TWENTY SECOND ANNUAL

WILLEM C. VIS

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

HONGKONG

MEMORANDUM FOR RESPONDENT

UNIVERSITY OF MÜNSTER

LEA HAMMERMANN | PHILIP MAMPE | MAXIMILIAN SCHWEIZER

BENEDIKT MARX | TIM DETTMER | MARIE KNÜFERMANN

CASE NO. FAI MOOT 100/2024

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

ACADEMIC INTEGRITY AND ARTIFICIAL INTELLIGENCE DISCLOSURE STATEMENT

UNIVERSITY: UNIVERSITY OF MÜNSTER

COUNTRY: GERMANY

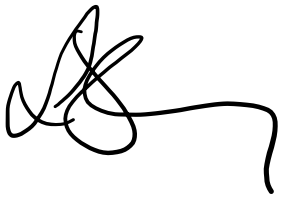
ACADEMIC INTEGRITY	YES	UNSURE	NO
We confirm that this memorandum does not include text from any source, whether the source was in hard copy or online available, which has not been properly distinguished by quotation marks or citation.			

USE OF AI			
We have used AI enhanced search engines for researching sources and (factual or legal) information on the Moot Problem.			
We have used AI-enhanced proof-reading tools.			
We have used AI enhanced translation tools to translate sources relevant for our work on the Moot Problem.			
We have used AI enhanced translation tools to translate parts of the text submitted in this Memorandum into English from any other language.			
We have used AI to generate overviews or briefings on relevant factual and legal topics which are not submitted as part of the memorandum but have been solely used to advance our own understanding.			
We have used AI tools to generate statements that are now included in the memo. Please tick yes even if you have altered or amended the text generated by AI before submission.			
We have trained an AI tool on Vis Moot documents.			

We have used an AI tool that has been trained on Vis Moot documents to generate text that is part of our Memorandum.			[redacted]

We hereby certify that our statements are true and confirm that we have not used AI applications in any other way in preparing this memorandum.

DATE: 29 January 2025

NAME: Lea Hammermann SIGNATURE: 

NAME: Philip Mampe SIGNATURE: 

NAME: Maximilian Schweizer SIGNATURE: 

NAME: Benedikt Marx SIGNATURE: 

NAME: Tim Dettmer SIGNATURE: 

NAME: Marie Knüfermann SIGNATURE: 

READER'S GUIDE

Dear Reader,

The Vis East Moot Team of the University of Münster is proud to present its RESPONDENT 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 Moot Team of the University of Münster

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TABLE OF ABBREVIATIONS

ABBREVIATION	FULL TEXT
%	Percent
AC	Advisory Council
ADR	Alternative Dispute Resolution
Apr	April
ARfA	Answer to the Request of Arbitration
Art./Artt.	Article/Articles
A.Ş.	Anonim Şirket
ASA	Association Suisse de l'Arbitrage (Swiss Arbitration Association)
Aug	August
CEO	Chief Executive Officer
cf.	confer (compare)
Ch.	Chapter
CISG	UN Convention on Contracts for the International Sale of Goods 1980
Co.	Company
Convention	UN Convention on Contracts for the International Sale of Goods 1980
Corp.	Corporation
DAL	Danubian Arbitration Law, verbatim adoption of the UNIDROIT Principles of International Commercial Contracts
Dec	December
ed.	Edition
edt.	Editor
e.g.	exempli gratia (for example)
et al.	et alii/et aliae (and others)
EPC	Engineering, Procurement and Construction
EUR	Euro

Ex. C/Ex. R	CLAIMANT's Exhibit/RESPONDENT's Exhibit
FAI	The Finland Arbitration Institute
FAI Arbitration Rules	Arbitration Rules 2024 of the Finland Chamber of Commerce
FAI Mediation Rules	Mediation Rules 2024 of the Finland Chamber of Commerce
Feb	February
File	Case File
GmbH	Gesellschaft mit beschränkter Haftung
IBA	International Bar Association
ibid.	ibidem (in the same place)
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICSID	International Center for Settlement of Investment Disputes
Inc.	Incorporated
infra	see below
Jan	January
Jul	July
LLC	Limited Liability Company
Ltd.	Limited
mbH	mit beschränkter Haftung
MfC	Memorandum for CLAIMANT
Mgt.	Management
Mio	Million
Mr./Ms.	Mister/Miss
NAFTA	North American Free Trade Agreement
No.	Number
Nov	November

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
Pty Ltd	proprietary limited
RfA	Request for Arbitration
RfQ	Request for Quotation
SND BHD	Sendiriran Berhad
S.A.	Sociedad Anónima
S.p.A.	Società per azioni
S.r.l.	Società a responsabilità limitata
supra	vide supra (see above)
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
USA	United States of America
v.	Versus
Vol.	Volume

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STATEMENT OF FACTS

The parties to this arbitration are Equatoriana RenPower Ltd. [*hereinafter:* "RESPONDENT"] and GreenHydro Plc. [*hereinafter:* "CLAIMANT"].

RESPONDENT is a private entity owned by the state of Equatoriana, operating in the field of renewable energies. It is employed by the government to implement its ambitious "Green Energy Strategy".

CLAIMANT is a medium-sized engineering company with its administrative centre in Mediterraneo. It is specialized in the planning and construction of plants for the production of green hydrogen. For years, it has been working closely together with its later subsidiary, Volta Transformer [*hereinafter:* "VT"], which is based in Equatoriana.

03 Jan 2023 RESPONDENT issues a reverse bid auction [*hereinafter:* "Reverse Bid Auction"] for the planning and construction of a green hydrogen plant and two options – an eAmmonia and an extension option. Key factors in the selection of bidders are the share of local content from Equatoriana and the adherence to the strict timeline.

May 2023 To fulfil the local content requirement, CLAIMANT starts negotiations with the Equatorianian company P2G.

12 Jul 2023 CLAIMANT informs RESPONDENT that it is confident to finalise the supply contract with P2G, which would ensure a local content share of at least 45 %.

13 Jul 2023 CLAIMANT grants a 5 % price reduction in exchange for a waiver of RESPONDENT's rights to terminate for convenience.

17 Jul 2023 RESPONDENT and CLAIMANT [*hereinafter:* "the Parties"] sign the Purchase and Service Agreement [*hereinafter:* "PSA"]. The Parties agree on a multi-tier dispute resolution clause in Art. 30 PSA. It mandates to settle disputes first by mediation before a party shall resort to arbitration.

25 Aug 2023 Equatoriana-based VT and CLAIMANT conclude a supplier contract for the PSA.

Nov 2023 CLAIMANT acquires VT through a share deal, making it its subsidiary.

Dec 2023 CLAIMANT becomes aware that it will likely not be able to adhere to the timeline.

28 Feb 2024 CLAIMANT delivers incomplete construction plans to RESPONDENT 28 days late.

29 Feb 2024 Due to the delay, RESPONDENT terminates the PSA with immediate effect.

25 May 2024 To resolve the dispute, RESPONDENT sends a without-prejudice offer to CLAIMANT in the context of settlement negotiations.

31 Jul 2024 CLAIMANT requests arbitration without having resorted to mediation first.

30 Mar 2025 Oral Hearings before the arbitral tribunal [*hereinafter*: "Tribunal"] begin.

SUMMARY OF ARGUMENT

ISSUE A: THE TRIBUNAL LACKS JURISDICTION AND THE CLAIM IS INADMISSIBLE

The mediation requirement in Art. 30 PSA is a condition precedent for the Tribunal's jurisdiction or at least for the admissibility of the claim. Both the wording of the clause as well as the Parties' conduct show their intent for mediation to be a mandatory pre-arbitral requirement. Further, mediation proceedings would not be futile. On the contrary, rendering the claim admissible would contravene procedural efficiency. In any case, CLAIMANT cannot rely on the futility of mediation as it did not even make a genuine attempt to initiate the process itself. Thus, the Tribunal should exercise its discretion to dismiss or at least stay the case.

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

Ex. R3 constitutes admissible evidence since it was not obtained illegally. The attorney-client privilege does not render it confidential. As the admission of Ex. R3 does not affect the award's enforceability, it should not be excluded from the case. Meanwhile, Ex. C7 is confidential under both Art. 15 FAI Mediation Rules and the without-prejudice privilege. RESPONDENT's challenge to Ex. C7 does not constitute contradictory behaviour. Therefore, it should be excluded from the case.

ISSUE C: THE CISG IS NOT APPLICABLE TO THE PSA

The PSA is a turnkey-contract which is generally not subject to the Convention under Art. 3(2) CISG. This is supported by an analysis of the Parties' intent: The nature of the PSA as well as its denomination and entire content show that the Parties intended the service obligations to be preponderant. Further, VT's seat in Equatoriana is CLAIMANT's decisive place of business under Art. 10(a) CISG. Thus, both Parties have their decisive places of business in Equatoriana, and the PSA is not "international" in the sense of Art. 1(1)(a) CISG. In any case, the Convention's application is excluded by virtue of Art. 2(b) CISG since the PSA was concluded through the Reverse Bid Auction.

ISSUE D: THE PARTIES HAVE VALIDLY EXCLUDED THE APPLICATION OF THE CISG

Both a subjective and an objective interpretation of the Parties' conduct show the Parties' intent to exclude the CISG. First, since CLAIMANT's head of legal interpreted Art. 29 PSA the same way as RESPONDENT, RESPONDENT's subjective intent to exclude the CISG is binding as per Art. 8(1) CISG. Second, even under Art. 8(2) CISG, the exclusion of RESPONDENT's right to terminate for convenience and the revised wording of the clause highlight the Parties' intent to exclude the CISG.

ISSUE A: THE TRIBUNAL LACKS JURISDICTION TO HEAR THE DISPUTE, THE CLAIM IS INADMISSIBLE AND THE TRIBUNAL SHOULD USE ITS DISCRETION TO DISMISS THE CLAIM

1 RESPONDENT respectfully requests the Tribunal to dismiss or at least stay the claim.

2 Agreements must be kept. This is what the Parties accepted when concluding the arbitration agreement contained in Art. 30 PSA [*hereinafter:* "Arbitration Agreement"]. Therein, the Parties agreed that in case of disputes, they shall first resort to mediation and only finally to arbitration [*PSA, pp. 12, 13 Art. 30*]. CLAIMANT confirmed throughout the contract negotiations that arbitration would be "the last resort" and that the Parties "must first try to mediate" [*Ex. R2, p. 31*]. However, after the dispute arose, CLAIMANT never even tried to mediate [*Ex. C5, p. 18 para. 16*]. Instead, it immediately resorted to arbitration [*ibid.*]. Confronted with its failure to adhere to the Arbitration Agreement, CLAIMANT disputes that mediation is a pre-condition to arbitration [*MfC, p. 31 paras. 13-15*]. It extends its far-fetched reasoning to all procedural layers: construing arguments for jurisdiction and admissibility whilst disregarding the Tribunal's discretion [*MfC, pp. 29-36 paras. 3-35*]. All this at the costs of an expensive arbitration [*File, pp. 42, 43*].

3 However, contrary to CLAIMANT's assertions, RESPONDENT asks the Tribunal to exercise its competence-competence according to Art. 33.1 Arbitration Rules 2024 of the Finland Chamber of Commerce [*hereinafter:* "FAI Rules"]. First, it should reject the claim for lack of jurisdiction (**A.**). Second, it should render the claim inadmissible (**B.**). Third, it should dismiss the claim as part of its discretion (**C.**).

A. THE TRIBUNAL LACKS JURISDICTION TO HEAR THE DISPUTE

4 The Tribunal has no jurisdiction to adjudicate the case. CLAIMANT contends that its failure to initiate mediation does not affect the Tribunal's jurisdiction [*MfC, p. 31 para. 15*]. In this vein, CLAIMANT makes three arguments:

5 First, CLAIMANT states that the mediation requirement and the Arbitration Agreement are to be treated separately according to the doctrine of separability [*MfC, p. 31 para. 13*]. However, the doctrine of separability only applies to the separation of the arbitration agreement and the main contract [*Sulamérica Case, pp. 3, 4 para. 9; p. 9 para. 26*]. It preserves the arbitration agreement's validity in case the main contract is invalid [*Sulamérica, p. 9 para. 26; Primrose, p. 141; Art. 16(1) DAL*]. The doctrine does not apply to the relationship between a mediation requirement and an arbitration agreement contained in a single dispute resolution clause [*cf. ibid.*].

6 Second, according to CLAIMANT, the law applicable to the Arbitration Agreement is the CISG [*MfC, p. 30 para. 6*]. In light of this, CLAIMANT argues that the Arbitration Agreement was validly concluded under Artt. 14-24 CISG [*MfC, p. 30 paras. 6-12*]. RESPONDENT does not contest the valid

conclusion of the Arbitration Agreement [*PO2, p. 56 para. 36b*]. With regard to the applicable law for the interpretation of the arbitration agreement, the tribunal should either turn to the law governing the contract or the law of the seat of arbitration [*Redfern/Hunter, para. 3.12*]. The law governing the contract, however, is the Civil Code of Equatoriana [*infra paras. 117-216*]. The law of the seat of arbitration is the Civil Code of Danubia [*PSA, p. 13 Art. 30; PO1, p. 50 para. III.4*]. Both legal frameworks are a verbatim adoption of the UNIDROIT Principles of International Commercial Contracts [*hereinafter:* "UPICC"*; PO1, p. 50 para. III.4*]. Thus, contrary to CLAIMANT, the UPICC is the law applicable to the interpretation of the Arbitration Agreement instead of the CISG.

7 Third, CLAIMANT asserts that compliance with the mediation requirement is not a condition precedent for the validity of the Arbitration Agreement [*MfC, p. 31 paras. 13-15*]. It seems to argue that the Parties intended the mediation requirement to be non-mandatory [*MfC, p. 31 para. 15*]. Thereby, it argues in favour of the Arbitration Agreement's operability [*PO2, p. 56 para. 36b; ARfA, p. 27 para. 16*]. Under Art. 8(1) Danubian arbitration law [*hereinafter:* "DAL"] and Art. II(3) NYC, an arbitration agreement is inoperable where it has no legal effect [*Albon v. Naza, para. 18; Bantekas et al., p. 150; Mistelis, p. 13*]. This is the case if a pre-condition for its validity is not fulfilled [*Mistelis, p. 13*]. A mediation clause is such a pre-condition if it is mandatory [*Born, 2021, p. 981*]. Whether a mediation clause is mandatory is assessed according to the parties' intentions [*Jiménez Figueres, p. 72*]. For that, Art. 4.3 UPICC stipulates to consider all relevant circumstances, such as the wording of the clause and the parties' conduct [*Vogenauer/Kleinheisterkamp, Art. 4.3 para. 3*].

8 Both the wording of the clause (**I.**) and the Parties' conduct (**II.**) show their intent for the mediation requirement to be mandatory.

I. THE WORDING OF THE ARBITRATION AGREEMENT SHOWS THE PARTIES' INTENT FOR MEDIATION TO BE MANDATORY

9 The Parties intended mediation to be a mandatory pre-arbitral requirement as evidenced by the wording of the Arbitration Agreement. CLAIMANT could have argued that the wording of the clause is not sufficiently clear to express the Parties' intent for a mandatory mediation requirement.

10 In order to be mandatory, a clause must reflect such intention in clear and unequivocal language [*Tang v. Grant Thornton, para. 60; Born, 2023, Ch. 5 p. 120; Jiménez Figueres, p. 72; Kayali, p. 569; Redfern/Hunter, para. 2.98; Jolles, p. 336*]. In this regard, the following criteria have been established: First, the use of the imperative term "shall" implies a mandatory requirement for the parties to comply with the clause [*Emirates v. Prime Mineral, para. 25; Cable & Wireless Case, p. 7; ICC Case No. 9984, p. 1; Lancashire v. Landlease, para. 57; Born, 2023, Ch. 5 p. 120; Jiménez Figueres, p. 72; Lew*

et al., p. 178; Kayali, p. 572]. This has also been held in the *Philip Morris v. Uruguay Case*: "the use of the term shall is unmistakeably mandatory*"* [*Philip Morris v. Uruguay, p. 46 para. 140*]. Second, other criteria to determine the mandatory nature of the clause are detailed requirements, e.g. a named institution and specified rules [*Born, 2023, Ch. 5 p. 120*].

11 The Arbitration Agreement reads as follows:

"Any dispute […] shall first be submitted to mediation in accordance with the Mediation Rules of the Finland Chamber of Commerce.

(a) The place of mediation shall be Danubia.

(b) The language of the mediation shall be English.

Any dispute […] shall be finally settled by arbitration in accordance with the Rules for Expedited Arbitration of the Finland Chamber of Commerce. […]" [*PSA, pp. 12, 13 Art. 30*]

First, the Parties used the imperative term "shall" for the initiation of mediation [*ibid.*]. Second, the mediation clause stipulates detailed requirements: The institution administering the mediation is the Finland Arbitration Institute [*hereinafter:* "FAI"*; PSA, pp. 12, 13 Art. 30; Art. 1.1 FAI Mediation Rules*]. The rules governing the mediation are the mediation rules of this institution [*ibid.*]. These rules explicitly regulate the commencement of mediation, the appointment of the mediator and the applicable legal framework [*Ch. II-IV FAI Mediation Rules*]. The place of mediation is Danubia, and the language is English [*PSA, pp. 12, 13 Art. 30*]. Moreover, the Arbitration Agreement has a sequential structure, stipulating that the Parties shall first mediate and only as a final step resort to arbitration [*ibid.*]. All the provided particularities ensure that the clause provides for specific instructions on how to proceed. Thus, the wording of the clause is sufficiently clear and unequivocal, reflecting the Parties' intention of a mandatory clause.

12 Consequently, the wording of the Arbitration Agreement proves its mandatory character.

II. THE CONDUCT OF THE PARTIES SHOWS THEIR INTENT FOR MEDIATION TO BE MANDATORY

13 The conduct of the Parties proves the mandatory nature of the mediation requirement. CLAIMANT could have argued that the Parties' conduct indicates its non-mandatory nature.

14 When assessing the parties' intention, Art. 4.3(a) UPICC provides that regard shall be paid to the preliminary negotiations between the parties.

15 Given the Parties' strong interest in resolving disputes amicably, they agreed to use a multi-tier clause [*Ex. R1, p. 30 para. 8*]. To this end, CLAIMANT proposed to include a combination of the model mediation and arbitration clauses of the FAI [*Ex. R1, p. 30 para. 8; cf. FAI Mediation Rules, p. 1; cf. FAI Rules, p. 77*]. Originally, the model mediation clause allowed a party to commence

arbitration without first trying to mediate [*FAI Mediation Rules, p. 1*]. RESPONDENT, however, had highlighted that arbitration should only be the last resort as it favoured to resolve disputes amicably [*Ex. R1, p. 30 para. 9; Ex. R2, p. 31*]. In response, CLAIMANT removed this provision [*Ex. R2, p. 31; PSA, pp. 12, 13 Art. 30*]. It did so against the backdrop of Equatorianian case law regarding multi-tier clauses: The jurisprudence stipulates that the conduct of mediation is a condition precedent for the Tribunal's jurisdiction [*Ex. R1, p. 30 para. 9*]. Afterwards, CLAIMANT even reassured RESPONDENT that the Arbitration Agreement "clearly provides that the parties must first try to mediate their dispute before resorting to arbitration" [*Ex. R2, p. 31*]. By deliberately removing the sentence stipulating the non-mandatory nature of mediation, the Parties, conversely, showed their intent for the mediation requirement to be mandatory.

16 Thus, the Parties' conduct proves their intent for a mandatory mediation requirement.

17 As CLAIMANT failed to commence mediation, the Arbitration Agreement is inoperative.

18 Hence, the Tribunal lacks jurisdiction to hear the case.

B. IN ANY CASE, THE CLAIM IS INADMISSIBLE

19 In any case, the Tribunal should render the claim inadmissible. Opposingly, CLAIMANT argues that it should be excused from commencing mediation because mediation appears to be futile [*MfC, pp. 31, 32 paras. 17, 18*]. It further states that referring the Parties to mediation would undermine procedural efficiency [*MfC, pp. 34-35 paras. 27-31*].

20 Contrary to CLAIMANT's view, parties with seemingly incompatible positions, often manage to reach amicable solutions via mediation [*Murphy Exploration v. Ecuador, pp. 42, 43 paras. 155, 156*]. Additionally, the very purpose of multi-tier clauses is to guarantee procedural efficiency by avoiding lengthy, complex and costly arbitration [*Kayali, p. 569; Goldsmith et al., p. 21*].

21 Based on the aforementioned, mediation would not be futile (**I.**) and rendering the claim admissible would contravene procedural efficiency (**II.**).

I. MEDIATION WOULD NOT BE FUTILE

22 Conducting mediation at the present stage would not be futile for the Parties. CLAIMANT states that RESPONDENT's without-prejudice offer – allegedly made in bad faith – demonstrates its lack of willingness to resolve disputes amicably [*MfC, pp. 32-34 paras. 18-26*]. CLAIMANT thus considers mediation fruitless [*ibid.*].

23 This entire argumentation is based upon inadmissible evidence – Ex. C7 [*infra paras. 87-115*]. Even if the Tribunal followed CLAIMANT's far-fetched assertion that Ex. C7 is admissible, it should consider the following: The commencement of mediation is not futile in cases where the parties appear unwilling to reach a compromise (**1.**). In any case, RESPONDENT is willing to resolve the

dispute amicably (**2.**).

1. THE COMMENCEMENT OF MEDIATION IS NOT FUTILE IF THE PARTIES APPEAR UNWILLING TO REACH A SETTLEMENT

24 Contrary to CLAIMANT's assumption, mediation still has a prospect of success where the parties do not seem amenable to settle the dispute [*cf. MfC, p. 32 para. 18; p. 33 para. 21*].

25 Parties often manage to solve their disputes by mediation, even if they had seemingly irreconcilable points of views at first [*Murphy Exploration v. Ecuador, pp. 42, 43 paras. 155, 156; Halsey v. NHS Trust, p. 3010 para. 20*]. To reliably assess the futility of mediation, the parties must at least attempt to mediate [*Murphy Exploration v. Ecuador, pp. 42, 43 paras. 155, 156*]. This is because a multi-tier clause can only unfold its purpose if it effectively grants the parties the opportunity to improve their mutual understanding [*Zhao, p. 123*]. While a multi-tier clause cannot enforce a party's willingness to cooperate, it can enforce participation in a process from which cooperation and consent may arise [*Hooper Bailie v. Natcon, p. 17*]. Consequently, a party may not bypass the agreed process simply by claiming that mediation has no prospect of success [*George, pp. 122, 123; Salehijam, pp. 607, 608 para. 17; Zhao, p. 123*].

26 Thus, the commencement of mediation is not limited to cases where the parties already seem willing to reach a settlement.

2. RESPONDENT IS WILLING TO REACH A SETTLEMENT

27 RESPONDENT's without-prejudice offer shows its willingness to reach a settlement. CLAIMANT contends that RESPONDENT's conduct demonstrates unwillingness to resolve the dispute amicably [*MfC, p. 33 para. 21*]. According to CLAIMANT, RESPONDENT's unwillingness to negotiate becomes evident by its request for an – allegedly disproportionate – price reduction [*MfC, p. 32 para. 19*].

28 A party might be deemed unwilling to reach a settlement if it has acted uncooperatively, e.g. by strictly insisting on a position that the other party cannot accept [*George, p. 122; cf. Ernest Ferdinand Case, p. 31 para. 67; cf. Murphy Exploration v. Ecuador, p. 42 para. 155*].

29 RESPONDENT did indeed request a price reduction from CLAIMANT [*Ex. C7, p. 20; Ex. C5, p. 18 paras. 15, 16*]. However, this was part of a cooperative proposal to solve the dispute. RESPONDENT offered to make significant concessions in return: To begin with, RESPONDENT offered a first demand guarantee worth EUR 24 Mio [*Ex. C7, p. 20; cf. PO2, p. 56 para. 35b*]. Most importantly, however, RESPONDENT did not strictly insist on its position but offered to withdraw its justified termination [*Ex. C7, p. 20; Ex. C5, p. 18 paras. 15, 16*]. Thereby, it was even willing to disregard CLAIMANT's various breaches of contract: First, CLAIMANT breached its commitment to achieve a local content of 45 % [*Ex. C4, p. 15; ARfA, p. 26 paras. 5, 6; Ex. R2, p. 31*]. To make matters worse,

CLAIMANT anticipated its inability to fulfil this commitment already during the negotiations for the PSA [*ARfA, p. 26 para. 7; Ex. R1, p. 29 para. 6; Ex. R3, p. 32*]. Nevertheless, in order to be awarded the contract, CLAIMANT told RESPONDENT that it was in "very good discussions" with its potential subcontractor and thus "confident" to achieve the promised local content [*Ex. R2, p. 31*]. Second, alerted by CLAIMANT's misconduct, RESPONDENT emphasized the importance of a timely finalization of the project [*ARfA, p. 26 para. 9*]. Yet, CLAIMANT did not meet the first deadline [*RfA, p. 5 para. 19; PO2, p. 54 para. 21*]. Again, it anticipated this breach but refrained from notifying RESPONDENT for two months [*cf. PO2, p. 54 para. 21*]. All of this raised serious concerns with RESPONDENT regarding CLAIMANT's ability to perform the PSA as agreed [*ARfA, p. 27 para. 12*]. In light of this, it was appropriate to request a significant price reduction by CLAIMANT in return.

30 Thus, RESPONDENT is willing to reach a settlement.

II. RENDERING THE CLAIM INADMISSIBLE ENHANCES PROCEDURAL EFFICIENCY

31 Referring the Parties back to mediation would uphold procedural efficiency. CLAIMANT argues that mediation would merely produce unnecessary costs and be a waste of time [*MfC, p. 34 para. 27*]. Instead, CLAIMANT suggests to proceed with arbitration [*ibid.*].

32 While arbitration can be an effective dispute resolution mechanism, at the same time, it is also costly and time consuming [*Pryles, p. 159; Berger, Escalation Clauses p. 1*]. For this reason, multi-tier clauses aim to avoid lengthy, complex and costly arbitral proceedings [*Kayali, p. 569; Goldsmith et al., p. 21; Caron et al., p. 227*]. Additionally, skilled mediators are able to achieve results for both parties that are beyond the powers of lawyers and courts [*Dunnett v. Railtrack, p. 3 para. 14*]. Thus, the Tribunal should encourage amicable dispute resolution to avoid unnecessary delays and expenses according to Artt. 26.1, 26.3 FAI Rules, even if it initially seems unpromising [*Caron et al., p. 227; Savola, p. 243*]. Mediation – regardless of its outcome – narrows down disputes and builds a foundation for subsequent arbitration [*Zhao, p. 123; Salehijam, pp. 607, 608 para. 17*].

33 The current arbitration proceedings are cost and time consuming: This is already highlighted by the substantial advance on costs of EUR 900,000 [*File, p. 46*]. Considering the value of the claim of EUR 100 Mio [*File, p. 1*], arbitration costs will further increase by the significant administrative costs and the fees of three arbitrators [*File, pp. 39, 47; Art. 49.2(d) FAI Rules*]. At the same time, mediation would merely require to pay for one mediator and EUR 26,500 of filing costs and administrative fees [*Art. 5.1 FAI Mediation Rules; FAI Mediation Rules, p. 26; Art. 1.1 Appendix I FAI Mediation Rules*]. Thus, if the Parties reached an agreement in mediation, this would result in significant savings in cost and time. In any case, even if mediation does not resolve the dispute, it is a first step in bringing the Parties' views together.

34 Hence, compliance with the mediation requirement is in line with procedural efficiency.

35 Thus, the claim is inadmissible.

C. THE TRIBUNAL SHOULD EXERCISE ITS DISCRETION TO DISMISS OR STAY THE CASE

36 As part of its discretion, the Tribunal is advised to refer the Parties back to mediation. CLAIMANT argues that the Tribunal should not exercise its discretion to dismiss the claim or stay the proceedings due to RESPONDENT's alleged unwillingness to mediate [*MfC, p. 36 paras. 32-34*].

37 Yet, as part of its discretion, the Tribunal should acknowledge that CLAIMANT is precluded from relying on the futility of mediation (**I.**). At least, the Tribunal should order the stay of the proceedings (**II.**).

I. CLAIMANT IS BARRED FROM RELYING ON THE FUTILITY OF MEDIATION

38 Contrary to CLAIMANT's assertions [*MfC, p. 36 paras. 32-34*], it cannot rely on RESPONDENT's alleged unwillingness to mediate.

39 A party is precluded from relying on the futility of mediation unless it has made good faith efforts to engage in the non-complied process itself [*George, p. 122*]. The party alleging the futility bears the burden to demonstrate that it made genuine efforts to engage in mediation [*George, p. 123; Berger/Kellerhals, para. 583a*].

40 CLAIMANT is the party alleging the futility [*MfC, pp. 32-34 paras. 18-26*]. It therefore bears the burden to demonstrate its genuine efforts to settle the dispute. However, CLAIMANT did not make any efforts to engage in mediation [*Ex. C5, p. 18 para. 16; RfA, p. 6 para. 25*].

41 Therefore, CLAIMANT cannot rely on the grounds of futility of mediation.

II. THE TRIBUNAL SHOULD AT LEAST STAY THE PROCEEDINGS

42 The case should be stayed. CLAIMANT contends that a stay of the proceedings would conflict with the Parties' right to present their case [*MfC, p. 36 para. 32*]. In this regard, it argues that even if a party did not comply with a pre-arbitration step, the tribunal should proceed with the arbitration anyway [*ibid.*]. CLAIMANT bases its argument on the *Cable & Wireless Case* [*ibid.*].

43 In the *Cable & Wireless Case*, the High Court of Justice decided on a party's non-compliance with the first step of a multi-tier clause [*Cable & Wireless Case, pp. 4, 8*]. Contrary to CLAIMANT's assertion, the court held that this party should "at least present the mediator with its case" [*Cable & Wireless Case, p. 7*]. The court therefore stayed the proceedings and referred the parties back to mediation [*Cable & Wireless, p. 8*]. Further jurisprudence and literature equally provide that in such cases, the tribunal should declare the claim currently inadmissible [*Aiton v. Transfield, para. 166; Mitrovic, p. 569; Oetiker/Walz, p. 881*; *Salehijam, pp. 44, 45; George, p. 126*]. It should stay the

proceedings for as long as the first tier has not been fulfilled [*ibid.*].

44 Just as in the *Cable & Wireless Case*, CLAIMANT has not complied with the mediation requirement but commenced arbitration straight away [*Ex. C5, p. 16 para. 18*]. Thus, the Tribunal should equally stay the proceedings and give the Parties the opportunity to resolve their dispute through mediation. If no settlement can be reached through mediation, the Parties can still return to arbitration. CLAIMANT could still present its case before the Tribunal [*cf. PSA, pp. 12, 13 Art. 30*].

45 Therefore, the Tribunal should exercise its discretion to dismiss or at least stay the case.

46 The Tribunal should, as part of its discretion, acknowledge that it lacks jurisdiction and that the case is inadmissible.

CONCLUSION TO ISSUE A

The Parties intended mediation to be the first step on the path of dispute resolution. Despite having caused the conflict through its own actions, CLAIMANT refuses to step foot on this well-trodden path of dialogue. Instead, it stumbles headfirst into arbitration, declaring mediation a dead end. However, CLAIMANT forgets that even the most winding roads can lead to common ground when both sides are willing to walk together – a willingness RESPONDENT consistently demonstrated by offering to meet halfway, only to find CLAIMANT unwilling to take even the first step.

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

47 RESPONDENT respectfully requests the Tribunal to admit Ex. R3 as evidence and to exclude Ex. C7 from the case.

48 In light of Artt. 26.2, 34.1 FAI Rules, the tribunal should generally admit all evidence unless there are substantial grounds for its exclusion [*Savola, pp. 243, 245; O'Malley, p. 279 para. 9.02*]. CLAIMANT attempts to circumvent this principle: On the one hand, it seeks to avoid responsibility for its deceptive behaviour as displayed in Ex. R3 – an email sent by CLAIMANT's in-house counsel [*Ex. R3, p. 32*]. To this end, it fabricates grounds for confidentiality and pulls allegations against RESPONDENT out of thin air [*MfC, pp. 37-42 paras. 38-59*]. On the other hand, CLAIMANT neglects that Ex. C7 is a highly confidential document, which it submitted in breach of the Parties' agreement [*MfC, pp. 42-47 paras. 60-79*].

49 Given the Tribunal's responsibility to obtain a comprehensive understanding of the case, it should order the exclusion of evidence only for compelling reasons. Therefore, RESPONDENT requests the Tribunal to find that Ex. R3 constitutes admissible evidence (**A.**). Moreover, it should declare Ex. C7 inadmissible and exclude it from the case (**B.**).

A. EXHIBIT R3 CONSTITUTES ADMISSIBLE EVIDENCE

50 The Tribunal should include Ex. R3 in the record of evidence. Contrary to CLAIMANT's assertions [*MfC, p. 37 para. 38; p. 41 para. 55*], Ex. R3 is an admissible piece of evidence since no reasons for exclusion apply: First, it was not obtained illegally (**I.**). Second, Ex. R3 is not protected by the attorney-client privilege (**II.**). Third, CLAIMANT's non-disclosure agreements with its employees do not hinder its inclusion (**III.**). Fourth, the inclusion of Ex. R3 does not impair the enforceability of the award (**IV.**).

I. EXHIBIT R3 WAS NOT OBTAINED ILLEGALLY

51 Ex. R3 does not constitute illegally obtained evidence. CLAIMANT purports that Ex. R3 was obtained in an illegal manner [*MfC, p. 37 para. 39*]. It bases its argument on the allegation that RESPONDENT procured Ex. R3 from the criminal investigations against Mr. Deiman [*MfC, pp. 38, 39 para. 44*]. CLAIMANT contends to have sufficiently established this assertion [*cf. MfC, p. 39 para. 45*]. It therefore requests the Tribunal to exclude Ex. R3 pursuant to Art. 9(3) of the IBA Rules on the Taking of Evidence [*hereinafter:* "IBA Rules"*; MfC, p. 38 para. 40*].

52 Art. 9(3) IBA Rules provides that the tribunal may exclude evidence that was obtained illegally. The party raising the allegation bears the burden to meet the appropriate standard of proof [*Ferrari/Rosenfeld, p. 68; Brown, p. 93*].

53 However, CLAIMANT applies an inappropriate standard of proof regarding the origin of Ex. R3. The appropriate standard requires "clear and convincing" evidence (**1.**). Pursuant to this standard, CLAIMANT did not sufficiently prove that Ex. R3 was obtained from the criminal investigations against Mr. Deiman (**2.**).

1. CLAIMANT MUST PROVIDE "CLEAR AND CONVINCING" EVIDENCE TO SUBSTANTIATE ITS ALLEGATION

54 The Tribunal should assess CLAIMANT's submission under the standard of "clear and convincing" evidence. CLAIMANT argues that strong indications suffice as proof for the Tribunal to follow its proposition [*MfC, pp. 38, 39 para. 44*].

55 However, allegations of particular gravity require a heightened standard of proof, namely "clear and convincing" evidence [*Gulf v. Iran, p. 6; Siag v. Egypt, p. 85 paras. 325, 326; EDF v. Romania, p. 64 para. 221; Redfern/Hunter, para. 6.85; O'Malley p. 218 para. 7.29*]. This is because the more serious an allegation, the less likely it is that the event actually occurred [*Minors Case, p. 586; Redfern/Hunter, para. 6.85*]. Charges of misconduct constitute serious allegations [*Fakes v. Turkey, p. 41 para. 131*]. The seriousness of an allegation may further be inferred from its implications on a party's reputation or procedural interests [*ECE v. Czech Republic, p. 331 para. 4.876*]. The standard

of proof needs to be particularly strict when such accusations involve states [*Bosnia Case, p. 90 para. 209; Corfu Channel Case, p. 17*].

56 CLAIMANT accuses RESPONDENT of procuring evidence in an illegal manner [*MfC, p. 39 para. 45*]. First, this constitutes an allegation of misconduct. Second, the present arbitration is subject to major public interest due to its political implications [*cf. Ex. C3, p. 14; cf. Ex. R1, p. 30 para. 9*]. Thus, if the Tribunal found that the Equatorianian state colluded with RESPONDENT to undermine the integrity of the proceedings, both would suffer significant reputational damage. Third, the criminal investigators confiscated all documents potentially relevant to the PSA [*Ex. C8, p. 36 para. 2*]. If the Tribunal gave way to CLAIMANT's objection to Ex. R3, CLAIMANT could equally challenge all future submissions of RESPONDENT. The Tribunal would effectively grant CLAIMANT a *carte blanche*. This could significantly impact RESPONDENT's ability to present its case pursuant to Art. 26.2 FAI Rules and Art. 17.1 DAL. CLAIMANT's allegation is thus of particular gravity, which requires a heightened standard of proof.

57 CLAIMANT must provide "clear and convincing" evidence to underscore its allegation.

2. CLAIMANT DID NOT SUFFICIENTLY PROVE THAT RESPONDENT OBTAINED EXHIBIT R3 FROM THE INVESTIGATIONS AGAINST MR. DEIMAN

58 CLAIMANT failed to provide "clear and convincing" evidence that RESPONDENT obtained Ex. R3 from the criminal investigations against CLAIMANT's main negotiator, Mr. Deiman. Instead of submitting any direct proof to substantiate its allegation, CLAIMANT relies on the following circumstantial evidence: It points out that the criminal investigations against Mr. Deiman were initiated upon notice of RESPONDENT's CEO [*MfC, p. 38 para. 44*]. It further states that he notified CLAIMANT of his intention to do so [*ibid.*]. CLAIMANT finally mentions that Ex. R3 was confiscated during the criminal investigations [*MfC, p. 39 para. 44*].

59 Where an allegation is to be supported only by circumstantial evidence, the presented evidence must be particularly compelling [*Rumeli v. Kazakhstan, p. 191 para. 709; Bayindir v. Pakistan, p. 40 para. 143*]. However, it is common for someone affected by deceptive behaviour to report the incident to the police [*Calkins, Fraud Claims*]. Likewise, it is common for the police to confiscate documents relating to the alleged misconduct [*Hildebrandt, Criminal Proceedings*]. This alone does not indicate that RESPONDENT obtained Ex. R3 from the criminal proceedings. Accordingly, in its previous statement, CLAIMANT already admitted that it does not know how Ex. R3 came into the possession of RESPONDENT [*File, p. 34*]. It even acknowledged the possibility that an employee of CLAIMANT leaked the document [*File, p. 34; Ex. C8, p. 36 para. 8*]. In the same vein, Mr. Deiman conceded that his theory regarding the origin of Ex. R3 was a mere speculation [*Ex. C8, p. 36*

para. 7]. Thus, CLAIMANT has not met the standard of "clear and convincing" evidence.

60 It is not evident that RESPONDENT obtained Ex. R3 from the investigations against Mr. Deiman.

61 Ex. R3 was not obtained illegally.

II. EXHIBIT R3 IS NOT PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE

62 The attorney-client privilege does not apply to Ex. R3. CLAIMANT argues that Ex. R3 is covered by the attorney-client privilege [*MfC, p. 40 para. 50*]. It seems to rely on Art. 9(2)(b) IBA Rules, which provides that the tribunal shall exclude evidence for reasons of legal privilege [*cf. MfC, p. 39 para. 47*]. To decide whether evidence is legally privileged, a tribunal first needs to determine the legal or ethical rules which it deems applicable [*Art. 9(2)(b) IBA Rules*]. CLAIMANT argues that for the applicable legal rules, the Tribunal should turn to the transnational standard set out by the tribunal in *Gallo v. Canada* [*MfC, p. 40 para. 48; cf. Gallo v. Canada, p. 13 para. 47*]. It contends that Ex. R3 is privileged under this standard [*MfC, p. 40 paras. 49-51*].

63 In this decision, however, the tribunal only resorted to a transnational standard because it was bound to apply international law pursuant to Art. 1131(1) NAFTA [*Gallo v. Canada, p. 12 para. 41*]. Such transnational standards cannot adequately address the differences regarding the protection of counsel-client communications contained in national laws, e.g. regarding the in-house counsel [*Sindler/Wüstmann, p. 625; Berger, Best Practice Standards, p. 514; Rubinstein/Guerrina, p. 601; Schlabrendorff/Sheppard, p. 774*]. Absent a mandatory provision, tribunals should therefore refrain from applying a transnational standard [*Berger, Best Practice Standards, pp. 514, 515*]. Rather, the tribunal should consider the relevant domestic notions of the attorney-client privilege [*O'Malley, p. 295 para. 9.32*]. Amongst those, it should determine the applicable law pursuant to Art. 9(2)(b) IBA Rules, honouring the parties' expectations in accordance with Art. 9(4)(c) IBA Rules. In making this decision, the tribunal may resort to the "closest-connection" test or apply the "least favoured nation" approach [*Berger, Best Practice Standards, p. 511; Kröll/Bjorklund/Ferrari, p. 1140*].

64 Presently, neither under Mediterranean nor under Danubian law, Ex. R3 would be barred from disclosure [*cf. Ex. R4, p. 33*]. Only under Equatorianian law, the attorney-client privilege might apply [*PO2, p. 55 para. 29; cf. Ex. R4, p. 33*]. When determining the applicable domestic law on privilege, the Tribunal should consider that CLAIMANT must have expected Mediterranean law on privilege to apply to Ex. R3 (**1.**). Equally, both the "closest-connection" test (**2.**) and the "least favoured nation" approach (**3.**) lead to the application of Mediterranean law.

1. CLAIMANT COULD NOT HAVE EXPECTED EXHIBIT R3 TO BE PRIVILEGED

65 CLAIMANT must have expected that Mediterranean law on privilege would govern Ex. R3. CLAIMANT contends that it expected Ex. R3 to be protected from disclosure [*MfC, p. 40 para. 50*].

66 Indeed, it is of major importance for the tribunal to consider the parties' expectations when determining the applicable law on privilege as per Art. 9(4)(c) IBA Rules [*Kröll/Bjorklund/Ferrari, p. 1139; O'Malley, p. 289 para. 9.23; Alvarez, p. 665; Schlabrendorff/Sheppard, p. 764*]. When entering arbitration, most parties reasonably expect their domestic law on legal privilege to apply [*IBA Review Task Force, p. 28; Ferrari/Rosenfeld, p. 302; Sindler/Wüstemann, p. 621; Sourgens/Duggal/Laird, p. 243 para 11.17*]. A party from a jurisdiction with very low protection standards can hardly assert to have expected its documents to be privileged [*Tevendale/Cartwright-Finch, p. 834*].

67 CLAIMANT's domestic jurisdiction is Mediterraneo [*File, p. 41*]. In the absence of any indications to the contrary, CLAIMANT thus must have expected Mediterranean law on privilege to apply to Ex. R3. As Mediterraneo has very low protection standards, it can hardly assert to have expected Ex. R3 to be privileged [*cf. Ex. R4, p. 33*].

68 Moreover, Mediterranean rules on privilege are regulated in the ethical rules for lawyers [*Ex. R4, p. 33*]. Meanwhile, the Equatorianian notion on privilege is stipulated in detailed legal rules [*ibid.*]. CLAIMANT itself argues to have expected ethical rules on legal privilege to apply to Ex. R3 [*MfC, p. 41 para. 53*]. This again indicates CLAIMANT's expectation for Mediterranean law to apply.

69 CLAIMANT could not have expected Ex. R3 to be privileged.

2. EXHIBIT R3 IS NOT PRIVILEGED UNDER THE "CLOSEST-CONNECTION" TEST

70 The "closest-connection" test leads to the application of Mediterranean law to Ex. R3. CLAIMANT could have argued that in light of the equal treatment of the Parties, the "closest-connection" test cannot be applied as a stand-alone method.

71 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; Rubinstein/Guerrina, p. 598*]. If the counsel is admitted to the bar in the same country where the client has its seat, this is a strong indicator for the closest connection [*Ferrari/Rosenfeld, p. 314; Berger, Best Practice Standards, p. 511; Schlabrendorff/Sheppard, p. 770*]. This "closest-connection" test may be applied as a stand-alone method if the parties' equal treatment is not affected [*cf. Berger, Best Practice Standards, pp. 511, 516; cf. IBA Privilege Task Force, pp. 4, 5*]. This is especially the case if only a single document is potentially covered by the attorney-client privilege [*Tevendale/Cartwright-Finch, p. 832; cf. Caron et al., p. 353; cf. Alvarez, p. 685*].

72 In the present case, Ex. R3 is the only submission potentially affected by the attorney-client privilege. Hence, it is suitable to apply the "closest-connection" test as a stand-alone method: Ex. R3 contains an email sent by CLAIMANT's head of legal, Ms. Smith [*Ex. R3, p. 32*]. She is admitted to the bar in Mediterraneo [*ibid.*]. Ms. Smith provides legal advice to CLAIMANT, a

company seated in Mediterraneo [*File, p. 41*]. Therefore, Mediterranean law on privilege is the law most closely connected to Ex. R3.

73 Ex. R3 would not be privileged under the "closest-connection" test.

3. EXHIBIT R3 IS NOT PRIVILEGED UNDER THE "LEAST FAVOURED NATION" APPROACH

74 The Tribunal should apply Mediterranean law as the law with the lowest standard of protection for attorney-client communication. CLAIMANT could have argued that the Tribunal should uphold the attorney-client privilege to the greatest extent possible. It could have therefore referred to Equatorianian law as the most favourable law on legal privilege.

75 However, an excessive application of the attorney-client privilege significantly decreases the amount of evidence available to the tribunal [*cf. Kröll/Bjorklund/Ferrari, p. 1140; cf. Alvarez, p. 686*]. This could infringe a party's right to be heard and compromise the effectiveness of the proceedings [*Kröll/Bjorklund/Ferrari, pp. 1140, 1204; Meyer, pp. 366, 371*]. Moreover, the application of the most favourable law on legal privilege encourages forum-shopping [*Kröll/Bjorklund/Ferrari, p. 1140; Caron et al., p. 253*]. Therefore, the tribunal may decide to apply the "least favoured nation" approach [*IBA Privilege Task Force, p. 5; Tevendale/Cartwright-Finch, p. 834*]. The tribunal may thereby admit as much evidence as possible, furthering its pursuit for the truth [*Kröll/Bjorklund/Ferrari, p. 1140; Alvarez, p. 686*]. This is particularly important since the arbitral award will be final and binding without any possibility of appeal on the substance [*Art. 43.4 FAI Rules; Savola, p. 16*].

76 Mediterranean law presently grants the lowest degree of protection under the attorney-client privilege [*Ex. R4, p. 33*]. If the Tribunal chooses to apply the "least favoured nation" approach, it should thus resort to Mediterranean law.

77 In line with CLAIMANT's expectations, both approaches lead to the application of Mediterranean law on privilege to Ex. R3.

78 Ex. R3 is not protected by the attorney-client privilege.

III. CLAIMANT'S NON-DISCLOSURE AGREEMENTS WITH ITS EMPLOYEES DO NOT RENDER EXHIBIT R3 INADMISSIBLE

79 Contrary to CLAIMANT, the non-disclosure agreements which it has concluded with its employees do not render Ex. R3 inadmissible for reasons of confidentiality [*MfC, pp. 40, 41 paras. 52, 53*].

80 As contracts only bind the signing parties under Art. 1.3 UPICC, confidentiality agreements do not have a third-party effect. Therefore, unrelated confidentiality agreements do not hinder a party from submitting evidence [*Gujarat v. Yemen, p. 25 para. 85*].

81 CLAIMANT's non-disclosure agreements with its employees do not hinder RESPONDENT from

submitting Ex. R3 as evidence.

IV. THE ADMISSION OF EXHIBIT R3 DOES NOT AFFECT THE AWARD'S ENFORCEABILITY

82 The Tribunal does not jeopardize the enforceability of the award by admitting Ex. R3. CLAIMANT argues that the admission of Ex. R3 would in two ways endanger the enforceability of the award pursuant to Art. V(2)(b) NYC [*MfC, p. 41 para. 57*]: First, CLAIMANT purports that courts would find the admission of Ex. R3 to violate public policy because it was – allegedly – obtained in an illegal manner [*ibid.*]. Second, CLAIMANT contends that Equatorianian courts would declare the award to violate their domestic public policy if the Tribunal did not find the attorney-client privilege applicable to Ex. R3 [*MfC, pp. 41, 42 para. 58*].

83 However, the scope of the public policy exception of Art. V(2)(b) NYC is to be interpreted narrowly [*Pagaduan v. Carnival, p. 3; Wolff, Art. V para. 504; Secretariat Guide, p. 240*]. This is why the protection of the provision is rarely granted, despite being easy to invoke in evidentiary matters [*Waincymer, p. 751; Secretariat Guide, p. 253; Wolff, Art. V para. 489*]. Pursuant to Art. V(2)(b) NYC, a party can only invoke the public policy of a country where enforcement is sought.

84 First, CLAIMANT did neither prove that Ex. R3 was obtained illegally, nor that the admission of such evidence is prohibited in any of the countries concerned – let alone that such rules constitute public policy [*supra para. 51-61; cf. MfC, p. 41 para. 57*]. Second, RESPONDENT has assets outside of Equatoriana [*PO2, p. 52 para. 4*]. CLAIMANT is therefore not dependent on seeking enforcement against RESPONDENT in Equatoriana. Moreover, in practice, courts have not yet refused enforcement because the tribunal did not apply their domestic privilege [*de Boisséson, p. 712; cf. IBA Privilege Task Force, p. 9*].

85 The admission of Ex. R3 does not affect the enforceability of the award.

86 Ex. R3 constitutes admissible evidence.

B. THE TRIBUNAL SHOULD DISMISS EXHIBIT C7 AS EVIDENCE

87 Ex. C7 constitutes inadmissible evidence. Contrary to CLAIMANT's assertions [*MfC, p. 42 para. 61*], Ex. C7 is confidential (**I.**). Moreover, the exclusion of Ex. C7 does not interfere with CLAIMANT's right to present its case (**II.**). Equatorianian state policy on transparency does not bar RESPONDENT from requesting the exclusion of Ex. C7 (**III.**).

I. THE INCLUSION OF EXHIBIT C7 CONSTITUTES A BREACH OF CONFIDENTIALITY

88 Since Ex. C7 is confidential, the Tribunal should exclude it pursuant to Art. 9(2)(b) IBA Rules. CLAIMANT contests the confidential character of Ex. C7 [*MfC, p. 44 para. 70*].

89 Under Art. 9(2)(b) IBA Rules, the tribunal should exclude evidence for reasons of confidentiality.

Confidentiality may arise both from party agreement under Art. 15 FAI Mediation Rules and from the without-prejudice privilege as per Art. 9(4)(b) IBA Rules.

90 Ex. C7 is subject to confidentiality both under Art. 15 FAI Mediation Rules (**1.**) and under the without-prejudice privilege as per Art. 9(4)(b) IBA Rules (**2.**).

1. ART. 15 FAI MEDIATION RULES EXTENDS TO NEGOTIATIONS PRIOR TO MEDIATION

91 Since the Parties agreed to extend the scope of confidentiality as per Art. 15 FAI Mediation Rules, Ex. C7 is confidential. CLAIMANT argues that Art. 15 FAI Mediation Rules does not render Ex. C7 confidential [*MfC, pp. 44, 45 paras. 71-74*]. It points out that the provision generally applies only to communications exchanged during a formally commenced mediation [*MfC, p. 45 para. 72*]. It further argues that the Parties never intended to extend the scope of Art. 15 FAI Mediation Rules [*MfC, p. 45 para. 73*]. Thereby, CLAIMANT acknowledges that it is possible for the Parties to widen the scope of confidentiality to other ADR mechanisms [*cf. ibid*].

92 Indeed, Art. 15 FAI Mediation Rules is a default rule, allowing the parties to amend its scope to other ADR mechanisms [*cf. FAI Mediation Guidelines, p. 4 para. 11*]. Negotiations prior to mediation are considered ADR mechanisms [*Dimitropoulos, p. 541; Howard, p. 124; Kirchhoff, p. 115*].

93 In light of the tense political climate in Equatoriana, RESPONDENT sought to prevent any potential dispute between the Parties from becoming public [*Ex. R1, p. 30 para. 10; cf. Ex. C3, p. 14*]. RESPONDENT thus saw a necessity to provide confidentiality for all ADR mechanisms, not only for mediation and arbitration [*cf. Ex. R1, p. 30 para. 10*]. Since a separate confidentiality agreement would have resulted in negative press, RESPONDENT reached out to CLAIMANT about its confidentiality-related concerns [*Ex. R1, p. 30 para. 10; Ex. R2, p. 31*]. CLAIMANT's main negotiator assured RESPONDENT that Art. 15 FAI Mediation Rules would provide "the needed confidentiality" for "the foreseen ADR mechanisms" [*Ex. R2, p. 31*]. In the present dispute, the Parties first resorted to settlement negotiations [*PO2, p. 54 para. 23; Ex. C5, p. 18 para. 15*]. This shows that those negotiations were a foreseen ADR mechanism. The Parties thus agreed to extend the scope of confidentiality of Art. 15 FAI Mediation Rules to negotiations prior to mediation.

94 Ex. C7 is confidential under Art. 15 FAI Mediation Rules.

2. THE WITHOUT-PREJUDICE PRIVILEGE APPLIES TO EXHIBIT C7

95 The without-prejudice privilege renders Ex. C7 inadmissible. CLAIMANT argues that it is not barred from submitting Ex. C7 by the without-prejudice privilege [*MfC, p. 33 para. 24; p. 45 para. 75*]. It further points out that the privilege is not recognized under Danubian law [*MfC, p. 45 paras. 75, 76*].

96 As reinstated by Art. 9(4)(b) IBA Rules, the without-prejudice privilege protects statements exchanged during settlement negotiations from disclosure. An offer must be genuinely aimed at

the goal of reaching a settlement to enjoy the privilege [*Rush & Tompkins v. GLC, para. 1299*].

97 Contrary to CLAIMANT's assertions, Ex. C7 constitutes a genuine attempt to reach a compromise (**a.**). Moreover, the Tribunal is not reliant upon Danubian law to apply the without-prejudice privilege (**b.**).

a) THE OFFER CONSTITUTES A GENUINE ATTEMPT TO REACH A SETTLEMENT

98 RESPONDENT's without-prejudice offer is genuinely aimed for a compromise. CLAIMANT argues to the contrary, contending that it does not enjoy the without-prejudice privilege [*MfC, p. 33 para. 24*].

99 An offer is genuinely aimed for a compromise if a party offers concessions [*cf. Bradford v. Rashid, p. 31 para. 73; cf. IBA Privilege Task Force, Annex 5, p. 2*].

100 RESPONDENT proposed to withdraw its justified termination [*Ex. C7, p. 20; cf. RfA, p. 7 para. 34.3; cf. Ex. C5, p. 17 para. 10*]. Moreover, it specifically addressed CLAIMANT's financial concerns by offering a first demand guarantee worth EUR 24 Mio [*Ex. C7, p. 20; cf. PO2, p. 56 para. 35b*]. Both serve CLAIMANT's interest. Nonetheless, as compromise requires concessions from both parties, RESPONDENT's request for a price reduction does not invalidate its attempt to reach a compromise. This is all the more true as the request for a price reduction is appropriate in light of CLAIMANT's breach of contract [*supra para. 29*].

101 RESPONDENT's without-prejudice offer constitutes a genuine attempt to reach a compromise.

b) THE TRIBUNAL IS NOT DEPENDENT ON DANUBIAN LAW TO APPLY THE WITHOUT-PREJUDICE PRIVILEGE

102 To apply the without-prejudice privilege, the Tribunal is not reliant upon Danubian Law. CLAIMANT contends that since Danubian law does not provide for confidentiality of settlement negotiations, the Tribunal may not find the without-prejudice privilege applicable to Ex. C7 [*MfC, pp. 45, 46 para. 75; cf. Ex. R4, p. 33*].

103 However, Art. 9(2)(b) IBA Rules grants the tribunal significant discretion in determining the law it deems applicable to a specific matter of privilege [*Khodykin/Mulcahy/Fletcher, Art. 9 para. 12.107*]. It may therefore generally handle matters of privilege without being bound by a single state's policy on privilege [*Alvarez, p. 683; cf. O'Malley, para. 9.24*]. Moreover – in contrast to the applicability of the attorney-client privilege to the in-house counsel – the settlement privilege constitutes a transnational standard [*Iran v. USA, pp. 74, 75; Sanders, pp. 390, 391; Berger, Best Practice Standards, p. 515; Baker/Davis, p. 115*]. This is further recognized by Art. 9(4)(b) IBA Rules.

104 The Tribunal is not dependent on Danubian Law to apply the without-prejudice privilege.

105 Ex. C7 is covered by the without-prejudice privilege.

106 Ex. C7 is inadmissible due to its confidential character.

II. THE EXCLUSION OF EXHIBIT C7 DOES NOT INTERFERE WITH CLAIMANT'S RIGHT TO PRESENT ITS CASE

107 By excluding Ex. C7, the Tribunal does not affect CLAIMANT's right to present its case, therefore not endangering the enforceability of the award. CLAIMANT argues that an exclusion of Ex. C7 would violate CLAIMANT's right to present its case [*MfC, pp. 43, 44 paras. 67-69*]. It points out that enforcement of the award may be refused if a party was unable to present its case pursuant to Art. V(1)(b) NYC [*MfC, p. 44 para. 68*].

108 However, when assessing the subsequent enforceability of the award, arbitral tribunals must equally consider matters of confidentiality, such as the without-prejudice privilege [*Ferrari/Rosenfeld, p. 303; Berger, Settlement Privilege, p. 275*]. Confidentiality can be a legitimate limit to a party's right to present its case, e.g. if privilege is invoked in good faith [*Berger, Best Practice Standards, p. 518; Sourgens/Duggal/Laird, p. 237; Ferrari/Rosenfeld, p. 303*]. The scope of the right-to-be-heard exception under Art. V(1)(b) NYC is to be interpreted narrowly [*Secretariat Guide, p. 156; Wolff, Art. V para. 130*]. When applying this provision, courts recognise the significant discretion enjoyed by arbitral tribunals in the admission of evidence [*Wolff, Art. V para. 174; Art. 34.1 FAI Rules; Savola, p. 288*].

109 Ex. C7 is confidential [*supra paras. 88-106*]. Thus, in light of the narrow scope of Art. V(1)(b) NYC and the Tribunal's discretion, excluding Ex. C7 does not violate CLAIMANT's right to present its case.

110 The Tribunal does not endanger the enforceability of the award by excluding Ex. C7.

III. EQUATORIANIAN STATE POLICY ON TRANSPARENCY DOES NOT BAR RESPONDENT FROM REQUESTING THE EXCLUSION OF EXHIBIT C7

111 RESPONDENT's procedural rights are not affected by the Equatorianian state's support for transparency in investor-state arbitration. CLAIMANT contends that RESPONDENT's objection to Ex. C7 is contradictory to the Equatorianian government's policies [*MfC, pp. 46, 47 paras. 77-79*].

112 However, for allegations of contradictory behaviour, a party's conduct may only be assessed with respect to its own previous actions [*Henriques, pp. 519, 520; Kotuby/Sobota, p. 121*]. As a general principle of corporate law, a corporation is a distinct legal person, independent of its shareholders [*Barcelona Traction Case, p. 35 para. 41; Kotuby/Sobota, p. 141*]. Therefore, when assessing the conduct of a state enterprise, the tribunal may only in exceptional circumstances refer to the conduct of the state itself [*Böckstiegel, State, p. 100*]. This may particularly be the case if the state enterprise is allowed to exercise governmental authority [*Böckstiegel, Arbitration, p. 43*].

113 First, RESPONDENT is a private legal entity separate from the state of Equatoriana [*PO2, p. 52 para. 3*]. Any decisions concerning governmental policy lie only with the minister for energy, Ms. Vent [*RfA, p. 5 paras. 17, 18*]. Thus, RESPONDENT is not granted any governmental authority. Therefore, RESPONDENT's conduct cannot be equated with the conduct of the Equatorianian state. Second, by ratifying the UNCITRAL Rules on Transparency, the Equatorianian state has committed only to transparency in investor-state arbitration [*File, p. 34*]. Transparency aims to ensure public access to case documents [*Jansen Calamita/Zelazna, p. 271*]. Art. 3.1 UNCITRAL Rules on Transparency provides that this does not include evidentiary submissions. In any case, presently, the admission of evidence in a commercial arbitration is concerned, which is confidential under Art. 51 FAI Rules – not its disclosure to the public in investor-state arbitration.

114 RESPONDENT's request for the exclusion of Ex. C7 is not contradictory to Equatorianian state policy on transparency.

115 Ex. C7 constitutes inadmissible evidence.

116 RESPONDENT respectfully requests the Tribunal to exclude Ex. C7 from the record of evidence and to admit Ex. R3 as evidence.

CONCLUSION TO ISSUE B

CLAIMANT accuses RESPONDENT of using guerrilla tactics [*MfC, p. 47 para. 79*]. However, it is CLAIMANT who is laying traps for the Tribunal: Hiding behind a fabricated argument for confidentiality, it seeks to catch RESPONDENT unguarded by construing allegations of illegal conduct. The Tribunal should be cautious to preclude a trial by ambush, granting protection only to genuine claims for confidentiality.

ISSUE C: THE PSA IS NOT GOVERNED BY THE CISG

117 RESPONDENT respectfully requests the Tribunal to declare the CISG inapplicable to the PSA. CLAIMANT's reliance on the CISG seems more like an attempt to mask fundamental failures than to resolve substantive issues. From the outset, RESPONDENT repeatedly emphasized the importance of adhering to agreed timelines, a key factor in concluding the PSA with CLAIMANT [*ARfA, p. 26 para. 9; Ex. C5, p. 16 paras. 7, 8*]. Despite this clear understanding, CLAIMANT delivered the plans for the plant almost one month after the agreed milestone [*RfA, p. 5 para. 19; Ex. C6, p. 19*]. Even worse, these plans were incomplete, lacking the critical eAmmonia module [*Ex. C6, p. 19; ARfA, p. 26 para. 11*]. This raised serious doubts about CLAIMANT's ability to fulfil its contractual obligations [*Ex. C6, p. 19; ARfA, p. 26 paras. 11, 12*]. Consequently, RESPONDENT was compelled to reassess the contractual relationship, ultimately leading to the termination of the

PSA in accordance with the applicable Equatorianian Civil Code [*hereinafter:* "ECC"*; Ex. C6, p. 19*].

118 Nevertheless, CLAIMANT now tries to evade the consequences of its own actions by asserting that the CISG is applicable to the PSA [*MfC, pp. 47-54 paras. 81-114*]. Contrary to CLAIMANT's assertions [*MfC, p. 47 para. 82; p. 56 para. 119*], the PSA as a turnkey-contract does not fall under the CISG since the sale of equipment does not form its preponderant part (**A.**). Furthermore, the CISG does not apply to the PSA under Art. 1(1)(a) CISG as both Parties have their place of business in the same contracting state (**B.**). In any case, the Convention does not apply to the PSA as per Art. 2(b) CISG (**C.**).

A. THE PSA AS A MIXED CONTRACT DOES NOT FALL UNDER THE CISG

119 As the sales elements do not constitute the PSA's preponderant part, the CISG is inapplicable pursuant to Art. 3(2) CISG. CLAIMANT recognizes the mixed nature of the PSA [*MfC, p. 48 paras. 83, 86*]. Nevertheless, it examines the CISG's applicability not only under the preponderance test of Art. 3(2) CISG but also under the substantiality test of Art. 3(1) CISG [*MfC, p. 49 para. 87*].

120 According to Art. 1(1) CISG the Convention applies to contracts for the sale of goods. Art. 3(1) CISG and Art. 3(2) CISG extend the substantive scope of the CISG [*Ferrari et al., Art. 3 para. 1; Schlechtriem/Schwenzer, Art. 3 para. 4*]. However, both provisions govern different matters [*CISG-AC Op. No. 4, p. 125 para. 1.2; p. 130 para. 4.1; Drescher et al., Art. 3 para. 2*]. Art. 3(1) CISG governs work contracts which are generally subject to the CISG unless the ordering party supplies a substantial part of the materials necessary for the manufacture of the goods. In comparison, Art. 3(2) CISG governs mixed contracts, such as turnkey-contracts, which are generally not subject to the CISG unless the sales obligations form the contract's preponderant part [*CISG-AC Op. No. 4, p. 130 para. 3.5; Kröll/Mistelis/Perales Viscasillas, Art. 3 para. 16*]. Turnkey-contracts oblige the contractor to perform all tasks necessary to attain a fully functional end product [*Kapellmann/Schiffers, p. 146 para. 432; Lotz, p. 54*].

121 The PSA contains various obligations such as the commissioning and delivery of the plant as well as the provision of training and maintenance services [*PSA, pp. 10, 11 Art. 7; Ex. C5, p. 17 para. 11*]. Thus, as the PSA contains both sales and service obligations, it is a mixed contract and not a work contract [*ibid.*]. It was concluded on a turnkey basis [*MfC, p. 51 para. 101; RfQ, p. 8 para. 1; RfA, p. 3 para. 4*]. Therefore, contrary to CLAIMANT's view, Art. 3(1) CISG is irrelevant to the case at hand. Consequently, the Convention's applicability must be determined solely under Art. 3(2) CISG, requiring the application of the preponderance test.

122 However, applying the preponderance test to turnkey-contracts generally leads to the inapplicability of the CISG (**I.**). This holds true for the PSA since its service elements are preponderant (**II.**).

I. THE CISG GENERALLY DOES NOT APPLY TO TURNKEY-CONTRACTS

123 As service obligations typically constitute the preponderant part of turnkey-contracts, the Convention generally does not apply to such contracts under Art. 3(2) CISG. CLAIMANT acknowledges the nature of the PSA as a turnkey-contract [*MfC, p. 49 para. 89; p. 51 para. 101*].

124 However, it omits a general presumption that leads to the inapplicability of the CISG in cases of turnkey-contracts: During the drafting of Art. 3(2) CISG it was held that "if the preponderant part of the obligation of the seller consists in the supply of labour or other services, such as in a "turnkey" contract, the contract is not subject to the provisions of this convention" [*UNCITRAL YB 1976, p. 99; Mahnken, CISG, p. 242*]. This is further supported by literature stating that sales elements are rarely at the forefront in turnkey-contracts [*Schlechtriem/Schwenzer, Art. 3 para. 21; Herber/Czerwenka, Art. 3 para. 5; Kröll/Mistelis/Perales Viscasillas, Art. 3 para. 16; Huber, p. 47*].

125 Thus, turnkey-contracts generally do not fall under the CISG.

II. THIS HOLDS TRUE FOR THE PSA, AS THE SERVICE OBLIGATIONS FORM ITS PREPONDERANT PART

126 The PSA does not fall within the scope of the CISG pursuant to Art. 3(2) CISG as its preponderant part consists of service obligations. CLAIMANT argues that the service obligations of training and maintenance represent an ancillary part of the PSA, with its primary obligation being the delivery of goods [*MfC, p. 48 paras. 83, 84*]. Thus, according to CLAIMANT, the sale of equipment is the PSA's preponderant part under Art. 3(2) CISG [*MfC, p. 48 para. 85*]. To support its argument, CLAIMANT only relies on a single decision, the *Aluminium v. Saint-Bernard Case* [*MfC, p. 48 para. 84*].

127 In this case, the Court of Appeal Paris did not apply Art. 3(2) CISG but Art. 3(1) CISG [*Aluminium v. Saint-Bernard Case, p. 3 para. 12*]. However, Art. 3(1) CISG is not applicable to the PSA [*supra para. 121*]. Hence, the *Aluminium v. Saint-Bernard Case* must be strictly distinguished from the case at hand. Applying the relevant provision of Art. 3(2) CISG, the economic value criterion and the parties' intentions are common measures to determine a contract's preponderant part [*Window Production Plant Case, p. 3 para. 17; Cylinder Case, p. 4 para. 19; Gsell et al., Art. 3 para. 9*].

128 In the case at hand, the economic value criterion is impossible to apply (**1.**). An interpretation of the Parties' intent leads to a preponderant service part in the PSA (**2.**).

1. THE ECONOMIC VALUE CRITERION IS IMPOSSIBLE TO APPLY

129 It is impossible to apply the economic value criterion in the case at hand. Nevertheless, CLAIMANT applies this criterion and contends that the Tribunal is well-equipped with sufficient data to determine the economic values of the PSA [*MfC, p. 50 para. 94*]. Its whole argumentation is based on CLAIMANT's internal calculation referred to in Ex. C5 [*MfC, p. 50 paras. 94-96*].

130 To determine the preponderant part under the economic criterion, the value of the contractual obligations must be compared [*Fire Trucks Case, p. 9 para. 44; Hau/Poseck, Art. 3 para. 6*]. However, in the case of turnkey-contracts, an economic comparison is almost impossible since they generally include a variety of obligations [*Schlechtriem/Schwenzer, Art. 3 para. 21*]. The relevant point in time is the time of contract conclusion [*Säcker et al., Art. 3 para. 12; Bamberger et al., Art. 3 para. 6*].

131 The PSA, as a turnkey-contract, obliges CLAIMANT to perform a variety of tasks for the construction of a plant and two extension options [*PSA, pp. 10, 11 Art. 2*]. These are partially listed in its internal calculation which CLAIMANT refers to [*MfC, p. 50 paras. 94-96; Ex. C5, p. 17 para. 11*]. This calculation is based on the original remuneration of EUR 300 Mio [*PSA, p. 11 Art. 2; Ex. C5, p. 17 para. 11*]. However, at the relevant time of contract conclusion, the price had already changed to EUR 285 Mio [*RfA, p. 5 para. 14; PO2, p. 56 para. 35b*]. This shows that the calculation is not final yet, it merely constitutes a drafting of CLAIMANT's own investments. This provisional nature becomes further evident from the missing inclusion of the critical options [*Ex. C5, p. 17 para. 11; PSA, p. 11 Art. 2; RfA, p. 5 para. 14*]. The finalized options in sum amount to EUR 160 Mio [*Ex. C5, pp. 16, 17 para. 9; PO2, p. 54 para. 18; p. 56 para. 35b*]. Since CLAIMANT has not provided an internal calculation regarding the task distribution of these options, 36 % of the overall contract volume is not considered [*cf. ibid.*]. Thus, an exact comparison of the economic values of the sales and service obligations is not possible.

132 Consequently, the economic value approach is impossible to apply.

2. THE PARTIES INTENDED THE SERVICE OBLIGATIONS TO BE PREPONDERANT

133 The preponderance of the PSA's service obligations becomes evident from the Parties' intentions. CLAIMANT argues that the economic criterion should prevail when determining the preponderance [*MfC, pp. 49, 50 paras. 93-96*]. It solely relies on this criterion [*MfC, p. 50 para. 94-96*].

134 However, the economic value criterion should merely serve as a starting point for this determination, as reliance on prescriptive percentages is too dogmatic [*Schlechtriem/Schwenzer, Art. 3 para. 18; Huber; p. 47; Kröll/Mistelis/Perales Viscasillas, Art. 3 para. 19*]. The parties' intentions are decisive – they should always prevail [*Schlechtriem/Schwenzer, Art. 3 paras. 18, 19; cf. Spinning Plant Case, p. 11 para. 42; cf. Orintix Case, pp. 3, 4 para. 3*]. The parties' intentions must be examined by an overall assessment considering a variety of factors, such as the contract's nature, its denomination and entire content [*CISG-AC Op. No. 4, p. 130 para. 3.4; Kröll/Mistelis/Perales Viscasillas, Art. 3 para. 19; Recycling Machines Case, p. 7 para. 24; cf. Cylinder Case, p. 4; cf. Orintix Case pp. 3, 4 para. 3*].

135 In the case at hand, the nature of the PSA (**a.**) as well as its denomination and entire content (**b.**) highlight the Parties' intent of a preponderant service part.

a) THE NATURE OF THE PSA DEMONSTRATES THE PARTIES' INTENT OF A PREPONDERANT SERVICE PART

136 The nature of the PSA indicates the preponderance of the service obligations. CLAIMANT acknowledges that its main responsibility is the delivery of an entire plant [*MfC, p. 48 para. 83*].

137 In cases where the parties focus on the production of an overall functioning system, courts have regularly decided that the service part is preponderant [*Potato Chips Plant Case, pp. 8, 9 paras. 44-46; Spinning Plant Case, p. 11 para. 42; Orintix Case, p. 4; Waste Separation Machine Case, p. 4*]. In the *Orintix Case* the Appellate Court Ghent decided that the will of the parties "was to create a system and make it operational" [*Orintix Case, p. 4*]. Likewise, the German Federal Court of Justice in the *Potato Chips Plant Case* held that the parties' interest lied in the production of an overall system and not in the delivery of individual components [*Potato Chips Plant Case, pp. 8, 9 paras. 44-46*]. In both cases the service obligations constituted the main contractual part, rendering the CISG inapplicable as per Art. 3(2) CISG [*Orintix Case, p. 4; Potato Chips Plant Case, pp. 8, 9 paras. 42-46*].

138 CLAIMANT intended to use the plant to showcase its new production technology [*RfA, p. 3 para. 5; p. 7 para. 30; Ex. C5, pp. 16, 17 paras. 7, 10*]. As CLAIMANT acknowledged, RESPONDENT's main interest lied in in the decarbonisation of Equatoriana's energy production [*MfC, p. 46 para. 78; PSA, p. 10 Preamble; Ex. C5, p. 16 para. 5; RfA, p. 3 para. 2*]. Therefore, it can be concluded that the Parties intended to create an overall system as both of their goals could only be achieved by a fully operational plant [*cf. PSA, p. 10 Preamble; cf. Ex. C5, p. 16 paras. 5, 7; p. 17 para. 10*]. Accordingly, the Parties committed not only to "jointly building the plant" but also to "making it operational by 1 January 2026" [*PSA, p. 10 Preamble*]. Consequently, the Parties' interest lies in the production of an overall system and not in the delivery of individual components.

139 Therefore, the nature of the PSA highlights its preponderant service part.

b) THE DENOMINATION AND ENTIRE CONTENT OF THE PSA EMPHASIZE THE PARTIES' INTENT OF A PREPONDERANT SERVICE PART

140 An examination of the denomination and entire content of the PSA reveals that the Parties intended the services to be preponderant. CLAIMANT asserts that the PSA's title "Purchase and Supply Agreement" suggests a preponderant sales part [*MfC, p. 50 para. 97*].

141 Indeed, the denomination of a contract is decisive when determining its preponderant part [*CISG-AC Op. No. 4, p. 130 para. 3.4; Mahnken, CISG, p. 244*]. In addition, the denomination of the contracting parties and the entire content of a contract, particularly its wording must be considered [*Ethyl Acetate Case, p. 3; CISG-AC Op. No. 4, p. 130 para. 3.4; Kröll/Mistelis/Perales Viscasillas, Art. 3 para. 19*]. Further specific indicators pointing towards the preponderance of service elements are:

First, the quantity of obligations [*Schlechtriem/Schwenzer, Art. 3 para. 6*]. Second, the inclusion of an acceptance test at the end of the performance period [*Mahnken, CISG, p. 244; Mahnken, Acceptance, p. 511*]. Third, the denomination of the price as "remuneration" [*cf. Pizzeria Equipment Case, p. 3; cf. CISG-AC Op. No. 4, p. 125 para. 3.4*]. This term is defined as "a payment especially for a service that someone has performed" [*Black's Law Dictionary, p. 1550*].

142 Contrary to CLAIMANT's assertion, the PSA is not titled "Purchase and Supply Agreement" but "Purchase and Service Agreement" [*PSA, p. 10*]. Moreover, the Parties to the PSA are not described as "buyer and seller" but as "Customer and Contractor" [*ibid.*]. Additionally, the fulfilment of the PSA requires CLAIMANT to perform a variety of service obligations [*PSA, p. 11 Art. 2*]. These are partially listed in CLAIMANT's internal calculation [*Ex. C5, p. 17 para. 11*]. They include project management and engineering, site works, buildings and foundation for the facility, remaining EPC services, packaging as well as training and maintenance [*ibid.*]. Even though the calculation is only a first draft of CLAIMANT's investments, there are twice as many service obligations as sales ones [*ibid.*]. This quantitative predominance shows the significance of the service obligations in the PSA. Furthermore, Art. 18 PSA stipulates that "the acceptance of the Plant will be based on the successful completion of the Performance and Acceptance Test" [*PSA, p. 12 Art. 18*]. It is the final and compulsory step for the completion of the PSA [*ibid.*]. Additionally, the exact denomination of the contract price is not "purchase price" but "contract price/remuneration" [*PSA, p. 11 Art. 7*].

143 Hence, the denomination of the PSA and the Parties, along with the entire content of the PSA emphasize its preponderant service part.

144 The CISG is not applicable to the PSA under Art. 3(2) CISG since its preponderant part consists of service obligations.

B. FURTHER, THE CISG DOES NOT APPLY TO THE PSA UNDER ART. 1(1)(A) CISG AS BOTH PARTIES HAVE THEIR PLACE OF BUSINESS IN THE SAME CONTRACTING STATE

145 The PSA does not fall within the territorial scope of the CISG as both Parties' decisive places of business are in Equatoriana. CLAIMANT asserts that the CISG applies to the PSA as the Parties have their places of business in different contracting states [*MfC, p. 56 para. 119*]. It contends that CLAIMANT's only and decisive place of business is in Mediterraneo since VT cannot be considered a place of business of CLAIMANT [*MfC, p. 55 para. 118*].

146 As CLAIMANT correctly states, for a contract to be international in the sense of Art. 1(1)(a) CISG, both parties must have their places of business in different contracting states [*MfC, p. 55 paras. 115, 116*]. 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 [*MfC, p. 55 para. 117*]. RESPONDENT agrees with CLAIMANT's assessment that RESPONDENT's place of business is in Equatoriana [*MfC, p. 56 para. 119*]. Further, it does not contest that CLAIMANT has a place of business in Mediterraneo [*MfC, p. 55 para. 118*].

147 However, contrary to CLAIMANT's assertions, VT's seat in Equatoriana also constitutes a place of business of CLAIMANT (**I.**). This place of business in Equatoriana is CLAIMANT's decisive place of business under Art. 10(a) CISG (**II.**).

I. VOLTA TRANSFORMER'S SEAT IN EQUATORIANA IS A PLACE OF BUSINESS OF CLAIMANT

148 VT's headquarter in Equatoriana constitutes a place of business of CLAIMANT. CLAIMANT contends that VT cannot be considered a place of business of CLAIMANT as it was an independent third party at the time of contract conclusion [*MfC, p. 55 para. 118*].

149 However, to qualify as a place of business of a party under the CISG, an entity does not need to be part of a specific group of companies [*Kröll/Mistelis/Perales Viscasillas, Art. 10 para. 19*]. As the ownership-structure – e.g. a parent-subsidiary relationship – is irrelevant under Artt. 1(1)(a), 10 CISG, even fully independent legal entities can qualify as a "place of business" of a corporation [*Säcker et al., Art. 1 para. 27; Piltz, p. 47 para. 2.78; Kröll/Mistelis/Perales Viscasillas, Art. 10 para. 19; cf. Royal Feinsprit Case p. 10; cf. Isocab France v. E.C.B.S., p. 2*]. The decisive criterion is whether two branches have such close business and operational ties that they "can reasonably be taken as belonging to a single group entity" [*Kröll/Mistelis/Perales Viscasillas, Art. 10 para. 21*]. Thus, if the entity in question meets the general criteria of a place of business and maintains such close ties, it can be taken as a place of business of the party [*ibid.*].

150 In the case at hand, VT meets the general criteria of a place of business (**1.**) and retains such close links to CLAIMANT that it can be considered part of its business operation (**2.**).

1. VOLTA TRANSFORMER MEETS THE GENERAL CRITERIA OF A PLACE OF BUSINESS

151 VT falls under the general criteria defining a place of business. CLAIMANT points out that VT only provides 20 % of the total goods under the PSA [*MfC, p. 51 para. 100*]. It further purports that VT depended on CLAIMANT for contract negotiation and communication with RESPONDENT [*MfC, pp. 55, 56 para. 118*]. Thereby, CLAIMANT seems to argue that VT does not meet the definition of a place of business.

152 A place of business is the place from which a business activity is effectively carried out with a certain duration, stability and autonomy [*Floor Coverings Case, p. 5 para. 21; Al Palazzo v. Bernardaud., p. 5; Brunner/Gottlieb, Art. 10 para. 1; Schroeter, CISG, p. 19 para. 38; Ferrari/Flechtner/Brand, p. 27; Herberger et al., Art. 10 para. 7*]. Legally independent companies will generally fulfil these

requirements due to their stability and legal independence [*Piltz, p. 47 para. 2.78; Enderlein/Maskow/Strohbach, Art. 10 para. 2; cf. Floor Coverings Case, p. 5 para. 21*].

153 VT is a legally independent company based in Equatoriana [*RfA, p. 3 para. 8; Ex. C3, p. 14*]. It is a stable, long-time business partner of CLAIMANT and heavily involved in the performance of the PSA [*RfA, p. 3 para. 8; Ex. C3, p. 14; Ex. C5, p. 17 para. 11*]. Further, all goods and services to be provided by VT are delivered autonomously and independently to RESPONDENT at the Greenfield Site in Equatoriana [*Ex. C4, p. 15; Ex. C5, p. 17 para. 11; PO2, p. 53 para. 16*]. In addition to that, VT is independently participating in trade and commercial activities with third parties – amongst other things by producing electrolyser stacks under a license by CLAIMANT [*RfA, p. 4 para. 11; Ex. C5, p. 17 para. 11*].

154 Hence, due to its independent stable business activities, VT fulfils the general criteria of duration, stability and autonomy.

155 VT constitutes a place of business.

2. VOLTA TRANSFORMER RETAINS SUCH CLOSE BUSINESS LINKS TO CLAIMANT THAT IT CAN BE CONSIDERED PART OF ITS BUSINESS OPERATION

156 The required business connection between VT and CLAIMANT exists in the present case.

157 In determining whether an entity is sufficiently connected to the party and its business, commercial reality is important, not formalities concerning the entity's legal personality [*Kröll/Mistelis/Perales Viscasillas, Art. 10 para. 21*]. Relevant factors are the entity's involvement in contract performance and conclusion [*cf. Kröll/Mistelis/Perales Viscasillas, Art. 10 para. 21*].

158 VT provides 40 % of the electrolyser stacks, the transformer including its related equipment and performs the packaging of all stacks – worth EUR 100 Mio [*Ex. C4, p. 15; Ex. C5, p. 17 para. 11*]. This shows VT's relevance to the performance of the PSA. Furthermore, CLAIMANT stresses on multiple occasions that the short-term availability of a transformer was a crucial factor in winning the tender [*RfA, pp. 3, 4 para. 8; Ex. C5, p. 16 para. 8*]. In addition to that, CLAIMANT would not have been able to fulfil the local content requirement without relying heavily on its long-time Equatorianian business partner and later subsidiary VT [*ARfA, p. 26 para. 5; Ex. R2, p. 31*]. This shows that VT also played a crucial role in the conclusion of the PSA – VT's involvement is the very foundation upon which CLAIMANT's offer and the PSA are built. This inextricable link between both businesses becomes even more evident when considering that the PSA would have made up over 70 % of VT's and 60% of Volta Electrolyser's production capacities [*Ex. C8, p. 36 para. 2; PO2, p. 52 para. 6*]. Both CLAIMANT and VT were heavily reliant on another. The fact that they were conducting merger talks at the time of the PSA's conclusion only further underlines the

close ties between the companies [*RfA, p. 4 para. 11*].

159 Thus, VT retains such close business ties to CLAIMANT that they can be taken as belonging to a single group entity.

160 As VT further meets the general criteria of a place of business, its seat in Equatoriana must be considered a place of business of CLAIMANT.

II. VOLTA TRANSFORMER'S SEAT IN EQUATORIANA IS CLAIMANT'S DECISIVE PLACE OF BUSINESS

161 CLAIMANT's place of business in Equatoriana is decisive under Art. 10(a) CISG. CLAIMANT argues that even if VT constituted a place of business of CLAIMANT, it would not be the decisive one [*MfC, p. 55 paras. 117, 118*]. It bases this assessment on several factors, such as the address of CLAIMANT in the PSA and in formal correspondence via letters and emails [*ibid.*].

162 However, these factors merely relate to the exchange of documents regarding the conclusion of the contract. CLAIMANT fails to consider that Art. 10(a) CISG refers to both, the closest connection to the conclusion and to the performance of the contract [*Schwenzer/Fountoulakis/Dimsey, p. 91; Witz/Salger/Lorenz, Art. 10 para. 3; Herber/Czerwenka, Art. 10 para. 3*]. In cases where different places of business are responsible for the contract's conclusion and its performance, the wording of Art. 10(a) CISG suggests the place closest to the performance to be decisive – as long as it is known by the parties [*Ferrari/Flechtner/Brand, p. 30; Kröll/Mistelis/Perales Viscasillas, Art. 10 para. 30; Honsell, Art. 10 para. 4; Schlechtriem/Schwenzer/Schroeter, Art. 10 para. 8; Drescher et al., Art. 10 para. 8*].

163 As CLAIMANT correctly states, the place responsible for the conclusion of the PSA is CLAIMANT's Mediterranean office [*MfC, p. 24 para.* 96]. The performance of the PSA, however, stands and falls with VT's contribution: CLAIMANT would not have been able to perform its contractual obligations under the PSA, in particular the timeline and the local content requirement, without relying on VT [*RfA, pp. 3, 4 para. 8; Ex. C5, p. 16 para. 8; ARfA, p. 26 para. 5; Ex. R2, p. 31*]. CLAIMANT's place of business in Equatoriana – the seat of VT – is thus closest to the PSA's performance. CLAIMANT clearly communicated this reliance on VT from the start [*Ex. R2, p. 31*]. Hence, both Parties were aware of VT's predominant role in the performance of the PSA.

164 Thus, CLAIMANT's place of business in Equatoriana is decisive under Art. 10(a) CISG as it is the place closest to the PSA's performance.

165 Therefore, both Parties' relevant places of business are in the same contracting state – Equatoriana.

166 The CISG does not apply to the PSA under Art. 1(1)(a) CISG.

C. IN ANY CASE, ART. 2(B) CISG EXCLUDES THE APPLICATION OF THE CONVENTION

167 Even if the requirements for the substantive and territorial scope were met, the conclusion of the PSA through the Reverse Bid Auction excludes the CISG under Art. 2(b) CISG. CLAIMANT alleges that the application of the CISG is not excluded under Art. 2(b) CISG [*MfC, pp. 52-54 paras. 105-113*]. It argues that the Reverse Bid Auction does not fall within the scope of Art. 2(b) CISG as reverse auctions are generally not covered by the provision [*MfC, pp. 52, 53 paras. 106-108*]. Further, it claims that the rationale of Art. 2(b) CISG speaks against its application in the case at hand [*MfC, p. 53 para. 110*].

168 Art. 2(b) CISG excludes the application of the Convention in case of sales by auction.

169 Contrary to CLAIMANT, the Reverse Bid Auction falls within the scope of Art. 2(b) CISG (**I.**). Further, the rationale of Art. 2(b) CISG speaks in favour of its application in the case at hand (**II.**).

I. THE REVERSE BID AUCTION FALLS WITHIN THE SCOPE OF ART. 2(B) CISG

170 Art. 2(b) CISG applies to the Reverse Bid Auction in the present case. CLAIMANT submits that the wording of Art. 2(b) CISG speaks against such application [*MfC, pp. 52, 53 paras. 106-108*]. It further argues that the Reverse Bid Auction does not fall under Art. 2(b) CISG since it differs fundamentally from traditional auctions [*MfC, pp. 52, 53 para. 106*].

171 First, reverse auctions generally fall within the scope of Art. 2(b) CISG (**1.**). Second, the Reverse Bid Auction in the case at hand fulfils all key elements of an auction under Art. 2(b) CISG (**2.**).

1. REVERSE AUCTIONS GENERALLY FALL WITHIN THE SCOPE OF ART. 2(B) CISG

172 The scope of Art. 2(b) CISG generally extends to reverse auctions. CLAIMANT argues that reverse auctions do not fall under Art. 2(b) CISG since the provision reads "auctions" and not "reverse auctions" [*MfC, pp. 52, 53 para. 106*].

173 However, due to the autonomous interpretation of Art. 2(b) CISG, it is not justifiable why other forms of auctions – such as reverse auctions – should be generally excluded from its scope without further reasoning [*Schroeter, Auctions, pp. 24, 25*]. Moreover, reverse auctions are labelled "auctions" and were already widely known before the CISG was drafted [*Mankowski, Art. 2 para. 8; Drescher et al., Art. 2 para 17*]. This suggests that Art. 2(b) CISG was deemed to include reverse auctions [*ibid.*]. Thus, reverse auctions cannot be excluded from the scope of Art. 2(b) CISG solely because they are not explicitly mentioned [*cf. Schroeter, Auctions, pp. 24, 25*].

174 Consequently, reverse auctions generally fall within the scope of Art. 2(b) CISG.

2. THE REVERSE BID AUCTION FULFILS ALL KEY ELEMENTS OF AN AUCTION

175 The Reverse Bid Auction meets all essential criteria of an auction under Art. 2(b) CISG. According

to CLAIMANT, the Reverse Bid Auction is conducted in a completely different procedure than a traditional auction [*MfC, pp. 52, 53 para. 106*].

176 An auction under Art. 2(b) CISG is defined by three key elements: The first one is competitive bidding [*Mankowski, Art. 2 para. 7; Säcker et al., Art. 2 para. 14; Staudinger, Art. 2 para. 33; Black's Law Dictionary, pp. 160, 161*]. It does not matter whether the award is given to the highest or second highest bidder [*Drescher et al., Art. 2 para. 17*]. The second element is the acceptance of the bid by an auctioneer or the initiator of the auction [*Schlechtriem/Schwenzer/Schroeter, Art. 2 para. 28; Staudinger, Art. 2 para. 33; Säcker et al., Art. 2 para. 16; Staudinger, Art. 2 para. 33*]. The third one is public announcement of the auction in advance [*Kröll/Mistelis/Perales Viscasillas, Art. 2 para. 28; Säcker et al., Art. 2 para. 14*].

177 First, in the Reverse Bid Auction, all participants had the possibility to underbid each other [*RfQ, p. 8 para. 1c; cf. PO2, pp. 52, 53 para. 9; cf. RfA, p. 4 para. 10*]. Only the two lowest bidders of the Reverse Bid Auction were able to win the award [*RfQ, p. 8 para. 1c; p. 9 para. 7*]. Thus, competitive bidding was possible. Second, RESPONDENT – as the initiator of the auction – accepted the bid [*PO2, pp. 52, 53 para. 9; cf. RfQ, p. 8*]. Third, RESPONDENT announced the tender process including the Reverse Bid Auction publicly on 3 January 2023 [*RfQ, p. 8; RfA, p. 3 para. 2*]. Considering this, the Reverse Bid Auction is not conducted in a different procedure as a traditional auction.

178 Hence, the Reverse Bid Auction meets all key elements of an auction under Art. 2(b) CISG.

179 Thus, the Reverse Bid Auction falls within the scope of Art. 2(b) CISG.

II. THE RATIONALE OF ART. 2(B) CISG SPEAKS IN FAVOUR OF ITS APPLICATION

180 The original rationale of Art. 2(b) CISG favours its application in the case at hand. CLAIMANT asserts that the rationale of Art. 2(b) CISG is not fulfilled as the identities of the auction's participants are known in advance [*MfC, pp. 53, 54 paras. 109-113*].

181 However, CLAIMANT conveniently omits that the original purpose of the provision was to keep auctions under the applicable national laws even if the winner was from another country [*Secretariat Commentary, Art. 2 para. 5; Staudinger, Art. 2 para. 32*]. The aim of Art. 2(b) CISG was to leave these national regulations untouched [*Schroeter, Auctions, p. 23*].

182 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*]. In case of auctions, the contract is concluded with the award [*Gsell et al., Art. 2 para. 10; cf. Auction of Car Case, p. 1; cf. Vegetables Auction Case, p. 2 para. 4*]. By governing the award of the contract, the national Public Procurement Law provides rules for the PSA's conclusion. Equally, under Art. 4 CISG, the Convention would also govern the PSA. Therefore, the CISG and the Public Procurement Law of Equatoriana address the same issue.

Hence, the original rationale of Art. 2(b) CISG – not to interfere with national law – speaks in favour of the CISG's exclusion in the case at hand.

183 Consequently, the Convention is excluded under Art. 2(b) CISG.

184 To conclude, the CISG is not applicable to the PSA.

CONCLUSION TO ISSUE C

CLAIMANT rushed into the commitment of building a green infrastructure even though it was too green and unseasoned to weather the task. Overwhelmed by the storm of responsibility, CLAIMANT let deadlines slip through its fingers, leaving plans unfinished and incomplete. Instead of facing the consequences of its failures, CLAIMANT seeks refuge behind the CISG. It is up to the Tribunal to see through this fog of excuses, finding the CISG inapplicable.

ISSUE D: THE PARTIES VALIDLY EXCLUDED THE APPLICATION OF THE CISG

185 RESPONDENT respectfully requests the Tribunal to find that the Parties have validly opted out of the CISG.

186 The issue of whether the Parties have validly excluded the CISG revolves around Art. 29 PSA, a recently revised model choice of law clause [*Ex. R1, p. 29 para. 7*]. This clause, introduced by RESPONDENT, had been amended in the context of Equatoriana's new government strategy "to strengthen the role of Equatorianian Law" [*Ex. R1, p. 29 para. 7; PO2, p. 53 para. 10*]. The previous model clause explicitly stated: "The Agreement is governed by the CISG. For all issues not regulated by the CISG the law of Equatoriana shall apply." [*PO2, p. 53 para. 10*]. In contrast, the revised version no longer contains any reference to the CISG [*PSA, p. 12 Art. 29*]. Ms. Smith, CLAIMANT'S head of legal, interpreted the revised clause as only referring to the non-harmonized law of Equatoriana [*PO2, p. 53 para. 11*]. CLAIMANT subsequently accepted the model choice of law clause in Art. 29 PSA [*Ex. R1, p. 29 para. 11*].

187 CLAIMANT argues that the Parties did not exclude the CISG explicitly [*MfC, pp. 56-58, paras. 120-127*]. Further, CLAIMANT contends that the Parties' conduct and statements do not imply the exclusion of the CISG but rather endorse its application [*MfC, pp. 58, 59 paras. 129-135*].

188 An intent to exclude the CISG under Art. 6 CISG must be determined according to Art. 8 CISG, as the Convention governs its own exclusion [*Italian Knitwear Case III, pp. 3, 4 paras. 13, 14*]. Before resorting to the reasonable person standard of Art. 8(2) CISG, first, the subjective interpretation of Art. 8(1) CISG must be applied [*Gillette/Walt, p. 68; Staudinger, Art. 8 para. 17*].

189 RESPONDENT acknowledges that the Parties did not explicitly exclude the CISG. However, an

interpretation of the Parties' behaviour under Art. 8 CISG reveals that they impliedly excluded the Convention: First, an interpretation of the Parties' conduct and statements under Art. 8(1) CISG shows their intent to exclude the CISG (**A.**). Second, even under Art. 8(2) CISG, the Parties' conduct and statements can only be interpreted as an intent to exclude the CISG (**B.**).

A. AN INTERPRETATION OF THE PARTIES' CONDUCT AND STATEMENTS UNDER ART. 8(1) CISG SHOWS THEIR INTENT TO EXCLUDE THE CONVENTION

190 A subjective interpretation of the Parties' conduct and statements pursuant to Art. 8(1) CISG reveals their intent to opt out of the CISG. CLAIMANT, however, argues the contrary: To support its claim, CLAIMANT refers to Art. 8(1) CISG, which requires knowledge of a party's true intent [*MfC, p. 58 para. 129*]. Instead of proving such knowledge, CLAIMANT merely submits that RESPONDENT knew that the CISG is part of Equatorianian national law [*MfC, p. 58 para. 130*].

191 However, recognition by the addressee is the sole requirement for the subjective intent to be decisive as per Art. 8(1) CISG. In cases where that intent is known by the addressee, the true and recognized intent of the declaring party is binding – even despite an objectively different meaning of the statement [*Organic Spelt Kernels Case, p. 8 para. 30; Strip Steel Case, p. 2 para. 13*].

192 It was RESPONDENT's intent for the PSA to be governed by the non-harmonized law of Equatoriana (**I.**). CLAIMANT knew of this intent (**II.**).

I. RESPONDENT INTENDED TO EXCLUDE THE CISG

193 It was RESPONDENT's intent to exclude the Convention. CLAIMANT argues that RESPONDENT failed to demonstrate a clear intent to opt out of the CISG [*MfC, p. 58 paras. 130, 131*].

194 When determining the intent of a party under Art. 8(1) CISG, due consideration must be given to all relevant circumstances of the case pursuant to Art. 8(3) CISG. Special weight must be attributed to the behaviour shown during negotiations and any subsequent behaviour by the parties [*Achilles, Art. 8 para. 6; Gsell et al., Art. 8 paras. 13-16; Drescher et al., Art. 8 para. 13*].

195 RESPONDENT's intent to exclude the CISG can be inferred from both its behaviour before and after contract conclusion: First, RESPONDENT introduced the recently changed model contract to the negotiations in which the explicit reference to the CISG was removed [*Ex. R1, p. 29 para. 7*]. The former clause referred to the CISG and the "law of Equatoriana" separately, strictly distinguishing between both terms [*PO2, p. 53 para. 20*]. Thus, the term "law of Equatoriana" was defined as only encompassing the non-harmonized law, not including the CISG. The new version continues to use this term and was drafted specifically to implement the government's strategy to "strengthen the role of Equatorianian law" [*PO2, p. 53 para. 20; Ex. R1, p. 29 para. 7*]. Therefore, in both versions of the model contract, the term "law of Equatoriana" was continuously used to

mean only non-harmonized Equatorianian law and not the CISG. In fact, RESPONDENT chose the new model specifically because of this reform – to avoid any political controversy over derogating from the government strategy "to strengthen Equatorianian law" [*Ex. R1, p. 29 para. 7*].

196 Second, after contract conclusion, RESPONDENT also referred only to non-harmonized Equatorianian law in its termination [*Ex. C6, p. 19*]. It did not mention the CISG once [*ibid.*]. Thereby, RESPONDENT further expressed its intent for the PSA to be governed by Equatoriana's non-harmonized law and its understanding of Art. 29 PSA.

197 Consequently, RESPONDENT showed a clear intent to exclude the CISG.

II. CLAIMANT KNEW OF RESPONDENT'S INTENT

198 RESPONDENT's intent to exclude the CISG was known to CLAIMANT. In applying Art. 8(1) CISG, CLAIMANT conveniently omitted that it was aware of that intent [*MfC, p. 58 paras. 129-131*].

199 According to Art. 8(1) CISG, for the subjective intent of the declaring party to be decisive, it must have been known to the addressee.

200 In the present case, CLAIMANT's head of legal, Ms. Smith, understood Art. 29 PSA the same way as RESPONDENT – as only referring to the non-harmonized law of Equatoriana [*PO2, p. 53 para. 11*]. Together with Mr. Deiman, CLAIMANT's head of contracting, Ms. Smith was one of the two representatives acting for CLAIMANT during negotiations [*PO2, p. 53 para. 11; cf. Ex. R3, p. 32*]. In this role, she was the relevant addressee of RESPONDENT's statements and conduct [*cf. ibid.*]. Based on her understanding of the choice of law, she provided her legal assessment concerning misrepresentation and assurances addressed to Mr. Deiman [*ibid.*]. In this assessment in Ex. R3, she explicitly referred to domestic Equatorianian law and only included the legal assessment by her intern to err on the side of caution [*ibid.*].

201 Hence, RESPONDENT's intent to exclude the CISG was known to CLAIMANT.

202 In line with Art. 8(1) CISG, the clause must therefore be understood as excluding the CISG.

B. FROM THE PERSPECTIVE OF A REASONABLE PERSON UNDER ART. 8(2) CISG, THE PARTIES' CONDUCT AND STATEMENTS SHOW THEIR INTENT TO EXCLUDE THE CISG

203 Even when applying the reasonable person standard of Art. 8(2) CISG, the Parties' conduct and statements can only be understood as an intent to exclude the Convention. CLAIMANT submits that the Parties' statements and conduct as well as alleged practices between them indicate their intent to have the CISG govern the PSA [*MfC, p. 59 para. 132*].

204 Pursuant to Art. 8(2) CISG, a party's conduct must be interpreted according to the understanding of a reasonable person in the same situation as the addressee. Art. 8(3) CISG prescribes to consider

all relevant circumstances, particularly negotiations and practices established between the parties.

205 However, the Parties did not establish any practices between themselves (**I.**). Furthermore, the Parties' conduct and statements imply the exclusion of the CISG (**II.**).

I. THE PARTIES DID NOT ESTABLISH ANY PRACTICES BETWEEN THEMSELVES

206 No practices exist between the Parties. CLAIMANT argues that it consistently upheld the application of the CISG in its prior dealings with entities in Equatoriana and thus established a practice in favour of the Convention's application [*MfC, p. 59 para. 134*].

207 However, practices in the sense of Art 8(3) CISG only bind the respective parties and do not claim general validity [*Hau/Poseck, Art. 9 para. 3; Staudinger, Art. 9 para. 13*]. Hence, under Art. 8(3) CISG, decisive are only practices which the parties have established between themselves [*Tantalum Powder Case II, p. 5 para. 15; Mankowski, Art. 9 para. 18*]. Such practices require a long-term business relationship between the parties during which they have repeated the conduct in question at least twice [*Säcker et al., Art. 8 para. 20; Ferrari, Practices, p. 572; Gsell et al., Art. 9 para. 11*].

208 It was CLAIMANT's first time contracting with RESPONDENT [*PO2, p. 52 para. 2*]. The Parties did not have any previous contractual relationship between themselves [*ibid.*]. CLAIMANT merely concluded two smaller contracts with other governmental entities in the past [*ibid.*]. This cannot lead to a practice between the Parties in question, CLAIMANT and RESPONDENT.

209 Thus, the Parties did not establish practices between themselves.

II. THE PARTIES' CONDUCT AND STATEMENTS IMPLY THE EXCLUSION OF THE CISG

210 From the perspective of a reasonable person in the sense of Art. 8(2) CISG, the Parties' conduct shows their intent to exclude the CISG. CLAIMANT submits that the Parties' behaviour reflects their understanding that the CISG would govern the PSA [*MfC, p. 59 paras. 132-135*].

211 A specific indicator for an intent to exclude the Convention is that the parties agreed on provisions which only make sense in the context of national law [*Drescher et al., Art. 6 para. 13; Hau/Poseck, Art. 6 para. 6*]. This is particularly true where the parties have amended or supplemented certain national provisions and this amendment shows their intent to exclude the CISG in its entirety [*Drescher et al., Art. 6 para. 13; Enderlein/Maskow/Strohbach, Art. 6 para. 1.3*].

212 In the present case, CLAIMANT agreed to a 5 % price reduction in return for a waiver of RESPONDENT's right to terminate for convenience [*RfA, p. 5 para. 13; p. 7 para. 29; Ex. C5, p. 17 para. 10; PSA, p. 13 Art. 28(2)*]. Naturally, this deal was based on the mutual understanding that RESPONDENT possessed the right to terminate for convenience in the first place. However, such a right to terminate for convenience only exists under the ECC and not under the CISG: Under the CISG, the avoidance of a contract requires a fundamental breach as per Artt. 49, 64 CISG [*Magnus,*

p. 425; Fisher, p. 248; DiMatteo et al., p. 631 para. 46]. The ECC on the other hand, includes such a right for termination in Art. 7.3.8 ECC [*PO1, p. 50 para. III.4; PO2, p. 55 para. 33; Ex. C6, p. 19*]. Thus, this waiver would have only made sense in the context of the national ECC. From this amendment of Art. 7.3.8 ECC, a reasonable person in the Parties' respective position would have concluded that they assumed the PSA was governed by the ECC.

213 This is further substantiated by the fact that Mr. Law, CLAIMANT's former head of legal, identified the changes in the model contract [*PO2, p. 53 para. 11*]. He consequently flagged the applicable law as a topic of discussion for the initial meeting between the Parties [*ibid.*]. Mr. Law's sudden termination by CLAIMANT and the ensuing chaotic replacement process is the sole reason why the issue was not cleared up in the very first meeting between the Parties [*ibid.*]. Hence, it is only reasonable that CLAIMANT should bear the consequences of its inadequate legal support.

214 In sum, a reasonable person in the Parties' respective position would have understood the revised wording of the model contract as a change in the applicable law.

215 Therefore, the conduct and statements of both Parties can only be interpreted as an intent to exclude the CISG.

216 The Parties have validly excluded the CISG by means of implied exclusion.

CONCLUSION TO ISSUE D

By insisting that the Parties did not exclude the CISG, CLAIMANT attempts to rewrite the rulebook. It tries to cheat its way through the choice of law, despite knowing the true rules. However, one can easily see through CLAIMANT's poker face, unmasking its bad hand: Neither its move on the applicability nor its denial of the Parties' intent to exclude the Convention can lead to a win. It is now the Tribunal's move to call out CLAIMANT's bluff and uphold Equatorianian law.

STATEMENT OF RELIEF SOUGHT

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

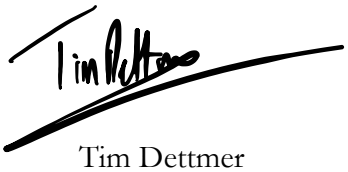
1) The Tribunal should reject the claim for lack of jurisdiction or inadmissibility or as part of its discretion.
2) The Tribunal should admit Exhibit R3 as evidence and exclude Exhibit C7 from the case.
3) The CISG is not applicable to the PSA.
4) In any case the Parties have validly excluded the application of the CISG.

CERTIFICATE OF INDEPENDENCE

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

Münster, 29 January 2025

Benedikt Marx



Tim Dettmer

Lea Hammermann

Marie Knüfermann

Philip Mampe

Maximilian Schweizer