLAIMANT and RESPONDENT
PCA	Permanent Court of Arbitration
PCA Rules	PCA Arbitration Rules 2012
PO	Procedural Order
Proceedings	Arbitral Proceedings
RB	Rechtbank (District Court)
Resp. Exh.	Respondent's Exhibit
RESPONDENT	Equatoriana Geoscience Ltd
RNoA	Response to the Notice of Arbitration
SCC	Stockholm Chamber of Commerce
see infra	see below
see supra	see above
SOE	State-Owned Entity
TdC	Tribunal des Conflits
Tribunal	Arbitral Tribunal
TS	Tribunal Supremo (Supreme Court)
TSdJ	Tribunal Superior de Justicia (High Court of Justice)
TSdJ	Madrid Tribunal Superior de Justicia (High Court of Justice of Madrid)
UAV	Unmanned Aerial Vehicles
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
USA	United States of America
USD	United States Dollar
v	versus
Vol.	Volume
ZHK	Zürich Chamber of Commerce

STATEMENT OF FACTS

Drone Eye plc (hereinafter "**CLAIMANT**") is a producer of Unmanned Aerial Vehicles in Mediterraneo. Equatoriana Geoscience Ltd (hereinafter "**RESPONDENT**"; collectively referred to as "**the Parties**") is a state-owned entity (hereinafter "**SOE**") of the Equatorianian government.

2016-2017	The government sets up the Northern Part Development Program (hereinafter "**NPDP**") and RESPONDENT to develop the country's north.
2017	CLAIMANT starts to develop the Hawk Eye 2020 (hereinafter "**HE2020**"), a technically advanced Unmanned Aerial Vehicle (hereinafter "**UAV**").
March 2020	RESPONDENT opens a call for tender (hereinafter "**the Tender**") to purchase four "state-of-the-art" UAVs. CLAIMANT submits an offer.
November 2020	After a confidential meeting between the two main negotiators, the contractual terms are substantially changed.
27 November 2020	CLAIMANT's main negotiator, Mr Bluntschli, is arrested for tax evasion.
1 December 2020	The Parties sign the Purchase and Supply Agreement, including an arbitration clause (hereinafter "**the Contract**") on the sale of six Kestrel Eye 2010 (hereinafter "**KE2010**") without parliamentary approval.
February-May 2021	The HE2020 is launched, leading RESPONDENT to force re-negotiations of the Contract's terms due to fraud. The issue remains unresolved.
June 2021	Equatoriana's biggest corruption scheme concerning the NPDP comes to light. RESPONDENT's main negotiator, Mr Field, is suspected of having accepted bribes in connection to several deals.
27 December 2021	Following early elections, the new government issues a moratorium for all contracts concluded under the NPDP to expose bribery-related contracts.
May 2022	Mr Field is being charged with bribery in two cases, and the leading prosecutor announces further investigations concerning the Contract (hereinafter "**the Investigation**").
30 May 2022	RESPONDENT avoids the Contract due to CLAIMANT's fraudulent behaviour.

SUMMARY OF ARGUMENTS

In 2017, the Equatorianian government started the NPDP – a program designed to provide the northern provinces of Equatoriana with much-needed support. As part of this program, RESPONDENT opened the Tender in March 2020 to find a company that could provide state-of-the-art UAVs required to conduct surveillance and transport cargo. After months of negotiations, CLAIMANT was surprisingly chosen, and the Contract was signed on 1 December 2020. Two months later, the sky started to darken: CLAIMANT released its improved UAV – making it clear to RESPONDENT that it had become a victim of fraud. In an effort to save the contractual relationship, RESPONDENT tried to re-negotiate the contractual terms. However, the sky turned black after a corruption scheme within the NPDP came to light. It became more and more evident that the Contract, including the arbitration agreement, had most likely been procured through bribery. After these new revelations, RESPONDENT had no choice but to avoid the Contract. Now, CLAIMANT argues that RESPONDENT was not justified in doing so.

First, CLAIMANT initiated arbitral proceedings (hereinafter "**the Proceedings**") without cause as the Arbitral Tribunal does not have jurisdiction to hear the present dispute. This is because the arbitration agreement is invalid as it was obtained through bribery. Additionally, RESPONDENT lacked the capacity to enter into the arbitration agreement as the parliamentary approval required under Art. 75 Equatorianian Constitution was not given. Furthermore, the dispute itself is not arbitrable (**Issue I**).

Second, CLAIMANT, in an attempt to withhold essential evidence from the Proceedings, contests the stay or bifurcation of the Proceedings. However, as the Arbitral Tribunal has limited investigative powers, a stay is essential to allow the consideration of the Investigation's results. If the request for a stay were to be denied, a bifurcation would guarantee the consideration of the results (**Issue II**).

Third, CLAIMANT refers to provisions of the CISG. By doing so, it disregards that the Convention is not even applicable as the KE2010 are aircraft under Art. 2(e) CISG (**Issue III**).

Lastly, CLAIMANT falsely argues that it did not commit fraud and that RESPONDENT cannot rely upon Art. 3.2.5 Equatorianian International Commercial Contract Act (hereinafter "**ICCA**") to avoid the Contract. However, Art. 3.2.5 ICCA is applicable and all its requirements are fulfilled. Moreover, RESPONDENT has not lost its right to rely upon Art. 3.2.5 ICCA (**Issue IV**).

ARGUMENT

ISSUE I: THE TRIBUNAL LACKS JURISDICTION TO HEAR THE CASE

1 CLAIMANT relies on the presumption of substantive validity to assert the jurisdiction of the Arbitral Tribunal (hereinafter "**Tribunal**") (*Cl. Memo., §§ 21 et seqq.*). Thereby, it fails to address why this presumption does not apply and omits the effects of bribery on a tribunal's jurisdiction (*cf. Cl. Memo., §§ 1 et seqq., 33 et seqq.*). Further, it attempts to bypass constitutional laws (*Cl. Memo., § 4*).

2 It is undisputed that the PCA Rules apply to the case at hand and that a tribunal can rule on its own jurisdiction under the competence-competence doctrine (*Cl. Memo., §§ 1 et seqq.*). This doctrine is enshrined in Art. 23(1) PCA Rules and Art. 16(1) Danubian Arbitration Law (hereinafter "**DAL**") which is applicable as *lex arbitri* (*cf. Cl. Exh. C 2, Art. 20(b); Garuda v Birgen (Singapore); HILL, p. 519; BLACKABY ET AL., pp. 3 et seq.*). When asserting its competence-competence, a tribunal must reject its jurisdiction where no valid arbitration agreement exists or if a dispute is not arbitrable (*ICC No. 20561/TO (2017); Rent-A-Center v Jackson (USA); LEW ET AL., p. 187*).

3 In the present case, the Tribunal lacks jurisdiction as the arbitration agreement is invalid (**A.**). In any case, the dispute at hand is not arbitrable (**B.**).

A. THE PARTIES DID NOT CONCLUDE A VALID ARBITRATION AGREEMENT

4 Contrary to CLAIMANT's submission (*Cl. Memo., §§ 21 et seqq.*), the arbitration agreement (hereinafter "**the Arbitration Agreement**") is invalid.

5 An arbitration agreement is invalid if it is tainted by bribery (*ICC No. 13515 (2006); ICSID No. ARB/00/7 (2006); GAILLARD, p. 14*) or if a party lacked the capacity to enter into the agreement (*BGer, 16 October 2012 (Switzerland); BÖCKSTIEGEL, p. 181; BLACKABY ET AL., p. 81*).

6 The Arbitration Agreement is invalid as it was procured by bribery (**I.**) In any case, it is void as RESPONDENT lacked the capacity to enter into the Arbitration Agreement (**II.**).

I. The Arbitration Agreement Is Invalid Due to Bribery

7 CLAIMANT cannot rely on the validity of the Arbitration Agreement (*Cl. Memo., §§ 21 et seq.*) since CLAIMANT's negotiator paid bribes to procure the Contract, including the Arbitration Agreement.

8 Bribery is a form of corruption (*BANIFATEMI, § 2; cf. LOW, p. 343; LLAMZON, p. 291*). It is defined as the promise of a financial or other advantage to a person in exchange for the person executing its function improperly (*Artt. 1 et seq. UK Bribery Act; Art. 1 German Anti-Corruption Law; Artt. 7 et seq. EU Convention on Corruption*). Agreements procured by bribery may neither directly nor indirectly be performed and are, thus, to be considered invalid in accordance with Art. 15 Equatorianian Anti-Corruption Act (hereinafter "**EACA**") (*cf. RNoA, § 2*). Where a contract is tainted by bribery,

the arbitration agreement contained therein is invalid if its conclusion is equally affected (*Fiona Trust v Privalov (UK); Hancock v Rinehart (Australia); FEEHILY, p. 365*).

9 Bribery occurred in the present case (**1.**) and taints the Arbitration Agreement (**2.**).

1. The Contract was concluded due to bribes paid to Mr Field

10 Contrary to CLAIMANT's assertion (*Cl. Memo., §§ 41 et seqq.*), the Contract was procured by bribery.

11 CLAIMANT insists that the Tribunal shall apply the standard of "clear and convincing evidence" to assess the occurrence of bribery (*Cl. Memo., §§ 34 et seqq.*). This standard is a deviation from the regular one of "balancing of probabilities" and must be rejected as it sets the bar too high, making it virtually impossible to prove wrongdoing (*POPOVA/LACHOWITZ, in: Ferrari/Rosenfeld, pp. 98 et seq.; SMITH/NADEAU-SÉGUIN, pp. 138 et seqq.; cf. Hub v Energy (Australia)*). This is because bribery, as acknowledged by CLAIMANT (*Cl. Memo., § 55*), is concealed by its nature (*KHVALEI, p. 15; LLAMZON, p. 296; LAMM ET AL., p. 702*). Thus, when assessing the probability of bribery, tribunals must rely on circumstantial evidence indicating corrupt activities (*Metal-Tech v Uzbekistan – ICSID No. ARB/10/3 (2013); ICC No. 8891 (1998); PARTASIDES, pp. 52 et seqq.*). Such circumstantial evidence is referred to as a "**red flag**" (*ICC No. 13914 (2008); ICC No. 13515 (2006); CdA Paris, 5 April 2022 (France)*). When a tribunal detects sufficient red flags, the burden of proof shall be shifted to the party denying bribery (*VEIT, pp. 379 et seqq.; SHARPE, pp. 554 et seq.; cf. ICC No. 6497 (1994)*). If it fails to produce sufficient counterevidence, an adverse inference that bribery occurred can be drawn (*DELLA VALLE ET AL., pp. 838 et seq.; MENAKER, pp. 78 et seq.; LEMAIRE, p. 191*).

12 Presently, the burden of proof must be shifted to CLAIMANT due to several red flags (**a**). Absent any substantial counterevidence, an adverse inference shall be drawn to establish bribery (**b**).

(a) The burden of proof must be shifted to CLAIMANT due to several red flags

13 CLAIMANT contends that the burden of proof lies with RESPONDENT (*Cl. Memo., §§ 34, 38*). This does not hold true: The burden shall be shifted towards CLAIMANT as multiple red flags are present.

14 Under Art. 27(1) PCA Rules, each party bears the burden of proving the facts it relies on. However, this burden shall be shifted if it is more likely than not that bribery led to a contract's conclusion (*KHVALEI, p. 24; BAIZEAU/HAYES, p. 263; cf. ICC No. 13914 (2008)*). As guidance, catalogues of red flags have been developed (*WORLD BANK; ICC; WOOLF COMMITTEE*). In particular, red flags related to the persons involved in a contract's conclusion and the contractual terms are strong indicators of bribery (*LOW, p. 343; cf. ICC No. 13515 (2006); CdA Paris, 21 February 2017 (France)*).

15 Presently, several red flags can be raised: First, the poor reputation of CLAIMANT, the NPDP and Equatoriana suggest bribery (*i*). Second, the background of the Contract's negotiators deepens this suspicion (*ii*). Third, the circumstances of the Contract's conclusion indicate corrupt activity (*iii*).

(i) Equatoriana, the NPDP and CLAIMANT have a history of corruption

16 The poor reputation of Equatoriana, the NPDP and CLAIMANT strongly suggest bribery.

17 Red flags can be raised where the parties and the countries they are seated in have a history of corruption (*ICC No. 13914 (2008); ICC No. 12990 (2005); US DEP. JUS.*).

18 RESPONDENT is seated in Equatoriana (*Cl. Exh. C 2, Art. 1*). Equatoriana is not only recognised as one of the 20 % most corrupt countries worldwide but heavily struggled with corruption under its former government (*Cl. Exh. C 3, § 11; Cl. Exh. C 5*). This struggle was again showcased when the country's biggest corruption scheme was revealed (*Cl. Exh. C 5; Resp. Exh. R 2*). It concerned the former government's NPDP, which RESPONDENT is a part of (*NoA, § 2*). Moreover, CLAIMANT itself has no clean slate either as it has struggled with corruption in the past (*PO 2, § 3*).

19 As CLAIMANT, the NPDP and Equatoriana have a history of corruption, red flags are apparent.

(ii) The Contract's negotiators being suspected of having committed white-collar crimes constitutes a red flag

20 CLAIMANT acknowledges that Mr Field was a key figure in the bribery scandal in Equatoriana but omits that Mr Bluntschli is also suspected of having committed financial crimes (*cf. Cl. Memo., § 42*).

21 A red flag is apparent where the persons associated with the contract have dubious backgrounds, *i.e.,* relating to white-collar crimes (*ICC No. 12990 (2005); LOCKHEED MARTIN, p. 1; SAAB, p. 7*). Especially, the accumulation of unexplained wealth raises suspicion (*Crime v Hussain (England/Wales); LSAG Guidance, p. 38; FATF Recommendations, p. 71*).

22 The negotiations were led by the Parties' former COOs, Mr Field for RESPONDENT and Mr Bluntschli on CLAIMANT's behalf (*Cl. Exh. C 3, §§ 2, 6*). After the Contract's conclusion, Mr Field was charged with corruption (*cf. Cl. Exh. C 8*). This was due to him having received payments of EUR 2,000,000 to his offshore accounts (*Resp. Exh. R 2*). These payments can be directly associated with contracts Mr Field concluded on RESPONDENT's behalf (*ibid.*). In addition, there are still more than EUR 4,000,000 on Mr Field's accounts whose origin cannot be explained (*ibid.*). This amount is especially suspicious as Mr Field struggled with poverty before becoming RESPONDENT's COO (*Resp. Exh. R 2*). During his time at RESPONDENT, he could, at the most, have made EUR 1,500,000 – not considering his living expenses (*Resp. Exh. R 2; cf. PO 2, § 4*). Mr Bluntschli, on the other hand, was arrested for not disclosing over USD 8,000,000 on two of his offshore accounts (*Cl. Exh. C 3, § 2; PO 2, § 40*). Coincidentally, larger sums from these accounts had been transferred to other offshore accounts whose owners remain unknown (*ibid.*).

23 Considering these backgrounds, it can be assumed that Mr Bluntschli likely bribed Mr Field.

(iii) The circumstances surrounding the Contract's conclusion and the contractual terms strongly suggest bribery

24 CLAIMANT submits that there is no evidence that the Contract was procured by bribery (*Cl. Memo., §§ 41 et seqq.*). However, the course of the negotiations and the contractual terms indicate bribery.

25 Red flags are apparent where the circumstances and terms of the contract are unusual, *i.e.*, private meetings off the record and high-value contracts (*SAAB, pp. 4 et seqq.; LOCKHEED MARTIN, pp. 2 et seq.; IOM, Red flags; cf. ICC No. 13515 (2006)*). Further, unjustified changes of a contract's scope or value, as well as cases where the economically most favourable bidder is not selected constitute red flags (*WORLD BANK; DELLA VALLE ET AL, p. 849; cf. ICC No. 13515 (2006)*).

26 During the final negotiations, the Parties scheduled several meetings, including a weekend at Mr Bluntschli's beachhouse (*Resp. Exh. R 1, § 4*). The only attendees of these unrecorded meetings were Mr Field and Mr Bluntschli (*Cl. Exh. C 7, § 7; Resp. Exh. R 1, § 4*). Coincidentally, afterwards the remaining bidder was dropped, although it offered better conditions (*Resp. Exh. R 1, §§ 3, 5*).

27 At the same time, the scope and value of the Contract were substantially amended. At first glance, these terms might appear more favourable for RESPONDENT as the price per KE2010 was reduced by 20 % (*Resp. Exh. R 1, § 5*). However, CLAIMANT added two more KE2010s to the deal and extended its maintenance obligations by two years (*Cl. Memo., §§ 93, 126*). While the original price reduction offered RESPONDENT a EUR 12,000,000 relief, the necessary maintenance in return was extended by EUR 13,440,000 (*cf. Cl. Exh. C 2; Artt. 2 et seqq.; Resp. Exh. R 1, § 5; PO 2, § 27*). This is especially odd as the new maintenance costs are 34 % higher than usual (*cf. Cl. Exh. C 2, Art. 3(a); PO 2, § 8; PO 2, § 27, Resp. Exh. R 1, § 6*). Further, maintenance services, previously included, now had to be purchased additionally (*Resp. Exh. R 1, § 6*). Thus, the offer was a worse deal than before.

28 Due to these modifications, the Contract's value increased from EUR 44,000,000 to over EUR 61,440,000, thus, exceeding RESPONDENT's budget (*PO 2, § 27; Cl. Exh. C 2, Artt. 2, 3; Resp. Exh. R 1, § 5; cf. PO 2, § 7*). As a result, RESPONDENT could not have afforded any additional maintenance, which it would have certainly required to keep operating the KE2010 (*PO 2, § 27*).

29 Thus, as the negotiations between the two main negotiators led to unjustified contractual changes, an abundance of red flags is apparent. Therefore, the burden of proof shall be shifted to CLAIMANT.

(b) As CLAIMANT cannot produce any counterevidence, the Tribunal shall assume bribery

30 CLAIMANT is unable to bring forward evidence countering the bribery accusations (*cf. Cl. Memo., §§ 41 et seqq.*). Thus, the Tribunal shall draw the adverse inference that bribery occurred.

31 CLAIMANT alleges that the accusations of bribery regarding the NPDP are frivolous as they are "largely motivated by political expediency" (*Cl. Memo., §§ 46 et seq.*). In this context, CLAIMANT attempts to discredit the evidentiary value of "The Citizen" solely because this newspaper is owned

by a member of the liberal party (*Cl. Memo., § 47*). By doing so, CLAIMANT contradicts itself as it relied on this source as evidence in its submission (*Cl. Memo., § 58*). Furthermore, it disregards that the Tribunal has already recognised "The Citizen" as a credible source (*PO 2, § 42*).

32 Additionally, CLAIMANT could have attempted to disprove that the Contract's terms were economically unreasonable (*cf. RNoA, § 10*). Absent any viable arguments to do so, CLAIMANT limits itself to contending the credibility of Ms Bourgeois, Mr Field's former assistant, regarding her assessment that the contractual terms were suspicious (*Cl. Memo., § 45*). This is not convincing as Ms Bourgeois has an economics degree and several years of job experience (*Resp. Exh. R 1, § 2*).

33 Further, instead of solely challenging the evidence brought forward by RESPONDENT, CLAIMANT could have submitted an exhaustive review of all payments possibly related to bribery. Instead, it only checked its payments made to accounts in Equatoriana (*Cl. Exh. C 3, § 7*). However, bribes would likely have been paid to offshore accounts, *i.e.*, via Mr Bluntschli's private offshore accounts (*cf. supra §§ 22 et seqq.*). Moreover, CLAIMANT's examination was limited to a brief time frame (*Cl. Exh. C 3, § 7*). Thus, the review was insufficient to procure counterevidence.

34 Lastly, CLAIMANT could have called Mr Field and Mr Bluntschli as witnesses. Mr Field already stated that he would "vigorously defend himself" against the bribery allegations (*Letter by Langweiler to Tribunal*). According to CLAIMANT's CEO, Mr Bluntschli asserted that he did not commit bribery in private and declared his willingness to testify for compensation (*Cl. Exh. C 3, § 11*) which is a common request (*RICHMOND, pp. 907 et seq.; GÉLINAS, p. 34; SCHWARTZ, p. 225*). Thus, it seemingly would have only made sense for CLAIMANT to rely on their testimony to provide counterevidence. Still, CLAIMANT refrained from doing so (*cf. Cl. Exh. C 3, § 11*).

35 To conclude, CLAIMANT fails to produce any counterevidence. Hence, the Tribunal is respectfully requested to draw the adverse inference that the Contract was procured by bribery.

2. Bribery directly affected the conclusion of the Arbitration Agreement

36 The Arbitration Agreement is invalid as it is directly affected by acts of bribery.

37 CLAIMANT mistakenly argues that the Parties implicitly chose the DAL to govern the Arbitration Agreement (*Cl. Memo., § 7*). Thereby, CLAIMANT disregards that the Parties' choice of Equatorianian law governing the Contract suffices as an implicit choice for the law governing the arbitration agreement (*Cl. Exh. C 2, Art. 20(d)); cf. ICC No. 23835/GR (2019); Enka v Chubb (UK); Sulamérica v Enesa (England/Wales); BCY v BCZ (Singapore); BGH, 12 February 1976 (Germany)*). Thus, the law of Equatoriana governs the Arbitration Agreement. Consequently, in cases of bribery, the Arbitration Agreement is invalid in the sense of Art. 15 EACA.

38 Further, while CLAIMANT cites *Fiona Trust* and refers to the doctrine of separability stipulated in Art. 16(1) DAL and Art. 23(1) PCA Rules (*Cl. Memo., § 12*), it does not recognise the doctrine's significance regarding the validity of arbitration agreements. *Fiona Trust* is the leading case on the effects of bribery on an arbitration agreement (*DUNDAS/ALTARAS, p. 241; FEEHILY, pp. 5 et seq.; PAULSSON, pp. 624 et seq.*). Thus, CLAIMANT could have argued that the Tribunal shall follow this decision to find that the Arbitration Agreement remains valid, irrespective of bribery affecting the Contract (*Fiona Trust v Privalov (UK)*). However, in *Fiona Trust* the court also held that an arbitration agreement might become invalid if bribery also taints its conclusion (*Fiona Trust v Privalov (UK); cf. ICC No. 21243/CYK/PTA (2016); BXH v BXI (Singapore)*). This is the case where arbitration favours one party (*MCNEILL/JURATOWITCH, p. 487; cf. Credit Suisse v Seagate (England/Wales)*).

39 CLAIMANT was cautious of submitting potential disputes to Equatorianian state courts due to Equatorianian case law granting more legal protection towards SOEs such as RESPONDENT (*cf. Cl. Exh. C 7, § 17; C 8*). Furthermore, CLAIMANT most likely became aware of the courts' general "reputation of deciding in favour of [SOEs] in case of doubt" (*PO 2, § 18*). In light of this, arbitration was a more favourable dispute resolution mechanism for CLAIMANT. Opposed to this, RESPONDENT, as an SOE, faces constitutional obstacles in the form of approval requirements when agreeing to arbitrate (*cf. RNoA, § 21*). This weighs particularly heavy considering that there is an increasing sentiment against arbitration within the Equatorianian public (*NoA, § 16; Cl. Exh. C 7, § 15*). Therefore, and precisely because of the tendency of Equatorianian courts to favour SOEs (*PO 2, § 18*), there is no apparent incentive for RESPONDENT to opt for arbitration.

40 As arbitration favours CLAIMANT, it must be assumed that the Arbitration Agreement is tainted by bribery. Thus, it is invalid in the sense of Art. 15 EACA and the Tribunal shall deny its jurisdiction.

II. The Arbitration Agreement Is Invalid as It Lacked Parliamentary Approval

41 CLAIMANT submits that the Arbitration Agreement was validly concluded even "in the absence of formal parliamentary approval" (*Cl. Memo., §§ 6 et seqq., 25 et seqq.*). This does not hold true.

42 Under Art. 75 Equatorianian Constitution (hereinafter "**EC**"), the Parliament must approve submissions of Equatorianian SOEs to arbitration within "administrative contracts" where the other party is a foreign entity or the arbitration is foreign-seated (*RNoA, § 21; cf. PO 2, § 34*).

43 Presently, Art. 75 EC is not excluded (**1.**), the Parties' submission to arbitration required approval (**2.**) and such approval cannot be bypassed (**3.**).

1. Art. 75 EC can neither be excluded by the Parties' choice of law nor the merger clause

44 Contrary to CLAIMANT's assertions (*Cl. Memo., §§ 18 et seq.*), Art. 75 EC applies to the case.

45 CLAIMANT submits that the Arbitration Agreement is governed by the DAL and thereby concludes that Art. 75 EC is not applicable (*Cl. Memo., §§ 6 et seqq.*). This does not hold true as the Arbitration Agreement is governed by the law of Equatoriana (*see supra § 37*). Further, it is the international consensus that questions of a party's capacity to arbitrate are governed by the *lex societatis*, *i.e.*, the law of this party's seat or the law under which the party is organised (*ICC No. 13954 (2007); CAM No. 7211 (2013); GAILLARD/SAVAGE, p. 860*). Since RESPONDENT is seated in Equatoriana and organised under Equatorianian law, the law of Equatoriana applies to RESPONDENT's capacity to arbitrate (*cf. Cl. Exh. C 1, C 2*). In this regard, Art. 75 EC is the relevant provision.

46 Further, CLAIMANT argues that the merger clause in Art. 21 of the Contract excludes Art. 75 EC (*Cl. Memo., § 19*). However, merger clauses only exclude pre-contractual behaviour and cannot bypass legal requirements (*BRÖDERMANN, p. 59; AGUIAR, p. 77; MURRAY*).

47 Therefore, Art. 75 EC is not excluded.

2. Parliamentary approval was required in accordance with Art. 75 EC

48 Contrary to what CLAIMANT could have argued, all prerequisites of Art. 75 EC are met. Thus, RESPONDENT agreeing to arbitration required parliamentary approval.

49 Presently, the Contract contains an arbitration agreement between RESPONDENT, an Equatorianian SOE, and CLAIMANT, a Mediterranean company (*Cl. Exh. C 2, Art. 1*). Further, the seat of arbitration is in Danubia (*Cl. Exh. C 2, Art. 20(b)*). Thus, the only requirement that CLAIMANT could have questioned is whether the Contract can be considered "administrative".

50 Administrative contracts in the sense of Art. 75 EC are contracts "relating to public works, or other contracts concluded for administrative purposes" (*RNoA, § 21*).

51 Presently, the Contract relates to public works (**a**). In any case, it serves administrative purposes (**b**).

(a) The Contract relates to public works pursuant to Art. 75 EC

52 Contrary to what CLAIMANT could have argued, the Contract relates to public work.

53 Art. 75 EC covers all contracts "relating to public work" and not only "public work contracts" (*RNoA, § 21*). Thus, from the outset, any connection between a contract and public work is sufficient (*cf. Aikman v Building (USA); CHANG, p. 105; KENNEDY, p. 112; PARASHARAMI ET AL. p. 34*). Nevertheless, with regard to the term public works, the existing case law on Art. 75 EC exclusively covers cases for the actual construction of infrastructure and does not provide guidance for preparatory contracts (*PO 2, § 29*). Hence, the Tribunal is respectfully requested to rely on international approaches: According to these, public work contracts aim to execute works for the administration, *i.e.,* civil engineering or construction (*EFTA, 16 July 2020 (EU); KITSOS, pp. 210 et seq.; ADAM/MATEI, p. 141; I(2), Schedule 2 UK PC*). In particular, this includes site preparations such

as geotechnical investigations and surface explorations (*Preamble ∫ 10 EU PC, Annex I; ∫ 1720(a)(1) CLC; cf. DEGANI, pp. 51209 et seq.; PAVLOVICH ET AL., p. 2294*).

54 RESPONDENT was founded within the NPDP, a program to explore northern Equatoriana so that the government can develop it by building infrastructure such as motorways (*Cl. Exh. C 5; cf. Cl. Exh. C 1*). To make such development feasible, RESPONDENT required UAVs to collect surveillance data (*Cl. Exh. C 2, Preamble*). To obtain the specialised UAVs necessary for this task, RESPONDENT opened the Tender leading to the Contract's conclusion (*Cl. Exh. C 1; NoA, ∫ 5*).

55 Therefore, the Contract relates to public works in accordance with Art. 75 EC.

(b) In any case, the Contract was concluded for administrative purposes

56 In any case, the Contract was concluded for administrative purposes according to Art. 75 EC.

57 A sales contract is considered to have an administrative purpose if it aims to benefit the public (*ICSID No. ARB(AF)15/1 (2020); BVerwG, 22 February 1972 (Germany); SANDU/PAGARIN, p. 903; cf. CRCICA No. 154/2000 (2000)*). In this regard, public well-being is reflected by the life expectancy, the level of education and the standard of living in a country (*ROY ET AL., p. 2; PINAR, pp. 2 et seqq.; PCA No. 2001-02 (2009); SHARMA/SHARMA, p. 24*). Infrastructure investments enhance the employment rate of a country and, thus, increase wealth (*ZIERER, p 94; GARRET-PELTIER, p. 2; PIRIBAUER/HUBER, p. 863*). Further, more wealth raises the life expectancy and level of education (*LAMPERT ET AL., pp. 147 et seq.; BAUM ET AL., p. 1; WENAU ET AL., p. 608*).

58 Presently, northern Equatoriana is in a dire state: The unemployment rate and the number of school dropouts are significantly higher than in the rest of the country (*Cl. Exh. C 5*). In line with this, alcohol and drug abuse are frequent and the general life expectancy is seven years lower than in the rest of Equatoriana (*ibid.*). For these reasons, investments in the infrastructure of northern Equatoriana are essential to increase public well-being. To achieve this, the government set up the NPDP and invested in it (*Cl. Exh. C 5; RNoA, ∫ 3*). This is exemplified by the government funding RESPONDENT with an initial EUR 25,000,000 and EUR 10,000,000 annually (*PO 2, ∫ 7*). RESPONDENT used this money to conclude the Contract to explore northern Equatoriana (*see supra ∫ 54; cf. Cl. Exh. C 2*). Such exploration is necessary to develop this area of Equatoriana (*PO 2, ∫ 7; cf. Cl. Exh. C 2, Preamble; RNoA, ∫ 3*).

59 Thus, the Contract aims to benefit the public of Equatoriana. Therefore, it was concluded for administrative purposes pursuant to Art. 75 EC, making parliamentary approval necessary.

3. The lack of formal parliamentary approval cannot be overcome

60 Contrary to CLAIMANT's submission (*Cl. Memo., ∫∫ 25 et seqq.*), the formal approval of the Equatorianian Parliament is mandatory and cannot be bypassed.

61 First, it cannot be substituted by the signature of Minister Barbosa (**a**). Second, CLAIMANT cannot rely on the principle of good faith to bypass the approval requirement (**b**). Third, the lack of parliamentary approval was not cured by the Arbitration Agreement being amended (**c**). Fourth, the lack of parliamentary approval cannot be excused by virtue of COVID-19 as *force majeure* (**d**).

(a) Minister Barbosa's approval cannot replace that of the Equatorianian Parliament

62 Contrary to CLAIMANT's contention (*Cl. Memo., §§ 26 et seq.*), the formal parliamentary approval cannot be replaced by Minister Barbosa signing the Contract.

63 Presently, both the competent minister and the Parliament had to approve RESPONDENT's submission to arbitration pursuant to Art. 75 EC (*RNoA, § 21*). CLAIMANT argues that the signature of the competent minister on the Contract can replace the approval of the Parliament (*Cl. Memo., § 27*). Thereby, CLAIMANT disregards Art. 75 EC and that "the minister lacks any power to replace such an approval" (*PO 2, § 34*). Further, the only sources CLAIMANT cites in this regard are *Blackburn v General* and *Miller v Secretary* (*Cl. Memo., § 26*). *Blackburn v General* concerns the issue of whether a parliament could voluntarily relinquish its own sovereignty to a supranational body (*Blackburn v General (England/Wales)*). *Miller v Secretary* discussed whether the UK government could commence the secession from the European Union without a legislative act by parliament (*Miller v Secretary (UK)*). Thus, the cases cited by CLAIMANT are irrelevant to the dispute at hand.

64 Concluding, the approval by Parliament could not be substituted by Mr Barbosa's signature.

(b) RESPONDENT may rely on Equatorianian law to invoke its incapacity to arbitrate

65 Contrary to what CLAIMANT argues (*Cl. Memo., §§ 30 et seqq.*), RESPONDENT can rely on Equatorianian law to invalidate the Arbitration Agreement.

66 An SOE cannot invoke its incapacity to arbitrate by relying on its domestic law when arbitrating with a foreign party (*Cl. Memo., §§ 30 et seqq.*). This doctrine is derived from the principle of good faith as a foreign party may not be aware of domestic capacity requirements, while the SOE is expected to be familiar with its own law (*ICC No. 7375/CK (1996); ICC No. 3896 (1982); Ad-Hoc, 18 November 1983*). However, the foreign party cannot rely on this doctrine if it was notified by the SOE that the form requirement had not been upheld (*cf. ICC No. 6474 (1992); ICC No. 4381 (1986); TSdJ Madrid, 13 March 2012 (Spain); DERAINS, p. 1111*).

67 In the case at hand, RESPONDENT informed CLAIMANT of the missing parliamentary approval before the Contract's conclusion (*Cl. Exh. C 7, § 9; Resp. Exh. R 4*). Furthermore, CLAIMANT itself concedes that it was aware that the approval was still outstanding (*Cl. Exh. C 7, § 6*).

68 Thus, RESPONDENT can rely on Equatorianian law to invoke its incapacity to arbitrate.

(c) The Arbitration Agreement's amendment cannot cure the lack of approval

69 Contrary to what CLAIMANT could have submitted, the amendment made to the Arbitration Agreement cannot cure the missing approval of Parliament.

70 In Equatoriania, there is a legal debate about whether changes to an arbitration agreement require parliamentary approval: According to the minority view, major changes to the arbitration regime require the approval by Parliament (*PO 2, § 36*). Pursuant to the majority view, only the initial submission to arbitration must be approved (*ibid.*).

71 In May 2020, the Parties amended the Arbitration Agreement (*Cl. Exh. C 9*). If the Tribunal were to follow the minority view, this amendment would have required approval as it involved major changes: According to the initial Arbitration Agreement, all disputes would be resolved by three arbitrators under the PCA Rules in a normal proceeding (*Cl. Exh. C 2, Art. 20*). The amendment, however, provides for a split system – depending on the amount in dispute (*Cl. Exh. C 9*). Pursuant to this, certain disputes ought to be resolved by a sole arbitrator under the UNCITRAL Expedited Arbitration Rules 2021 (*ibid.*). Furthermore, the Parties agreed to apply the UNCITRAL Transparency Rules to any arbitration, loosening the general principle of strict confidentiality (*Artt. 2 et seqq. UNCITRAL Transparency Rules*). Thus, according to the minority view, approval by Parliament for this major change was required but has not been given (*cf. PO 2, § 36*).

72 If the Tribunal considered the changes made to the Arbitration Agreement to be minor or follow the majority view, the amendment itself would not require approval (*ibid.*). However, this would not cure the lack of initial approval. Otherwise, the initial approval could always be bypassed by making small changes. As a result, Art. 75 EC would become obsolete.

73 Therefore, either way, the lack of parliamentary approval persists.

(d) RESPONDENT cannot rely on *force majeure*

74 Contrary to CLAIMANT's contention (*Cl. Memo., § 28*), the lack of parliamentary approval is not excused by any *force majeure* event.

75 *Force majeure* means the occurrence of an event or circumstance that prevents or impedes a party from performing its contractual obligations under a contract (*LESSANS, p. 802; BRUNNER, p. 82; ICC, FM, p. 68; cf. CAS No. 2018/A/5802 (2019); ICC No. 8874*). The legal consequence of relying on a *force majeure* event is an excuse for non-performance of contractual obligations or adjustments (*ERDEM, p. 125; cf. ICC No. 8874; FIROOZMAND/ZAMANI, p. 395*).

76 CLAIMANT relies on the absence of 20 MPs due to COVID-19 to excuse the lack of required parliamentary approval (*Cl. Memo., § 29*). However, by doing so, CLAIMANT draws the wrong conclusion: Regardless of whether the event in question can be seen as *force majeure*, it would not

entitle CLAIMANT to ignore Art. 75 EC (*cf. RNoA, § 13*). This is because the approval by Parliament is a requirement of the Arbitration Agreement's validity and not a performance required by it.

77 Thus, the requirement of parliamentary consent cannot be bypassed by any *force majeure* event.

B. IN ANY CASE, THE DISPUTE IS NOT ARBITRABLE

78 In any case, contrary to what CLAIMANT argues (*Cl. Memo., §§ 48 et seq.*), the dispute is not arbitrable.

79 Arbitrability determines which disputes can be submitted to arbitration (*MISTELIS, in: Mistelis/Brekoulakis; pp. 3 et seq.; STEINGRUBER, p. 40; cf. ICC No. 8420 (1996)*). A dispute is not arbitrable if it contravenes transnational public policy (*PCA No. 2010-07 (2010); BARON/LINIGER, pp. 27 et seq.; BÖCKSTIEGEL, Public Policy, p. 127; LEW ET AL., p. 188*).

80 It is well established that a contract which was procured by bribery or other types of corruption contravenes transnational public policy (*ICSID No. ARB/00/7 (2006); CdC, 13 September 2017 (France)*; *LAMM ET AL., pp. 728 et seqq.*). Provisions prohibiting bribery are non-negotiable rules to protect the public that must always be adhered to (*ICSID No. ARB/10/11 (2019); CdC, 21 February 2017 (France); cf. MANTE, pp. 287 et seqq.*). Ensuring the correct application of anti-bribery laws requires a detailed investigation of the relevant facts, as bribery matters are highly complex and usually concealed (*Ayyasamy v Paramasivam (India); PARK, p. 700; IGBOKWE, pp. 53 et seqq.*). However, contrary to state courts, tribunals are unable to compel parties to produce evidence or testimony (*TORGBOR, pp. 384 et seqq.; cf. BORN, Bribery; ROGERS, pp. 1 et seqq.*). Thus, by deciding such matters through arbitration, bribery could remain unsanctioned, which risks injuring society (*PARK, p. 700; IGBOKWE, pp. 53 et seqq.; cf. BORN, Bribery*). This weighs even heavier as arbitration is a one-stop-proceeding, without supervisory review through an appeal (*PARK, p. 700; cf. SEVER, p. 1601; SOPATA, p. 614; Letter to President Trump; BABU, p. 399*). Consequently, disputes involving issues of bribery are not arbitrable (*ICC No. 1110 (1963); HUBCO v Pakistan (Pakistan); Ayyasamy v Paramasivam (India); cf. Soleimany v Soleimany (England/Wales)*).

81 Equatoriana, as well as Mediterraneo and Danubia are contracting states to the UN Convention Against Corruption, and Equatoriana has adopted an Anti-Corruption Act (*PO 1, § III(3); RNoA, § 2*). As the present case involves bribery (*see supra §§ 7 et seqq.*), it violates national and transnational public policy. Therefore, the present dispute is not arbitrable.

Conclusion to Issue I

The Tribunal does not have jurisdiction. This is because the Arbitration Agreement is invalid: First, it was tainted by bribery. Second, it lacked approval by the Equatorianian Parliament pursuant to Art. 75 EC. In any case, the dispute is not arbitrable as it concerns bribery.

ISSUE II: A STAY OR, ALTERNATIVELY, A BIFURCATION SHOULD BE ORDERED

82 In order to investigate the NPDP corruption scheme, the government appointed Ms Fonseca as the public prosecutor in charge (*RNoA, §§ 14 et seq.*). Her far-reaching Investigation also includes the Contract (*Resp. Exh. R 2*). RESPONDENT emphasises that contrary to CLAIMANT's understanding (*cf. Cl. Memo., §§ 51 et seqq.*), the Tribunal is not bound by judgments made in the subsequent criminal proceedings (*RNoA, § 23*).

83 Rather, the Tribunal is respectfully requested to consider the Investigation's results to assess the issue of bribery sufficiently (**A.**). To do so, it shall stay the Proceedings (**B.**). Even if the Tribunal were to denied the request for a stay, it shall order a bifurcation of the Proceedings (**C.**).

A. THE INVESTIGATION'S RESULTS MUST BE SUFFICIENTLY ASSESSED

84 The Tribunal shall consider the Investigation's outcome to determine whether bribery occurred.

85 In cases of bribery allegations, tribunals must comprehensively consider all relevant evidence (**I.**). To obtain such, the Tribunal shall rely on the Investigation (**II.**), which will produce reliable results (**III.**). Furthermore, this evidence will be relevant and material to the dispute (**IV.**).

I. All Evidence Relevant to Bribery Is to Be Exhaustively Evaluated

86 The Tribunal shall consider the outcome of the Investigation to avoid a public policy violation.

87 Tribunals must render awards that are enforceable and cannot be set aside (*PCA No. 2010-07 (2010); ICC No. 10623 (2001); HORVATH, p. 153*). The enforcement of awards can be denied, or an award may be set aside where it violates public policy (*Art. 34(2)(b)(ii) DAL; Art. V(2)(b) NYC*). Acts of bribery violate public policy, and laws prohibiting such are fundamental rules to protect a functioning society (*Brothers v Alstrom (England/Wales); CdA Paris, 21 February 2017 (France); DAVID, § 16.85*). As CLAIMANT admits, bribery is a highly complex and concealed matter (*Cl. Memo., § 55; KHVALEI, p. 15; LLAMZON, p. 296*). Thus, to ensure that awards are enforceable and cannot be set aside, tribunals must exhaustively evaluate all relevant and material evidence relating to bribery (*CAIRNS/CREMADES, pp. 77 et seq.; PITKOWITZ, pp. 30 et seqq.; cf. HAHN, p. 72*). If they fail to do so, it constitutes a public policy violation (*see supra §§ 79 et seq.*). To obtain relevant and material evidence, tribunals can rely on domestic investigations if these are conducted by unbiased authorities (*BESSON, p. 106; PITKOWITZ, Duty, p. 214; NAUD, p. 518*).

88 It is undisputed that the present dispute concerns the question of whether the Contract is invalid due to bribery (*Cl. Memo., §§ 34 et seqq.; cf. Cl. Exh. C 6, C 8; RNoA, § 20*).

89 Thus, all relevant evidence relating to bribery must be considered to avoid a public policy violation.

II. The State Prosecutor Has Broad Investigative Powers to Produce Sufficient Evidence

90 Contrary to CLAIMANT's contention (*Cl. Memo., § 50*), the Tribunal is limited in its power to gather sufficient evidence for the occurrence of bribery. Therefore, it shall rely on the Investigation.

91 The Tribunal can order the Parties to produce evidence (*Art. 27(3) PCA Rules*). Nevertheless, contrary to CLAIMANT's assertion (*cf. Cl. Memo., § 55*), the Tribunal lacks the power to compel them to do so (*cf. GÉLINAS, p. 33; ALI/REPOUSIS, in: Bantekas et al., p. 718; PITKOWITZ, Duty, p. 217*). Further, it cannot summon witnesses (*cf. Art. 27(3) PCA Rules; DALY ET AL., § 5.112*). Instead, it would need to request assistance of Danubian courts to obtain evidence pursuant to Art. 27 DAL. However, their jurisdiction only covers Danubia, where it is unlikely that any case-related evidence will be found (*cf. BVerfG, 22 March 1988 (Germany); JENNINGS, pp. 209 et seq.; KEGEL ET AL., p. 252*).

92 Evidence can most likely be obtained in Equatoriana and Mediterraneo: First, the negotiations mainly took place in these countries (*Cl. Exh. C 2, Art. 1; C 7, § 9; PO 2, § 39; Resp. Exh. R 1, § 4*). Second, it can be assumed that both bribery suspects are located in the respective countries: Mr Field in Equatoriana (*cf. Resp. Exh. R 2; Cl. Exh. C 5*) and Mr Bluntschli in Mediterraneo (*cf. PO 2, § 40*). Third, CLAIMANT, refusing to cooperate in the taking of evidence by not calling either of them as witnesses (*see supra § 34*), is based in Mediterraneo (*Cl. Exh. C 2, Art. 1*).

93 Both Equatoriana and Mediterraneo have adopted the Model Law verbatim (*PO 1, § III*). The right to request court assistance under Art. 27 Equatorianian and Mediterranean Arbitration Law is limited to domestic tribunals, pursuant to Art. 1(2) Equatorianian and Mediterranean Arbitration Law. As the Tribunal is seated in Danubia and neither law extends court assistance to foreign tribunals, a request for such would be denied (*cf. BINDER, p. 392; HOLTZMANN/NEUHAUS, p. 738; BROCHES, pp. 127 et seq.*). Thus, the Tribunal's investigative powers are limited.

94 Opposed to this, the Equatorianian prosecutor, Ms Fonseca, has extensive investigative powers: As a state authority, she can seize documents, obtain bank records and interrogate suspects and witnesses (*cf. RNoA, § 23; NAUD, pp. 518 et seq.; ESER/AMBOS, p. 19; CAGNEY/CUTLER, p. 484*). Ms Fonseca is also empowered to request legal assistance from her counterparts in Mediterraneo to obtain evidence (*cf. NAUD, p. 519; AUGUSTINE, p. 104; KATZ/BREWSTER, p. 401*). She may even request assistance from other countries, *e.g.*, to gain access to the bank records of Mr Field's and Mr Bluntschli's offshore accounts (*cf. Resp. Exh. R 2; PO 2, § 40*).

95 Given the prosecutors' investigative powers, the Tribunal shall rely on the Investigation's results.

III. The Investigation's Results Will Also Be Reliable

96 Contrary to CLAIMANT's submission (*Cl. Memo., § 56*), the Investigation's results will be reliable.

97 Tribunals may consider evidence from domestic investigations if such was gathered by unbiased authorities (*see supra ∫ 87*). In this regard, public prosecutors are deemed unbiased if their acts are objectively comprehensible and not personally or politically motivated (*JACKSON, pp. 5 et seq.; UN, Guidelines, p. 3; cf. BALL ET AL., p. 266; BROCKE, in: Knauer et al., Art. 145, ∫ 9*).

98 CLAIMANT alleges that the Investigation is part of a political campaign by the new government (*Cl. Memo., ∫ 57*). However, Ms Fonseca is not a member of any of the new Equatorianian government's parties (*PO 2, ∫ 44*). Thus, a political motivation cannot be assumed.

99 Further, CLAIMANT only lists Ms Fonseca's personal relationships without any further indicators of undue influence (*Cl. Memo., ∫ 58*): First, she knows the head of the prosecution office (*ibid.*). Second, her brother-in-law is the CEO of the other final competitor during the Tender (*ibid.*). Third, her son's fiancé, Ms Bourgeois, used to work for Mr Field and was promoted before becoming a member of Ms Fonseca's team (*ibid.*). All of this information was disclosed by Mr Field's lawyers in an attempt to personally discredit Ms Fonseca (*Resp. Exh. R 2*). By now citing it, CLAIMANT seems to attempt the same. However, the accusations fail to convince: First, as Ms Fonseca is a well-known criminal lawyer in Equatoriana, it is unsurprising that she knows the head of the public prosecution office (*cf. PO 2, ∫ 44; RNoA, ∫ 15*). Second, it is unlikely that she intended to use the Investigation as vengeance for RESPONDENT not award her future sons-in-law's company with the Contract. Rather, the reason for conducting the Investigation follows from her being "one of the most vocal critics of the corruption within the previous government" (*PO 2, ∫ 44*). Third, Ms Bourgeois was immediately removed from Ms Fonseca's team after it became apparent that her previous employment at RESPONDENT could raise doubts (*cf. PO 2, ∫ 43*).

100 Most notably, Ms Fonseca has already proven her skills and impartiality: She investigated RESPONDENT's CEO, Ms Queen, who has already led the company during the term of the previous government (*PO 2, ∫ 43; Cl. Exh. C 2; Resp. Exh. R 2*). When no evidence of corruption was found, Ms Fonseca dropped the charges (*PO 2, ∫ 43*). On the other hand, it is sensible of her to investigate the Contract's conclusion as several red flags indicate bribery (*cf. Resp. Exh. R 2; supra ∫∫ 13 et seqq.*).

101 Lastly, while Ms Fonseca would obtain the evidence, it is up to the Tribunal to evaluate the weight given to it (*Art. 27(4) PCA Rules*). This safeguards the integrity of the Proceedings.

102 As Ms Fonseca is neither politically nor personally motivated, the Tribunal shall rely on the Investigation's results as they will be reliable.

IV. The Results of the Investigation Will Be Relevant and Material to the Case at Hand

103 The Investigation's results shall be exhaustively considered as they will be relevant and material.

104 The relevance and materiality of evidence are to be determined in accordance with Art. 27(4) PCA Rules. Evidence is deemed relevant if it proves a fact which allows drawing legal conclusions to a case (*PILKOV, p. 148; KAUFMANN-KOHLER/BÄRTSCH, p. 18; ASPEN, p. 26*). Further, evidence is material to the outcome of a case if it is necessary to fully assess the legal issues at hand (*NATER-BASS/PFISTERER, p. 681; RAESCHKE-KESSLER, p. 427; MARGHITOLA, pp. 52 et seq.*).

105 It is undisputed between the Parties that bribery is a crucial issue in the case at hand (*Cl. Memo., §§ 34 et seqq.; see supra §§ 7 et seqq.*). The Investigation's results will prove whether Mr Bluntschli bribed Mr Field to influence the Contract's conclusion, *e.g.*, during the alleged beachhouse meeting (*cf. Resp. Exh. R 2; cf. Cl. Exh. C 3, § 6; C 5*). Since these results will make it possible to evaluate if bribery occurred in the case at hand, they will be relevant.

106 Further, with the results the Tribunal could conclusively assess the validity of the Contract, which would be void if bribery occurred in the sense of Art. 15 EACA (*Cl. Exh. C 8; RNoA, §§ 2, 20*). This will impact the Tribunal's decision of whether RESPONDENT is obliged to perform the Contract or whether CLAIMANT is entitled to damages – or none of the above (*NoA, §§ 19, 26(2)(3)(4)*). In either case, the Investigation's results will be necessary for a complete consideration of the issue of bribery and, thus, will be material.

107 Consequently, the outcome of the Investigation will be relevant and material to the dispute. In conclusion, the Tribunal shall rely on the Investigation's comprehensive results.

B. A STAY IS THE APPROPRIATE MEASURE TO ALLOW FOR AN EXHAUSTIVE CONSIDERATION OF THE INVESTIGATION'S OUTCOME

108 The Tribunal shall order a stay to ensure that it can exhaustively consider the Investigation's results.

109 To avoid a public policy violation, the Tribunal must consider the Investigation's results (*see supra § 87*). A stay is the most appropriate measure to allow such consideration. This is because following a stay, the case would be decided in a one-stop proceeding, which could even increase procedural efficiency: If the Tribunal found the Contract to be void due to bribery, the issues of fraud, performance and damages would not have to be decided upon (*cf. PO 2, § 53; NoA, § 26(2)(3)(4)*). Opposed to that, a bifurcation entails the danger of legal uncertainty. Any finding of the Tribunal in the first bifurcated stage would be affected if the Contract was found invalid due to bribery at a second stage (*cf. Cl. Exh. C 8*). Furthermore, this would increase costs and consume resources as, for the second stage, further hearings would have to be scheduled (*cf. Cl. Exh. C 2, Art. 1; Letter by Fasttrack; Letter by Langweiler of 15 July 2022*). Thus, presently, a stay is the most appropriate measure.

110 The power to order a stay lies within a tribunal's broad discretion to adjust the procedure to the needs of the particular arbitration pursuant to Art. 17(1) PCA Rules (*cf. PCA No. 2020-21 (2021);*

PCA No. 2016-07 (2017); CORONA HENRIQUES, § 3). This power must be used appropriately under sentence one of Art. 17(1) PCA Rules. When determining whether a stay is appropriate, a tribunal shall consider all circumstances of the specific case (*Bonarich v Dreyfus (Hong Kong); BDC v BDD (Singapore); cf. ICSID No. ARB/12/10 (2015)*). In particular, a stay of proceedings must not lead to an unnecessary delay according to sentence two of Art. 17(1) PCA Rules.

111 Presently, ordering a stay is appropriate: First, staying the Proceedings does not even lead to a relevant delay (**I.**). Second, even if the delay were relevant, a stay would be necessary (**II.**).

I. Staying the Proceedings Does Not Lead to a Relevant Delay

112 Contrary to what CLAIMANT could have argued, a stay does not entail a significant delay.

113 A delay is only relevant where it obstructs the parties' right to conduct the arbitration at a normal pace (*Ad-Hoc, 26 February 2001; PCA No. 2016-07 (2017)*). Here, all circumstances of the case shall be considered (*ICSID No. ARB/14/4 (2018); PCA No. 2016-07 (2017); cf. FERIS, pp. 12 et seq.*).

114 CLAIMANT mistakenly states that a stay would delay the Proceedings until after the criminal proceedings (*Cl. Memo., § 61*). RESPONDENT only requests the Tribunal to consider the Investigation's results (*RNoA, §§ 23, 29*). Ms Fonseca committed herself to conclude the Investigation by the end of 2023 (*Resp. Exh. R 2*). In comparison, the first round of oral hearings of the Proceedings will take place only at the end of March 2023 (*PO 1, § IV*). Following, further rounds of submissions might be necessary, provided the Tribunal assumes its jurisdiction (*PO 1, § III(1)*). Delaying the Proceedings at most until the end of 2023 cannot be considered relevant.

115 Therefore, a stay of the Proceedings would not lead to a significant delay.

II. Even If the Delay Were Significant, a Stay Would Be Necessary in the Present Case

116 Even if a stay of the Proceedings caused a relevant delay, it is nonetheless necessary.

117 A stay is only unnecessary where it cannot be justified considering the specific circumstances of the case (*ICSID No. ARB/02/6 (2004); BGer, 23 September 2014 (Switzerland); GROSELJ, p. 576*). To assess this, the parties' interests must be weighed against each other (*PCA No. 2016-07 (2017); NEEDHAM, pp. 189 et seq.; cf. PCA No. 2020-21 (2021)*).

118 In the present case, CLAIMANT's interests are not significantly impaired if the Tribunal ordered a stay (**1.**). However, RESPONDENT's interests are significantly harmed if no stay were granted (**2.**).

1. If a stay were granted, CLAIMANT would not suffer substantial harm

119 If the Tribunal were to order a stay, CLAIMANT's interests would still be sufficiently upheld.

120 When deciding on a request for a stay, tribunals shall assess the possible harm to the party opposed to it (*CMAX v Hall (USA); Law Society v Abrametz (Canada); cf. Voth v Mills (Australia)*).

121 CLAIMANT only submits that delaying the Proceedings might constitute harm regarding the losses and costs caused by the storage of the UAVs' production materials during that time (*Cl. Memo., § 61*). However, as the stay will be brief, it seems unlikely that CLAIMANT will suffer substantial harm (*cf. supra § 114*). Moreover, CLAIMANT can remedy any potentially irreparable harm during the stay period by requesting interim measures and preliminary orders pursuant to Art. 26 PCA Rules and Artt. 17 *et seqq.* DAL. Since it has not requested such interim measures, it must be assumed that CLAIMANT itself is of the view that no irreparable harm will occur by staying the Proceedings. Considering this, CLAIMANT is sufficiently protected from irreparable harm.

122 In conclusion, a stay would inflict no substantial harm on CLAIMANT.

2. RESPONDENT would suffer significant harm if its request to stay were not granted

123 A stay is necessary so that RESPONDENT will not suffer substantial harm.

124 On the side of the party requesting the stay, tribunals shall consider the possible harm by denying such request (*PCA No. 2020-21 (2021); CAS No. 2022/A/8709 (2022); ICSID No. ARB/14/12 (2020)*). Here, sentence one of Art. 17(1) PCA Rules must be considered, according to which each party must be given a reasonable opportunity to present its case. To ensure this right, a party must be able to support its legal arguments by presenting relevant evidence (*cf. ECHR, 22 June 2020 (Council of Europe); GABRIEL ET AL., p. 50; RECHBERGER ET AL., p. 438*). Otherwise, significant harm would be apparent due to an impairment of this party's right to be heard (*cf. CAPRASSE/TECQMENNE, p. 528; DALY ET AL., p. 66; GROSELJ, p. 571*). Thus, if parallel domestic investigations provide relevant evidence, this justifies even a significant delay due to a stay (*BESSON, p. 106; cf. PCA No. 2020-21 (2021); PCA No. 2016-07 (2017); GROSELJ, p. 577*).

125 RESPONDENT argues that the Contract is invalid due to bribery (*Cl. Exh. C 8; RNoA, § 20*). The Investigation will provide evidence relevant to assessing such (*see supra §§ 103 et seqq.*). Due to the concealed nature of bribery, RESPONDENT depends on this evidence (*cf. supra § 11*). Without it, RESPONDENT could not present its legal arguments and its right to be heard would be violated.

126 Further, proceedings can only be closed where each party has a reasonable opportunity to present its case (*Art. 31(1) PCA Rules*). Otherwise, proceedings may be reopened at any time before the award is made, pursuant to Art. 31(2) PCA Rules *(cf. ICSID No. ARB/03/25 (2010); Ad-Hoc, 1 August 1974; LUPINI/WILLCOCKS, § 18*). This requires exceptional circumstances, *i.e.*, new and decisive facts come to light (*cf. ICSID No. ARB/10/25 (2013); ICSID No. ARB/14/1 (2018); RAGNWALDH ET AL., pp. 128 et seq.*). Thus, if a stay were denied, the Proceedings could not be closed or would have to be reopened. This would increase costs and hinder efficiency (*ICSID No. ARB/10/20 (2018); IUSCT No. 213 (1994); GHARAVI, p. 147*).

127 Thus, staying the Proceedings upholds RESPONDENT's right to be heard and procedural efficiency.

C. IF THE TRIBUNAL WERE TO DENY A STAY, A BIFURCATION IS NECESSARY

128 Contrary to CLAIMANT's submission (*Cl. Memo., §§ 59 et seqq.*), if a stay were to be denied, the Proceedings should at least be bifurcated to ensure that the Investigation's results are exhaustively addressed. In line with this, the issue of the Contract's validity shall be postponed while the remaining issues shall be addressed at a preliminary stage (*cf. PO 2, § 52*).

129 Within their discretion under Art. 17(1) PCA Rules, arbitral tribunals have the power to bifurcate proceedings (*DALY ET AL., § 5.06; cf. PCA No. 2012-12, PO 4 (2012); SCHWARZ/KONRAD, p. 460; CASTAGNA, p. 366*). A bifurcation is granted if a separate consideration of the issues is more efficient than addressing them together (*ICSID No. ARB/21/26 (2022)*; *SECOMB/TAN, p. 58; CIArb, Guideline 6, p. 8*). Particularly, issues of a dispute can be bifurcated if they are not intertwined (*ICSID No. ARB/21/26 (2022); cf. SCHREUER, p. 537, § 76; MCILWRATH/SAVAGE, p. 277*).

130 Presently, the Tribunal shall bifurcate: This is possible as the issues are not intertwined (**I.**). Further, a bifurcation is required due to public policy and enhances procedural efficiency (**II.**).

I. The Issue of Bribery and the Remaining Issues Are Not Intertwined

131 As the issues of the present dispute are not intertwined bifurcation is possible

132 Issues are not intertwined if a tribunal would not touch upon or prejudge the remaining issues of the dispute when deciding on the issue which is to be preliminary addressed (*PCA No. 2012-12, PO 8 (2014); ICSID No. ARB/18/12 (2020); ICSID No. ARB/12/25 (2013)*).

133 CLAIMANT relies on *Chevron v CBI* to argue that a bifurcation is generally undesirable (*Cl. Memo., § 62*). There, bifurcating the proceedings was illogical as the issues to be separated were not clearly identified (*Chevron v CBI (Australia)*). However, the present issues are identifiable and, thus, separable: CLAIMANT's request for relief hinges on the validity of the Contract (*NoA, §§ 19, 26(4)*). This validity is challenged, first, due to bribery tainting the conclusion of the Contract and, second, because RESPONDENT avoided the Contract due to fraud (*RNoA, § 20*; *Cl. Exh. C 8*). The acts of bribery relating to the Contract's conclusion concern the pre-contractual negotiations and the unexpected modifications of the Contract's terms (*Resp. Exh. R 1, §§ 4 et seq.; see supra §§ 26 et seqq.*). Opposed to that, the termination was given since the KE2010, which were to be sold to RESPONDENT, are neither "state-of-the-art" nor CLAIMANT's "present top model" as promised (*see infra §§ 191 et seqq.*). Thus, to assess whether fraud was committed, the Tribunal shall examine the features of the KE2010 in light of the CLAIMANT's assurances. This can be accomplished without prejudging the issue of bribery. This is underlined by the fact that bribery cannot be exhaustively assessed yet as no evidence will be available at the preliminary stage (*cf. supra §§ 124 et seqq.*).

134 Thus, a bifurcation of the Proceedings is possible as the issues to be separated are not intertwined.

II. A Bifurcation Is Not Only Necessary but Also Promotes Procedural Efficiency

135 Presently, a bifurcation is required to avoid violating public policy (*see supra §§ 87 et seq.*). Contrary to CLAIMANT's submission (*Cl. Memo., §§ 60, 62 et seq.*), it would also ensure procedural efficiency.

136 Arbitrators need to evaluate whether a bifurcation would be more efficient than addressing all issues together (*CASTAGNA, pp. 374 et seq.; cf. SENGER, p. 724; GREENWOOD, p. 426; GOTANDA, pp. 14 et seq.*). This shall be done in two steps: At the **first stage**, it should be considered whether the issue that shall be resolved preliminarily is *prima facie* substantial (*PCA No. 2012-12, PO 8 (2014); ICSID No. ARB/16/16 (2017); ICSID No. ARB/18/12 (2020)*). At the **second stage**, it must be assessed whether this issue is likely to dispose all or an essential part of the claims raised if successful (*PCA No. 2016-39 (2018); PCA No. 2016-13 (2016); ICSID No. ARB/19/25 (2021)*).

137 RESPONDENT's defence of fraud pursuant to Art. 3.2.5 ICCA would be addressed at the preliminary stage (*cf. PO 2, § 52*). As the KE2010 is neither "state-of-the-art" nor CLAIMANT's "present top model" (*see infra §§ 191 et seqq.*), this objection is *prima facie* substantial (**first stage**). Once the Tribunal recognises the termination due to fraud to be justified, the Contract is avoided (*cf. Art. 3.2.5 ICCA*). Therefore, CLAIMANT's contractual claims will be without merit and assessing the Contract's invalidity due to bribery in the subsequent stage will be superfluous (*cf. NoA, §§ 19, 26(2)(3)(4)*). Thus, the *prima facie* substantiated objection is likely to dispose of an essential part of the claim and will lead to a timely end of the Proceedings (**second stage**). Concluding, a bifurcation would be more efficient than following the regular course of proceedings should a stay be denied.

138 This result is not altered by the case of *Lauder v Czech Republic* brought up by CLAIMANT (*Cl. Memo., § 60*), as it is not comparable to the dispute at hand. It concerned a request to bifurcate the issues of liability and remedy (*Ad-Hoc, 3 September 2001*). The case at hand, however, does not concern the bifurcation of liability and quantum but the separation of the issue of contract validity due to bribery which is presently unrelated to questions of liability (*PO 1, § III(1); PO 2, § 52*).

139 To conclude, if the request to stay was denied, the Tribunal shall bifurcate the Proceedings.

Conclusion to Issue II

Due to its limited investigative powers, the Tribunal shall rely on the Investigation to consider all relevant evidence. As this evidence is not yet available, it shall stay the Proceedings to allow for its consideration. If a stay were denied, a bifurcation shall be ordered to guarantee such consideration.

ISSUE III: THE APPLICABILITY OF THE CISG IS EXCLUDED

140 RESPONDENT intended to purchase UAVs for the collection of geological and geophysical data with the capability of carrying high payload weights (*Cl. Exh. C 1*). It ultimately decided to obtain the KE2010 from CLAIMANT and concluded the Contract (*Cl. Exh. C 2*).

141 It is undisputed between the Parties that the Contract, in principle, falls within the scope of the CISG under Art. 1(1)(a) CISG (*Cl. Memo., ∫ 64*). However, contrary to CLAIMANT's submission (*Cl. Memo., ∫∫ 70 et seqq.*), the Contract concerns the sale of aircraft. Therefore, it is excluded from the Convention's scope according to Art. 2(e) CISG.

142 While the CISG excludes the sale of aircraft in Art. 2(e) CISG, it does not provide any definition of the term "aircraft". Thus, the term must be interpreted pursuant to Art. 7(1) CISG (*cf. BGer, 28 May 2019 (Switzerland); PERALES VISCASILLAS, in: Kröll et al., Art. 7, ∫ 10; GRUBER, in: Säcker et al., Art. 7, ∫ 1*). Here, regard is to be had to the Convention's international character and to the need to promote uniformity in its application (*SCC No. V2014/078/080 (2017); RB Noord-Nederland, 9 February 2022 (Netherlands); HUBER/MULLIS, p. 7*). The intention of the CISG's drafters is fundamental for interpreting the Convention's terms (*LOOKOFSKY, p. 35; BRUNNER/WAGNER, in: Brunner/Gottlieb, Art. 7, ∫ 6; cf. LG Aachen, 20 July 1995 (Germany)*).

143 In line with this, the Contract is excluded from the CISG's scope since the KE2010 are aircraft pursuant to Art 2(e) CISG (**A.**). This exclusion conforms with the drafters' intention (**B.**).

A. AS THE CONTRACT CONCERNS THE SALE OF AIRCRAFT, IT IS NOT GOVERNED BY THE CISG

144 Contrary to what CLAIMANT submits (*Cl. Memo., ∫∫ 70 et seqq.*), the Contract is excluded from the Convention in accordance with Art. 2(e) CISG as it concerns the sale of aircraft.

145 When interpreting terms of the CISG pursuant to Art. 7(1) CISG, tribunals must primarily give effect to its universal character by examining international case law and scholarly writings (*Smallmon v Transport (New Zealand); NH, 6 February 2019 (Norway); LOOKOFSKY, p. 35*). To ensure a uniform application of the CISG, a term's interpretation shall not conflict with the legal understandings of the Contracting States (*GH 's-Hertogenbosch, 16 October 2002 (Netherlands); ICDR No. 50-181-T-00364-06 (2007); SCHWENZER, p. 118*).

146 The KE2010 are aircraft pursuant to an international interpretation of this term (**I.**). This interpretation is in line with the Contracting States' understanding of the term aircraft (**II.**).

I. The KE2010 Are Aircraft Pursuant to an International Understanding

147 Contrary to CLAIMANT's submission (*Cl. Memo., ∫∫ 78 et seqq.*), according to an international standpoint, the KE2010 must be considered as aircraft pursuant to Art. 2(e) CISG.

148 CLAIMANT recognises that "[t]ransporting goods or people is an integral characteristic that defines an aircraft" (*Cl. Memo., ∫ 82*). However, it incorrectly limits this to commercial use (*Cl. Memo., ∫∫ 82, 84*). Rather, the decisive criterion for products to classify as "aircraft" under Art. 2(e) CISG is whether their objective purpose is to transport cargo or humans (*SPOHNHEIMER, in: Kröll et al., Art. 2, ∫ 46; FERRARI, in: Ferrari et al., UNCITRAL, p. 93; PILTZ, ∫ 2-53*).

149 Since the KE2010 are fit for cargo transport, the Contract is excluded from the CISG's scope (**1.**). Even if only some of the KE2010 served such purpose, the Contract is still exempted (**2.**).

1. The KE2010 are aircraft as their objective purpose is to transport cargo

150 As the KE2010's objective purpose is transporting cargo, they are aircraft under Art. 2(e) CISG.

151 A good is considered an aircraft if it is fit to transport humans or cargo (*GH Leeuwarden, 31 August 2005 (Netherlands); FERRARI, p. 82; MANKOWSKI, in: Säcker et al., Art. 2, ∫ 32*). At the same time, its size or ability to fly alone is not crucial for such a classification (*ibid.*)

152 Nonetheless, CLAIMANT compares satellites to the KE2010 (*Cl. Memo., ∫∫ 91 et seq.*). Its only reason for doing so is that the KE2010 are "off from the ground while performing their functions" (*ibid.*). Additionally, CLAIMANT brings forth that the KE2010 cannot be classified as aircraft due to their small size, length and height (*Cl. Memo., ∫∫ 84 et seq.*). Thus, CLAIMANT misses the point and overlooks the decisive criterion, namely whether the KE2010 is fit to transport humans or cargo.

153 In fact, CLAIMANT's former COO Mr Bluntschli advertised the KE2010 as being "suitable for other purposes, in particular to bring high value and sensitive other loads to the remote areas of the northern provinces" (*Resp. Exh. R 4*). Accordingly, all six KE2010 have a central payload bay able to carry 245 kg of cargo (*Cl. Exh. C 4*). While they cannot conduct surveillance flights and transport cargo simultaneously, they are nonetheless built to carry either goods or cameras (*cf. PO 2, ∫ 9*). This is underlined by the fact that additional payload bays that increase the payload by 25 % can optionally be installed and that the KE2010 have been used to transport cargo in the past (*Cl. Exh. C 4; PO 2, ∫∫ 10, 22 et seq.*). Accordingly, the Parties changed the contractual terms to provide for "possible additional use of the aircraft" (*Cl. Exh. C 2, Preamble*).

154 Therefore, the KE2010's objective purpose is to transport cargo and conduct surveillance.

2. Even if not all KE2010s are fit to transport cargo, the CISG does not govern the Contract

155 Even if the KE2010 was not built to transport cargo in its standard configuration, the CISG does not cover the Contract as at least two of the KE2010 are fit to do so.

156 Pursuant to the concept of *dépeçage*, different laws may apply to the same contract (*Enka v Chubb (UK); REESE, pp. 58 et seq.; GERTZ, p. 164*). However, the CISG's aim to promote uniformity and

legal certainty prohibits *dépeçage* involving the CISG if such is not explicitly intended by the parties (*DIEDRICH, p. 353; MARSHALL, § 183; cf. SPICKHOFF, in: Hau/Poseck, Art. 4 Rom-I-VO, § 90*).

157 Presently, the Parties agreed that the last two KE2010s would have additional payload bays (*PO 2, § 23*). This substantially increases their capacity and allows them to transport cargo while conducting surveillance missions (*PO 2, § 10; cf. PO 2, § 9*). Thus, these two KE2010s are built for the transportation of cargo. They are "aircraft" under Art. 2(e) CISG and the exclusion of their sale is necessitated by the drafting history of this provision (*see infra §§ 165 et seqq.*). However, applying different laws to the first four and the last two KE2010 contradicts the core principles of uniformity and legal certainty underlying the CISG. To uphold these principles, the exclusion must extend to the sale of all six KE2010 and, thus, the Contract as a whole.

158 Therefore, even if not all KE2010 are aircraft under Art. 2(e) CISG, the Contract is still excluded from the CISG's scope.

II. The KE2010 Are Aircraft Pursuant to the National Understanding of This Term

159 The KE2010 being considered aircraft is in line with the understanding of this term in national law.

160 Since the interpretation of the CISG's terms pursuant to Art. 7(1) CISG shall not conflict with the national understanding of such terms, their meaning within the Contracting States must be considered (*Tribunale di Padova, 25 February 2004 (Italy); Schmitz-Werke v Rockland (USA); Materials v Forberich (USA); Pretura di Locarno Campagna, 27 April 1992 (Switzerland)*).

161 For one, Art. 1(a) Equatorianian Aviation Safety Act (hereinafter "**ASA**") sets out two decisive criteria to identify aircraft. First, whether an air vehicle is "used or intended to be used for moving persons or objects in the air" (*Resp. Exh. R 5*). Second, only air vehicles "without any mechanical connection to the ground" are considered aircraft under the ASA (*ibid.*). The KE2010 was built to carry cargo (*see supra §§ 150 et seqq.*) and fly without a mechanical connection to the ground (*Cl. Exh. C 4*). Thus, the UAVs are aircraft in the sense of Art. 1(a) ASA.

162 This understanding is also mirrored by the *Capetown Convention,* which classifies aircraft to be capable of transporting humans or cargo (*Art. 1(2)(a)(l) Capetown Convention*). This Convention was ratified by more than 80 states, most of which are Contracting States to the CISG (*Capetown Convention, Status List*). Thus, it showcases the global understanding of the term "aircraft".

163 Lastly, CLAIMANT contends that considering the KE2010 aircraft would contradict aviation regulations, in particular the *ICAO Convention* and the *EC No 216/2008* (*Cl. Memo., §§ 88 et seqq.*). Contrary to these assertions, the aviation regulations cited by CLAIMANT in fact encompass the KE2010. The *ICAO Convention* and the *EC No 216/2008* apply to all non-military and non-state aviation, including so-called "aerial works" (*ICAO Convention; EC No 216/2008*). Aerial works

describe operations in which an air vehicle is used for services such as photography or surveillance (*ICAO Convention, Annex 6, p. 1.1-1; EC No 216/2008, Annex II, p. 1*). Presently, the KE2010 were to be operated by a private company to *inter alia* conduct surveillance (*NoA, §§ 2 et seqq.*).

164 Thus, the interpretation of aircraft under Art. 2(e) CISG is in line with international and domestic definitions of the term.

B. THE EXCLUSION OF THE CONTRACT IS IN LINE WITH THE DRAFTING HISTORY OF ART. 2(E) CISG

165 Excluding the Contract from the Convention's scope aligns with the drafters' intention.

166 The predecessor of Art. 2(e) CISG excluded "any […] aircraft, which is or will be subject to registration" (*Art. 5(1)(b) ULIS*). As this was impractical due to different national laws providing for different registration requirements, the drafters of the CISG extended the exclusion to all aircraft (*CISG Conference, p. 16; cf. WINSHIP, p. 1057; UNCITRAL, CISG Digest, Art. 2, §§ 9 et seq.; BAILEY, p. 306*). Nonetheless, the purpose of this exclusion is still to particularly exclude aircraft potentially subject to registration requirements (*HUBER, in: Säcker et al., Art. 2, § 20; SPOHNHEIMER, in: Kröll et al., Art. 2, §§ 41 et seq.; SÄNGER, in: Ferrari et al., Art. 2, § 11*).

167 So far, in three of the five jurisdictions that the KE2010 had been sold to, their registration was generally necessary (*PO 2, § 20; Resp. Exh. R 5, Artt. 1, 10*). When the KE2010 were exempted from registration, this was only because CLAIMANT contracted with governmental entities (*PO 2, § 20; Resp. Exh. R 5, Art. 10*). This shows that, depending on the applicable law and the contracting parties, registration requirements potentially applicable to the KE2010 can vary widely (*ibid.*).

168 Since this is precisely the kind of uncertainty that Art. 2(e) CISG attempts to avoid, an exclusion of the Contract from the scope of the CISG aligns with the drafters' intention.

Conclusion to Issue III

169 The Convention's application is exempted pursuant to Art. 2(e) CISG: The Contract is excluded from the CISG's scope since the KE2010 are aircraft according to an international and national understanding. This is in line with the drafters' intention.

ISSUE IV: RESPONDENT CAN RELY ON ART. 3.2.5 ICCA FOR AVOIDANCE

170 When RESPONDENT concluded the Contract for the KE2010, it was convinced that it was purchasing UAVs which were "state-of-the-art" and CLAIMANT's most advanced model (*Cl. Exh. C 2*). Shortly after, CLAIMANT launched a better UAV, the HE2020 (*NoA, ∫ 10*). This was when RESPONDENT realised that it had been misled by CLAIMANT since the beginning. RESPONDENT saw no option but to avoid the Contract under Art. 3.2.5 ICCA due to fraud (*Cl. Exh. C 8*).

171 Presently, RESPONDENT can rely on Art. 3.2.5 ICCA: It is applicable (**A.**) and all of its requirements are met (**B.**). Additionally, RESPONDENT has not forfeited its right to avoid the Contract (**C.**).

A. ART. 3.2.5 ICCA IS APPLICABLE AS FRAUD IS NOT GOVERNED BY THE CISG

172 Contrary to what CLAIMANT could have argued, RESPONDENT may rely on domestic law as the CISG does not cover fraud. Thus, Art. 3.2.5 ICCA applies.

173 The scope of the CISG is determined pursuant to Art. 4 CISG (*ICC No. 17326 (2012); HvB Antwerpen, 22 March 2004 (Belgium); OLG Graz, 24 February 1999 (Austria)*). According to the first sentence, the Convention governs the formation of contracts and the rights and obligations of the parties. Pursuant to Art. 4(a) CISG, the Convention does not concern the validity of contracts except when expressly provided for. There are two approaches which disagree on which sentence one must rely on when determining the scope of the CISG, a "domestic approach" and the so-called "facultative approach" (*LESSIAK, p. 492; HUBER, p. 596*; *KRÖLL, pp. 40 et seq.*).

174 As fraud is excluded from the CISG's scope pursuant to a "domestic approach" (**I.**) and the "facultative approach" (**II.**), Art. 3.2.5 ICCA applies to the present case.

I. The CISG Does Not Govern Fraud According to a "Domestic Approach"

175 The CISG does not govern fraud when applying a "domestic approach".

176 It relies exclusively on the wording of Art. 4(a) CISG, which states that the Convention "is not concerned with […] the validity of the contract". As such, this approach solely considers domestic law remedies for questions of validity (*LESSIAK, p. 492; DALHUISEN, pp. 230 et seq.; LOOKOFSKY, p. 288; DUHL, p. 1282; cf. HvB Antwerpen, 22 March 2004 (Belgium)*). This is in line with the drafters' intention to exclude all matters of contract validity (*HARTNELL, p. 72; SCHWENZER/HACHEM, p. 471; DOGE, p 78; cf. ICC No. 13184*). Fraud is commonly considered to be an issue of validity (*ZHK No. 273/95 (1996); MATHER, p. 162; DOGE, p. 78*).

177 Thus, fraud is not governed by the CISG under the "domestic approach".

II. According to the "Facultative Approach", Fraud Is Equally Excluded From the CISG

178 The CISG' scope equally does not include fraud when applying the "facultative approach".

179 The "facultative approach" relies on the first sentence of Art. 4 CISG to determine the Convention's scope and considers the second sentence of Art. 4 CISG to be declaratory (*HUBER, p. 596*; *KRÖLL, pp. 40 et seq.; cf. HEIZ, p. 661*). Under this approach, it must be determined whether the CISG contains provisions that treat the subjective matter (*SCHRÖTER, p. 102; HARTNELL, p. 50; TORSELLO, p. 279*). If not, recourse to domestic law is possible (*Pamesa v Yisrael (Israel); Electrocraft v Super Electric (USA); HONNOLD/FLECHTNER, Art. 4, § 87*). No provisions of the CISG concern fraud (*MATHER, p. 162; NWAFOR ET AL., p. 165; cf. ICC No. 13184*). In particular, Art. 35 CISG, which refers to the conformity of goods, does not govern fraud (*CSC, 12 December 2022 (Italy); Kingspan v Borealis (England/Wales); BRUNNER/GOTTLIEB, in: Brunner/Gottlieb, Art. 35, § 4*). This is because fraud does not stem from the contract specifying the quality of goods but rather from the contract conclusion process, during which the buyer was induced to enter into a contract (*HEIZ, p. 654; SCHLECHTRIEM, p. 474; DUHL, p. 1282*).

180 As such, CLAIMANT cannot rely on Art. 35 CISG (*cf. Cl. Memo., §§ 103 et seqq.*). Instead, recourse can be had to domestic provisions covering the issue of fraud. The Parties chose Equatorianian law to govern the Contract, which addresses fraud in Art. 3.2.5 ICCA (*Cl. Exh. C 2, Art. 20(d)*).

181 Thus, under both approaches fraud is not governed by the CISG and Art. 3.2.5 ICCA is applicable.

B. THE PREREQUISITES OF ART. 3.2.5 ICCA ARE FULFILLED

182 Contrary to CLAIMANT's assertion (*Cl. Memo., § 97*), the requirements of Art. 3.2.5 ICCA are met.

183 Art. 3.2.5 ICCA sets out three requirements to determine whether fraud occurred: First, a party must have conducted itself fraudulently (*Off. Comm., Art. 3.2.5; DU PLESSIS, in: Vogenauer, Art. 3.2.5, §§ 6 et seqq.; cf. Raja v Holden (England/Wales); BGH, 9 November 2011 (Germany)*). Second, such conduct must have induced the aggrieved party to conclude a contract (*ibid.*). Third, the acting party must have had a fraudulent state of mind (*ibid.*).

184 The requirements of Art. 3.2.5 ICCA are met: First, CLAIMANT acted fraudulently (**I.**). Second, its conduct led to the Contract's conclusion (**II.**). Third, CLAIMANT acted with fraudulent intent (**III.**).

I. CLAIMANT Conducted Itself Fraudulently During the Contractual Negotiations

185 Contrary to what CLAIMANT argues (*Cl. Memo., §§ 98 et seqq.*), it acted fraudulently during the negotiations which led to the conclusion of the Contract.

186 According to Art. 3.2.5 ICCA, a party acts fraudulently if it misrepresents relevant facts or breaches its disclosure obligations (*DU PLESSIS, in: Vogenauer, Art. 3.2.5, § 10; cf. Ad-Hoc, 4 December 1996; ACL v Lynch (England/Wales)*).

187 CLAIMANT misrepresented relevant facts (**1.**) and failed to adhere to its duty of disclosure (**2.**).

1. CLAIMANT fraudulently misrepresented relevant facts regarding the KE2010

188 Contrary to CLAIMANT's contention (*Cl. Memo., §§ 95 et seqq.*), it misrepresented the KE2010.

189 Facts are misrepresented where they are expressly or implicitly conveyed to the other party in a misleading manner (*DU PLESSIS, in: Vogenauer, Art. 3.2.5, §§ 11 et seq.; cf. AAA No. 01-16-0001-8281 (2016); JAMS No. 1100112582 (2021)*). Potentially misleading statements must be interpreted pursuant to Art. 4.2 ICCA as the matter of fraud falls entirely within the scope of domestic law (*BRÖDERMANN, Art. 4.2, § 1; ZUPPI, in: Kröll et al., Art. 8, § 7; see supra §§ 172 et seqq.*). According to Art. 4.2 ICCA the common intent of the parties is the primary criterion, followed by a reasonable businessperson's understanding (*Franklins v Metcash (Australia); ZHK, 25 November 1994; cf. ICC No. 18489 (2013)*). Further, all relevant circumstances must be considered pursuant to Art. 4(3) ICCA. This holds true, even when considering the merger clause in the Contract (*Cl. Exh. C 2, Art. 21*), as merger clauses do not extend to fraudulent behaviour (*Shopping Center v LG (USA); cf. OLG Dresden, 27 December 1999 (Germany); Proforce v Rugby (England/Wales); MURRAY*).

190 During the negotiations, CLAIMANT assured RESPONDENT that the KE2010 were "state-of-the-art" as required by the Tender (*Cl. Exh. C 4; Resp. Exh. R 4*). Thus, this requirement was included in the Contract (*Cl. Exh. C 2, Art. 2(a)*). Moreover, CLAIMANT promised that the KE2010 were its "present top model for [RESPONDENT's] purposes" (*Cl. Exh. C 8; Resp. Exh. R 4*).

191 By making these assertions, CLAIMANT misrepresented relevant facts regarding the KE2010 as it is neither "state-of-the-art" (**a**) nor CLAIMANT's "present top model" (**b**).

(a) The KE2010 are not "state-of-the-art"

192 CLAIMANT misrepresented the KE2010 since they are not "state-of-the-art".

193 When interpreting statements, particular weight must be given to the usual meaning of the terms used (*Artt. 4.2, 4.3(e) ICCA; ICC No. 8908 (1998); Yoshimoto v Golf (New Zealand); TS, 21 December 2007 (Spain)*). While no universal understanding of the term "state-of-the-art" exists, international case law agrees that a state-of-the-art product must meet the highest technical and scientific standard available at the time of contract conclusion (*ICC No. 6320 (1992); cf. ICC No. 17272; Potter v Chicago Pneumatic (USA); Hastings v Finsbury (UK); OWEN/DAVIS, § 10:13*). This extends to comparable products of the same category (*Wagner v Case Corp. (USA); OWEN/DAVIS, § 10:13; cf. DIS No. DIS-SV-RM-541/15 (2018)*).

194 In light of this, it must be assumed that the Parties meant that the purchased UAV would be of the highest technical and scientific standard available for UAVs when referring to them as "state-of-the-art". While CLAIMANT refers to the technical features of the KE2010 to argue that they were "state-of-the-art", it omits that they were last updated in 2018 (*Cl. Memo., § 105; PO 2,*

§ 13). Furthermore, CLAIMANT fails to mention that better UAV models that were also fit to carry cargo and conduct surveillance missions, were already on the market (*PO 2, § 14*). It must have been aware that the KE2010 were outdated compared to these UAVs, as CLAIMANT itself was developing a comparable model, the HE2020, at the time (*cf. PO 2, § 15*). The HE2020 has a nine times higher payload than the KE2010, three times longer endurance, almost twice the maximum speed, uses advanced satellite radio communication technology and requires half as much maintenance (*cf. Cl. Exh. C 4, Resp. Exh. R 3*). Further, it has a higher dispatch reliability (*cf. Resp. Exh. R 3; R 4*). Additionally, the KE2010 still uses "JP-4" fuel (*Cl. Exh. C 4*). This fuel is no longer used in modern aircraft, such as the HE2020, as it is highly flammable and develops hazardous fumes (*SHELL, Jet Fuel; CHEMEUROPE, JP-4; CONCAWE, p. 42; ATSDR, Jet Fuels; CAMEO, JP-4*).

195 Considering its technical features, the KE2010 were not at the highest technical and scientific standard at the time of the Contract's conclusion. Consequently, they were not state-of-the-art.

(b) The KE2010 were not CLAIMANT's present top model

196 Contrary to CLAIMANT's contention (*Cl. Memo., § 128*), the KE2010 was not CLAIMANT's "present top model for [RESPONDENT's] purposes".

197 Factually correct statements can be considered a misrepresentation if they mislead the other party (*cf. Heidbreder v Carton (USA); ARMBRÜSTER, in: Säcker et al., Art. 123, § 29; DU PLESSIS, in: Vogenauer, Art. 3.2.5, § 11*). Whether a term is misleading must be determined in light of the surrounding circumstances, including the purpose of the subsequently concluded contract (*Art. 4.3(d) ICCA; cf. ICC No. 8908 (1998); Franklins v Metcash (Australia); Yoshimoto v Golf (New Zealand)*).

198 CLAIMANT stated that the KE2010 was its "present top model for [RESPONDENT's] purposes" (*Resp. Exh. R 4*). The Contract's purpose, as recognised by CLAIMANT, was to provide RESPONDENT with the best UAVs for collecting data and transporting cargo in northern Equatoriana (*Cl. Exh. C 1; Cl. Memo., § 105*). Thus, CLAIMANT could have only intended its assurances to be understood as follows: The KE2010 is the best-suited UAV for the exploration of northern Equatoriana CLAIMANT can offer. However, shortly after the Contract's conclusion, CLAIMANT released a new UAV, the HE2020, which, just like the KE2010, is able to transport cargo and conduct surveillance (*Cl. Exh. C 4; Resp. Exh. R 3*). Both UAVs could have been delivered in 2022 (*PO 2, § 14; Cl. Exh. C 2, Art. 2(c)*). The HE2020 not only has a longer endurance than the KE2010 but can also conduct more than one mission in one flight (*PO 2, § 17; Resp. Exh. R 3, R 4*). Further, it can collect high-quality data, even in the bad weather conditions common in Equatoriana, since the HE2020 has a satellite link and can be operated beyond the line of sight

(*Resp. Exh. R 3; PO 2, § 17*). Opposed to that, the KE2010 requires line-of-sight control as it uses a radio link (*Cl. Exh. C 4*). Thus, the HE2020 was a better fit for RESPONDENT's purposes.

199 Consequently, when referring to the KE2010 as its "present top model" and "state-of-the-art" CLAIMANT misrepresented facts.

2. CLAIMANT breached its duty to disclose the upcoming release of the HE2020

200 Contrary to CLAIMANT's contention (*Cl. Memo., §§ 98 et seqq., 109 et seqq.*), it violated its disclosure obligations by not revealing the impending release of the HE2020.

201 Fraud, pursuant to Art. 3.2.5 ICCA, can also be committed by breaching a duty to disclose. A disclosure duty is apparent where information is not protected and must be disclosed (*BGH, 4 March 1998 (Germany); Blockchain v Petrochemical (England/Wales); LANDMAN, pp. 722 et seq.*).

202 In the present case, CLAIMANT was under an obligation to disclose the HE2020's upcoming release (**a**). This is not altered by CLAIMANT's further submission (**b**).

(a) CLAIMANT was under an obligation to disclose the HE2020's release

203 CLAIMANT had the duty to disclose the imminent release of the HE2020.

204 Pursuant to Art. 3.2.5 ICCA, disclosure obligations arise when necessitated under "reasonable commercial standards of fair dealing". When interpreting this wording, national case law as an integral part of a body of law must be considered (*DE BOISSÉSON, p. 124; KAPLAN, § 197; NARIMAN, p. 551*). This holds especially true in common law systems (*ibid.*). Thus, if parties choose a law to govern their contract, this choice encompasses the respective case law (*BERNARDINI, p. 212; RIZZO AMARAL, pp. 53 et seqq.; BORN, § 20.04[C]*). As the Parties chose the law of Equatoriana, a common law jurisdiction, to govern the Contract, the Tribunal shall take Equatorianian case law into account (*cf. Cl. Exh. C 2, Art. 20(d); PO 1, § III(3)*).

205 Further, it shall consider criteria developed by international scholars and jurisprudence (*cf. ICC No. 13751/RCH/JHN (2006); ICSID No. ARB(AF)/15/2 (2021); PAULSSON, Model, p. 63*).

206 An obligation to disclose can be derived from the decision of the Equatorianian Supreme Court (hereinafter "**ESC**") (*i*). In any case, CLAIMANT had such a duty due to international standards (*ii*).

(i) CLAIMANT was under a disclosure obligation pursuant to the decision of the ESC

207 Contrary to what CLAIMANT argues (*Cl. Memo., § 98*), the ESC's decision is applicable to the present case. Thus, CLAIMANT had to disclose the HE2020's upcoming release.

208 The ESC ruled in a domestic setting that an experienced private party is under far-reaching disclosure obligations when contracting with newly formed government entities (*RNoA, § 18*).

209 CLAIMANT is an experienced private party, as it has been on the market for over 20 years (*PO 2, § 1*). The decision further applies even though the present case concerns an international setting

and RESPONDENT is not a government entity. First, where parties struggle to obtain information within the same country, it is even more difficult for foreign parties to access the necessary information (*cf. supra §§ 91 et seqq.*). Second, RESPONDENT was set up and is entirely owned by the government (*NoA, § 2*). The members of its supervisory board are appointed by different ministries, and it receives an annual fund of EUR 10,000,000 (*PO 2, §§ 5, 7*). Additionally, RESPONDENT is also newly formed (*cf. NoA, § 2*). In line with this, CLAIMANT itself acknowledged that the ESC's decision could apply to RESPONDENT as an SOE but rejected its consideration as it wrongfully assumed domestic law to be without relevance (*Cl. Exh. C 7, § 17; cf. supra §§ 172 et seqq.*). Moreover, the decision imposes disclosure obligations upon the private party for any information potentially relevant to the government entity, including information about planned improvements to the product sold (*RNoA, § 18*). Since 2017, CLAIMANT was developing a new UAV, the HE2020 (*PO 2, § 15*). The information about its upcoming release would have been of great value to RESPONDENT, as the HE2020 is better suited to its purposes (*see supra §§ 196 et seqq.*).

210 As the decision of the ESC is applicable, CLAIMANT had a duty to disclose the HE2020's release.

(ii) CLAIMANT had an obligation to disclose the upcoming release pursuant to international standards

211 In any case, CLAIMANT was under a duty to disclose the release of the HE2020 according to the reasonable commercial standards of fair dealing.

212 Pursuant to Art. 3.2.5 ICCA, disclosure obligations arise when necessitated under "reasonable commercial standards of fair dealing". Contrary to CLAIMANT's reasoning (*Cl. Memo., § 100*), this standard can be derived directly from Art. 3.2.5 ICCA without reliance on the principle of good faith pursuant to Art. 1.7 ICCA (*DU PLESSIS, in: Vogenauer, Art. 3.2.5, § 16; cf. BRÖDERMANN, in: Mankowski, Art. 3.2.5, § 1; Off. Comm., Art. 1.7, § 1*). CLAIMANT submits an abundance of criteria to assess whether a disclosure obligation exists (*Cl. Memo., §§ 101 et seqq.*). In doing so it relies on Art. 49(3) CESL (*Cl. Memo., § 101*). This approach is incorrect first, as the CESL has been withdrawn and second, since Art. 49(3) CESL is not a specification of Art. 3.2.5 ICCA (*GAVRILOVIC, p. 4; LILLEHOLT, p. 4; GOANTA/SIEMS, p. 721; cf. Art. 49(1)(3) CESL*). Instead, the Tribunal shall follow widely recognised criteria developed by scholars and jurisprudence (*cf. ICC No. 13751/RCH/JHN (2006); ICSID No. ARB(AF)/15/2 (2021); PAULSSON, Model, p. 63*). In particular, the importance of the information to the other party and the degree of difficulty to obtain it must be considered (*DU PLESSIS, in: Vogenauer, Art. 3.2.5, § 19; cf. ICC No. 20910/ASM/JPA (2017); BGH, 3 March 1982 (Germany)*).

213 The HE2020 is superior to the KE2010 and better suited for RESPONDENT's purposes (*see supra §§ 191 et seqq.*). Thus, the knowledge of its release was crucial for RESPONDENT (*cf. NoA, § 10*).

214 However, RESPONDENT was unaware of the information and was unable to obtain it: Even though CLAIMANT had stated that it planned to extend its product line in a press release in 2017, this information was only known to the market (*PO 2, § 15*). RESPONDENT does not operate in the field of the production or acquisition of UAVs and, thus, was not ought to be aware of it (*cf. NoA, § 2*). Moreover, even if RESPONDENT had been aware of the press release, CLAIMANT's vague wording made it unforeseeable when or if a new product would be introduced to the market (*cf. PO 2, § 15*). Therefore, it would have been extremely difficult for RESPONDENT to be aware of the upcoming release, a fact which was conceded by CLAIMANT itself (*Cl. Memo., § 109*). As such, RESPONDENT was unaware of the HE2020 being developed and had no incentive for further inquiries as CLAIMANT assured that the KE2010 was its present top model (*cf. PO 2, § 15*).

215 To conclude, CLAIMANT was obliged to disclose the upcoming release of the HE2020 during the contractual negotiations according to international standards and the ESC's decision.

(b) CLAIMANT's disclosure obligation is not altered by its further submission

216 Contrary to what CLAIMANT submits (*Cl. Memo., §§ 107, 109 et seqq.*), the development of the HE2020 was neither a trade secret nor protected by employer-employee confidentiality.

217 CLAIMANT states that a trade secret is a confidential information that confers a value and competitive advantage to its holder by keeping it secret, citing *LIN* (*Cl. Memo., § 111*). However, it fails to mention that the same source also argues that the holder of a trade secret cannot rely on the information's protected status after it has been revealed to the public (*LIN, p. 940*; *cf. LCIA No. 183861 (2020); AAA No. 02-15-0006-0013 (2017)*; *VIVARELLI, pp. 20 et seq.*).

218 CLAIMANT contends that the development of the HE2020 and information on its technical data and design constitute a trade secret which could not have been disclosed (*Cl. Memo., §§ 110 et seqq.*). However, it is not RESPONDENT's submission that CLAIMANT should have disclosed the HE2020's technical details (*cf. RNoA, § 27*). Instead, to make a conscious choice of which UAV to obtain, RESPONDENT only needed to know of the HE2020's development (*Cl. Exh. C 8*). After CLAIMANT's press release, this information became public in the market of UAV producers (*see supra § 212*). Thus, the HE2020's development was no trade secret and could have been disclosed.

219 Further, CLAIMANT fails to recognise that "director and employee confidentiality" is irrelevant to the case at hand (*cf. Cl. Memo., § 117*). Presently, RESPONDENT submits that CLAIMANT and not its employees were under a duty to disclose (*see supra §§ 201 et seqq.*). Thus, and as recognised by the sources cited by CLAIMANT, a distinction between the confidentiality obligations of an employee and a company must be drawn (*Cl. Memo., § 117; Triplex v Scorah (England/Wales); Faccenda v Fowler (England/Wales)*).

220 Hence, contrary to its submissions, CLAIMANT was obliged to disclose the HE2020's release.

II. The Contract's Conclusion Was a Result of CLAIMANT's Fraudulent Conduct

221 Contrary to CLAIMANT's contentions *(Cl. Memo., §§ 103, 122 et seqq.)*, RESPONDENT concluded the Contract because of the misrepresentation of the KE2010 and the non-disclosure of the HE2020.

222 The causal link required by Art. 3.2.5 ICCA is apparent where fraudulent conduct led to a contract being concluded (*cf. CdC, 2 October 1974 (France); Davis v Re-Trac (USA); KEAT, p. 80*).

223 First, CLAIMANT argues that the HE2020 would not be suitable for RESPONDENT as it requires an airfield to start and land (*Cl. Memo., § 128*). This would not have been an issue as a usable airfield already exists (*PO 2, § 16*). Although it may not be ideally placed, it could have been easily reached with the HE2020's endurance (*cf. Resp. Exh. R 3*). Furthermore, CLAIMANT's concern that the wildlife of the North of Equatoriana would be disrupted by building a new airfield is obsolete (*Cl. Memo., § 120*), as it is currently undergoing infrastructural development (*see supra § 54*).

224 Second, CLAIMANT argues that RESPONDENT would not have bought the HE2020 due to its high price (*Cl. Memo, § 126*). However, with the budget approved by its board of directors, RESPONDENT could have purchased at least two HE2020s (*PO 2, § 7; cf. Cl. Exh. C 3, § 9*). Due to the HE2020's superior features, two UAVs would have sufficed to fulfil the Contract's purpose (*see supra § 194; cf. PO 2, § 17*). Thus, RESPONDENT would have bought the HE2020 even despite their high price.

225 Third, CLAIMANT asserts that RESPONDENT avoiding the Contract in May 2022 rather than in March 2021 indicates that no causal link is apparent (*Cl. Memo., §§ 119, 123*). Nevertheless, RESPONDENT already stated that it intended to terminate the Contract shortly after the HE2020 was presented to the public (*cf. Cl. Exh. C 7, § 13*). CLAIMANT tries to downplay this by stating that Mr Cremer thought that the issue of termination had been resolved after discussions in May 2021 (*Cl. Memo., § 123*). However, after these discussions, RESPONDENT informed CLAIMANT that there were indeed "remaining outstanding issues" (*Cl. Exh. C 9*).

226 Thus, a causal link exists between Claimant's fraudulent conduct and the Contract's conclusion.

III. CLAIMANT Acted With Fraudulent Intent When Negotiating the Contract

227 Contrary to what CLAIMANT argues (*Cl. Memo., § 103*), it acted with fraudulent intent.

228 A party acts with fraudulent intent if it consciously disadvantages the other party for its own benefit (*BRÖDERMANN, Art. 3.2.5, § 1; cf. BGH, 11 May 2001 (Germany); Raja v McMillan (England/Wales)*).

229 CLAIMANT has been producing UAVs for over 20 years and must be well aware of both the state-of-the-art in its business and the technical capabilities of its UAVs (*cf. PO 2, § 1*). Thus, it knew what it promised when stating that the KE2010 was its present top model and state-of-the-art (*cf. supra §§ 191 et seqq.*). Moreover, when the Contract was concluded, CLAIMANT was currently in

the final testing stages of the HE2020, which was to be released only a few months later (*PO 2, § 14; Cl. Exh. C 8; RNoA, § 17*). CLAIMANT concedes that this release "would have a greater impact on the RESPONDENT's purchase decision" (*Cl. Memo., § 109*). This showcases that CLAIMANT's non-disclosure of the development of the HE2020 was intentional. Additionally, this behaviour benefited CLAIMANT, as it had three KE2010 in stock due to an insolvent customer and, thus, could avoid a loss of EUR 12,000,000 by concluding the Contract (*cf. Resp. Exh. R 4; PO 2, § 25*).

230 As CLAIMANT had fraudulent intent, RESPONDENT can avoid the Contract under Art. 3.2.5 ICCA.

C. RESPONDENT HAS NOT LOST ITS RIGHT TO RELY ON ART. 3.2.5 ICCA

231 Contrary to CLAIMANT's assertion (*cf. Cl. Memo., §§ 123 et seq.*), RESPONDENT's right to rely on Art. 3.2.5 ICCA has not been forfeited.

232 Neither Art. 39 CISG (**I.**) nor Art. 3.2.12 ICCA exclude reliance on Art. 3.2.5 ICCA (**II.**).

I. Art. 39 CISG Does Not Prevent RESPONDENT From Exercising Its Right of Avoidance

233 RESPONDENT has not lost its right to rely on Art. 3.2.5 ICCA pursuant to Art. 39 CISG.

234 According to Art. 39 CISG, the buyer loses the right to rely on a lack of conformity within a reasonable time after it has or ought to have discovered it.

235 However, CLAIMANT cannot rely on this provision for three reasons: First, CLAIMANT cannot refer to CISG provisions to undermine Art. 3.2.5 ICCA, a domestic law provision invoked by RESPONDENT (*cf. supra §§ 174 et seqq.*). Second, the reasonable time under Art. 39 CISG cannot be triggered before the delivery of goods as it only starts when the buyer discovered or ought to have discovered the defect (*GRUBER, in: Säcker et al., Art. 39, § 36; SAENGER, in: Hau/Poseck, Art. 39 CISG, § 9; CoC, 23 June 2020 (Egypt)*). The KE2010 have not been delivered (*Cl. Exh. C 2, Art. 2(d)(i)(ii)(iii)*). Third, the application of Art. 39 CISG is excluded under Art. 40 CISG if the seller knew or had to be aware of the non-conformity and did not disclose it. CLAIMANT acted with fraudulent intent and did not disclose the HE2020's development (*cf. supra §§ 200 et seqq.; SCC, 5 June 1998; OLG Köln, 21 May 1996 (Germany); KRÖLL, in: Kröll et al., Art. 40, § 11*).

236 Concluding, RESPONDENT's right under Art. 3.2.5 ICCA is not forfeited pursuant to Art. 39 CISG.

II. Art. 3.2.12 ICCA Does Not Exclude RESPONDENT's Right to Avoid the Contract

237 RESPONDENT's right of avoidance under Art. 3.2.5 ICCA is not excluded by Art. 3.2.12 ICCA.

238 According to Art. 3.2.12 ICCA, the right to avoid a contract is precluded where the notice of avoidance has not been given within reasonable time (*Off. Comm., Art. 3.2.12*; *BRÖDERMANN, Art. 3.2.12, § 1; cf. Dolores v Entergy Operations (USA)*). The standard for such a reasonable time frame must be determined on a case-by-case basis (*cf. OGH, 31 August 2010 (Austria); CdA Lyon,*

18 October 2012 (France); URDANETA, p. 2). As Art. 3.2.12 ICCA is inspired by comparable common law provisions, the Tribunal shall draw guidance from such jurisdictions (*cf. BARTON, p. 80; BRÖDERMANN, Art. 3.2.12, § 1; HUBER, in: Vogenauer, Art. 3.2.12, § 7*). These consider time frames ranging up to several years as reasonable (*Brown v South Burlington (USA); Twin-Lick v Marbury (USA); PRACTICAL LAW*). This was confirmed in the ESC's decision which shall be considered by this Tribunal (*see supra §§ 208 et seq.*). In this ruling, a party avoided a contract after more than a year of unsuccessful negotiations (*RNoA, § 18*). Further, especially in cases of fraud, time limits must be longer as the deceived party deserves extensive protection (*cf. HUBER, in: Vogenauer, Art. 3.2.12, § 7; US Res. Contract Act, Comm., Art. 381, § a*).

239 Shortly after RESPONDENT became aware that the Contract had been procured by fraud, it started negotiations to resolve this issue in March 2021 (*Cl. Exh. C 7, § 13*). After a year of unsuccessful negotiations with CLAIMANT, RESPONDENT came to the conclusion that the Contract could not be mended (*Cl. Exh. C 7, § 13; cf. Cl. Exh. C 8*). Therefore, it ultimately submitted its notice of avoidance on 28 May 2022 (*Cl. Exh. C 8*). This avoidance was both within the time limit set out in the ESC's ruling and the time limits considered reasonable in other common law jurisdictions.

240 Consequently, Art. 3.2.12 ICCA does not prohibit RESPONDENT from avoiding the Contract, as the notice was submitted within a reasonable time.

Conclusion to Issue IV

RESPONDENT can rely on Art. 3.2.5 ICCA to avoid the Contract. This is because the CISG does not govern fraud, and thus, domestic law, namely Art. 3.2.5 ICCA, must be referred to. The prerequisites of Art. 3.2.5 ICCA are met, and RESPONDENT has not lost its right to rely on it.

REQUEST FOR RELIEF

In light of the submissions above, RESPONDENT respectfully requests the Tribunal to find that:

I. the Tribunal has no jurisdiction to hear the present dispute;

II. the request to stay or, alternatively, bifurcate the Proceedings shall be granted;

III. the Contract is not governed by the CISG;

IV. RESPONDENT can rely on Art. 3.2.5 ICCA to avoid the Contract.

We hereby confirm that this Memorandum was written only by the persons who signed below. We also confirm that we did not receive any assistance during the writing process from any person who is not a member of this team.

Alina Damm	Louisa Högl	Till Jülicher
Lara Peters	Sophie Völkl	Theodor Ziegelhöffer