TWENTY SECOND ANNUAL

WILLEM C. VIS

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONGKONG

MEMORANDUM FOR CLAIMANT

UNIVERSITY OF MÜNSTER

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On Behalf Of	**Against**
CLAIMANT	**RESPONDENT**
GREENHYDRO PLC.	EQUATORIANA RENPOWER LTD.
1974 Russell Avenue	1 Russell Square
Capital City	Oceanside
Mediterraneo	Equatoriana

ACADEMIC INTEGRITY AND ARTIFICIAL INTELLIGENCE DISCLOSURE STATEMENT

UNIVERSITY: UNIVERSITY OF MÜNSTER

COUNTRY: GERMANY

ACADEMIC INTEGRITY	YES	UNSURE	NO
We confirm that this memorandum does not include text from any source, whether the source was in hard copy or online available, which has not been properly distinguished by quotation marks or citation.	■		

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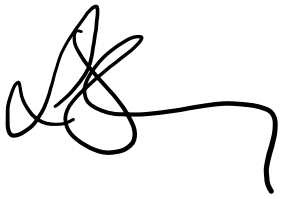
DATE: 12 December 2024

NAME: Lea Hammermann SIGNATURE: 

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READER'S GUIDE

Dear Reader,

The Vis (East) Moot Team of the University of Münster is proud to present our CLAIMANT Memorandum to you. All references within the text are designed to be fully interactive. We have created this guide to help you navigate through the electronic version of our Memorandum. In this regard:

- Clicking on any heading under the Table of Contents will take you to the respective heading within our Memorandum.
- Clicking on any "infra para" or "supra para" mentioned in the text of the Memorandum will take you to the relevant paragraph that has been cited.
- Clicking on any authority/case mentioned in the text of the Memorandum will take you to the Index, where full information on that authority may be obtained.
- Similarly, clicking on the paragraph numbers mentioned in the Index for a particular authority/case will take you to the respective paragraph where that authority/case has been cited.

We hope this proves to be helpful. Enjoy your reading and thank you for your time!

Respectfully,
Vis (East) Team of the University of Münster

STATEMENT OF FACTS

GreenHydro Plc. and Equatoriana RenPower Ltd. are the parties to this dispute [*hereinafter:* "the Parties"]. GreenHydro Plc. [*hereinafter:* "CLAIMANT"] is a medium-sized engineering enterprise based in Mediterraneo. It is specialised in the planning, construction and sale of plants for the production of green hydrogen. CLAIMANT plans to showcase its new technology for the first time in a major contract. Equatoriana RenPower Ltd. [*hereinafter:* "RESPONDENT"] is an entity which is fully government-owned by the state of Equatoriana. It is active in the field of renewable energies. RESPONDENT takes the lead in implementing Equatoriana's "Green Energy Strategy" to establish a hydrogen infrastructure by 2040.

Mediterraneo and Equatoriana are both contracting states to the CISG.

On 3 January 2023, RESPONDENT invites bids for the construction and delivery of a green hydrogen plant.

On 17 July 2023, CLAIMANT and RESPONDENT sign the Purchase and Service Agreement [*hereinafter:* "PSA"].

On 25 August 2023, CLAIMANT concludes a subcontract with Volta Transformer.

In October 2023, local elections in Equatoriana lead to a shift in the energy ministry. The new energy minister, Ms. Vent, is a member of the Equatorianian National Party. Her party strongly opposes the "Green Energy Strategy".

On 27 December 2023, RESPONDENT's CEO, Ms. Faraday, notifies CLAIMANT that she will be replaced. Her successor, Mr. la Cour, is close to the new government and a well-known critic of hydrogen energy. Ms. Faraday predicts that he will terminate or aggressively renegotiate unwanted contracts relating to the "Green Energy Strategy".

On 28 February 2024, CLAIMANT sends detailed plans for the construction of the plant to RESPONDENT.

On 29 February 2024, RESPONDENT terminates the PSA.

On 28 April 2024, in a meeting between the Parties, RESPONDENT threatens to initiate criminal investigations against CLAIMANT's representatives.

On 12 May 2024, in a subsequent meeting between the Parties' CEOs, Mr. la Cour demands a 15 % price reduction. The prosecution office starts criminal investigations against Mr. Deiman.

On 25 May 2024, RESPONDENT sends a document labelled "without-prejudice" offer to CLAIMANT, insisting on the 15 % price reduction.

On 31 July 2024, CLAIMANT submits its request for arbitration.

From 30 March to 6 April 2025, the Oral Hearings are taking place before the arbitral tribunal [*hereinafter:* "Tribunal"] in Vinobona, Danubia.

SUMMARY OF ARGUMENT

FIRST ISSUE: THE TRIBUNAL HAS JURISDICTION AND THE CLAIM IS ADMISSIBLE

As the Parties are bound by an operative arbitration agreement, the Tribunal has jurisdiction to hear the claim. Compliance with the mediation clause is not a question of jurisdiction. Equatorianian jurisprudence does not apply to this assessment. Moreover, the claim is admissible since the wording and the purpose of the mediation clause prove that it is not mandatory. When exercising its discretion, the Tribunal should recognise that RESPONDENT's reliance on the mediation clause is not in line with good faith and ensure the efficiency of the arbitration.

SECOND ISSUE: EXHIBIT R3 SHOULD BE EXCLUDED WHILE EXHIBIT C7 IS ADMISSIBLE

Ex. R3 is confidential and must therefore be excluded from the case. In accordance with the "most favoured nation" rule, the Tribunal is advised to uniformly apply Equatoriana's law on evidentiary privileges. Additionally, RESPONDENT should be prohibited to submit evidence which it obtained during criminal investigations to uphold the equality of arms. On the contrary, Ex. C7 constitutes admissible evidence. It is relevant and material to the case. There are no valid grounds for an exclusion: First, the mere labelling of Ex. C7 as "without-prejudice" does not confer legal privilege. RESPONDENT was only seeking concessions but was not willing to give one. Second, lacking a party agreement, Art. 15 FAI Mediation Rules does not cover negotiations conducted before the mediation. Third, RESPONDENT's objection to the admissibility of Ex. C7 is contrary to good faith.

THIRD ISSUE: THE CISG IS APPLICABLE TO THE PSA

The PSA qualifies as a mixed contract in the sense of Art. 3(2) CISG. The preponderance of the sales elements is demonstrated both by an economic analysis and the Parties' intention. Thus, the PSA falls within the substantive scope of the Convention. In addition, both Parties have their places of business in different contracting states. Volta Transformer cannot be regarded as a place of business of CLAIMANT since there are no legal ties between the two companies at the time of contract conclusion. Lastly, the exclusion of Art. 2(b) CISG is inapplicable because the tender process is a public procurement process. Although the public procurement process involves a reverse bid "auction", Art. 2(b) CISG remains inapplicable due to its purpose and drafting history.

FOURTH ISSUE: THE PARTIES HAVE NOT VALIDLY EXCLUDED THE CISG'S APPLICATION

The choice-of-law clause in Art. 29 PSA does not explicitly exclude the CISG. It does not include an explicit reference to the Convention. The CISG is not part of the excluded national conflict of laws principles. Furthermore, the Parties did not impliedly exclude the Convention: A reasonable third person would not have interpreted the Parties' behaviour as an intent to exclude the CISG. There is no consensus to impliedly exclude the CISG.

FIRST ISSUE: THE TRIBUNAL SHOULD NOT REJECT THE CLAIM FOR LACK OF JURISDICTION OR INADMISSIBILITY OR AS PART OF ITS DISCRETION

1 The Parties concluded the PSA driven by a mutual interest to construct the green hydrogen plant. CLAIMANT sought to use the project as a showcase for its newly patented technology while RESPONDENT aimed to implement the "Green Energy Strategy" of the Equatorianian government. However, as the political support for the strategy declined, RESPONDENT had to find a reason to discard its contractual obligations. Accordingly, it seized the first opportunity to terminate the project [*Ex. C5, p. 18 paras. 14 et seq.*].

2 For the event of disputes arising out of a termination, the Parties agreed to reach for a resolution through arbitration [*PSA, pp. 12 et seq. Art. 30*]. However – as much as it disregarded its contractual obligations under the PSA – RESPONDENT now equally abandons its commitment to arbitrate. It tries to evade an arbitral proceeding by calling into question the tribunal's authority on all fronts. To this end, RESPONDENT draws attention to the multi-tier clause in Art. 30 PSA [*PSA, pp. 12 et seq. Art. 30*]. Its first paragraph reads: *"*Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or validity thereof, shall first be submitted to mediation in accordance with the Mediation Rules of the Finland Chamber of Commerce*"* [*hereinafter:* "Mediation Clause"*; PSA, p. 12 Art. 30(1)*].

3 RESPONDENT alleges that compliance with the Mediation Clause was a pre-condition for the jurisdiction of the Tribunal or at least for the admissibility of the claim [*Answer, p. 27 para. 16*]. What RESPONDENT omits to state is that it demanded a 15 % price reduction as a pre-condition for any further negotiations [*Ex. C7, p. 20; Ex. C5, p. 18 para. 16*]. If CLAIMANT agreed to that, it would have suffered an irreversible loss of EUR 42.75 Mio [*cf. PSA, p. 11 Art. 7; PO2, pp. 55 et seq. para. 35b (Purchase Price EUR 285 Mio); cf. Ex. C7, p. 20*]. RESPONDENT now pressures CLAIMANT to either accept its demand or to enter a futile mediation process [*Ex. C5, p. 18 para. 16; cf. Ex. C7 p. 20*]. CLAIMANT is left with only one way to obtain justice: seeking relief in a fair arbitration. For this reason, CLAIMANT respectfully requests the Tribunal to find that it should <u>not</u> reject the claim for lack of jurisdiction or inadmissibility or as part of its discretion. Instead, it asks the Tribunal to proceed with the arbitration as efficiently as possible.

4 The Parties chose the FAI Arbitration Rules 2024 [*hereinafter:* "FAI Rules"] to govern the proceedings [*PSA, p. 13 Art. 30(2); PO1, p. 50 para. II*]. The FAI board made a positive prima facie decision on the Tribunal's jurisdiction [*File, p. 39 para. 1*]. CLAIMANT now asks the Tribunal to exercise its competence-competence and rule in favour of its own jurisdiction pursuant to Art. 33.1 FAI Rules. As part of its discretion according to Art. 26.1 FAI Rules, the Tribunal should ensure the swift and efficient resolution of the dispute [*Savola, p. 243*].

5 In this vein, CLAIMANT makes the following three submissions: First, the Tribunal has jurisdiction to hear the case (**A.**). Second, the claim is admissible (**B.**). Third, the Tribunal should allow the claim as part of its discretion (**C.**).

A. THE TRIBUNAL HAS JURISDICTION TO HEAR THE CASE

6 Under Art. 33.1 FAI Rules, the tribunal has the authority to rule on its jurisdiction, including any objections concerning the arbitration agreement. The Parties explicitly agreed that any dispute shall be settled by arbitration in Art. 30(2) PSA [*hereinafter:* "Arbitration Agreement"*; PSA, p. 13, Art. 30(2)*]. The Arbitration Agreement provides for Danubia as the seat of arbitration [*PSA, p. 13, Art. 30(2)*]. Danubia has adopted the UNCITRAL Model Law as Danubian Arbitration Law [*hereinafter:* "DAL"*; PO1, pp. 50 et seq. para. III.4*]. Accordingly, Art. 8(1) DAL regulates objections to the Arbitration Agreement, such as challenges to its operability. This is equally regulated by Art. II(3) New York Convention [*hereinafter:* "NYC"], which is the applicable law for the enforcement of an award in Equatoriana and Mediterraneo [*ibid.*].

7 RESPONDENT alleges that compliance with the Mediation Clause was a condition precedent for the operability of the Arbitration Agreement [*Answer, p. 27 para. 16; PO2, p. 56 para. 36c*]. Thereby, it challenges the Tribunal's jurisdiction to decide the case [*Answer, p. 27 para. 16*].

8 However, compliance with the Mediation Clause is not a question of jurisdiction (**I.**). Moreover, the Arbitration Agreement is operative pursuant to Art. 8(1) DAL and Art. II(3) NYC (**II.**).

I. COMPLIANCE WITH THE MEDIATION CLAUSE IS NOT A QUESTION OF JURISDICTION

9 By concluding an arbitration agreement, the parties mutually agree to the authority of an arbitral tribunal to decide a specific dispute [*Jolles, p. 335*]. If such dispute arises, it remains the same – whether it is settled by pre-arbitration procedures or not [*NWA v. NVF, p. 13 para. 54*]. It is the exact dispute the parties wanted to submit to arbitration [*ibid.*].

10 By choosing arbitration, the parties desire to have a single, centralised forum for resolving such dispute [*C v. D, p. 24 para. 49*]. Consulting the same forum for all procedural matters is both cost and time efficient and avoids inconsistent decisions [*C v. D, p. 24 para. 49; Born, Ch. 5 p. 126; cf. Aksen et al., p. 601*]. Thus, the chosen tribunal shall also decide on questions regarding pre-arbitration procedures [*C v. D, p. 24 para. 49*]. This is only consistent as the pre-arbitration procedure deals with the same substantive dispute as the arbitration [*cf. NWA v. NVF, p. 13 para. 54*]. If the parties desire otherwise, they must expressly agree that non-compliance with pre-arbitration procedures excludes jurisdiction [*C v. D, pp. 4 et seq. paras. 8, 11; Caron et al., p. 263; cf. Born, Ch. 5 pp. 115 et. seq.*].

11 Furthermore, it is a particularity of jurisdictional decisions that they can be subject to full judicial

review by state courts [*Redfern/Hunter, para. 5.112; Mavrantonakis, p. 2*]. Therefore, characterizing matters of pre-arbitration procedures as jurisdictional can lead to an unjustified extension of the scope for challenging awards [*Aksen et al., p. 601; Caron et al., p. 244*]. Thus, objections concerning pre-arbitration requirements generally do not challenge the tribunal's jurisdiction [*C. v. D., p. 24 para. 50; Westco v. Sui Chong, p. 4; Mining v. Sierra Leone, para. 21; Emirates Trading Case, para. 26*].

12 The Parties mutually agreed on a Tribunal established under the FAI Rules to decide any dispute arising out of a termination of the PSA [*PSA, p. 13 Art. 30(2); File, p. 39 para. 2*]. This Tribunal is the single, centralised forum that the Parties agreed upon. Thus, it is the only competent body to decide on questions regarding the Mediation Clause. The Parties did not explicitly provide for an exclusion of jurisdiction in case of non-compliance with the Mediation Clause [*PSA, p. 12 Art. 30(1)*].

13 Consequently, compliance with the Mediation Clause is not a question of jurisdiction.

II. THE ARBITRATION AGREEMENT IS OPERATIVE

14 Under Art. 8(1) DAL and Art. II(3) NYC, an arbitration agreement is inoperative where it has no legal effect [*Albon v. Naza, para. 18; Bantekas et al., p. 150; Mistelis, p. 13*]. This defect may apply where the arbitration agreement is conditional [*Mistelis, p. 13; Caron et al., p. 243*]. According to Equatorianian case law, mediation is a condition precedent for the jurisdiction of the arbitral tribunal in case of a multi-tier clause [*Ex. R1, p. 30 para. 9*]. However, only the law applicable to the arbitration agreement determines the tribunal's jurisdiction [*Redfern/Hunter, para. 3.07; Lew, p. 129; Pearson, p. 120*]. In Equatoriana, Danubia and Mediterraneo, arbitration clauses contained in CISG-governed sales contracts are also subject to the CISG [*PO1, p. 51 para. III.5*].

15 In general, a failure to initiate mediation under a multi-tier dispute resolution clause does not render an arbitration agreement inoperative: If such failure rendered an arbitration agreement inoperative, this would allow a party to withdraw from its initial commitment to arbitrate [*Seidel v. Telus, p. 535; Jolles, p. 335*]. As a consequence, the dispute would be submitted to state courts [*Jolles, p. 335*]. This would contradict both parties' initial intention since arbitration agreements are typically concluded to exclude state court jurisdiction [*Westco v. Sui Chong, p. 4; Jolles, p. 335; Redfern/Hunter, para. 1.04*]. Therefore, in case of multi-tier clauses, the commitment to arbitrate is not contingent on performing mediation first [*Jolles, p. 335*].

16 The PSA is predominantly a sales contract governed by the CISG [*infra paras. 122, 153, 181*]. Thus, the Parties have also subjected the Arbitration Agreement to the CISG – Equatorianian case law does not apply to determine the Tribunal's jurisdiction [*cf. PO1, p. 51 para. III.5*]. Right from the start, both Parties agreed on arbitration as the respective dispute resolution mechanism [*Ex. R1, p. 30 para. 8*]. They only negotiated minor questions, such as the seat and the institutional rules

[*ibid.*]. This shows that both Parties agreed on arbitration in order to exclude state court jurisdiction. Otherwise, RESPONDENT would now be allowed to unilaterally withdraw from its initial commitment to arbitrate.

17 Therefore, the Arbitration Agreement is operative.

18 The Tribunal has jurisdiction to decide the case.

B. THE CLAIM IS ADMISSIBLE

19 Admissibility refers to preliminary aspects of the merits of a claim, i.e. if it is ready to be heard by the tribunal [*Waste Mgt. v. United Mexican States, p. 265 para. 58; Aksen et al., p. 617; Caron et al., p. 244 fn. 59*]. Pre-arbitration steps in multi-tier clauses affect the admissibility only if they are mandatory [*Caron et al., p. 243; Jolles, p. 336; Born, Ch. 5 p. 118*]. Deeming pre-arbitration steps mandatory may delay or deny access to arbitral proceedings and relief on meritorious claims [*Born, Ch. 5 p. 119; Caron et al., p. 235*]. As this has far-reaching consequences for the parties, pre-arbitration steps are presumptively treated as non-mandatory [*Born, Ch. 5 pp. 118 et seq.; Berger, Escalation Clause, p. 11*]. To rebut this presumption, the parties must unambiguously show their intent for a mandatory requirement [*Born, Ch. 5 p. 118; Caron et al., p. 243*]. This is reflected by Art. 11.1 FAI Mediation Rules. The parties' intent is determined pursuant to Art. 8 CISG. To this end, one must consider all relevant circumstances as per Art. 8(3) CISG. These include the wording and the purpose of the clause [*George, p. 120; Born, Ch. 5 p. 119; cf. Biwater Gauff Case, para. 343*].

20 Neither the wording (**I.**) nor the purpose (**II.**) of the Mediation Clause show an intent of the Parties for it to be mandatory.

I. THE MEDIATION CLAUSE IS NOT MANDATORY PURSUANT TO ITS WORDING

21 For a mediation clause to be mandatory, the parties must formulate their intent in clear and unequivocal language [*Tang v. Grant Thornton, para. 60; Redfern/Hunter, para 2.98; Jolles, p. 336*]. Especially the use of conditional clauses highlights such intent [*Born, Ch. 5 p. 122*]. Furthermore, a reasonably clear clause must include a time limit for the pre-arbitral proceedings after which the parties can resort to arbitration [*X GmbH Case, para. 3.5.2; Tang v. Grant Thornton, para. 72; Redfern/Hunter, para. 2.98*]. Particularly under the FAI Mediation Rules, a mediation clause is mandatory if it contains such time limit [*FAI Mediation Guidelines, p. 6 para. 31*]. Otherwise, the tribunal could not determine with certainty whether a mediation clause has been complied with [*Jiménez Figueres, p. 72; Jolles, p. 336; cf. Tang v. Grant Thornton, para. 60*]. The parties would be obliged to mediate for an undetermined period of time [*Emirates Trading Case, para. 25; Jolles, p. 336*]. The dispute resolution clause at stake in the High Court's ruling in the *Emirates Trading Case* provides an example of a mandatory clause of conditional structure: "If no solution can be arrived at in

between the Parties for a continuous period of 4 (four) weeks then the non-defaulting party can invoke the arbitration clause and refer the disputes to arbitration" [*Emirates Trading Case, para. 3*]. In case of doubt, the tribunal should hold in favour of a non-mandatory clause [*Born, Ch. 5 p. 120; Caron et al., p. 239; Jolles, p. 336*].

22 Art. 30 PSA provides for mediation and arbitration as dispute resolution mechanisms [*PSA, pp. 12 et seq. Art. 30*]. The present dispute resolution clause must be distinguished from the one in the *Emirates Trading Case*: First, it is not set up in a conditional structure but rather contains two stand-alone clauses [*ibid.*]. Second, the Mediation Clause does not include a time limit after which the Parties can resort to arbitration [*cf. ibid.*]. If the Mediation Clause was deemed mandatory, this would allow RESPONDENT to oblige the Parties to mediate for an undetermined period of time. In any case, the Tribunal should hold in favour of its non-mandatory nature even if it has doubts on its clarity.

23 The wording of the dispute resolution clause does not show an intention of the Parties for a mandatory clause.

II. THE MEDIATION CLAUSE IS NOT MANDATORY ACCORDING TO ITS PURPOSE

24 The purpose of multi-tier clauses is to encourage an amicable settlement and to enhance efficiency, thereby avoiding expenses and delays [*Caron et al., p. 230; Fach Gómez/Lopez-Rodriguez, p. 36*]. Multi-tier clauses offer a flexible framework in which the parties choose the appropriate dispute resolution mechanism for their dispute [*Berger, Escalation Clauses, p. 5; Pryles, p. 24*]. It should not force the parties into a tight corset but rather be adaptable to the individual circumstances [*Berger, Escalation Clauses, p. 5*]. Multi-tier clauses aim to enhance efficiency by avoiding obsolete expenses or delays in fruitless negotiations [*ICC Case No. 8445, p. 169; Caron et al., p. 230; Pryles, p. 24*]. This is especially true for construction projects as disputes can arise out of various issues – some suited to be settled by mediation, some by arbitration [*Jenkins, p. 64; Pryles, pp. 24 et seq.*]. The efficient use of pre-arbitration requirements allows parties to avoid costly disruptions to their construction project [*Jenkins, p. 64*]. This enables the parties to complete their project in a timely manner despite arising disputes [*ibid.*].

25 CLAIMANT had a strong interest in timely finalizing the plant to use it as a reference project from 2026 onwards [*PO2, p. 54 para. 22; Request, p. 3 para. 7*]. Convergently, RESPONDENT chose CLAIMANT as a supplier particularly because it offered to construct the plant within a very ambitious time frame [*Ex. C5, p. 16 paras. 7 et seq.*]. This reflects the Parties' mutual intent to quickly realize the project. The Parties even took special precautions to ensure their adherence to the timeline, e.g. by limiting the possible objections to governmental permits [*Request, p. 3 para. 7; PSA, p. 11 Artt. 3, 4*]. Moreover, they initially agreed to use the FAI Rules for Expedited Arbitration [*PSA,*

p. 13 Art. 30]. Therefore, to avoid jeopardizing the timeline, it was crucial for all disputes to be resolved as efficiently and flexibly as possible.

26 This flexibility is further outlined in the Arbitration Agreement: It states that the FAI Board – at the parties' request – may determine whether it considers the comprehensive FAI Rules to be more appropriate than the FAI Rules for Expedited Arbitration [*PSA, p. 13 Art. 30(2)*]. To this end, it may consider the amount in dispute, the complexity of the case, and other circumstances [*ibid.*]. Thereby, the Parties expressed a willingness to adopt a set of rules tailor-made for the nature of the dispute. In light of the present dispute's complexity, they even made use of this flexibility by agreeing on the comprehensive FAI Rules instead of the Rules for Expedited Arbitration [*File, p. 39 para. 2*]. Hence, the Parties' intent for efficient dispute resolution does not include the introduction of a rigid procedure that cannot be derogated from. They rather intended to adopt a non-mandatory but efficient procedure that can be derogated from. This must be equally true for the Mediation Clause.

27 Accordingly, the Mediation Clause is not mandatory according to its purpose.

28 Hence, the claim is admissible.

C. THE TRIBUNAL SHOULD EXERCISE ITS DISCRETION TO ALLOW THE CLAIM

29 Efficiency is a major objective of arbitration and of FAI Arbitration in particular [*Savola, p. 21; Ehrström/Timonen/Turunen, p. 75*]. Art. 26.1 FAI Rules stipulates that the arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate. This entails the maxim to conduct the proceedings efficiently in order to avoid unnecessary costs and delays [*Savola, p. 243*]. Moreover, Art. 26.3 FAI Rules imposes a duty on all parties to act in good faith.

30 The Tribunal should exercise its procedural discretion in the following way: To ensure an efficient proceeding, it should refrain from ordering the Parties to mediate (**I.**). Moreover, it should consider that RESPONDENT's reliance on mediation is contrary to good faith (**II.**).

I. IT IS INEFFICIENT FOR THE PARTIES TO ENGAGE IN FUTILE MEDIATION

31 While arbitration resolves disputes in a final and binding award, mediation can only provide for a negotiated settlement [*Redfern/Hunter, paras. 1.114, 1.122; Spencer, p. 9; Kayali, p. 554*]. Hence, a successful mediation at least requires the basic willingness of both parties to reach a compromise [*Redfern/Hunter, para. 1.51; Berger, Mediation, p. 122 para. 6-25; Brown/Marriott, p. 164 para. 8-051*]. It would therefore be inefficient if a party had to adhere to pre-arbitration steps which – because of a reluctant opposing party – are unlikely to succeed [*Mitrovic, p. 567; Klausegger et al., p. 66; Kayali, p. 560; Carter, p. 456*]. A party may not prolong resolution of a dispute by insisting on such mediation that can only lead to further delay [*Cumberland v. Coors, in Born, Cases, p. 547 para. 5*].

Accordingly, multi-tier clauses should not oblige the parties to engage in fruitless negotiations [*ICC Case No. 8445, p. 169; Aydemir, p. 198; Léonard/Dharmananda, p. 304*]. This is also reasonable as no party is harmed by being preserved from negotiations without any prospect of success [*Caron et al., p. 254; Born, Ch. 5 p. 119*].

32 On 28 February 2024, CLAIMANT sent the required final plans for the plant with a delay of less than a month [*Answer, p. 26 para. 11*]. This delay would have most likely not affected the final delivery of the plant [*PO2, p. 54 para. 23*]. However, one day after receiving the plans, RESPONDENT immediately terminated the PSA – a long-term contract worth EUR 285 Mio [*Ex. C6, p. 19*]. Although this issue could have been resolved by negotiations, RESPONDENT was unwilling to reach a compromise. In the following correspondence, CLAIMANT made constructive proposals to resolve the dispute [*PO2, p. 54 para. 23*]. It even offered to defer the payment due on 10 February 2024 by 50 % [*ibid.*]. Again, RESPONDENT was unwilling to reach a compromise [*ibid.*].

33 In April 2024, RESPONDENT finally agreed to CLAIMANT's proposal for a meeting in person [*ibid.*]. However, it merely took the opportunity to threaten CLAIMANT with the initiation of criminal investigations against its representatives [*Ex. C8, p. 36 para. 3*]. Again, RESPONDENT was unwilling to reach a compromise.

34 On 12 May 2024, CLAIMANT's CEO arranged a second meeting with RESPONDENT's CEO [*Ex. C5, p. 18 para. 15*]. After having previously threatened CLAIMANT, RESPONDENT now demanded a significant price reduction [*Ex. C5, p. 18 para. 15*]. Thereby, it did not leave any room for further negotiations [*ibid.*]. RESPONDENT later reinstated its ultimatum in writing [*Ex. C7, p. 20*]:

> „Any further discussion […] only makes sense, if GreenHydro is willing to accept a serious price reduction of 15 % or at least a two-digit number."

For CLAIMANT, such price cut would have meant a loss of EUR 42.75 Mio [*cf. PSA, p. 11 Art. 7; PO2, pp. 55 et seq. para. 35b; cf. Ex. C7, p. 20*]. A price reduction of this magnitude would have been highly uneconomical and thus not acceptable for CLAIMANT [*Ex. C5, p. 18 para. 16*]. However, RESPONDENT made this price-reduction a pre-condition for any further discussions [*Ex. C7, p. 20, Ex. C5, p. 18 para. 16*]. Again, RESPONDENT was unwilling to reach a compromise. Thus, mediation with RESPONDENT lacks any prospect of success. By insisting on this mediation, RESPONDENT would only prolong the resolution of the dispute.

35 It is inefficient for the Parties to engage in futile mediation.

II. IT IS NOT IN LINE WITH GOOD FAITH FOR RESPONDENT TO INSIST ON MEDIATION

36 Art. 26.3 FAI Rules stipulates that all participants in the arbitration shall act in good faith. It may be contrary to the principle of good faith for a party to rely on pre-arbitration steps to resist

arbitration [*George, p. 120; Oetiker/Walz, p. 878; Berger, Escalation Clauses, p. 15*]. This is the case if it continually gave the other party the impression that it is not interested in an amicable settlement – but then relies on the failure to comply with pre-arbitration steps [*Berger, Escalation Clauses, pp. 15 et seq.*]. For a party to rely on such failure, it must have proposed to the other party to conduct pre-arbitration steps [*X GmbH Case, para. 3.5.2.; Hydrocarbon Case, para. 2.4.3.1.; Coffee Machine Case, para. 4.3.3.1.; George, p. 122*]. This proposal must have been made after the dispute arose but before arbitration was initiated [*ibid.*]. Otherwise, the party acts in contradiction to its previous behaviour [*Berger, Escalation Clauses, pp. 15 et seq.; Oetiker/Walz, p. 878*].

37 During the negotiations for the PSA, RESPONDENT emphasized its strong interest in an amicable settlement in case of disputes [*Ex. R1, p. 30 para. 9*]. It even accepted a one-sided clause in Art. 4 PSA, binding RESPONDENT to use its best endeavours to finalize the project [*Request, p. 7 para. 30; Ex. C5, p. 17 para. 10*]. However, as soon as the present dispute arose, RESPONDENT did not show any willingness to engage in genuine negotiations [*supra paras. 32 et seqq.*]. Four times, it gave CLAIMANT the impression that it was not interested in an amicable settlement to resolve the dispute [*ibid.*]. Additionally, RESPONDENT never proposed to CLAIMANT to conduct mediation [*cf. PO2, p. 55 para. 24*]. Now, in the arbitration, RESPONDENT insists on the opportunity to mediate with CLAIMANT [*Answer, p. 27 para. 16*]. Hence, RESPONDENT acts in contradiction of its previous behaviour.

38 Thus, RESPONDENT's reliance on mediation is not in line with good faith.

39 The Tribunal should allow the claim as part of its discretion.

40 Therefore, CLAIMANT respectfully requests the Tribunal to not reject the claim for lack of jurisdiction or inadmissibility or as part of its discretion.

CONCLUSION TO THE FIRST ISSUE

41 Just as the core system is essential for the functionality of a hydrogen plant, so is compromise for a functioning relationship. It demands concessions from both sides – something RESPONDENT is not willing to offer. Quite the contrary, it stubbornly holds on to its ultimatum, hindering any further discussions between the Parties. Under these circumstances, mediation is not a shortcut to resolution, but rather a detour into unnecessary delay. The Tribunal should therefore not allow the proceedings to be sidetracked by RESPONDENT's manoeuvres. Instead, it should make use of its authority to decide the case.

SECOND ISSUE: THE TRIBUNAL SHOULD EXCLUDE EXHIBIT R3 AND ADMIT EXHIBIT C7

42 CLAIMANT respectfully requests the Tribunal to exclude Ex. R3 from the proceedings and to admit Ex. C7 as evidence.

43 Unless there are substantial grounds for exclusion, the tribunal may generally admit all evidence [*Ashford, p. 146 para. 9-2; Zuberbühler et al., p. 202 para. 1; O'Malley, p. 279 para. 9.02*]. RESPONDENT attempts to cherry-pick around this rule: On the one hand, it submits a highly confidential document belonging to CLAIMANT which it obtained by improper means [*File, p. 34 para. 3; cf. Ex. C8, p. 36 paras. 2, 7*]. On the other, it seeks to avoid responsibility for its negotiation tactics by fabricating grounds for confidentiality [*Answer, p. 28 para. 23*].

44 Regarding the admissibility, relevance and materiality of evidence, Art. 34.1 FAI Rules grants the tribunal a broad discretion [*Savola, p. 288*]. The tribunal may resort to the IBA Rules on the Taking of Evidence [*hereinafter:* "IBA Rules"] for guidance in exercising this discretion [*Savola, p. 246; Ehrström/Timonen/Turunen, p. 81; IBA Finland, p. 15*].

45 Considering the IBA Rules, CLAIMANT requests to declare Ex. R3 inadmissible and to exclude it from the proceedings (**A.**). It should find that Ex. C7 constitutes admissible evidence (**B.**).

A. EXHIBIT R3 CONSTITUTES INADMISSIBLE EVIDENCE

46 Following Art. 9(2)(b) IBA Rules, the tribunal shall exclude evidence on grounds of legal privilege. In addition, the equality of arms between the parties can require the exclusion of evidence under Art. 9(2)(g) IBA Rules. The principle of equal treatment is also displayed in Art. 26.2 FAI Rules and Art. 17 DAL.

47 The Tribunal should exclude Ex. R3 from the proceedings for two reasons: first, due to its confidential nature (**I.**) and second, to uphold the equality of arms between the Parties (**II.**).

I. EXHIBIT R3 IS CONFIDENTIAL

48 The scope of Art. 9(2)(b) IBA Rules includes the exclusion of evidence based on the privilege for correspondence between legal counsel and client [*Zuberbühler et al., Art. 9 p. 207; Ashford, p. 143*]. To this end, the tribunal needs to determine the legal or ethical rules which it deems applicable to the attorney-client privilege. When making such decision, it should pay due regard to the criteria stipulated in Art. 9(4) IBA Rules [*Khodykin/Mulcahy/Fletcher, Art. 9 para. 12.131*].

49 The Tribunal is advised to uniformly apply the law of Equatoriana on attorney-client privilege (**1.**). Under Equatorianian law, Ex. R3 is protected by this privilege (**2.**).

1. EQUATORIANIAN LAW ON CONFIDENTIALITY SHOULD BE APPLIED UNITARILY

50 Generally, to determine the relevant rules on privilege, the tribunal may ascertain the law which

has the closest connection to the respective communication [*Berger, Best Practice Standards, p. 511; Ferrari/Rosenfeld, p. 314*]. In most cases, this "closest-connection" test leads to each party being subject to its domestic confidentiality rules [*Sourgens/Duggal/Laird, p. 243 para. 11.16; Mosk/Ginsburg, pp. 381 et seq.*]. In international arbitration, the result may often be the application of two separate standards of confidentiality [*O'Malley, p. 305 fn. 91*]. However, the application of two different privilege standards violates the principles of party equality and procedural fairness [*Berger, Best Practice Standards, p. 516; O'Malley, p. 303 para. 9.60; Ashford, p. 162 para. 9-50; Khodykin/Mulcahy/Fletcher, Art. 9 para. 12.141*]. It would not be in line with due process if the tribunal applied a certain legal privilege standard only to the submissions of one party [*IBA Review Task Force, p. 28; Ashford, pp. 163 et seq. para. 9-56*]. Pursuant to Art. 9(4)(e) IBA Rules, the tribunal may consider the need to treat the parties equally, particularly if they are subject to different rules on privilege. Accordingly, the tribunal should reconcile diverging privilege rules [*Berger, Best Practice Standards, p. 517; Kröll/Bjorklund/Ferrari, p. 1139; Ferrari/Rosenfeld, p. 316*]. Therefore, the tribunal may choose to unitarily apply one single rule for all matters of privilege [*Khodykin/Mulcahy/Fletcher, Art. 9 para. 12.232; Kröll/Bjorklund/Ferrari, p. 1140*].

51 There is consensus that the best way to maintain fairness and equality is to apply the "most favoured nation" rule [*O'Malley, p. 304 para. 9.61; Khodykin/Mulcahy/Fletcher, Art. 9 para. 12.119; Ashford, p. 163 para. 9-57; Kröll/Bjorklund/Ferrari, p. 1206; Alvarez, p. 686; Ferrari/Rosenfeld, p. 316*]. Thereunder, the tribunal selects among the available laws on privilege the one which grants the highest level of protection [*Zuberbühler et al., Art. 9 para. 30; Kröll/Bjorklund/Ferrari, p. 1140*]. The "most favoured nation" rule has two major advantages:

52 First, when entering arbitration, most parties reasonably expect any communication which is confidential under their domestic law to remain confidential [*IBA Review Task Force, p. 28; Sindler/Wüstemann, p. 621; Khodykin/Mulcahy/Fletcher, Art. 9 para. 12.192; Sourgens/Duggal/Laird, p. 243 para. 11.17; Ferrari/Rosenfeld, p. 302*]. Under the "most favoured nation" rule, the parties can legitimately expect at least their domestic standard of confidentiality to be applied [*Zuberbühler et al., Art. 9 p. 212; Ferrari/Rosenfeld, p. 318*]. Thus, in line with Art. 9(4)(c) IBA Rules, the "most favoured nation" rule ensures the consideration of the parties' legitimate expectations regarding legal privilege [*Ferrari/Rosenfeld, p. 318; Berger, Best Practice Standards, p. 518; Rubinstein/Guerrina, p. 599; Khodykin/Mulcahy/Fletcher, Art. 9 para. 12.232*].

53 Second, following Art. V(2)(b) NYC, courts may refuse to enforce an award if it conflicts with public policy. Public policy is composed of the fundamental principles of a state's legal system [*Ferrari/Rosenfeld, NYC, p. 331*]. Evidentiary privileges often form part of a state's public policy due to their fundamental role in guaranteeing the right to legal advice and a fair trial [*Mosk/Ginsburg,*

pp. 380 et seq.; Alvarez, pp. 667 et seq.; Caron et al., p. 348; cf. R. v. McClure, p. 453 para. 17]. Thus, failure to consider or apply specific privilege rules may constitute a breach of public policy [*Ferrari/Rosenfeld, p. 303; Alvarez, p. 687; Meyer, p. 366*]. The scope of the "most favoured nation" law covers all privilege rules relevant to the case and thereby avoids any breaches of public policy. Therefore, the "most favoured nation" rule ultimately guarantees the enforceability of the arbitral award [*Ferrari/Rosenfeld, p. 318*].

54 RESPONDENT's seat of business is in Equatoriana [*File, p. 41*]. Under the "closest-connection" test, RESPONDENT would be subject to its domestic Equatorianian law on legal privilege. Meanwhile, Mediterranean rules would apply to CLAIMANT respectively [*cf. ibid.*]. Equatoriana has adopted far-reaching protective provisions for communications between counsel and client [*Ex. R4, p. 33*]. The protections even extend to the in-house counsel [*PO2, p. 55 para. 29*]. In contrast, Mediterraneo's ethical rules for lawyers do not protect such correspondence from disclosure [*Ex. R4, p. 33*]. Thus, the degree of protection granted by legal privilege differs between the two jurisdictions. Subjecting both RESPONDENT and CLAIMANT to their domestic law would therefore violate the principles of party equality and procedural fairness. Consequently, the Tribunal should apply the "most favoured nation" rule. Presently, Equatorianian law offers the most comprehensive protection and thus is the "most favoured nation" law. It therefore constitutes the applicable law on attorney-client privilege.

55 Equatorianian law on attorney-client privilege should be applied unitarily.

2. UNDER EQUATORIANIAN LAW, EXHIBIT R3 IS COVERED BY LEGAL PRIVILEGE

56 Pursuant to Equatorianian law, communications between counsel and clients are to be kept confidential [*PO2, p. 55 para. 29*]. This includes communications with in-house lawyers if the following conditions are fulfilled: The respective lawyer is a member of the bar, and the advice was given in relation to a specific legal question [*ibid.*].

57 Ex. R3 is an email sent by Ms. Smith to CLAIMANT's CEO and its main negotiator [*Ex. R3, p. 32*]. Ms. Smith is part of CLAIMANT's in-house legal department and admitted to the bar in Mediterraneo [*ibid.*]. Within the email, Ms. Smith replies to specific legal questions of assurances and misrepresentations under the law of Equatoriana [*ibid.*].

58 Under Equatorianian law, Ex. R3 is therefore covered by privilege for in-house lawyers.

59 The Tribunal should exclude Ex. R3 from these proceedings due to its confidential character.

II. THE EQUALITY OF ARMS REQUIRES THE EXCLUSION OF EXHIBIT R3

60 Pursuant to Art. 9(2)(g) IBA Rules, the tribunal may exclude evidence to ensure the equality of arms between the parties. The equality of arms entails a duty for the parties not to submit evidence

obtained by improper means [*OOO v. Belarus, p. 30 para. 159*]. This is why a state party may not submit evidence which was procured in exercise of its sovereign powers, e.g. by criminal proceedings [*Libananco Holdings v. Turkey, p. 38 para. 79; OOO v. Belarus, p. 31 para. 160; Glencore v. Colombia, p. 36 para. 89; O'Malley, p. 334 para. 9.120; Wälde, p. 37*]. It is indeed within a sovereign state's rights to pursue criminal investigations within its territory [*Chaisse/Choukroune/Jusoh, p. 1336; Wälde, p. 36*]. However, a state should not be allowed to use such evidence to defend itself in arbitral proceedings [*Glencore v. Colombia, p. 36 para. 89; O'Malley, p. 334 para. 9.120*]. This would violate the duty to arbitrate in good faith and disrupt the equality of arms between the parties [*Methanex v. USA, p. 26 para. 54; Glencore v. Colombia, p. 149 paras. 645 et seq.; Fach Gómez/Gourgourinis/Titi, p. 250; O'Malley, p. 334 para. 9.120; Fach Gómez/Titi, p. 171*]. In light of this, the tribunal in *Libananco Holdings v. Turkey* set out a "separation rule" to ensure that criminal investigations do not impair an arbitral proceeding: The criminal investigators may not disclose the contents of their inquiries to any person involved in the arbitral process [*Libananco Holdings v. Turkey, p. 41 para. 82 No. 1.1.4*].

61 The duty not to submit evidence procured from the exercise of sovereign powers applies to RESPONDENT (**1.**). RESPONDENT violated that duty since it is sufficiently evident that it obtained Ex. R3 from the criminal prosecutions against Mr. Deiman (**2.**). This is a consequence of RESPONDENT's heightened interest in disregarding the equality of arms (**3.**).

1. RESPONDENT MAY NOT SUBMIT EVIDENCE PROCURED IN CRIMINAL INVESTIGATIONS

62 When contracting with a state or state-owned enterprise, a private company is exposed to the dual role of the state: the state as a contractual partner and as a sovereign government [*Wälde, p. 15; Fach Gómez/Titi p. 167; Lalive, p. 37*]. The private company is thus also subject to the state's powers, resulting in a power imbalance between the parties [*OOO v. Belarus, p. 30 para. 155; Wälde, p. 36*]. Such asymmetries have led to the development of procedural mechanisms to secure the equality between the parties in investor state arbitration [*Kläsener/Magál/Neuhaus, pp. 221 et seq.; Sourgens/Duggal/Laird, p. 260 paras. 11.80 et seq.*]. These mechanisms can be applied analogously in commercial arbitration when state-owned entities are involved [*Kläsener/Magál/Neuhaus, p. 222; cf. Wälde, p. 41*]. This includes the duty for the state not to submit evidence obtained in criminal investigations [*cf. Libananco Holdings v. Turkey, p. 38 para. 79; cf. Wälde, p. 37*].

63 CLAIMANT, a private company, contracted with RESPONDENT, a state-owned enterprise [*PSA, p. 10*]. CLAIMANT's contractual obligations involve work to be performed on Equatorianian territory [*PSA, p. 8 para. 1*]. Thus, CLAIMANT is subject to the powers of the Equatorianian state and exposed to its dual role. The standards from investment arbitration – including the constraint on submitting evidence obtained in criminal investigations – may therefore be applied analogously.

64 Thus, RESPONDENT may not submit evidence procured in criminal investigations.

2. IT IS SUFFICIENTLY EVIDENT THAT RESPONDENT RECEIVED EXHIBIT R3 FROM THE CRIMINAL INVESTIGATIONS AGAINST MR. DEIMAN

65 Regarding the standard of proof for the origin of evidence, the tribunal may apply the "balance of probabilities" standard [*cf. Khodykin/Mulcahy/Fletcher, Art. 9 para. 12.52*]. This is the standard tribunals generally apply in arbitration [*Rompetrol v. Romania, p. 94 para. 183; O'Malley, p. 215 para. 7.27; Khodykin/Mulcahy/Fletcher, Art. 9 para. 12.52*]. It is fulfilled if the tribunal is convinced that the claim is more likely true than not true [*Chaisse/Choukroune/Jusoh, p. 1341*]. The standard can be fulfilled by prima facie evidence [*Khodykin/Mulcahy/Fletcher, Art. 9 para. 12.49; Kläsener/Magàl/Neuhaus, p. 143*]. This refers to evidence which, if uncontradicted, is sufficient to prove a fact [*Kling v. United Mexican States, p. 585; O'Malley, p. 219 para. 7.31*]. The tribunal may give particular consideration to prima facie evidence where conclusive proof of a fact is difficult to attain [*AAPL v. Sri Lanka, p. 550 para. 56; Zhinvali v. Georgia, para. 311; Brown, p. 99; Chaisse/Choukroune/Jusoh, p. 1339*]. This is the proper approach to "lift the veil" for secret, internal communication [*Wälde, p. 38; Verdín Mansilla, p. 19*]. Such communication occurs especially within a state's internal organization [*Fach Gómez/Titi, p. 173; Lalive, p. 37*].

66 CLAIMANT has no direct proof of how RESPONDENT obtained Ex. R3 [*File, p. 34 para. 3*]. In order to provide direct proof of the origin of Ex. R3, CLAIMANT would need evidence of internal communication within the state organization of Equatoriana. Such proof is impossible for CLAIMANT to produce. The Tribunal may thus give particular consideration to the following prima facie evidence: First, one of the investigations' primary objectives was to gain evidence for the arbitration (**a.**). Second, the Equatorianian prosecution office confiscated Ex. R3 (**b.**). Third, it disclosed the content of Ex. R3 to RESPONDENT in breach of the "separation rule" (**c.**).

a) THE INVESTIGATIONS PRIMARILY SERVED THE PURPOSE OF GAINING EVIDENCE FOR THE ARBITRATION

67 Mr. la Cour, RESPONDENT's CEO, maintains a very close relationship with the Equatorianian prosecution office [*Ex. C8, p. 36 para. 7*]. Two weeks prior to the arbitration, he signalized to Mr. Deiman that he might disclose information to the prosecution office [*Ex. C8, p. 36 para. 3*]. Mr. la Cour outlined the prospect of criminal investigations against CLAIMANT's representatives, should there be no settlement of the dispute [*ibid.*]. Hence, he used the threat of criminal proceedings as leverage in the negotiations with CLAIMANT. Shortly after – on the same day as RESPONDENT introduced its demand for the price reduction – the Equatorianian police initiated criminal investigations against Mr. Deiman [*Ex. C8, p. 36 para. 3; cf. Ex. C5, p. 18 para. 15*]. They

were based on information Mr. la Cour provided [*PO2, p. 55 para. 27*]. These investigations concerned alleged misconduct of CLAIMANT's representatives during the negotiation of the PSA [*ibid.*]. RESPONDENT now bases its argument upon these allegations [*Answer, p. 26 paras. 6 et seq.*]. This significant overlap in time and content between the investigations and the arbitration suggests the following: The investigations primarily served the purpose of gaining evidence for the arbitration.

68 This speaks in favour of the fact that RESPONDENT obtained Ex. R3 through the criminal investigations.

b) THE EQUATORIANIAN INVESTIGATORS CONFISCATED EXHIBIT R3

69 The criminal investigators confiscated all documents in Mr. Deiman's possession [*Ex. C8, p. 36 para. 5*]. Thereby, they obtained all information potentially relevant to the PSA [*Ex. C8, p. 36 para. 2*]. This includes confidential communications of CLAIMANT's legal department concerning the PSA, submitted as Ex. R3 [*Ex. R3, p. 32*].

70 The fact that the investigators confiscated Ex. R3 again suggests that RESPONDENT obtained it through the criminal investigations.

c) THE INVESTIGATORS UNLAWFULLY REVEALED THE CONTENT OF EXHIBIT R3 TO RESPONDENT

71 From a friend involved in the criminal proceedings against Mr. Deiman, RESPONDENT's main negotiator, Ms. Ritter, learned about internal communications of CLAIMANT [*Ex. R1, p. 29 para. 6*]. Thus, a criminal investigator revealed information from the prosecution to a representative of RESPONDENT. This is not in line with the "separation rule", prohibiting the disclosure of details of the inquiries to any person involved in the arbitral process. Specifically, Ms. Ritter learned that CLAIMANT had doubts whether the contract with P2G would materialize [*ibid.*]. This statement corresponds to the content of Ex. R3 [*cf. Ex. R3, p. 32*]. Thus, the prosecution office disclosed its content to RESPONDENT in breach of the "separation rule".

72 This makes it highly likely that RESPONDENT obtained Ex. R3 through the investigations.

73 The given prima facie evidence therefore meets the "balance of probabilities" standard. It is thus sufficiently evident that RESPONDENT obtained Ex. R3 from the criminal investigations against Mr. Deiman.

3. RESPONDENT'S BEHAVIOUR RESULTS FROM ITS HEIGHTENED INTEREST IN NEGLECTING THE EQUALITY OF ARMS

74 States often have difficulties accepting their limited sovereignty in international arbitration [*Lalive, p. 37*]. This is especially true for disputes resulting from policy decisions of a former government

being disowned by its successor [*Wälde, p. 19*]. A loss in a subsequent arbitration may resonate as political failure [*Wälde, p. 19; Fach Gómez/Titi, p. 167; cf. Quiborax Case, p. 4 para. 8*]. Thus, the stakes are high to avoid such outcome in the proceedings [*Fach Gómez/Titi, p. 167*]. In these situations, governments tend to have a heightened interest in disregarding the equality of arms [*Fach Gómez/Titi, p. 167; Mirzayev, p. 74; Wälde, p. 19*].

75 The PSA was set out under the "Green Energy Strategy" pursued by the Equatorianian minister for energy and environment [*PSA, p. 10; Ex. C5, p. 18 para. 13*]. Following a shift in the government, his successor strongly opposed and disowned this policy [*Request, p. 5 para. 18*]. This resulted in an arbitration with CLAIMANT concerning the continuance of the PSA [*Request, p. 5 para. 19*]. A loss in this arbitration against CLAIMANT would resonate as political failure for the new government. The stakes to avoid such an outcome were therefore high. Accordingly, the former CEO of RESPONDENT assumed that her successor would try everything to aggressively enforce the new policy [*Request, p. 5 para. 18*]. Consequently, RESPONDENT had a heightened interest in disregarding the equality of arms.

76 In sum, to uphold the equality of arms, the Tribunal should exclude Ex. R3.

77 To conclude, CLAIMANT respectfully requests the Tribunal to exclude Ex. R3 from the proceedings.

B. EXHIBIT C7 IS ADMISSIBLE

78 Besides reasons of confidentiality, Art. 9(2) IBA Rules further provides for the exclusion of evidence if it lacks relevance to the case or materiality to its outcome. An objection invoking confidentiality must be raised in good faith [*Alvarez, p. 693; Zuberbühler et al., Art. 9 p. 208*].

79 Presently, no reasons for exclusion apply. Ex. C7 is relevant to the case and material to its outcome (**I.**). It does not enjoy confidentiality (**II.**). Moreover, RESPONDENT's objection to the admissibility of Ex. C7 violates the principle of good faith (**III.**).

I. EXHIBIT C7 IS RELEVANT TO THE CASE AND MATERIAL TO ITS OUTCOME

80 Pursuant to Art. 9(2)(a) IBA Rules, the tribunal may exclude evidence when it is not relevant to the case or material to its outcome. To this end, the tribunal needs to evaluate whether the evidence may prove a fact that potentially influences its final decision [*O'Malley, p. 283 para. 9.13; Zuberbühler et al., Art. 9 p. 215*].

81 First, CLAIMANT seeks to establish the fact that RESPONDENT primarily intended to terminate the PSA to reach a significant price reduction [*Request, p. 6 para. 21*]. With Ex. C7, CLAIMANT submitted a document sent by RESPONDENT that shows RESPONDENT's demand for a significant price reduction [*Ex. C7, p. 20*]. It is the only explicit proof of RESPONDENT's intent. Second,

RESPONDENT insists on compliance with the mediation prerequisite [*Answer, p. 27 para. 16*]. Ex. C7 depicts RESPONDENT's unwillingness to further engage in negotiations, thereby proving the futility of mediation [*supra paras. 32 et seqq.*]. Thus, Ex. C7 may prove facts that potentially influence the Tribunal's final decision.

82 Ex. C7 is relevant to the present case and material to its outcome.

II. EXHIBIT C7 IS NOT CONFIDENTIAL

83 Reason to exclude evidence under Art. 9(2)(b) IBA Rules can be derived from different legal privileges: The "without-prejudice" privilege protects statements made in settlement negotiations from disclosure [*Ferrari/Rosenfeld, p. 307; Haller, p. 313*]. Furthermore, Art. 15 FAI Mediation Rules provides legal privilege for statements or information exchanged during an FAI Mediation [*FAI Mediation Guidelines, p. 4 para. 11*].

84 Ex. C7 is not protected by the "without-prejudice" privilege (**1.**). Moreover, confidentiality under Art. 15 FAI Mediation Rules does not extend to Ex. C7 (**2.**).

1. EXHIBIT C7 DOES NOT ENJOY THE "WITHOUT-PREJUDICE" PRIVILEGE

85 For the "without-prejudice" privilege to apply, the mere labelling of a statement as "without-prejudice" does not suffice [*Unilever v. Procter, p. 356; IBA Privilege Task Force, Annex 5, p. 2; Altaras, p. 483*]. An offer must be "genuinely aimed" at the goal of reaching a settlement agreement to enjoy the privilege [*Rush & Tompkins v. GLC, para. 1299; Unilever v. Procter, p. 351; Oceanbulk v. TMT, p. 9 para. 23; Berger, Settlement Privilege, p. 267; Ashford, p. 158 para. 9-39*]. This point was also addressed by the much-cited House of Lords ruling in the *Bradford v. Rashid Case*: Merely asking for concessions instead of giving any does not constitute such genuine attempt to settle a dispute [*Bradford v. Rashid, p. 31 para. 73; see also: IBA Privilege Task Force, Annex 5, p. 2*].

86 Ex. C7 contains an email labelled "without-prejudice" which was sent by RESPONDENT to CLAIMANT [*Ex. C7, p. 20*]. This labelling, by itself, does not suffice for legal privilege. In Ex. C7, RESPONDENT demands a non-negotiable price reduction as the only possible path to continue discussions [*Ex. C7, p. 20*]. RESPONDENT's so-called offer merely consists of asking CLAIMANT to make a serious concession worth at least EUR 42.75 Mio [*cf. PSA, p. 11 Art. 7; PO2, pp. 55 et seq. para. 35b; cf. Ex. C7, p. 20*]. Conversely, RESPONDENT failed to offer any substantive concessions on its part [*cf. Ex. C7, p. 20*]. The mere willingness to continue the discussions – after having terminated on dubious grounds – does not constitute a concession. Rather, it constitutes the next step in RESPONDENT's strategy to beat down the purchase price. Thus, Ex. C7 is not genuinely aimed at the goal of reaching a settlement agreement.

87 Hence, Ex. C7 does not enjoy the "without-prejudice" privilege.

2. EXHIBIT C7 IS NOT CONFIDENTIAL UNDER ART. 15 FAI MEDIATION RULES

88 Art. 15 FAI Mediation Rules grants confidentiality only to statements exchanged in the course of an FAI mediation [*FAI Mediation Guidelines, p. 4 para. 11*]. The parties may nevertheless agree to extend or modify the scope of confidentiality [*ibid.*]. Whether such an agreement exists must be determined pursuant to the standard laid down in Art. 8 CISG.

89 Since Ex. C7 was not exchanged in the course of FAI mediation, Art. 15 FAI Mediation Rules does not apply by default [*cf. Answer, p. 27 para. 16*]. RESPONDENT now alleges that the Parties agreed to extend the scope of Art. 15 FAI Mediation Rules to negotiations prior to mediation [*Ex. R1, p. 30 para. 10*]. The Parties did indeed discuss the matter of confidentiality during the negotiations for the PSA [*ibid.*]. However, RESPONDENT expressly did not want to conclude an additional confidentiality agreement [*ibid.*]. CLAIMANT's main negotiator, Mr. Deiman, therefore outlined the confidentiality of the "foreseen ADR mechanisms" in his email to RESPONDENT [*Ex. R2, p. 31*]. To this end, he referred to Art. 15 FAI Mediation Rules and Artt. 51, 52 FAI Rules [*ibid.*]. These provisions stipulate confidentiality for FAI mediation and arbitration proceedings. Correspondingly, Mr. Deiman stated that "the regulations contained therein should […] be sufficient […] as they ensure the needed confidentiality" [*Ex. R2, p. 31*]. Mr. Deiman thus solely highlighted the already provided confidentiality of mediation and arbitration proceedings [*ibid.*]. He neither referred to "negotiations" nor offered to extend the ambit of confidentiality [*cf. ibid.*]. Thus, CLAIMANT did not express an intent to widen the scope of Art. 15 FAI Mediation Rules. Also, RESPONDENT itself did not presume that it had made an agreement to widen the scope of Art. 15 FAI Mediation Rules to negotiations. This is evidenced by its attempt to rely on the without-prejudice privilege during the negotiations prior to this arbitration [*Ex. C7, p. 20*].

90 The drafting history of the PSA and all correspondence therefore suggest the following: The Parties did not agree on the application of Art. 15 FAI Mediation Rules to prior negotiations. Hence, Ex. C7 is not confidential under Art. 15 FAI Mediation Rules.

91 Ex. C7 is not covered by any legal privilege.

III. RESPONDENT'S CHALLENGE TO EXHIBIT C7 IS CONTRARY TO GOOD FAITH

92 If a party shows contradictory behaviour, it does not honour its duty to act in good faith pursuant to Art. 7 CISG [*CISG-AC Op. No. 17, p. 140 para. 4.27; Kröll/Mistelis/Perales Viscasillas, Art. 7 para. 27*]. To assess whether a state-controlled enterprise acts contradictorily, the tribunal may additionally refer to the conduct of the state itself [*Böckstiegel, State Enterprises, p. 137*]. The state's conduct is relevant if the state enterprise is considered as functionally identical with the state [*Böckstiegel, Arbitration, p. 44*]. A state enterprise is functionally identical with the state if it discharges certain obligations on behalf of the government [*ICC Case No. 3572, p. 119; Wintershall v. Qatar,*

pp. 27 et seq.; Böckstiegel, Arbitration, p. 44; Berger, Economic Arbitration, p. 182].

93 Under the "Green Energy Strategy", the government of Equatoriana pursued the goal of decarbonising its energy production [*PSA, p. 10 Preamble; Request, p. 3 para. 2*]. RESPONDENT, a state-owned enterprise, is one of the government's primary vehicles in implementing the strategy [*Answer, p. 25 para. 3; Ex. C5, p. 16 para. 5*]. Besides its engagement in renewable energies, RESPONDENT was charged with developing a green hydrogen infrastructure in Equatoriana [*Ex. C5, p. 16 para. 5*]. RESPONDENT conducted the selection of its contractual partners for this undertaking through a public procurement process [*RfQ, p. 9 para. 8; infra paras. 138*]. Thus, RESPONDENT discharges the obligation of decarbonising the energy production on behalf of the government [*cf. Ex. C5, p. 16 para. 5*]. The Tribunal may therefore consider RESPONDENT as functionally identical with the state of Equatoriana.

94 The government of Equatoriana is one of the loudest supporters of absolute transparency in disputes concerning public interests [*File, p. 34*]. To underscore this policy, Equatoriana signed the Mauritius Convention on Transparency [*ibid.*]. Further, Equatorianian ministers publicly declared that they would even submit their commercial arbitrations to the UNCITRAL Rules of Transparency in Investor-State Arbitration [*File, p. 35*]. During the negotiations for the PSA, RESPONDENT acted in line with this position of the Equatorianian government [*cf. Ex. R1, p. 30 para. 10*]. It recognised that a dispute between the Parties would be subject to public interest due to its political implications [*cf. Ex. R1, p. 30 para. 10; cf. Ex. C3, p. 14*]. For this reason, RESPONDENT did not want to include a confidentiality agreement in the PSA to avoid the impression of trying to hide information [*Ex. R1, p. 30 para. 10*]. Now however, it attempts to limit the information available to the Tribunal by demanding the exclusion of Ex. C7 from the case [*Answer, p. 28 para. 23*]. This shows that RESPONDENT does not advocate for the transparency of information anymore – the very policy its owner has been so fond of before. Such conduct constitutes contradictory behaviour.

95 Therefore, RESPONDENT's challenge to Ex. C7 is contrary to the principle of good faith.

96 To conclude, CLAIMANT respectfully requests the Tribunal to admit Ex. C7 and to exclude Ex. R3.

CONCLUSION TO THE SECOND ISSUE

97 A transformer balances powers in a hydrogen plant by adjusting voltage levels. In the same way, procedural fairness balances the parties' powers in the proceedings, ensuring equality of arms. RESPONDENT has shown an illusory understanding of procedural fairness. It cannot bend the rules to suit its own needs and call that fair play. RESPONDENT must admit the reality that the arbitration places the Parties on an equal footing. The Tribunal may balance the scales, granting protection only to evidence that actually deserves it.

THIRD ISSUE: THE CISG IS APPLICABLE TO THE PSA

98 CLAIMANT respectfully requests the Tribunal to find the CISG applicable in the present case.

99 In its attempt to discard its contractual obligations, Respondent tries to take advantage of CLAIMANT's minor delay in submitting the final plans [*Ex. C5, p. 18 paras. 14 et seq.; cf. Ex. C5, p. 19*]. Recognising that this delay does not meet the standard for a fundamental breach under the CISG, RESPONDENT turned to the Equatorianian Civil Code as an alternative legal basis to terminate the PSA [*cf. Ex. C6, p. 19*]. By doing so, RESPONDENT seeks to evade the CISG's application [*Answer, p. 27 para. 19*]. This reliance on domestic law, however, is misguided and unconvincing:

100 First, the PSA falls within the substantive (**A.**) and territorial (**B.**) scope of the CISG according to Art. 1(1)(a) CISG. Second, the Convention's applicability is not excluded under Art. 2(b) CISG (**C.**).

A. THE PSA FALLS WITHIN THE SUBSTANTIVE SCOPE OF THE CISG

101 Pursuant to Art. 1(1) CISG, the Convention governs contracts for the sale of goods. Art. 3(2) CISG further extends its scope to mixed contracts involving labour or other services if the sales elements are preponderant [*Pasteurizing Lines Case, p. 7 para. 32; Printed Flyers Case, p. 5 para. 18*; *Ferrari/Flechtner/Brand, p. 70*]. These mixed contracts encompass so-called turnkey-contracts [*Herber/Czerwenka, Art. 3 para. 5; Schlechtriem/Schwenzer, Art. 3 para. 21*]. Whether these contracts fall within the CISG's substantive sphere of application must be determined on a case-by-case basis, applying the preponderance test of Art. 3(2) CISG [*Kröll/Mistelis/Perales Viscasillas, Art. 3 para. 16; CISG-AC Op. No. 4, p. 130 para. 3.5; Lannan, p. 12; Drescher et al., Art. 3 para. 13*].

102 The green hydrogen plant to be delivered by CLAIMANT constitutes a good under Art. 1(1) CISG (**I.**) The PSA is a turnkey-contract consisting of sales and service obligations (**II.**). The sales elements constitute the preponderant part of the PSA (**III.**).

I. THE GREEN HYDROGEN PLANT IS A GOOD WITHIN THE MEANING OF ART. 1(1) CISG

103 Goods are defined as tangible, moveable items at the time of delivery [*ACT Energy v. Gestión Integral, para. 5.5; Gsell et al., Art. 1 para. 9; Brunner, Art. 2 para. 2*]. The term "goods" must be interpreted broadly [*Piltz, p. 38 para. 48; Ferrari/Flechtner/Brand, pp. 240 et seq.*]. Thus, it includes moveable items intended to become components of a property upon delivery [*Spinning Plant Case, p. 4 para. 2.2; Witz/Salger/Lorenz, Art. 1 para. 6; Brunner, Art. 2 para. 2*]. Based on this reasoning, even entire plants – consisting of various components designed to function as a complete unit and sold at a single price – fall under the term "goods" [*Spinning Plant Case, p. 11 para. 7.4; Filling and Packaging Plant Case, p. 1 paras. 3 et seq., p. 7 para. 27; Ostendorf, p. 850 para. 78*].

104 The PSA obliges CLAIMANT to deliver a 100 MW green hydrogen production plant to be constructed on the Greenfield Site for a single price of EUR 285 Mio [*PSA, p. 11 Artt. 2, 7; PO2, p. 56 para. 35b*]. It consists of various components such as electrolyser stacks, a transformer and electrical and mechanical equipment [*PO2, p. 54 para. 16*].

105 The plant constitutes a good within the meaning of the Convention.

II. THE PSA IS A TURNKEY-CONTRACT CONSISTING OF SALES AND SERVICE OBLIGATIONS

106 The term "turnkey" refers to mixed contracts, obliging the contractor to perform all tasks necessary to attain a fully functional end product – the customer merely has to "turn the key" [*Kapellmann/Schiffers, p. 146 para. 432; Lotz, p. 549; Dietl/Lorenz, p. 856*] These tasks can contain work supply obligations for the supply of goods to be manufactured or produced, which are considered sales pursuant to Art. 3(1) CISG [*Mahnken, p. 240; Herber/Czerwenka, Art. 3 paras. 2, 5; cf. Industrial Plants Case, p. 1*].

107 The Parties concluded the PSA on a turnkey-basis [*RfQ, p. 8 para. 1; Ex. C5, p. 16 para. 9*]. To complete the fully functional plant by 2 January 2026, CLAIMANT must perform several obligations, including the production and delivery of the core system, the transformer and other components [*Ex. C5, p. 17 para. 11*]. These work supply obligations – equivalent to sales – are supplemented by ancillary service obligations such as maintenance and training for the first year [*RfQ, p. 8 para. 1; PSA, pp. 10 et seq. Art. 2*]. Hence, the PSA consists of both sales and service obligations.

108 The PSA constitutes a turnkey-contract.

III. THE SALES OBLIGATIONS ARE PREPONDERANT

109 The determination whether sales obligations form the preponderant part of a turnkey-contract is conducted following a two-step approach: First, such an assessment involves a comparison of the contractual obligations' economic value [*Window Production Plant Case, p. 3 para. 17; Herber/Czerwenka, Art. 3 para. 17; Gsell et al., Art. 3 para. 9*]. Second, special weight is given to the parties' intention [*Cylinder Case, p. 4 para. 19; Potato Chips Plant Case, p. 8 para. 44; Drescher et al., Art. 3 para. 13; Staudinger, Art. 3 para. 21*].

110 Both an economic assessment of the PSA (**1.**) and an analysis of the Parties' intention (**2.**) prove the preponderance of the sales obligations.

1. THE SALES OBLIGATIONS ECONOMICALLY OUTWEIGH THE SERVICE ELEMENTS

111 To determine the preponderant part, the values of the sales and service obligations must be compared [*Volmari v. Isocab, p. 2 paras. 7, 10; Fire Trucks Case, p. 9 para. 44; Prada v. Caporicci, p. 6 para. 20; Hau/Poseck, Art. 3 para. 6*]. Preponderance in the sense of Art. 3(2) CISG means exceeding 50 % of the total value of obligations [*Hydraulic Pressure Units Case, p. 3; Officine Maraldi. v. Intessa,*

p. 7 para. 3.3; Brunner/Gottlieb, Art. 3 para. 8; Mankowski, Art. 3 para. 9].

112 CLAIMANT's initial internal calculation outlines the required investments for the individual production components [*Ex. C5, p. 17 para. 11*]. These add up to the originally agreed price of EUR 300 Mio [*Ex. C5, pp. 16 et seq. paras. 9, 11*]. Based on this calculation, the sales elements – the electrolyser's core system (EUR 100 Mio), trafo and electrical equipment (EUR 40 Mio) as well as compressor, pipes, cable installation, connections and other equipment (EUR 50 Mio) – amount to a total of EUR 190 Mio [*see Figure below*; *Ex. C5, p. 17 para. 11; Ex. R1 p. 29 para. 4; PO2, p. 54 para. 17*]. They represent 63 % of the overall value, thus exceeding the 50 % threshold.

113 The preponderance of the sales obligations persists even after taking into account the later price reduction of EUR 15 Mio [*Request, p. 4 para. 13; Ex. C5, p. 17 para. 10; PO2, p. 56 para. 35*]. Even if these EUR 15 Mio were to be subtracted from the sales obligations, their value would still amount to EUR 175 Mio, equalling 61.5 % of the overall value, thus exceeding the 50 % threshold.

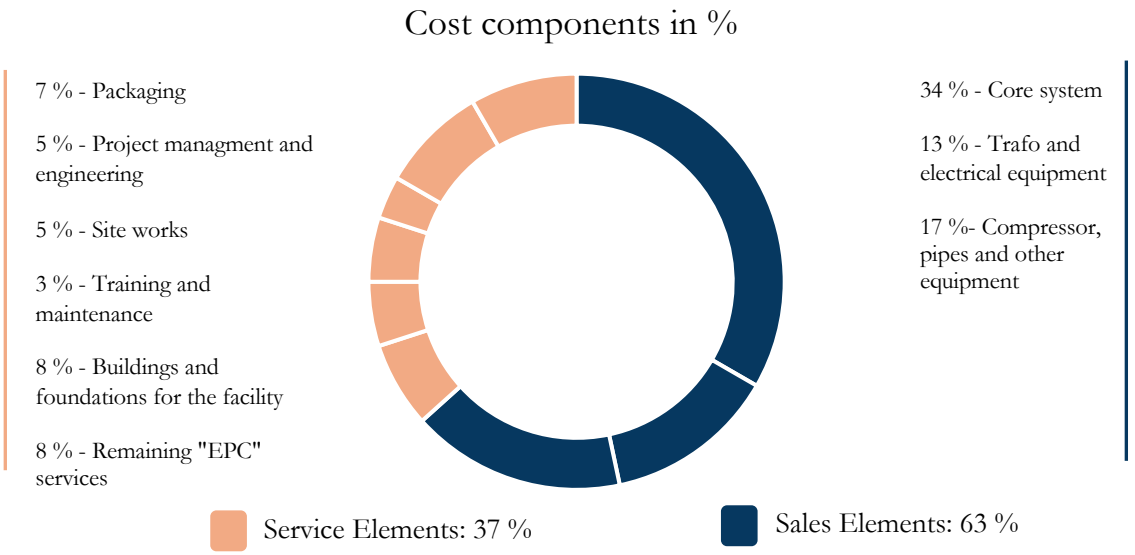

Figure: Cost Components of the PSA

114 Hence, from an economic perspective, the sales obligations form the PSA's preponderant part.

2. IT WAS THE PARTIES' INTENTION FOR THE SALES OBLIGATIONS TO BE PREPONDERANT

115 Under Art. 8(1) CISG, statements and other conduct must first be interpreted according to a party's subjective intent where the other party knew or could not have been unaware of it. Since it is nearly impossible to prove the true intent of a party, most problems are governed by Art. 8(2), (3) CISG [*Schlechtriem/Schwenzer, Art. 8 para. 20; Gsell et al., Art. 8 para. 11; cf. Roland Schmidt v. Blumenegg, p. 6 paras. 21 et seq.*]. Pursuant to Art. 8(2) CISG, a party's behaviour must be interpreted according to the understanding of a reasonable third person in the same situation as the addressee. Due consideration is to be given to all relevant circumstances as per Art. 8(3) CISG. The interpretative

tools of Art. 8(3) CISG are not precluded by an entire agreement clause – like Art. 31 PSA – as such a provision generally does not exclude extrinsic evidence under the CISG [*Caffaro Chimica v. Sipcam Agro, p. 6 paras. 16 et seq.; CISG-AC Op. No. 3, p. 86 para. 4.6; Murray, pp. 11, 45; DiMatteo et al., p. 795 para. 190*].

116 From a reasonable third person's perspective, both the wording of the PSA (**a.**) and the Parties' conduct (**b.**) suggest the preponderance of the sales elements.

a) THE PSA'S WORDING INDICATES THE PREPONDERANCE OF THE SALES PART

117 When applying the reasonable third person standard under Art. 8(2) CISG, the wording of the contractual document is decisive [*Ethyl Acetate Case, p. 3; Kröll/Mistelis/Perales Viscasillas, Art. 3 para. 19; Mahnken, p. 243; Witz/Salger/Lorenz, Art. 8 para. 11*]. There are different indicators which suggest the preponderance of the sales part: First, the inclusion of a delivery duty at the end of the performance period as evidenced by Art. 30 CISG [*Mahnken, p. 244*]. Second, the nature of an underlying model contract, since it defines the legal framework for the contractual obligations [*Seghers/Walschot, p. 418*]. Third, a definite purchase price without any variable elements that may reflect changes in labour or service costs, such as hourly rates [*TMCo v. Green Light Energy Solutions, p. 55 paras. 17 et seqq.; cf. Pizzeria Equipment Case, pp. 2 et seq.*].

118 First, Art. 2 PSA stipulates CLAIMANT's central contractual duty to "deliver the 100 MW Plant" [*PSA, p. 11 Art. 2*]. Art. 3 PSA further specifies that "the contractor agrees to deliver and hand over the Plant as agreed no later than 2 January 2026" [*PSA, p. 11 Art. 3*]. This delivery duty at the end of the performance period indicates the sales character of the PSA. Second, Art. 31 PSA states that the agreement is based on the "Model Purchase and Sales Agreement for governmental entities in Equatoriana" [*PSA, p. 13 Art. 31*]. It is not based on a model service agreement. Thus, from the perspective of a reasonable third person, the Parties intended the legal framework of the PSA to be a sales contract. Third, the Parties agreed on a definite purchase price of EUR 285 Mio for the overall plant, without any variable elements referring to labour or service costs [*PO2, p. 56 para. 35b*]. This further emphasizes the Parties' intent for the sales part to be preponderant.

119 Thus, considering its wording, a reasonable third person would interpret the PSA as a preponderant sales contract.

b) THE PARTIES' CONDUCT INDICATES THE PREPONDERANCE OF THE SALES PART

120 According to Art. 8(3) CISG, when interpreting the parties' conduct and statements, one must especially consider the negotiations and subsequent behaviour of the parties.

121 Mr. Cavendish, CEO of CLAIMANT, labelled the CISG the gold standard for "international sales transactions" in his initial meeting with RESPONDENT's former CEO [*Ex. R1, p. 30 para. 11; PO2,*

p. 52 para. 2]. Accordingly, in his witness statement, he referred to CLAIMANT as the "seller" [*Ex. C5, p. 16 para. 5*]. Thereby, CLAIMANT unambiguously expressed its understanding of the PSA as a sales contract. This must have been apparent to a reasonable third person in RESPONDENT's shoes: RESPONDENT's main negotiator, Ms. Ritter, even confirmed that she was aware of the exchange between the CEOs [*Ex. R1, p. 30 para. 11*]. Yet, RESPONDENT did not act in any way that could have revealed a different understanding or intention [*cf. ibid.*].

122 Hence, both the PSA's wording and the Parties' conduct show that they intended the sales elements to be preponderant. As this complies with the economic evaluation, the PSA predominantly consists of sales obligations.

123 Consequently, the PSA fulfils the Convention's substantive requirements.

B. THE PSA FALLS WITHIN THE TERRITORIAL SCOPE OF THE CISG

124 For a contract to fall within the territorial scope of the Convention, both parties must have their places of business in different contracting states as per Art. 1(1)(a) CISG. If a party has more than one place of business, Art. 10(a) CISG declares the place with the closest relationship to the contract and its performance to be decisive. The relevant point in time is the moment of contract conclusion [*Média Graph Dépôt v. MTEX Solutions, p. 5 para. 30; Danish Lingerie Case, p. 4 para. 25; UNCITRAL Digest, p. 4 para. 3; Ferrari et al., Art. 1 para. 13*]. A subsequent transfer of a party's place of business is irrelevant [*Säcker et al., Art. 1 para. 25; Staudinger, Art. 1 para. 69; Loizou, p. 4*].

125 RESPONDENT's place of business as a governmental entity is in Equatoriana, a contracting state to the CISG [*PSA, p. 10;* PO2*, p. 56 para. 35b; PO1, p. 50 para. III.4; Request, p. 6 para. 27, p. 3 para. 2*]. CLAIMANT's place of business is in Mediterraneo, also a contracting state to the CISG [*PSA, p. 10; PO2, p. 56 para. 35b; PO1, p. 50 para. III.4*]. Contrary to RESPONDENT's assertions, Volta Transformer's seat in Equatoriana is not a place of business of CLAIMANT. The Mediterranean office is CLAIMANT's only place of business (**I.**). Even if one considered Volta Transformer to be a place of business of CLAIMANT, the latter's seat in Mediterraneo would still be decisive (**II.**).

I. CLAIMANT'S ONLY PLACE OF BUSINESS IS IN MEDITERRANEO

126 A place of business is any location from which an entity effectively conducts its business activity with third parties [*Kröll/Mistelis/Perales Viscasillas, Art. 1 para. 43; Brunner/Gottlieb, Art. 1 para. 5*]. For determining the internationality under Art. 1(1)(a) CISG, only the contracting parties' places of business are relevant [*Achilles, Art. 1 para. 6; Ferrari et al., Art. 1 para. 9; Bamberger et al., Art. 1 para. 10; Honsell, Art. 1 para. 7*]. Parties to a sales contract are buyer and seller as per Artt. 30 and 53 CISG [*Soergel, Art. 1 para. 3; cf. Sizing Machine Case, p. 5*]. The CISG respects the distinction between separate legal entities [*Flechtner, para. 42; Loizou, p. 4; Staudinger, Art. 1 para. 66; Achilles,*

Art. 1 para. 6; Gillette/Walt, pp. 27 et seq.]. Thus, subsidiaries with independent legal personalities do not qualify as a party's place of business [*Achilles, Art. 1 para. 6; Herber/Czerwenka, Art. 1 para. 15; Schlechtriem/Schwenzer, Art. 1 para. 25; cf. Honnold/Flechtner, p. 32 para. 42; cf. Honsell, Art. 1 para. 13*]. All the more, a third company with no legal ties to the contracting party, merely involved in the contract, cannot constitute a party's place of business [*Achilles, Art. 1 para. 6; Staudinger, Art. 1 para. 67; Säcker et al., Art. 1 para. 29*]. This was confirmed by the Court of Appeal Stuttgart in its landmark *Floor Coverings* decision [*Floor Coverings Case, p. 1 para. 3, p. 5 para. 21*]. The court ruled that even despite personal overlaps between the boards of both companies, an independent corporation could not be considered a place of business of the seller under the CISG [*ibid.*].

127 Parties to the PSA are only CLAIMANT (Green Hydro Plc.) and RESPONDENT (Equatoriana RenPower Ltd.) [*PSA, p. 10*]. Volta Transformer is neither a party to the PSA nor was it involved in the contract negotiations between the Parties [*PSA, p. 10; cf. Request, p. 5 paras. 13 et seq.*]. At the relevant time of the PSA's formation, there were no legal ties between Volta Transformer and CLAIMANT [*PO2, p. 52 para. 8*]: The two companies did not finalize their supplier contract until 25 August 2023, one and a half months after the PSA was signed [*Request, p. 4 paras. 11, 14*]. Volta Transformer was merely one of two suppliers employed by CLAIMANT to fulfil parts of its contractual duties [*Request, p. 4 para. 11; PO2, p. 53 para. 16*]. Moreover, five months passed between the conclusion of the PSA on 17 July 2023 and the purchase of Volta Transformer in November 2023 [*PSA, p. 13; Answer, p. 28 para. 20; Ex. C8, p. 36 para. 2*]. Until the acquisition, there were no formal or informal agreements that guaranteed CLAIMANT any control or operational influence over Volta Transformer [*PO2, p. 52 para. 8*]. Volta Transformer was a completely independent legal entity without any representative competence or personnel overlaps, only connected to CLAIMANT by a common history [*Ex. C5, p. 16 para. 8*]. Consequently, Volta Transformer does not constitute a place of business of CLAIMANT.

128 Thus, the Mediterranean office is CLAIMANT's only place of business.

II. EVEN IF VOLTA TRANSFORMER WAS A PLACE OF BUSINESS OF CLAIMANT, CLAIMANT'S SEAT IN MEDITERRANEO WOULD STILL BE DECISIVE

129 According to Art. 10(a) CISG, if a party has more than one place of business, the one most closely related to – first – the contract and – second – its performance is decisive. To this end, all circumstances known to or contemplated by the parties at the time of the contract's conclusion must be considered, Art. 10(a) CISG. These may include addresses, letterheads as well as the place from which the correspondence between the parties was sent [*Vision Systems v. EMC, p. 7*; *Isocab France v. E.C.B.S., p. 2; America's Collectible Network v. Timlly, p. 4 para. 15*; *Schwenzer/Fountoulakis/Dimsey, p. 91; Achilles, Art. 10 para. 2*]. Further indicators are where the

decisions on the next steps in handling disputes are made or what place of business was responsible for the contract's conclusion [*Schwenzer/Atamer/Butler, p. 34 para. 3.3.1; Staudinger, Art. 10 para. 5; Witz/Salger/Lorenz, Art. 10 para. 3*].

130 First, CLAIMANT's seat in Mediterraneo is closest to the contract: The Mediterranean office was responsible for concluding the PSA [*PSA, p. 10; PO2, pp. 55 et seq. para. 35*]. All correspondence leading up to its signing originated from and was sent to CLAIMANT's Mediterranean office. This is indicated by the email-domains and letterheads [*Ex. C4, p. 15; Ex. R2, p. 31; Ex. C6, p. 19*]. Furthermore, the negotiations for the PSA were conducted by Mr. Cavendish, Mr. Deiman and Ms. Smith, all representatives of the Mediterranean office [*Ex. C4, p. 15; Ex. R2, p. 31; PO2, p. 51 para. 11; Ex. R1, p. 29 paras. 4 et seqq.*]. Finally, decisions regarding the continuation of the PSA and the present dispute are handled at the administrative centre in Mediterraneo as well [*cf. Ex. C6, p. 19; cf. Ex. C7, p. 20; cf. PO2, p. 52 para. 1*]. RESPONDENT is fully aware of this, as it addressed both the termination notice and the without-prejudice offer to the Mediterranean office [*Ex. C6, p. 19; Ex. C7, p. 20*]. Thus, as Volta Transformer does not have any representative authority, all power over the contractual relationship rests with CLAIMANT's Mediterranean office.

131 Second, CLAIMANT's seat in Mediterraneo is closest to the performance of the contract: The PSA is founded on CLAIMANT's innovative technology and production process [*Request, p. 3 paras. 5 et seq.*]. Moreover, CLAIMANT carries out over 66 % of the project's obligations in terms of economic value – twice as much as Volta Transformer [*Ex. C5, p. 17 para. 11*]. Hence, CLAIMANT's contribution considerably outweighs Volta Transformer's part from an economic perspective.

132 Therefore, even if Volta Transformer's place of business was considered one of CLAIMANT, the Mediterranean office would be decisive.

133 Consequently, both Parties have their places of business in different contracting states and the territorial requirements of Art. 1(1)(a) CISG are met.

C. THE CISG IS NOT EXCLUDED UNDER ART. 2(B) CISG

134 The applicability of the Convention can be limited by specific exclusions listed in Art. 2 CISG. As stated in its preamble, the CISG aims to provide uniform rules for international trade. Therefore, the grounds for its exclusion must be interpreted narrowly [*Kröll/Mistelis/Perales Viscasillas, Art. 2 para. 31; Schroeter, Auctions, p. 28; CISG-AC Op. No. 16, p. 119 para. 3.5*]. Art. 2(b) CISG stipulates that the Convention does not apply to sales by auction. This exception, however, does not extend to contracts concluded in a public procurement process as they do not constitute sales by auction [*Electronic Electricity Meters Case II, p. 10 paras. 30 et seqq.; Ferrari et al., Art. 2 para. 8; Hau/Poseck, Art. 2 para. 8; Schlechtriem/Schwenzer, Art. 2 para. 20; Staudinger, Art. 2 para. 34*].

135 The process at hand constitutes a public procurement process (**I.**). Even though the public

procurement process encompasses a reverse bid "auction", Art. 2(b) CISG still does not apply (**II.**).

I. THE TENDER PROCESS AT HAND CONSTITUTES A PUBLIC PROCUREMENT PROCESS

136 A public procurement process is defined as the acquisition of goods, construction or services by a state or state-owned enterprise [*OECD, p. 172; Art. 2(j), (n) UNCITRAL Model Law on Public Procurement* (*hereinafter:* "UNCITRAL MLPP"*); MLPP Glossary, p. 15 paras. 58, 62; Grandia/Volker, p. 5; cf. Electronic Electricity Meters Case II, p. 1 para. 1*].

137 As the government of Equatoriana is the sole shareholder of RESPONDENT, it is a state-owned enterprise [*PSA, p. 10 Preamble; PO2, p. 52 para. 3*]. Furthermore, the entire process is governed by the public procurement law of Equatoriana [*RfQ, p. 9 para. 8*]. RESPONDENT itself acknowledged that the PSA was concluded "in the context of a public procurement process" [*Answer, p. 28 para. 20*].

138 Consequently, the process at hand constitutes a public procurement process.

II. EVEN THOUGH THE PUBLIC PROCUREMENT PROCESS ENCOMPASSES A REVERSE BID "AUCTION", ART. 2(B) CISG STILL DOES NOT APPLY

139 RESPONDENT argues that the exclusion of Art. 2(b) CISG is still applicable, since the public procurement process at hand encompasses a reverse bid auction [*Answer, p. 28 para. 20*].

140 However, the reverse bid "auction" in the present public procurement process is not an auction in the sense of Art. 2(b) CISG (**1.**). Moreover, the purpose and drafting history of Art. 2(b) CISG speak against its application in the process at hand (**2.**).

1. THE REVERSE BID "AUCTION" IN THE PRESENT TENDER PROCESS IS NOT AN AUCTION WITHIN THE MEANING OF ART. 2(B) CISG

141 An auction under Art. 2(b) CISG is a public sale in which the award is given to the highest bidder [*Black's Law Dictionary, p. 160; Ferrari et al., Art. 2 para. 8; Brunner/Gottlieb, Art. 2 para. 11; Schlechtriem/Schwenzer, Art. 2 para. 20; Schmitt, p. 146*]. Reverse auctions go downwards, giving the award directly to the lowest bidder [*Schafft, pp. 393 et seq.; Leible/Sosnitza, p. 753; cf. Art. 2(d) UNCITRAL MLPP*]. In both cases, the awarding decision is determined either through over- or underbidding [*Mankowski, Art. 2 para. 7; Staudinger, Art. 2 para. 33; Leible/Sosnitza, p. 755*].

142 The present procurement process consisted of four phases [*RfQ, p. 8 para. 1c*]. In the first phase, interested parties could make initial offers [*ibid.*]. RESPONDENT analysed these offers internally in the second phase [*ibid.*]. After the third phase – the reverse bid "auction" – RESPONDENT started to negotiate with the two lowest bidders in the fourth phase [*ibid.*]. The awarding decision was made following these detailed negotiations [*RfQ, p. 9 para. 7; PO2, pp. 52 et seq. para. 9*]. RESPONDENT was therefore not necessarily giving the award to the lowest bidder but to the party

prevailing in negotiations. The preceding underbidding was only a tool to select two possible contractors. It did not directly determine the awarding decision.

143 Consequently, the reverse bid "auction" in the present tender process is not an auction in the sense of Art. 2(b) CISG.

2. THE PURPOSE AND DRAFTING HISTORY OF ART. 2(B) CISG SPEAK AGAINST ITS APPLICATION IN THE PROCESS AT HAND

144 The purpose of the provision is to protect the seller from a surprising application of the CISG [*Slakoper/Tot, p. 154; Schroeter, Auctions, p. 23*]. Furthermore, Art. 2(b) CISG was drafted in order to avoid conflicts with special national rules for auctions [*Secretariat Commentary, Art. 2 para. 5*].

145 RESPONDENT cannot rely on the protection granted by Art. 2(b) CISG (**a.**). Additionally, the CISG does not interfere with Equatoriana's national rules governing the present process (**b.**).

a) RESPONDENT CANNOT RELY ON THE PROTECTION GRANTED BY ART. 2(B) CISG

146 Art. 2(b) CISG aims to protect the seller from a surprising application of the CISG since the buyer's identity and place of business are only revealed after the award [*Drescher et al., Art. 2 para. 16; Kröll/Mistelis/Perales Viscasillas, Art. 2 para. 27*]. The protective purpose of Art. 2(b) CISG is only triggered when the sale's possible international nature is not recognisable at the time of contract conclusion [*Schroeter, Auctions, p. 28; cf. Staudinger, Art. 2 para. 32*].

147 RESPONDENT is the buyer and not the seller [*PSA, p. 10*]. Therefore, it is not entitled to the seller protection underlying Art. 2(b) CISG. Even if RESPONDENT – due to being the initiator of the procurement process – was considered to be equally in need of protection, there is no element of surprise: RESPONDENT expressly demanded that at least 25 % of the materials and services for the plant would originate from entities in Equatoriana [*RfQ, p. 9 para. 9; Ex. R1, p. 29 para. 4; Ex. C4, p. 15; Answer, p. 26 para. 6*]. This shows that RESPONDENT anticipated the possibility that its contractual partner might not be from Equatoriana. Otherwise, it would not have highlighted this requirement in the Request for Quotation. Furthermore, in the first phase, RESPONDENT evaluated the initial proposals before entering the reverse bid "auction" [*RfQ, p. 8 para. 1c; PO2, pp. 52 et seq. para. 9*]. Additionally, in the last phase, the Parties exchanged emails and engaged in joint discussions [*Ex. R2, p. 31; cf. PSA, p. 13*]. Thus, RESPONDENT knew the identity and places of business of all bidders at all stages of the process. The possible international nature of the sale was objectively recognisable for RESPONDENT at the time of contract conclusion. There is no surprise that RESPONDENT needs to be protected from.

148 Hence, RESPONDENT cannot rely on the protection granted by Art. 2(b) CISG.

b) THERE IS NO INTERFERENCE BETWEEN THE EQUATORIANIAN PUBLIC PROCUREMENT LAW AND THE CISG

149 Art. 2(b) CISG excludes sales by auctions from the Convention since auctions are typically governed by specific national laws [*Staudinger, Art. 2 para. 32; Kröll/Mistelis/Perales Viscasillas, Art. 2 para. 27*]. The drafters of the CISG preferred to keep auctions under national rules [*Secretariat Commentary, Art. 2 para. 5*]. However, special national laws regarding public procurement processes typically regulate only the selection of the bidder [*Schroeter, Auctions, p. 26; cf. UNCITRAL MLPP*]. Conversely, pursuant to Art. 4 CISG, the Convention governs only the formation of the contract and the parties' rights and obligations. Therefore, conflicts between public procurement laws and the Convention are exceedingly rare [*Schroeter, Auctions, p. 26*].

150 Both the bidding process and the award of the PSA are governed by the Public Procurement Law of Equatoriana [*PO2, p. 55 para. 32; RfQ, p. 9 para. 8*]. There are no indications that it also regulates the contract conclusion. Consequently, there is no interference between the CISG and Equatoriana's Public Procurement Law.

151 Thus, both the purpose and the drafting history of Art. 2(b) CISG speak against its application in the process at hand. Even though the reverse bid "auction" forms part of the public procurement process, the exception of Art. 2(b) CISG does not apply.

152 The application of the CISG is not excluded under Art. 2(b) CISG.

153 To conclude, the CISG is applicable to the PSA.

CONCLUSION TO THE THIRD ISSUE

154 Just as the hydrogen plant rests on a stable foundation, a contractual relationship is built on reliability. This is a quality RESPONDENT has repeatedly neglected, acting like a weathervane that shifts with every political gust. As soon as the governmental winds in Equatoriana changed, RESPONDENT's commitment to use its best endeavours to fulfil the PSA evaporated. Now, RESPONDENT pulls arguments from thin air, desperately seeking to evade its contractual duties. Nevertheless, CLAIMANT has the wind at its back: The PSA falls within the substantive and territorial scope of the CISG. The Convention is also not excluded by Art. 2(b) CISG.

FOURTH ISSUE: THE PARTIES HAVE NOT VALIDLY EXCLUDED THE CISG'S APPLICATION

155 CLAIMANT respectfully requests the Tribunal to find that the Parties have not validly excluded the application of the CISG.

156 RESPONDENT has consistently sought to evade its contractual obligations, first by disputing the applicability of the CISG and now by invoking Art. 29 PSA – a choice-of-law clause adopted verbatim from an Equatorianian model contract [*Answer, pp. 27 et seq., paras. 19 et seq.; Ex. R1, p. 30 para. 11*]. By invoking this unsuitable choice of law, RESPONDENT tries to flee into its own national law, which would effectively grant RESPONDENT a *carte blanche* through Art. 7.3 Equatorianian Civil Code [*Ex. C6, p. 19; PO1, p. 50 para. III.4*]. Despite knowing that the CISG's application was crucial to CLAIMANT – having praised it as the "gold standard" [*Ex. R1, p. 30 para. 11*] – RESPONDENT now struggles to find indications of a non-existent mutual intent to opt out of the CISG.

157 Art. 6 CISG grants the parties the possibility to exclude the application of the Convention. An exclusion requires a mutual party agreement – a unilateral exclusion is not possible [*Bernards v. Carstenfelder, para. 4.10; Schlechtriem/Schwenzer, Art. 6 para. 10*]. The burden of proof to show such a consensus lies with the party alleging the exclusion [*Schlechtriem/Schwenzer/Schroeter, Art. 6 para. 38; Hau/Poseck, Art. 6 para. 9; cf. Rheinland Versicherungen v. Atlarex, p. 11*]. Both Parties must have demonstrated a clear intent to opt out of the CISG [*BP Oil Case, p. 3 para. 12; CISG-AC Op. No. 16, pp. 118 et seq. paras. 3 et seq.; Brunner/Gottlieb, Art. 6 para. 3*]. Such intent must be determined in accordance with Art. 8 CISG since the Convention governs its own exclusion [*Italian Knitwear Case III, pp. 3 et seq. paras. 13 et seq.; Lohmann, p. 250; Brunner/Gottlieb, Art. 6 para. 2; CISG-AC Op. No. 16, p. 118 para. 3*]. Based on Art. 6 CISG, the parties can exclude the CISG either expressly or impliedly [*Citroen Type C 5 Case III, p. 17; Schwenzer/Fountoulakis/Dimsey, Art. 6 p. 41*].

158 However, neither did the Parties expressly exclude the CISG's application via Art. 29 PSA (**A.**), nor did they impliedly exclude the application of the CISG (**B.**).

A. THE CISG WAS NOT EXPRESSLY EXCLUDED BY THE PARTIES VIA ART. 29 PSA

159 The choice-of-law clause in Art. 29 PSA does not constitute an express exclusion of the CISG.

160 First, Art. 29 PSA does not contain an explicit reference to the CISG (**I.**). Second, the reference to the conflict of laws principles in Art. 29 PSA is not an express exclusion of the CISG (**II.**).

I. ART. 29 PSA DOES NOT CONTAIN AN EXPLICIT REFERENCE EXCLUDING THE CISG

161 For an express derogation from the Convention, the parties must include a clear reference to the CISG in their agreement [*Coke Case III, p. 1; Säcker et al., Art. 6 para. 8*]. The CISG forms part of a contracting states' national substantive law [*Electronic Electricity Meters Case II, p. 5 para. 16; Säcker et al., Art. 6 para. 12*]. Thus, the mere designation of the law of a contracting state is not sufficient

for an express exclusion [*Staudinger, Art. 6 para. 24; cf. Boiler Case, p. 8*].

162 The choice-of-law clause in Art. 29 PSA reads: "The Agreement is governed by the law of Equatoriana to the exclusion of its conflict of laws principles" [*PSA, p. 12 Art. 29*]. No explicit reference to the CISG is made.

163 Consequently, the CISG is not excluded under Art. 29 PSA by explicit reference.

II. ART. 29 PSA DOES NOT EXPRESSLY EXCLUDE THE CISG BY EXCLUDING THE CONFLICT OF LAWS PRINCIPLES

164 Conflict of laws rules are "the legal principles relied on to determine preliminary issues of applicable law" [*Black's Law Dictionary, p. 375*]. Conversely, the CISG exclusively deals with substantive issues of contract formation, party obligations and remedies [*Kröll/Mistelis/Perales Viscasillas, Intro to the CISG para. 11*]. It does not contain any provisions regarding the conflict of laws [*Construction Materials Case IV, p. 3 para. 9; Ferrari, PIL and CISG, pp. 56 et seq.; Säcker et al., Intro to Art. 1 para. 1*].

165 Moreover, excluding conflict of laws principles has fundamentally different effects than opting out of the CISG: Whereas an exclusion of the Convention has effects on the substantive level, an exclusion of conflict of laws principles aims to exclude *renvoi* [*Coyle/Drahozal, p. 337; Reithmann/Martiny, p. 170 para. 2.301; Mankowski, Choice of Laws, p. 8*]. The issue of *renvoi* arises when a court must determine if a reference to a foreign jurisdiction is referring only to its substantive law or also to its conflict of laws rules [*Born, Law and Practice, p. 308; Bermann, p. 323; Sonnentag, p. 1; Black's Law Dictionary, p. 1552*]. The latter may then cause *renvoi* by referring the issue back to another jurisdiction [*ibid.*]. To avoid uncertainties, it is common practice in international trade to limit the choice of law to the substantive provisions by expressly excluding the conflict of laws rules [*Coyle/Drahozal, p. 337; Mallmann, pp. 2953 et seq.; Born, Ch. 19 p. 52; Mankowski, Choice of Laws, p. 8*]. This practice must be strictly distinguished from an exclusion of the CISG under Art. 6 CISG.

166 Thus, the exclusion of Equatoriana's conflict of laws principles is no express exclusion.

167 The Parties did not expressly exclude the CISG through Art. 29 PSA.

B. THE CISG WAS NOT IMPLIEDLY EXCLUDED BY THE PARTIES

168 An implied exclusion under Art. 6 CISG requires a clear mutual intent by the parties [*BP Oil Case, para. 12; CISG-AC Op. No. 16, pp. 118 et seq. paras. 3 et seq.; Brunner/Gottlieb, Art. 6 para. 3*]. Whether the parties mutually intended to exclude the Convention is assessed according to Art. 8 CISG [*Italian Knitwear Case III, p. 3 paras. 13 et seq.; Electronic Electricity Meters Case III, para. 26; Schlechtriem/Schwenzer/Schroeter, Art. 6 para. 18*]. Such mutual intent cannot be easily inferred: The drafters of the Convention rejected an explicit reference to the option of implied exclusion [*Off. Rec., pp. 249 et seq.; Secretariat Commentary, Art. 5 para. 2; Schroeter, para. 71; UNCITRAL Digest, p. 34*

para. 9; CISG-AC Op. No. 16, p. 120 para. 3.7]. Rather, an intent to exclude must be "unequivocal" and "clearly manifested" "beyond any reasonable doubt" [*Citroen Type C 5 Case II, p. 15 para. 71; CISG-AC Op. No. 16, p. 118 para. 3*; *Achilles, Art. 6 para. 5*]. An unspecified choice of a contracting state's law, by itself, does not qualify as an implied exclusion of the CISG [*Aluminum Rings Case, para. 15; Boiler Case, p. 8; CISG-AC Op. No. 16, pp. 120 et seq. para. 4.2*]. To interpret such a choice as an exclusion, there must be additional evidence of the parties' mutual intent to opt out [*Aluminum Rings Case, para. 15; Gasoline and Gas Oil Case, p. 4; Ferrari et al., Art. 6 para. 4*]. Any ambiguities must be resolved against the party which included the clause in the contract [*Bowling Alleys Case, p. 6 para. 21; Kröll/Mistelis/Perales Viscasillas, Art. 8 para. 26*].

169 In line with Art. 8 CISG, it is decisive how a reasonable third person in the position of the actual addressee would have interpreted the other party's conduct.

170 The choice of the Equatorianian law in Art. 29 PSA, by itself, does not qualify as an implied exclusion. Additionally, a reasonable third person would have interpreted neither RESPONDENT's (**I.**) nor CLAIMANT's behaviour (**II.**) as an unequivocal intent to exclude the CISG.

I. A REASONABLE THIRD PERSON WOULD NOT HAVE INTERPRETED RESPONDENT'S CONDUCT AS AN INTENT TO EXCLUDE THE CISG

171 Presently, Mr. Deiman acted as CLAIMANT's main negotiator for the PSA, taking the lead in correspondence with RESPONDENT [*Ex. R1, p. 30 para. 4; Ex. R2, p. 31*]. Ms. Smith, a labour lawyer, stepped in at the last moment to replace CLAIMANT's head of legal, merely supporting Mr. Deiman during negotiations [*PO2, p. 53 para. 11*]. In these negotiations, RESPONDENT only addressed Mr. Deiman [*cf. Ex. R1, p. 29 paras. 4 et seqq.*]. Thus, the decisive standard is that of a reasonable third person in the position of Mr. Deiman [*Ex. C8, p. 36 para. 1; PO2, p. 55 para. 26*].

172 RESPONDENT showed no conduct from which a reasonable third person in Mr. Deiman's position could have inferred RESPONDENT's alleged intent to exclude the CISG [*cf. Ex. R1, p. 30 para. 11*]. Beyond introducing the changed model clause, RESPONDENT did not in any way communicate its intention regarding the applicable law [*cf. Ex. R1, p. 30 paras. 7, 11*].

173 The former model clause had expressly provided for the CISG's application [*PO2, p. 53 para. 10*]. In 2022, the Equatorianian government changed the clause to the wording adopted in Art. 29 PSA [*Ex. R1, p. 30 para. 11; Answer, p. 27 para. 19*]. However, one cannot expect a reasonable person in Mr. Deiman's shoes to be aware of such a change in a foreign country's model contract. The last time Mr. Deiman dealt with the former model contract was three years prior to the negotiations with RESPONDENT [*Ex. R1, p. 30 para. 11*]. Presuming that a head of contracting handles numerous clauses, it is hard to imagine that he would recall the exact wording of a clause he dealt with years ago. Moreover, in a model contract with predetermined clauses, individual provisions are not

negotiated, further supporting the idea that such a change would go unnoticed.

174 Even if the reasonable third person was aware of the change, he would not have interpreted the new clause as an exclusion of the CISG. The official press release accompanying the amendment merely stated that its purpose was "to strengthen the role of Equatorianian Law" [*PO2, p. 53 para. 10*]. However, as the CISG forms part of Equatorianian Law, the objective legal meaning of the clause remained unchanged, with the CISG still being applicable [*supra para. 161 et seqq.*]. Accordingly, one must assume that the lawyers in the Ministry of Justice realized that such an amendment was not sufficient for excluding the CISG. This raises serious doubts as to whether the intent of Equatoriana's Ministry of Justice – the foundation of RESPONDENT's whole argument – was ever to exclude the CISG. Hence, a reasonable person could not infer an intent of RESPONDENT to exclude the CISG from the press release formulating the governmental strategy.

175 Thus, a reasonable third person in CLAIMANT's position would not have interpreted RESPONDENT's conduct as an intention to exclude the CISG.

II. A REASONABLE THIRD PERSON WOULD NOT HAVE INTERPRETED CLAIMANT'S CONDUCT AS AN INTENT TO EXCLUDE THE CISG

176 First, during negotiations, CLAIMANT's CEO referred to the CISG as "the gold standard" [*Ex. R1, p. 30 para. 11*]. Additionally, Mr. Deiman agreed on the model contract particularly due to his positive experiences with the CISG-governed version in 2020 [*ibid.*]. There was no further discussion on this issue [*ibid.*]. Hence, this explicit preference was RESPONDENT's last and only information regarding CLAIMANT's position [*cf. ibid.*]. A reasonable third person in RESPONDENT's shoes could only understand CLAIMANT's conduct as in favour of the CISG. RESPONDENT's main negotiator, Ms. Ritter, even admits that she knew about CLAIMANT's preference [*ibid.*].

177 Second, CLAIMANT's acceptance of the PSA's wording itself could not tell RESPONDENT differently. The clause objectively did not provide for an exclusion of the CISG [*supra para. 161 et seqq.*]. Therefore, RESPONDENT's lawyers must have recognised that CLAIMANT's acceptance of the clause encompassed the CISG.

178 Third, Mr. Cavendish immediately referred to the CISG in reaction to the termination [*Request, pp. 5 et seq. paras. 19 et seq.*]. Thereby, CLAIMANT once again showed its intention to rely on the CISG. This subsequent behaviour reflects the interpretation of its conduct during the negotiations.

179 Thus, a reasonable third person in RESPONDENT's position would not have interpreted CLAIMANT's conduct as an intention to exclude the CISG.

180 Both Parties' conduct did not amount to an unequivocal and clearly manifested intent beyond any reasonable doubt required for an implied exclusion.

181 In conclusion, the Parties have not excluded the CISG's application.

CONCLUSION TO THE FOURTH ISSUE

182 Cables and pipes connect the individual parts of a hydrogen plant. Likewise, clear and unequivocal communication connects the parties of a contractual relationship. But how can one be expected to grasp what has never been expressed? And what use does communication have if the addressee only hears what it wants to hear? RESPONDENT's argumentation suffers from these two flaws: RESPONDENT did not lift a finger to express its alleged intent to exclude the CISG and yet expects to be understood. Conversely, it turns a blind eye to CLAIMANT's clear intent to apply the CISG. These inconsistencies unmask RESPONDENT's submissions as what they really are: an attempt to escape its contractual obligations by hiding behind an unsuitable choice of law. However, no such escape is possible. The CISG remains the law governing the PSA. The Parties did not opt out of it.

STATEMENT OF RELIEF SOUGHT

On the grounds of the arguments set out in this memorandum, CLAIMANT respectfully requests the Tribunal to find that:

1) The Tribunal should not reject the claim for lack of jurisdiction or inadmissibility or as part of its discretion.

2) The Tribunal should exclude Exhibit R3 from the proceedings and admit Exhibit C7 to the case.

3) The CISG is applicable to the PSA.

4) The Parties have not validly excluded the application of the CISG.

CERTIFICATE OF INDEPENDENCE

We hereby certify that only the persons whose names appear below have authored this Memorandum.

Münster, 12 December 2024

Benedikt Marx

Tim Dettmer

Lea Hammermann

Marie Knüfermann

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TABLE OF ABBREVIATIONS

ABBREVIATION	FULL TEXT
%	Percent
AC	Advisory Council
A.G.	Aktiengesellschaft
Answer	Answer to the Request of Arbitration, Problem pp. 25-28
Art./Artt.	Article/Articles
B.V.	Besloten vennootschap met beperkte aansprakelijkheid
CEO	Chief Executive Officer
cf.	confer (compare)
Ch.	Chapter
C.I.	Sociedad de Comercialización Internacional
CISG	UN Convention on Contracts for the International Sale of Goods 1980
Convention	UN Convention on Contracts for the International Sale of Goods 1980
Co.	Company
Corp.	Corporation
ed.	Edition
edt.	Editor
e.g.	exempli gratia (for example)
et al.	et alii/et aliae (and others)
et seq./seqq.	et sequentia (and following)
EUR	Euro
Ex. C/Ex. R	CLAIMANT's Exhibit/RESPONDENT's Exhibit
FAI	The Finland Arbitration Institute
FAI Mediation Rules	Mediation Rules 2024 of the Finland Chamber of Commerce
FAI Rules	Arbitration Rules 2024 of the Finland Chamber of Commerce

File	Case File/Problem
fn.	Footnote
GmbH	Gesellschaft mit beschränkter Haftung
IBA	International Bar Association
IBA Rules	International Bar Association Rules on the Taking of Evidence in International Arbitration (2020)
ibid.	ibidem (in the same place)
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
i.e.	id est (that is)
Inc.	Incorporated
LLC	Limited Liability Company
Ltd.	Limited
mbH	mit beschränkter Haftung
Mgt.	Management
Mio	Million
Mr./Ms.	Mister/Miss
MW	Megawatt
No.	Number
N.V.	Naamloze Vennootschap
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
Op.	Opinion
p./pp.	Page/Pages
para./paras.	Paragraph/Paragraphs
Plc.	Public limited company
PO1/PO2	Procedural Order No. 1/ Procedural Order No. 2, Problem pp. 50-56
Request	Request for Arbitration, Problem pp. 2-7

RfQ	Request for Quotation, pp. 8-9
Sdn Bhd	Sendiriran Berhad
S.A.	Sociedad Anónima
S.L.	Sociedad de responsabilidad limitada
S.p.A.	Società per Azioni
S.r.l.	Società a responsabilità limitata
supra	vide supra (see above)
UAE	United Arab Emirates
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Digest	UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods
UNCITRAL MLPP	UNCITRAL Model Law on Public Procurement (2011)
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments
U.S.	United States
v.	Versus
Vol.	Volume

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