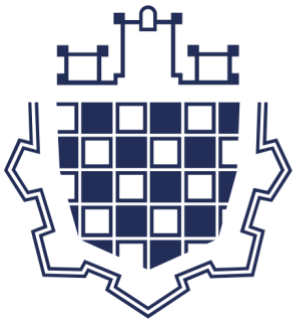
20th Annual
Willem C. Vis (East) International Commercial Arbitration Moot
19th March – 26th March 2023



UNIVERSITY OF MANNHEIM

Memorandum for RESPONDENT

PCA CASE NO. 2022-76

On behalf of	**Against**
Equatoriana Geoscience Ltd	Drone Eye plc
1907 Calvo Rd	1899 Peace Avenue
Oceanside	Capital City
EQUATORIANA	MEDITERRANEO
(RESPONDENT)	**(CLAIMANT)**

BRUNO SCHMOLZE JENNIFER KNEISL TINO WASNER

LEON SCHOENEMEYER LUCA BISCHOFF

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INDEX OF ABBREVIATIONS

Ann.	Annotation
Art./Artt.	Article/Articles
CEO	Chief Executive Officer
cf.	*Confer* (compare)
CISG	United Nations Convention on Contracts for the International Sale of Goods
CLAIMANT	Drone Eye plc
COO	Chief Operating Officer
DAL	Danubian Arbitration Law (verbatim adoption of the Model Law)
e.g.	*Exempli gratia* (for example)
emph. add.	*Emphasis added*
et al.	*Et alia* (and others)
Et seq./et seqq.	*folio* (following) / (and the following)
Exh. C	CLAIMANT's Exhibit (1-9)
Exh. R	RESPONDENT's Exhibit (1-5)
i.e.	*Id est* (that is)
Ibid.	*Ibidem*
ICC	International Chamber of Commerce
ICCA	International Commercial Contract Act (based on the UNIDROIT Principles on International Commercial Contracts)
ICC Rules	2021 Rules of the International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes

ISO	International Organization for Standardization
IUSCT	Iran-US Claims Tribunal
kg	Kilogram
Ltd	Limited
MfC	Memorandum for CLAIMANT
Model Law	UNCITRAL Model Law on International Commercial Arbitration with the 2006-amendments
No.	Number
NoA	Notice of Arbitration
NP	Northern Parts of Equatoriana
NYC	New York Convention (United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards)
p./pp.	Page/Pages
PCA	Permanent Court of Arbitration
PCA Rules	PCA Arbitration Rules 2012
para./paras.	Paragraph/Paragraphs
PARTIES	CLAIMANT and RESPONDENT
plc	Public limited company
PO1	Procedural Order Number 1
PO2	Procedural Order Number 2
RESPONDENT	Equatoriana Geoscience Ltd.
Response to NoA	Response to the Notice of Arbitration
SOE	State owned entity

Statement of Impartiality	Statement of Impartiality and Independence by Bertha Suttner
Supply Agreement	Purchase and Supply Agreement (Claimant Exhibit C2)
UAS	Unmanned Aerial Systems
UAV	Unmanned Aerial Vehicle
ULIS	Convention relating to a Uniform Law on the International Sale of Goods
UNCAC	United Nations Convention Against Corruption
UNCITRAL	United Nations Commission on International Trade Law
v.	versus
VCLT	Vienna Convention on the Law of Treaties 1969

STATEMENT OF FACTS

The parties to this arbitration are Drone Eye plc **("CLAIMANT")** and Equatoriana Geoscience Ltd **("RESPONDENT"**; together **"PARTIES")**. CLAIMANT is a producer of drones based in Mediterraneo. RESPONDENT is a company entirely owned by the Ministry of Natural Resources and Development of Equatoriana. The following chronology summarises the factual course of events of this arbitration:

2016 RESPONDENT is set up as part of the Northern Part Development Program **("NP Development Program")**. RESPONDENT's purpose is to generate necessary data and funds to develop the infrastructure [*NoA, pp. 4f., paras. 2f.; Exh. C5, p. 16, paras. 2ff.*].

2018 CLAIMANT starts developing the new Hawk Eye 2020 drone model **("Hawk Eye 2020")** [*NoA, p. 5, para. 10*].

20 March 2020 RESPONDENT opens a tender process for the acquisition of four state-of-the-art aircraft [*Response to NoA, pp. 27f., para. 4, Exh. C1, p. 9, para. 4*].

Nov 2020 Mr. Field, RESPONDENT's main negotiator and COO, accepted CLAIMANT's offer for six drones instead of the four drones originally foreseen in the Call for Tender [*Exh. R1, p. 32, para. 5*].

1 Dec 2020 The PARTIES sign the Purchase and Supply Agreement **("Supply Agreement")** without parliamentary approval [*Exh. C2, pp. 10ff., Exh. C7, p. 18, para. 9*].

Feb 2021 CLAIMANT presents its new Hawk Eye 2020 model [*NoA, p. 5, para. 10*].

Dec 2021 Due to the discovery of a corruption scheme surrounding the NP Development Program, the government declared a moratorium on all contracts awarded in the context of this program. This also affects the Supply Agreement [*Exh. C6, p. 17, paras. 1f., Exh. R2, p. 33, para. 1*].

21 May 2022 The public prosecution office investigates the corruption scheme and brings charges against Mr. Field in relation to contracts he concluded in his capacity as COO of RESPONDENT. It specifically announces the investigation of the Supply Agreement [*Exh. R2, p. 33, paras. 1ff.*].

30 May 2022 RESPONDENT avoids the Supply Agreement [*Exh. C8, pp. 20f., paras. 1ff.*].

15 July 2022 CLAIMANT initiates the arbitral proceedings [*Letter by Langweiler, p. 3, para. 1*].

SUMMARY OF ARGUMENTS

1 In the remote corners of Northern Equatoriana poverty and the lack of infrastructure have long been the norm. Now, RESPONDENT – an entity owned by the state of Equatoriana – aims to transform the region and improve the lives of its citizens. This transformation was to be fuelled by drones with cutting-edge technology that could enable the mining of the region's natural resources for the benefit of its citizens. Additionally, the drones were set to transport critically needed medicine to the remote corners of Northern Equatoriana. While RESPONDENT was focused on the public good, CLAIMANT was busy preparing its dagger for a well-placed stab in RESPONDENT's back. CLAIMANT fraudulently misrepresented its inferior drones and resorted to pay off the COO of RESPONDENT in charge of the negotiations. RESPONDENT respectfully requests the Arbitral Tribunal to stand against fraud and corruption by denying CLAIMANT's unjustified claims.

2 **The Arbitral Tribunal lacks the jurisdiction to hear the dispute.** The Arbitration Clause is invalid due to corruption. In any event, RESPONDENT lacked capacity to conclude the Arbitration Clause because the required parliamentary approval was not given. This approval was necessary pursuant to Art. 75 of the Equatorianian Constitution **("EC")** as the Supply Agreement constitutes a contract for administrative purposes **[Issue 1]**.

3 **If the Arbitral Tribunal's jurisdiction can be established, it should stay or, alternatively, bifurcate the proceedings until the investigations against Mr. Field have been concluded.** A stay or bifurcation ensures the enforceability of the award since it promotes the compliance with Equatorianian public policy. Further, a stay or bifurcation would be in line with the obligations set out by Art. 17 PCA Rules which require the Arbitral Tribunal to ensure fair and efficient proceedings **[Issue 2]**.

4 **The Supply Agreement is not governed by the CISG.** The application of the CISG is excluded pursuant to Art. 2(e) CISG as the Kestrel Eye 2010 is an aircraft. Furthermore, the CISG is excluded pursuant to Art. 3(2) CISG as the service part is the preponderant part of the Supply Agreement. In any case, the PARTIES excluded the CISG pursuant to Art. 6 CISG **[Issue 3]**.

5 **In case the Supply Agreement is governed by the CISG, RESPONDENT can rely on Art. 3.2.5 ICCA to avoid the Supply Agreement.** The application of Art. 3.2.5 ICCA is not pre-empted pursuant to Art. 4(a) CISG as the CISG does not govern matters of fraud. CLAIMANT acted fraudulently when misrepresenting the Kestrel Eye 2010 as *state-of-the-art* and when failing to disclose the release of the Hawk Eye 2020 **[Issue 4]**.

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

6 RESPONDENT respectfully requests the Arbitral Tribunal to deny its jurisdiction [*against MfC, p. 5, paras. 20ff.*]. CLAIMANT falsely submits that the Arbitral Tribunal's jurisdiction stems from Art. 20 of the Supply Agreement with its amendment from 27 May 2021 **("Arbitration Clause")** [*MfC, p. 5, para. 21; Exh. C2, p. 12; Exh. C9, p. 22, paras. 2f.; Letter to Parties, p. 24*]. However, the Arbitration Clause is invalid due to CLAIMANT's corrupt actions, as well as the lack of parliamentary approval.

7 RESPONDENT acknowledges the principle of *competence-competence* which grants an arbitral tribunal the power to rule on its own jurisdiction [*MfC, p. 5, para. 23; Daly/Goriatcheva/Meighen, Art. 23(1), para. 5.55; Croft/Kee/Waincymer, Art. 23(1), para. 23.1; cf. ICC 6515 & 6516; Born, para. 7.02*]. The *competence-competence* principle is emphasised in Art. 23(1) PCA Rules, a verbatim adoption of the 2010 UNCITRAL Arbitration Rules [*Introduction PCA Rules*].

8 However, the Arbitral Tribunal lacks jurisdiction to hear the dispute. First, the Arbitration Clause is invalid as it was influenced by corruption **[A]**. Second, the Arbitral Tribunal lacks jurisdiction because the Arbitration Clause has never been approved by the Equatorianian Parliament **[B]**.

A. The Arbitral Tribunal lacks jurisdiction because the Arbitration Clause was procured by corruption

9 At hand, the Supply Agreement was procured by corruption which leads to the invalidity of the Arbitration Clause **[I]**. Furthermore, the Arbitral Tribunal lacks jurisdiction due to the influence of corruption on the Arbitration Clause**[II]**.

I. The Supply Agreement and therefore the Arbitration Clause included therein are void due to corruption

10 CLAIMANT argues that the *doctrine of separability* preserves the Arbitration Clause regardless of the issue of corruption [*MfC, p. 6, paras. 28ff.*]. However, the *doctrine of separability* cannot prevent the arbitration agreement from being void in conjunction with the main contract when the agreement between the parties was influenced by corruption [*Maulana Abdul v. Balochistan; Myirski, p. 309; cf. Aster Anderson v. Delta Funding*].

11 In *Maulana Abdul v. Balochistan,* the court decided that in avoiding the main contract *"the arbitration clause in the original contract and subsequent agreements were void"* [*Maulana Abdul v. Balochistan*]. The court reasoned that it had jurisdiction to invalidate the contract despite an arbitration clause since there were allegations of corruption under Art. 34 United Nations Convention Against Corruption **("UNCAC")**. Equatoriana, Danubia, and Mediterraneo signed the UNCAC [*PO1, p. 43, III(3)*].

12 In the case at hand, the conclusion of the Supply Agreement was influenced by corruption. Hence, Art. 15 of the Equatorianian Anti-Corruption Act **("EACA")** was violated, and RESPONDENT has the right to consider the Supply Agreement annulled pursuant to Art. 34 UNCAC.

13 The Supply Agreement was procured by corruption **[1]** and therefore is void from the beginning **[2]** preventing the *doctrine of separability* from preserving the Arbitration Clause.

1. The conclusion of the Supply Agreement was influenced by corruption

14 CLAIMANT underlines that RESPONDENT "*shall have the burden of proving the facts relied on to support its claim or defence"* pursuant to Art. 27(1) PCA Rules [*MfC, p. 12, para. 52*]. However, unlike CLAIMANT proposes, *"clear and convincing"* evidence is not necessary to prove corruption [*against MfC, p. 12, para. 52*]. Since the presence of corruption is never easy to prove, circumstantial evidence suffices [*Rutas de Lima v. Lima; ICC 4145; Oostergeltel and Laurentius v. Slovak Republic; Pereira de Souza Fleury, para. 3; cf. Rumeli Telekom v. Kazakhstan; Rockwell v. Iran; Asian Agricultural Products v. Sri Lanka*].

15 The circumstantial evidence approach is also known as "*red flag approach*" [*Neufeld/Jaramillo, para. 7*]. It provides warning signs of corruption that can be *"any fact that suggests commercial, financial, legal and ethical irregularities"* [*ICC Guidelines; cf. Metal Tech v. Uzbekistan*]. Thereafter, when a tribunal perceives too many red flags, allegations of corruption should not be overlooked [*Neufeld/Jaramillo, para. 7; Pereira de Souza Fleury, para. 3; Llamzon/Sinclair, p. 452*]. The following factors constitute red flags and indicate the influence of corruption:

(1) The selection of the weaker bidder in a tender process constitutes a red flag [*Della Valle/De Carvalho, p. 849*]. Even though the other bidder in the tender process, *Air Systems plc,* had a better offer concerning the price of the drones, its offer was rejected [*Exh. R1, p. 32, paras. 3ff.*]. Instead, a contract with CLAIMANT was concluded [*Exh. C2, p. 12*].

(2) Unusual payment structures and mechanisms constitute a red flag [*Della Valle/De Carvalho, pp. 848f.*]. Generally, the service part of contracts comparable to the Supply Agreement constitutes between three and five percent of the purchase price [*Exh. R1, p. 32, para. 6*]. The share of the maintenance and service part of the Supply Agreement, however, constitutes over 28% of the Supply Agreement [*cf. Exh. R1, p. 32, para. 6, P02, p. 47, para. 27*]. Thus, the Supply Agreement has an unusual payment structure.

(3) The scope and content of the contract have changed drastically [*Exh. R1, p. 32, paras. 5f.*]. Instead of four drones, as specified in the Call for Tender, in the Supply Agreement the PARTIES agreed on the purchase of six drones [*Exh. C1, p. 9, para. 4; Exh. C2, p. 10, Art. 2(a)*]. In addition, the duration of the services was significantly extended from originally two to four years of maintenance [*Exh. R1, p. 32, para. 6*].

(4) Contracting parties with a history of corruption constitute a red flag [*Della Valle/De Carvalho, p. 849; Lockheed Martin, p. 1*]. CLAIMANT was already involved in two corruption schemes before [*PO2, p. 44, para. 3*]. Additionally, it was uncovered that Mr. Field received USD 2 Mio. for the award of two contracts to companies which *"were obviously not able to provide the agreed services"* [*Exh. R2, p. 33, para. 2*]. In this context, two offshore-accounts were traced back to him [*Exh. R2, p. 33, para. 1*].

(5) The involvement of individuals with a history of anti-competitive or illegal behaviour during the negotiations constitutes a red flag [*Della Valle/De Carvalho, p. 849*]. Mr. Bluntschli, CLAIMANT's COO and main negotiator of the Supply Agreement, was arrested for private tax evasion after hiding USD 8 Mio. on offshore-accounts [*PO2, p. 49, para. 40; Exh. C3, p. 13, para. 2*].

(6) Ongoing criminal investigations into corruption constitute a red flag [*Pieth/Betz, p. 8*]. In the present case, there are ongoing criminal investigations of the public prosecutor looking into the conclusion of the Supply Agreement regarding corruption [*Exh. R2, p. 33, para. 3*].

16 Therefore, several red flags in relation to the conclusion of the Supply Agreement can be identified which lead to the conclusion that the Supply Agreement was influenced by corruption.

2. The *doctrine of separability* does not apply to contracts that never came into existence

17 CLAIMANT incorrectly asserts that at hand, the *doctrine of separability* preserves the validity of the Arbitration Clause [*MfC, p. 6, paras. 28ff.*]. However, the *doctrine of separability* does not apply in the present case as the Supply Agreement is void *ab initio*, meaning it is void from the beginning.

18 The *doctrine of separability* is not absolute: *"Contracts void ab initio cannot go into arbitration*" [*Heyman v. Darwins; cf. Adams v. Suozzi; Will-Drill v. Samson; Sphere Drake v. Clarendon; Myirski, p. 312*]. As arbitration relies on the bilateral consent of the parties, there can be no arbitration if there was never an agreement to arbitrate [*Smit, p. 33; Myirski, pp. 312f.; cf. Aster Anderson v. Delta Funding; Muji v. Yue*]. The court in the case of *Pollux Marine Agencies v. Louis Dreyfus* emphasised that *"something can be severed only from something else that exists. How can the Court 'sever' an arbitration clause from a non-existent [contract]?"* [*Pollux Marine Agencies v. Louis Dreyfus; cf. Sphere Drake v. All Am.; Smit, p. 32*]. Moreover, it has been established that the *"judiciary rather than an arbitrator decides whether a contract came into being"* [*Sphere Drake v. All Am.; cf. Maulana Abdul v. Balochistan; N&D Fashions v. DHJ Industries; Aster Anderson v. Delta Funding; Dasyam, p. 7; Pengelley, p. 453; Myirski, p. 310*].

19 In conclusion, the *doctrine of separability* does not apply in the case at hand, as the Supply Agreement is void from the beginning due to corruption.

II. The Arbitral Tribunal lacks jurisdiction due to the influence of corruption on the PARTIES' Arbitration Clause

20 CLAIMANT alleges that the jurisdiction of the Arbitral Tribunal remains independent of corruption [*MfC, p. 6, para. 29*]. However, following the *clean hands doctrine,* CLAIMANT cannot demand justice through arbitration as it violated Equatorianian law. Furthermore, contrary to CLAIMANT's statement, the Arbitration Clause itself was influenced by corruption [*MfC, p. 6, para. 29*].

21 The Arbitral Tribunal has no jurisdiction due to the *clean hands doctrine* **[1]** and as corruption influenced the Arbitration Clause **[2]**.

1. Following the *clean hands doctrine*, the Arbitral Tribunal should decline jurisdiction over the dispute.

22 The *clean hands doctrine* has been applied by various arbitral tribunals in investor-state arbitration [*Hamester v. Ghana; Plama v Bulgaria; Mamidoil v. Albania; Yaung Chi Oo v. Myanmar*]. Although the *clean hands doctrine* has mainly been applied in investor-state arbitration so far, the application to the present dispute is appropriate. Investor-state arbitration is characterised by the involvement of public interest [*OECD Working Papers, p. 2*]. The case at hand is also characterised by public interest as RESPONDENT is a state-owned entity [*NoA, p. 4, para. 2*].

23 Tribunals have found that *"claimants with 'dirty hands' have no standing in investment arbitration"* and thus concluded that a claimant cannot invoke its arbitration agreement to establish the tribunal's jurisdiction [*Rusoro Mining v. Venezuela; cf. Flughafen Zürich v. Venezuela; Phoenix v. Czech Republic; Saur v. Argentina*]. A claimant has *dirty hands* if it engages in corruption [*World duty free v. Kenya; Hamester v. Ghana; Inceysa v. El Salvador; cf. Metal Tec v Uzbekistan*].

24 Many investment treaties contain provisions requiring investments to be made <u>in accordance with</u> the laws and regulations of the host state [*Le Moullec, p. 22*]. These so-called *"in-accordance-with provisions"* embody the *clean hands doctrine* because they ensure compliance with the law [*Le Moullec, p. 22*]. Thus, the *clean hands doctrine* precludes a claimant from demanding justice through arbitration if it violated the laws of the host state. [*Le Moullec, p. 14f.*]

25 At hand, each bidder – including CLAIMANT – warranted that *"it has not made any unauthorized payments or promised other benefits to anyone involved"* by participating in the public tender **("Call for Tender")** [*Exh. C1, p. 9, para. 5*]. Any violation of these warranties *"entitle[s] [RESPONDENT] to terminate the contract [...] <u>in accordance with</u> the applicable Equatorianian law."* [*Exh. C1, p. 9, para. 5; emph. add.*]. This provision represents the *clean hands doctrine* in the current dispute.

26 The conclusion of the agreements in the case at hand were influenced by corruption [*see supras, para. 14ff.*]. Therefore, CLAIMANT's dirty hands prevent it from invoking the Arbitration Clause. Hence, the Arbitral Tribunal should decline its jurisdiction in accordance with the *clean hands doctrine.*

2. The conclusion of the Arbitration Clause was influenced by the corruption

27 Tribunals are not obliged to investigate signs of illegal activity [*Baizeau/Hayes, p. 236; cf. Lachmann, p. 320; Redfern/Hunter, pp. 333f.*]. In line with this, they are also not required to forward information to the competent criminal authorities [*Lachmann, p. 320*]. However, when there are indications that the arbitration agreement is *"the fruit of corruption"* and the corruption taints the parties' choice to arbitrate, tribunals relinquish their jurisdiction to state courts [*ICC 6474; cf. Fiona Trust v. Privalov; Hwang/Lim, p. 62; Uluc, p. 123*].

28 CLAIMANT and Mr. Field, RESPONDENT's former COO, seized the opportunity to hide their corrupt practices behind the veil of arbitration. In Equatoriana, any contracts by the state including an arbitration clause need to be approved by Parliament [*NoA, p. 6, para. 14*]. This is because of the negative public perception of arbitration in Equatoriana [*Exh. C7, p. 19, para. 15*]. After the PARTIES had come to an agreement and wanted to include an arbitration agreement in their contract a parliamentary debate was scheduled to approve the Supply Agreement [*Exh. C7, p. 18, para. 7*]. However, the debate set for 27 November 2020 was called off at the last minute [*Exh. C7, p. 18, para. 9*]. CLAIMANT and RESPONDENT's former COO Mr. Field wanted to avoid any risk that the arbitration clause would not be approved in Parliament [*Exh. C7, p. 18, para. 9*].

29 When it became clear that the anti-arbitration Parliament of Equatoriana would not approve the Arbitration Clause, CLAIMANT and RESPONDENT's former COO, Mr. Field, simply decided to execute the contract without the constitutionally required parliamentary approval [*PO2, p. 47, para. 30*]. CLAIMANT's main negotiator, Mr. Bluntschli, and RESPONDENT's former COO, Mr. Field decided on this conduct when they spent the last weekend of contract negotiations at Mr. Bluntschli's beach house [*cf. Exh. R1, p. 32, para. 4*].

30 As all these factors point to the fact that the Arbitration Clause was the fruit of corruption the Arbitral Tribunal should relinquish its jurisdiction.

B. The Arbitral Tribunal lacks jurisdiction because the missing parliamentary approval invalidates the Arbitration Clause

31 Pursuant to Art. 75 EC, RESPONDENT is not authorized to enter into an arbitration agreement without obtaining the prior approval of the Parliament. At hand, the Equatorianian Parliament never agreed to the Arbitration Clause [*Exh. C7, p. 18, para. 11; NoA, p. 6, para. 14*].

32 Art. 75 of the Equatorianian Constitution provides:

"in contracts relating to public works or other contracts concluded for administrative purposes the State […] entities may submit to arbitration only with consent of the respective minister. If the other party is a foreign entity, […] Parliament has to consent to this submission" [*Response to NoA, p. 30, para. 21*].

33 A rule that restricts a state entities' authority to submit to arbitration is a limitation of its capacity to arbitrate [*Born, § 5.03[E]; Poudret/Besson, p. 182*]. Both PARTIES refer to this issue by using the term 'capacity' [*MfC, pp. 5f., paras. 25f.; pp. 9ff., paras. 39ff.*].

34 Without giving any legal reasoning, CLAIMANT alleges that capacity is governed by the law applicable to the substantive validity of the Arbitration Clause [*MfC, p. 7, para. 30*]. It then argues that the law governing the substantive validity of arbitration agreements was Danubian law and RESPONDENT could therefore not be restricted by Art. 75 EC [*MfC, p. 7, paras. 31ff.*]. Contrary to its own conclusion, CLAIMANT then applies a broad set of international and foreign domestic laws [*against MfC, pp. 7ff., paras. 31ff.*].

35 However, RESPONDENT's capacity to conclude arbitration agreements is governed by RESPONDENT's personal law, including Art. 75 EC **[I]**. The Arbitral Tribunal should apply Art. 75 EC **[II]**. RESPONDENT can rely on Art. 75 EC **[III]**. Pursuant to Art. 75 EC, RESPONDENT lacked the capacity to conclude the Arbitration Clause **[IV]**.

I. RESPONDENT's capacity to conclude arbitration agreements is governed by RESPONDENT's personal law, including Art. 75 EC

36 The PCA Rules and the Arbitration Law of Danubia **("DAL")**, do not impose rules on the capacity to arbitrate. However, Art. V(1)(a) NYC stipulates that the capacity to agree to arbitration shall be governed by the personal law of each party [*Art. V(1)(a) NYC; Poudret/Besson, para. 270*]. Therefore, a tribunal must determine a party's capacity under this party's personal law [*Poudret/Besson, para. 270; Born, § 4.07 [A]*]. Hence, Art. V(1)(a) NYC is a guiding light illuminating the way to determine the applicable law of capacity during the pre-award stage [*cf. Redfern/Hunter, p. 81*].

37 Pursuant to Art. V(1)(a) NYC, an arbitration agreement is invalid if a party was *"under the law applicable to them, under some incapacity"*. The law applicable to the capacity of a legal entity is the law of incorporation or of its seat [*Poudret/Besson, p. 234; cf. Dicey/Morris, pp. 819, 1537; Fouchard/Gaillard/Goldman, p. 245*]. This follows from the underlying rationale that *"a legal person cannot […] exercise […] greater power than is given to it by the legal system to which it owes its existence."* [*Dicey/Morris, pp. 1537f.; cf. Ukraine v. The Law Debenture Trust Corporation*].

38 RESPONDENT is a state-owned legal entity. It is incorporated and has its seat in Equatoriana. [*NoA, p. 4, para. 2; Exh. C2, p. 10, Art. 1; Response to NoA, p. 27, para. 3*]. Hence, the applicable law to RESPONDENT's capacity is the law of Equatoriana. Consequently, the Constitution of Equatoriana,

including Art. 75 EC, applies as it contains rules regarding the capacity of state-owned entities [*Response to NoA, p. 30, para. 21*].

39 Furthermore, contrary to CLAIMANT, the ICCA is irrelevant in determining RESPONDENT's capacity [*against MfC, pp. 7f., para. 33ff.*]. CLAIMANT itself admits that "*the Constitution of Equatoriana likely prevails over the ICCA*" [*MfC, p. 8, para. 38*]. At hand, this is proven by Art. 3.1.1 ICCA, which stipulates that capacity is a matter outside the ICCA's scope of application [*UNIDROIT Principles Commentary, Art. 3.1.1 Art. 1.6(2); Vogenauer/Huber, Art. 3.1.1, paras. 2f.*].

40 Hence, Art. 75 EC determines RESPONDENT's capacity to conclude the Arbitration Clause.

II. The Arbitral Tribunal should apply Art. 75 EC

41 In order to avoid rendering an unenforceable award, the Arbitral Tribunal should apply Art. 75 EC as it safeguards the public policy of Equatoriana.

42 RESPONDENT will demonstrate that the Arbitral Tribunal should apply the public policies of Equatoriana **[1]** and that Art. 75 EC constitutes such a public policy **[2]**.

1. The Arbitral Tribunal should apply the public policies of Equatoriana

43 Pursuant to Art. V(2)(b) NYC, courts may refuse enforcement of an award if it is *"contrary to public policy"*. Courts should deny enforcing an award if the award violates the public policy of the state of enforcement [*Ferrari/Kröll/Papeil, pp. 355f.*]. This stems from the courts' duty to conduct extensive reviews of awards that could violate public policy [*Genentech v. Hoechst; Quarry case*]. Hence, to fulfil its duty to render an enforceable award, a tribunal must apply the law representing public policy at the place of enforcement [*Mante, pp. 278f.; Ferrari/Kröll/Bermann, p. 334*].

44 Since RESPONDENT's assets are located in Equatoriana [*cf. Response to NoA, pp. 27f., paras. 3ff.*], CLAIMANT would have to seek enforcement in Equatoriana. Therefore, the rules of Equatorianian public policy apply to the dispute at hand.

2. Art. 75 EC represents a public policy of Equatoriana

45 Public policies of a nation are its basic norms of justice, the violation of which would be wholly offensive to the reasonable and informed members of the public [*Mante, p. 280*]. The national economic, political, and social demands must determine whether a specific national rule constitutes public policy [*ILA Resolution, p. 214*; *Redfern/Hunter, p. 111; Mante, p. 276; cf. Mayer, p. 2*].

46 In Equatoriana, the restrictions for SOEs to submit to arbitration were seen so fundamental that they were enshrined in its very constitution [*cf. PO2, pp. 47f., para. 31; Response to NoA, p. 30, para. 21*]. The ongoing populous support for Art. 75 EC in Equatoriana is signified by recent Equatorianian politics. For 20 years, the socialist party had been in power [*Response to NoA, p. 29,*

para. 14]. In 2020, the situation changed when the socialist government was criticised for the practice of submitting disputes of public interest to arbitration which was seen as undemocratic practice [*Exh. C7, p. 19, para. 15*]. When the public became aware that the conclusion of such contracts was accompanied by corruption the public showed their disapproval of this practice by ending the reign of the socialist party [*NoA, p. 5, para. 11; Response to NoA, p. 29, para. 14*].

47 The political landscape in Equatoriana therefore shows that policies on arbitration shape the whole of modern Equatorianian politics. Thus, the purpose of Art. 75 EC is representative of domestic Equatorianian public policy. Hence, the Arbitral Tribunal has the duty to apply Art. 75 EC.

III. RESPONDENT can rely on Art. 75 EC

48 Contrary to CLAIMANT's submission, RESPONDENT can rely on Art. 75 EC [*against MfC, pp. 7ff., paras. 30ff.*]. CLAIMANT tries to rely on different legal principles to invoke that RESPONDENT cannot rely on its own domestic law to invoke incapacity. This includes CLAIMANT's farfetched argumentation applying Art. 177(2) Swiss Arbitration Law to the case, even though it is clear that Swiss Arbitration Law does not apply in the case at hand [*against MfC, p. 9, para. 39*].

49 CLAIMANT can neither rely on the Vienna Convention on the Law of Treaties **("VCLT") [1]** nor on its case law to prevent RESPONDENT from invoking Art. 75 EC **[2]**.

1. The Vienna Convention on the Law of Treaties is not applicable

50 CLAIMANT relies on Art. 27 VCLT to prevent RESPONDENT from relying on the Equatorianian Constitution [*MfC, p. 9, para. 41*]. CLAIMANT tries to compare the Supply Agreement and an international treaty regarding its legal consequences [*MfC, p. 9, para. 41*].

51 CLAIMANT argues that the VCLT contains the principle that a *"party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"* [*MfC, p. 9, para. 41, emph. add.*]. Pursuant to Art. 2(1)(a) VCLT, treaties are agreements governed by international law between states.

52 Neither of the PARTIES to the Supply Agreement is a state. The Supply Agreement is therefore no treaty. Hence, CLAIMANT cannot rely on the principle of the VCLT.

2. The invoked case law does not prevent RESPONDENT from relying on Art. 75 EC

53 CLAIMANT further argues that "*[w]hen arbitration is international and one of the parties is an SOE, that party may not invoke its own law to deny its capacity to be bound by an arbitral award"* [*MfC, p. 9, para. 39*]. It bases its argumentation on the *Gatoil II* case **[a]**, the *Raytheon case* **[b]** and the *Benteler v. Belgium* case **[c]** [*MfC, p. 9, para. 39*]. However, RESPONDENT will demonstrate that neither one of those cases is fit to support CLAIMANT's argument.

a) The *Gatoil II* case does not support CLAIMANT's submission

54 CLAIMANT heavily relies on the *Gatoil II* case in order to support its argument that an SOE cannot invoke its own incapacity. In the *Gatoil II* case, the contracting SOE required governmental approval to enter into an arbitration agreement according to the constitution at the SOE's place of incorporation. While the SOE had insisted on arbitration, the private company, however, refused to arbitrate [*Gatoil I*]. After an award was rendered, the private company tried to challenge the arbitral award relying on the incapacity of the SOE to conclude the arbitration agreement. The challenge was refused stating that *"international public policy […] would prohibit [the SOE] from relying on the restrictive provisions of its national law in order to avoid, a posteriori, the arbitration agreed upon between the parties"* and this similarly applies to the private company [*Gatoil II*].

55 This can only be understood as a principle of international public policy stating that a SOE cannot avoid the arbitration after it has already agreed to pursue its interest in the arbitral proceedings. However, it cannot be understood as a general principle to prohibit RESPONDENT invoking its incapacity. At hand, the *Gatoil II* case cannot support CLAIMANT's argument as RESPONDENT contested the Arbitral Tribunals jurisdiction from the beginning [*Letter by Fasttrack, p. 26, para. 2*].

b) The *Raytheon case* does not support CLAIMANT's submission

56 As further proof, CLAIMANT cites the *Raytheon case* in which a Venezuelan company invoked Venezuelan law pursuant to which arbitration agreements require ministerial approval [*MfC, p. 9, para. 39*]. Since ministerial approval had not been granted, it claimed the arbitration agreements invalidity. The court confirmed the validity of the arbitration agreement. However, the national arbitration law in the *Raytheon case* contained an express legal provision prohibiting SOE's from invoking its own incapacity [*Raytheon case; cf. Article 2.2 Spanish Arbitration Law, Law 60/2.003*].

57 Contrary to that national arbitration law, neither Equatorianian nor Danubian law contain such a rule [*PO2, p. 48, para. 33*]. Hence, the *Raytheon case* cannot provide guidance in the case at hand.

c) The *Benteler v. Belgium* case does not support CLAIMANT's submission

58 Equally, *Benteler v. Belgium* does not support CLAIMANT's submission. In this case, the tribunal decided that the arbitration agreement between *Belgium* and *Benteler*, a private company, was valid irrespectively of the incapacity of the Belgian state. However, this decision was solely based on Art. 2 European Convention 1961 [*Benteler v. Belgium*]. Neither Equatoriana nor Danubia have singed the European Convention 1961 and their national arbitration laws do not contain comparable rules [*cf. PO1, p. 43, para. III(3); PO2, p. 48, para. 33*]. Additionally, none of the parties of the arbitration agreement was an SOE [*Benteler v. Belgium*]. Hence, the award cannot be applied and does not support CLAIMANT's argumentation.

59 Thus, the cases referenced by CLAIMANT show that rules that prohibit SOE's from invoking their incapacity are based on national rules rather than principles of transnational law [*Benteler v. Belgium; Raytheon case; Poudret/Besson, p. 192; Ferrari/Kröll/Papeil, pp. 364f.*]. In fact, there is no rule of transnational mandatory law that prohibits SOEs from invoking incapacity [*Poudret/Besson, p. 192f.; Sornarajah, pp. 108f.; cf. Ferrari/Kröll/Papeil, pp. 364f.; Vorburger, pp. 165f.*].

IV. Pursuant to Art. 75 EC, RESPONDENT lacked capacity to conclude the Arbitration Clause

60 Art. 75 EC stipulates conditions under which a state-owned entity's submission to arbitration is possible in Equatoriana. Thereafter, arbitration must be approved by the Parliament if the contracting party is a foreign entity or the arbitration is seated in a different state and the contract relates to public works or other administrative purposes [*Response to NoA, p. 30, para. 21*].

61 First, RESPONDENT is owned by the State of Equatoriana and CLAIMANT is based in Mediterraneo and thus a foreign entity [*NoA, p. 4, paras. 1f.*]. Further, the seat of arbitration would be in Vindobona, Danubia and thus the arbitration would be in a different state [*PO1, p. 43, IV*].

62 Second, *"public works"* include construction projects for the public good executed by the government such as infrastructure projects [*Cambridge Dictionary/public works; Collins Dictionary/public works*]. The Supply Agreement also relates to public works. It contains the purchase and maintenance of six Kestrel Eye 2010 [*Exh. C2, pp. 10f., Art. 2(a)*]. These drones are operated by RESPONDENT to gather data which is used for the construction of infrastructure [*PO2, p. 44, para. 7*]. Additionally, RESPONDENT planned on using the gathered data to gain revenue from the exploitation of natural resources in the Northern Part of Equatoriana to construct this infrastructure [*Response to NoA, p. 28, para. 5*]. The Supply Agreement should therefore be treated as a contract related to public works. The legal department of CLAIMANT shares this view by stating that the Supply Agreement is a contract for *"public infrastructure"* which required the approval by the minister in charge as well as the Parliament [*Exh. C7, p. 18, para. 6*].

63 Third, the systematic placement of *"other administrative purposes"* in Art. 75 EC relates to *"public work"* as its point of reference. Thus, the *"other administrative purposes"* must necessarily also benefit the public. RESPONDENT intended to use the drones to transport urgently needed medicine and small crucial spare parts in remote areas of the Northern Part of Equatoriana [*cf. Exh. R2, p. 33, para. 5*]. The transportation of medicine and spare parts benefits the public and should therefore be considered as an *"other administrative purpose"*.

64 Hence, the Supply Agreement is a contract relating to public work or at least for other administrative purposes and thus meets all the conditions set forth by Art. 75 EC. The

parliamentary debate to approve the Arbitration Clause was called off [*Exh. C7, p. 18, para. 11*]. Therefore, there was no *"consent from parliament"* to the Arbitration Clause [*PO2, p. 47, para. 30*].

65 Consequently, the PARTIES did not validly agree on the Arbitration Clause and the Arbitral Tribunal lacks jurisdiction.

CONCLUSION ISSUE 1

The Arbitral Tribunal does not have jurisdiction to hear the dispute. The PARTIES did not validly conclude the Arbitration Clause as the Arbitration Clause is invalid due to the influence of corruption, even if the *doctrine of separability* is applied. In any case, the Arbitration Clause is invalid since RESPONDENT lacked parliamentary approval which is required by Art. 75 EC. Thus, without a valid Arbitration Clause the Arbitral Tribunal lacks jurisdiction to hear the dispute.

ISSUE 2: THE ARBITRAL TRIBUNAL SHOULD STAY OR ALTERNATIVELY BIFURCATE THE PROCEEDINGS UNTIL THE INVESTIGATIONS AGAINST MR. FIELD ARE CONCLUDED

66 In case the Arbitral Tribunal decides to hear the dispute, RESPONDENT respectfully requests the Arbitral Tribunal to stay or, alternatively, bifurcate the proceedings. The Supply Agreement is tainted by corruption [*see supra, paras. 14ff.*]. On behalf of RESPONDENT, the conclusion of the Supply Agreement was negotiated by Mr. Field. The Arbitral Tribunal should therefore await the results of the investigations into Mr. Field and the Supply Agreement [*Exh. C8, p. 20, para. 2*].

67 CLAIMANT has misunderstood that the prosecutors' office is not only investigating the criminal activities of Mr. Field but also the specific conclusion of the Supply Agreement [*Exh. R2, p. 33, para. 3; against MfC, p. 15, para. 67*]. Contrary to CLAIMANT's understanding, the outcome of the criminal investigations can influence the outcome of these proceedings [*against MfC, p. 15, para. 66*].

68 A tribunal will be able to acquire the results of the investigations. Pursuant to Art. 27 DAL, a tribunal or a party may request court assistance to acquire necessary evidence. As all states have adopted the UNCAC, this assistance will be granted to the tribunal. Pursuant to Art. 46(3)(f) UNCAC, all contracting states shall provide legal assistance in *"providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records"*.

69 Pursuant to Art. 27(4) PCA Rules, the tribunal has the power and duty to determine the admissibility, relevance, and weight of the evidence that is offered by the parties. A tribunal cannot compel the production of evidence, which makes it inherently difficult to prove corruption in

arbitration [*Rose, p. 184*]. Public prosecutors, on the other hand, have more extensive investigative powers [*Rose, p. 220; Della Valle/Schilling de Carvalho, p. 828; Girsberger/Voser, p. 290*].

70 To ensure the arbitral tribunal can fulfil its duty to consider all relevant evidence it should consider domestic investigations as evidence [*Rose, p. 220, Caprasse/Tecqmenne, pp. 545f.; cf. Niko Resources v. Bangladesh*]. CLAIMANT cites *Niko Resources v. Bangladesh* to assert that corruption must be proven by RESPONDENT with clear and convincing evidence [*MfC, p. 12, para. 52*]. However, it fails to mention that the arbitral tribunal has formed the basis for a finding of corruption on domestic findings [*Niko Resources v. Bangladesh; Rose, p. 220*].

71 Thus, the Arbitral Tribunal should stay **[A]** or, alternatively, bifurcate **[B]** the proceedings until the investigations against Mr. Field are concluded to ensure all evidence is considered.

A. The Arbitral Tribunal should stay the proceedings

72 RESPONDENT agrees with CLAIMANT that a tribunal *"has the power to decide the most appropriate matter in which to conduct the arbitral proceeding, including whether a stay […] the proceedings is appropriate"* [*MfC, p. 14, para. 61*].

73 CLAIMANT further correctly highlights [*MfC, pp. 17f., para. 77*] that tribunals should consider different circumstances when determining whether to stay arbitral proceedings [*Groselj, p. 571; cf. Burlington v. Ecuador*]: First, the extent to which the outcome of the parallel matters is necessary to resolve the dispute [*Corona Henriques/Tan, para. 1; Groselj, p. 571; MfC, pp. 17f., para. 77; cf. MOL v. INA*]. Second, whether a stay of the proceedings creates an imbalance between the parties [*Groselj, pp. 561ff.; cf. Iran v. USA; IPOC v.* LVFG; *MfC, pp. 17f., para. 77*]. Third, the protection of the parties' right to be heard and to be treated equally [*Groselj, p. 571; MfC, pp. 17f., para. 77*]. Fourth, the efficiency of the proceedings for the resolution of the dispute [*Groselj, p. 571; MfC, pp. 17f., para. 77*].

74 All four circumstances CLAIMANT identifies to justify the continuance of the proceedings point to the contrary. First, the findings of the investigations are necessary to ensure the enforceability of the award **[I]**. Second, the PARTIES' interests will be balanced because the fairest way to address the corruption scheme is to utilize domestic investigations **[II]**. Third, the right to be treated equally and the right to be heard will be protected **[III]**. Fourth, it is most efficient to wait for the conclusion of the criminal investigations against Mr. Field **[IV]**.

I. Staying the proceedings will ensure the enforceability of the award

75 *"The ultimate purpose of an arbitration tribunal is to render an enforceable award"* [*Lew, p. 119*, *cf. Pitkowitz, p.* 218; *Horvath, p. 135*]. Pursuant to Art. V(2)(b) NYC, the enforcement of an award can be refused by a court if the award conflicts with the public policy of the country where the enforcement is sought. The enforcement of an award violates public policy in the sense of Art. V(2)(b) NYC when

the award arises from a contract procured by corruption [*Wolff, Art. V, para. 576; Gojkovic, p. 3; cf. ICC 1110; ICC 2730; ICC 3916; ICC 5622; ICC 8891*].

76 In the case at hand, enforcement will most likely be sought in Equatoriana as RESPONDENT is a state-owned entity with most of its assets in Equatoriana [*cf. NoA, p. 4, para. 2*]. Equatoriana is a Contracting State to the NYC and therefore Art. V(2)(b) NYC is applicable [*PO1, p. 43, para. III(3)*].

77 CLAIMANT underlines that public policy should be applied *"where the harm to the public is 'substantial' and 'incontestable'"* [*MfC, p. 17, para. 76*]. Specifically, Equatoriana has committed itself to the fight against corruption by signing the UNCAC. The preamble of the UNCAC recognizes the threats posed by corruption *"to the stability and security of societies undermining the institutions and values of democracy"* [*UNCAC Preamble, para. 1*]. Equatoriana has even implemented Art. 15 EACA that prohibits the performance of a contract for the conclusion of which undue benefits were granted. Hence, the fight against corruption is part of Equatoriana's public policy.

78 If the Arbitral Tribunal rendered an award in favour of CLAIMANT but the investigations' results found that the Supply Agreement was procured by corruption, the Equatorianian courts would breach Art. 15 EACA by enforcing the award. Thus, they would have to refuse the enforcement pursuant to Art. V(2)(b) NYC due to public policy.

79 In conclusion, staying the proceedings until the investigations are concluded ensures the enforceability of the award. This provides legal certainty for the PARTIES as the award will not be at risk of contradicting the results of the investigations.

II. Staying the proceedings ensures a fair process for both PARTIES

80 Pursuant to Art. 17(1) PCA Rules, a tribunal must ensure that *"each party is given a reasonable opportunity of presenting its case"*.

81 Arbitral tribunals face evidentiary barriers due to their inability to compel the production of evidence [*von Mehren, pp. 128f.; Speller/et al., pp. 1ff.; Rose, p. 184; Besson, p. 1*]. They can only request information from the parties to the proceedings, not third parties [*Meier/Oetiker/Pitkowitz, p. 31; Della Valle/Schilling de Carvalho, p. 828; cf. Rose, p. 184*].

82 In contrast, a public prosecution office has extensive investigative powers: It can subpoena witnesses, sentence persons to appear, arrest suspects and search and seize property [*Rose, p. 220; Meier/Oetiker/Pitkowitz, p. 31*]. Thus, the fairest solution to tackle these evidentiary barriers is to *"make strategic use of the fact-finding in domestic legal system"* [*Rose, p. 220; cf. Niko Resources v. Bangladesh*].

83 At hand, the limited powers of the Arbitral Tribunal are likely to be insufficient to conduct a full investigation into the corruption. CLAIMANT has already announced that its main negotiator of the

Supply Agreement, Mr. Bluntschli, *"is not willing to testify"* without a remuneration which CLAIMANT rejected to pay [*Exh. C3, p. 14, para. 11*]. Even worse, as he was arrested for private tax evasion, he would not be available for a witness examination by the Arbitral Tribunal [*cf. Exh. C3, p. 13, para. 2*]. This shows that CLAIMANT is unwilling to cooperate in providing evidence for this core issue [*cf. Exh. C3, p. 14, para. 11*].

84 On RESPONDENT's side, the main negotiator and former COO, Mr. Field, would also not be available for a witness examination of the Arbitral Tribunal. After his corrupt activities had been uncovered, he also was arrested [*Exh. C3, p. 13, para. 6; Exh. R2, p. 33, para. 7*]. Therefore, the crucial witnesses could not be convened for a witness examination by the Arbitral Tribunal.

85 It is therefore likely that the Arbitral Tribunal cannot adequately address the issue of corruption. The special public prosecution office of Equatoriana, on the other hand, has broad investigative powers [*Response to NoA, p. 30, para. 23*]. Thus, the fairest way to conduct the proceedings would be to utilize the findings of the investigations by the special public prosecution office.

86 In conclusion the Arbitral Tribunal should stay the proceedings to ensure *"fair and efficient"* proceedings and to ensure *"each party is given a reasonable opportunity of presenting its case"*.

III. Staying the proceedings would not violate CLAIMANT's right to equal treatment

87 CLAIMANT falsely alleges that suspending the proceedings would violate its right to equal treatment [*against MfC, p. 18, para. 79*]. CLAIMANT submits it would be deprived of its opportunity to present its case in front of the public prosecutor, Ms. Fonseca. [*MfC, p. 18, para. 79*]. Yet, only the evidence collected in the criminal investigations, not the court's judgment, will be used by the Arbitral Tribunal to assess the issue of corruption [*PO1, p. 42, para. III(1)(b)*]. This assessment will take place in front of the Arbitral Tribunal where CLAIMANT will have the full opportunity to present its case.

88 Moreover, CLAIMANT raises *"bias suspicions"* against the investigations and the public prosecutor, Ms. Fonseca [*MfC, p. 18, para. 79*]. However, despite CLAIMANT's allegations, the criminal investigations conducted by Ms. Fonseca are reliable and impartial.

89 First, the investigations are conducted by a national public prosecutor, which is obliged to conduct fair and impartial investigations [*UN Prosecutors Guidelines, p. 3; Guidelines for prosecutors, pp. 12f.*].

90 Second, Ms. Fonseca is one of the best-known criminal lawyers in Equatoriana [*PO2, p. 49, para. 44*]. She is dedicated to fight corruption as she is one of the most critical voices against corruption in Equatoriana [*PO2, p. 49, para. 44*]. Opposed to CLAIMANT, this commitment against corruption does not stem from any political motivations [*against MfC, p. 16, para. 71*]. Ms. Fonseca is not even a member of a party forming the Equatorianian government [*PO2, p. 49, para. 44*].

91 Rather, the investigations of the Supply Agreement are based on a positive finding of corruption in a similar case [*Response to NoA, p. 28, para. 11; Exh. R2, p. 33, para. 2; cf. Exh. C5, p. 16, para. 8*]. In this case, the scope of the contract was also substantially changed during the negotiations following a tender process [*Response to NoA, p. 28, para. 11; Exh. R2, p. 33, para. 2; cf. Exh. C5, p. 16, para. 8*]. These negotiations had been held by Mr. Field who also negotiated the Supply Agreement [*Exh. R1, p. 32, para. 4; Exh. R2, p. 33, para. 3*].

92 Thus, the investigations are founded on reasonable grounds and can provide reliable information for the Arbitral Tribunal. Moreover, CLAIMANT will have the opportunity to present its case in front of the Arbitral Tribunal which ultimately may determine the significance of the investigations' findings. Therefore, staying the proceedings does not violate CLAIMANT's right to equal treatment.

IV. Staying the proceedings is the most efficient approach

93 An efficient process requires proceedings to be conducted in the most cost- and time-effective manner while still ensuring a fair process [*cf. Black's Law Dictionary/operational efficiency*].

94 Contrary to CLAIMANT, staying the proceedings is cost-efficient as a stay will keep the costs of the proceedings at a minimum [*against MfC, p. 21, para. 90*]. As the corruption scheme is already being investigated by the public prosecution office, the Arbitral Tribunal avoids unnecessary expenses by not having to investigate the corruption itself.

95 Furthermore, as shown above, it is most likely that the award will not be enforceable without staying the proceedings [*see supra, paras. 75ff.*]. As a result, the Arbitral Tribunal would invest a substantial unnecessary effort and cause unnecessary expenses.

96 Even in the unlikely event that the investigations find no evidence of corruption, a stay would not cause significant costs. The entire process would be put on hold until the facts concerning the corruption would be clarified with legal certainty. During the stay, no additional costs arise for the PARTIES as they do not have to pay fees. Conducting the proceedings without certainty if the award is enforceable imposes the risk that all costs arising from the proceedings are unnecessary.

97 Thus, it would be cost- and time efficient to use the findings of the investigations conducted by the Equatoriana's public prosecution office.

B. The Arbitral Tribunal should, alternatively, bifurcate the proceedings

98 In case the Arbitral Tribunal does not grant a stay, it should bifurcate the proceedings instead.

99 It is undisputed between the PARTIES that the Arbitral Tribunal has the authority to bifurcate the proceedings [*MfC, p. 20, para. 85; cf. Trapl, p. 269; Daly/Goriatcheva/Meighen, Art. 34, para. 6.09; Greenwood I, pp. 105ff.; Castagna, p. 359; Singer/Hanson, p. 103*]. A bifurcation divides the arbitral

proceedings into two separate phases by postponing elected issues [*Castagna, p. 360; Greenwood I, pp. 105ff.; cf. TELUS v. Wellman*].

100 If the proceedings were to be bifurcated, the PARTIES agreed to divide the more abstract legal questions from the question of the contract's invalidity due to corruption [*PO2, pp. 49f., para. 52; Response to NoA, p. 31, para. 25*]. In the first phase of the proceedings, the Arbitral Tribunal would address the application of the CISG and the issue of fraud [*PO2, pp. 49f., para. 52*]. The issue of corruption would then be addressed in the second phase of the arbitration [*PO2, pp. 49f., para. 52*].

101 In order to decide on the bifurcation request, the Arbitral Tribunal should use its discretion in accordance with the abovementioned principles outlined in Art. 17(1) PCA Rules, which prioritize fairness and efficiency. As previously stated, the Arbitral Tribunal's obligation to conduct the proceedings fairly is safeguarded if it holds off on addressing the issue of corruption until investigations have been concluded [*see supra, paras. 80ff.*]. To assess the efficiency of a bifurcation, a tribunal has to take into account the complexity of a dispute [*Trapl, p. 271; Calamita/Sardinah, p. 60*]. In complex disputes, bifurcation promotes procedural efficiency [*Daly/Goriatcheva/Meighen, Art. 17, paras. 5.66f.; Kinnear/Bjorklund/Hannaford, p. 1135; Greenwood II, p. 422*].

102 At hand, the determination of questions III(1)(c) **("Issue 3")** and III(1)(d) **("Issue 4")** at an earlier stage of the proceedings promotes the efficiency of the proceedings. First, separating these abstract legal questions from the corruption issue decreases the complexity of the case **[I]**. Second, separating these abstract legal questions not only saves time but also reduces expenses **[II]**.

I. Bifurcating the proceedings is efficient as it decreases the complexity of the case

103 In complex arbitration, bifurcation allows the parties and the tribunal to focus first on single issues saving cost and time by clarifying the scope of the present arbitration [*Daly/Goriatcheva/Meighen, Art. 17, paras. 5.66f. cf. Kinnear/Bjorklund/Hannaford, p. 1135; Greenwood II, p. 422*]. A dispute is complex if it involves *"numerous and difficult legal issues"* [*Bender, p. 1*].

104 CLAIMANT correctly notes that the complexity of a case cannot be decreased, if the questions are factually closely intertwined [*MfC, p. 20, para. 88*]. However, CLAIMANT is mistaken in its assertion that the merits of the case and the matter of corruption are *"so intertwined as to make bifurcation impractical"* [*MfC, p. 21, para. 89*].

105 On the contrary, Issue 3 and Issue 4 are independent of the corruption claim. The questions Issue 3 [*see infra, paras. 110ff.*] and Issue 4 [*see infra, paras. 160ff.*] address the question of the applicable law to the dispute. These issues are therefore *"abstract legal questions"* and can be resolved independently of the corruption issue [*PO2, pp. 49f., para. 52*]. It would significantly reduce the complexity of the

case if the Arbitral Tribunal addressed the issues of the CISG's scope of application and fraudulent misrepresentation separately from the corruption claim.

106 Henceforth, the Arbitral Tribunal should bifurcate the proceedings to decrease the complexity of the case and to promote a quick and efficient review that is in the PARTIES' mutual interest.

II. Bifurcating the proceedings is efficient as it is likely that the dispute will be entirely solved after the first phase of the proceedings

107 Bifurcating the proceedings serves procedural economy and efficiency when there is a significant likelihood that the first-phase decision will end the case. [*Westwater v. Turkey; Glamis v. USA; Emmis v. Hungary; Tulip v. Turkey; Morris v. Australia; Greenwood II, p. 425; cf. RWE v. Netherlands; Benedettelli, p. 497; Tallerico/Behrendt, p. 296*]. To avoid cost-intensive evidence gathering, bifurcation especially serves the interest of efficiency if the proceedings can be ended by deciding on an issue not requiring extensive evidence gathering [*Kinnear/Bjorklund/Hannaford, p. 1135; Greenwood II, p. 422*].

108 The questions in Issue 3 and Issue 4 pertain to the law applicable to the dispute. If the Arbitral Tribunal finds that the ICCA instead of the CISG applies to the dispute, it could have the same outcome as if corruption was proven. Both would lead to the denial of any contractual claims arising from the Supply Agreement. This is due to the fact that, in accordance with the ICCA, RESPONDENT in principle could rely on Art. 3.2.5 ICCA to be able to avoid the Supply Agreement due to fraudulent misrepresentation [*see infra, paras. 160ff.*]. Hence, there is a significant likelihood that the Arbitral Tribunal ends the proceedings within the first phase of arbitration.

109 Furthermore, contrary to CLAIMANT, bifurcating the proceedings would not result in higher fees for arbitrators or lawyers [*against MfC, p. 20, para. 85*]. These fees depend on the amount of time invested, which in turn is affected by the complexity and scope of the issues [*see supra, paras. 103ff.*]. Therefore, if the Arbitral Tribunal decides to bifurcate the proceedings, the PARTIES will save the costs associated with the arbitrators' and lawyers' time to review and evaluate the findings of corruption. Thus, the Arbitral Tribunal should bifurcate the proceedings to promote efficiency.

CONCLUSION ISSUE 2

In case the Arbitral Tribunal's jurisdiction can be established, it should stay the proceedings until the criminal investigations against Mr. Field are concluded. A stay would ensure an enforceable award as well as fair and efficient proceedings for the PARTIES. Alternatively, the Arbitral Tribunal should bifurcate the proceedings. This provides efficient proceedings as the complexity of the case would be decreased and the dispute could end after the first phase of the proceedings.

ISSUE 3: THE CISG DOES NOT GOVERN THE SUPPLY AGREEMENT

110 RESPONDENT respectfully requests the Arbitral Tribunal to find that the Supply Agreement is governed by the Equatorianian International Commercial Contract Act **("ICCA")** which is based on the UNIDROIT Principles on International Commercial Contracts [*PO1, p. 43, III(3)*].

111 The CISG does not govern the Supply Agreement. First, the sale of the Kestrel Eye 2010 falls outside of the scope of the CISG as it qualifies as an aircraft pursuant to Art. 2(e) CISG **[A]**. Second, the application of the CISG is excluded pursuant to Art 3(2) CISG because the preponderant part of the Supply Agreement is the service part **[B]**.

A. The application of the CISG is excluded pursuant to Art. 2(e) CISG

112 Art. 2(e) CISG states that the CISG does not apply to the sale of aircraft. CLAIMANT falsely submits that the Kestrel Eye 2010 is not an aircraft in the sense of Art. 2(e) CISG [*against MfC, pp. 22ff., paras. 97ff.*]. However, a correct interpretation of Art. 2(e) CISG demonstrates the opposite.

113 The term aircraft in the sense of Art. 2(e) CISG should be interpreted uniformly pursuant to Art. 7(1) CISG giving regard to its wording and drafting history [*cf. Schlechtriem/Schwenzer/Schroeter/Ferrari I, Art 7, para. 36*]. This leads to a broad definition of the term aircraft without the imposition of restrictive criteria [*Honnold/Flechtner, Art. 2, para. 54; cf. Ensthaler/Achilles, Art. 2, paras. 8f.; Herberger/et al./Münch, Art. 2, para. 40*]. In contrast, CLAIMANT proposes to apply restrictive criteria such as whether the aircraft is capable of continual movement or if the aircraft required registration [*MfC, pp. 22ff., paras. 98ff.*].

114 Contrary to CLAIMANT's submission, an interpretation of Art. 2(e) CISG demonstrates that the Kestrel Eye 2010 must be considered an aircraft in the sense of Art. 2(e) CISG **[I]**. Even if the Arbitral Tribunal follows CLAIMANT's narrow approach by using restrictive criteria, the Kestrel Eye 2010 would still be considered an aircraft **[II]**.

I. An interpretation of Art. 2(e) CISG demonstrates that the Kestrel Eye 2010 should be considered an aircraft

115 RESPONDENT agrees with CLAIMANT that the term aircraft should be interpreted autonomously within the CISG [*MfC, pp. 22f. para. 99; cf. Magnus, p. 662*]. However, contrary to CLAIMANT's submission, an autonomous interpretation of aircraft leads to an exclusion of the Kestrel Eye 2010 from the scope of the CISG by virtue of Art. 2(e) CISG [*against MfC, pp. 22f. para. 98*].

116 The wording and drafting history of Art. 2(e) CISG demonstrate that the sale of all aircraft is excluded from the CISG's scope of application **[1]**. The uniform interpretation required by Art. 7(1) CISG confirms that the Kestrel Eye 2010 is an aircraft in the sense of Art. 2(e) CISG **[2]**.

1. The wording of Art. 2(e) CISG and its drafting history demonstrate that all aircraft are excluded from the scope of the CISG

117 Art. 2(e) CISG states that *"this Convention does not apply to sales of ships, vessels, hovercraft or aircraft"* [*emph. add.*]. As the wording does not provide any additional restrictive criteria, it was meant to exclude all aircraft from the scope of the CISG.

118 This interpretation of the wording is supported by the drafting history of Art. 2(e) CISG which can be used to interpret the CISG's provisions [*Schlechtriem/Schwenzer/Schroeter/Ferrari I, Art. 7, para. 36*]. The predecessor of Art. 2(e) CISG is Art. 5(1)(b) of the Uniform Law for the International Sale of Goods **("ULIS")**. Art. 5(1)(b) ULIS did not exclude all aircraft from the scope of the ULIS as it contained a restrictive criterion that the ULIS shall not apply to sales of aircraft *"which [are] or will be subject to registration"*. In Art. 2(e) CISG, however, this criterion was not adopted or replaced [*cf. Travaux préparatoires, p. 16*]. The official reasoning for deleting this restrictive criterion states *"in order not to raise questions of interpretation as to which […] aircraft were subject to this Convention […] the sale of all ships, vessels and aircraft was excluded from the application of this Convention"* [*Travaux préparatoires, p. 16, emph. add.*].

119 Thus, the CISG's drafters intentionally rejected to only exclude registered aircraft in Art. 2(e) CISG. By rejecting this criterion, the CISG's drafters recognized that removing the registration requirement would even result in small vehicles like *"small pleasure craft"* being excluded from the CISG's scope [*Honnold/Flechtner, Art. 2, para. 54; cf. Säcker/et al./Huber, Art. 2, para. 22*].

120 To prevent issues related to determining the CISG's sphere of application, Art. 2(e) CISG excludes all aircraft from its scope of application. [*Travaux preparatoires, p. 16*; *Andersen/Mazzotta/Zeller/Mazzotta, Art. 2, para. 1.2.2; Honsell/Siehr, Art. 2, para. 19; Brunner, Art. 2, para. 14; Herberger/Martinek/Rüßmann/Weth/Würdinger/Münch, Art. 2, para. 40*]. Hence, Art. 2(e) CISG *"must be read without qualification"* [*Honnold/Flechtner, Art. 2, para. 54*].

121 In conclusion, all aircraft are excluded from the CISG's scope of application pursuant to the wording and the drafting history of Art. 2(e) CISG.

2. In accordance with the uniform interpretation required by Art. 7(1) CISG, the Kestrel Eye 2010 qualifies as an aircraft

122 Pursuant to Art. 7(1) CISG, the CISG must be interpreted in a uniform way giving regard to the international character of the CISG. This aims to ensure that *"uniform rules will be considered the common denominator in international business transactions"* [*Kröll/Mistelis/Perales Viscasillas/Perales Viscasillas, Art. 7, para. 17; cf. Bamberger/Roth, Art. 7, para. 5; DiMatteo/Janssen, pp. 1f.*]. To achieve a uniform interpretation of the term aircraft, international standards in international trade should be considered [*Druzin, pp. 426f.*].

123 A recognized global standard is the ISO standard, published by the International Organization for Standardization **("ISO")**. Like the CISG, ISO standards aim to promote uniform international relationships and business transactions [*cf. CISG Preamble; e.g. ISO 13326*]. Thus, the ISO provides an internationally recognized way to interpret the international terms in a uniform manner.

124 According to the ISO, aircraft are defined as "*machines that can derive support in the atmosphere from reactions of the air other than reactions of the air against the earth's surface*" [*ISO 21384, 3.6*]. This definition is supported by different international laws [*Aircraft Act India, Art. 2(1); Civil Aviation Act Australia, Art. 3(1)(a); Civil Aviation Act South Africa, Art. 1(1); Transportation Act Canada, Art. 55(1); Aeronautics Act Canada, Art. 3(1)*]. To put it in simpler terms, an aircraft is *"any vehicle with or without engine that can fly, such as a plane or helicopter"* [*Cambridge Dictionary/aircraft*].

125 The Kestrel Eye 2010 uses "*helicopter technology*" [*Exh. C4, p. 15*] which lifts the vehicle in the air by creating suction due to the shape of the rotor blades [*cf. NASA*]. Thus, the Kestrel Eye 2010 can derive its support in the atmosphere from reactions of the air without having to rely on reactions of the air against the surface [*cf. Exh. C4, p. 15*]. Hence, the Kestrel Eye 2010 is an aircraft according to the uniform definition of aircraft.

126 Following the uniform interpretation outlined in Art. 7(1) CISG and the uniform ISO standard of aircraft, the Kestrel Eye 2010 qualifies as aircraft in the sense of Art. 2(e) CISG.

II. Even if aircraft had to be defined using restrictive criteria, the Kestrel Eye 2010 would still qualify as an aircraft

127 Even if the Arbitral Tribunal follows CLAIMANT's approach by using restrictive criteria, the Kestrel Eye 2010 falls outside the scope of application of the CISG [*against MfC, pp. 22ff., paras. 98ff*].

128 Even taking into account the restrictive criteria mentioned by CLAIMANT [*MfC, pp. 23ff., paras. 102ff.*], the Kestrel Eye 2010 is to be qualified as an aircraft in the sense of Art. 2(e) CISG. The Kestrel Eye 2010's purpose is transportation **[1]**. It is further subject to registration requirements **[2]** and fulfils the criteria of continual movement **[3]** and size **[4]**.

1. The Kestrel Eye 2010's purpose is transportation

129 CLAIMANT argues that the Kestrel Eye 2010 is no aircraft in the sense of the CISG as it is not meant for transportation [*MfC, pp. 25f., paras. 107ff.*]. Opposing CLAIMANT's analysis, the Kestrel Eye 2010 is constructed to transport surveillance equipment and other goods. Thus, even applying the transportation criterion the Kestrel Eye 2010 is to be considered an aircraft.

130 RESPONDENT agrees with CLAIMANT's analysis that the Kestrel Eye 2010 is not meant for the transportation of people [*MfC, p. 25, para. 107*]. In its attempt to deny the Kestrel Eye 2010's

purpose of transportation, CLAIMANT refers to the objective use and RESPONDENT's subjective intended use [*against MfC, p. 25, para. 109*].

131 However, the Kestrel Eye 2010 is objectively built for the transportation of goods **[a]**. Even if the Arbitral Tribunal were to assess the subjective intent, RESPONDENT intends to use the Kestrel Eye 2010 for transportation **[b]**.

a) The Kestrel Eye 2010 can be utilized for transportation

132 CLAIMANT argues that typical tasks for Unmanned Aerial Vehicles **("UAV")** are for example surveillance, monitoring or contamination measurement [*MfC, p. 25, para. 108*]. However, as CLAIMANT itself remarks, the relevant question is whether the aircraft is intended for the "*transport of people or cargo*" [*MfC, p. 25, para. 107, emph. add.*]. Yet, the Kestrel Eye 2010 is meant to carry cargo.

133 The Kestrel Eye 2010 possesses a payload capacity of 245 kg [*Exh. C4, p. 15*]. This payload capacity can be utilized for cargo transportation in either the central payload bay or the optional payload bay [*Exh. C4, p. 15; cf. PO2, p. 44, para. 8*]. Hence, the Kestrel Eye 2010 as such is limited to cargo transportation [*PO2, pp. 44f. paras. 9f.*]. Any other use would require additional equipment [*PO2, pp. 44f., paras. 9f.*].

134 In conclusion, the Kestrel Eye 2010 can be utilized for transportation purposes.

b) The Kestrel Eye 2010 is intended for transportation purposes by RESPONDENT

135 CLAIMANT even goes one step further by using the subjective intent of the PARTIES to determine the term aircraft [*MfC, p. 25, paras. 107ff.*]. Although CLAIMANT's approach heavily contradicts the uniform interpretation required by Art. 7(1) CISG, it still leads to the results that the Kestrel Eye 2010 is excluded by Art. 2(e) CISG.

136 To support its argumentation that the Kestrel Eye 2010 is not an aircraft, CLAIMANT focuses on *"the intended use for air transportation"* [*MfC, p. 25, para. 107*].

137 CLAIMANT alleges that *"transportation was not the intended purpose in either the [Supply Agreement] or the call for tender"* [*MfC, p. 25, para. 109*]. While it is true that in the Call for Tender no use other than the collection of data was specified, the negotiations leading up to the Supply Agreement resulted in the intended use of the Kestrel Eye 2010 for transportation purposes. This was reflected in the Supply Agreement as it expressly provided for the possibility of *"additional use of the aircrafts"* [*Exh. C2, p. 10, para.* 5]. Further, the Minister reinforced that the additional use of the Kestrel Eye 2010 would be to *"transport urgently needed spare parts or medicine to remote areas"* [*Exh. R2, p. 33, para. 5*]. Hence, the Kestrel Eye 2010 was intended to be used for transport.

138 Thus, even following CLAIMANT's approach the intended use is transportation and thus the Kestrel Eye 2010 is excluded by Art. 2(e) CISG.

2. The Kestrel Eye 2010 is subject to the registration requirement pursuant to Art. 10 ASA

139 Even if the Arbitral Tribunal follows CLAIMANT's view that only aircraft that need to be registered are excluded by Art. 2(e) CISG, the Kestrel Eye 2010 would still be an aircraft [*against MfC, pp. 23ff., paras. 102ff.*].

140 CLAIMANT itself admits that its drones *"are generally subject to the rules of the Aviation Safety regulations in the different jurisdictions."* [*Exh. C7, p. 18, para. 2*]. This particularly holds true in Equatoriana due to Equatoriana's Aviation Safety Act **("ASA")**. Pursuant to Art. 10 ASA, aircraft owned or operated by a private entity in the territory of Equatoriana must be registered [*Exh. R5, p. 36*].

141 Pursuant to Art. 1(a) ASA, an aircraft is a *"vehicle with or without an engine, heavier or lighter than air that is used or intended to be used for moving persons or objects in the air without any mechanical connection to the ground"* [*Exh. R5, p. 36*]. UAVs are treated accordingly as aircraft *"if their overall length exceeds 90 cm or if their payload is higher than 50 kg"* [*Exh. R5, p. 36*].

142 CLAIMANT argues that Kestrel Eye 2010 is not covered by Art. 1 ASA [*MfC, p. 28, para. 119*]. To prove this assumption, it tries to argue that the *"intended use of the UAV was never switched to cargo transportation"* [*MfC, p. 26, para. 115*].

143 The Kestrel Eye 2010 will be used by RESPONDENT to *"transport urgently needed spare parts or medicine"* [*Exh. R2, p. 33, para. 5*]. Hence, the Kestrel Eye 2010 is intended to move objects. The Kestrel Eye 2010 merely has a radio connection to the ground and is not mechanically connected to the ground [*cf. Exh. C4, p. 15*]. Since the Kestrel Eye is a 6.3 m long and contains a payload of 245 kg, both additional requirements for UAVs of Art. 1 ASA are met [*cf. Exh. C4, p. 15*]. Thus, the Kestrel Eye 2010 qualifies as an aircraft pursuant to Art. 1 ASA.

144 CLAIMANT erroneously argues that the Kestrel Eye 2010 does not need to be registered pursuant to Art. 10 ASA as RESPONDENT *"is not a private entity, it is a SOE"* [*against MfC, pp. 24f., para. 106*]. However, not only is RESPONDENT *"operated like a commercial company"* [*PO2, p. 44, p. 5*], it has also been recognized by CLAIMANT that RESPONDENT *"is a private company"* [*NoA, p. 4, para. 2*].

145 Hence, the Kestrel Eye 2010s purchased by RESPONDENT need to be registered in Equatoriana and are therefore aircraft in the sense of Art. 2(e) CISG.

3. The Kestrel Eye 2010 fulfils the criterion of continual movement

146 According to CLAIMANT's submission, another determining characteristics of aircraft in the sense of the CISG is whether an aircraft is meant for continual movement [*MfC, p. 25, para. 107*].

CLAIMANT states that *"while aircrafts are intended for "continual movement", UAVs […] suggest multiple stops in [their] movement"* [*MfC, p. 25, para. 107*].

147 To support its view, CLAIMANT relies on *Spohnheimer* who defines vehicles intended for continuous movement as vehicles, which are not *"intended for a local use at the same place"* [*Kröll/Mistelis/Perales Viscasillas/Spohnheimer, Art. 2, para. 44*]. As examples *Spohnheimer* provides *"house boats, oil rigs and floating decks"* [*Kröll/Mistelis/Perales Viscasillas/Spohnheimer, Art. 2, para. 44*]. While these examples have in common that they are not intended to move greater distances, the Kestrel Eye 2010 is suitable to reach the remote parts of Northern Equatoriana [*Exh. R2, p. 33, para. 5*].

148 Therefore, the Kestrel Eye 2010 fulfils the criterion of continuous movement.

4. The Kestrel Eye 2010 fulfils the criterion of size

149 Although CLAIMANT, in its memorandum, recognizes the criterion of size, it refrains to use the criterion of size to determine aircraft in the sense of Art. 2(e) CISG [*MfC, p. 24, para. 104*].

150 In the same way ships of significant size are excluded from the CISG's scope of application pursuant to Art. 2(e) CISG, and only aircraft of considerable size should be excluded as the rationale can be transferred to aircraft [*Piltz, pp. 39f.; cf. Kröll/Mistelis/Perales Viscasillas/Spohnheimer, Art. 2, para. 39; Brunner, Art. 2, para. 14*]. More specifically, drones should be considered aircraft unless they are mere toys of small size [*Staudinger/Magnus, Art. 2, para. 48*].

151 Whilst the Kestrel Eye 2010 has an overall length of 6,3 m and a height of 4 m, only its rotors have a span of 7 m [*Exh. C4, p. 15*]. Thus, the Kestrel Eye 2010 is an aircraft of considerable size.

B. The application of the CISG is excluded pursuant to Art. 3(2) CISG

152 Contrary to CLAIMANT, the Supply Agreement is excluded from the CISG's scope of application pursuant to Art. 3(2) CISG as its service part is the predominant part [*against MfC, p. 22, paras. 95f.*].

153 Art. 3(2) CISG excludes contracts from the application of the CISG in which the preponderant part is the supply of labour or other services. CLAIMANT states that solely the economic value of the different parts of the contract should be considered to assess the preponderant part of a sales contract [*MfC, p. 22, para. 95*]. However, this would contradict the drafting history during which a proposal to include the wording *"major part in value"* in Art. 3(2) CISG was rejected [*Travaux préparatoires, p. 84; CISG-AC No. 4; Schlechtriem/Schwenzer/Schroeter/Ferrari I, Art. 3, para. 14*].

154 Instead, the preponderant part of the contract is to be determined by an overall assessment including the parties' intent [*Potato chips plant case; Czerwenka, p. 144; Säcker/et al./Huber, Art. 3, para. 14; cf. Schroeter III, p. 46; Kröll/Mistelis/Perales Viscasillas/Ferrari, Art. 3, para. 18; CISG-AC No 4*]. The economic approach only serves as a starting point and can be superseded by the parties

allocating the importance of each part of the contract differently [*Schlechtriem/Schwenzer/Schroeter/Hachem II, Art. 3, para. 18; cf. Airbags case; Steel bars case*].

155 The weight placed by the parties on each part of a contract is one of the *"primary determinative factors"* [*Kröll/Mistelis/Perales Viscasillas/Ferrari, Art. 3, para. 19*] while assessing the preponderant part pursuant to Art. 3(2) CISG [*Centerless grinding machine case; cf. Säcker/et al./Huber, Art. 3, para. 14*].

156 CLAIMANT mistakenly argues that the Supply Agreement is governed by the CISG as the economic value of the goods exceeds 50% of the contracts' total value [*against MfC, p. 22, paras. 95f.*]. This argumentation should not be followed as the service part of the Supply Agreement is preponderant.

157 As stated in Art. 2(f) of the Supply Agreement, RESPONDENT primarily has an interest in a *"proper operation of the UAS"* [*Exh. C2, p. 11, Art. 2(f)*]. For this purpose, the use of frequent maintenance and services is inevitable. CLAIMANT provides these services [*Exh. C2, pp. 10f., Art. 2(f)*]. The PARTIES extended the originally envisioned two-year maintenance period to four years [*Exh. R1, p. 32, para. 6*]. Furthermore, the service part is over five times higher than a service part of a typical sales contract [*cf. Exh, C2, p. 11, Art. 3, Exh. R1, p. 32, para. 6, P02, p. 47, para. 27*].

158 Specifically, CLAIMANT placed more weight on the service part as it was of high economic interest to for CLAIMANT. During the negotiations, CLAIMANT specifically informed RESPONDENT that its offer was only possible due to the structure of the *"service element of the contract"* [*Exh. R4, p. 35, para. 2*]. Thus, CLAIMANT would have not concluded the Supply Agreement without the service part [*cf. Exh. R4, p. 35, para. 2*].

159 The present circumstances allow to derogate from the economic approach and therefore the Arbitral Tribunal should find that the application of the CISG is excluded by Art. 3(2) CISG.

CONCLUSION ISSUE 3

The CISG does not govern the Supply Agreement. The application of the CISG to the Supply Agreement is excluded as the Kestrel Eye 2010 is an aircraft in the sense of Art. 2(e) CISG. An extensive interpretation of Art. 2(e) CISG reveals that all aircraft should be excluded from the application of the CISG. Even following CLAIMANT's approach by applying restrictive criteria, the Kestrel Eye 2010 would still be excluded by Art. 2(e) CISG. Further, the application of the CISG to the Supply Agreement is excluded by Art. 3(2) CISG as its service part is the preponderant part. Thus, instead of the CISG, the ICCA should be applied to the Supply Agreement.

ISSUE 4: IN CASE THE SUPPLY AGREEMENT IS GOVERNED BY THE CISG, RESPONDENT CAN RELY ON ART. 3.2.5 ICCA TO AVOID THE SUPPLY AGREEMENT

160 RESPONDENT respectfully requests the Arbitral Tribunal to find that even if the CISG was applicable, RESPONDENT can in principle rely on Art. 3.2.5 ICCA to avoid the Supply Agreement.

161 CLAIMANT seeks to profit from an unduly favourable contract that would never have been concluded but for CLAIMANT's fraudulent misrepresentation. It tries to circumvent the legal consequences of its actions by arguing that RESPONDENT could not rely on Art. 3.2.5 ICCA because it was pre-empted by the CISG [*MfC, pp. 28ff., paras. 122ff.*].

162 If an issue falls within the scope of the CISG, the CISG prevails over domestic law [*Thyssenkrupp v. Energy Coal; Schroeter I, p. 59*]. However, the subject matter of Art. 3.2.5 ICCA is not covered by the CISG. Thus, the CISG cannot pre-empt the application of Art. 3.2.5 ICCA.

163 RESPONDENT can rely on Art. 3.2.5 ICCA because CLAIMANT acted fraudulently **[A]**. Even if CLAIMANT had not acted fraudulently, RESPONDENT could rely on Art. 3.2.5 ICCA as the CISG does not provide a functionally adequate solution **[B]**.

A. RESPONDENT can in principle rely on Art. 3.2.5 ICCA because CLAIMANT acted fraudulently

164 The CISG does not pre-empt the reliance on Art. 3.2.5 ICCA because the matter of fraud is excluded from the CISG's scope of application [*against MfC, pp. 28ff., paras. 122ff.*].

165 CLAIMANT itself notes *"that 'validity' covers fact patterns involving tort and fraudulent misrepresentation which are therefore excluded from the scope of the CISG"* [*MfC, p. 30, para. 130*]. This follows from the exclusion of validity in Art. 4(a) CISG **[I]**. As CLAIMANT acted fraudulently **[II]**, the CISG does not pre-empt the application of Art. 3.2.5 ICCA.

I. Pursuant to Art. 4(a) CISG, fraud is excluded from the CISG's scope of application

166 Pursuant to Art. 4(a) CISG, the CISG is not concerned with the validity of contracts *"except as otherwise expressly provided in this Convention"*.

167 Validity in the sense of Art. 4(a) CISG targets all issues by which the *"domestic law would render the contract void, voidable, or unenforceable."* [*Geneva Pharmaceuticals v. Barr Laboratories; cf. Hartnell, p. 45; Rosett, p. 292*]. Art. 3.2.5 ICCA is part of the ICCA's *"Chapter 3 – Validity"* and renders a contract void [*Art. 3.2.14 ICCA; Vogenauer/Du Plessis, Art. 3.2.14, para. 1*]. Hence, Art. 3.2.5 ICCA – a provision governing fraud – concerns a matter of contract validity in the sense of Art. 4(a) ICCA.

168 Furthermore, the CISG does not provide an express provision dealing with *"unfair or culpable conduct"* as it is not designed to do so [*Lookofsky II, p. 286; cf. Bianca/Bonell/Khoo, p. 47*]. Instead, it is generally

agreed that the CISG does not provide provisions concerned with fraud and thus fraud is not governed by the CISG [*Soinco SACI v. NKAP; Used car case I; Semi-Materials v. MEMC Materials; Electrocraft Arkansas v. Super Electric Motors; Valley v. Lebbing; TeeVee Toons v. Schubert; Schroeter II, pp. 585f.; Hartnell, pp. 70ff.; Lookofsky I, p. 21; Kastely, p. 590; cf. Dingxi v. Becwood; Snowchains case*].

169 Therefore, Art. 3.2.5 ICCA governs a subject matter that the CISG does not address. Even if the CISG was applicable to the Supply Agreement, Art. 4(a) CISG would require the application of Art. 3.2.5 ICCA.

II. CLAIMANT acted fraudulently

170 With the exclusion of fraud from the CISG's scope of application, this subject matter was left to domestic law [*Soinco SACI v. NKAP; Chinese circuit boards case; Semi-Materials v. MEMC Materials; Piltz, p. 81; Lookofsky II, p. 280; Kastely, p. 590*]. Hence, it is to be determined by domestic law whether a party's conduct is considered fraudulent [*Soinco SACI v. NKAP; Chinese circuit boards case; Semi-Materials v. MEMC Materials; Hartnell, p. 71; Bell, p. 252; cf. Snowchains case; Lessiak, pp. 492ff.*]. Pursuant to Art. 3.2.5 ICCA, a party may avoid the contract *"when it has been led to conclude the contract by the other party's fraudulent representation […] or fraudulent non-disclosure"*.

171 CLAIMANT engaged in both, fraudulent misrepresentation **[1]**, and non-disclosure **[2]**. This fraudulent conduct has led RESPONDENT to conclude the Supply Agreement **[3]**. The Merger Clause does not prohibit the Arbitral Tribunal from considering all evidence **[4]**.

1. CLAIMANT engaged in fraudulent misrepresentation

172 Pursuant to Art. 3.2.5 ICCA, a party may avoid the contract *"when it has been led to conclude the contract by the other party's fraudulent representation"*. CLAIMANT has engaged in fraudulent misrepresentation [*against MfC, pp. 31, paras. 132ff.*]. The Kestrel Eye 2010 was represented as *"state-of-the-art"* **[a]** even though it was not **[b]**. The misrepresentation was done with fraudulent intent **[c]**.

a) CLAIMANT represented the Kestrel Eye 2010 as *"state-of-the-art"*

173 Representations in the sense of Art. 3.2.5 ICCA are all statements and conduct made *"expressly or by implication"* through *"words or actions"* [*Vogenauer/Du Plessis, Art. 3.2.5 ICCA, paras. 11f.*].

174 In its Call for Tender, RESPONDENT specifically requested *"four state-of-the-art unmanned aircraft systems"* [*Exh. C1, p. 9, para. 4*]. By submitting its bid as a reply to this Call for Tender, CLAIMANT implicitly represented its Kestrel Eye 2010 as *"state-of-the-art"*. CLAIMANT upheld this representation during the negotiations by referring to the Kestrel Eye 2010 as its *"present top model for [Respondent's] purpose"* because of its *"advanced technology"* [*Exh. R4, p. 35, para. 3; against MfC, pp. 31f., para. 135*].

b) CLAIMANT's representation of the Kestrel Eye 2010 as *"state-of-the-art"* was false

175 *"State-of-the-art"* indicates that a good's technology is at *"the level of pertinent scientific and technical knowledge existing at the time of a product's manufacture"*, which is *"available at the time the product was sold"* [*Black's Law Dictionary/state-of-the-art, emph. add.; cf. Cambridge Dictionary/state-of-the-art; Collins Dictionary/state-of-the-art*]. Consequently, the *"state-of-the-art"* is constantly evolving as new technologies and products are developed and introduced to the market [*Ometov/et al., p. 1*]. Hence, the available technology on the market, not CLAIMANT's outdated product portfolio, sets the bar for what is to be considered *"state-of-the-art"* technology [*against MfC, p. 34, para. 144*].

176 First, the Kestrel Eye 2010 had already been developed in 2010 and represents the technological standards of 2010 [*cf. Exh. C7; p. 19, para. 13*]. In contrast, CLAIMANT's new drone – the Hawk Eye 2020 – represented *"the level of pertinent scientific and technical knowledge"* as it was developed at the time of the contract's conclusion in 2020. Thus, at the time of the contract's conclusion, not the Kestrel Eye 2010 but CLAIMANT's new Hawk Eye 2020 was "*state-of-the-art*".

177 Second, the comparison of the technical specifications of the Kestrel Eye 2010 with the Hawk Eye 2020 shows that it lags behind *"state-of-the-art"* drones in every technical aspect [*Exh. C4, p. 15, para. 2*; *Exh. R3, p. 34, para. 2*]. This is illustrated by the following chart:

	Kestrel Eye 2010	Hawk Eye 2020
Capacity	245 kg	2,200 kg
Maximum take-off weight	1,100 kg	6,250 kg
Maximum speed	250 km/h	460 km/h
Dispatch reliability	89 %	95 %
Maintenance interval	100 hours	200 hours
Endurance	13 hours	37 hours

178 Third, while the new Hawk Eye 2020's engine runs on commonly used Avgas 100LL fuel, the old Kestrel Eye 2010's engine is running on outdated JP-4 military fuel [*Exh. C4, p. 15, para. 2*]. JP-4 fuel was already phased out in the 1990s due to its above-average flammability and toxic properties [*Shell Global, Military Jet Fuel; Toxicological Profile, p. 4*]. Nowadays, JP-4 is barely produced [*Shell Global, Military Jet Fuel*].

179 In its memorandum, CLAIMANT attempts to justify itself by emphasizing that the Hawk Eye 2020 *"had not yet been presented to the market"* [*MfC, p. 34, para. 144*]. However, the available technology on the market sets the standard for what is to be considered *"state-of-the-art"* [*see supra, paras. 175ff.*]. Even though CLAIMANT's new Hawk Eye 2020 was not available at the time of the contract's

conclusion, similar drones were already on the market [*PO2, p. 45, para. 14*]. Merely because CLAIMANT lags behind the market does not mean the "*state-of-the-art"* remains the same until CLAIMANT comes up with new products.

180 The Kestrel Eye 2010 was not *"state-of-the-art"* and the representation as such was false.

c) CLAIMANT acted with fraudulent intent when misrepresenting the Kestrel Eye 2010

181 As CLAIMANT illustrates, conduct is fraudulent if it *"it is intended to lead the other party into error and thereby to gain an advantage to the detriment of the other party"* [*MfC, p. 32, para. 138*]. A party, therefore, acts fraudulently *"if it knows that its representation is false, yet makes it deliberately, with the purpose of leading the other party into believing it."* [*Vogenauer/Du Plessis, Art. 3.2.5 ICCA, para. 6, emph. add.*].

182 At hand, CLAIMANT deliberately misrepresented the Kestrel Eye 2010 with the purpose to make RESPONDENT believe that the drone is *"state-of-the-art"*. CLAIMANT's argument that it acted in good faith is neither accurate nor an excuse for fraud.

183 CLAIMANT cannot and did not deny that it knew the Hawk Eye 2020 and not the Kestrel Eye 2010 represented the newest technological standard. To keep up with the technological standard, CLAIMANT purchased a competitor to use its knowledge and invested *"three years of development and extensive testing"* for developing the Hawk Eye 2020 [*NoA, p. 5, para. 10*].

184 Even though the Hawk Eye 2020 represented the standard requested by the Call for Tender, CLAIMANT was under economic pressure to sell its old Kestrel Eye 2010. Due to the insolvency of another customer, CLAIMANT bought back three Kestrel Eye 2010s in 2020 [*PO2, p. 46, para. 25*]. This resulted in CLAIMANT suddenly possessing three Kestrel Eye 2010s more and one customer less [*PO2, p. 46, para. 25*]. Since CLAIMANT only produces five drones per year [*NoA, p. 4, para. 1*], the loss of one customer had to be compensated by a large sale. To escape its economic pressure, CLAIMANT had to seal a deal. To seal the deal with RESPONDENT, CLAIMANT intentionally misrepresented the Kestrel Eye 2010 as *"state-of-the-art"*.

185 The pressure intensified when RESPONDENT asked to renegotiate the Supply Agreement shortly before the signing date [*PO2, p. 48, para. 39; cf. Exh. R4, p. 35, para. 2*]. CLAIMANT rejected these requests by reinforcing that the Kestrel Eye 2010 was the *"present top model"* with its *"state-of-the-art"* features [*Exh. R4, p. 35, paras. 3f.*]. This shows that CLAIMANT intentionally maintained the misrepresentation until the signing of the contract and long after [*Exh. R4, p. 35, paras. 3f.*].

186 CLAIMANT now seeks to wash its hands of the fraud by pretending that it *"acted in good faith"* [*MfC, p. 32, para. 139*]. However, even if CLAIMANT had acted in good faith, it would be no excuse *"that*

the motive was to act in the best interests of others, even though they were in fact led to act to their detriment" [*Vogenauer/Du Plessis, Art. 3.2.5, para. 9*].

187 Hence, CLAIMANT deliberately misrepresented the Kestrel Eye 2010 to convince RESPONDENT to buy the drones.

2. CLAIMANT engaged in fraudulent non-disclosure

188 Moreover, CLAIMANT violated its obligation to disclose the release of the Hawk Eye 2020.

189 A decision of the Equatorianian Supreme Court requires an experienced private party to disclose *"all information potentially relevant"* if its contracting partner is a newly formed government entity [*Response to NoA, pp. 29f., para. 18; cf. PO2, p. 46, para. 18*]. Although the Arbitral Tribunal is not bound by any court decisions, it should consider the Supreme Court decision as it offers valuable orientation to the case at hand.

190 Both disputes share a comparable factual and legal basis. In 2010, the Supreme Court decided a dispute between an experienced private entity and a newly formed government entity [*Response to NoA, pp. 29f., para. 18*]. In terms of the legal basis, the Supreme Court interpreted an equivalent provision to Art. 3.2.5 ICCA [*Response to NoA, pp. 29f., para. 18*].

191 The Supreme Court ruled that the private party had extensive disclosure obligations, including all information that could be relevant to the government entity [*Response to NoA, pp. 29f., para. 18*]. An intentional violation of these disclosure obligations constitutes misrepresentation, entitling the government entity to avoid the contract under the equivalent of Art. 3.2.5 ICCA [*Response to NoA, pp. 29f., para. 18*].

192 CLAIMANT was established more than 20 years ago whereas RESPONDENT is entirely owned by the government and was only founded at the end of 2016 [*PO2, p. 44, para. 1ff.*]. Thus, similar to the Supreme Court decision, the present dispute concerns an experienced private company contracting with a newly formed government entity. Moreover, RESPONDENT relies on Art. 3.2.5 ICCA the equivalent provision ruled upon by the Supreme Court.

193 Following the Supreme Court's decision, CLAIMANT had to disclose all relevant information to RESPONDENT. CLAIMANT could have delivered drones that were more suited for RESPONDENT's purpose [*PO2, pp. 45f., para. 17*]. This is relevant information for RESPONDENT since RESPONDENT sought *"the most attractive bids taking into account the criteria set out"* in its Call for Tender [*Exh. C1, p. 9, para. 3*]. CLAIMANT, therefore, had to disclose the upcoming presentation of the Hawk Eye 2020.

194 CLAIMANT planned to present its new Hawk Eye 2020 at an air show in early 2021 [*NoA, p. 5, para. 10*]. Hence, it knew of the upcoming presentation at the time of contract conclusion in

December 2020. To convince RESPONDENT to buy the Kestrel Eye 2010 CLAIMANT intentionally kept this information from RESPONDENT [*see supra, paras. 181ff.*]. Hence, CLAIMANT kept this information to itself and thereby intentionally violated its disclosure obligation.

195 Therefore, CLAIMANT engaged in fraud in the sense of Art. 3.2.5 ICCA.

3. CLAIMANT's fraudulent conduct has led RESPONDENT to conclude the Supply Agreement

196 Yet, the Supply Agreement would either have been concluded on different terms or not concluded at all since RESPONDENT would have profited from the Hawk Eye 2020's additional functionalities [*PO2, pp. 45f., para. 17*].

197 Pursuant to Art. 3.2.5 ICCA, fraud requires that the party has been *"led to conclude the contract"* by the fraudulent misrepresentation. It is sufficient that a party would have concluded the contract on different terms [*Vogenauer/Du Plessis, Art. 3.2.5 ICCA, para. 24*].

198 Originally, the decision to increase the volume of the Supply Agreement to six drones was based on the identification of *"potential additional fields of use"* [*NoA, p. 5, para. 5; cf. Exh. R4, p. 33, para. 5*]. As mentioned by the Equatorianian Minister in his speech, the drone's additional use is the *"transport [of] urgently needed spare parts or medicine to remote areas of the Northern Part of Equatoriana"* [*Exh. R2, p. 33, para. 5; cf. NoA, p. 5, para. 5*]. However, a single Hawk Eye 2020 has the same cargo capacity as nine Kestrel Eye 2010s [*see supra, para. 177*]. Moreover, the Hawk Eye 2020 has a longer endurance than the Kestrel Eye 2010 and satellite as its communication link, which allows for the possibility *"to conduct with one flight more than one investigation"* [*PO2, p. 46, para. 17*].

199 Hence, if CLAIMANT disclosed the information about the Hawk Eye 2020 the Supply Agreement would not have been concluded or at least on different terms.

4. The Merger Clause does not prohibit the Arbitral Tribunal from considering all evidence

200 In the case at hand, Art. 21 of the Supply Agreement **("Merger Clause")** states that the document of the Supply Agreement contains the entire agreement between the PARTIES. CLAIMANT argues that the tender documents and *"any affirmations made by Mr. Bluntschli are irrelevant due to the operation of the merger clause contained in Art. 21 of the PSA"* [*MfC, p. 31, paras. 133f.*].

201 In case the Arbitral Tribunal applies the CISG to the Supply Agreement, the scope of the Merger Clause has to be assessed in accordance with the CISG [*cf. Meyer, p. 595; Bonell, p. 698; Lookofsky III, p. 67*]. In a CISG context, it intends to exclude *"all relevant circumstances"* prescribed by Art. 8(3) CISG. All relevant circumstances include oral statements and agreements made prior to the contract [*Kröll/Mistelis/Perales Viscasillas/Zuppi, Art. 8, para. 29*]. To determine whether parties

have derogated from the application of Art. 8(3) CISG to their contract, the actual parties' intent needs to be assessed pursuant to Art. 8 CISG [*CISG-AC No. 3, Art. 4.6; Meyer, pp. 595ff.*]. The limitation of the contract to the *"entire agreement"* does not suffice [*Meyer, p 595; Bonell, p. 698*].

202 In the case at hand, CLAIMANT asked to insert the Merger Clause on the last day before the ceremonial signature of the Supply Agreement [*PO2, pp. 48f., para. 39; Exh. C3, p. 13, para. 3*]. Because RESPONDENT did not want to blow up the signature event last minute, it accepted CLAIMANT's request [*cf. PO2, pp. 48f., para. 39*]. In any case, the undifferentiated wording of the Merger Clause does not suffice to establish the PARTIES' intent to exclude any circumstances. Thus, the PARTIES did not intend to deviate from the interpretation pursuant to Art. 8(3) CISG.

203 In any case, a merger clause, being a provision in a contract, cannot prevent the introduction of *"extrinsic evidence"* that may render the contract void and thus the merger clause contained therein. [*Vogenauer/Vogenauer, Art. 2.1.17, para. 7; cf. Haynes v. Morton*; *Riverisland v. Fresno*; *Hull Dobbs v. Mallicoat; Meyer, p. 593; Baumann, p. 97; Fontaine/de Ly, pp. 147f.*]. This includes evidence for mistake and fraudulent misrepresentation [*Vogenauer/Vogenauer, Art. 2.1.17, para. 7; Meyer, p. 593*].

204 Thus, contrary to CLAIMANT's last-resort effort to exclude relevant circumstances, the Arbitral Tribunal may consider all evidence despite the Merger Clause.

B. In any case, the CISG does not contain a functionally adequate solution for the case at hand, and therefore Art. 3.2.5 ICCA can be relied upon

205 CLAIMANT argues that the subject matter of the present case does not concern fraud, but rather negligent behaviour [*MfC, pp. 30ff., paras. 130ff.*]. It alleges the CISG would not be excluded from the outset pursuant to Art. 4(a) CISG. It further argues that *"no recourse to art. 3.2.5 ICCA is needed"* as the subject matter in the case at hand is a matter of conformity governed by Art. 35 CISG [*MfC, p. 32, para. 137, cf. MfC, pp. 30ff., paras. 130ff.*].

206 Although CLAIMANT does not provide a legal basis for this conclusion it could have relied on some scholar's opinion that the CISG pre-empts *"national law on validity […] when the CISG provides a functionally adequate solution"* [*Enderlein/Maskow/Strohbach, Art. 4, para. 3.1*]. To evaluate if the CISG provides such functionally adequate solutions, the relevant provisions of the domestic law and the CISG have to be compared [*Köhler, p. 66; Ferrari, p. 67*].

207 However, Art. 3.2.5 ICCA can in principle be relied upon as the CISG does not contain a functionally adequate solution to Art. 3.2.5 ICCA's subject matter. Art. 3.2.5 ICCA governs mistake induced by culpable conduct **[I].** Yet, the CISG does not account for this subject matter **[II]**. CLAIMANT's argument based on Art. 7(2) CISG does not prevent the reliance on Art. 3.2.5 ICCA either **[III]**.

I. Art. 3.2.5 ICCA governs mistake induced by culpable conduct

208 Art. 3.2.5 ICCA constitutes a provision characterised by its function to govern a special case of mistake [*Vogenauer/Du Plessis, Art. 3.2.5, paras. 1ff.*]. Pursuant to Art. 3.2.1 ICCA, *"mistake is an erroneous assumption relating to facts […] existing when the contract was concluded"*. Art. 3.2.5 ICCA covers a different scope of application and regulation than a general provision on mistake as it requires culpable conduct to cause a mistake [*cf. Vogenauer/Du Plessis, Art. 3.2.5, paras. 1ff.*]. Thus, the relevant provision, Art. 3.2.5 ICCA, governs mistake caused by culpable conduct.

II. Art. 35 CISG does not contain a functionally adequate solution for mistake induced by culpable conduct

209 Contrary to CLAIMANT's position, Art. 35 CISG does not provide a functionally adequate solution for the subject matter of the present case being mistake induced by culpable conduct in the sense of Art. 3.2.5 ICCA [*against MfC, pp. 31f., paras. 135ff.*].

210 First, the CISG's rules on non-conformity govern different fact patterns than domestic provisions on mistake [*Neumayer, p. 102; Lessiak, p. 490*]. Following Art. 3.2.5 ICCA, a party's misrepresentation must have caused an error of fact to the other party leading it to concluding the contract [*Vogenauer/Du Plessis, Art. 3.2.5, para. 23; Lessiak, p. 490*]. In contrast, a breach of contract in Art. 35 CISG does not require such error [*Lessiak, p. 490*].

211 Second, domestic rules on mistake are functionally different [*Neumayer, p. 102; Lessiak, p. 491*]. These rules are meant to protect the other party's trust in the facts that it was made to believe and that formed the factual basis for its decision to contract [*Lessiak, p. 491*]. Art. 35 CISG serves to uphold the balance between the value of the goods and the price paid [*Lessiak, p. 491*].

212 Third, Art. 35 CISG and Art. 3.2.5 ICCA unfold their effect at different stages of the parties' contractual relationship. Art. 35 CISG unfolds its effect regarding the non-conformity of the goods after the delivery of the good. Art. 3.2.5 ICCA in contrast may already unfold its effect before the delivery of the good at any stage of the parties' contractual relationship.

213 Fourth, the CISG is in general not designed to deal with *"unfair or culpable conduct"* [*Lookofsky II, p. 286; cf. Bianca/Bonell/Khoo, p. 47*]. A claim arising from negligent misrepresentation is a "*claim completely different from a claim for breach of contract*" [*SkyCast v. Global; against MfC, p. 30, paras. 130f.*]. Hence, a claim for mistake arising from negligent misrepresentation is outside the CISG's scope irrespective of whether the error also relates to the quality of the goods [*Soinco SACI v. NKAP; SkyCast v. Global; Valley v. Lebbing; Geneva Pharmaceuticals v. Barr Laboratories; Used woodworking machine case; Chinese circuit boards case; Airfilter case; Neumayer, p. 102; Lessiak, p. 496; Lookofsky I, p. 21*].

214 Henceforth, the CISG does not provide a functionally adequate solution compared to Art. 3.2.5 ICCA and Art. 3.2.5 ICCA can therefore be in principle relied upon by RESPONDENT.

III. Art. 7(2) CISG does not pre-empt the application of Art. 3.2.5 ICCA

215 As a last resort, CLAIMANT tries to base its argumentation on *"recourse to the general principles"* of the CISG arising from Art. 7(2) CISG [*MfC, p. 34, para. 147*]. Pursuant to Art. 7(2) CISG, the CISG applies to "*questions concerning matters governed by this Convention which are not expressly settled in it*". Such matters are *'internal gaps'* [*Kröll/Mistelis/Perales Viscasillas/Perales Viscasillas, Art. 7, para. 52*].

216 The subject matter of this case is not settled within the CISG and thus does not constitute an internal gap [*see supra, paras. 209ff.*]. Hence, Art. 7(2) CISG is no obstacle to the application of Art. 3.2.5 ICCA.

CONCLUSION ISSUE 4

Even in case the Supply Agreement is governed by the CISG, RESPONDENT can, in principle, rely on Art. 3.2.5 ICCA. Since fraud is excluded by Art. 4(a) CISG and CLAIMANT engaged in fraudulent misrepresentation, the CISG does not pre-empt the application of Art. 3.2.5 ICCA. Even in case the matter is not generally excluded from Art. 4(a) CISG, Art. 3.2.5 ICCA can still be relied upon as Art. 35 CISG does not provide a functionally adequate solution to the subject matters in the sense of Art. 3.2.5 ICCA. Thus, RESPONDENT can rely on Art. 3.2.5 ICCA.

REQUEST FOR RELIEF

In light of the foregoing submissions, RESPONDENT respectfully requests the Arbitral Tribunal **to adjudge and declare that:**

- The Arbitral Tribunal does not have jurisdiction to hear the dispute **[Issue 1]**;
- Subsidiarily, the proceedings should be stayed or, alternatively, bifurcated **[Issue 2]**;
- The Supply Agreement is not governed by the CISG **[Issue 3]**;
- RESPONDENT can rely on Art. 3.2.5 ICCA to avoid the contract **[Issue 4]**.

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CERTIFICATE OF VERIFICATION

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 that is not a member of this team.

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Mannheim, 26 January 2023