TWENTY-SECOND ANNUAL

WILLEM C. VIS EAST INTERNATIONAL ARBITRATION MOOT

Memorandum for Respondent

University of Vienna

Case Reference: FAI MOOT 100/2024

On behalf of:	Against:
Equatoriana RenPower Ltd	**Green Hydro Plc**
1 Russel Square	1974 Russel Avenue
Oceanside	Capital City
Equatoriana	Mediterraneo
RESPONDENT	CLAIMANT

Varvara Artiukh • Sophie Hannah Egger • Lukas Hellmayr

Agnes Oppitz • Jonas Schneider-Beron • Alina Waldenberger

2024/2025 • Vienna, Austria

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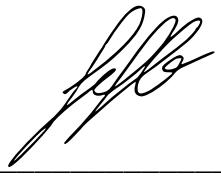

NAME: Jonas Schneider-Beron

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INDEX OF ABBREVIATIONS AND DEFINITIONS

§(§)	Paragraph(s)
&	and
%	Percent
ADR	Alternative Dispute Resolution
Arb	Arbitration
ARfA	Answer to the Request for Arbitration
Art(s)	Article, articles
CEO	Chief Executive Officer
cf	conferatur, compare
Ch	Chapter
contra	contrary to
ECC	Equatorianian Civil Code
eg	exemplum gratia, for example
et al	et alii / et aliae / et alia, and others
et seq	et sequens, and the following
EUR	Euro
Exh C	Claimant's Exhibit
Exh R	Respondent Exhibit
FAI	Keskuskauppakamarin välityslautakunta, Arbitration Institute of the Finland Chamber of Commerce

FAI Model Med Clause	Model Mediation Clause of the Arbitration Institute of the Finland Chamber of Commerce
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
infra	See below
Intro	Introduction
lit	Litera, letter
Ltd	Limited
Med	Mediation
MfC	Memorandum for Claimant
MM	Million
Mr	Mister
Ms	Miss or Mrs
No	Number
ObjLang	Objection of Mr Langweiler to the transmission of Exhibit R3 of 14 August 2024
p(p)	Page, pages
para(s)	Paragraph, paragraphs
Plc	Public limited company
PO1	Procedural Order No 1 of 11 October 2024

PO2	Procedural Order No 2 of 13 November 2024
PoB	Place of business
PSA	Purchase and Service Agreement
RfA	Request for Arbitration
Sec	Section
SOE	State-owned entities
supra	See above
UNCITRAL	United Nations Commission On International Trade Law
UK	United Kingdom of Great Britain and Northern Ireland
US	United States of America
v	versus, against
VIAC	Vienna International Arbitral Centre

Index of Legal Texts

Austrian Federal Procurement Act	Bundesvergabegesetz, Federal Procurement Act of 2018
BGB	Bürgerliches Gesetzbuch, German Civil Code 1896
CISG	United Nations Convention on Contracts for the International Sale of Goods 1980
FAI Arb Rules	Arbitration Rules of the Finland Chamber of Commerce 2024
FAI Med Guidelines	Mediation Guidelines of the Arbitration Institute of the Finland Chamber of Commerce 2016
FAI Med Rules	Mediation Rules of the Finland Chamber of Commerce 2024
FAI Rules for Expedited Arbitration	Rules for Expedited Arbitration of the Finland Chamber of Commerce 2024
German Competition Act	Gesetz gegen Wettbewerbsbeschränkungen, German Competition Act 2013
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration 2020
ICC Med Rules	ICC Mediation Rules 2014
Kazakh Public Procurement Act	Закон Республики Казахстан “О государственных закупках”, Law of the Republic of Kazakhstan, No 434-V КРЗ, on Public Procurement 2015
Mauritius Convention	United Nations Convention on Transparency in Treaty-based Investor-State Arbitration 2014
Spanish Code of Public Sector Contracts	Código de contratos del sector público, Spanish Code of Public Sector Contracts 2014

NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
Transparency Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014
UK Procurement Act	UK Procurement Act 2023
ULF	Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods 1964
ULIS	Convention Relating to a Uniform Law on the International Sale of Goods 1964
UNCITRAL Arb Rules	UNCITRAL Arbitration Rules 2021
U.S.C.	Code of Laws of the United States of America
VCLT	Vienna Convention on the Law of Treaties 1969
VIAC Rules of Arb and Med	VIAC Rules of Arbitration and Mediation 2021

Statement of Facts

1 Equatoriana RenPower Ltd (**"RESPONDENT"**) is a state-owned energy company, entrusted with the decarbonisation of Equatoriana's energy production. GreenHydro Plc (**"CLAIMANT"**) is a medium-sized Mediterranean engineering company operating in the field of renewable energy.

2 With the Request for Quotation on **3 January 2023**, RESPONDENT put Equatoriana's ambitious Green Energy Strategy into action and requested bids for the construction and maintenance of a turnkey green hydrogen plant in Equatoriana. In a reverse-bid auction, CLAIMANT was selected, leading to the conclusion of the Purchase and Service Agreement (**"PSA"**) between CLAIMANT and RESPONDENT (**"the Parties"**) on **17 July 2023**. It was based on a model contract drafted to strengthen Equatorianian law. Only later, RESPONDENT became aware of misrepresentations during the negotiations: CLAIMANT had been conscious that they would fail to meet the promised local content requirement – a key factor for the award of the contract.

3 After local elections in Equatoriana, the new governing party announced the revision of the Green Energy Strategy, which led to a re-evaluation of the PSA. As the new policy no longer supported hydrogen energy and CLAIMANT was unable to timely perform their obligations, RESPONDENT was left with no other choice but to terminate the PSA on **29 February 2024**.

4 Behind the scenes, RESPONDENT still set all levers in motion to realise the venture, acknowledging the importance of the plant as a reference project for CLAIMANT. In their without-prejudice offer of **25 May 2024**, RESPONDENT threw CLAIMANT a lifeline to continue their collaboration, now for the production of green steel. To not get pulled into the water themselves, RESPONDENT made clear that a price reduction was necessary. Still, CLAIMANT rejected this genuine settlement attempt.

5 CLAIMANT initiated the present arbitral proceedings (**"Proceedings"**) and filed the Request for Arbitration (**"RfA"**) with the Finland Arbitration Institute (**"FAI"**) on **31 July 2024**. Thereby, they completely disregarded the dispute resolution clause (**"Multi-Tier Clause"**) proposed by themselves, containing a mandatory mediation agreement (**"Mediation Agreement"**).

6 In their Answer to the Request for Arbitration (**"ARfA"**) on **14 August 2024**, RESPONDENT, in accordance with the Parties' Multi-Tier Clause, objects to the jurisdiction of this arbitral tribunal (**"Tribunal"**) and requests that the claim be rejected.

Summary of Arguments

I. The Arbitral Proceedings should be terminated or stayed

7 The Parties' Multi-Tier Clause obliges them to mandatorily mediate prior to arbitration, as evidenced by the Mediation Agreement's wording, structure, and purpose. Disregarding this mediation requirement, CLAIMANT immediately commenced arbitration. The Tribunal should thus deny jurisdiction in the present case. Alternatively, it should reject the claim under the purview of admissibility or stay the arbitration.

II. CLAIMANT's Exhibit C7 should be excluded from the file

8 By introducing Exh C7, CLAIMANT circumvents well-established evidentiary rules. First, RESPONDENT's without-prejudice offer shows genuine settlement intention, rendering it protected by without-prejudice privilege. Second, the Parties' agreed-upon confidentiality provisions protect such settlement communication. Last, CLAIMANT cannot rely on Equatoriana's transparency commitments in the Proceedings. Exh C7 must be excluded.

III. RESPONDENT's Exhibit R3 should remain in the file

9 Exh R3 does not fulfil any grounds for exclusion. Its content is neither subject to commercial confidentiality nor attorney-client privilege. Further, CLAIMANT fails to prove any impropriety of Exh R3's obtention by RESPONDENT. Thus, it remains admissible even if leaked or obtained during the investigations, as they were initiated in good faith. Since its exclusion would violate due process, Exh R3 must remain in the case file.

IV. The CISG is not applicable to the PSA

10 The PSA does not fall within the sphere of application of the CISG. First, as both Parties had their relevant places of business in Equatoriana, they concluded a domestic contract. Second, as a turnkey contract that preponderantly concerned the provision of works and services, the PSA does not qualify as a sale of goods. Even if the PSA constituted a sale of goods, it was concluded by auction and would thus be exempt from the CISG.

V. In any event, the Parties have excluded the CISG

11 The Parties have excluded the CISG. Under a subjective interpretation, RESPONDENT's unequivocal intention to exclude the CISG was known to CLAIMANT when they entered into the PSA. Equally, under an objective assessment, all circumstances demonstrate an exclusion of the CISG. Therefore, domestic Equatorianian law governs the PSA.

PART I: PROCEDURAL ISSUES

I. THE ARBITRAL PROCEEDINGS SHOULD BE TERMINATED OR STAYED

12 CLAIMANT initiated arbitral proceedings by submitting the RfA on 31 July 2024 [*RfA pp 2 et seq*], despite their obligation to mediate under the Multi-Tier Clause. By doing so, CLAIMANT discarded the mutual agreement contained in the Parties' contract, the PSA, and betrayed RESPONDENT's expectations as to amicable settlement. As evidenced by its wording, structure, and purpose, the Mediation Agreement within the Multi-Tier Clause is a mandatory precondition for the Proceedings (**A.**). Non-compliance with this requirement should result in the claim being rejected either under the purview of jurisdiction or at least admissibility (**B.**). Even if the Tribunal were to initially proceed with the arbitration, it should stay the Proceedings and refer the Parties to mediation (**C.**).

A. MEDIATION IS A MANDATORY PRECONDITION FOR THE ARBITRATION

13 In the PSA, the Parties agreed on a multi-tier dispute resolution clause consisting of a mediation agreement and an arbitration agreement [*Exh C2 p 12 et seq Art 30*]. CLAIMANT argues that the Mediation Agreement is not binding upon the Parties [*MfC paras 16 et seq*]. However, this interpretation of the Multi-Tier Clause is flawed. Under the applicable standard of interpretation, as prescribed by the UNIDROIT Principles of International Commercial Contracts ("**UPICC**") (**1.**), the Parties intended for the Mediation Agreement to be mandatory (**2.**) and a prerequisite for arbitration (**3.**), which is further evidenced by the purpose for which the Parties chose mediation (**4.**).

1. The Mediation and Arbitration Agreements should be interpreted according to the UPICC

14 Equatorianian law applies to the interpretation of the Parties' Mediation and Arbitration Agreements. Concerning the Arbitration Agreement, it is well-established in international arbitration practice that the law chosen for the contract also extends to the arbitration agreement [*BNA Case; Broker Case; Channel Tunnel Case; Cyprus Case; Enka Case; Kabab-Ji Case; Peanut Case; Transformer Case; Blackaby et al para 3.18; Born I § 4.04[A][2][d]*]. In the present case, the Parties chose the law of Equatoriana as the governing law of the PSA [*Exh C2 p 12 Art 29*], and thus the Arbitration Agreement. Equally, international practice extends the law of the contract to mediation agreements [*Deixler-Hübner et al para 8.6.4.2.3; Hutner pp 124, 145 et seq*]. In particular, this conclusion should be followed with regard to multi-tier clauses. Subjecting an arbitration agreement to a different legal framework would tear up the applicable standard for the multi-tier clause [*Enka Case*]. To avoid this, Equatorianian law should apply to both the Parties' Mediation and Arbitration Agreement.

15 Notwithstanding the above, the standard of interpretation is in any case found under the UPICC, as they have been adopted by both Equatoriana and Danubia [*PO1 p 50 para III(4)*]. The CISG does not govern the PSA (*infra IV. paras 96-140*), therefore it does not prescribe the applicable standard of interpretation [*PO1 p 51 para III(5)*].

16 Under Art 4.1(1) UPICC, the parties' common intention is the primary consideration. If such intention cannot be ascertained, interpretation defaults to the understanding of a reasonable person of the same kind as the parties pursuant to Art 4.1(2) UPICC [*Brödermann Art 4.1 para 1*]. As both Arts 4.1(1) and 4.1(2) UPICC seek to determine the intentions of the parties and CLAIMANT does not assert anything to the contrary, the two provisions shall not be distinguished further in the following. Even if the CISG were the applicable standard, the interpretation would not result in a different outcome, as Art 8 CISG is identical in content to Art 4.1 UPICC [*Vogenauer Intro Ch 4 para 6*].

2. The Mediation Agreement is mandatory

17 The nature of a mediation agreement is ascertained through the intentions of the parties [*Berger I p 5*]. In the present case, the Parties intended a mandatory character, as evidenced by the wording of the Mediation Agreement.

18 First, the Mediation Agreement contains *"shall"* [*Exh C2 p 12 et seq Art 30*], **a strong and unequivocal indicator of its mandatory nature** [*Ambiente Officio Case; Daimler Case; Morris Case; Berger I p 5; Born/Šćekić p 263; Figueres p 71 citing ICC Case 9984*]. Non-binding mediation agreements contain *"may"*, *"can"*, or *"should"* [*ICC Case 1025615; Born I § 5.08[A][2]*].

19 This rationale is evidenced by VIAC's model mediation clauses (VIAC Rules of Arb and Med, Annex 1). Until recently, VIAC differentiated between an optional and an obligatory mediation clause. The optional clause used the wording *"the parties agree to jointly consider proceedings in accordance with the Rules of Mediation"* [*emphasis added*]. In contrast, VIAC's mandatory clause closely resembles the Multi-Tier Clause in the present case: *"The parties agree that the present dispute shall be submitted to proceedings in accordance with the Rules of Mediation"* [*emphasis added*]. Relatedly, the ICC's optional model mediation clause uses the word *"may"*, while the mandatory clause again essentially corresponds to the present case: *"the parties shall first refer the dispute to proceedings under the ICC Mediation Rules"* [*emphasis added*].

20 Second, the Parties' Mediation Agreement is based on the FAI Model Med Clause. In its original wording, the Model Clause specifically allows parallel proceedings, stipulating that *"[t]he commencement of proceedings under the Mediation Rules shall not prevent any party from commencing arbitration in accordance with the clause below"*. CLAIMANT left out this sentence when

drafting the Parties' Mediation Agreement [*Exh R2 p 31*], which should be understood as deeming mediation a mandatory precondition to arbitral proceedings.

21 Third, the structure and wording of the Mediation Agreement are essentially identical to the Arbitration Agreement, which CLAIMANT clearly acknowledges as binding on the Parties [*RfA pp 2 et seq*]. Both **contain the term *"shall"*** and use **substantially similar wording**. However, CLAIMANT conveniently negates the mandatory nature of the Mediation Agreement, and not the Arbitration Agreement, despite their consistent language.

22 Even if the Tribunal found that the wording of the Mediation Agreement is unclear as to its mandatory character, an ambiguous contract must be construed against the interest of the party who drafted it pursuant to Art 4.6 UPICC [*Vogenauer Art 4.6 para 9*]. As CLAIMANT drafted the Multi-Tier Clause [*Exh R2 p 31*] any ambiguity should be interpreted against them [*see Vogenauer Art 4.6 para 9*]. Consequently, the Mediation Agreement is mandatory.

3. Arbitration is conditional on mediation

23 A mediation agreement precludes arbitration when a multi-tier clause contains a conditional structure between mediation and arbitration and a clear-cut mediation procedure [*see Born I § 5.08[A][1][b]; Oetiker/Walz p 877*].

24 To begin with, the Parties agreed on a contingent relationship between the Mediation and Arbitration Agreements, intending for the mediation to be conducted prior to arbitration. Mr Deiman and Ms Ritter, CLAIMANT and RESPONDENT's respective head negotiators, discussed RESPONDENT's *"strong interest in an amicable settlement"* and that *"arbitration should only be the last resort to resolve disputes"* [*Exh R1 p 30 para 9*]. Mr Deiman confirmed this verbal exchange by email, reassuring that the FAI Model Med Clause suggested by CLAIMANT *"clearly provides that the parties must first try to mediate their dispute before resorting to arbitration"* [*Exh R2 p 31; emphasis added*]. This mutual intention is reflected in the language of the Multi-Tier Clause, which stipulates that disputes *"shall first be submitted to mediation"* [*Exh C2 pp 12 et seq Art 30; emphasis added*].

25 Second, CLAIMANT cannot contend that the Multi-Tier Clause is non-conditional because it lacks a time limit for the completion of mediation [*MfC para 26*]. Conditionality does not require an express time limit for mediation because the Parties incorporated the FAI Med Rules, which provide robust and clear mechanisms for determining the duration of the mediation. The mediator must conduct mediation expediently, which includes timetabling and a fixed duration of proceedings or number of mediation sessions (Art 8 FAI Med Rules; X.34 FAI Med Guidelines). Accordingly, the clear procedural framework renders an express agreement on a time limit superfluous.

26 Similarly, case law downplays the relevance of a time limit and emphasises the need for a clear mediation procedure, eg established by an ADR organisation [*Sulamérica Case; see Cable Wireless Case; Holloway v Chancery Case*]. In the *Emirates Trading Case* cited by CLAIMANT [*MfC para 26*], the tribunal had considered a multi-tier clause and found that arbitration was conditional on the parties first engaging in *"friendly discussions"*, emphasising that there was a time limit for the performance of that first step [*Emirates Trading Case*]. Compared to the present case, an obligation to engage in *"friendly discussions"* is more ambiguous than a clause requiring mediation which incorporates precise procedural rules. Thus, the Multi-Tier Clause does not require a specific time limit in order for it to have sufficient certainty.

27 To conclude, the agreement on a well-structured mediation procedure demonstrates that the Parties intended arbitration to be conditional on mediation.

4. The Mediation Agreement's mandatory nature and conditionality are confirmed by its purpose

28 CLAIMANT argues that mandatory mediation would obstruct the very purpose of mediation, namely efficient dispute resolution [*MfC paras 26 et seq*].

29 However, successful meditation is less costly and time consuming than arbitration [*Pryles p 159*]. It is especially suited for long-term construction projects, such as the construction of the plant in the present case [*see Blackaby et al para 2.96*]. The proceedings are finalised within a shorter timeframe and limit the issues eventually submitted to an arbitral tribunal [*Cremades p 1; Fortune 1000 Survey p 37; Gavrila/Mohamed; Leinwather/Thurner p 378*]. The shorter duration necessarily results in cost savings. Further, cost savings occur by having one mediator (Art 5.1 FAI Med Rules) instead of three arbitrators [*Record p 39*] and limiting expenses for counsel and experts [*Ihde p 21*].

30 The intention to mandatorily mediate prior to arbitration was already established by the wording and structure of the Multi-Tier Clause and is only confirmed by the Mediation Agreement's purpose. Thus, CLAIMANT's argument in favour of the non-mandatory nature is unfounded.

B. THE TRIBUNAL SHOULD REJECT THE CLAIM FOR LACK OF JURISDICTION OR ADMISSIBILITY

31 RESPONDENT agrees with CLAIMANT [*MfC paras 13 et seq*] that the Tribunal is competent to decide on its own jurisdiction. However, in case CLAIMANT discussed the competence-competence principle as a way of drawing a conclusion as to the jurisdiction of the Tribunal, this would be unfounded

[*see Cremades p 1*]. Competence-competence cannot validate an arbitration agreement, it only permits a tribunal to determine its own jurisdiction [*Blackaby et al para 5.110*].

32 CLAIMANT's non-compliance with the Parties' Multi-Tier Clause [*ARfA p 27 para 16; ObjLang p 35*] should be assessed under the purview of **jurisdiction** and not admissibility as CLAIMANT contends [*MfC paras 18 et seq*]. The law applicable to the arbitration agreement determines the tribunal's jurisdiction [*Blackaby et al para 3.07*]. Under Equatorianian law – the law applicable to the Arbitration Agreement (*supra I.A.1. paras 14-16*) – consistent jurisprudence establishes that mediation is a condition precedent to jurisdiction in the case of multi-tier clauses [*Exh R1 p 30 para 9*]. Consequently, to **activate** the Multi-Tier Clause and eventually be able to resort to arbitration, the Parties must first initiate mediation [*see Morris Case; File p 35; Oetiker/Walz p 881*]. Leading authorities in international arbitration confirm that mandatory pre-arbitral steps, including mediation requirements, are a jurisdictional impediment [*Builders Case; Cable Wireless Case; Cycling Case; Emirates Trading Case; Kemiron Case; Lufthansa Case; Morris Case; Cremades p 7*]. This ensures legal accuracy, as jurisdictional awards are subject to review by State courts [*Obamuroh para 13*].

33 Even if the Tribunal had jurisdiction, it should nevertheless respect the mandatory nature of the Mediation Agreement by declaring the claim **inadmissible**, thereby closing the Proceedings [*see Born/Šćekić p 243; Oetiker/Walz p 881*]. Irrespective of the qualification, both a lack of jurisdiction and a lack of admissibility lead to the dismissal of the claim [*Hydrocarbons Case; Mitrovic p 565*]. Considering the Parties' non-compliance with the Multi-Tier Clause, the Tribunal should dismiss the claim, primarily under the purview of jurisdiction or, alternatively, admissibility.

C. THE TRIBUNAL SHOULD STAY THE PROCEEDINGS IN ANY CASE

34 In the counterfactual scenario that the Tribunal upholds its jurisdiction and the admissibility of the claim, it shall conduct the arbitration in such manner as it considers appropriate, pursuant to Art 26.1 FAI Arb Rules. Therefore, RESPONDENT requests that the Tribunal exercise its discretionary power and stay the Proceedings. Moreover, Art 26.3 FAI Arb Rules obliges all participants of arbitral proceedings to act in good faith. CLAIMANT asks the Tribunal to refrain from staying the arbitration based on the alleged futility of mediation [*MfC paras 21 et seq*]. However, they prematurely jump to conclusions, assuming the outcome of a mediation that was never initiated.

35 As for futility, parties are discharged of their duty to mediate only in cases of *"persistent deadlock"* [*ICC Case 6276*] or if mediation constitutes a *"completely hopeless exercise"* [*Cable Wireless Case*]. This standard is not met. CLAIMANT's submission as to futility should already be denied as it is based on the inadmissible Exh C7. If the Tribunal finds that Exh C7 is a without-prejudice offer (*infra II.B.1.*

and 2. paras 44-55), it must have found RESPONDENT's offer to settle is genuine. This genuine offer invites further negotiations, which in turn suggests a mediation would not have been futile. In addition, an unrelated green hydrogen project was successfully reviewed and renegotiated by RESPONDENT, demonstrating their ability to find compromise [*PO2 p 55 para 25*]. The assertion that RESPONDENT's behaviour resulted in the futility of further negotiations is thus unfounded [*contra MfC para 22*].

36 In addition, a stay is further warranted according to CLAIMANT's own commitment to mediation. The principle of good faith (Art 26.3 FAI Arb Rules) should guide the Tribunal in the application of its discretionary procedural powers. A party is prohibited from negatively affecting their counterparty by acting contrary to past behaviour [*Pearson-Wenger pp 193, 336*]. RESPONDENT took one step towards CLAIMANT; CLAIMANT took three steps back. CLAIMANT sought negotiations with RESPONDENT after the Equatorianian government's change of strategy [*Exh C5 p 18 para 15*] but shut them down after RESPONDENT's first offer [*PO2 p 55 para 24*]. CLAIMANT themselves insisted on including a mediation agreement into the PSA [*Exh R1 p 30 para 8*], just to disregard their own stipulation and file an arbitral claim [*RfA pp 2 et seq; PO2 p 55 para 24*]. CLAIMANT insists on forgoing mediation, invoking the importance of an undelayed procedure [*MfC para 17*], but caused initial delays to the project by submitting the final plans late [*RfA p 5 para 19*]. CLAIMANT can therefore rely neither on the alleged futility of mediation nor on an alleged breach of RESPONDENT's good faith obligations – they themselves violated said obligations. The Tribunal should therefore stay the Proceedings and refer the Parties to mediation [*see Mitrovic p 566*].

* * *

37 To conclude **I.**, the Parties intended the Mediation Agreement as a binding precondition for arbitration. As CLAIMANT did not comply with the mandatory requirement, the Tribunal should reject the claim. Alternatively, in exercising its discretion, the Tribunal should not reward CLAIMANT's contradictory behaviour and stay the Proceedings due to the promising prospects of mediation.

II. CLAIMANT'S EXHIBIT C7 SHOULD BE EXCLUDED FROM THE FILE

38 CLAIMANT is attempting to rely on RESPONDENT's without-prejudice offer in the Proceedings, contained in Exh C7 [*Exh C7 p 20*]. By doing this, they not only disregard rules of privilege, but also breach confidentiality. RESPONDENT therefore requests that the Tribunal exclude Exh C7 from the file.

39 As CLAIMANT correctly states [*MfC para 31*], the Tribunal has broad evidentiary discretion pursuant to Art 34.1 FAI Arb Rules. RESPONDENT suggests that the Tribunal apply the universally recognised IBA Rules on the Taking of Evidence ("**IBA Rules**") as guidelines for its discretion [*Born II p 45; Forss*

et al p 15; Gaillard pp 150 et seq; Savola p 246]. To properly assess the evidentiary objection, the Tribunal should appoint an independent expert (**A.**). Under said assessment, Exh C7 evidently fulfils several grounds for exclusion (**B.**). As a separate legal entity, RESPONDENT is not bound by transparency commitments of Equatoriana (**C.**).

A. THE TRIBUNAL SHOULD APPOINT AN INDEPENDENT EXPERT TO REVIEW EXHIBIT C7

40 RESPONDENT objects to Exh C7, as it contains privileged and confidential information. **The validity of this evidentiary objection can only be assessed by revealing the document's content** [*see Smeureanu p 157; Van Houtte p 624*]. In the following (*infra II.B.1. and 2. paras 44-55)*, RESPONDENT will therefore disclose parts of Exh C7.

41 This discussion of the exhibit's content could potentially be construed as a waiver of privilege [*Marsh et al p 231*]. To avoid this, RESPONDENT requests that the Tribunal appoint an independent and impartial expert to review Exh C7 and RESPONDENT's submission under II.B.1. and 2. pursuant to Art 37.1 FAI Arb Rules and Art 3(8) IBA Rules, respectively [*see Gumbu p 340*].

42 RESPONDENT does not question the impartiality of the Tribunal [*Statement Aqua p 2; Statement Synonoun p 2*]. A third-party assessor would, however, support the Tribunal in providing an informed opinion [*see Savola p 316; Tamminen/Saavola p 210*] while simultaneously safeguarding RESPONDENT's legitimate interest in confidentiality [*see Zuberbühler et al p 85*].

B. EXHIBIT C7 FULFILS SEVERAL GROUNDS FOR EXCLUSION

43 CLAIMANT argues that RESPONDENT is *"selectively citing"* confidentiality rules to prevent disclosure of Exh C7 [*MfC para 30*]. However, it should be excluded based on widely-accepted grounds. From the outset, Exh C7 is privileged under the without-prejudice rule (**1.**). Disregarding its privileged nature would violate public policy, rendering a subsequent award unenforceable (**2.**). Further, it is protected by the confidentiality obligation of Art 15 FAI Med Rules (**3.**).

1. Exh C7 constitutes a privileged without-prejudice offer

44 CLAIMANT submits that they rightfully introduced a letter from RESPONDENT's CEO, Mr la Cour, to CLAIMANT's CEO, Mr Cavendish [*Exh C7 p 20*], as it allegedly does not constitute a privileged without-prejudice offer [*MfC para 43*]. However, since Exh C7 reflects RESPONDENT's genuine intention to settle an existing dispute, it is protected by without-prejudice privilege.

45 The without-prejudice privilege is a transnational principle of international arbitration [*Berger II p 514; Cohen p 441*], generally acknowledged in Art 9(4)(b) IBA Rules [*IBA Report pp 11 et seq*]. It

applies to any documents produced to facilitate amicable settlement and bars these documents from being produced as evidence in subsequent legal proceedings [*Berger III pp 307 et seq*].

46 CLAIMANT submits that Exh C7 *"is not marked as 'without-prejudice'"* [*MfC para 33*]. In fact, the letter constituting Exh C7 is entitled a *"Without-prejudice Offer"* and contains RESPONDENT's express assertion to make an *"offer without prejudice"* [*Exh C7 p 20*]. These are strong prima facie indicia of RESPONDENT's intention to make a without-prejudice offer [*Williams Case; Altaras p 483; Haller p 314*]. However, RESPONDENT acknowledges that the privilege will only apply if a proper review of the letter also reveals this intention [*see Khodykin et al para 12.184*]: the communication must refer to an **existing dispute** and, as CLAIMANT correctly states [*MfC para 38*], show a **genuine intention** to reach a settlement [*Rush v GLC Case*].

47 As to the first criterion, the dispute must be capable of settlement in the sense of compromise [*Bradford Case*]. It can hardly be denied that such a **dispute between the Parties exists**. Regarding the second criterion, genuine intention can reveal itself through **admissions** or **concessions** made in the course of negotiations [*Rush v GLC Case*]. Exh C7 contains both.

48 The validity of RESPONDENT's termination of the PSA is central to the Proceedings [*RfA p 7 para 34*]. In their notice of termination of 29 February 2024, RESPONDENT asserted to be *"entitled to terminate"* since hydrogen *"no longer fits into Equatoriana's energy strategy"* [*Exh C6 p 19*]. Accordingly, RESPONDENT's without-prejudice offer of 25 May 2024 contains an **admission of fact against RESPONDENT's interest**: RESPONDENT could still comply with the revised strategy to utilise hydrogen for green steel production [*Exh C7 p 20*] – a change of course from their previous assertion.

49 RESPONDENT further offers CLAIMANT a *"first demand guarantee"* for the performance of their obligations [*Exh C7 p 20*]. This provides CLAIMANT with security in case of RESPONDENT's insolvency [*see Bertrams p 80*] and constitutes a **concession** omitted by CLAIMANT [*cf MfC paras 30 et seq*].

50 Further, negotiations aimed at a price reduction fall within the scope of the without-prejudice privilege [*Desiatnik p 33*]. RESPONDENT made clear that a *"price reduction of 15 % or at least a two-digit number"* is necessary for hydrogen to be competitive in steel production [*Exh C7 p 20*]. The openness to determine the degree of the reduction and other contractual conditions further does not constitute a *"conditional approach to negotiations"* [*MfC para 41*]. By indicating a margin for the price reduction, RESPONDENT is indicating their willingness to engage in further negotiations. RESPONDENT is not simply forcing CLAIMANT to agree to their terms.

51 After being made aware of RESPONDENT's good-faith attempt to find compromise, CLAIMANT had the opportunity to make concessions themselves. Instead, they chose not to engage, rejected the offer, and immediately threatened to initiate arbitral proceedings [*PO2 p 55 para 24*].

52 In conclusion, Exh C7 fulfils all requirements of a privileged without-prejudice offer and should be excluded for this reason alone.

2. Admitting Exh C7 into the file would violate public policy

53 Under Art 52 FAI Arb Rules, the Tribunal shall make every effort to render an enforceable award, clarifying the outer boundaries of evidentiary discretion [*see Godhe I p 15*]. Pursuant to Art V(2)(b) NYC, recognition or enforcement of an award will be refused if it violates the public policy of the country where recognition or enforcement is sought.

54 The without-prejudice privilege is accepted by an overwhelming majority of common law jurisdictions [*eg Australia: Barrett Case; Barbados: Mapp Case; Canada: Union Carbide Case; England & Wales: Ofulue Case; Eswatini: Mahlalela Case; Ireland: Purcell Case; New Zealand: Waterfall Case; Singapore: Ernest Case; US: DirecTV Case*]. The underlying public policy of the rule aims to encourage amicable settlement between parties to a dispute [*Cutts Case; ICC Case 6653; Mariwu Case*]. Due to this notion, **RESPONDENT legitimately expected that communication which is privileged when made will remain privileged** thereafter [*see Acorn Case; Sampson Case; Kläsener et al p 99*].

55 CLAIMANT would most likely try to enforce in Equatoriana, the seat of RESPONDENT. Although there is no case law on the definition of the phrase *"without-prejudice"* in Equatoriana [*PO2 p 55 para 30*], it is reasonable to assume that the public policy considerations of other common law jurisdictions apply in Equatoriana [*PO2 p 55 para 34*]. Not applying a privilege operating in the place of enforcement might be considered a breach of public policy [*Waincymer p 814*]. To avoid this undue risk of refusal of recognition or enforcement under Art V(2)(b) NYC, the Tribunal should exclude Exh C7.

3. Exh C7 is covered by the confidentiality obligation of Art 15 FAI Med Rules

56 In Art 30 PSA, the Parties jointly agreed to mediate under the FAI Med Rules [*Exh C2 p 12*]. Art 15 FAI Med Rules stipulates the confidentiality of settlement communication.

57 CLAIMANT now argues that Art 15 does not cover statements exchanged outside the scope of formal FAI Mediation [*MfC para 32*]. However, they only rely on Art 15.1 [*MfC paras 30 et seq*] and fail to mention the full wording of the provision. Art 15.2 expressly provides for the confidentiality of *"statements made regarding the possibility to settle the dispute"* obtained *"in the context of FAI Mediation"*. Such documents are consequently barred from being invoked in subsequent legal

proceedings. Despite their sole reliance on Art 15.1, CLAIMANT even admits that Art 15 can be understood as protecting without-prejudice communication [*MfC para 36*]. As the prospect of mediation was already looming, **Exh C7 should be seen as a settlement statement made in the context of FAI Mediation**. From a textual interpretation of Art 15 alone, it must remain confidential.

58 Even if the Tribunal followed CLAIMANT's narrow interpretation of Art 15, the **Parties nevertheless demonstrated their intent to extend the scope of confidentiality**. Parties are free to deviate from the FAI Med Rules under Art 1.1. To determine whether such a deviation was intended, the Tribunal should apply Art 4.1 UPICC (*supra I.A.1. paras 14-16*).

59 Under the subjective test of Art 4.1(1) UPICC, the Parties intended to extend confidentiality to pre-mediation communication: CLAIMANT knew about RESPONDENT's confidentiality concerns regarding potential disputes [*Exh R1 p 30 para 10*]. These were only reinforced by the debate in Danubia concerning the confidentiality of settlement negotiations and their admission as evidence [*Exh R4 p 33*]. CLAIMANT reassured RESPONDENT that Art 15 FAI Med Rules would suffice to ensure confidentiality [*Exh R2 p 31*]. Following this, RESPONDENT reasonably relied on an extension of confidentiality to settlement communication, as it was understood by Ms Ritter [*Exh R1 p 30 para 10*].

60 Extended confidentiality would also be the understanding of a reasonable person pursuant to the objective test of Art 4.1(2) UPICC: a reasonable person in the same circumstances as the Parties would expect communication made in the furtherance of settlement to remain confidential under Art 15 FAI Med Rules. Otherwise, they might be reluctant to disclose useful information or make necessary concessions [*see Alexander et al para 5.07; Grierson/van Hooft p 56*]. In general, parties do not expect statements made during settlement communication to have the same consequences as if they were made before a tribunal [*see Alexander pp 245 et seq*]. For these reasons, it is held that an agreement to amicably settle contains an implied agreement to exclude such negotiations from being introduced as evidence in legal proceedings [*Alexander p 266; see Cumbria Case; Muller Case*].

61 To conclude, both the wording of Art 15 FAI Med Rules and the Parties' intentions show that Exh C7 must remain confidential. CLAIMANT cannot rely on it in the Proceedings.

C. RESPONDENT IS NOT BOUND BY EQUATORIANA'S TRANSPARENCY COMMITMENTS

62 CLAIMANT argues that RESPONDENT, by objecting to Exh C7, acts in contradiction to the UNCITRAL Transparency Rules and the Mauritius Convention [*MfC para 36*], ratified by the State of Equatoriana [*PO2 p 55 para 34*]. However, these investor-State instruments do not apply to the Proceedings.

63 Art 1(1) Transparency Rules limits their scope of application to *"investor-State arbitration"* initiated under the UNCITRAL Arb Rules pursuant to a *"treaty providing for the protection of investments or investors"* [*see Miles/Goh p 399*]. The same applies for the Mauritius Convention, which aims to extend the application of the Transparency Rules [*Moneke p 178*]. CLAIMANT's assertion that the Mauritius Convention covers *"arbitrations involving state-owned enterprises"* [*MfC para 41*] is not supported by its scope of application.

64 In contrast, the Proceedings are a commercial arbitration – not an investor-State arbitration. Both Parties are commercial entities – not sovereign States [*see Sachs/Schwalb para 76*]. The Proceedings are governed by the FAI Arb Rules – not the UNCITRAL Arb Rules [*Exh C2 p 13*]. They were initiated under the PSA, a private purchase and service contract – not a treaty [*see Sicard-Mirabal/Derains p 12*].

65 The Transparency Rules cannot be applied by analogy due to the substantial differences between treaty-based arbitration involving sovereign States and contract-based arbitration involving private entities. As treaty arbitration is governed by public international law [*Bjorklund/Vanhonnaeker para 19.1*], the international community of sovereign States has an inherent interest in transparency and the dispute's outcome that transcends the interests of commercial parties [*Transparency Working Group 3*]. As the Proceedings were initiated under a contractual arbitration agreement between commercial parties and not an investment treaty concluded by sovereign States, the transparency considerations at the heart of treaty arbitration are not justified [*see Myers Case; O'Malley p 38*]. To apply the Transparency Rules to this arbitration would be to find that the Transparency Rules apply by analogy to all commercial arbitrations involving SOEs.

66 Additionally, the Transparency Rules only govern the accessibility of arbitral documents to the public [*Calamita/Zelazna p 281*]. The admission of Exh C7 concerns the accessibility of a party's document to an arbitral tribunal – a preliminary question outside the scope of the Transparency Rules. In any case, Art 7(1) Transparency Rules exempts *"confidential or protected information"* from publication. This essentially refers to privilege [*Paulsson/Petrochilos p 467; Privilege Working Group para 132*]. While it is true that Equatorianian ministers have declared that *"all their arbitration"* is to be submitted to the Transparency Rules [*ObjLang pp 34 et seq*], this can only be understood as referring to arbitration where the Equatorianian State is a party. Although their sole shareholder is the State of Equatoriana, RESPONDENT is a separate legal entity and managed separately [*RfA p 3 para 2; PO2 p 52 para 3*], conducting the Proceedings in their own name and under their own agreement. To sum up, instruments of investor-State arbitration do not apply to these commercial Proceedings.

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67 To conclude **II.**, Exh C7 shows RESPONDENT's genuine intention to settle the Parties' dispute, making it a privileged without-prejudice offer. Additionally, the Parties' agreed-upon confidentiality provisions exclude such communication from being introduced in the Proceedings. CLAIMANT cannot rely on investor-State instruments in this commercial arbitration. Exh C7 can under no reasonable circumstances remain in the file.

III. RESPONDENT'S EXHIBIT R3 SHOULD REMAIN IN THE FILE

68 The Tribunal is once again called upon to exercise its evidentiary discretion, albeit this time under substantially different circumstances. Exh R3 shows in-house counsel communication within CLAIMANT's management that is direct evidence for CLAIMANT's deceptive conduct during the negotiations with RESPONDENT [*Exh R3 p 32*]. Under the IBA Rules, evidence is generally admissible unless certain grounds for exclusion apply [*Ashford p 146*]. Accordingly, CLAIMANT cannot rely on any grounds for exclusion, neither commercial confidentiality [*MfC para 50*] **(A.)**, nor legal privilege (**B.**), nor CLAIMANT's mere speculation that this document was improperly obtained by RESPONDENT [*MfC para 52*] (**C.**). In any case, excluding the decisive Exh R3 would violate arbitral due process (**D.**).

A. EXHIBIT R3 IS NOT SUBJECT TO COMMERCIAL CONFIDENTIALITY

69 CLAIMANT argues that *"RESPONDENT's strategy on local content policies"*, contained in Exh R3, constitutes commercially confidential information [*MfC para 50; emphasis added*]. Although CLAIMANT does not provide any legal basis that expressly addresses commercial confidentiality, RESPONDENT acknowledges that Art 9(2)(e) IBA Rules permits the Tribunal to exclude evidence on *"grounds of commercial or technical confidentiality"*.

70 CLAIMANT does not provide reasons as to how a disclosure of RESPONDENT's local content policies would affect commercial confidentiality [*see MfC paras 50 et seq*]. Such confidentiality aims to protect parties' trade secrets from unauthorised access [*Sourgens et al p 252; Zuberbühler et al p 218*] which are defined by *"the limited number of people knowing the information, the objective value of keeping the information secret, and the subjective intent or the efforts to do so"* [*Marghitola p 93*]. RESPONDENT's local content strategies are mentioned in the public Request for Quotation [*Exh C1 p 9 para 9*] and in Transition News [*Exh C3 p 14*]. Their secrecy has no commercial value to CLAIMANT or RESPONDENT.

71 If CLAIMANT, in fact, intended to refer to *"[CLAIMANT's] strategy on local content policies"* [*MfC para 50*] to argue that Exh R3 contains sensitive information in relation to its potential suppliers, P2G and Green Ammonia, Exh R3 would still not fall under commercial confidentiality. The quality issues

concerning P2G were already revealed through the RfA [*RfA p 5 para 16*] and the fact that Green Ammonia offered a lower price was disclosed by CLAIMANT's own CEO, Mr Cavendish [*Exh C5 p 18 para 12*]. As it was CLAIMANT themselves who introduced said information into the file, they now cannot rely on commercial confidentiality.

B. EXHIBIT R3 IS NOT SUBJECT TO ATTORNEY-CLIENT PRIVILEGE

72 CLAIMANT refers to the *Caratube II Case* [*MfC para 51*] – a case that dealt with legal privilege [*Caratube II Case; Bertrou/Alekhin p 35*] – thereby appearing to argue that Exh R3 enjoys protection by attorney-client privilege. In this regard, they might invoke Art 9(2)(b) IBA Rules, pursuant to which documents may be excluded for privilege under the *"rules determined by the Arbitral Tribunal to be applicable"*. The Tribunal should apply Mediterranean law to CLAIMANT's in-house counsel communication. Under said law, in-house counsel communication is not protected and Exh R3 is therefore admissible (**1.**). Equality and fairness concerns do not warrant the application of Equatorianian law (**2.**). Even if the Tribunal applied Equatorianian law, Exh R3 would fall under the crime-fraud exception to attorney-client privilege (**3.**).

1. Under the applicable Mediterranean law, in-house counsel communication is not privileged

73 Neither the FAI Rules nor the IBA Rules provide guidance for the determination of the law applicable to attorney-client privilege. Authorities widely suggest applying the closest connection test to identify the legal regime that is most closely connected with the issue at hand [*Gregoire p 137; Henriksen et al p 151; Meyer-Hauser/Sieber p 184*]. Closest connection typically refers to the place where the attorney-client relationship was established [*Berger II p 511; Zuberbühler et al p 211*]. For Exh R3, this points to Mediterraneo, since it is the place of operation for both CLAIMANT and their in-house counsel, Ms Smith, as shown by the usage of Mediterranean email addresses [*RfA p 2; Exh R3 p 32*]. Protection of in-house counsel communication under Mediterranean law is not on file and should not apply.

2. Equality and fairness do not warrant the application of Equatorianian law

74 CLAIMANT might seek to invoke the more protective Equatorianian law [*Exh R4 p 33*] on attorney-client privilege under the so-called *"most favoured nation rule"*, based on equality and fairness considerations. This rule aims to offset imbalances between different applicable legal regimes by extending the rules that provide the broadest protection to all parties [*Zuberbühler et al pp 212 et seq*]. However, its application in this case is unjustified.

75 Pursuant to Art 9(4)(c) IBA Rules, and as endorsed by authorities [*Gore para II.1.b; IBA Commentary p 28; ICCA Task Force p 120*], RESPONDENT requests that the Tribunal consider the Parties' legitimate

expectations when determining the applicable standard of privilege protection. Typically, when entering into an attorney-client relationship, parties expect the law of their home jurisdiction to apply [*ICCA Task Force p 120; Mökesch p 254*]. Privilege should not be extended where a party could not have reasonably expected such protection to apply [*Marghitola p 79; Shaughnessy p 467*]. Particularly, a party with the lower standard cannot be said to have expected a higher standard of protection [*Fernández Araluce p 29; Kuitkowski p 96*]. Extending protection beyond these expectations risks unjustifiably excluding key evidence, potentially impairing the other party's ability to present its case [*Scherer et al para 37.3.3.1; Waincymer p 806*]. As the *"most favoured nation rule"* disregards party expectations, the Tribunal should not apply it [*Shaughnessy p 467; see Born I § 16.02[8][f]*].

76 In any event, the prerequisites for applying the *"most favoured nation rule"* are not met: it would require an actual imbalance between the Parties [*de Boisséson p 713; Zuberbühler et al pp 212 et seq*]. However, in the present case, only Exh R3 – an email from CLAIMANT – is affected by concerns of attorney-client privilege, whereas no in-house counsel communication from RESPONDENT is at issue. As only CLAIMANT asserts privilege for legal advice, the proper standard is the law which they legitimately expected to apply [*see Mökesch pp 260 et seq*]: the law of Mediterraneo. Extending Equatorianian law's broader protections would be both unwarranted and inequitable in this context.

3. Exh R3 falls under the crime-fraud exception to attorney-client privilege under Equatorianian law

77 Even if the Tribunal applied Equatorianian law, Exh R3 is directly connected to CLAIMANT's deceptive behaviour (*infra III.D. paras 90-93*) and therefore falls under the crime-fraud exception – also called iniquity exception – to attorney-client privilege [*see Al Sadeq Case; ICC Case 20097/RD; Andrews/Zorn p 17; IBA Report Annex 2 p 3*].

78 Said exception is a common law doctrine and therefore recognised in Equatoriana [*see Citic Pacific Case; East-West Case; O'Connell p 3*], as a common law country with detailed rules on legal privilege like the US [*Exh R4 p 33; PO2 p 55 para* 34]. Attorney-client privilege encourages open communication between attorney and client [*Mökesch p 2*]. However, if there is prima facie evidence [*Clark Case*] that legal advice was sought to advance ongoing or future wrongdoing, such privilege is inapplicable [*Tex Health Case; Zolin Case; Mosk/Ginsburg p 352; O'Connell p 3*]. The crime-fraud exception also extends to *"intentional tort involving misrepresentation, deception, and deceit"* [*Koch Case; see Madanes Case*] or conduct contrary to good faith [*Al Sadeq Case*].

79 CLAIMANT sought advice from their in-house counsel, Ms Smith, on how to maintain RESPONDENT's expectation that the promised local content ratio could be achieved despite CLAIMANT's doubts as to

whether the contract with a local supplier, P2G, would materialise [*ARfA p 26 paras 6 et seq; Exh R3 p 32*]. That advice is contained in Exh R3. Utilising drafting suggestions from in-house counsel, RESPONDENT wrote an email highlighting the likelihood of the promised local content ratio and toning down quality concerns about P2G's facilities [*Exh R2 p 31; Exh R3 p 32*]. Thus, the advice in Exh R3 was sought in furtherance of an ongoing misrepresentation. It cannot be covered by attorney-client privilege as the crime-fraud exception applies.

C. EXHIBIT R3 WAS NOT OBTAINED IMPROPERLY

80 CLAIMANT speculates that Exh R3 was illegally obtained by RESPONDENT during criminal investigations against employees of CLAIMANT, allegedly *"instigated"* by RESPONDENT, violating the duty to arbitrate in good faith and procedural fairness [*MfC paras 52 et seq*]. They might have intended to base their request for exclusion on Art 9(3) IBA Rules, concerning illegally obtained evidence, or Art 9(2)(g) IBA Rules, concerning equality and fairness. Either way, CLAIMANT cannot prove that Exh R3 was obtained in criminal investigations rather than through a leak, nor that the investigations were improper **(1.)**. As the investigations were initiated in good faith, documents obtained in their course are admissible **(2)**.

1. CLAIMANT cannot prove that Exh R3 was obtained improperly

81 For severe, quasi-criminal allegations, a *"more likely than not"* standard of proof is unreasonable [*Greenberg/de Zitter p 168; Sourgens et al p 88*] to prevent parties from making unfounded accusations [*Alftar p 149*]. Thus, international arbitral practice supports a heightened standard for bribery, bad faith, or severe wrongdoings [*ConocoPhillips Case; EDF Case; ICC Case 13914; Betz p 276; Popova/Wang Lachowicz p 101*]. Especially in the context of State power abuse, *"a particularly high threshold must be overcome"* [*Churchill Mining Case para 70*]. As CLAIMANT invokes RESPONDENT's bad faith conduct and thereby indicates an abuse of State power [*MfC paras 52, 55*], CLAIMANT's allegations are subject to said heightened standard. However, they cannot even meet the lower *"more likely than not"* standard.

82 First, CLAIMANT's own admissions reveal a pattern of internal mismanagement and breaches of confidentiality. Notably, CLAIMANT's former Head of Legal, Mr Law, has leaked critical information to competitors [*PO2 p 53 para 11*]. Further, CLAIMANT's legal representative admits a leak of information concerning the local content requirement which affected the negotiations with P2G [*RfA p 5 para 15*]. The temporal and substantive context do not rule out that this leak might have been Exh R3. In light of this pattern, CLAIMANT's argument that a leak of Exh R3 is *"less likely"* [*Exh C8 p 36 para 8*] is difficult to reconcile with the facts.

83 For leaked documents to be excluded under Art 9(3) IBA Rules, the admission would have to impede procedural fairness or RESPONDENT would have had to be involved in the illegal procurement [*see IBA Commentary p 30; Sicard-Mirabal/Derains p 208*]. As CLAIMANT has not submitted any evidence in this regard, the Tribunal should follow the predominant view and consider leaked documents admissible [*see Caratube II Case; Bertrou/Alekhin p 52; Sicard-Mirabal/Derains p 208*].

84 Second, even if CLAIMANT could prove an obtention through criminal investigations, they nonetheless lack evidence as to the impropriety of the investigations. CLAIMANT relies on their own former employee's interpretation of statements made by RESPONDENT's CEO, Mr la Cour, who allegedly threatened criminal investigations [*Exh C8 p 36 para 3*]. However, the Tribunal should consider the context of said statements: Mr la Cour was rightly concerned about fraud through misrepresentation and collusion during the Parties' negotiations [*PO2 p 55 para 27*]. CLAIMANT's deceptive conduct in Exh R3 itself confirms that these concerns were not just an unsubstantiated threat. The investigations were thus initiated in good faith.

85 In sum, CLAIMANT's track record strongly indicates that Exh R3 seeped out through internal channels. CLAIMANT cannot prove that RESPONDENT received Exh R3 directly from investigators nor that the investigations were improperly initiated.

2. Evidence obtained through properly conducted investigations is admissible

86 If the Tribunal came to the conclusion that Exh R3 was, in fact, obtained through the investigations, it should hold that the investigations were initiated in good faith and that Exh R3 is therefore admissible. CLAIMANT might argue that RESPONDENT – as a SOE – is generally not allowed to submit evidence obtained through State power, as it would put one party in a privileged position, disrupt the equality of arms, and violate the duty to arbitrate in good faith. This is unfounded.

87 The issue of evidence obtained through State power is prevalent in investor-State arbitration [*see Lao Case; Libananco Case; Mirzayev pp 71 et seq*]. Both Parties are private entities, involved in a commercial arbitration (*supra II.C. paras 62-67*).

88 Even if the Tribunal applied this case law, this would not lead to Exh R3's exclusion. Unless exceptional circumstances apply, the usage of State power does not affect the integrity of proceedings, and evidence obtained through it can be used in subsequent proceedings [*Lao Case; Quiborax Case; Sourgens et al p 262*]. The tribunal in the *Gavrilović Case* saw no equality of arms concerns, as the State apparatus had not been used *"as a vehicle through which to assist it in this arbitration"* [*Gavrilović Case para 196*]. Correspondingly, other tribunals have permitted reliance on evidence procured through State power [*Caratube I Case; Roussalis Case; Sourgens et al pp 260 et seq*].

89 Even if the Tribunal considered an obtention through criminal investigations evidenced, RESPONDENT would be allowed to rely on Exh R3 as the investigations were initiated in good faith.

D. THE EXCLUSION OF EXHIBIT R3 WOULD VIOLATE DUE PROCESS

90 Returning to the duty to render an enforceable award under Art 52 FAI Arb Rules (*supra II.B.2. paras 53-55*), the Tribunal should refrain from excluding Exh R3, as this would violate due process and thus increase the risk of unenforceability of a subsequent award under Art V(1)(b) NYC.

91 Due process is a fundamental principle of international arbitration [*Ferrari et al pp 1, 19; Lew et al p 95*], superseding tribunal discretion [*Godhe II p 80*]. It is reflected in Art 26.2 FAI Arb Rules, which stipulates that each party shall have a reasonable opportunity to present its case. In the *Hoteles Condado Case*, the court held that the exclusion of evidence violates due process if the evidence is **unquestionably relevant** and **decisive** to determine a party's position [*Hoteles Condado Case*].

92 Exh R3 shows communication between CLAIMANT's management concerning their negotiations with RESPONDENT [*Exh R3 p 32*]. It demonstrates that CLAIMANT was well-aware that a key factor for being awarded the PSA – the promised local content [*ARfA p 26 para 6; Exh R1 p 29 para 4*] – would most likely not be met [*ARfA p 26 para 7; Exh R3 p 32*]. CLAIMANT, however, held up the impression that it would [*Exh R2 p 31; Exh R3 p 32*] and chose to reveal this crucial information only after the PSA was already concluded [*RfA p 3 para 4; Exh C4 p 15*].

93 Thus, Exh R3 is an **unquestionably relevant** component of the factual matrix around which RESPONDENT exercised its right to termination and should therefore be considered by the Tribunal when assessing the termination. It is further **decisive**, as it is the only available document that proves CLAIMANT's unwillingness and incapacity to perform the PSA under the agreed terms. As Exh R3 fulfils the dual criteria established in the *Hoteles Condado Case*, its exclusion would violate due process. To avoid refusal of enforcement, it should remain in the file.

* * *

94 To conclude **III.**, Exh R3 is admissible as its content is neither subject to commercial confidentiality nor attorney-client privilege. Further, CLAIMANT's track record suggests that Exh R3 was leaked. However, even if received through the investigators, Exh R3 would be admissible as the investigations were carried out in good faith. The decisive and relevant Exh R3 must remain in the file, as an exclusion would impair RESPONDENT's due process rights.

PART II: SUBSTANTIVE ISSUES

95 The PSA is governed by the domestic law of Equatoriana. By asserting the applicability of the CISG, CLAIMANT is attempting to deprive RESPONDENT of a termination right enshrined in the domestic law of Equatoriana, designed to enable SOEs to comply with changes in government policy. The CISG is not applicable to the PSA (**IV.**), as it constitutes neither an international contract nor a sale of goods. In any case, the PSA would be exempt from the sphere of application as a sale by auction. Even if the Tribunal were to find that the PSA falls within the sphere of application of the CISG, the Parties have validly excluded its application (**V.**).

IV. THE CISG IS NOT APPLICABLE TO THE PSA

96 CLAIMANT asserts that the PSA is governed by the CISG [*MfC paras 57 et seq*]. For the CISG to apply to a contract, all of the following cumulative requirements must be met: the contract concerns a sale of goods, it is international, and no exceptions under Art 2 CISG apply. The PSA lacks all these criteria. It is a domestic contract since both Parties have their relevant places of business ("**PoBs**") in Equatoriana (**A.**). Furthermore, as a typical turnkey contract, it is not a sale of goods and does not fall within the substantive sphere of application of the CISG (**B.**). In any case, Art 2(b) CISG exempts the PSA as a sale by auction (**C.**). Accordingly, the CISG does not apply.

A. THE PSA IS A DOMESTIC CONTRACT

97 Only international contracts are governed by the CISG. Under Art 1(1), the CISG does not apply to contracts concluded between parties whose relevant PoBs – those with the closest connection to the contract and its performance – are located in one State. CLAIMANT has an administrative centre in Mediterraneo [*RfA p 2*] and asserts that it was their relevant PoB for the PSA [*MfC paras 72 et seq*]. CLAIMANT's approach would indeed render the PSA international, with CLAIMANT and RESPONDENT having their PoBs in Mediterraneo and Equatoriana, respectively.

98 However, not only did CLAIMANT have multiple PoBs (**1.**), but the relevant one under the PSA was at the building site in Equatoriana (**2.**). Since both Parties had their relevant PoBs in Equatoriana, the PSA is a domestic contract that does not fall within the sphere of application of the CISG.

1. The site in Equatoriana was a place of business of CLAIMANT

99 While CLAIMANT's administrative centre is located in Mediterraneo and serves as one of several PoBs [*RfA p 2*], they would have operated a building site in Equatoriana, manifesting their physical presence there. The building site fulfils the criteria for the qualification as a PoB under Art 1(1) CISG.

100 As defined by case law, a PoB is a place with sufficient autonomy [*Floor Coverings Case*] and a stable organisation [*Clothing Linen Case*]. **Sufficient autonomy** is already established when a potential PoB has the power to perform contracts [*Piltz I Art 10 para 2-81*], whereas a **stable organisation** requires a certain continuance [*Clothing Linen Case*]. This excludes cases in which premises are used by the parties for a brief period of time, eg fair booths and conference rooms [*Hachem Art 1 para 24*]. Whether these criteria are met must be assessed on a case-by-case basis [*Ferrari I p 963*]. Thereby, the commercial reality should be decisive, as the CISG disregards formalities such as separate legal entities [*Brekoulakis Art 10 para 21*]. A PoB is not limited to legal entities or their branches but can be any organisational structure [*Piltz I Art 10 para 2-79*]. For example, **a building site qualifies as a PoB** [*Piltz I Art 10 para 2-79; Walter Bau Case*]. As held in the *Walter Bau Case*, a *"tunnel construction site [...] must be considered a place of business under Art 1(1) CISG"* [*translated by the authors*].

101 The building site in Equatoriana fulfils the mentioned criteria. First, it had **sufficient autonomy** in the sense that performance of the PSA depended on work to be undertaken on the site by CLAIMANT and their partners, Volta Transformer and Green Ammonia. Considering the scale of the project, these works would have been coordinated by a manager on site. This manager would also serve as a point of contact with RESPONDENT and ensure completion of the project as well as adherence to industry standards [*see Alhady/Ezeldin pp 6 et seq; Mäki/Kerosuo p 165; UNCITRAL Guide p 110 para 3*]. Second, this ongoing management at the site will ensure that it continues to function as a **stable organisation**, as required for a project with the complexity of that undertaken by the Parties. This management would also ensure that the site remains viable for more than three years: two years for the construction of the plant, a year for maintenance and training services, and additional time for any further construction should the options be exercised [*RfA p 3 para 4; Exh C1 p 8; Exh C2 p 11 Art 3*].

102 That this building site would become operational only after the conclusion of the PSA has no effect on its status as a PoB. It suffices that the **Parties expected** that a building site would be set up and become operational. This is underscored by the *Target Corp Case*, where a Canadian party opened a facility in the US after concluding a contract with an American company to implement the agreement. The facility was later recognised as a PoB, since the Canadian party had been expected to set it up specifically for the purposes of the contract [*Target Corp Case*]. Similarly, CLAIMANT was expected to be physically present in Equatoriana for the purposes of the contract [*Exh C1 p 8; Exh C2 p 10 Art 1; Exh R3 p 32*].

103 In accordance with commercial reality, the building site was a PoB of CLAIMANT. Hence, CLAIMANT had two PoBs: its administrative centre in Mediterraneo and the building site in Equatoriana.

2. CLAIMANT's place of business in Equatoriana is relevant under Art 10(a) CISG

104 Despite CLAIMANT having multiple PoBs, only one is relevant for the internationality of the PSA under Art 10(a) CISG, namely that with the closest connection to the contract and its performance.

105 CLAIMANT discusses the connection to the contract and its performance under Art 10(a) CISG as cumulative criteria [*MfC para 72*]. However, there are circumstances in which a party uses one PoB to conclude the contract but another to perform it [*Schmidt-Kessel Art 10 para 5*]. If understood as cumulative criteria, Art 10(a) could not provide solutions for such cases. Consequently, a connection to both the contract and its performance cannot be demanded. Rather, all circumstances of the individual case must be assessed to determine the most **substantial and real connection** [*Jayme Art 1 para 2.3*]. Such connection exists primarily with the **place of performance of the contract**, if the parties knew or contemplated that the contract would be performed in a specific place [*Ferrari I p 964; Herrmann p 213; Secretariat Commentary Art 9 para 6*].

106 While the PSA was concluded through CLAIMANT's administrative centre in Mediterraneo, CLAIMANT does not acknowledge the physical place of performance: under the PSA, the place designated for construction and maintenance of the plant would be the building site in Equatoriana [*RfA p 5 para 13; Exh C2 pp 10 et seq*]. What is more, one of the requirements for the award of the contract was to either use local materials or find local subcontractors [*Exh C1 p 9*] since RESPONDENT's main objective was to *"develop local industry"* [*ARfA p 25 para 4*]. This was also known by CLAIMANT, who sought to maintain the impression during the negotiations that they would achieve the required local content by cooperating with two local entities, Volta Transformer and P2G [*RfA p 5 para 13; ARfA p 26 para 5; Exh R1 p 29 para 4; Exh R2 p 31*]. That the negotiations between CLAIMANT and P2G later failed is irrelevant for determining the relevant PoB, as CLAIMANT waited until after the conclusion of the PSA to inform RESPONDENT [*ARfA p 26 para 7; Exh R3 p 32; see Rajski Art 10 para 2.2*].

107 Of Claimant's two PoBs, the building site in Equatoriana had the closest connection to the PSA. Hence, it is the relevant PoB under Art 10(a) CISG. Like RESPONDENT's PoB, it lies in Equatoriana. Thus, the PSA is a domestic contract that is not governed by the CISG.

B. THE PSA DOES NOT CONSTITUTE A SALE-OF-GOODS CONTRACT

108 For the PSA to be governed by the CISG, it would need to be a sale-of-goods contract within the meaning of Art 1(1) CISG. CLAIMANT argues that *"while the agreement includes engineering and planning services, the preponderant part, valued at over 60 % of the total price, consists of the delivery of equipment"* [*MfC para 78*]. From this, they derive the applicability of the CISG to the PSA. These assertions are unfounded. It is true that the PSA contains sale-of-goods elements ("**sales**") as well as

works and service elements ("**services**"). This makes it a mixed contract, specifically a turnkey contract. Such contracts were intended to be exempt from the CISG (**1.**). Even if one subjected the PSA to a stricter examination, the CISG would not be applicable, as the service elements are the preponderant obligation (**2.**).

1. The PSA is a turnkey contract

109 The construction of the plant required a more complex contract than just a simple sale. The PSA comprised a number of interrelated sales and service obligations: the agreed services would have included the packaging of the electrolyser stacks, the management and engineering of the project, the construction of the buildings and foundations, site works, and continued training and maintenance [*Exh C5 p 17 para 11*]. Consequently, the PSA is a mixed contract, which CLAIMANT acknowledges [*MfC para 77; see also Karollus p 24*].

110 What is more, the PSA is a turnkey contract. Under such contracts, the contractor has the full responsibility to plan and construct a plant, which must be ready for operational use at the time of handover [*Cambridge Business Dictionary "turnkey (adj.)"*]. In the present case, not only do the Parties refer to the plant as *"turnkey"* [*Exh C1 p 8; Exh C5 p 16 para 9*], but the various service obligations are also reflective of a typical turnkey contact: CLAIMANT was contracted to provide all necessary works and services along with the delivery of the plant [*RfA p 3 para 4; Exh C2 pp 10 et seq Art 2*], which would have started production immediately after handover [*Exh C1 p 8 para 1; Exh C2 p 11 Art 3; see Mahnken pp 238 et seq*]. This, too, is undisputed by CLAIMANT [*MfC p 9*].

111 Although such contracts partly concern the sale of goods, the provision of the CISG on mixed contracts – Art 3(2) – was formulated specifically to exclude turnkey contracts from its sphere of application, given their complexity [*Ferrari II Art 3 para 18; see Mahnken p 242*]. As evident from a report of the UNCITRAL Working Group, the insertion of Art 3(2) was intended to ensure the exclusion of turnkey contracts in particular: *"[...] in a "turnkey" contract, the contract is not subject to the provisions of this convention"* [*UNCITRAL YB 1976 p 98 No 2*].

112 This aim has been recognised and accepted by case law and literature, according to which Art 3(2) CISG leads to the inapplicability of the CISG to turnkey contracts [*Inter Rao Case; Waste Separation Case; Grieser p 150; see Gillette/Walt p 61; Honnold/Flechtner para 81*]. In the *Inter Rao Case*, a contractor was obligated to supply, install and commission parts of a plant for a turnkey project. In determining whether the CISG was applicable, the tribunal emphasised that the obligations of the contractor were in their nature more extensive than the mere purchase and sale of goods, as the project had to be delivered *"in perfect working order for its commercial operation"*. The tribunal concluded

that the **CISG** ***"is not designed for this type of contract and, in principle, should not be applied in this case"*** [*Inter Rao Case, translated by the authors*].

113 Since it is undisputed between the Parties that the PSA is a turnkey contract [*MfC p 9*], the Tribunal should give effect to the rationale behind Art 3(2) CISG and deny the applicability of the CISG.

2. The CISG does not apply to the PSA given the preponderance of service elements

114 Even if one were to undertake a more concrete examination of the individual case, Art 3(2) CISG exempts mixed contracts in which the services are preponderant from its sphere of application. Preponderance under Art 3(2) CISG is determined on the basis of the Parties' intentions (**a.**), which show the preponderance of the service obligations (**b.**).

a. The Parties' interests determine the preponderant obligation

115 If the Tribunal subjects the PSA to a strict examination under Art 3(2) CISG despite the drafters' intentions, it will still arrive at the non-applicability of the CISG due to the preponderance of the service elements. Under Art 3(2) CISG, mixed contracts are not governed by the CISG whenever the service obligations are preponderant compared to the sales obligations [*Huber I Art 3 para 12; Köhler Art 3 para 2; Mistelis/Raymond Art 3 para 3*].

116 The wording of Art 3(2) CISG does not expressly contain a standard on how the preponderant obligation is to be determined [*Huber II p 46; Mistelis/Raymond Art 3 para 17*]. CLAIMANT mistakenly assumes that the preponderant obligation should be assessed on the basis of economic values [*MfC paras 77 et seq*]. In fact, the Parties' interests are paramount.

117 First, preponderance under Art 3(2) CISG was never intended to be assessed on the basis of economic values. Before the term "*preponderant*" was included in the CISG, the UK delegation made a proposal to use in its place the phrase "*major part in value*" [*Secretariat Commentary pp 84, 241*]. That this wording was dismissed shows a clear preference of the drafters for a comprehensive assessment of the preponderant obligation, thus rejecting the notion that economic values alone should be decisive [*Ferrari II Art 3 para 14; Huber I Art 3 para 14; Köhler Art 3 para 13*]. Thus, Art 3(2) CISG provides for a less one-dimensional approach when determining the preponderant obligation.

118 Instead of isolating one aspect of the parties' agreement – the value of the contractual obligations – the interests of the parties should be considered in their entirety. In the same vein, case law and literature predominantly recognise that the parties' interests are decisive under the preponderance test [*Car Trim Case; Centerless Case; Potato Chips Case; Waste Separation Case; Piltz I para 2-37; see Mistelis/Raymond Art 3 para 20*]. In the *Waste Separation Case*, the court focused exclusively on

the parties' interests to determine the preponderant obligation. The contract concerned the delivery of a waste recycling plant, encompassing planning, delivery, construction, and maintenance of the plant. The court found that the CISG did not apply, as the contract placed **significantly more weight** on the installation and maintenance of the components than on their mere purchase [*Waste Separation Case*].

119 In the *Orintix Case*, one party was contracted to provide a computer system, prepare it for operational use, and to adjust the included software repeatedly. Thus, while the delivered goods were higher in economic value, the court determined that the operability of the entire system was central to the contract. Consequently, it decided that the services were the preponderant obligation and the economic values irrelevant [*Orintix Case*]. Courts have regularly found a preponderance of service obligation in cases where their economic value appeared to fall behind the value of the sales elements [*Orintix Case; Potato Chips Case*].

120 In any case, authorities have recognised that the application of the economic value test is limited by appropriateness considerations [*see AC Opinion No 4 para 3.3; Schroeter para 101*]. In line with this, an application of the economic value test is inappropriate in the present case. Turnkey contracts contain obligations which are intertwined in such a complex way that the economic value test leads to arbitrary results [*see Waste Separation Case*]. On the one hand, the value of the delivered machinery is dependent on correct installation, planning and engineering. On the other hand, RESPONDENT's obligations entail not only monetary compensation, but also various additional obligations: Art 4 PSA required RESPONDENT to hand over the building site, organise permits, provide the necessary utilities for construction, and to ensure the connection of the plant to Equatoriana's green energy infrastructure [*Exh C2 p 11 Art 4*]. Hence, assigning specific values to each of these obligations and then comparing them is inappropriate.

121 Last, it is impossible to conduct the economic value test in the present case. In the *Cylinder Case*, the court found for this to be the case if a contract provides for a uniform price without a possibility to separate the values of the different obligations [*Cylinder Case*]. This is the case for the PSA, which included two options to extend the base plant. The file gives no indication as to the ratio of economic values between the sales and service obligations contained in those options. Furthermore, it is unclear what exact obligations the options even would have entailed [*PO2 p 54 para 18; cf Exh C2 pp 10 et seq Art 2 paras 2 et seq; Exh C5 p 17 para 11*]. As in the *Cylinder Case*, the Parties set a uniform price of EUR 160 MM for both options [*Exh C5 pp 16 et seq para 9*]. In view of these uncertainties, it only makes sense that CLAIMANT themselves conveniently omits the options when determining the preponderant obligation [*cf MfC paras 77 et seq*]. As the options formed part of one uniform contract

with the remaining obligations, this uncertainty affects the entire PSA. To conclude, only the interests of the Parties determine the preponderant obligation.

b. The service elements of the PSA are the preponderant obligation

122 In assessing the parties' interests under Art 3(2) CISG, various factors must be considered in conjunction. In essence, the test aims to determine the weight which the parties attribute to the various obligations [*Pasteurizing Lines Case; Huber I Art 3 para 14; Köhler Art 3 para 13; Mistelis/Raymond Art 3 para 19*]. In the present case, the Parties attribute more weight to the service elements.

123 First, the relevance attached to the final product rather than the machinery alone supports the preponderance of the services. This was pertinently established in the *Potato Chips Case,* which concerned a contract for the construction of a plant for the production of potato chips. The court found that the sales elements were higher in value than the service elements. Nevertheless, since the buyer had no interest in the delivery of the machinery alone, the court found the CISG inapplicable under Art 3(2) [*Potato Chips Case*]. Similarly, the PSA concerns the delivery of a plant for the production of green hydrogen [*Exh C2 pp 10 et seq Art 2*]. RESPONDENT was only interested in the finished plant – not in the machinery. If they had been, they would have arranged for different contractors to perform the various obligations, such as the construction work and the maintenance and training services. They did not. Instead, they hired one contractor – CLAIMANT – to perform the entire contract [*Exh C1 p 8; Exh C2 pp 10 et seq Art 2*].

124 Second, the period of time necessary for performance is relevant. Obligations which are continuous in nature and require a long period of time for fulfilment indicate the preponderance of the service obligations [*Huber I Art 3 para 14*], whereas a sales contract is best demonstrated where parties have short and largely transactional obligations. In its Art 3, the PSA provides for a timeline stretching over more than three years. This duration of the contractual relationship would have been extended even further had RESPONDENT exercised the options [*Exh C2 pp 10 et seq Art 2*].

125 Third, the parties' self-description in the contract is indicative of its nature [*Mahnken p 244*]. The PSA explicitly refers to CLAIMANT as the *"contractor"* and RESPONDENT as the *"customer"*, not as a *"seller"* and *"buyer"*, respectively [*Exh C2 pp 10 et seq*]. This wording is typical for works contracts, but entirely atypical for sales contracts [*see Mahnken p 244*]. Notably, the Parties chose a terminology which goes contrary to the one in the CISG.

126 To conclude, the service obligations of the PSA are preponderant. Therefore, the PSA is not a sale-of-goods contract within the meaning of the CISG and the Convention is inapplicable.

C. EVEN IF THE PSA WERE A SALE OF GOODS, IT WOULD BE EXEMPT FROM THE CISG AS AN AUCTION

127 Even if the PSA constituted a sale of goods, it would qualify as a sale by auction. Art 2(b) CISG exempts such sales from the Convention's sphere of application. CLAIMANT misapplies said provision as they detach it from the sphere of application and invoke it in the context of the Parties' implied exclusion under Art 6 CISG [*see MfC paras 104 et seq*]. The exemption under Art 2(b) is fulfilled by the PSA (**1.**) and is in line with the purpose of Art 2(b) (**2.**).

1. The PSA was a sale by auction within the literal meaning of Art 2(b) CISG

128 The PSA has the nature of a sale by auction because the reverse-bid auction conducted by RESPONDENT was an *"auction"* within the ordinary meaning of this word.

129 As a treaty, the CISG has to be interpreted in accordance with Art 31 VCLT [*see PO2 p 55 para 31; see Arts 1, 4 VCLT*]: its terms are to be given their *"ordinary meaning"* in light of the object and purpose of the treaty [*Andersen pp 255 et seq*], taking all authentic languages into account (Art 33 VCLT). This is in line with the interpretation methodology of the CISG, which focuses on the text of its provisions in all authentic languages [*Coffee Machines Case; Herber/Czerwenka Art 7 para 2; Melis Art 7 paras 10 et seq*] and emphasises international uniformity [*Piltz I para 2-184; Reinhart para 2*]. The usual literal meaning of a term is to be assumed [*Magnus Art 7 para 31; see Kropholler p 264*]. Such focus on the plain meaning is reasonable: the drafters of the CISG resorted to common, *"earthy"* language rather than domestic legal terms to create a text that could be used as a *"common language"* of international trade [*Felemegas p 221*]. When looking at the usual meaning of the terms of the CISG, one must interpret the notion of *"auction"* functionally, instead of restricting it to the best-known type of auction, the so-called English auction [*Mankowski Art 2 para 7*].

130 From the outset, CLAIMANT relies on this concept of English auctions and arbitrarily denies that any other types of auctions have relevance under Art 2(b) CISG [*see MfC paras 104 et seq*]. This is the oldest kind of auction, in which the price offered increases with each bid and the highest bidder wins [*Krishna p 2*]. However, the usual meaning of an *"auction"* encompasses different types of sales of *"somewhat similar character"* [*Oxford English Dictionary "auction (n.), sense 3"*]. Other authentic languages of the CISG similarly **define the equivalent terms for *"auction"* broadly, encompassing different types of auctions** [*see French: Dictionnaire de l'Académie française "enchère (n.), sense 1" and Larousse Dictionary "adjudication (n.), sense 1"; Russian: Ozhegov "аукцион (и.сущ.)"*]. In particular, the Spanish term *"subasta"* is defined, among other meanings, as the *"award of a contract, generally of public service, such as the execution of a work, the supply of provisions, etc., to the one*

who presents the most advantageous proposal" [*Diccionario de la lengua española "subasta, sense 2"; translated by the authors*]. What all notions of "*auction*" have in common are two features: first, they elicit information in the form of bids and the winner is determined solely on the basis of the received information; second, auctions are anonymous in a sense that the identities of the bidders are irrelevant for the determination of the winner [*Krishna p 6*].

131 Under Art 2(b), it is irrelevant whether an auction was initiated by the seller or the buyer. The latter is referred to as a reverse-bid auction [*Mankowski Art 2 para 7*]. This must be seen in the context of the specific interpretation principles provided by Art 7 CISG [*Honnold/Flechtner p 148*]. One of them is to give regard to the international character of the CISG, which means that its terms are the result of a compromise between different jurisdictions [*Ferrari III p 141; Herber/Czerwenka Art 7 para 2*]. Reverse-bid auctions already existed in various jurisdictions when the CISG was adopted in 1980 [*Mankowski Art 2 para 8*]. If this specific type of auction was intended to be excluded from the meaning of Art 2(b), delegates would have addressed the issue and strived for a more detailed wording.

132 The reverse-bid auction conducted by RESPONDENT corresponded to the nature of an auction. On the one hand, RESPONDENT could only conclude the PSA with parties selected on the basis of the submitted bids. On the other hand, only objective elements of the bids, such as the technologies used and the efficiency of the plant, were decisive for the award of the contract [*RfA p 3 para 3; Exh C1 p 8 para 1(c); PO2 pp 52 et seq para 9*]. The bidders' identities remained irrelevant. RESPONDENT simply reserved their right to reject proposals at any time [*Exh C1 p 9 para 2(b)*]. This is similar to an auction with reserve, which is typical for common law jurisdictions like Equatoriana [*PO2 p 55 para 34; see Lord § 4:12; Van Arsdale § 28; Winbush § 20*]. In brief, since the PSA was a sale by auction, it is exempt from the sphere of application of the CISG by virtue of Art 2(b).

2. The purpose of Art 2(b) CISG justifies the exemption of the reverse-bid auction conducted by RESPONDENT

a. Protection of unaware parties is not the purpose of Art 2(b)

133 CLAIMANT alleges that public procurement proceedings are not auctions within the meaning of Art 2(b) because the application of the CISG is not surprising for the parties [*MfC para 111*]. CLAIMANT seemingly relies on the protection of unaware parties from a surprising application of the CISG. Yet, such protection is not the purpose of the provision and does not affect the exemption under it.

134 First, protection from the unpredictable application of the CISG is already granted by a separate provision, Art 1(2) CISG. Under this provision, the internationality of the contract is disregarded if it

was not apparent to parties before or at the time of contract conclusion [*Manner/Schmitt Art 1 para 6*]. CLAIMANT seemingly relies on historical materials to allege that this purpose is inherent in the exemption for auctions. It is true that the Working Group from 1971 initially added the exemption, among other reasons [*see Honnold/Flechtner p 65*], *"since at the opening of the auction the seller could not know which buyer would make the purchase"* [*UNCITRAL YB 1971 p 56 para 58*]. However, this happened in the early stages of the CISG's drafting process, which attempted to modernise its predecessors, the ULIS and ULF. It had not included any provisions protecting parties from a lack of apparent internationality, such as the current Art 1(2) CISG. In fact, the only similar provision in the 1971 draft was strongly criticised by the members of the Working Group and required significant revision [*UNCITRAL YB 1972 p 73 para 27; see Herber/Czerwenka Art 1 para 20*]. If Art 2(b) CISG ever had an ancillary rationale of protecting parties unaware of a contract's international nature, this eventually became obsolete once Art 1(2) materialised as the central provision of the Convention pursuing this aim [*Herber/Czerwenka Art 1 para 20*].

135 This is illustrated by case law, which considers Art 2(b) and Art 1(2) as separate standards [*Electricity Meters Case; Online Auction of Car Case*]. In the *Online Auction of Car Case*, the CISG did not apply *"because the foreign nature of the contract was not recognisable to the defendant when it was concluded (Art 1(2) CISG) and because auctions do not fall within the material scope of the agreement (Art 2(b) CISG)"* [*Online Auction of Car Case; emphasis added; translated by the authors*]. The court clearly applied unpredictability as a separate legal standard.

136 Second, if the qualification of an *"auction"* under Art 2(b) depended on the necessity of protecting unaware parties, the provision would have explicitly included this as a requirement for the exemption under it. For instance, the exemption for goods sold for personal use under Art 2(a) explicitly provides that it does not apply when *"the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use"*. This explicit clarification serves the purpose of protecting the seller's reliance on the applicability of the CISG [*Hachem Art 2 para 9*]. Conversely, the drafters must have knowingly left out any similar specifications in the immediately following provision, Art 2(b).

b. The true rationale behind Art 2(b) is to uphold specialised national rules

137 According to CLAIMANT, the reverse-bid auction does not fall under Art 2(b) since it was governed by the Public Procurement Law of Equatoriana, suggesting a formalised process, unlike a *"typical"* auction under Art 2(b) [*MfC para 108*].

138 The actual purpose of Art 2(b) CISG is to exempt auctions from the Convention's sphere of application precisely because **widely divergent** special rules exist in the **national legal systems** [*Huber I Art 2 para 1; Secretariat Commentary Art 2 para 5*]. For this reason, procurement proceedings are encompassed by Art 2(b). Public procurement law in a multitude of common and civil law jurisdictions contains tailored contract law provisions, diverging from both general contract law and the CISG. They variously prescribe the written form, in contrast to the freedom of form in Art 11 CISG (eg Sec 145 Austrian Federal Procurement Act; Art 153 Spanish Code of Public Sector Contracts); provide for a variety of contractual terms not recognised by the CISG (eg 41 U.S.C. §§ 6301 et seq; Sec 67 et seq UK Procurement Act) or envision additional termination provisions (eg Sec 18 para 4 Kazakh Public Procurement Act; Sec 133 German Competition Act). It is irrelevant whether the Public Procurement Law of Equatoriana, specifically, is in conflict with the CISG.

139 The drafters' main concern was not whether any specific national rules were in conflict with the CISG. Instead, it was the difficulty of achieving harmonisation in such matters since the special rules in the national legal systems tend to be widely divergent [*Huber I Art 2 para 1*]. As the interpretation of Art 2(b) CISG must necessarily be uniform under Art 7(1), its application cannot be left up to chance, ie the question whether domestic procurement law happens to contain provisions conflicting with the CISG or not.

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140 Concluding **IV.**, none of the cumulative criteria for the application of the CISG have been met: the PSA is not international, and it is not a contract for the sale of goods. Even if it were a sale of goods, it would be encompassed by the CISG's exemption for auctions. For these reasons, the domestic law of Equatoriana governs the PSA.

V. IN ANY CASE, THE PARTIES HAVE EXCLUDED THE CISG

141 Even if the Tribunal were to find that the PSA generally falls within the scope of application of the CISG, the Parties would have validly excluded its application under Art 6 CISG. CLAIMANT disregards the CISG's rules on the interpretation of statements and instead opportunistically relies on an objective test alone (**A.**). However, when the appropriate interpretative framework is applied – encompassing both subjective and objective assessments of the relevant circumstances – the interpretation leads to the conclusion that the Parties intended to exclude the application of the CISG (**B.**).

A. CLAIMANT MISAPPLIES THE STANDARD FOR CONTRACT INTERPRETATION

142 Parties can agree to exclude the Convention under Art 6 CISG [*Siehr Art 6 para 1*]. Such an agreement on exclusion is to be assessed in accordance with the rules of the CISG, regardless of whether the CISG ultimately applies or not [*Ferrari II Art 6 para 13; Köhler Art 6 para 2; Magnus Art 6 para 11*].

143 CLAIMANT does not measure the Parties' exclusion of the CISG against any specific standard of interpretation. Rather, they conflate an exemption from the application of the CISG under Art 2(b) with a party-autonomous exclusion of the Convention under Art 6 CISG [*MfC paras 95, 102 et seq*].

144 The relevant standard is stipulated in Art 8 CISG, which CLAIMANT has not applied. Art 8 CISG does not recognise an *"express"* or *"implied"* intent of the parties, as posited by CLAIMANT [*MfC paras 92 et seq, 102 et seq*]. Instead, the provision primarily applies a subjective assessment of the parties' intent, complemented by an objective interpretation in cases of doubt [*Polyethylene Case*]. Ultimately, it seeks to identify the true will of the parties [*Wade p 35*]. Whenever a party could not have been unaware of their counterpart's real intent, this intent takes absolute precedence under Art 8(1). Under Art 8(2) CISG, an objective interpretation on the basis of the understanding of a reasonable third person will only be conducted when a subjective intent cannot be discerned [*Aluminium Cans Case; Schmidt-Kessel Art 8 para 23*].

145 What is more, neither the subjective test nor the objective test is exclusively conducted on the basis of the plain wording of the contract. All relevant circumstances of the case, including negotiations, any practices which the parties have established between themselves, usages, and the subsequent conduct of the parties, have to be taken into account [*Fertilizantes Case; Ferrari IV Art 8 para 13; Neumayer/Ming Art 8 para 2*]. This is illustrated by the *Boiler Case*, where the court found that even a wording which expressly opted into the CISG actually excluded it, taking into account evidence of the parties' real intent and the drafting history of the agreement [*Boiler Case*].

146 Therefore, the interpretation of the Parties' exclusion of the CISG must be carried out in light of the tests stipulated by Art 8 CISG [*see Ferrari II Art 6 para 18; Herber/Czerwenka Art 6 para 10*], primarily taking into account the subjective understanding of the Parties.

B. ALL RELEVANT CIRCUMSTANCES DEMONSTRATE EXCLUSION OF THE CISG

147 In this case, a consideration of all relevant circumstances shows that the Parties have excluded the CISG. CLAIMANT was made aware of RESPONDENT's intent to exclude the CISG (**1.**). Even if CLAIMANT did not recognise this intent, the choice-of-law clause objectively provides for an exclusion (**2.**).

1. CLAIMANT was aware of RESPONDENT's intent to exclude the CISG

148 In assessing whether CLAIMANT was aware of RESPONDENT's intent to exclude the CISG, all knowledge of CLAIMANT's responsible departments and organisational levels [*see RfA p 2 para 1; PO2 p 53 para 11; Osuna et al p 36*] must be attributed to CLAIMANT as an entity. This is revealed by a comparative analysis: when responsible individuals of a party could not have been unaware of a given piece of information, it is imputed to the legal entity as a whole [*Germany: Buck p 152; Heinrichs p 52; Schilken Sec 166 para 6; New Zealand: Meridian Global Case; Republic of Korea: Jung p 204; South Africa: Hon Shin Case; Switzerland: Fournier para 690; Art 1:305 Lando Principles; Art II-1:105 DCFR*].

149 In line with this, the negotiation history exhibits multiple manifestations of RESPONDENT's intent to exclude the CISG of which CLAIMANT's employees could not have been unaware. First, the choice-of-law clause in the model contract proposed by RESPONDENT has recently been subject to an amendment [*Exh R1 p 29 para 7; PO2 p 53 para 10*]. Previously, the clause had expressly called for the application of the CISG. Now, it provides for the application of Equatorianian law [*Exh C2 p 12 Art 29; PO2 p 53 para 10*], thereby indicating RESPONDENT's intent to exclude the CISG.

150 In fact, CLAIMANT's legal department duly noted the change in the model clause [*PO2 p 53 para 11*]. Since the recognition of RESPONDENT's intent by CLAIMANT's employees is attributed to CLAIMANT as an organisation, CLAIMANT could not have been unaware of the intent to exclude.

151 Second, even if CLAIMANT did not infer the intent of exclusion from the modifications of the clause alone, it is inconceivable that CLAIMANT would not have been aware of the campaign accompanying the amendment of the clause. That campaign sought to *"strengthen the role of Equatorianian Law"* [*Exh R1 p 29 para 7*]. Evidently, this choice of wording refers to domestic law, as Equatorianian legislation can only influence domestic legal sources. This is not the case with the CISG [*see Rheinland Case; Hachem Art 7 para 10; Pert/Couzens p 69*].

152 CLAIMANT does not mention the campaign, presumably to avoid giving the impression to have taken note of it. However, this claim appears implausible given CLAIMANT's own assertion that they *"were always interested in the market of Equatoriana"* [*Exh C5 p 16 para 5*]. If such an interest genuinely existed, it would have necessitated a close monitoring of the political developments in Equatoriana. Further, CLAIMANT's prior contracts with other SOEs [*Exh R1 p 30 para 11*] demonstrate their vested involvement in the market, further undermining their assertion of unawareness.

153 Third, if CLAIMANT had turned a blind eye to these developments in Equatoriana until the negotiation phase, at the very least, they could not have been unaware at the time of contract conclusion. The PSA

explicitly provided for the implementation of the Equatorianian government's Green Energy Strategy and served as a lighthouse project for CLAIMANT [*Exh C3 p 14*]. In view of the future prospects expected from the successful implementation of the PSA, CLAIMANT would not have signed without a meticulous examination of the model contract. It is therefore reasonable to assume that the contract would have been scrutinised more closely than in a one-off transaction. Given these circumstances, it is highly improbable that the campaign remained unnoticed by CLAIMANT. Thus, CLAIMANT could not have been unaware of RESPONDENT's intent to exclude the CISG.

154 Despite the apparentness of this intention, CLAIMANT did not communicate any contrary intent to RESPONDENT. A party must use appropriate means to communicate its intent [*Schmidt-Kessel Art 8 para 11*]. While CLAIMANT's CEO, Mr Cavendish, once described the CISG as the *"gold standard"* [*Exh R1 p 30 para 11*], RESPONDENT could not have understood this reference as a declaration of intent. Said reference never constituted CLAIMANT's final position. The CEOs eventually delegated discussion on this to their lawyers [*Exh R1 p 30 para 11*]. As a consequence of this delegation to the lawyers, it would have been the duty of CLAIMANT's legal department to stipulate changes to the applicable law clause contained in the model contract proposed by RESPONDENT. In fact, RESPONDENT welcomed amendment proposals [*Exh R1 p 29 para 7*]. At the same time, RESPONDENT could trust that CLAIMANT would either stipulate changes or accept the provided terms. Although presented with this opportunity, CLAIMANT never proposed any amendments to the choice-of-law clause; CLAIMANT's suggestions only pertained to the dispute resolution clause [*Exh R1 p 30 para 8*]. Therefore, they cannot expect their alleged intent of exclusion to be taken into account retroactively [*see Achilles Art 8 para 2*].

155 Concluding, CLAIMANT was aware of RESPONDENT's intended exclusion of the CISG. If they ever had any intent to stipulate changes to the Parties' choice-of-law clause, this was later dropped, as they made no effort to formulate a proposal. CLAIMANT therefore implicitly approved the exclusion. Under Art 8(1) CISG, the PSA must be interpreted in light of this intent [*see Treibacher Case; Zuppi Art 8 para 23*].

2. An objective interpretation of the PSA leads to the exclusion of the CISG

156 Should the Tribunal conclude that CLAIMANT did not recognise RESPONDENT's identifiable intent to exclude the CISG, the interpretive standard resorts to Art 8(2) CISG. Under this objective interpretation of the choice-of-law clause and in light of all relevant circumstances, the same conclusion is reached: the Parties excluded the CISG.

157 This is derived from the Parties' choice of *"the law of Equatoriana to the exclusion of its conflict of laws principles"* [*Exh C2 p 12 Art 29*]. Although most of the Convention's provisions are substantive

in nature, the CISG does not completely dispense of conflict-of-laws rules [*see Lurger/Melcher p 3 fn 2*]. Such rules are concerned with the resolution of conflicts arising from interactions between different legal systems [*Davies para 1.3*]. Notably, the central provision defining the sphere of application of the CISG, Art 1(1)(a), is a unilateral conflict-of-laws rule [*Butler p 381; Kröll et al Intro to the CISG fn 29; von Mehren para 192; see Bridge para 16.24 et seq*]. Crucially, the CISG's applicability to the contract is dependent on the requirements described by Art 1(1)(a) CISG. The provision adjudicates whether the domestic law of the forum or a different law shall apply. Similarly, literature clarifies that Art 1(1)(b) invokes the CISG as part of the law of the forum, and not as part of the referred foreign law [*Hachem Art 1 para 36; Herber/Czerwenka Art 1 para 17; Lorenz Art 1 para 12*]. Consequently, both Arts 1(1)(a) and 1(1)(b) CISG have conflict-of-laws character. By excluding the *"conflict of laws principles"* [*Exh C2 p 12 Art 29*], Art 29 PSA excludes this foundational element of the CISG, rendering the CISG inapplicable in its entirety, and simultaneously establishing the domestic law of Equatoriana as the governing law.

158 Irrespective of the conflict-of-laws nature of Art 1(1) CISG, Art 29 PSA has the effect of excluding any instrument other than domestic law. The clause stipulates that the applicable law should be *"the law of Equatoriana"* [*Exh C2 p 12 Art 29*]. Although case law and literature suggest that a choice-of-law clause in favour of the law of a Contracting State may not constitute an exclusion of the CISG [*Vintage Porsche 911 Case; Achilles Art 6 para 4*], this is only the case in the absence of further indications of an intent to exclude [*Foil Case; Piltz II p 556; see Dokter/Kruisinga p 107*]. However, in the case at hand, the aforementioned campaign (*supra para 151*) is a strong indication of RESPONDENT's intent to exclude the CISG.

159 Second, in addition to the wording of the contract, the Tribunal should take into account all relevant circumstances under Art 8(3) CISG, including the Parties' negotiation history. Mr Law, CLAIMANT's former Head of Legal, recognised the significance of the reworded choice-of-law clause. As the previous model contract had explicitly provided for the CISG [*PO2 p 53 para 10*], this rewording can only have been understood as a change of the applicable law, providing for Equatorianian law. This must have been the conclusion drawn by Mr Law, as he considered it necessary to put the applicable law on the list of issues to be discussed at CEO-level [*Exh R1 p 30 para 11; PO2 p 53 para 11*]. Moreover, his successor in the position of Head of Legal, Ms Smith, interpreted the choice-of-law clause to refer to the non-harmonised law of Equatoriana [*PO2 p 52 para 11*].

160 CLAIMANT might submit that Mr Deiman, CLAIMANT's main negotiator, did not have the same level of knowledge as CLAIMANT's legal department. However, not only his knowledge is relevant. Though

Mr Deiman did act as CLAIMANT's principal negotiator, he neither signed the Parties' contract [*cf Exh C2 p 13*] nor was he entrusted with the examination of the choice-of-law clause [*cf Exh R1 p 30 para 11*]. The knowledge of CLAIMANT's legal department is ultimately attributed to CLAIMANT, as CLAIMANT is imputed with the knowledge obtained within their own organisation (*supra 148*). Therefore, even under the assumption that Mr Deiman did not recognise the significance of the change in the model clause, CLAIMANT, as an organisation, understood its consequences.

161 Taking all factors of the case into consideration, under the objective test of Art 8(2) CISG, a reasonable person in CLAIMANT's position would have interpreted RESPONDENT's statements and conduct as an exclusion of the CISG.

***

162 Concluding **V.**, the Parties have excluded the Convention by virtue of Art 6 CISG. The Parties' intention to do so must be assessed under Art 8 CISG. Under the subjective test, RESPONDENT has manifested an intent to exclude the CISG, of which CLAIMANT could not have been unaware. Yet even under an objective examination of all relevant circumstances, a reasonable third party would have understood the choice-of-law provision of the PSA, as well as RESPONDENT's statements and conduct, as an exclusion of the CISG. Therefore, the CISG has been excluded. CLAIMANT asks the Tribunal to jump ship and abandon the Parties' original bargain on the applicable law. Still, CLAIMANT should not be permitted to simply pick and choose a substantive law that is favourable to their case on the merits.

Request for Relief

In light of the foregoing submissions, RESPONDENT upholds its requests that the Tribunal:

1. Declare that it has no jurisdiction to hear the case;
2. *In the alternative*, reject the claim as inadmissible;
3. *In the alternative*, stay the Proceedings and refer the Parties to mediation;
4. *In the alternative*, dismiss the claim on the merits; and
5. *In any case*, order CLAIMANT to bear the costs of the Proceedings.

Certificate

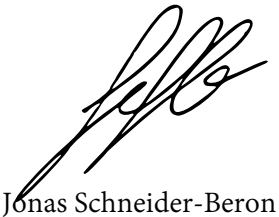
We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. Only those sources were used which are listed in indices.

Varvara Artiukh

Sophie Hannah Egger

Lukas Hellmayr

Agnes Oppitz



Jonas Schneider-Beron

Alina Waldenberger

Vienna, 30 January 2025

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