TWENTIETH ANNUAL
WILLEM C. VIS (EAST) INTERNATIONAL COMMERCIAL ARBITRATION MOOT
HONG KONG – 19 TO 26 MARCH 2023

MEMORANDUM FOR CLAIMANT

UNIVERSITY OF ZURICH

PCA CASE NO.: 2022-76

ON BEHALF OF:	AGAINST:
Drone Eye plc 1899 Peace Avenue Capital City Mediterraneo	Equatoriana Geoscience Ltd 67 Wallace Rowe Drive Oceanside Equatoriana
CLAIMANT	**RESPONDENT**

PERLA BACHMANN • MELINA BALSARINI • NATHALIE CANDRIAN • ANN-KATHRIN FISCHER
ANAÏS FRISCHKNECHT • ALINA MARTALOGU • LOUISE SCHMIDT • DARIA SHYLOVA

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Index of Abbreviations

AC	Advisory Council
Art./Artt.	Article(s)
AUT	Austria
ASA	Association Suisse de l'Arbitrage (Swiss Arbitration Association)
b-Arbitra	Belgian Review of Arbitration
CAN	Canada
CEO	Chief Executive Officer
cf.	confer (compare)
ch.	chapter
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
CLOUT	Case Law on UNCITRAL Texts
COO	Chief Operating Officer
DAL	Danubian Arbitration Law
e.g.	exempli gratia (for example)
ed.	edition
Ed./Eds.	Editor/Editors
et al.	et alii (and others)
et seq./et seqq.	et sequens (and the following one)/et sequentes (and the following ones)
EU	European Union
EUR	Euro(s)
Exh. C	CLAIMANT's Exhibit
Exh. R	RESPONDENT's Exhibit
FRA	France
GER	Germany
h	hour(s)
i.e.	id est (that is)
ibid.	ibidem (in the same source)
ICC	International Chamber of Commerce
ICCA	(Equatorianian) International Commercial Contract Act
ICSID	International Centre for Settlement of Investment Disputes

Inc.	Incorporated
kg	kilogram(s)
Ltd	Limited Company
m	meter(s)
m^3	cubic meter(s)
Mr.	Mister
Ms.	Miss
NLD	The Netherlands
No.	Number
NoA	Notice of Arbitration
NPDP	Northern Part Development Program
NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), 1958
p./pp.	page/pages
para./paras.	paragraph/paragraphs
PCA	Permanent Court of Arbitration
PICC	UNIDROIT Principles on International Commercial Contracts, 2016
plc	public limited company
PO	Procedural Order
PSA	Purchase and Supply Agreement
RNoA	Response to the Notice of Arbitration
SCAI	Swiss Chambers' Arbitration Institution
SCC	Stockholm Chamber of Commerce
SOE	State-owned entity
SUI	Switzerland
Swiss PILA	Private International Law Act of Switzerland
UAS	Unmanned Aerial System(s)
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 2006

UNIDROIT	International Institute for the Unification of Private Law
U.S.	United States
USA	United States of America
v.	versus
VCLT	Vienna Convention on the Law of Treaties, 1969
Vol.	Volume

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Ad-hoc Arbitration

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[ad hoc, 1995]	Final award 28. July 1995 in: ASA Bulletin, Vol. 13 Issue 4, 1995, pp. 742-751 *in para. [49]*

S.D. Myers Case

[ad hoc, 2001]

S.D. Myers Inc. v. Government of Canada

Procedural Order No. 17

26 February 2001

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Aviation Safety Act	Aviation Safety Act of Equatoriana
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
DAL	Danubian Arbitration Law (adoption of the UNCITRAL Model Law on International Commercial Arbitration, Vienna, 21 June 1985, with the 2006 amendments)
European Convention 1961	European Convention on International Commercial Arbitration, 1961
Equatoriana's Constitution	Constitution of Equatoriana
ICCA	International Commercial Contract Act of Equatoriana (based on the UNIDROIT Principles on International Commercial Contracts)
NY Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
PCA Rules	Permanent Court of Arbitration, Arbitration Rules 2012
PICC	UNIDROIT Principles on International Commercial Contracts, 2016
Swiss PILA	Private International Law Act of Switzerland, 2022
UNCITRAL Expedited Arbitration Rules	UNCITRAL Expedited Arbitration Rules, 2021

UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration, 2006
UNCITRAL Rules on Transparency	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 2014
VCLT	Vienna Convention on the Law of Treaties, 1980

Statement of Facts

The parties ("**Parties**") to this arbitration ("**Arbitration**") are Drone Eye plc ("**CLAIMANT**"), a medium-sized producer of Unmanned Aerial Systems ("**UAS**") based in Mediterraneo, and Equatoriana Geoscience Ltd ("**RESPONDENT**"), a private company entirely owned by the Ministry of Natural Resources and Development of Equatoriana.

In March 2020, RESPONDENT opened a tender process regarding the Northern Part Development Program ("**NPDP**") for the delivery of four drones "*for the collection of geological and geophysical data necessary for the exploration and subsequent exploitation of the expected natural resources*", in which CLAIMANT submitted a successful bid.

On 1 December 2020, after negotiations, the Purchase and Supply Agreement ("**PSA**") for the purchase of six Kestrel Eye 2010 drones from CLAIMANT and the arbitration agreement ("**Arbitration Agreement**") contained therein was signed at a formal ceremony by the Parties and approved by the Minister of Natural Resources and Development. The drones were sold at a price 20 % lower than CLAIMANT's last offer. These favorable conditions became possible due to the insolvency of another customer of CLAIMANT, which had led to the cancellation of a partly paid order.

In February 2021, CLAIMANT presented its newest UAS, the Hawk Eye 2020 drone, at the air show in Mediterraneo, which is based on a different technology. It is considerably larger and 100 % more expensive than the Kestrel Eye 2010 drone.

On 27 May 2021, RESPONDENT requested to amend the Arbitration Agreement by including a provision regarding the UNCITRAL Expedited Arbitration Rules and the UNCITRAL Rules on Transparency, which CLAIMANT accepted.

On 3 July 2021, The Citizen, Equatoriana's leading investigative journal, published a series of headline articles about a corruption scheme surrounding the NPDP and several high-profile members of the ruling Socialist Party.

On 3 December 2021, this corruption scheme led to early elections, which resulted in a new government formed by a coalition of several parties, including the Liberal Party.

On 27 December 2021, RESPONDENT suspended the PSA because the new government had declared a moratorium on all contracts concluded within the NPDP.

On 30 May 2022, after several attempts by CLAIMANT to find a solution for both Parties, RESPONDENT declared the PSA avoided and terminated all negotiations concerning the Parties' issues.

On 15 July 2022, CLAIMANT initiated the Arbitration against RESPONDENT by filing the Notice of Arbitration ("**NoA"**).

Summary of Argument

Issue A: The Arbitral Tribunal ("Tribunal") has jurisdiction to hear the present dispute because the Parties expressly agreed to submit their dispute to arbitration in a validly concluded Arbitration Agreement. The validity of the Arbitration Agreement is not affected by any of the allegations brought forward by RESPONDENT in the present case: The absence of the formal parliamentary approval set out in Art. 75 of Equatoriana's Constitution is irrelevant because the PSA is not an administrative contract. Furthermore, RESPONDENT is barred form invoking its national law as this behavior would strongly contravene international public policy. In any event, this provision is discriminatory and thus without effect. Finally, the validity of the Arbitration Agreement is not affected by RESPONDENT's allegations of corruption because there is no corruption surrounding the PSA and, in any case, the Arbitration Agreement is to be treated separately from the PSA.

Issue B: The Tribunal should neither stay nor bifurcate the proceedings because this would contravene the principle of procedural efficiency. None of the issues to be decided by the Tribunal depend on the outcome of the criminal investigation and therefore a stay would not only delay the proceedings unreasonably but would also cause major financial detriment to CLAIMANT. Additionally, RESPONDENT's request for bifurcation should be rejected. The decision on Issues C and D would not dispose of the question of validity of the PSA and therefore, bifurcation would imply a stay of the second phase of the Arbitration.

Issue C: The PSA is governed by the CISG as the PSA falls under the territorial and material scope of the CISG and was not excluded pursuant to Art. 6 CISG. Furthermore, the Kestrel Eye 2010 drones are not excluded by Art. 2(e) CISG because the function of the drone is not the transportation of humans or goods. Additionally, RESPONDENT cannot rely on its national law for the qualification and the alleged duty to register is not pertinent. Therefore, the Kestrel Eye 2010 drones cannot be qualified as an aircraft in the sense of Art. 2 (e) CISG, and thus they lay within the scope of the CISG.

Issue D: RESPONDENT cannot avoid the PSA by Relying on Art. 3.2.5 ICCA since RESPONDENT is not entitled to declare the PSA avoided as the factual basis is insufficient to establish fraudulent misrepresentation. Further, RESPONDENT's alleged misrepresentation is exhaustively governed by the CISG, as the facts invoked by it at most pertain to innocent misrepresentation and are thus preempted by the CISG's remedies. Lastly, RESPONDENT cannot avoid the PSA based on the CISG as the Kestrel Eye 2010 drones are conforming goods in the sense of Art. 35 CISG and RESPONDENT lost its right to avoid the PSA as it failed to fulfill the notice period of Art. 39 CISG.

A. THE TRIBUNAL HAS JURISDICTION TO HEAR THE DISPUTE

1 The Tribunal has jurisdiction to hear the present dispute since the Parties validly concluded an Arbitration Agreement on 1 December 2020 (*Exh. C 2, p. 12, Art. 20*).

2 In Art. 20(b) of the PSA, the Parties chose Vindobona (Danubia) as the place of arbitration (*Exh. C 2, p. 12*), thus the arbitration law of Danubia ("**DAL**"), which is a verbatim adoption of the UNCITRAL Model Law (*PO 1, p. 43, para. III.3*), serves as *lex arbitri*. Further, Equatoriana, Mediterraneo and Danubia are Contracting States of the NY Convention (*ibid.*). Moreover, the present Arbitration shall be governed by the PCA Rules (*Exh. C 2, p. 12, Art. 20; Exh. C 9, p. 22*). Pursuant to Art. 23(1) PCA Rules, the Tribunal has the power to rule on its own jurisdiction, including any objections with respect to the validity of the Arbitration Agreement.

3 RESPONDENT alleges that based on Art. 75 of Equatoriana's Constitution the Arbitration Agreement is invalid since the Equatorianian Parliament had not authorized it. Further, RESPONDENT alleges that the PSA was tainted by corruption and misrepresentation, which renders the Arbitration Agreement invalid (*RNoA, p. 30, paras. 20 et seq.*). However, RESPONDENT is wrong.

4 CLAIMANT will show that the Tribunal has jurisdiction to hear the present dispute because the Parties expressly agreed to submit their disputes to arbitration [**I**]. Furthermore, RESPONDENT cannot evade its obligation to arbitrate by relying on the absent formal approval of the Parliament [**II**] and the validity of the Arbitration Agreement remains unaffected by RESPONDENT's allegations of corruption and misrepresentation [**III**].

5 Any other prerequisites for the validity of the Arbitration Agreement (e.g., the designation of a legal relationship according to Art. 7(1) DAL, the written form according to Art. 7(2) DAL and the arbitrability of the subject matter according to Art. 34(1)(b)(i) DAL) are not disputed between the Parties, which is why they shall not be addressed in the submission at hand.

I. The Parties Expressly Agreed to Submit Their Disputes to Arbitration

6 The Parties expressly agreed to submit their disputes to arbitration by signing the PSA containing the Arbitration Agreement in its Art. 20 and by later amending it in May 2021.

7 An arbitration agreement is valid if it, *inter alia*, clearly expresses the parties' intent to arbitrate (*cf. Art. 7(1) DAL; GIRSBERGER/VOSER, p. 79, para. 283; POUDRET/BESSON, p. 124, para. 155*).

8 In the case at hand, the Parties signed the PSA, which contains the Arbitration Agreement in its Art. 20. The Arbitration Agreement states that "[a]ny dispute, controversy or claim arising out of or in connection to this agreement, or the existence, interpretation, application, breach, termination, or invalidity thereof shall be settled by arbitration […]" (*Exh. C 2, p. 12; Exh. C 9, p. 22*). This wording shows an unambiguous mutual intent of the Parties to submit *any* arising

disputes in the context of the PSA to arbitration. The Parties' intent to arbitrate thus includes any issues of alleged bribery affecting the validity of the PSA or avoidance of the PSA.

9 This mutual intent is corroborated by the preceding negotiations of the PSA, since there are no indications that the Parties considered a different dispute resolution mechanism at any time. It was further obvious for both Parties that resolving disputes under the PSA in front of State courts was no option for CLAIMANT due to the bad reputation of the courts in Equatoriana (*PO 2, p. 47, para. 28*) and the danger that State courts could be biased and decide in favor of the State-entity. This is supported by the fact that for the same reason, also the other bidder, Air Systems plc, had insisted on an arbitration clause (*ibid.*). Thus, it was clear from the beginning for both Parties that arbitration is the only acceptable means of dispute resolution.

10 Additionally, the Parties affirmed their mutual will to arbitrate by amending Art. 20 of the PSA on 27 May 2021. RESPONDENT requested to include the UNCITRAL Expedited Arbitration Rules and the UNCITRAL Rules on Transparency (*Exh. C 9, p. 22*). This request took place amid the increasing public debate in Equatoriana about the submission of State-contracts to arbitration. Critics were of the view that arbitration was non-transparent and expensive (*NoA, p. 6, para. 16; Exh. C 7, p. 19, para. 15*). Hence, RESPONDENT's insistence on declaring said Rules applicable indicates that RESPONDENT wanted to ensure the Parliament's and the government's approval of the Arbitration Agreement. The request to supplement the Arbitration Agreement thus not only constitutes a clear manifestation of RESPONDENT's intent to arbitrate, but also evidences that it considered itself bound by the Arbitration Agreement. CLAIMANT agreed to the proposed supplements, which RESPONDENT "highly appreciated" (*Exh. C 9, p. 22*). Thus, both Parties' subsequent conduct affirmatively manifests their intent to arbitrate.

11 In conclusion, the Parties validly concluded the Arbitration Agreement as they signed the PSA and thereby clearly expressed their mutual intent to arbitrate.

II. RESPONDENT Cannot Evade Its Obligation to Arbitrate by Relying on the Absent Formal Approval of the Parliament

12 One and a half years after the Arbitration Agreement was validly concluded, RESPONDENT now tries to evade its obligation to arbitrate by relying on the absent formal parliamentary approval. However, RESPONDENT was nonetheless entitled to validly conclude the Arbitration Agreement.

13 The parties must be entitled to submit their disputes to arbitration (*e.g., Art. 34(2)(a)(i) DAL; GIRSBERGER/VOSER, p. 77, para. 275*). Especially SOEs are sometimes restricted in their ability to agree on arbitration by their national law (*FOUCHARD/GAILLARD/GOLDMAN, p. 313, para. 534; KRÖLL, p. 11; LEW/MISTELIS/KRÖLL, p. 140, para. 7-33*).

14 RESPONDENT is now trying to rely on such a restriction in its national law, since it invokes Art. 75 of Equatoriana's Constitution. This provision stipulates that SOEs may submit disputes concerning administrative contracts to international arbitration only with parliamentary approval (*RNoA, p. 30, para. 21*). However, this approval is not relevant in the case at hand.

15 As will be demonstrated, the Parliament's approval was not required since the PSA is not an administrative contract [**1**]. Moreover, in an international setting, RESPONDENT is barred from invoking its national law to repudiate the Arbitration Agreement [**2**]. In any event, Art. 75 of Equatoriana's Constitution would be without any effect as it is discriminatory [**3**].

1. The Parliament's Approval Was Not Required Because the PSA Is Not an Administrative Contract

16 The Parliament's formal approval was not necessary for the Arbitration Agreement to be valid because the PSA is not an administrative contract but a normal commercial contract.

17 Pursuant to Art. 75 of Equatoriana's Constitution, there are special authorization requirements for SOEs to submit disputes to arbitration when "international contracts relating to public works or other contracts concluded for administrative purposes" are affected (*RNoA, p. 30, para. 21*).

18 A contract qualifies as an administrative contract according to the existing case law of Equatoriana if it involves the actual construction of public infrastructure (*PO 2, p. 47, para. 29*). The case law, however, leaves it open whether there might be other contracts that could qualify as administrative contracts, which is why a general definition shall be sought. Generally, administrative contracts delegate the execution of a public service or serve execution methods of the government (*GONOD, pp. 137 et seqq.*). If a State or an SOE is acting, it needs to be distinguished between commercial and sovereign activities (*HEILBRON, pp. 931 et seqq.*). Exercising authoritative control of commerce is considered a sovereign activity because it cannot be exercised by a private party, whereas a contract to buy materials is a commercial activity because private companies can similarly use sales contracts to acquire goods (*cf. Argentina Case [USA, 1992]*). Thus, SOEs can conclude administrative and commercial contracts.

19 In the case at hand, the PSA was concluded for the acquisition of UAS to collect data necessary to detect and exploit natural resources (*Exh. C 2, p. 10*). The resulting expected revenues from this exploitation could then subsequently be used for the construction of infrastructure (*RNoA, p. 28, para. 5*). However, the contractual obligations of the Parties under the PSA are limited to the purchase and supply of drones. CLAIMANT is neither involved in the expeditions and/or exploitations planned under the NPDP, nor is RESPONDENT delegating the execution of a public service to CLAIMANT. Hence, the PSA itself does not constitute a contract for the actual

construction of infrastructure. The PSA rather constitutes a common sales contract, and thus, RESPONDENT acted not sovereignly but purely commercially. Thus, the PSA cannot be qualified as an administrative contract neither under the Equatorianian case law nor under the general understanding of administrative contracts.

20 In conclusion, the PSA is a purely commercial contract and not an administrative contract. Thus, no approval by the Parliament was needed for the Arbitration Agreement to be valid.

2. RESPONDENT Is Barred From Invoking Its Own National Law to Repudiate the Arbitration Agreement in an International Setting

21 Even if the PSA qualified as an administrative contract, RESPONDENT is barred from invoking its national law to repudiate the Arbitration Agreement, since in an international setting, restrictions in a party's national law concerning its entitlement to arbitrate are irrelevant [**a**]. Further, RESPONDENT cannot rely on its own omission [**b**] and CLAIMANT fulfilled its duty of due diligence [**c**]. Lastly, CLAIMANT legitimately believed that the Parliament would approve the Arbitration Agreement after its conclusion and that such approval had indeed been granted [**d**].

a) In an International Setting, Restrictions in a Party's National Law Concerning Its Entitlement to Enter Into an Arbitration Agreement Are Irrelevant

22 In an international setting, restrictions in RESPONDENT's national law concerning its entitlement to enter into the Arbitration Agreement are irrelevant, and thus, cannot affect its validity.

23 It is generally accepted in international commerce that an SOE may not knowingly and willingly enter into an arbitration agreement, only to subsequently claim that its own undertaking was void due to domestic law restrictions. Such conduct would strongly contravene the fundamental principles of good faith and international public policy, which cannot be excluded (*e.g., FOUCHARD/GAILLARD/GOLDMAN, p. 326, paras. 551 et seqq.; LEW/MISTELIS/KRÖLL, p. 736, para. 27-12; Galakis Case [FRA, 1966], p. 649; ICC Case 1939 [ICC, 1971], p. 145; Elf Aquitaine Case [ad hoc, 1982], p. 104, para. 24; Benteler Case [ad hoc, 1983], pp. 189 et seq.; Gatoil Case [FRA, 1991], p. 190; Société d'études Case [FRA, 2009], p. 357*). Rather, arbitral tribunals should preclude reliance on domestic law limitations and solely look to the parties' intentions (*BORN, ch. 5.03(C)*). Thus, an arbitration clause is valid if the underlying contract is an international contract which was concluded for the needs and in accordance with the usages of international commerce (*Bec Frères Case [FRA, 1994]*, *p. 687, para. 9*).

24 The general acceptance of this rule has been confirmed by its codification in Art. II(1) European Convention 1961 and Art. 177(2) Swiss PILA. Its rationale can further be found in Artt. 27 and 46 Vienna Convention on the Law of Treaties ("**VCLT**"). The VCLT regulates treaties between

States and recognizes that the principles of free consent, good faith and *pacta sunt servanda* are universal (*Recitals and Art. 1 VCLT*). Although the VCLT is not directly applicable to the case at hand, the fact that Equatoriana is a Contracting State shows that the rationale of this rule is acknowledged in RESPONDENT's jurisdiction (*PO 2, p. 49, para. 50*).

25 This generally accepted rule must also be applied to the case at hand, since the PSA is an international commercial contract and was concluded by two Parties having their seat of incorporation in different States for the sale of drones (*Exh. C 2, p. 10*). RESPONDENT is entirely owned by the State of Equatoriana (*NoA, p. 4, para. 2; PO 2, p. 44, para. 5*) and was aware of the restriction in its Constitution (*RNoA, p. 30, para. 21*). Nevertheless, it willingly and unreservedly entered into the Arbitration Agreement with CLAIMANT, a foreign company (*NoA, p. 4, para. 1*). Only now, one and a half years after the conclusion of the PSA, RESPONDENT suddenly tries to rely on the restriction regarding its entitlement to arbitrate in its Constitution. Interestingly, RESPONDENT's change of mind coincides with the government change and the moratorium imposed on the performance of the PSA. Thus, this Tribunal should not protect RESPONDENT's ambiguous behavior and disregard the invocation of its domestic law restriction. Rather, it should look at the Parties' intentions and expectations at the time of the conclusion of the Arbitration Agreement, which was a clear mutual intent to arbitrate (*cf. paras. 6 et seqq.*).

26 Therefore, RESPONDENT is barred from invoking its national law because such conduct would strongly contravene the fundamental principles of good faith and international public policy.

b) RESPONDENT Cannot Rely on Its Own Failure to Obtain the Parliamentary Approval

27 RESPONDENT had a duty to satisfy the requirement of Equatoriana's Constitution when entering the PSA. Yet, RESPONDENT refrained from doing so, hence it cannot rely on its own failure to obtain the parliamentary approval to repudiate the Arbitration Agreement now.

28 The general principle of good faith in international relations demands the parties to act accordingly (*e.g., Art. 1.7 PICC; Recitals VCLT*). Based on this principle, it is incumbent on an SOE to ensure that its national laws are being adhered to when concluding an international contract. This rule was established in an ICC case with facts comparable to the case at hand: In that case, a State-entity and several foreign parties had concluded a contract including an arbitration agreement, while the national law of the State-entity applied to their contract. At the time of contract conclusion, the State-entity had not duly complied with national authorization requirements. After the dispute had arisen, the State-entity tried to rely on this omission to frustrate the contract and arbitration agreement. However, the tribunal found that the State-entity cannot take advantage of its own omissions (*ICC Case 3896 [ICC, 1982], pp. 94 et seqq.*).

29 In the present case, RESPONDENT's behavior is comparable, i.e., it now tries to rely on its own omission to avoid the Arbitration. However, it was RESPONDENT's duty to ensure that the approval process was being duly adhered to when entering an international contract. Although RESPONDENT was aware that there had been irregularities in the approval process (*Exh. R 4, p. 35*), it concluded the Arbitration Agreement nonetheless and thereby ignored its own national law. Thus, invoking this omission now to declare the Arbitration Agreement invalid strongly opposes the principle of good faith in international relations.

30 Therefore, RESPONDENT cannot rely on its own failure to obtain the parliamentary approval.

c) CLAIMANT Fulfilled Its Duty of Due Diligence

31 The principle that a party cannot rely on its national law to repudiate an arbitration agreement only applies if the other party fulfilled its own duties in good faith (*FOUCHARD/GAILLARD/GOLDMAN, p. 252, para. 470; cf. BEISTEINER, p. 65, para. 28*).

32 In contrast to RESPONDENT, CLAIMANT fulfilled its duties. Before contract conclusion, it conducted a due diligence regarding any special requirements under Equatorianian law.

33 While the foreign private party has a duty to perform a reasonable due diligence on the requirements of the counterparty's internal rules prior to the conclusion of an international contract (*FOUCHARD/GAILLARD/GOLDMAN, p. 252, para. 470*), the standard of such due diligence should not be set too high (*BEISTEINER, p. 65, para. 28*). In fact, a foreign party cannot be requested to perform an extensive due diligence into the authority of an SOE, a State's representative or into domestic formalities (*BEISTEINER, p. 65, para. 27; ICC Case 3896 [ICC, 1982], p. 101*). It is sufficient for a foreign party to obtain information from officials or general knowledge about a regulatory framework (*LEVASHOVA, para. 9; cf. Foresight Case [SCC, 2018]*).

34 In the case at hand, Ms. Porter from CLAIMANT's legal department had examined whether there are special requirements for contracting in Equatorianian law prior to concluding the PSA (*Exh. C 7, p. 18, paras. 3 et seqq.*). As a result, CLAIMANT learned about the approval requirements in Art. 75 of Equatoriana's Constitution. In the following, CLAIMANT inquired with RESPONDENT and the Minister that the approval will be forthcoming, and that they would take care of it (*Exh. R 4, p. 35*). As the domestic processes were in detail unknown to CLAIMANT, it had to rely on the assurances and information obtained by them. Due to these assurances, CLAIMANT had no obligation to further enquire whether the approval had been subsequently granted or not.

35 Therefore, CLAIMANT fulfilled its duty of due diligence prior to contracting with RESPONDENT because it informed itself about any special requirements in RESPONDENT's national law.

d) CLAIMANT Legitimately Believed That the Parliament Would Approve the Arbitration Agreement After Its Conclusion and That Such Approval Had Indeed Been Granted

36 CLAIMANT legitimately believed that the Parliament would approve the Arbitration Agreement after its conclusion and that such approval had indeed been granted based on the assurances and the conduct of RESPONDENT, the Minister and the Parliament of Equatoriana.

37 RESPONDENT sets forth that CLAIMANT may not invoke any good faith arguments due to its knowledge of the restriction (*RNoA, p. 30, para. 22*). However, RESPONDENT is wrong since this knowledge does not change CLAIMANT's good faith in RESPONDENT's ability to arbitrate.

38 First, CLAIMANT believed that the approval of Parliament would subsequently be granted, since there was no reason for CLAIMANT to doubt the authority of the counter-signatories. Besides RESPONDENT's CEO Ms. Queen, the Minister of Natural Resources and Development, Mr. Barbosa, and thus a person with a high position in the State's hierarchy officially representing the government, signed and approved the PSA (*Exh. C 2, p. 12*). Although they both knew that the parliamentary approval had not yet been given, they made CLAIMANT believe that this was no obstacle for a valid contract conclusion (*Exh. R 4, p. 35*). The Minister even assured that it "was just a formality and would be forthcoming after the Christmas break" (*Exh, C 7, p. 18, para. 9*). This utterance and the fact that the approval had already been granted effectively after the signing in a case before (*PO 2, p. 47, para. 30*) made the impression on CLAIMANT that RESPONDENT and the Minister could and would obtain the approval subsequently (*Exh. R 4, p. 35*). CLAIMANT even provided RESPONDENT with further information on the PSA for the speech of the Minister in "subsequent discussions in Parliament" for the approval (*ibid.*).

39 This belief was reinforced by the conduct of the Parliament. The scheduled debate for the approval of the PSA on 27 November 2020 only got called off on this very day (*RNoA, p. 29, para. 13*) and the topic had been announced in the Parliament's agenda (*PO 2, p. 47, para. 29*). The signing of the PSA took place publicly and only four days after the cancelled debate in the context of a visit of an official delegation from Mediterraneo (*Exh. C 7, p. 18, para. 9*). Hence, although the Parliament obviously knew about the Arbitration Agreement in the PSA and the signing, it did not object to it, which made the impression that it may be approved subsequently.

40 Second, CLAIMANT believed that the approval had indeed been subsequently granted, since in the parliamentary debate on the submission of State contracts to arbitration in June 2021, the government explicitly referred to the Arbitration Agreement in the PSA as being one of the authorized contracts compliant with Equatorianian standards (*NoA, p. 7, para. 16; Exh. C 7, p. 19, para. 15*). The PSA being used as an example of an authorized contract in a parliamentary

debate displays that the Parliament knew about the Arbitration Agreement, and not objecting to it made the impression on CLAIMANT that the Parliament had subsequently approved it.

41 Therefore, CLAIMANT legitimately believed that RESPONDENT was entitled to enter into the Arbitration Agreement since the parliamentary approval could and would subsequently be granted.

3. In Any Event, Art. 75 of Equatoriana's Constitution Would Be Without Any Effect as It Is Discriminatory

42 In any event, Art. 75 of Equatoriana's Constitution would be without any effect as it is discriminatory and thus violates Art. II(3) NY Convention.

43 Under the NY Convention, Contracting States are not free to fashion additional grounds for the validity of arbitration agreements, but are subject to Artt. II(1) and II(3) NY Convention (*BORN, ch. 4.04(A)(1)(b)(i)*). Derived from these provisions, they may not impose discriminatory rules for arbitration agreements into their national law (*ibid.*). Hence, any provision discriminating between the ability to participate in domestic and in international arbitral proceedings, including the ability to conclude agreements providing for such participation, conflicts with Art. II(3) NY Convention and is, thus, without effect (*BORN, ch. 4.07(B)(3)*).

44 Art. 75 of Equatoriana's Constitution is discriminatory as per Art. II(3) NY Convention. It stipulates that SOEs, when concluding an administrative contract, may submit to arbitration only with consent of the respective minister (*RNoA, p. 30, para. 21*). However, if the counterparty is a *foreign entity* or the arbitration is seated *in a different State*, an *additional* approval of the Parliament based on a formal vote is required (*ibid.; PO 2, p. 48, para. 34*). Hence, there is a significantly higher threshold for international arbitration agreements to be valid.

45 In conclusion, the parliamentary consent according to Art. 75 of Equatoriana's Constitution is discriminatory in the sense of Art. II(3) NY Convention. Thus, it must not be given any effect.

III. The Validity of the Arbitration Agreement Remains Unaffected by RESPONDENT's Allegations of Corruption and Misrepresentation

46 RESPONDENT tries to evade this Arbitration by asserting that the Arbitration Agreement is invalid due to corruption and misrepresentation affecting the PSA (*RNoA, p. 30, para. 20*). However, RESPONDENT is wrong. As will be demonstrated, there is no corruption surrounding the PSA [**1**]. Even if the PSA were invalid due to corruption or could be avoided for misrepresentation, the validity of the Arbitration Agreement would remain unaffected as it is separate from the PSA [**2**].

1. There Is No Corruption Surrounding the PSA

47 The Arbitration Agreement is valid since there is no corruption surrounding the PSA.

48 RESPONDENT alleges that within the negotiations of the PSA, bribes were paid from CLAIMANT to RESPONDENT's employees and thus that there was corruption involved in the conclusion of the PSA and the Arbitration Agreement (*Exh. C 8, p. 20*).

49 Each party must prove the facts relied upon to support its claim or defense (*Art. 27(1) PCA Rules*). While the general standard of proof is that of the balance of probabilities (*BORN, ch. 15.09(B)*), it is widely agreed that allegations of corruption must be proven with "clear and convincing evidence" (*HWANG/LIM, p. 15, para. 30; Getma Case [ICSID, 2016], para. 184*). The applicable standard is that of "reasonable certainty" (*O'MALLEY, pp. 218 et seq., para. 7.29*), which is "greater than the balance of probabilities, but less than beyond reasonable doubt" (*Waguih Case [ICSID, 2009], para. 326*). In this respect, mere newspaper articles about criminal trials related to corruption scandals are not deemed sufficient evidence to support allegations of corruption (*S. S.A. Case [ad hoc, 1995], para. 40*). The absence of corruption can be proven by showing that the parties engaged in serious negotiations, particularly if they agreed on price reductions (*SCHERER, p. 34*).

50 In the present case, corruption cannot be established. RESPONDENT submits that the decrease in price of 20 % and the change of scope from four to six drones indicates that there was corruption (*RNoA, p. 28, para. 10*). However, the price reduction is based on commercial considerations. First, the price reduction became possible because CLAIMANT was able to reuse three nearly finished UAS which it could acquire at a very good price from an insolvent customer (*Exh. R 4, p. 35, para. 2*). Second, according to Ms. Queen, RESPONDENT's CEO, who was cleared from all corruption charges (*PO 2, p. 49, para. 44*), the choice of six drones was, *inter alia*, due to the very favorable price (*Exh. R 2, p. 33*). This shows that the Parties engaged in serious negotiations concerning the object of the PSA. The contractual changes which RESPONDENT uses to hint at corruption have a justification in the Parties' contractual interests.

51 Additionally, CLAIMANT did its due diligence as it adopted an anti-corruption policy and ethical rules to prevent corruption within the company (*PO 2, p. 44, para. 3*). It reviewed all payments made from its accounts to Equatoriana from the date of the Call for Tender until two months after conclusion of the PSA and did not find any suspicious payments (*Exh. C 3, p. 13, para. 7*).

52 Furthermore, RESPONDENT bases all its corruption allegations only on the article of 22 May 2022 of The Citizen, an investigative journal (*RNoA, p. 29, paras. 14 et seqq.; Exh. R 2, p. 33*). In accordance with the relevant jurisprudence, RESPONDENT cannot use The Citizen as the sole

evidence to support corruption allegations. Moreover, since The Citizen is tied to the Liberal Party, it is questionable if it is an entirely independent source (*NoA, p. 5, para. 11*).

53 Finally, even RESPONDENT admits that "there is no proof yet as to the payment of any bribes in relation to this contract" (*Exh. C 8, p. 20*).

54 In conclusion, RESPONDENT failed to provide convincing evidence to support its allegations as there was no corruption in relation the PSA and the Arbitration Agreement contained therein.

2. The Arbitration Agreement is Separate From the PSA

55 Even if the PSA were invalid due to corruption or could be avoided for misrepresentation, the validity of the Arbitration Agreement would remain unaffected as it is a separate agreement.

56 According to Art. 23(1) PCA Rules, "[a] decision by the arbitral tribunal that the contract […] is null, void, or invalid shall not automatically entail the invalidity of the arbitration clause." This provision reflects that arbitration agreements are legally distinct from the main contract (*e.g., Art. 16(1) DAL; BORN, ch. 3.01; FOUCHARD/GAILLARD/GOLDMAN, p. 198, para. 389*). While there are cases in which the doctrine of separability does not apply, e.g., in cases of forgery or where a party's true consent is lacking (*PITKOWITZ, Jurisdiction, p. 30*), corruption and misrepresentation are not among those cases. Thus, an allegation of corruption is unlikely to involve a direct impeachment of the arbitration agreement (*SCHWEBEL/SOBOTA/MANTON, p. 10; Fiona Trust Case [UK, 2007], para. 35*) because the consent to arbitrate is usually not affected where one party is engaging in corruption or bribery (*PITKOWITZ, Jurisdiction, p. 30)*.

57 Following the doctrine of separability, the validity of the Arbitration Agreement remains unaffected even if the PSA were invalid or terminated due to corruption or misrepresentation. Furthermore, the alleged corruption only concerns the conclusion of the contract in terms of its substance, e.g., the number of drones sold or their price, and not the Arbitration Agreement itself (*Exh. R 1, p. 32, paras. 5 et seq.; Exh. R 2, p. 33*). The same holds true for the alleged misrepresentation, which only concerns the features of the drones. However, none of the allegations relate to the dispute resolution mechanism. The Parties' consent to resort to arbitration was at no point ambiguous and there was no vitiated consent (*cf. paras. 6 et seqq.*).

58 In conclusion, since the Arbitration Agreement constitutes a separate agreement from the main contract and the mutual intent of the Parties to arbitrate is established, the Arbitration Agreement remains valid even in the case of an eventual invalidity or avoidance of the PSA.

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59 **Conclusion Issue A**: The Tribunal has jurisdiction to hear the present dispute since the Parties concluded a valid Arbitration Agreement. First, the Parties expressly agreed to submit their disputes to arbitration. Second, RESPONDENT cannot repudiate the validly concluded Arbitration

Agreement by relying on the absent formal approval of the Parliament. Third, the validity of the Arbitration Agreement remains unaffected by RESPONDENT's unproven allegations of corruption and misrepresentation.

B. THE ARBITRAL PROCEEDINGS SHOULD NEITHER BE STAYED NOR BIFURCATED

60 RESPONDENT requests the Tribunal to stay or, alternatively, bifurcate the proceedings until the criminal investigation and proceedings against Mr. Field are concluded (*RNoA, p. 30, para. 23*). Currently, Mr. Field is being investigated in relation to contracts concluded by him in his capacity of COO of RESPONDENT (*ibid.*).

61 According to Art. 17(1) PCA Rules, the tribunal enjoys discretion regarding the conduct of the proceedings. Hence it may also decide on stay (*Hrvatska Case [ICSID, 2008], para. 33*) or bifurcation of the proceedings (*BENEDETTELLI, p. 493*). However, this discretion is not without limits, as the tribunal must consider whether the stay or bifurcation ordered is meant to avoid unnecessary delay and expense and whether it provides an efficient process (*Art. 17(1) PCA Rules*). This principle of procedural efficiency requests a balance between "time, costs and quality" throughout the proceedings (*KIRBY, p. 689*).

62 Following the principle of procedural efficiency, the arbitral proceedings should neither be stayed [**I**] nor bifurcated [**II**].

I. The Arbitral Proceedings Should Not Be Stayed

63 The arbitral proceedings should not be stayed because such a decision would contravene the principle of procedural efficiency.

64 RESPONDENT does not only request the Tribunal to stay the proceedings until the investigation against Mr. Field has ended, but also until a criminal verdict has been rendered (*RNoA, p. 30, para. 23*). The Tribunal should dismiss RESPONDENT's request.

65 When deciding on a stay, a tribunal must analyze factors such as whether the outcome of the external proceedings is material to the arbitration, whether the stay delays the proceedings unreasonably and whether it creates an imbalance between the parties (*Cairn Case [PCA, 2017], para. 114*). In assessing these factors, a tribunal must consider that a stay is an exceptional remedy which can be granted only when the applicant provides compelling reasons (*ibid.; Patel Case [PCA, 2020], para. 44*). Such "compelling reasons" have been recognized for example if the tribunal could not decide on the facts underlying a request for stay due to a lack of jurisdiction (*POUDRET/BESSON, p. 501, para. 581; cf. ICC Case [redacted] [ICC, 2016]*). There are no such compelling reasons in the case at hand.

66 As will be demonstrated in the following, the present Arbitration should not be stayed as the criminal investigation against Mr. Field is irrelevant for the present Arbitration [**1**]. Furthermore, a stay would delay the Arbitration unreasonably [**2**] and would cause an imbalance between the Parties' interests and major financial detriment to CLAIMANT [**3**]. Finally, a stay is not necessary as the Tribunal has the instruments to properly decide on the case at hand [**4**].

1. The Ongoing Criminal Investigation Against Mr. Field Is Irrelevant for the Present Arbitration

67 The ongoing criminal investigation against Mr. Field is irrelevant for the present Arbitration because the decisions to be made in the present case do not depend on the result of that investigation. The same applies to the result of any related and eventual criminal proceedings.

68 A tribunal may disrupt the normal course of an arbitration if it considers that the outcome of external proceedings is material to the outcome of the arbitration (*Cairn Case [PCA, 2017], para. 114*). However, when suspicions of bias surround the verdict, the arbitral tribunal should consider it "with the utmost caution" (*Mol Case [PCA, 2009], para. 139*).

69 The ongoing criminal investigation against Mr. Field is irrelevant for the present Arbitration, as RESPONDENT failed to demonstrate the impact of the investigation on it [**a**]. Further, the investigation will not produce reliable evidence as the investigating authority appears biased [**b**].

a) RESPONDENT Failed to Demonstrate the Impact of the Investigation on the Arbitration

70 Considering that the ongoing criminal investigation against Mr. Field does not concern the PSA, RESPONDENT failed to demonstrate its impact on the Arbitration.

71 The party requesting the stay must establish the impact of the criminal proceedings on the subject-matter of the dispute (*cf. Art. 27(1) PCA Rules; cf. ICC Case 8459 [ICC, 1997]*). In case of external criminal proceedings (including investigations), the standard to grant a stay is rather high. Even if they were initiated to "obtain evidence that may not otherwise be obtained" (*SCAI Case 300273-2013 [SCAI, 2015], para. 26*) or are at advanced stages, such as that of evidentiary hearing (*ICC Case [redacted] [ICC, 2016], para. 17*), these circumstances are not sufficient to grant a stay. Furthermore, while there is no binding effect of national court decisions on arbitral tribunals, arbitrators will include a criminal verdict in their assessment of evidence (*STOYANOV et al., p. 35, para. 45; VIDAK GOJKOVIC, p. 3; Inceysa Case [ICSID, 2006], para. 214*).

72 RESPONDENT alleges that the Arbitration depends on the outcome of the ongoing investigation against Mr. Field and thus a stay is necessary (*RNoA, p. 31, para. 29*). However, it solely relies

on the fact that Mr. Field was charged with corruption in relation to "other contracts concluded by him" (*RNoA, p. 29, para. 16; Exh. C 8, p. 20; Exh. R 2, p. 33*). These facts do not support RESPONDENT's request as the charges do not concern the PSA, but two different contracts concluded by him with local companies closely related to the Socialist Party (*Exh. C 8, p. 20*).

73 Furthermore, RESPONDENT itself acknowledged that to this day, there is not a shred of evidence as to the payment of bribes in relation to the PSA (*ibid.*). In fact, the prosecutor, Ms. Fonseca, has so far only announced that her team would also investigate other contracts with foreign companies concluded by Mr. Field on behalf of Equatoriana Geoscience (*Exh. R 2, p. 33*). However, this is yet to happen (*Exh. C 8, p. 20; Letter Langweiler, p. 40*).

74 Therefore, the potential investigation against Mr. Field has no impact on the Arbitration and RESPONDENT failed to prove how these circumstances would justify a stay in the present case.

b) The Criminal Investigation Will Not Produce Reliable Evidence as the Investigating Authority Appears Biased

75 The criminal investigation would not produce reliable evidence given that the prosecuting authority, Ms. Fonseca, appears biased due to conflicting personal interests.

76 When deciding to abandon the normal course of the arbitration due to national criminal proceedings, an arbitral tribunal should consider "the perceived impartiality of the criminal authorities dealing with the criminal process" (*NAUD, p. 518; cf. BESSON, p. 106, para. 19*). It follows that an arbitration should not be stayed if the national investigations are carried out by biased authorities that are likely to favor one of the parties (*BESSON, p. 106, para. 19*).

77 In the present case, the criminal investigation against Mr. Field is carried out by Ms. Fonseca, who has tight personal connections to parties that might have an interest in seeing Mr. Field convicted. First, Ms. Fonseca's brother-in-law is the CEO of Air Systems plc, the other bidder in the tender process (*Exh. R 2, p. 33*). Second, Ms. Bourgeois, former personal assistant to Mr. Field, is Ms. Fonseca's future daughter-in-law (*Exh. R 2, p. 33*). Upon Mr. Field's arrest, Ms. Bourgeois was promoted to head of internal investigations at RESPONDENT (*PO 2, p. 49, para. 43*). Later on, she became member of Ms. Fonseca's team, from which she was removed only after her family relationship became public (*ibid.*). In a nutshell, Ms. Fonseca's brother-in-law lost the tender process against CLAIMANT while her daughter-in-law was promoted upon Mr. Field's arrest. It is extremely doubtful that this constellation of facts has no influence on Ms. Fonseca and does not conflict with her duty as an investigative authority as she might have a personal interest in finding Mr. Field guilty.

78 Furthermore, Ms. Fonseca was specifically appointed by the new government in Equatoriana to investigate corruption in the context of the NPDP (*RNoA, p. 28, para. 16*). It is known that the new government is against this program and does not want to execute the related contracts (*NoA, p. 6, para. 13*). All in all, a prosecuting authority with strong connection to the case was appointed by a government that has an interest in the outcome of the investigation. This creates serious concerns as to the impartiality of Ms. Fonseca.

79 Therefore, the decision taken in the criminal investigation against Mr. Field would not produce reliable evidence, as Ms. Fonseca is influenced by her personal connection to the case.

80 In conclusion, the potential investigation against Mr. Field has no impact on the Arbitration and the prosecuting authority appears biased.

2. A Stay Would Delay the Arbitration Unreasonably

81 A stay of the Arbitration would be unreasonable as there is no proper justification for the delay that would be caused.

82 Pursuant to Art. 17(1) PCA Rules, when exercising its discretion, a tribunal shall conduct the proceedings so as to avoid unnecessary delay. A delay caused by a stay is considered unnecessary, unless there is a good reason for the stay (*NAZZINI, p. 897*). When dealing with potentially related criminal proceedings, arbitral tribunals should consider the status of the criminal proceedings and whether the forthcoming decision in the criminal courts will be susceptible to challenge on appeal (*NAUD, p. 518*). Additionally, the tribunal should assess the likely duration of the investigations (*BESSON, p. 106, para. 20*). Nevertheless, the overarching presumption is that a party to an arbitration is entitled "to have the arbitration proceedings continued at a normal pace" (*S.D. Myers Case [ad hoc, 2001], para. 8*).

83 First, as already mentioned, there is no investigation concerning the PSA (*cf. para. 73*) and the charges that have been brought against Mr. Field do not concern it either (*cf. para. 72*). Based on these facts, the Tribunal cannot assess the duration of a criminal investigation in relation to the PSA, as it has not started yet. Hence, there is no good reason to stay the proceedings.

84 Second, according to the new government of Equatoriana, a decision on corruption against Mr. Field could be expected in July 2024 (*RNoA, p. 31, para. 24*). As RESPONDENT is requesting a stay until there is a criminal verdict (*cf. para. 64*), the Arbitration would have to be stayed for at least one and a half years. Moreover, an appeal against the decision of the criminal court is possible (*PO 2, p. 49, para. 47*). It follows that even if the court of first instance in Equatoriana was to decide on the alleged corruption concerning the PSA until 2024, this might not represent the end of the national proceedings. Mr. Field has announced that he will "vigorously defend

himself*"* (*Letter Langweiler, p. 40*), thus appeal against a decision of the criminal court seems very likely and a further delay past 2024 can reasonably be expected.

85 In conclusion, due to the mentioned circumstances, a stay would result in an unreasonable delay of the Arbitration.

3. Delaying the Proceedings Would Cause an Imbalance Between the Parties' Interests and Major Financial Detriment to CLAIMANT

86 A delay in the proceedings would create an imbalance between the Parties' interests, considering that solely CLAIMANT would suffer major financial detriment.

87 Pursuant to Art. 17(1) PCA Rules and Art. 18 DAL, the parties are to be treated equally. When deciding on a request for stay, a tribunal must consider the interests that may be served or jeopardized (*BENEDETTELLI, p. 498*). This means that the tribunal must assess whether a decision on stay would create an imbalance between the parties (*Cairn Case [PCA, 2017], para. 114*).

88 In case the proceedings were stayed, CLAIMANT would suffer major financial detriment. On 27 December 2021, after the State of Equatoriana declared a moratorium on all NPDP contracts, RESPONDENT announced that "until further notice" no payments would be made (*Exh. C 6, p. 17*). Since then, it has become uncertain whether CLAIMANT would eventually receive what it is entitled to under the PSA. CLAIMANT is still seeking another buyer for three of the drones purchased by RESPONDENT (*NoA, p. 8, para. 23*). However, reselling the drones to another party will be difficult and only possible with considerable price reductions, as the drones have been customized for RESPONDENT and there had been considerable media coverage of the present dispute (*PO 2, p. 46, para. 24*). Also, it is not clear whether the materials already bought for the other three drones as well as the production time reserved may be used for other projects (*NoA, p. 7, para. 23*). This leads to CLAIMANT not being able to recover the price of the six drones, which amounts to a total of EUR 44,000,000 (*Exh. C 2, p. 11*). Considering that CLAIMANT is a medium-sized producer of UAS with an annual output of around five drones per year (*NoA, p. 4, para. 1*), waiting for at least two years for the Tribunal to decide on the matter would put CLAIMANT's entire business operations at risk. It is therefore of utmost importance for CLAIMANT to obtain a swift and cost-effective decision on RESPONDENT's liability before it suffers any further damage.

89 By contrast, continuing this Arbitration would not cause harm to RESPONDENT. In fact, RESPONDENT does not put forward any interests that prevail over CLAIMANT's above-mentioned interests and justify delaying the proceedings for such a long period of time. With its request, RESPONDENT is solely trying to avoid its obligations under the PSA. If the stay were granted,

RESPONDENT would have at least two years in which it would not have to fulfill its contractual obligations. In a nutshell, RESPONDENT's request is a mere dilatory technique.

90 In conclusion, a stay would create an imbalance between the Parties and cause CLAIMANT major financial detriment whilst RESPONDENT would bear no such consequences.

4. The Tribunal Has the Instruments to Properly Decide on the Case at Hand

91 RESPONDENT alleges that the competent authorities in Equatoriana "are in a much better position than the Arbitral Tribunal to investigate the underlying corrupt practices" (*RNoA, p. 27, para. 1*). Additionally, RESPONDENT is concerned that the Tribunal might not have sufficient investigation powers, which would allegedly lead to an incorrect decision (*RNoA, p. 30, para. 23*). However, these concerns are unfounded. The Tribunal has all the procedural instruments at its disposal to properly decide on the case at hand.

92 The relevant doctrine establishes that if a tribunal finds it necessary to consider corruption issues, it has a wide discretion to do so (*BANIFATEMI, p. 20*). Further, Arbitrators are considered qualified to address matters of corruption (*BAIZEAU/HAYES, p. 227; PITKOWITZ, Corruption, p. 209*). However, in cases where parties' allegations are difficult to prove, arbitrators can request the competent state court for "assistance in taking evidence" (*Art. 27(1) DAL*) and in calling third parties to the proceedings (*ALI/REPOUSIS, pp. 718 et. seqq.*). If a State has adopted the UNCITRAL Model Law, its national courts are allowed to provide such assistance to domestic and foreign tribunals (*ibid.*).

93 The State courts are not in a better position to rule on matters of corruption than the Tribunal because the Tribunal has all the procedural instruments at its disposal to fully treat the issues at hand, i.e. witness testimony, interim measures and document production (*Artt. 17, 26 and 27 PCA Rules*).

94 Even if RESPONDENT considered that the evidence taken by the Tribunal would not be sufficient, it could – upon the approval by the Tribunal – request the assistance of competent courts in Equatoriana in taking of further evidence. Similarly, the Tribunal could take the same actions on its own motion (*Art. 27(1) DAL*). Given that Equatoriana has adopted the UNCITRAL Model Law (*PO 1, p. 43, para. III.4*), its national courts would be allowed to provide the assistance required.

95 Therefore, the Tribunal has the instruments to properly decide on the issues at hand.

96 In conclusion, the arbitral proceedings should not be stayed because the criminal investigation against Mr. Field is irrelevant to the Arbitration. Further, a stay would delay the proceedings

unreasonably and cause major financial detriment to CLAIMANT. Lastly, the Tribunal has the instruments to properly decide on the case at hand.

II. The Arbitral Proceedings Should Not Be Bifurcated

97 The Tribunal should reject RESPONDENT's alternative request for bifurcation because like the request for stay, if granted, a bifurcation would violate the principle of procedural efficiency.

98 RESPONDENT requests the Tribunal to bifurcate the proceedings and in a first phase to solely decide on the abstract legal questions of Issues C and D (*PO 2, p. 49, para. 52*). The second phase would concern the validity of the Arbitration Agreement and would have to be suspended until the criminal investigations have terminated (*RNoA, p. 31, para. 25*).

99 A tribunal has full discretion to bifurcate the proceedings (*Art. 17(1) PCA Rules*). When deciding on bifurcation, tribunals must consider the three elements of procedural efficiency, i.e. time, costs and quality (*cf. para. 61*) and factors such as whether bifurcation would lead to a material reduction of the proceedings at the next stage (*Glamis Gold Case [ICSID, 2005], para. 12; Renco Case [PCA, 2020], para. 4.1*).

100 In the present case, the Tribunal should dismiss RESPONDENT's alternative request as the decision on Issues C and D is not dispositive of the question of the validity of the PSA [**1**] and RESPONDENT's request of bifurcation would imply a stay of the second phase of Arbitration and thus cannot be justified [**2**].

1. The Decision on Issues C and D Is Not Dispositive of the Question of the Validity of the PSA

101 Considering that a decision on C and D would not discharge the Tribunal from deciding on the validity of the PSA due to corruption, the objective of bifurcation would not be met.

102 In deciding on whether to allow bifurcation, tribunals should consider that this instrument is meant to allow an early disposal of discrete issues (*MCILWRATH/SAVAGE, paras. 5-138 et seqq.*). While bifurcation inevitably imposes delays, these can only be justified when a first decision could lead to the remaining issues becoming irrelevant and thus significant expenses could be saved (*BORN, ch. 15.08(Q)*). The usual case of bifurcation of jurisdictional objections from merits is justified when a successful objection renders the submissions on merits redundant (*WEIGAND/BAUMANN, paras. 1.207 et seq.*). The same applies to bifurcation of liability and quantum of damages, as damages cannot be quantified if there is no liability (*ibid.*).

103 In the present case, RESPONDENT's request to bifurcate the merits (*PO 2, p. 50, para. 52*) is in no way efficient. Bifurcating the Arbitration pursuant to this request would not dispense the proceedings of any potentially unnecessary phase. The decisions on whether the PSA is

governed by the CISG or whether Art. 3.2.5 ICCA applies have no bearing on the decision on the validity of the PSA. Moreover, an abstract decision on the applicability of the CISG and avoidance of the PSA would not be of any practical use until the Tribunal decides on the validity of the PSA.

104 In conclusion, the usual objective of bifurcation to reduce the phases of the Arbitration would not be achieved in the case at hand and thus bifurcation would not be efficient.

2. RESPONDENT's Request of Bifurcation Would Imply a Stay of the Second Phase of the Arbitration and Thus Cannot Be Justified

105 Considering that the bifurcation would ultimately result in a stay of the second phase of the Arbitration, the arguments against staying the proceedings apply accordingly and RESPONDENT's alternative request for bifurcation should also be dismissed.

106 RESPONDENT's request to bifurcate the proceedings would ultimately imply a stay of the Arbitration, with the difference that the Tribunal would render a decision on issues C and D before staying the rest of the proceedings, waiting for the outcome of the criminal investigations against Mr. Field (*RNoA, p. 31, para 25*). In other words, RESPONDENT's request to bifurcate represents an attempt to misuse this measure and obtain, in any case, a suspension of the proceedings. As previously demonstrated, a stay should not be granted (*cf. paras. 63 et seqq.).*

107 Therefore, bifurcation cannot be justified as it would imply a stay of the second phase of the Arbitration.

108 In conclusion, the Tribunal should reject RESPONDENT's subsidiary request for bifurcation because like the request for stay, bifurcation would infringe the principle of procedural efficiency.

109 **Conclusion Issue B**: Both stay and bifurcation would be against the principle of procedural efficiency. Thus, the Tribunal should neither stay nor bifurcate the proceedings until the investigations against Mr. Field have been concluded.

C. THE PSA IS GOVERNED BY THE CISG

110 The PSA is governed by the CISG as all requirements for the application of the CISG are fulfilled.

111 RESPONDENT tries to deny the applicability of the CISG by alleging that the PSA is exhaustively governed by Equatorianian law because of the choice of law clause in favor of the law of Equatoriana in Art. 20 of the PSA. Furthermore, RESPONDENT alleges that the drones are considered "aircrafts" and therefore are subject to the exclusion of Art. 2(e) CISG (*RNoA, p. 31, para. 26*).

112 Contrary to those allegations, it will be demonstrated in the following that the CISG applies since the choice of law clause in favor of the law of Equatoriana does not constitute an exclusion

of the CISG in the sense of Art. 6 CISG [**I**], and the Kestrel Eye 2010 drones do not qualify as aircrafts in the sense of Art. 2(e) CISG [**II**].

113 The other prerequisites for the application of the CISG pursuant to Art. 1 *et seq*. CISG are fulfilled and undisputed, which is why they will not be addressed in the submission at hand.

I. The Choice of Law Clause in Favor of the Law of Equatoriana Does Not Constitute an Exclusion of the CISG

114 A mere choice of law in favor of the law of Equatoriana does not constitute an exclusion of the CISG since the Parties had no intent to exclude it pursuant to Art. 6 CISG.

115 According to Art. 6 CISG, the parties may exclude the CISG either explicitly or implicitly (*FERRARI, Commentary, Art. 6, para. 12*). However, an implicit exclusion of the CISG must only be accepted very restrictively (*LORENZ, Art. 6, para. 6*). The intent to exclude the CISG must be clear and unambiguous (*FERRARI, Commentary, Art. 6, para. 18*). Therefore, an exclusion can be assumed when the parties explicitly exclude the CISG, *inter alia*, by choosing the law of a non-contracting State or opting for an expressly specified domestic regulation which would have been otherwise displaced by the Convention (*cf. SCHWENZER, CISG AC Opinion No. 16; SCHWENZER/HACHEM, Art. 6, paras. 12 et seq.; CISG-Online 616 [USA, 2001], paras. 23 et seq.; CISG-Online 6111 [USA, 2022], para. 44*). If the parties choose the law of a Contracting State, then they automatically choose the CISG because it is an integral part of that State's national law (*CISG-Online 276 [GER, 1997], ch. II.A.1; CISG-Online 877 [GER, 2004], para. 17; CISG-Online 2308 [AUT, 2012], para. 17; CISG-Online 6111 [USA, 2022], para. 44*). Hence, a mere choice of national law of a Contracting State does not suffice to exclude the CISG (*FERRARI, Commentary, Art. 6, para. 18*).

116 In the case at hand, a potential exclusion of the CISG was never addressed by the Parties. They merely chose the law of Equatoriana as the governing law of the PSA (*Exh. C 2, p. 12, Art. 20(d)*). Because Equatoriana is a Contracting State of the CISG (*PO 1, p. 43, para. III.3*) the CISG is an integral part of its national law. CLAIMANT even changed the wording of Art. 18 of the PSA related to termination, avoidance, and fundamental breach of contract to a wording based on the CISG (*Exh. C 7, para. 18; cf. Artt. 25, 49 CISG*), which clearly demonstrates CLAIMANT's intent to apply the CISG. At the same time, RESPONDENT did not object to this change in wording and at no point during the negotiations and contract conclusion expressed any intent to exclude the CISG. Thus, no common intent of the Parties with regard to the exclusion can be established.

117 The rule stated above is further not displaced by the fact that RESPONDENT is an SOE. The international practice draws no distinction between SOEs and private entities and the Equatorianian law does not contain any special regulations for SOEs (*PO 2, p. 44, para. 6*).

118 In conclusion, the Parties did not agree on the exclusion of the CISG pursuant to Art. 6 CISG.

II. The Kestrel Eye 2010 Drones Do Not Qualify as Aircrafts in the Sense of Art. 2(e) CISG

119 The sale of the six Kestrel Eye 2010 drones is not excluded from the CISG's scope of application under Art. 2(e) CISG because the drones do not have the function to transport humans or goods [**1**], there was no registration duty for the drones operated by an SOE [**2**] and RESPONDENT cannot rely on Art. 1 Aviation Safety Act for the qualification of the drones as "aircrafts" [**3**].

1. The Kestrel Eye 2010 Drone Does Not Have the Function to Transport Humans or Goods

120 Since the function of the Kestrel Eye 2010 drone is solely aerial surveillance and not transportation of humans or goods, it does not qualify as aircraft and is therefore not excluded by Art. 2(e) CISG.

121 The term "aircraft" in the sense of Art. 2(e) CISG includes civil and military aircrafts that – irrespective of their size – have the function to transport humans or goods and are intended for continual movement (*FERRARI, Commentary, Art. 2, paras. 39 et seqq.*). Whether something is considered an aircraft depends on whether its *primary* function is transportation (*FERRARI, Commentary, Art. 2, para. 41*). Thus, an aircraft not intended for transportation does not fall under Art. 2(e) CISG (*MEIER/STACHER, Art. 2, para. 14*). For this reason, hang-gliders, model planes, kites, rockets, satellites, space stations and drones are not excluded by Art. 2(e) CISG as explicitly stated by MANKOWSKI (*MANKOWSKI, Art. 2, para. 21*).

122 First, according to the Call for Tender, RESPONDENT requested "unmanned" drones for the collection of geological and geophysical data, which was to be executed by means of aerial surveillance *(Exh. C 1, p. 9, para. 4*). This then led to the conclusion of the PSA, where both Parties agreed to the acquisition of "Unmanned Aerial Systems (UAS) to collect the relevant geological and geophysical data" (*Exh. C 2, p. 10*). The sole function of the Kestrel Eye 2010 drone – according to the PSA – was aerial surveillance and not the transportation of humans or goods. It thus differed from the function of an aircraft according to Art. 2(e) CISG. Even if RESPONDENT decided to modify the function of the Kestrel Eye 2010 drones subsequently and use them

for functions other than what they were sold and engineered for under the PSA, it would not change their initial and primary function of data collection.

123 Second, the Kestrel Eye 2010 drones, in the version sold to RESPONDENT, are unable to transport humans (*PO 2, p. 45, para. 9*) or – as will be demonstrated in the following – goods. All of the drones sold to RESPONDENT had a *central payload bay*, which however, once the surveillance equipment is installed, does not have further payload capacity (*PO 2, p. 45, para. 10*). Only three of the drones sold to RESPONDENT also had an *optional payload bay* at the front (*PO 2, p. 44, para. 8*). The *optional payload bay* adds 25 % (roughly 49 kg) to the payload capacity of the drone (*PO 2, p. 45, para. 10*). Commercially, it makes little sense to use the Kestrel Eye 2010 drone with its small *optional payload bay* for standard delivery of cargo over short distances (*PO 2, p. 45, para. 9*). Therefore, it could only be used for transportation purposes if the whole surveillance equipment was removed (*PO 2, p. 44, para. 9*), which would then lead to a complete change of function of the drone. Besides, merely moving the surveillance equipment in between the northern and central parts of Equatoriana without landing or unloading the drone does not qualify as "transportation".

124 Third, CLAIMANT must further object to the statement of Mr. Barbosa, the Minister of Natural Resources and Development, that the drones were also supposed to transport urgently needed spare parts or medicine to remote areas (*Exh. R 2, p. 33, para. 5*). Mr. Field merely mentioned to the Minister that the Kestrel Eye 2010 drone had in the past been used for transportation of medicine or urgently needed parts, however, those were truly exceptional cases of emergency (*PO 2, p. 46, para. 22*). Even if the drones were used for transportation in truly exceptional cases, this would not make them an aircraft in the sense of Art. 2(e) CISG because their primary function would still be surveillance. Other air vehicles such as model aircrafts, hand-gliders or kites could as well be used to transport small goods, however, those are not subject to the exclusion in Art. 2(e) CISG.

125 In conclusion, the function of the Kestrel Eye 2010 drones shows that they are not aircrafts in the sense of Art. 2(e) CISG as they were neither intended by the Parties nor engineered by CLAIMANT to transport humans or goods. Their primary function was and is collecting geological data via aerial surveillance.

2. There Was No Registration Duty for the Drones Operated by an SOE

126 RESPONDENT argues that the registration duty under the Aviation Safety Act leads to the conclusion that the drones are aircrafts in the sense of Art. 2(e) CISG. In fact, there was no registration duty for the Kestrel Eye 2010 drones and even if there was, this would not suffice to

qualify an object as aircraft under Art. 2(e) CISG, as it would just be an indicator for its application.

127 The main reason for the exclusion of aircrafts under Art. 2(e) CISG is that many jurisdictions have their own special provisions regarding aircrafts, such as a requirement of registration being linked to the transfer of ownership (*MEIER/STACHER, Art. 2, para. 14; SCHWENZER/FOUNTOULAKIS/DIMSEY, Art. 2, p. 21*). However, an obligation for registration should be treated as an indicator for the qualification as aircraft in the sense of said provision and not as a firm requirement (*LORENZ, Art. 2, para. 9*). This is also shown by Art. 5(1)(b) ULIS (the predecessor of Art. 2(e) CISG), where these exceptions were limited to the purchases of aircrafts that were registered or subject to registration. This provision led to legal uncertainty, as it then became unclear which domestic law would apply to the issue of registration (*SCHWENZER/HACHEM, Art. 2, para. 27*). Thus, a duty of registration under national law is – by itself – no longer sufficient for the qualification as aircraft under Art. 2(e) CISG.

128 Art. 10 of the Aviation Safety Act states that "any aircraft *owned or operated by a private entity* in the territory of Equatoriana shall be registered at the aircraft registry" (*Exh. R 5, p. 36, Art. 10; emphasis added*). *E contrario*, if drones are owned or operated by an SOE, there is no such obligation.

129 In the case at hand, the drones were bought to be operated by RESPONDENT. RESPONDENT is a private company that is fully owned by the state of Equatoriana (*NoA, p. 4, para. 2; PO 2, p. 44, para. 5*). Furthermore, the Minister of Natural Resources and Development chairs a specifically installed supervisory board composed of eight members appointed by different ministries who meet twice a year and are responsible for the selection of the board of ministers and the approval of the annual budget and must be involved in any major decision of RESPONDENT (*PO 2, p. 44, para. 5*). Thus, RESPONDENT is an SOE and cannot be viewed as a "private entity" according to Art. 10 Aviation Safety Act. Since there is no duty of registration for "aircrafts" owned and operated by an SOE like RESPONDENT under the Aviation Safety Act, there was never an obligation to register the drones. This was also recognized by Ms. Bourgeois, the assistant of the COO of RESPONDENT at the time, who acknowledges that during the negotiations RESPONDENT confirmed "that under the law of Equatoriana a registration requirement existed for UAS of that size if they were operated by private parties. While no such requirement existed in the present case where the aircrafts were to be operated by an SOE […]" (*Exh. R 1, p. 32, para. 7*). In addition, it must be noted that UAS used for surveillance purposes were never registered under the Aviation Safety Act in the past (*PO 2, p. 46, para. 19*).

130 Even if there was an obligation to register the drones, this would just be an indicator for the qualification as an aircraft and not a requirement.

131 In conclusion, there has not been a registration duty for the Kestrel Eye 2010 drones because they were not owned or operated by a private entity.

3. RESPONDENT Cannot Rely on Art. 1 Aviation Safety Act for the Qualification of The Drones as "Aircrafts"

132 Contrary to RESPONDENT's view (*RNoA, p. 31, para. 26*), Art. 1 Aviation Safety Act, which provides a national definition of the term "aircraft" (*Exh. R 5, p. 36)*, is irrelevant for the qualification of "aircrafts" in the sense of Art. 2(e) CISG because the CISG must be interpreted autonomously.

133 Art. 1 Aviation Safety Act states, *inter alia*, that "Unmanned Aerial Vehicles are treated accordingly as aircrafts if their overall length exceeds 90 cm or if their payload is higher than 50 kg". Although the Kestrel Eye 2010 drone could qualify as aircraft under this definition, RESPONDENT may not rely on it for the interpretation of Art. 2(e) CISG.

134 Whether the CISG applies to a contract is to be determined autonomously in application of the terms and concepts within the CISG (*GEBAUER, pp. 685 et seq.; PERALES VISCASILLAS, Art. 7, para. 13; CLOUT Case 447 [USA, 2002], para. B.2; CISG-Online 2438 [AUT, 2012], para. 1; CISG-Online 2013 [SUI, 2009], para. 5.2.1*). Art. 7 CISG provides rules on how to interpret the articles of the CISG. According to Art. 7(1) CISG, the CISG has to be interpreted with regard to its international character, the need to promote uniformity in its application and the observance of good faith in international trade. Even if a certain term is equivalent or resembles a term used in a domestic legal system, relying on domestic legal solutions and relevant case law is prohibited (*FERRARI, Commentary, Art. 7, para. 10; SCHWENZER, Interpretation, p. 110; CISG-Online 4876 [CAN, 2020], para. 29*). Thus, a national interpretation of the term "aircraft" would be against the purpose of Art. 7 CISG (*FERRARI, Commentary, Art. 7, para. 12*). It is important for a forum not to be influenced by its own domestic law when interpreting the Convention because national rules on sales diverge sharply (*UNCITRAL CISG Commentary, Art. 7, para. 6*).

135 RESPONDENT attempts to argue that under its own national law (*cf. Art. 1 Aviation Safety Act*) the drones qualify as aircrafts and thus also qualify as aircrafts in the sense of Art. 2(e) CISG (*RNoA, p. 31, para. 26).* However, in respect of the international character of the CISG and the need to promote uniformity in its application, the term "aircraft" must be interpreted autonomously. Otherwise, it would affect the legal certainty of the Convention.

136 In conclusion, RESPONDENT cannot rely on Art. 1 Aviation Safety Act in qualifying the drones because Art. 2(e) CISG must be interpreted autonomously.

137 **Conclusion Issue C**: The PSA is governed by the CISG because the Parties did not exclude the CISG pursuant to Art. 6 CISG. Furthermore, the Kestrel Eye 2010 drone cannot be qualified as an aircraft in the sense of Art. 2(e) CISG as the function of the drone is not the transportation of humans or goods, there is no obligation to register the drones and RESPONDENT cannot rely on Art. 1 Aviation Safety Act or the PSA for the interpretation of the term "aircraft".

D. RESPONDENT CANNOT RELY ON ART. 3.2.5 ICCA TO AVOID THE PSA

138 RESPONDENT claims it could avoid the PSA because CLAIMANT allegedly misrepresented the Kestrel Eye 2010 drone as its newest and state-of-the-art model while the Hawk Eye 2020 drone was already in development (*Exh. C 8, p. 20; RNoA, p. 29, para. 17 and p. 31, para. 27*). According to RESPONDENT, this non-disclosure constitutes a misrepresentation, entitling it to avoid the PSA pursuant to Art. 3.2.5 ICCA. RESPONDENT further alleges that the present dispute is not governed by the CISG because all issues of substantive validity are excluded from its scope by virtue of Art. 4 CISG (*RNoA, p. 31, para. 28*). RESPONDENT thus bases its claim of misrepresentation on Art. 3.2.5 ICCA, Equatoriana's domestic law, which is a verbatim adoption of Art. 3.2.5 PICC (*RNoA, p. 29, para. 17*).

139 However, Art. 4(a) CISG states that the CISG only governs the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. Art. 4(a) CISG further clarifies that, "except as otherwise *expressly provided in this Convention*" (emphasis added), the validity of the contract or of any of its provisions shall be excluded from its scope of application. Thus, even the matters specifically mentioned in Art. 4(a) CISG as being excluded are not necessarily subject to the applicable domestic law (*SCHWENZER/HACHEM, Art. 4, para. 29*). In the specific case of misrepresentation, three different types need to be differentiated. In case of fraudulent misrepresentation, the CISG does not preempt the remedies provided by national law (*SCHROETER, p. 568*). Such remedies are, however, preempted if a claim of negligent or innocent misrepresentation that pertains to the quality of the goods sold is raised (*ibid.*).

140 As will be demonstrated, RESPONDENT cannot avoid the PSA based on fraudulent misrepresentation according to Art. 3.2.5 ICCA [**I**]. In fact, the alleged misrepresentation is exhaustively governed by the CISG [**II**]. Furthermore, RESPONDENT cannot avoid the PSA based on the CISG as the Kestrel Eye 2010 drones are conforming goods in the sense of Art. 35 CISG and RESPONDENT failed to fulfilled the notice period of Art. 39 CISG [**III**].

I. The Factual Basis Is Insufficient to Establish Fraudulent Misrepresentation

141 According to RESPONDENT, CLAIMANT's alleged non-disclosure of the fact that the Hawk Eye 2020 drone will launch soon constitutes a misrepresentation, entitling RESPONDENT to rely on Art. 3.2.5 ICCA to avoid the PSA (*Exh. C 8, p. 20, para. 4; RNoA, p. 29, paras. 17 et seqq.*).

142 However, RESPONDENT fails to recognize that Art. 3.2.5 ICCA can only be applied in cases of fraudulent misrepresentation. Yet, the facts of the case do not indicate fraudulent misrepresentation, which is why Art. 3.2.5 ICCA is excluded.

143 First, the facts do not indicate a fraudulent intent of CLAIMANT at the time the PSA was concluded [**1**]. Second, CLAIMANT's conduct was not fraudulent [**2**]. Third, there is no causality between the omission of facts and conclusion of the PSA [**3**].

1. CLAIMANT had no Fraudulent Intent at the Time the PSA Was Concluded

144 CLAIMANT had no fraudulent intent at the time the Parties concluded the PSA. CLAIMANT did not deliberately make a false representation regarding the Kestrel Eye 2010 drone by omitting the fact that the Hawk Eye 2020 drone was being developed.

145 Fraudulent intent can be established where the intent is to lead the other party into error and thereby gain an advantage to the detriment of the other party (*UNIDROIT Official Commentary, Art. 3.2.5; DU PLESSIS, Art. 3.2.5, para. 6; BRÖDERMANN, Art. 3.2.5, para. 1*). Thus, a party acts fraudulently if it is aware that its representation is false, but nonetheless deliberately misrepresents facts with the purpose of leading the other party into relying on misconstrued information when exercising business judgement (*DU PLESSIS, Art. 3.2.5, para. 6*).

146 In the case at hand, at the time of the conclusion of the PSA, the Kestrel Eye 2010 drone was indeed CLAIMANT's newest model complying with all technical requirements set out in the Call for Tender and providing state-of-the-art data collection (*cf. paras. 175 et seqq.*). While it is correct that CLAIMANT was also developing the Hawk Eye 2020 drone at that time, it is another type of UAS altogether. In particular, the Hawk Eye 2020 drone has different features and is based on a different technology, making it more than 100 % more expensive than the Kestrel Eye 2010 drone (*Exh. C 3, p. 14, para. 9; Exh. C 4, p. 15; Exh. R 3, p. 34*). Thus, CLAIMANT did not have an intent to commit a misrepresentation by not disclosing its work on the Hawk Eye 2020 drone.

147 This is corroborated by the fact that the term "newest technology" has no specific meaning in RESPONDENT's business practice (*PO 2, p. 45, para. 11*) and should thus be understood in its literal sense. The Kestrel Eye 2010 drone was indeed CLAIMANT's newest technology at the

time the PSA was concluded since the Hawk Eye 2020 drone was not yet on the market (*NoA, p. 5, para. 9*).

148 Further, CLAIMANT did not gain any unfair advantage over RESPONDENT by concluding the PSA. At the time of conclusion of the PSA, CLAIMANT had three largely finished Kestrel Eye 2010 drones in stock due to a partly paid order having been cancelled by an insolvent customer (*NoA, p. 5, para. 5 and 8*). Thus, CLAIMANT was able to offer the Kestrel Eye 2010 drones quickly and at a very favorable price (*NoA, p. 5, para. 5; Exh. C 3, p. 14, para. 9*). The normal price for the latest Kestrel Eye 2010 drone is EUR 10,000,000 (*Exh. R 4, p. 35*). RESPONDENT, however, was able to acquire four fully equipped drones for EUR 8,000,000 each and two un-equipped drones for EUR 6,000,000 each, which is more than competitive (*Exh. C 2, p. 11, Art. 3(1)(a)*).

149 Therefore, no fraudulent intent can be established as CLAIMANT neither deliberately made a false representation regarding the Kestrel Eye 2010 drones nor did it gain any unfair advantage over RESPONDENT.

2. CLAIMANT's Conduct Was Not Fraudulent

150 CLAIMANT's conduct cannot be qualified as fraudulent because it had no obligation to disclose its confidential business operations, and thus, acted in good faith. Further, RESPONDENT cannot rely on domestic jurisprudence to establish a wide-ranging duty of full disclosure.

151 Fraud can be committed by way of omission if according to reasonable commercial standards of fair dealing the non-disclosed information should have been disclosed (*DU PLESSIS, Art. 3.2.5, para. 10*). These "reasonable commercial standards of fair dealing" can be regarded as a manifestation of the general duty laid down in Art. 1.7 PICC, which demands each party to act according to good faith in international trade (*VOGENAUER, Art. 1.7, para. 16*). This standard is rather vague and thus prone to be interpreted in radically different ways (*DU PLESSIS, Art. 3.2.5, para. 18*). Thus, the "principle of good faith and fair dealing in international trade" according to Art. 1.7 PICC must be interpreted autonomously, i.e., domestic standards may be taken into account only to the extent that they are shown to be generally accepted amongst various legal systems (*UNIDROIT Official Commentary, Art. 1.7, para. 3; BONELL, Art. 1.7, ch. 3*). When establishing the scope of the duty to cooperate, a Dutch court ruled that according to Art. 1.7 PICC, the uniform regime of the PICC prevails over the less stringent standard available under French law because it is not so wide-spread and is not applied uniformly (*CISG-Online 545 [NLD, 1997], para. 4.5; VOGENAUER, Art. 1.7, para. 24*).

152 RESPONDENT bases its misrepresentation allegation on an interpretation by the Equatorianian Supreme Court of the national contract law of Equatoriana. The Equatorianian Supreme Court held that an experienced private party contracting with a newly formed government entity is under far-reaching disclosure obligations. These obligations extended to planned improvements of the product and any intentional violation of this disclosure would constitute a misrepresentation entitling the party to avoid the contract pursuant to the national equivalent of Art. 3.2.5 ICCA (*RNoA, p. 29, para. 18 et seq.*).

153 However, as there is no indication that such a wide-ranging domestic interpretation would be generally accepted amongst various legal systems, it is not possible to rely on it for the interpretation of Art. 3.2.5 ICCA. Rather, it should be interpreted in line with the example above. The duty to disclose shall thus be construed in a more narrow sense in accordance with Art. 1.7 PICC.

154 In any event, the case decided by the Supreme Court of Equatoriana is not comparable to the dispute at hand, as it took place in a purely domestic setting and the facts of the case differ. The precedent concerns a planned improvement to the product not being disclosed. However, the Hawk Eye 2020 drone does not represent an improvement of the Kestrel Eye 2010 drone, but a whole new product meant for a different purpose. In particular, the Hawk Eye 2020 drone has different features such as an almost ten times larger payload, which makes it better suited for transportation of goods and lengthy expeditions rather than simple data collection (*Exh. C 4, p. 15; Exh. R 3, p. 34*). Furthermore, the Hawk Eye 2020 drone is based on a different technology, is considerably larger than the Kestrel Eye 2010 drone, and requires a small airfield to start and land (*NoA, p. 5, para. 9*). Consequently, it is more than 100 % more expensive (*Exh. R 3, para. 34; Exh. C 3, para. 9*).

155 Therefore, no fraudulent conduct can be established as CLAIMANT was under no obligation to disclose the information of the Hawk Eye 2020 drone being in development.

3. There Is No Causality Between the Alleged Omission of Facts and the Conclusion of the PSA

156 There is no causality between the alleged omission of facts (CLAIMANT's non-disclosure of the Hawk Eye 2020 drone being developed) and RESPONDENT's decision to conclude the PSA.

157 To argue fraudulent misrepresentation, a causal link must be established between the conclusion of the contract by the party seeking avoidance and the alleged fraudulent conduct or omission by the other party (*DU PLESSIS, Art. 3.2.5, paras. 23 et seqq.; BRÖDERMANN, Art. 3.2.5, para. 1*).

158 It is hardly comprehensible why the non-disclosure of development of the Hawk Eye 2020 drone would have been causal to RESPONDENT entering the PSA. The fact that CLAIMANT was developing the Hawk Eye 2020 drone is irrelevant because the alleged non-disclosure is in no way connected with the technical output and other characteristics of the drones contracted for. As stated above, the Kestrel Eye 2010 drone fulfills all the requirements set by RESPONDENT, while the Hawk Eye 2020 drone is a completely different product (*cf. para. 154*). RESPONDENT further fails to prove that it would not have entered the PSA had it known about the Hawk Eye 2020 drone.

159 Therefore, no causality can be established between the non-disclosure of the Hawk Eye 2020 drone being in development and RESPONDENT's decision to enter the PSA.

160 In conclusion, RESPONDENT cannot rely on Art. 3.2.5 ICCA to avoid the PSA, because CLAIMANT did not fraudulently misrepresent the Kestrel Eye 2010 drone, as neither fraudulent intent nor fraudulent conduct can be established. Further, CLAIMANT's non-disclosure of the Hawk Eye 2020 drone being developed was not causal for RESPONDENT entering the PSA.

II. The Alleged Misrepresentation Is Exhaustively Governed by the CISG

161 A domestic law rule regarding misrepresentation is preempted by the CISG if it is triggered by a factual situation to which the CISG also applies, and this situation pertains to a matter exhaustively regulated by the CISG (*SCHROETER, p. 563*). In order to determine whether a remedy for misrepresentation is exhaustively regulated by the CISG, one needs to distinguish between innocent, negligent and fraudulent misrepresentation (*SCHROETER, p. 563*). While the CISG does not preempt remedies regarding fraudulent misrepresentation, the remedies for negligent and innocent misrepresentation are preempted by the remedies of the CISG as far as they relate to features of the goods sold, thus pertaining to a matter regulated by the CISG (*SCHROETER, pp. 582 et seq.*).

162 RESPONDENT's misrepresentation allegation is exhaustively governed by the CISG, as the facts invoked by RESPONDENT at most pertain to innocent misrepresentation [**1**] and are thus preempted by the CISG's remedies [**2**].

1. The Facts Invoked at Most Pertain to Innocent Misrepresentation

163 The facts invoked by RESPONDENT to establish the alleged misrepresentation of CLAIMANT at most pertain to innocent misrepresentation regarding the quality of the goods.

164 The innocent nature of a misrepresentation is usually defined negatively: A misrepresentation is innocent when it is neither fraudulent nor negligent (*SCHROETER, p. 569*). Fraudulent misrepresentation is distinguished from negligent misrepresentation by the element of intent (*KRAUSS,*

p. 11, para. 1.12). A party acts fraudulently when it acts dishonestly or in bad faith, while it acts negligently when it has not communicated certain information that the ordinary person in his or her position would have communicated (*ibid.*).

165 As shown above, the misrepresentation alleged by RESPONDENT cannot qualify as fraudulent misrepresentation (*cf. paras. 141 et seqq.*).

166 CLAIMANT's non-disclosure would be negligent if it did not communicate certain information that an ordinary person in the same position would have communicated. While it was generally known in the market that CLAIMANT was developing a new drone (*PO 2, p. 45, para. 14*), no ordinary person in CLAIMANT's position would have disclosed specific information about the features of a product not yet released. In contrast, a reasonable person in RESPONDENT's position would have made an effort to inform itself or would have asked CLAIMANT about its *future products*. However, RESPONDENT never did and now, after the conclusion of the PSA, cannot blame CLAIMANT for its own failure to inform itself.

167 Therefore, the misrepresentation alleged by RESPONDENT was neither fraudulent nor negligent and thus, could at most be qualified as innocent misrepresentation.

2. The Domestic Remedies for the Alleged Misrepresentation Are Preempted by the Remedies of the CISG

168 The domestic remedies for the alleged misrepresentation RESPONDENT tries to rely on are preempted by the remedies of the CISG.

169 As established above, RESPONDENT's claim could at most be qualified as a claim of innocent misrepresentation (*cf. paras. 163 et seqq.*). Domestic law remedies for innocent (as well as for negligent) misrepresentation are preempted as far as they relate to features of the goods sold, since the CISG exhaustively deals with those issues (*cf. FERRARI, Draft Digest, p. 522, para. 3; UNCITRAL CISG Commentary, Art. 4, para. 3; SCHROETER, p. 581*).

170 Indeed, the remedies concerning breach of contract by the seller, including any non-conformity of the goods sold, are addressed in Art. 45(1) CISG (*MÜLLER-CHEN, Art. 45, para. 1*). This provision contains a summary of the remedies available to the buyer such as the right to specific performance, repair, delivery of substitute goods, price reduction and avoidance (*Artt. 46-52 CISG*). The contractual obligation regarding conformity of the goods is regulated by Art. 35(1) CISG, which states that the seller must deliver goods that are of the quantity, quality, and description required by the contract. Regardless of what label is given to a claim, if it does not involve matters other than contractual obligations, it is a contract claim and falls within the scope of the CISG (*CISG-Online 2045 [USA, 2009], para. 20; CISG-Online 5233 [USA, 2020],*

paras. 17 et seq.). In accordance with this principle, any misrepresentation claim concerning the quantity, quality and description of the goods required by the contract between the parties falls under Art. 35(1) CISG (*SCHROETER, p. 572; CISG-Online 5825 [NLD, 2022], para. 53; CISG-Online 5233 [USA, 2020], paras. 18 et seq.*).

171 RESPONDENT laid down its allegations concerning the Kestrel Eye 2010 drones in its letter of 30 May 2022 (*Exh. C 8, p. 20*). The specific wording used by RESPONDENT is that the Kestrel Eye 2010 drones were misrepresented regarding the "quality" required by the tender documents and, thus, do not qualify as "state-of-the-art technology" (*ibid.*). Further, RESPONDENT argues that the development of the Hawk Eye 2020 drone is inconsistent with the "description" of the Kestrel Eye 2010 drone by Mr. Bluntschli, CLAIMANT's former CEO, as being CLAIMANT's newest model (*ibid.*).

172 All the above mentioned allegations in fact pertain to a misrepresentation claim that *relates to features of the goods sold*. Such a claim falls within the scope of Art. 35 CISG, preempting recourse to domestic remedies under the ICCA.

173 Therefore, RESPONDENT's claim of misrepresentation falls within the scope of the CISG, preempting reliance on domestic remedies.

III. RESPONDENT Cannot Avoid the PSA Based on the CISG

174 Even though RESPONDENT's claim of misrepresentation is regulated by Art. 35 CISG, RESPONDENT cannot avoid the contract because the Kestrel Eye 2010 drones sold under the PSA are in fact conforming goods in the sense of Art. 35 CISG [**1**] and RESPONDENT lost its right of avoidance as it failed to fulfill the notice period of Art. 39 CISG [**2**].

1. The Kestrel Eye 2010 Drones Are Conforming Goods in the Sense of Art. 35 CISG

175 The Kestrel Eye 2010 drones sold under the PSA are conforming goods in the sense of Art. 35 CISG, as they fulfill all technical requirements set by RESPONDENT and are fit for the purpose as described in the contract. Thus, RESPONDENT cannot avoid the PSA based on the CISG.

176 Art. 35(1) CISG provides for the duties of the seller regarding the quantity, quality and description of the goods to be delivered under the contract. When assessing the conformity of a good, only the contractual description may be relied upon (*SCHWENZER, Commentary, Art. 35, para. 9*).

177 In the case at hand, the Kestrel Eye 2010 drones sold to RESPONDENT are conforming goods in the sense of Art. 35 CISG as they comply with all requirements defined in the PSA and in the Call for Tender. The PSA states that CLAIMANT is obliged to deliver six of its "newest model of Kestrel Eye 2010 UAS", four of which are equipped with state-of-the-art geological

surveillance feature fit for the collection of relevant geological and geophysical data for the proper exploitation of natural resources (*Exh. C 2, p. 10, Art. 2*).

178 As the contract itself does not contain an explicit definition of the word "state-of-the-art", the Parties' intent regarding the state-of-the-art geological surveillance features must be construed in accordance with the Call for Tender wherein RESPONDENT stipulated the requirements the drones had to fulfill. Therein, the following minimum requirements were outlined: payload weight of 180 kg, volume of 0.8 m^3, operating altitude of 5000 m and endurance of 10 h (*Exh. C 1, p. 9*). Further, the drones had to be equipped with the technology allowing communication via radio and the necessary surveillance appliances for the collection of geological and geophysical data (*ibid.*). The Kestrel Eye 2010 drone is entirely compliant with those technical requirements and the purpose described. Its payload of 245 kg, operating altitude of 6000 m and endurance of 13 h meet and even significantly exceed the minimum thresholds set by RESPONDENT (*Exh. C 4, p. 15; PO 2, p. 45, para. 12*). Further, the Kestrel Eye 2010 drone is equipped with a radio link and can successfully operate in remote areas such as the Northern Provinces of Equatoriana (*NoA, p. 5, para. 9*). Thus, the Kestrel Eye 2010 drones are entirely compliant with the PSA and the Call for Tender.

179 Furthermore, as the term "newest technology" has no specific meaning in RESPONDENT's business practice (*PO 2, p. 45, para. 11*), it must be understood in its literal sense, meaning the newest, as in most recent, drone type that CLAIMANT had developed at the time of conclusion of the PSA. The Kestrel Eye 2010 drones were indeed based on CLAIMANT's newest technology as the Hawk Eye 2020 drones' development was not yet finished and it was still in its testing phase (*PO 2, p. 45, para. 14*).

180 In conclusion, avoidance of the PSA is not possible because the Kestrel Eye 2010 drones are conforming goods in the sense of Art. 35 CISG.

2. RESPONDENT Lost Its Right to Avoidance of the Contract as It Failed to Fulfill the Notice Period of Art. 39 CISG

181 Even if the Kestrel Eye 2010 drones sold under the PSA were not conforming goods in the sense of Art. 35 CISG (*quod non*), RESPONDENT would have lost its right to rely on a lack of conformity, since it failed to give notice of avoidance within a reasonable time according to Art. 39 CISG.

182 Art. 39(1) CISG states that the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a *reasonable time*. "Reasonable time" is to be determined based on the circumstances of the

individual case, but one can assume as a rough average that it is about one month after the buyer has discovered the lack of conformity or ought to have discovered it (*SCHWENZER, CISG, Art. 39, para. 17; MARTI-SCHREIER, Art. 39, para. 13; CISG-Online 5538 [GER, 2020], para. 36*). The period to give notice about a lack of conformity – whether the non-conformity was discovered upon own examination of the goods or from other circumstances – starts running from the moment of factual certainty of the alleged non-conformity (*cf. SCHLECHTRIEM, CISG AC Opinion No. 2, p. 1*).

183 In the case at hand, RESPONDENT became aware that CLAIMANT launched its new drone, the Hawk Eye 2020, at the air show in Mediterraneo in February 2021 (*NoA, p. 5, para. 10*). The Kestrel Eye 2010 drone and the Hawk Eye 2020 drone are entirely different models based on different types of technology and are engineered for different purposes (*cf. para. 154*). Thus, actual delivery of the Kestrel Eye 2010 drones would not have been decisive in achieving factual certainty of the alleged non-conformity. Rather, the start of the period to give notice about a lack of conformity of roughly one month must be tied to the air show of February 2021. In lieu of submitting any notice of lack of conformity within this period, RESPONDENT, in May 2021, scheduled a meeting to discuss the issue of misrepresentation, where it did not even discuss any conformity issues, but instead requested the Arbitration Agreement to be amended (*Exh. C 7, p. 19, para. 14*). After that, according to Mr. Cremer, the CEO of CLAIMANT, the matter was resolved (*Exh. C 3, p. 13, para. 4*) and RESPONDENT did not initiate any further discussions regarding the alleged misrepresentation.

184 RESPONDENT notified CLAIMANT of the alleged non-conformity on 30 May 2022, more than a year after the air show (*NoA, p. 5, para. 9; Exh. C 8, p. 20*). This time span of over a year does not qualify as reasonable, as it by far exceeds one month.

185 In conclusion, RESPONDENT in any event lost its right of avoidance as it failed to fulfill the notice period of Art. 39(1) CISG.

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186 **Conclusion Issue D**: RESPONDENT is not entitled to declare the PSA avoided as the factual basis is insufficient to establish fraudulent misrepresentation. Further, the misrepresentation alleged by RESPONDENT is exhaustively governed by the CISG, as the facts invoked by it at most pertain to innocent misrepresentation and are thus preempted by the CISG's remedies. Lastly, RESPONDENT cannot avoid the PSA based on the CISG as the Kestrel Eye 2010 drones are conforming goods in the sense of Art. 35 CISG and RESPONDENT lost its right to avoid the PSA as it failed to fulfill the notice period of Art. 39 CISG.

Requests

In light of the submissions above, on behalf of CLAIMANT, we herewith respectfully request the Tribunal:

a. to declare that the Arbitral Tribunal has jurisdiction to hear the case;

b. to reject RESPONDENT's request to stay or, alternatively, bifurcate the proceedings;

c. to find that the Purchase and Supply Agreement is fully governed by the CISG;

d. to find that RESPONDENT cannot rely on Art. 3.2.5 ICCA to avoid the Purchase and Supply Agreement;

e. to order RESPONDENT to bear the costs of this Arbitration, including CLAIMANT's legal fees and expenditures.

Respectfully submitted on 8 December 2022 by

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