TWENTY-SECOND ANNUAL

WILLEM C. VIS EAST

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

MEMORANDUM FOR RESPONDENT

NATIONAL UNIVERSITY OF SINGAPORE

ON BEHALF OF:	AGAINST:
Equatoriana RenPower Ltd. 1 Russell Square Oceanside, Equatoriana (RESPONDENT)	GreenHydro Plc. 1974 Russell Avenue Capital City, Mediterraneo (CLAIMANT)

COUNSEL

Ang Dean • Ellisha Khairi • Elson Law • Isaac Heng
Julia Liaw • Ling Sean Yi • Liu Xuanxuan • Tan Yan Ren

ACADEMIC INTEGRITY AND ARTIFICIAL INTELLIGENCE DISCLOSURE STATEMENT

SCHOOL NAME: National University of Singapore

JURISDICTION: Singapore

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

USE OF AI	YES	UNSURE	NO
We have used AI enhanced **search engines** for researching sources and (factual or legal) information on the Moot Problem.			✓
We have used AI-enhanced **proof-reading** tools.			✓
We have used AI enhanced translation tools to translate sources relevant for our work on the Moot Problem.	✓		
We have used AI enhanced translation tools to translate parts of the text submitted in this Memorandum into English from any other language.			✓
We have used AI to generate overviews or briefings on relevant factual and legal topics which are not submitted as part of the memorandum but have been solely used to advance our own understanding.			✓
We have used AI tools to generate statements that are now included in the memo. Please tick yes even if you have altered or amended the text generated by AI before submission.			✓
We have trained an AI tool on Vis Moot documents.			✓
We have **used an AI tool that has been trained on Vis Moot documents** to generate text that is part of our Memorandum			✓
Other (please specify):			✓

We hereby certify the truthfulness of our statements, and confirm that we have not used AI applications in any other way in preparing the submission of this memorandum.

DATE: 30 January 2025

Dean Ang 

Ellisha Khairi 

Elson Law 

Isaac Heng 

Julia Liaw 

Ling Sean Yi 

Liu Xuanxuan 

Tan Yan Ren 

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Index of Treaties, Conventions and Rules

Index of Court Decisions

Jurisdiction	Abbreviation	Citation	Cited at Paragraphs
Australia	**Hooper**	*Hooper Bailie Associates Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 New South Wales Supreme Court 13 April 1992	57
	Idoport	*Idoport Pty Ltd v National Australia Bank* New South Wales Supreme Court [2001] NSWSC 427 24 May 2001	57
	Nuance	*The Nuance Group (Australia) Pty Ltd v Shape Australia Pty Ltd* New South Wales Supreme Court [2021] NSWSC 1498 22 November 2021	22
	Santos	*Santos Ltd v Fluor Australia Pty Ltd* Supreme Court of Queensland [2016] QSC 129 13 June 2016	36
	Boiler case	CISG-online No: 1889 *Boiler case* Oberster Gerichtshof 2 April 2009	154
	Citroen Case	CISG-online No.: 1560 *Citroen Case* Oberster Gerichtshof 4 July 2007	166

Austria	**OGH 18OCg6/18h**	*Oberste Gerichtshof* Austria Supreme Court 18OCg6/18h 15 May 2019	6
	Steel bars case V	CISG-online No.: 1735 *Steel bars case V* Oberlandesgericht Innsbruck 18 December 2007	154
Belgium	**S.r.l. Orintix**	CISG-online No.: 966 *Orintix S.r.l. v Fabelta Ninove NV* Appellate Court Ghent 24 November 2004	137
China	**PepsiCo v Sichuan Pepsi**	*PepsiCo Inc v Sichuan Pepsi-Cola Beverage Co. Ltd.* Chengdu Intermediate People's Court [2005] Cheng Ming Chu Zi Di No. 912 30 April 2008	52
	PepsiCo v Sichuan Yunlv	*PepsiCo Investment (China) Co. Ltd. v Sichuan Yunlv Development Industrial Co* Chengdu Intermediate People's Court [2006] Cheng Ming Chu Zi Di No. 36 30 April 2008	52
France	**Joaquim Marques**	*Joaquim Marques Roque v Holding Manin Riviere S.a.r.l* Cour d'appel de Grenoble 93/4879 26 April 1995	130
	BGH I ZR 245/19	*Bundesgerichtshof* German Federal Court of Justice IZR 245/19	6, 46

		26 November 2020	
Germany	**Construction materials Case II**	CISG-online No.: 490 *Construction materials Case II* District Court of the Canton Zug 25 February 1999	130
	Cylinder case	CISG-online No.: 563 *Cylinder for the production of tissue-paper case* District Court Mainz 26 November 1998	132
	Window Production Plant Case	CISG-online No.: 585 *Window Production Plant Case* Court of Appeal Munich 03 December 1999	132
Hong Kong	**C v D**	*C v D* Hong Kong Court of Final Appeal [2023] 5 HKC 440 27 April, 30 June 2023	18, 22
	China Railway	*China Railway (Hong Kong) Holdings Ltd v Chung Kin Holdings Co. Ltd* Hong Kong Court of First Instance [2023] HKCFI 132 19 January 2023	6
	Sarah Tanya Borwein Olsen	*Sarah Tanya Borwein Olsen v Market Dragon Ltd and Another* Hong Kong Court of First Instance [2024] HKCFI 516 19 February 2024	79
	Haldiram	*Haldiram Manufacturing Company v Dlf Commercial Complexes Limited*	21

India		Delhi High Court 193 DLT 410 16 April 2012	
Malaysia	**Usahasama v Abi**	*Usahasama SPNB-LTAT Sdn Bhd v Abi Construction Sdn Bhd* High Court of Malaya [2016] 7 CLJ 275 29 April 2016	21
Nepal	**Hanil Engineering**	*Hanil Engineering Construction Co. Ltd v Appellate Court, Patan and others* Supreme Court of Nepal Decision No. 10138 26 December 2017	52
	National Construction	*National Construction Company Nepal v Appellate Court, Patan* Supreme Court of Nepal Decision No. 7933 13 November 2007	21
New Zealand	**Coromandel Land**	*Coromandel Land Trust Ltd v MilkT Investments Ltd, High Court Hamilton* High Court of New Zealand CIV-2009-419-000232 28 May 2009	95
	Anupam	*Anupam Mittal v Westbridge Ventures II Investment Holdings* Singapore Court of Appeal [2023] SGCA 1 6 January 2023	6
	BBA	*BBA v BAZ* Singapore Court of Appeal	22, 27

		[2020] SGCA 53 28 May 2020	
	IRC v Lufthansa (CA)	*International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* Singapore Court of Appeal [2013] SGCA 55 18 October 2013	21, 25
	IRC v Lufthansa (HC)	*International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* Singapore High Court [2012] SGHC 226 12 November 2012	22, 25
Singapore	**Leong Quee Ching Karen**	*Leong Quee Ching Karen v Lim Soon Huat* Singapore High Court [2023] SGHC 234 29 December 2023	79, 80
	Mariwu	*Mariwu Industrial Co (S) Pte Ltd v Dextra Asia Co Ltd and Another* Singapore Court of Appeal [2006] SGCA 37 10 October 2006	79
	Swee Wan Enterprises	*Swee Wan Enterprises Pte Ltd v Yak Thye Peng* Singapore High Court [2017] SGHC 313 12 June 2019	79
	Swissbourgh	*Swissbourgh Diamond Mines (Pty) Ltd and others v Kingdom of Lesotho* Singapore Court of Appeal [2018] SGCA 81 27 November 2018	22, 27

Pakistan	**Fine Star**	*Board of Intermediate and Secondary Education, Multan v Fine Star & Company, Engineers and Contractors* Supreme Court of Pakistan [1993] SCMR 530 21 October 1992	21
Switzerland	**Centerless grinding machine case**	CISG-online 701 *Centerless Grinding Machine Casse* Gerichtskreis Bern VIII Bern-Laupen 29 January 1999	130
	Swiss Federal Tribunal Case	*X Ltd. v Y S.p.A.* Swiss Federal Tribunal Case No. 4A_628/2015 16 March 2016	39, 40
Tanzania	**Marine v Gas**	*Marine Services Co Ltd v Gas Entec Company Ltd* High Court of Tanzania TZHCComD3337 17 September 2021	22
United Arab Emirates	**Dubai Ct App Case 32/2019**	Case Name: Unknown Dubai Court of Appeal Case No. 32/2019 5 February 2020	21
	Georgia Corporation v Gavino Supplies	*Georgia Corporation v Gavino Supplies* Court of First Instance of the Dubai International Financial Centre Courts [2016] DIFC ARB 005 11 Oct 2016	80
	Bradford & Bingley plc	*Bradford & Bingley plc v Rashid* United Kingdom of House of Lords	80

		[2006] 1 WLR 2066 24 May 2006	
	Cable v IBM	*Cable & Wireless plc v IBM UK Ltd* The High Court of Justice of England and Wales [2002] EWHC 2059 (Comm) 10 November 2002	13, 36
	Enka	*Enka Insaat Ve Sanayi AS v Insurance Company Chubb and Chubb European Group SE* United Kingdom Supreme Court [2020] UKSC 38 9 Oct 2020	6
United Kingdom	**Halsey v Milton**	*Halsey v Milton Keynes General NHS Trust* England and Wales Court of Appeal (Civil Division) [2004] EWCA Civ 576 11 May 2004	40
	National Iranian Oil Co.	*National Iranian Oil Co. v Crescent Petroleum Co. 2016 EWCH 510* Judgment of the High Court of Justice of England and Wales [2016] EWHC 510 4 March 2016	113
	NWA	*NVF, RWK and KLB v NWA and FSY* The High Court of Justice of England and Wales [2021] EWHC 2666 8 Oct 2021	18, 27
	SL Mining	*SL Mining Limited v Republic of Sierra Leone*	27

		The High Court of Justice of England and Wales [2021] EWHC 286 15 Feb 2021	
	Asante Technologies, Inc. Case	CISG-online No.: 616 *Asante Technologies, Inc. v PMC-Sierra, Inc.* U.S. District Court for the Northern District of California 30 July 2001	166
	BG v Argentina	*BG Group plc v Republic of Argentina* Supreme Court of the United States 572 U. S. ____ (2014) 5 March 2014	18
United States of America	**BP Alaska**	*BP Alaska Exploration, Inc. v Superior Court* Court of Appeal of California, Fifth District 199 Cal.App.3d 1240 29 March 1988	105
	Chaudhry	*Chaudhry v Gallerizzo* United States Court of Appeals, Fourth Circuit 174 F.3d 394, 403-404 (4th Cir. 1999) 5 April 1999	104
	Goodyear Tire & Rubber Co.	*Goodyear Tire & Rubber Co. v Chiles Power Supply* United States Court of Appeals, Sixth Circuit 332 F.3d 976 (6th Cir. 2003) 16 June 2003	80, 83

United States of America	**Hoteles Condado**	*Hoteles Condado Beach v. Union de Tronquistas de Puerto Rico* United States District Court for the District of Puerto Rico 588 F. Supp. 679 (1984) 25 April 1984	95
	In re Grand Jury Investigation (Schroeder)	*In re Grand Jury Investigation (Schroeder)* United States Courts of Appeal, Eleventh Circuit 842 F.2d 1223, 1226 (11th Cir. 1987) 20 May 1987	104
	Koch	*Koch v Specialized Care Services Inc* United States District Court for the District of Maryland 437 F. Supp. 2d 362 (D. Md. 2005) 23 September 2005	105
	Lampliter	*Lampliter Dinner Theater v Liberty Mut. Ins. Co.* United States Court of Appeals, Eleventh Circuit 792 F.2d 1036 (11th Cir. 1986) 30 June 1986	77
	McClandon	*McClandon v Heathrow Land Co. Ltd. P'ship* United States District Court, M.D. Florida, Orlando Division 2010 U.S. Dist. LEXIS 11662 22 January 2010	77
	Sire Spirits	*Sire Spirits LLC Petitioner v Mitchell Green* United States District Court, S.D. New York 21 Civ. 7343 (JPC) 6 June 2022	83

Index of Arbitral Awards			
ICC Arbitral Tribunals	**ICC Case 16314**	*Claimant(s) v Respondent(s)* Final Award ICC Case No. 16314 1 January 2011	165
	ICC Case 26290/AYZ/ELU	*Cardno Middle East Limited v Central Bank of Iraq* Final Award ICC Case No. 26290/AYZ/ELU 26 February 2023	44
	ICC Case 4237/1984	*Claimant(s) v Respondent(s)* Final Award ICC Case No. 4237 1985	98
	ICC Case 9117	*Claimant(s) v Respondent(s)* Final Award ICC Case No. 9117 1 January 1998	165
	ICC Case 9984	*Claimant(s) v Respondent(s)* Preliminary Award ICC Case No. 9984 7 June 1999	12
ICSID Arbitral Tribunals	**Abaclat (Abi-Saab)**	*Abaclat and others (formerly Giovanna A. Beccara and others) v Argentine Republic* Decision on Jurisdiction and Admissibility (Dissenting Opinion of Professor Georges Abi-Saab) ICSID Case No. ARB/07/5 28 October 2011	22, 46

	Apotex	*Apotex Inc. v United States of America* Award ICSID Case No. UNCT/10/2 14 June 2013	36
	Caratube	*Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan* Decision on Claimants' Request for the Production of "Leaked Documents" ICSID Case No. ARB/13/13 27 July 2015	116
ICSID Arbitral Tribunals	**EDF v Romania**	*EDF (Services) Ltd. v Romania* Award ICSID Case No. ARB/05/13 8 October 2009	111
	Glencore v Colombia	*Glencore International A.G. and C.I. Prodeco S.A. v Republic of Colombia* Decision on Annulment ICSID Case No. ARB/16/6 22 Sept 2021	77, 84
	Hasanov v Georgia	*Hasanov v Georgia* Decision on Respondent's Inter-State Negotiation Objection ICSID Case No. ARB/20/44 19 April 2022	46
	İçkale	*İçkale İnşaat Ltd Şirketi v Turkmenistan* Award ICSID Case No. ARB/10/24 8 March 2016	30, 35

	Kiliç	*Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan* Award ICSID Case No. ARB/10/1 2 July 2013	36
	Niko Resources	*Niko Resources (Bangladesh) Ltd. v Bangladesh Petroleum Exploration & Production Co. Ltd. ('Bapex') & Bangladesh Oil Gas & Mineral Corp.* Decision on Jurisdiction ICSID Case No. ARB/10/18 19 August 2013	74, 97, 111
ICSID Arbitral Tribunals	**Philip Morris v Uruguay**	*Philip Morris Brand SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay* Decision on Jurisdiction ICSID Case No. ARB/10/7 2 July 2013	12
	Quiborax	*Quiborax S.A., Non-Metallic Minerals S.A. & Allan Fosk Kaplún v Plurinational State of Bolivia* Decision on Jurisdiction ICSID Case No. ARB/06/2 27 September 2012	110
	RREEF	*RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Kingdom of Spain* Decision on Jurisdiction ICSID Case No. ARB/13/30 6 June 2016	46

ICSID Arbitral Tribunals	**Teinver v Argentina**	*Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v Argentine Republic* Decision on Jurisdiction ICSID Case No. ARB/09/1 21 December 2012	32, 34
	Tulip	*Tulip Real Estate Investment and Development Netherlands B.V. v Republic of Turkey* Decision on Bifurcated Jurisdictional Issue ICSID Case No. ARB/11/28 5 March 2013	22
	Waste Management (Highet)	*Waste Management, Inc v United Mexican States (I)* Award (Dissenting Opinion of Keith Highet) ICSID Case No ARB(AF)/98/2 8 May 2000	27

Permanent Court of Arbitration	**Clayton v Canada**	*William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon Delaware Inc. v Government of Canada* Procedural Order No. 13 PCA Case No. 2009-04 11 July 2012	114
	ICS	*ICS Inspection and Control Services Limited v Argentine Republic (I)* Award on Jurisdiction PCA Case No. 2010-9 10 February 2012	30, 35-36
	Philip Morris v Australia	*Philip Morris Asia Limited v The Commonwealth of Australia* Procedural Order No. 7 PCA Case No. 2012-12 31 Dec 2012	76
Court of Arbitration for Sport	**Fusimalohi v FIFA**	*Ahongalu Fusimalohi v Fédération Internationale de Football Association (FIFA)* CAS 2011/A/2425 Award 8 March 2012	115
	Adamu v FIFA	*Amos Adamu v Fédération Internationale de Football Association (FIFA)* CAS 2011/A/2426 Award 24 February 2012	115
Ad hoc Arbitrations	**Finnish Ships**	*Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish*	36

		vessels during the war (Finland, Great Britain) Award UN RIAA, vol. III, pp. 1479–1550 9 May 1934	
Santiago Arbitration and Mediation Centre	**Inter Rao**	CISG-online No.: 6903 *Inter Rao UES et al. v CELECT EP* Santiago Arbitration and Mediation Centre 29 May 2023	167, 168
Iran-US Claims Tribunal	**Sylvania v Iran**	*Sylvania Technical Systems, Inc. v The Government of the Islamic Republic of IranS*Award IUSCT Case No. 64 27 June 1985	118
London Court of International Arbitration	**Vale v BSG**	*Vale S.A. v BSG Resources Limited* Award LCIA Case No. 142683 4 April 2019	76
Milan Chamber of Arbitration	**Prada S.p.A. v Caporicci USA Corp**	*Prada S.p.A. v Caporicci USA Corp* Final Award CAM – Milan Case No. 17/00120 30 January 2019	130

Index of International Court Decisions			
Court	**Abbreviation**	**Citation**	**Cited at Paragraphs**
International Court of Justice	**Nicaragua v USA**	*Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v USA)* [1986] ICJ Rep 14 27 June 1986	22, 27
	Northern Cameroons (Fitzmaurice)	*Case concerning the Northern Cameroons (Cameroon v United Kingdom), Preliminary Objections* Judgment (Separate Opinion of Judge Sir Gerald Fitzmaurice) ICJ Reports 1973 2 December 1963	
Permanent Court of International Justice	**Greece v Great Britain**	*Case of the Mavrommatis Palestine Concessions (Greece v Great Britain)* PCIJ Series A, No. 2 30 August 1924	33, 34

Index of Books, Commentaries and Articles		
Abbreviation	**Citation**	**Cited at Paragraphs**
Analytical Commentary	UNCITRAL *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary General* UN Doc. A/CN.9/264 25 March 1985	50
Augsburger	Thierry P Augsburger *Article 7. Exceptions to Transparency in Dmitrij Euler, Markus Gehring & Maxi Scherer, Transparency in International Investment Arbitration* 2015	86
Berger (I)	Klaus P. Berger *Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion* Arbitration International Vol. 22, Issue 4 2006	95, 100, 101
Berger (II)	Klaus P. Berger *The Settlement Privilege, in William W. Park (ed.)* Arbitration International Vol. 24, Issue 2 2008	77
Born	Gary Born *International Commercial Arbitration* 2021, 3rd Ed. Kluwer Law International	5, 12, 13, 18, 20, 22, 28, 41,76, 83, 97, 118

CISG-AC4	*CISG Advisory Council Opinion No. 4: Contracts for the Sale of Goods to be Manufactured or Produced and Mixed Contracts* 24 October 2004 https://cisgac.com/opinions/cisgac-opinion-no-4/ Accessed on: 4 January 2025	129, 132, 159
CISG-AC16	*CISG Advisory Council Opinion No. 16: Exclusion of the CISG under Article 6* 30 May 2014 https://cisg-online.org/files/ac_op/CISG_Advisory_Council_Opinion_No_16.pdf Accessed on: 4 January 2025	160, 166
Crawford	James Crawford *Brownlie's Principles of Public International Law* Oxford University Press 2019, 9th Ed.	22, 27
Cuniberti	Gilles Cuniberti *The UNCITRAL Model Law on International Commercial Arbitration: A Commentary* Edward Elgar Publishing 2022	50
Diana Kuitkowski	Diana Kuitkowski *The Law Applicable to Privilege Claims in International Arbitration* Journal of International Arbitration Volume 32, Issue 1 2015	74, 97, 100
Ellam/Douglas	Ellam, T., & Douglas, D.	113

	Illegality and corruption in international arbitration: The Role of Arbitrators and Counsel Mondaq 26 February 2018	
Ferrari	Franco Ferrari *Contracts for the International Sale of Goods: Applicability and Applications of the 1980 United Nations Sales Convention* Martinus Nijhoff Publishers 2012	144
Ferrari/Kröll	Franco Ferrari & Stefan Kröll (eds) *Conflict of Laws in International Commercial Arbitration* JurisNet 2019	101
Figueres	Dyalá Jiménez Figueres *Multi-Tiered Dispute Resolution Clauses in ICC Arbitration* ICC International Court of Arbitration Bulletin Vol.14, Issue I 2003	12
Gaillard	Emmanuel Gaillard *Use of General Principles of International Law in International Long-Term Contracts* International Business Lawyer 1999	20
Honnold/Fletchner	John O. Honnold, Harry M. Flechtner. *Honnold's Uniform Law for International Sales under the 1980 United Nations Convention* Kluwer Law International 2021, 5th Ed.	147

Hwang/Lim	Michael Hwang & Si Cheng Lim *Chapter 16: The Chimera of Admissibility in International Arbitration"*, in Neil Kaplan and Michael J. Moser (eds), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* Kluwer Law International 2018	22
Kajkowska	Ewelina Kajkowska *Enforceability of Multi-Tiered Dispute Resolution Clauses* Hart Publishing 2017	39, 41
Khodykin	Roman Khodykin, Carol Mulcahy, et al. *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* Oxford University Press 2019	114–116
Kronke et al	Herbert Kronke et al *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* Kluwer Law International 2010	52
Kröll/Mistelis/ Viscasillas	Stefan Kröll, Loukas A Mistelis, Maria del Pilar Perales Viscasillas *UN Convention on Contracts for the International Sale of Goods, A Commentary,* Hart Publishing 2011, 2nd Ed.	122, 124, 126

Lew/Mistelis/Kröll	Julian DM Lew, Loukas A Mistelis & Stefan M Kröll *Comparative International Commercial Arbitration* Kluwer Law International 2003	6
Lim/Ho/ Paparinskis	Chin Leng Lim & Jean Ho & Martins Paparinskis *International Investment Law and Arbitration: Commentary, Awards and Other Materials* Cambridge University Press 2021, 2nd Ed.	22
Mankowski	Peter Mankowski *Commercial Law: A Commentary* Bloomsbury Publishing 2018, 1st Ed.	129
Merrills	Merrills JG. *International Dispute Settlement* Cambridge University Press 2017, 6th Ed.	71
Official Comment	UNIDROIT *Official Comment to the PICC* 2010	165
Platte	Martin Platte & Yoanna Schuch *A 17 – Selected Issues Relating to the Application of the CISG* VIAC Selected Arbitral Awards, Vol. 1 2015	
Redfern/Hunter	Nigel Blackaby, Constantine Partasides & Alan Redfern *Redfern and Hunter on International Arbitration*	6, 76

	Oxford University Press 2023, 7th Ed.	
Ren	Raphael Ren *The Dichotomy between Jurisdiction and Admissibility in International Arbitration* International & Comparative Law Quarterly Vol. 73, Issue 2 April 2024	22
Restatement	John Fellas Restatement of the U.S. Law of International Commercial and Investor-State Arbitration New York Law Journal Vol. 263, No. 33 2023	6
Reyes/Gu	Anselmo Reyes & Weixia Gu (eds) *Multi-Tier Approaches to the Resolution of International Disputes* Cambridge University Press 2021	41
Rosenfeld	Friedrich Rosenfeld *Arbitral Praeliminaria – Reflections on the Distinction between Admissibility and Jurisdiction after BG v Argentina* Leiden Journal of International Law Vol. 29, Issue 1 March 2016	22, 27
Rubinstein/Guerrina	Javier Rubinstein & Britton Guerrina *The Attorney-Client Privilege and International Arbitration* Journal of International Arbitration Volume 18, Issue 6 2001	101

Rutz	Fabien Rutz *Admissibility of unlawfully obtained evidence in international arbitration in Switzerland Swiss* Arbitration Academy 2020	117
Salehijam (I)	Maryam Salehijam *Mediation and Commercial Contract Law: Towards a Comprehensive Legal Framework* Routledge 2021	39, 57
Salehijam (II)	Maryam Salehijam *Mediation Clauses: Enforceability and Impact* Singapore Journal of Legal Studies 2019	40–41
Santacroce	Fabio G Santacroce *Navigating the Troubled Waters Between Jurisdiction and Admissibility* Arbitration International Vol.33, Issue 4 December 2017	18
Schlechtriem/ Schwenzer	Peter Schlechtriem, Ingeborg Schwenzer *Commentary on the UN Convention on the International Sale of Goods (CISG)* Oxford University Press, 4th Ed. 2016	122, 124, 129, 130, 132, 147, 150, 151, 154, 157, 159, 160
Secretariat Commentary	*Commentary on the Draft Convention on Contracts for the International Sale of Goods, prepared by the Secretariat* UN Doc. A/CONF.97/5 https://cisg-online.org/Travaux-preparatoires/1979-secretariat-commentary	87

	Accessed on: 3 January 2025	
Shany	Yuval Shany *Questions of Jurisdiction and Admissibility before International Courts* Cambridge University Press 2015	22, 27
Siblesz	Hugo Hans Siblesz *ISDS and Freedom of Information: What Role for Public Scrutiny in the Resolution of International Disputes?* XII Conferencia Internacional Hugo Grocio de Arbitraje 2020	86
Sopinka/Lederman	J. Sopinka and S. Lederman *The Law of Evidence in Civil Cases* Toronto: Butterworths 1974	117
Staudinger/Magnus	Julius von Staudinger, Ulrich Magnus *Wiener UN-Kaufrecht (CISG)* Sellier - de Gruyter 2013	126
UNCITRAL YB II	UNCITRAL *United Nations Commission on International Trade Law Yearbook, Volume II* A/CN.9/SER.A/1971 https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/yb_1971_e.pdf Accessed on: 6 January 2025	81
UN Conference on CISG (1981)	United Nations *United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March - 11 April 1980,*	111

	Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee (1981) A/CONF.97/19 https://digitallibrary.un.org/record/160585?ln=en&v=pdf Accessed on: 15 January 2025	
Vogenauer	Stefan Vogenauer (ed) *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* Oxford Legal Research Library 2015, 2nd Ed.	90, 92-94
Waincymer	Waincymer, J. M. *Procedure and Evidence in International Arbitration* Kluwer Law International 2012, 1st Ed.	86, 110

INDEX OF ABBREVIATIONS

Abbreviation	Expansion
¶ / ¶¶	Paragraph / Paragraphs
%	Percentage
§, §§	Section/Sections
&	And
CISG-AC	CISG Advisory Council
Aqua's statement	Narvin Aqua Arbitrator Statement (28 August 2024)
Art. / Arts.	Article/ Articles
ARA	Answer to Request for Arbitration (14 August 2024)
CEO	Chief Executive Officer
Ch.	Chapter
CISG	United Nations Convention on contracts for the International Sale of Goods (1980)
CLAIMANT	GreenHydro Plc.
Cl. Memo.	Claimant's Memo
DAL	Danubian Arbitration Law
Dispute Resolution Clause	Article 30 of the Purchase and Service Agreement
ed(s)	Editors(s)
C1-C7	Claimant Exhibit 1 to Claimant Exhibit 7
R1-R4	Respondent Exhibit 1 to Respondent Exhibit 4
et al.	*Et alia* (and others)
FAI	The Finland Arbitration Institute

Ibid	In the same place
ICC	International Chamber of Commerce
Infra	See below
Letter from Langweiler	Letter by Langweiler Objecting to Admittance of Document
Ltd.	Limited
Mr.	Mister
Ms.	Miss
No.(s)	Number(s)
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
p. / pp.	Page / Pages
PARTIES	CLAIMANT and RESPONDENT
PICC	UNIDROIT Principles of International Commercial Contracts (2016)
PO1	Procedural Order No. 1 (11 October 2024)
PO2	Procedural Order No. 2 (13 November 2024)
PSA	Purchase and Service Agreement
RfA	Request for Arbitration (31 July 2024)
RfQ	Request for Quotation
RESPONDENT	Equatoriana RenPower
Synonoun's Statement	Carl Gustaf Synonoun Arbitrator Statement (29 August 2024)
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

US	United States of America
USD	United States Dollar
v	*Versus*
Vol.	Volume

STATEMENT OF FACTS

RESPONDENT is fully owned by the Equatorianian Government and plays a crucial role in implementing the country's renewable energy policies. CLAIMANT is an engineering company specializing in the planning and construction of green hydrogen plants and associated services.

KEY DATES	FACTS
3 January 2023	RESPONDENT invites bids through an open tender for the engineering, planning and construction of a green hydrogen plant in Equatoriana. The amount of local content in the project was a key factor in the awarding of the project [*Exh. C1, ¶9*].
May 2023	CLAIMANT is selected as one of the final bidders [*RfA, ¶10*].
12 July 2023	During negotiations, CLAIMANT represents to RESPONDENT that the local content would "*most likely*" be 45%, although it knew that it would likely to be less [*Exh. R2, R3*]. Acting on these assurances, RESPONDENT agreed to exclude its right to terminate for convenience [*ARA, ¶6*].
17 July 2023	The Parties signed the PSA [*Exh. C2*]. The PSA provides that any dispute "*shall first be submitted to mediation*" [*Exh. C2, p. 12, Art. 30*].
December 2023	The Equatorianian government makes significant changes to its renewable energy policies, shifting away from hydrogen as an energy source due to its high costs [*Exh. C6; RfA, ¶¶17–18*].
1 February 2024	CLAIMANT fails to submit the Final Plans by the deadline [*ARA, ¶18*].
28 February 2024	CLAIMANT submits its Final Plans, but they are incomplete [*ARA, ¶11*].
29 February 2024	RESPONDENT issues CLAIMANT a termination letter, informing CLAIMANT that the failure to submit complete Final Plans on time was a fundamental breach of contract and that, alternatively, under Equatorianian law RESPONDENT as a state-owned entity has the right to terminate its contracts if they conflict with the government policies [*Exh. C6, p.19*]
25 May 2024	RESPONDENT sends CLAIMANT a without-prejudice offer, offering to continue with the contract if the contract price were adjusted to make it compatible with the new government policies [*Exh. C7*].
26 May 2024	CLAIMANT rejects the without-prejudice offer and threatens arbitration [*PO2, ¶57*]. CLAIMANT makes no attempt to negotiate further or to submit the dispute to mediation.
31 July 2024	CLAIMANT initiates arbitration.

SUMMARY OF ARGUMENTS

I. THIS TRIBUNAL SHOULD REJECT THE CLAIM FOR LACK OF JURISDICTION, ADMISSIBILITY OR ON PROCEDURAL GROUNDS.

The Dispute Resolution Clause in the agreement expressly states that any dispute "*shall first be submitted to mediation*". CLAIMANT did not submit the dispute to mediation before commencing arbitration. CLAIMANT's noncompliance with the pre-arbitration mediation requirement deprives this Tribunal of jurisdiction to hear this claim. Alternatively, if this is characterised as an issue of admissibility, then CLAIMANT's noncompliance renders the claim inadmissible. Likewise, if this were a procedural matter, the Tribunal should still reject the claim.

II. THIS TRIBUNAL SHOULD EXCLUDE EXHIBIT C7 BUT ADMIT EXHIBIT R3.

Exhibit C7 should be excluded because it is irrelevant and immaterial. Even if it were relevant and material, it should be excluded because it is protected by confidentiality under the FAI Mediation Rules Article 15 and subject to "without prejudice" privilege. Excluding Exhibit C7 neither harms CLAIMANT'S procedural rights nor contradicts the good faith principle.

Exhibit R3 should not be excluded. It is highly relevant and material. It is not subject to legal privilege. CLAIMANT has failed to prove its allegations that Exhibit R3 was illegally obtained or that the illegality, even if made out, justifies excluding Exhibit R3. Lastly, the fact that RESPONDENT sent Exhibit R3 directly to the party-appointed arbitrators does not justify its exclusion because CLAIMANT suffered no prejudice from this.

III. THE CISG IS INAPPLICABLE TO THE PSA.

The CISG is inapplicable to the PSA. First, the PSA is excluded from the CISG as it was concluded by reverse auction, which qualifies as an "auction" under Art 2(b) CISG. Second, it is not a sale of goods contract because the preponderant part of the PSA consisted of services. Third, the Art 1(1) requirement that the Parties must have their places of business in different States is not satisfied. RESPONDENT'S place of business is in Equatoriana, and Volta Transformer in Equatoriana constitutes CLAIMANT'S place of business for the purposes of determining if the CISG is applicable.

IV. THE PARTIES HAVE VALIDLY EXCLUDED THE APPLICATION OF CISG.

The Parties have validly excluded the CISG's application to the PSA. The choice of law clause in the PSA amounts to an exclusion of the CISG, because the exclusion of conflict of laws principles refers to an exclusion of the CISG. The Parties' intention to exclude the CSIG is supported by the drafting history of the Model Contract and contractual negotiations for the PSA. The merger clause does not preclude recourse to such extrinsic material. Further, the choice of law clause in the Request for Quotation also amounts to an exclusion of the CISG.

ARGUMENTS

I. THIS ARBITRAL TRIBUNAL SHOULD REJECT THE CLAIM FOR A LACK OF JURISDICTION, INADMISSIBILITY OR ON PROCEDURAL GROUNDS.

1. It is elementary that agreements should be kept – *pacta sunt servanda*. The Dispute Resolution Clause in Article 30 of the PSA contains an express agreement that "*any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or validity thereof,* ***shall first be submitted to mediation*** *in accordance with the Mediation Rules of the Finland Chamber of Commerce*" *[emphasis added]* [*Exh. C2, pp.12–13*]. This agreement, just like any other legal agreement, must be upheld. Since it is undisputed that CLAIMANT failed to submit the dispute to mediation before commencing arbitration [*RfA, ¶25; Cl. Memo., ¶26*], this Tribunal must reject the present claim.

2. CLAIMANT's noncompliance with the pre-arbitration mediation requirement deprives this Tribunal of jurisdiction **[A]**. Alternatively, if this is characterised as an issue of admissibility (as CLAIMANT suggests), then CLAIMANT's noncompliance renders the claim inadmissible **[B]**. Likewise, if this were a procedural matter, the Tribunal should still reject the claim **[C].**

A. The Tribunal lacks jurisdiction to hear this claim because CLAIMANT did not comply with the pre-arbitration mediation requirement.

3. This Tribunal lacks jurisdiction to hear this claim. Compliance with the mediation requirement is a condition precedent to arbitration **[1]**. CLAIMANT's failure to comply with this condition precedent results in a lack of jurisdiction; it is not merely a matter of admissibility or procedure **[2]**. CLAIMANT cannot rely on the alleged futility of mediation to excuse its noncompliance **[3]**. RESPONDENT's invocation of the mediation requirement is done in good faith **[4]**.

1. Compliance with the mediation requirement is a condition precedent to arbitration.

4. CLAIMANT argues that "*the mediation requirement is not sufficiently clear and certain to be enforceable as a condition precedent*" [*Cl. Memo., ¶25*]. CLAIMANT is wrong. Under the law applicable to this question, being Equatorianian domestic law **[i]**, the mediation requirement in the Dispute Resolution Clause is a condition precedent to arbitration. **[ii]** Even if this issue were governed by Danubian law, it would still be a condition precedent to arbitration. **[iii]**

i. Preliminarily, this issue is governed by Equatorianian domestic law.

5. Whether the mediation requirement constitutes a condition precedent to arbitration is an issue of interpretation of the Dispute Resolution Clause [*Born, §5.08[A][4]*]. Hence, the applicable law is the law governing the interpretation of the Dispute Resolution Clause. In the present case, that is Equatorianian law. Insofar as CLAIMANT suggests it is Danubian law [*Cl Memo, ¶7*], that is incorrect.

6. If the contract does not contain a choice of law clause specific to the dispute resolution clause, but contains a general choice of law clause, then the presumption is that parties intended for the general choice of law clause to apply not only to their substantive contract, but also to the Dispute Resolution Clause [*Redfern/Hunter, ¶3.18; Lew/Mistelis/Kröll, ¶¶6-24; Enka, ¶170; Anupam, ¶67; China Railway, ¶35(b); BGH I ZR 245/19, ¶38; OGH 18OCg6/18h, ¶5.3; Restatement, §4.14 comment b*]. This is because this would provide the parties with certainty that their choice of law clause would be effective in relation to all contractual rights and obligations. It also ensures consistency in the interpretation of the parties' contract as a whole [*Redfern/Hunter, ¶3.18*].

7. This is also the approach adopted by courts in Danubia, Equatoriania, and Mediterraeneo. In all three jurisdictions, "*[t]here is consistent jurisprudence … that in sales contracts governed by the CISG, the latter also applies to the … interpretation of the arbitration clause contained in such contracts*" [*PO1, ¶51*]. This implicitly reflects the rule that the law governing a dispute resolution clause should be presumed to be the same as the law governing the substantive contract. In the present case, the substantive contract is governed by Equatorianian domestic law, pursuant to the express choice of law clause [*see also §§III–IV infra*]. It follows that the interpretation of the Dispute Resolution Clause is also governed by Equatorianian domestic law.

ii. Under Equatorianian domestic law, the mediation requirement is a condition precedent to arbitration.

8. Under Equatorianian domestic law, there is consistent case law that, in case of a multi-tier clause providing first for mediation and then for arbitration under the rule of an institution, the conduct of mediation is a condition precedent for arbitration [*Exh. R1, ¶9, p. 30*].

9. The present Dispute Resolution Clause does precisely that: it states that any dispute "*shall **first** be submitted to mediation in accordance with the Mediation Rules of the Finland Chamber of Commerce*" and then "*shall be **finally** settled by arbitration in accordance with the Rules for Expedited Arbitration of the Finland Chamber of Commerce*" [*Exh. C2, pp. 12–13, emphasis added*]. Therefore, under Equatorianian domestic law, submitting the dispute to mediation is a condition precedent to arbitration.

iii. Even if Danubian domestic law were applicable, the mediation requirement is a condition precedent to arbitration.

10. Even if we apply Danubian domestic law to interpret the Dispute Resolution Clause, the mediation requirement is still a condition precedent to arbitration. The language of the Dispute Resolution Clause clearly indicates so **[a]**. The common intention of the Parties supports this interpretation **[b]**. Lastly, not interpreting the mediation requirement as a condition precedent would render it practically useless, violating basic principles of contractual interpretation. **[c]**

a. The language of the Dispute Resolution Clause clearly and unambiguously indicates that mediation is a condition precedent to arbitration.

11. The language of the Dispute Resolution Clause clearly and unambiguously indicates that the dispute must be submitted to mediation, before it can be submitted to mediation:

> *Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or validity thereof,* ***shall first*** *be submitted to mediation in accordance with the Mediation Rules of the Finland Chamber of Commerce.*
>
> *[…]*
>
> *Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or validity thereof,* ***shall*** *be* ***finally*** *settled by arbitration in accordance with the Rules for Expedited Arbitration of the Finland Chamber of Commerce. …*
>
> *[emphasis added]*

12. The words "*first*" and "*finally*" contemplate a sequence: mediation must come *before* arbitration. The word "*shall*" indicates that it is *mandatory* for the Parties to follow that sequence [*Born, ¶5.08[A][2]; Figueres, p. 72; ICC Case 9984*; *Philip Morris v Uruguay, ¶¶139–140*]. These words clearly make mediation a condition precedent to arbitration.

13. Moreover, the Dispute Resolution Clause specifies that mediation is to be conducted in a specific place, in a specific language, and under a specific set of institutional rules. These factors give the clause sufficient certainty to be enforced, because they provide the tribunal with objective benchmarks against which a party's compliance can be measured [*Born, ¶5.08[A]; Cable v IBM, ¶24*]. Therefore, the Dispute Resolution Clause is sufficiently clear and certain to be enforceable as a condition precedent to arbitration.

b. The Parties' common intention was for the mediation requirement to be a condition precedent to arbitration.

14. A contract shall be interpreted according to the common intention of the parties [*PICC, Art. 4.1.1*]. Regard shall be had to all circumstances, including preliminary negotiations between the parties [*PICC, Art. 4.3*]. In this case, the Parties' preliminary negotiations make it very clear that the Parties' common intention was for mediation to be a condition precedent to arbitration.

15. RESPONDENT's main negotiator (Ms. Ritter) told CLAIMANT's main negotiator (Mr. Deiman) that "*Respondent had a strong interest in an amicable settlement of disputes and* ***arbitration should only be the last resort*** *to resolve disputes*" *[emphasis added]* [*Exh. R1, ¶9, p. 30*].

16. CLAIMANT acceded to RESPONDENT's wishes. In an email dated 12 July 2023, Mr. Deiman stated in no uncertain terms that "*the FAI Model-Mediation Clause suggested by us clearly provides that the Parties* ***must first*** *try to mediate their disputes* ***before*** *resorting to arbitration. Thus,* ***arbitration is only the last***

resort as you wished" *[emphasis added]* [*Exh. R2, p.31*]. Mr Deiman's use of the word "*must*" shows that CLAIMANT itself intended that it was mandatory for a dispute to be first submitted to mediation, before it could be submitted to arbitration.

c. If the mediation requirement were not enforceable as a condition precedent to arbitration, that would render the mediation requirement practically useless.

17. If the Tribunal were to accept CLAIMANT's interpretation that the mediation requirement is not enforceable as a condition precedent to arbitration, this would deprive the expressly written mediation requirement of any legal effect. This would contravene Article 4.5 of the Danubian contract law: "*[c]ontract terms shall be interpreted so as to give effect to all the terms rather than to deprive some of them of effect*" [*PICC, Art. 4.5*].

2. CLAIMANT's non-compliance with the mediation requirement results in a lack of jurisdiction, and is not merely a matter of admissibility or procedure.

i. Preliminarily, this issue is governed by Equatorianian domestic law.

18. Whether compliance with the mediation requirement is a matter of jurisdiction, admissibility or procedure depends on the parties' intentions. This is determined by interpreting the Dispute Resolution Clause [*Born, ¶5.08[C][1]; Santacroce, pp. 557–558; NWA, ¶¶48, 67; C v D, ¶¶7, 47, 111, 156; BG v Argentina, pp. 7, 17*]. Thus, the applicable law is the law governing the interpretation of the dispute resolution clause. In the present case, that is Equatorianian domestic law [*¶¶5–7 supra*].

ii. Under Equatorianian domestic law, compliance with the pre-arbitration mediation requirement is a matter of jurisdiction.

19. Equatorianian law provides a direct answer to this issue. In Equatoriana, there is consistent case law that, where there is a multi-tiered dispute resolution clause providing first for mediation and then for arbitration, submitting the dispute to mediation is a condition precedent for the *jurisdiction* of the arbitral tribunal [*Exh. R1, ¶9, p.30*]. The Dispute Resolution Clause in the present case fits this description perfectly [*see ¶¶8–9 supra*]. Hence, CLAIMANT's noncompliance with the mediation requirement results in a lack of jurisdiction.

iii. Even if Danubian domestic law were applicable, compliance with the pre-arbitration mediation requirement is a matter of jurisdiction.

20. Although there does not appear to be any Danubian statute or case law specifically addressing this issue, the position under Danubian law is very likely to be that compliance with the pre-arbitration mediation requirement is a matter of jurisdiction. Where the applicable law does not have an express statute or court decision that precisely answers the legal issue at hand, this Tribunal should be guided by the law of jurisdictions with related legal systems **(a)** and by general principles of law

(b). This is because the local courts would also look to such sources in formulating local law [*Born, §19.04[D][5]; Gaillard, p. 220*]. Here, these sources indicate that noncompliance with the mediation requirement is a jurisdictional issue.

21. **(a)** Danubia is a Model Law jurisdiction and is likely to follow the approach of other Model Law jurisdictions, such as Equatoriana, Singapore, India, Pakistan, Nepal, Dubai, and Malaysia, which treat pre-arbitration ADR requirements as matters of jurisdiction [*Exh. R1, ¶9, p. 30; IRC v Lufthansa (CA), ¶¶62–63; Haldiram, ¶¶14–16; Fine Star, ¶5; National Construction ¶24; Dubai Ct App Case 32/2019; Usahasama v Abi, ¶18*].

22. **(b)** It is a well-established general principle that a tribunal's jurisdiction is founded solely upon the ***consent*** of the parties [*BBA, ¶78; Nuance, ¶132; C v D, ¶42; Marine v Gas ¶59; Hwang/Lim, p.278; Rosenfeld, pp. 141, 151*]. Hence, to determine whether an issue is jurisdictional, the test is whether it impinges upon the parties' consent to the tribunal's power to hear the present claim [*Hwang/Lim, pp. 266–267, 277; BBA, ¶¶76–78; IRC v Lufthansa (HC), ¶¶99–106; Tulip, ¶63; Born, §5.08[A][4]; Rosenfeld, p. 150; Crawford, p. 667*]. Since the Parties' consent (and its limits) is reflected in the dispute resolution clause, conditions to arbitration that are stated in the dispute resolution clause reflect conditions to the parties' consent. Such conditions are thus matters of jurisdiction [*Lim/Ho/Paparinskis, p. 122; Swissbourgh, ¶207; Tulip, ¶63; Abaclat (Abi-Saab), ¶23; Northern Cameroons (Fitzmaurice), pp. 102–103; Ren, p. 444; Shany, pp. 131–132, 134*].

23. Here, the pre-arbitration mediation requirement is located in the Dispute Resolution Clause. The Parties consented to arbitrate subject to the condition that the dispute must first be submitted to mediation. Thus, non-compliance with the mediation requirement is a jurisdictional issue.

24. *IRC v Lufthansa* is instructive. The contract in that case contained a similar clause:

> *37.2 Any dispute between the Parties relating to or in connection with this Cooperation Agreement or a Statement of Works* ***shall be referred****:*
>
> > *37.2.1* ***first****, to a committee consisting of the Parties' Contact Persons or their appointed designates for their review and opinion; and (if the matter remains unresolved);*
> >
> > *[…]*
> >
> > *37.2.4 fourth, the dispute may be referred to arbitration as specified in Clause 37.3 hereto.*
>
> *37.3 All disputes arising out of this Cooperation Agreement, which cannot be settled by mediation pursuant to Clause 37.2,* ***shall be finally settled by arbitration*** *to be held in Singapore in the English language under the Singapore International Arbitration Centre Rules … [emphasis added]*

25. The claimant in that *IRC v Lufthansa* submitted the dispute to arbitration without having first complied with the preceding steps. The Singapore High Court, interpreting the above clause, found that "*the parties consented to arbitration only* ***on the condition that the parties must first attempt***

mediation" and therefore *"the Tribunal does not have jurisdiction until mediation has been attempted" [emphasis added]* [*IRC v Lufthansa (HC), ¶103; affirmed, IRC v Lufthansa (CA), ¶¶62–63*].

26. The Dispute Resolution Clause in this case is similar in all material aspects to the clause in *IRC v Lufthansa*. It provides that the parties "shall first" submit the dispute to mediation, and that arbitration is only to be the "final" means of dispute settlement. Likewise, during the pre-contractual negotiations, the Parties explicitly agreed that the dispute must first be submitted to mediation, and that arbitration was only to be the last resort [*¶¶14–16 supra*]. Evidently, their consent to arbitration was subject to the *condition* that the dispute had to first be submitted to mediation. Hence, noncompliance with the mediation requirement results in a lack of jurisdiction.

27. CLAIMANT is wrong to suggest that it is a matter of admissibility or procedure [*Cl. Memo., ¶¶14–15*]. "Admissibility" refers to "*whether it is* ***appropriate*** *for the Tribunal to hear the claim*", notwithstanding that parties have consented to the Tribunal's power to hear it [*Waste Management (Highet), ¶58, emphasis added; Swissbourgh, ¶207; BBA, ¶74; SL Mining, ¶18; NWA, ¶74; Crawford, p. 667*]. Whether it is "appropriate" depends on rules which are external to the Parties' agreement, such as rules of judicial propriety or due administration of justice [*BBA, ¶79; Rosenfeld, p. 140; Northern Cameroons (Fitzmaurice), p. 101; Shany, pp. 131–132, 134*]. In the present case, the pre-arbitration mediation requirement is not an external rule. It is located inside the Dispute Resolution Clause. It is a contractual condition which the Parties have chosen to place on their consent to arbitration. Thus, it is not a matter of admissibility.

28. Nor is this simply a matter of "procedure". Procedure refers to *how* the Tribunal should conduct the proceedings for hearing the claim [*Born, §5.08[C][1]*]. Compliance with the mediation requirement is not simply a matter of *how* the Tribunal will hear the claim. A failure to comply with the mediation requirement affects *whether* the Tribunal has the power to hear the claim at all.

3. CLAIMANT cannot rely on the alleged futility of mediation to excuse its failure to submit the dispute to mediation.

29. CLAIMANT argues that its noncompliance with the mediation requirement should be excused because mediation was futile [*Cl. Memo., ¶¶26–30*]. This argument fails on two grounds. Firstly, there is no "futility" exception to the pre-arbitration requirement in the present case **[i]**. Secondly, in any event, mediation was not futile **[ii]**.

i. The dispute resolution clause in the PSA does not contain a "futility" exception to the mediation requirement.

30. Whether or not there is a "futility" exception to a pre-arbitration requirement depends on the interpretation of the dispute resolution clause in question [*İçkale, ¶260; ICS, ¶¶265–268*]. The

Dispute Resolution Clause in the present case does not contain any "*futility*" exception to the pre-arbitration mediation requirement.

31. **Firstly**, the Dispute Resolution Clause does not contain any language which would suggest that Parties can choose not to even attempt mediation on the grounds that it would be futile. In contrast, in the cases cited by CLAIMANT to support its "futility" argument, the Dispute Resolution Clause contained clear language to support the existence of a futility exception.

32. For example, in *Teinver v Argentina* [*Cl. Memo.*, ¶*27*], the dispute resolution clause stated that

> *1. Disputes arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement shall,* ***as far as possible****, be settled amicably between the parties to the dispute.*
>
> *2. If a dispute within the meaning of section 1* ***cannot be settled*** *within six months as from the date on which one of the parties to the dispute raised it, it shall be submitted, at the request of either party, to the competent tribunals of the Party in whose territory the investment was made … [emphasis added]*

33. Likewise, in *Greece v Great Britain* [*Cl. Memo.*, ¶*27*], the dispute resolution clause provided that [*Greece v Great Britain, p.11*]:

> *… if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute,* ***if it cannot be settled by negotiation****, shall be submitted to the Permanent Court of International Justice … [emphasis added]*

34. The words *"as far as possible"* and "*if it cannot be settled*" indicated that Parties could proceed to the next step in the dispute resolution process if there was no possibility of amicable settlement methods leading to a resolution of the dispute. In those cases, the court and tribunal expressly justified their application of the futility exception with reference to this wording [*Teinver v Argentina,* ¶*108; Greece v Great Britain, p. 13*].

35. In the present case, the Dispute Resolution Clause does not contain similar wording. Absent any textual basis to support the existence of a "futility" exception, a "futility" exception should not be created [*İçkale,* ¶*260; ICS,* ¶¶*265–268*]. To do so would be to rewrite the Parties' agreement.

ii. In any event, mediation was not futile in the present case.

36. Even if there exists a "futility" exception to the mediation requirement, mediation is not futile in the present case. There is a high threshold for proving futility of a pre-arbitration condition. It is not sufficient that the prospect of settlement is merely "*unlikely*" [*ICS,* ¶*269*]. CLAIMANT must show that mediation will be a "*completely hopeless exercise*" [*Cable v IBM,* ¶*35*], "*obviously futile*" [*Finnish Ships, p. 1504; ICS,* ¶*269; Apotex,* ¶*276; Santos*, ¶*28*] – or in CLAIMANT's own words – "*completely futile*" [*Cl. Memo.*, ¶*31*]. The burden of proof lies on CLAIMANT to prove that this threshold has been met [*Kilic,* ¶*8.1.9*]. CLAIMANT has not discharged its burden.

37. The crux of CLAIMANT's "futility" argument is that when RESPONDENT requested CLAIMANT to reduce the contract price during settlement negotiations, the CLAIMANT found these requested reductions to be "*impossible … to accept*" [*Cl. Memo., ¶29*]. CLAIMANT says this shows that there was no chance of a consensus being reached [*Cl. Memo., ¶30*]. This argument fails, for three reasons.

38. **Firstly**, almost all the evidence that CLAIMANT relies on for this argument is inadmissible. The only piece of documentary evidence that CLAIMANT has produced, to show the price reduction requests that it complains of, is Exhibit C7 [*RfA, ¶25, p.6*]. This is inadmissible evidence [*§II.A. infra*].

39. **Secondly**, even if CLAIMANT could rely on the contents of Exhibit C7, Exhibit C7 does not show that mediation would have been futile. CLAIMANT's mere assertion that it was *"impossible for Claimant to accept*" the price reduction [*RfA, ¶25, p.6*] cannot be treated as evidence that settlement was in fact impossible. Otherwise, a party can escape the mediation requirement simply by claiming that the other party's offers were unacceptable [*Kajkowska, ¶2.21; Salehijam (I), p. 42; Swiss Federal Tribunal Case, ¶2.4.3.2*]. This would render pre-arbitration mediation requirements practically useless.

40. **Thirdly**, CLAIMANT's argument, at best, shows that *negotiations* failed to produce a settlement, but does not necessarily mean that *mediation* will be futile [*Halsey v Milton, ¶22*]. The advantage of mediation lies precisely in the involvement of a skilled third-party mediator, who can help parties to navigate disagreements and find mutually acceptable solutions that they may not otherwise have been able to find by themselves during negotiations [*Salehijam (II), ¶17*]. As the Swiss Federal Tribunal put it [*Swiss Federal Tribunal Case, ¶2.4.3.2*]:

> *… it would be wrong to underestimate the part a mediator can play in resolving a dispute and the beneficial influence that the force of persuasion of a person well versed in the alternative methods of dispute resolution may have upon the parties to a conflict.*

4. RESPONDENT invoked the mediation requirement in good faith.

41. CLAIMANT argues that "*the mediation procedure should be omitted given RESPONDENT's bad faith*" [*Cl. Memo., ¶31*]. In order to establish bad faith, CLAIMANT must prove that RESPONDENT invokes the mediation requirement with no intention of reaching an amicable settlement, and instead does so for the sole purpose of achieving another objective, such as delaying the arbitral proceedings [*PICC, Art. 2.1.15; Vogenauer, Art. 2.1.15, ¶26; Born, §5.08[B][3]; Kajkowska, ¶3.37; Reyes/Gu, ¶12.3.1; Salehijam (II), ¶22*]. CLAIMANT fails to prove any of this, for four reasons.

42. **First**, CLAIMANT relies on certain statements made by RESPONDENT in its without-prejudice offer in Exhibit C7 but Exhibit C7 is inadmissible evidence [*§II.A. infra*]. Thus, this Tribunal should disregard those arguments of CLAIMANT which rely on Exhibit C7.

43. **Second**, even if CLAIMANT could rely on the contents of Exhibit C7 (the without-prejudice offer), they do not establish bad faith. In Exhibit C7, RESPONDENT offered to continue with the contract,

instead of merely insisting on its legal rights to terminate the contract and claim damages. RESPONDENT also offered to give CLAIMANT a first demand guarantee for the performance of Respondent's obligations under the PSA, in the value of 10% of the contract price [*Exh. C7, p. 20*]. This shows that RESPONDENT is genuinely interested in finding a mutually acceptable solution.

44. **Third**, *ICC Case 26290/AYZ/ELU* [*cited in Cl. Memo., ¶32*] does not assist CLAIMANT. That case merely states that a party acts in bad faith if it "*fails to respond to the other party's requests* and *does not engage in a dialogue in order to reach an amicable settlement*" [*ICC Case 26290/AYZ/ELU*, ¶270]. That is clearly not the case here. RESPONDENT has consistently responded to CLAIMANT's communications and engaged in discussions with CLAIMANT:

a. On 28 April, RESPONDENT's CEO met with CLAIMANT's Head of Contracting to discuss possible solutions to the dispute [*PO2, ¶23, pp.54–55*].

b. On 12 May 2024, RESPONDENT's CEO met with CLAIMANT's CEO to discuss possible solutions to the dispute [*PO2, ¶23, p.55*].

c. On 25 May 2024, RESPONDENT sent CLAIMANT a without-prejudice offer [*RfA, ¶21, p.21*].

45. **Fourth**, CLAIMANT argues that RESPONDENT is merely using mediation requirement to delay the arbitral proceedings [*Cl. Memo., ¶¶41–42*]. This seems to be completely premised upon the assumption that "*there did not exist any possibility to solve the dispute through amicable mediation*" [*Cl. Memo., ¶41*] (*ie*, mediation is futile). However, mediation is not futile in the present case [*§I.A.3.ii. supra*].

B. Even if compliance with the mediation requirement were a matter of admissibility, the Tribunal should still reject the claim.

46. Even if compliance with the mediation requirement were a matter of admissibility, the Tribunal should still reject the claim [*BGH I ZR 245/19, ¶7; Abaclat (Abi-Saab), ¶25; RREEF, ¶225; Hasanov v Georgia, ¶99*]. Characterising the mediation requirement as a matter "admissibility" does not change the fact that it is mandatory. In the words of the tribunal in *Hasanov v Georgia*, "*whether the … negotiation condition precedent … is one of jurisdiction or admissibility, it would nevertheless preclude the Tribunal from proceeding to the merits of this dispute if the condition was not met*" [*Hasanov v Georgia, ¶99*].

C. Even if compliance with the mediation requirement were a matter of procedure, the Tribunal should still reject the claim.

47. Even if noncompliance with the mediation requirement is a "procedural" matter [*Cl. Memo., ¶11*], the Tribunal must still reject the claim. The Tribunal does not enjoy the discretion to allow the claim to proceed if the mediation requirement has not been complied with **[1]**. Even if it enjoyed that discretion, it should still reject the claim **[2]**.

1. Even if compliance with the mediation requirement were a matter of procedure, the Tribunal does not enjoy the discretion to allow the claim to proceed if the mediation requirement has not been complied with.

48. Even if CLAIMANT were correct that the mediation requirement is a "procedural" issue [*Cl. Memo., ¶11*], the Tribunal does not enjoy a discretion to allow the claim to proceed in spite of CLAIMANT's noncompliance with the mediation requirement.

49. CLAIMANT argues that the Tribunal can choose to "*proceed with the arbitration for procedural efficiency and fairness* ***in the exercise of its discretion***" [*Cl. Memo., p.9, §A.3.*] *[emphasis added]*. CLAIMANT seems to justify the existence of this discretion on the basis that the mediation requirement is merely another aspect of the arbitral procedure [*Cl. Memo., ¶11*].

50. However, the mere fact that something is a matter of procedure does not necessarily mean that the Tribunal enjoys discretion over it. The Tribunal's discretion to "*conduct the arbitration in such manner as it considers appropriate*" is qualified by the requirement that it must follow the parties' agreements on particular aspects of the arbitral procedure, if there are any [*see Analytical Commentary, p. 44; Cuniberti, ¶19.01*].

51. Article 19 of the UNCITRAL Model Law provides that "*parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings*", and it is only "***failing such agreement*** *[that] the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate*" *[emphasis added]*.

52. Likewise, the FAI Arbitration Rules, Article 26.1 provides that: *"****subject to*** *these Rules and* ***any agreement by the parties****, the arbitral tribunal shall conduct the arbitration in such manner as it considers appropriate*" *[emphasis added]*.

53. If this Tribunal nevertheless proceeds to hear the claim, the award would be liable to be set aside and enforcement may be refused. This is because a tribunal's failure to abide by the parties' agreement on pre-arbitration steps means that "*the arbitral procedure was not in accordance with the agreement of the parties*" within the meaning of UNCITRAL Model Law, Arts.34(2)(a)(iv) & 36(1)(a)(iv) and NYC, Art. V(1)(d) [*Kronke et al, Art. V(1)(d), p. 295*; *Hanil Engineering, ¶¶13–14; PepsiCo v Sichuan Pepsi; PepsiCo v Sichuan Yunlv*].

54. Hence, this Tribunal must follow the Parties' agreement that the dispute must first be submitted to mediation, before arbitration. This Tribunal does not enjoy a discretion to allow the arbitration to proceed when the dispute has not been submitted to mediation. It must hold CLAIMANT to its agreement to mediate before arbitration.

2. Even if the Tribunal enjoys the discretion to allow the claim to proceed, the Tribunal should still reject the claim.

55. Even if the Tribunal enjoyed the discretion to allow the claim to proceed, it should still reject the claim. CLAIMANT argues that the Tribunal should allow the arbitration to proceed because: firstly, that "*insistence on mediation is contrary to the principle of efficiency*"; and, secondly, that "*insistence on mediation breaches the good faith obligation*" [*Cl. Memo., ¶¶36–43*]. Neither reason stands up to scrutiny.

i. Upholding the mediation requirement will enhance rather than reduce procedural efficiency.

56. CLAIMANT argues that rejecting the claim is contrary to procedural efficiency because mediation is futile, and it would thus be a waste of time to reject the claim and have parties try to resolve their dispute by mediation [*Cl. Memo., ¶38*]. This argument fails on two grounds.

57. **First**, CLAIMANT has not shown that mediation is futile. There is a more than reasonable chance that mediation will lead to a settlement of the dispute [*§I.A.3.ii supra*], which would in fact save the time and costs associated with arbitrating the dispute.

58. **Second**, even if mediation does not lead to a complete settlement, it can help to narrow the scope of disputed issues between the parties, thereby saving time and costs if the matter does proceed to arbitration [*Idoport, ¶43; Hooper, ¶206*; *Salehijam (I), p. 41*].

ii. RESPONDENT's invocation of the mediation requirement does not violate its obligation to arbitrate in good faith.

59. CLAIMANT accuses RESPONDENT of breaching its obligation to arbitrate in good faith, on the basis that its invocation of the mediation requirement is a mere "delaying tactic" [*Cl. Memo., ¶40*]. These are pure assertions, unsupported by the slightest bit of evidence. On the contrary, RESPONDENT's conduct in the course of settlement negotiations consistently showed that RESPONDENT had a genuine interest in resolving the dispute through amicable means [*¶¶43–44 supra*].

II. THE TRIBUNAL SHOULD EXCLUDE EXHIBIT C7 BUT ADMIT EXHIBIT R3.

A. Exhibit C7 should be excluded.

60. Exhibit C7 is a without-prejudice offer made from RESPONDENT to CLAIMANT about their settlement of the contract price, which is aimed at facilitating the execution of the PSA to settle the contract price [*Cl. Exh. C7, p. 20*]. Exhibit C7 should be excluded for the following reasons. First, Exhibit C7 is not relevant and material **[1]**. Even if it were relevant and material, it should still be excluded **[2]** because CLAIMANT is prohibited from producing settlement offers as evidence under Article 15.2 of the FAI Mediation Rules and pursuant to the rule of without prejudice privilege.

1. Exhibit C7 is not relevant and material to the present case.

61. According to Article 19(2) of the UNCITRAL Model Law, this Tribunal shall determine the relevance and materiality of the evidence when deciding whether to exclude the evidence. CLAIMANT argues that Exhibit C7 is relevant and material to, first, the issue of jurisdiction and, second, the termination of the PSA [*Cl. Memo., ¶79*]. However, neither of these grounds are true.

62. **First**, CLAIMANT argues that Exhibit C7 is relevant to the issue of jurisdiction because it "*shows the unreasonable claims of the Respondent*" [*Cl. Memo., ¶79*]. But CLAIMANT does not explain why this is legally relevant to the question of jurisdiction. Insofar as CLAIMANT is suggesting that Exhibit C7 therefore shows that mediation would have been futile, this is legally irrelevant because there is no futility exception to the mediation requirement in the present case [*§I.A.3.i. supra*]. Therefore, Exhibit C7 is irrelevant to the issue of jurisdiction.

63. **Second**, CLAIMANT argues that Exhibit C7 is relevant "*to the question of whether the agreement has been terminated*" [*Cl. Memo., ¶79*]. However, there is no dispute between the Parties on whether the agreement has actually been terminated. The dispute centers on whether the termination of the contract was *valid* [*RfA, ¶22; ARA, ¶18*]. Therefore, Exhibit C7 is irrelevant and immaterial.

2. Even if this Arbitral Tribunal regards Exhibit C7 as relevant and material, Exhibit C7 should still be excluded.

64. Even if this Tribunal still considers Exhibit C7 relevant and material, Exhibit C7 should still be excluded. First, the confidentiality obligation in Article 15.2 of the FAI Mediation Rules prohibits Claimant from producing as evidence any communications made during settlement negotiations **[i]**. Second, Exhibit C7 is protected by without prejudice privilege **[ii]**. Excluding Exhibit C7 does not harm Claimant's procedural rights **[iii]** and does not contradict the good faith principle **[iv]**.

i. **Article 15.2 of the FAI Mediation Rules prohibits CLAIMANT from producing Exhibit C7 as evidence in this arbitration.**

65. Article 15.2 provides that "*[t]he parties, the mediator and any other person participating in the proceedings shall not invoke or produce as evidence any information (including, but not limited to, any statements made regarding the possibility to settle the dispute) obtained in the context of FAI Mediation in any subsequent legal proceedings*". CLAIMANT argues that Article 15.2 is inapplicable because Exhibit C7 was an offer made during negotiations, not during mediation [*Cl. Memo., ¶50*]. CLAIMANT is wrong. Article 15.2, properly interpreted, also protects communications made during settlement negotiations.

a. The language of Article 15.2 is broad enough to cover settlement negotiations.

66. **Firstly**, the language of Article 15.2 indicates that it is not limited to statements made or obtaining *"during"* mediation. Article 15.2 protects *"**any** information (including, but not limited to any statements made*

regarding the possibility to settle the dispute) obtained ***in the context of*** *FAI Mediation" [emphasis added].* Rather than simply using the word *"during"* (as is the case in Article 15.1), the drafters of the FAI Mediation Rules chose to use the phrase *"in the context of"* for Article 15.2.

67. The word "context" has a broader meaning than "*during*". "Context" refers to the "*events* ***related*** *to a particular event or situation*" [*Cambridge dictionary*]. In the present case, the Parties' negotiations were clearly related to the FAI Mediation. The subject of the Parties' negotiations was the present dispute over the termination of the PSA, which would also have been the subject of the FAI Mediation if CLAIMANT had complied with the dispute resolution clause. Therefore, negotiations forms part of the surrounding "context" of FAI Mediation and thus falls within the scope of Article 15.2.

b. It was the Parties' common intention for Article 15.2 to extend to negotiations.

68. Even if Article 15.2 does not ordinarily apply to settlement negotiations, the Parties in this case had the common intention to extend its scope of coverage to settlement negotiations. Article 15.2 of the FAI Mediation Rules forms part of the agreement to mediate [*FAI Mediation Rules, Art. 1.1*]. Like any other agreement, it should be interpreted in accordance with the Parties' common intention [*PICC, Art. 4.1*]. The parties' common intention may be gleaned from pre-contractual negotiations [*PICC, Art. 4.3*].

69. During pre-contractual negotiations, RESPONDENT's concern was that "*given the political climate and the existing opposition to the new energy strategy, we wanted to keep any potential dispute within the project out of the press*" [*Exh. R1, ¶10, p. 30*]. This indicates that RESPONDENT must have intended for not only mediation, but also negotiations, to be confidential. After all, there would be little point in keeping mediation confidential but then allowing the contents of all negotiations (which might concern essentially the same subject matter) to be freely disclosed.

70. However, *"[a]t the same time, [Respondent] did not want to press for a separate full-fledged confidentiality agreement for the resolution of disputes, which, if leaked, could be misinterpreted as an effort by [Respondent] to hide relevant information from the public*" [Exh. R1, ¶10, p. 30]. Since RESPONDENT did not want to conclude a separate confidentiality agreement, but also intended for negotiations to be confidential that must mean that RESPONDENT's intention was for the existing confidentiality provisions – such as Article 15.2 – to extend to settlement negotiations as well. This is confirmed by RESPONDENT's main negotiator, who has testified that "*[f]or me, it was clear that Article 15 of the Mediation Rules should also extend to all negotiations preceding mediation*" [*Exh. R1, ¶10, p. 30*]

71. CLAIMANT shared the common intention that Article 15 should extend to settlement negotiations. In an email dated 12 July 2023, CLAIMANT told RESPONDENT that:

> *In relation to your concerns regarding the confidentiality of the **foreseen** ADR mechanisms and the communications made therein, I would refer you to Article 15 of the Mediation Rules … The regulations contained therein should in my view be sufficient to address your concerns as they ensure the needed confidentiality. [emphasis added]*

72. This shows that CLAIMANT itself intended for Article 15 to apply to all the Parties' "*foreseen ADR mechanisms*". That must surely include negotiations – in practice, commercial parties almost always attempt some degree of negotiation first to resolve disputes [*Merrills, Ch.1, p.1*]. It would be incredible for CLAIMANT to suggest that it was not foreseen that negotiations would occur.

73. In these circumstances, it is clear that the Parties' shared the common intention that the confidentiality obligation in Article 15.2 of the FAI Mediation Rules would apply to settlement negotiations as well. Accordingly, CLAIMANT is prohibited from producing Exhibit C7 as evidence, because it was an offer made during settlement negotiations.

ii. Exhibit C7 is protected by "without prejudice" privilege.

a. The law and rules applicable to the without prejudice privilege are the law of Equatoriana and the IBA Rules.

74. The law and rules applicable to the without prejudice privilege in Exhibit C7 are the law of Equatoriana and the IBA Rules.

75. ***First,*** to determine the law applicable to the issue of privilege, the Tribunal should apply the law of the jurisdiction with the "closest connection" to the privilege. In determining which jurisdiction has the "closest connection", relevant factors include the jurisdiction in which the document was created or where the communication took place and the nature of the evidence. [*Diana Kuitkowski, p. 92; Niko Resources, ¶ 22*].

76. Here, Exhibit C7 is a without-prejudice offer made by RESPONDENT, an Equatorianian state-owned entity, from Equatoriana [*Exh. C7*]. This offer was made in an attempt to settle a dispute arising from an Equatorianian law contract [*see PSA Art. 29, in Exh. C2, p.12*] for the construction of a green hydrogen plant in Equatoriana [*Exh. C2, p. 11, Art. 2(1)*], which was meant to further the Equatorianian government's renewable energy policies [*RfA, ¶2*]. The in-person negotiations preceding this written offer had also taken place in Equatoriana [*PO2, ¶23; Exh. C8, ¶¶2–3*]. The totality of the circumstances overwhelmingly points to the law of Equatoriana as having the closest connection to the without prejudice privilege which protects Exhibit C7.

77. ***Second***, the IBA Rules should guide this Arbitral Tribunal in deciding whether or not to exclude Exhibit C7 on the grounds of without prejudice privilege [*Redfern/Hunter, ¶3.253; Born, §16.02[E][3][a](1)*]. CLAIMANT itself has agreed with the application of IBA Rules [*Cl. Memo., ¶¶52, 85, 90, 95*]. This approach is also consistent with established practice of arbitral tribunals [*Philip*

Morris v Australia, ¶4.4; Glencore v Colombia, ¶90; Vale v BSG, ¶23]. In conclusion, both the law of Equatoriana and the IBA Rules govern the without prejudice privilege here.

b. Under Equatorianian law and the IBA Rules, Exhibit C7 is protected by without prejudice privilege.

78. Both Equatorianian law and the IBA Rules recognize the principle of without prejudice privilege. ***First***, under Equatorianian law, there are detailed provisions on privilege that align closely with those in the United States and other jurisdictions adopting the American approach [*Rule 408 of Federal Rules of Evidence of the U.S; McClandon, ¶¶7-8; Lampliter, ¶¶15-16; Berger(II), p. 266, 271*].

79. ***Second***, for the IBA Rules, Article 9.4(b) provides that:

> *In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account: ...*
>
> *(b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations."*

80. RESPONDENT does not dispute that a "without prejudice" label cannot automatically render the document privileged as CLAIMANT contends [*Cl. Memo., ¶¶56-58*]. However, the fact that Exhibit C7 has been expressly labelled "without prejudice" shifts the burden to CLAIMANT to prove that without prejudice privilege does not apply [*Leong Quee Ching Karen, ¶29; Swee Wan Enterprises, ¶10; Mariwu, ¶ 24; Sarah Tanya Borwein Olsen, ¶18*]. However, CLAIMANT fails to provide reasoned justifications for this position [*Cl. Memo., ¶¶60-62*].

81. Here, regardless of just being labelled "without prejudice", Exhibit C7 is protected by the without prejudice privilege because Exhibit C7 satisfies the two criteria for without prejudice privilege, namely: (1) the existence of a dispute, either regarding its validity or the amount; and (2) an attempt to compromise or settle the dispute [*Goodyear Tire & Rubber Co, ¶¶980 –981; Leong Quee Ching Karen, ¶28; Leong Quee Ching Karen, ¶28; Georgia Corporation v Gavino Supplies, ¶36; Bradford & Bingley plc, ¶73*]. Specifically, if a party makes statements or offers with the intention of settling a dispute, rather than merely seeking a concession from the opposing party, such communications should be protected [*Goodyear Tire & Rubber Co., ¶¶980 –981*].

82. Despite the controversy surrounding the previous actions of CLAIMANT and the entire price of the PSA, RESPONDENT has demonstrated its genuine attempt to resolve this dispute. RESPONDENT terminated the PSA because the final plans sent by CLAIMANT were late and incomplete [*ARA, ¶¶11-12*]. Even so, RESPONDENT's CEO still met with CLAIMANT's CEO in person subsequently to explore potential support from the government for the Parties and to make the project compatible with the current policies of Equatoriana [*Exh. C5, ¶15*]. It was CLAIMANT itself who concluded that there was no room for further discussions [*Exh. C5, ¶15*], although the meeting

represented a clear opportunity to settle the dispute. Accordingly, Exhibit C7 should be entitled to the protection of the without prejudice privilege.

iii. Excluding Exhibit C7 will not harm CLAIMANT's procedural rights.

83. CLAIMANT argued that excluding Exhibit C7 would harm its procedural rights, specifically the right to be heard, because the wrongful exclusion of evidence violates Article V(1)(d) of the New York Convention [*Cl. Memo., ¶¶ 80 - 81*].

84. The right to be heard encompasses the ability to submit evidence in support of its case [*Glencore v Colombia, ¶348*]. However, if a document is privileged, the tribunal's decision to exclude such evidence does not violate the parties' right to be heard [*Born, Ch.16[B][2]*; *Glencore v Colombia, ¶ 348; Goodyear Tire & Rubber Co., ¶ 979*]. Further, if the evidence is irrelevant to the case, then its exclusion does not violate fundamental fairness [*Sire Spirits, ¶26*].

85. In the present case, Exhibit C7 is protected by the confidentiality obligation in Article 15.2 of the FAI Mediation Rules and by without prejudice privilege [*§II.A.2.i, II.A.2.ii. supra*]. In any event, Exhibit C7 is irrelevant to the dispute [*§II.A.1. supra*]. Therefore, excluding Exhibit C7 does not harm CLAIMANT's procedural rights.

iv. Excluding Exhibit C7 does not contradict the good faith principle.

86. CLAIMANT claims that RESPONDENT is estopped from arguing that Exhibit C7 should be excluded on the grounds of confidentiality, pursuant to the principle of good faith [*Cl. Memo., ¶¶64–72*]. CLAIMANT alleges that "*[o]n several occasions, ministers of Equatorian have publicly declared that they would submit all their arbitration [sic] to the UNCITRAL Rules of Transparency*" [*Letter from Langweiler, p. 35*].

87. CLAIMANT has grossly misunderstood the effect of the UNCITRAL Rules on Transparency. The UNCITRAL Rules on Transparency pertain to the question of whether documents properly in the arbitration proceedings should be disclosed *to the public* [*see UNCITRAL Rules on Transparency, Arts. 2 & 3(1)*]. This is a completely different question from whether certain documents are admissible as evidence to begin with [*Waincymer, p.799; Siblesz, p.25*; *Augsburger, p.251, ¶¶4–7*], which is the issue at hand. As one commentator explains [*Augsburger, p.251, ¶¶4–7*]:

> *As a principle, [the UNCITRAL Transparency Rules] deal only with exceptions to the flow of information from within a specific arbitration procedure into the public sphere.*
>
> ***The Rules do not deal with information (only) in the sphere of a party to the proceedings and the mechanisms under which such information comes into the arbitration proceeding. This is an issue of evidence.*** *… the Rules [are] no guide when it comes to issues of discovery, document production and evidentiary privilege claims …*
>
> *[emphasis added]*

88. Therefore, even if the UNCITRAL Rules on Transparency were somehow applicable to this arbitration, they have no bearing whatsoever on whether Exhibit C7 should be excluded.

B. Exhibit R3 should not be excluded.

89. Exhibit R3 is an email from Ms. Smith (CLAIMANT's in-house counsel) to Poul Cavendish (CLAIMANT's CEO) and Mr. Deiman (CLAIMANT's former Head of Contracting). In this email, Ms Smith suggests how to avoid making any actionable assurances or liability for misrepresentation [*Exh. R3, p. 32*].

90. Exhibit R3 should not be excluded. Exhibit R3 is both relevant and material to the issues in dispute **[1]**. Exhibit R3 is not protected under legal advice privilege **[2]**. Exhibit R3 was not procured through illegal means by the Respondent **[3]**. Respondent's direct transmission of Exhibit R3 to the arbitrators does not justify excluding Exhibit R3 **[4]**.

1. Exhibit R3 is relevant and material to multiple issues in this arbitration.

91. In determining whether Exhibit R3 should be excluded, its relevance and materiality are key considerations [*IBA Rules, Art. 9(2)*]. Exhibit R3 is relevant and material to two important issues in this arbitration. First, whether the PSA is governed by the CISG. Second, whether RESPONDENT's termination of the PSA was valid.

92. **First**, Exhibit R3 is relevant in determining whether the PSA is governed by the CISG or Equatorianian domestic law (excluding the CISG). Parties' common intention is relevant to interpreting the choice of law [*PICC, Art. 4.*1]. In Exhibit R3, Ms Smith states that she had taken "*a closer look at the* ***law of Equatoriana*** *concerning assurances and misrepresentations"* [*Exh. R3, p. 32*], that is, the non-harmonized law of Equatoriana [*PO2, ¶11, p. 53*]. The fact that Ms Smith rendered her advice under the non-harmonised law of Equatoriana shows that CLAIMANT's own in-house counsel did not interpret the choice of law clause in the PSA as referring to the CISG [*PO2, ¶11, p.53*]. Exhibit R3 is therefore key evidence to show CLAIMANT, like RESPONDENT, did not intend for the CISG to apply. Therefore, Exhibit R3 is highly relevant and material.

93. **Second**, Exhibit R3 is relevant and material to determining whether Respondent's termination of the Agreement was valid. One of RESPONDENT's grounds of termination is that it had the right to terminate its contracts for convenience if they conflict with the policies of the Equatorianian government [*Cl. Exh. C6, p.19*]. CLAIMANT's only defence to this is that RESPONDENT had waived this right to terminate for convenience [*RfA, ¶20*]. Exhibit R3 is relevant to determining whether this alleged waiver was valid, because Exhibit R3 shows that the waiver was procured by CLAIMANT's fraudulent misrepresentations.

94. RESPONDENT agreed to waive the right to terminate for convenience only because CLAIMANT cultivated the impression that it would be exceeding the minimum local content requirements [*ARA, ¶6, p.26*]. During pre-contractual negotiations, CLAIMANT told RESPONDENT that they would have a "*local content of around 45%*" [*Exh. R2, p.31*]; that it "*had a very good discussion*" with P2G;

was "*impressed by [P2G]'s proficiency and the production facilities*"; and it was "***confident*** *that we may be able to overcome the present quality concerns*" with P2G [*Exh. R2, p.31*], thus leading RESPONDENT to believe that CLAIMANT would be sourcing the eAmmonia option from P2G.

95. However, Exhibit R3 shows that CLAIMANT knew its representations were false. Exhibit R3 shows that, as of 10 July 2023, CLAIMANT already considered it "*not unlikely*" that the "*quality issues*" with P2G could not be resolved and that the eAmmonia option would thus have to be sourced from a non-Equatorianian company, reducing the promised local content. Indeed, Exhibit R3 itself shows the CLAIMANT knew that the "*local content is a relevant consideration for being awarded the contract*" and that it "*could be accused of misrepresentation*" [*Exh. R3, p.32*]. Thus, Exhibit R3 is relevant and material to deciding whether RESPONDENT's termination of the PSA was valid, as it constitutes evidence of CLAIMANT's fraudulent misrepresentation.

96. Given that Exhibit R3 is relevant and material to several issues in this arbitration, excluding it would infringe RESPONDENT's right to have a full opportunity to present its case [*Model Law, Article 18; FAI Arbitration Rules, Article 26.2*; *Berger (I), p.518; Hoteles Condado, p. 685*]. The failure to give a party the opportunity to present relevant and material evidence has been considered a ground for setting-aside [*Hoteles Condado, p. 685*] and refusing enforcement of an award [*Coromandel Land, ¶60*]. Accordingly, this Tribunal must not exclude Exhibit R3.

2. Exhibit R3 is not protected by legal advice privilege.

97. Under Art. 9(2)(b) of the IBA Rules, evidence may be excluded based on *"legal impediment or privilege"*. In determining what constitutes "*legal impediment or privilege",* Art. 9(4) allows for the standard to be applied to be left to the discretion of the arbitral tribunal. Regardless of the approaches employed by the tribunal, legal advice privilege does not apply to Exhibit R3. Furthermore, even if legal professional privilege were to apply to Exhibit R3, such privilege would be set aside under the "*crime/fraud exception."*

i. The applicable law to the issue of legal privilege is the law of Mediterraneo, which does not contain a rule of legal privilege.

98. To determine the law applicable to the issue of legal privilege, the Tribunal should apply the law of the jurisdiction with the "closest connection" to the privilege. In determining which jurisdiction has the "closest connection", relevant factors include: (i) the domicile of the client; (ii) the jurisdiction in which the lawyer is qualified to practice; and (iii) the jurisdiction in which the document was created or where the communication was made [*Kuitkowski, p. 92; ICC Case No 4237/1984, pp. 170–171; Niko Resources ¶22*; *Born, §16.02[E][8][e]*].

99. In the present case, (i) the client is CLAIMANT, headquartered in Mediterraneo [*RfA, p.2*]. (ii) The lawyer is its in-house counsel, who is admitted to the bar of Mediterraneo. (iii) The email was sent

and received via Mediterranean email addresses (domain extensions "*.me*"). These factors overwhelmingly point towards Mediterranean law as being the most closely connected to the issue of legal privilege.

100. Mediterranean law does recognize any rules on legal privilege which would require communication between lawyers and clients to be excluded. In that regard, jurisdiction of "*Mediterraneo ... is comparable to that of Danubia"* which has "*no rules on legal privileges protecting such documents from disclosure"* [*Exh. R4, p. 33*]. Therefore, there is no rule of legal privilege under Mediterranean law which requires Exhibit R3 to be excluded.

ii. Even if Danubian law were applicable to the issue of legal privilege, Exhibit R3 is not protected by legal advice privilege.

101. Even if Danubian law were applicable to the issue of legal privilege (on the basis that it is a procedural issue and therefore governed by the law of the seat [*Kuitkowski, pp. 84–85; Berger (I), p. 508*], Exhibit R3 still would not be protected by legal privilege. Like Mediterraneo, Danubian law does not have any rules on legal privileges protecting lawyer-client communications from disclosure [*Exh. R4, p. 33*].

iii. Even if Equatorianian law were applicable to the issue of legal privilege, legal privilege does not cover Exhibit R3.

102. Even if the tribunal were to apply the law of the jurisdiction with the "most protective privilege" [*Javier Rubinstein & Guerrina; Ferrari/Kröll, p. 236; Berger (I), pp. 518–519*], Exhibit R3 would still be admissible. In this case, the jurisdiction with the highest level of protection is Equatoriana, which has "*detailed rules on privilege"*, whereas Mediterraneo and Danubia have no privilege rules [*Exh. R4, p. 33*].

103. Exhibit R3 is not protected by legal privilege under Equatorianian law, for two reasons. First, the legal advice in Exhibit R3 was advice on the law of Equatoriana but the lawyer in question was not admitted to the Equatorianian bar **[a]**. Second, the "crime/fraud exception" excludes legal privilege from applying to Exhibit R3 **[b]**.

a. Legal privilege does not apply because the counsel was not admitted to the bar of Equatoriana.

104. Equatoriana follows the approach of United States law to legal privilege [*Exh. R4, p. 33*]. Thus, under Equatorianian law (following United States law), in order for legal privilege to apply to communications between in-house counsel and their client, the in-house counsel must be a member of the relevant bar [*PO2, ¶55; United States v United Shoe*]. Exhibit R3 contains legal advice on Equatorianian law by Ms. Smith. However, she is only admitted to the bar in Mediterraneo [*Exh.*

R3], and there is no indication that she is admitted to the bar in Equatoriana. Therefore, legal privilege does not apply to Exhibit R3.

b. The fraud exception excludes legal privilege from applying to Exhibit R3.

105. Equatoriana follows the approach of United States law to legal privilege [*Exh. R4, p. 33*]. United States law recognizes a fraud exception to legal privilege. There are two requirements for the fraud exception to apply: (i) the client must have been engaged in (or was planning) a fraudulent scheme when the advice was sought; and (ii) the advice was sought in furtherance of the fraudulent scheme or was closely related to it [*In re Grand Jury Investigation (Schroeder); Chaudhry*]. These two requirements are satisfied here.

106. Requirement (i) is met. At the relevant time, CLAIMANT was planning to write an email to mislead Respondent into believing that the local content in the project would be higher than it was going to be, to improve its chances of securing the contract [¶¶*93-94 supra*]. This was a scheme for fraudulent misrepresentation, which engages the fraud exception [*United States v Gorski; Koch; BP Alaska, pp.1263*].

107. Requirement (ii) is met. In particular, Exhibit R3 is the advice that CLAIMANT sought from its in-house counsel on how to best word its email such as to achieve its desired effect while avoiding liability. To that end, Ms. Smith advised CLAIMANT to "*state that you are **confident** that that we may be able to overcome [the ongoing quality issues with P2G]*" [*Exh. R3, p. 32*]. This was despite CLAIMANT's knowledge that it was "*not unlikely*" that the quality concerns could not be resolved [*Exh. R3, p. 32*]. Evidently, the advice was being sought for the purpose of furthering CLAIMANT's scheme of fraudulent misrepresentation.

108. By attempting to use its in-house counsel to help it advance its fraudulent scheme, CLAIMANT has forfeited its right to invoke legal privilege over Exhibit R3.

3. Exhibit R3 should not be excluded for the alleged illegality of procurement.

109. CLAIMANT argues that Exhibit R3 should not be admitted because it was illegally obtained [*Cl. Memo.,* ¶¶*85–88*]. To that end, CLAIMANT advances two speculative theories:

a. First, CLAIMANT alleges that Exhibit R3 was obtained in the course of an "*illegal criminal investigation*" by the Equatorianian government [*Letter from Langweiler, p. 34*], from whom RESPONDENT received the documents "*through corruption or other illegal ways*" [*Cl. Memo.,* ¶*86*].

b. Alternatively, CLAIMANT speculates that RESPONDENT induced an employee of CLAIMANT to disclose Exhibit R3 [*Letter from Langweiler, p. 34*].

110. CLAIMANT's argument fails on all counts. CLAIMANT has failed to discharge its burden of proving that Exhibit R3 was illegally obtained **[i]**. Even if it were true that Exhibit R3 was procured from

the public prosecution office, it should be admitted because its probative value outweighs other competing considerations **[ii]**. Similarly, even if Exhibit R3 were obtained from an employee of CLAIMANT, that does not amount to it being "illegality" obtained such as to warrant its exclusion. **[iii].**

i. CLAIMANT has not proven that Exhibit R3 was obtained through illegal means.

111. This Tribunal has the power to exclude illegally obtained evidence [*IBA Rules, Art. 9(3)*]. However, the principle of *onus probandi actori incumbit* requires that a party seeking to rely on a fact has the burden of establishing it [*Art. 27(1) UNCITRAL Arbitration Rules*; *Waincymer, ¶10.4.1*]. If a party seeks to exclude evidence on the grounds of illegality, the burden lies on that party to prove the alleged illegality [*Quiborax, ¶259*]. In this case, that burden lies on CLAIMANT.

112. Illegality and corruption are serious matters requiring a high standard of proof. In the case of *EDF v Romania,* the tribunal stated that "*the seriousness of the accusation of corruption … considering that it involves officials at the highest level of the Romanian Government … demands* ***clear and convincing evidence***" [*EDF v Romania, ¶221; Niko Resources, ¶424*].

113. In this case, CLAIMANT accuses the Government of Equatoriana of obtaining Exhibit R3 through an "*illegal criminal investigation"* [*Letter from Langweiler, p. 34*], and alleges that RESPONDENT received Exhibit R3 from the prosecution office "*through corruption or other illegal ways*" [*Cl. Memo., ¶86*]. These are serious allegations about the integrity of Equatoriana's authorities, but CLAIMANT has not substantiated them with a shred of evidence, let alone *"clear and convincing"* evidence.

114. The evidence presented by CLAIMANT is purely speculative and not substantiated. Arguments that raise the suspicion of illegality, as opposed to proof of the same, do not suffice [*Ellam/Douglas*]. In Langweiler's letter, he suggested that it was *"most likely"* that Exhibit R3 came into the possession of RESPONDENT through an illegal criminal investigation but also admits that it "does not know how exactly" it did so. Likewise, Mr. Deiman could "*only speculate*" how RESPONDENT received Exhibit R3, without any concrete evidence or substantiation [*Exh. C8, p. 36, ¶7*]. Finally, Mr. Deiman only asserted that Mr la Cour had "*mentioned his very close contact with the prosecution office"* [*Exh. C8, p. 36, ¶7*], which is once again a mere insinuation of possible illegality without any proof. In the case of *National Iranian Oil Co,* the tribunal found that without actual evidence to substantiate the bribery alleged, mere insinuations of any potential illegality are insufficient. Accordingly, the CLAIMANT's allegations of illegality, being baseless assertions, cannot exclude Exhibit R3.

ii. Even if Exhibit R3 was illegally procured through a leak in the public prosecution office, its probative value outweighs competing considerations of illegality.

115. Article 9(3) of the IBA Rules provides that the *"tribunal **may**, at the request of a Party or on its own motion, exclude evidence obtained illegally" [emphasis added]*. Plainly, the tribunal has the discretion to decide whether illegally obtained evidence should nevertheless be admitted. In determining whether such evidence should be admitted, international tribunals must balance the parties' need to obtain and access the evidence necessary to prove their case with competing interests of procedural fairness and equality of arms [*Khodykin, ¶12.28*]. The tribunal ought to balance between *"the compelling nature of the [one] party's asserted sensitivities and, on the other, the extent to which disclosure would advance the [other] party's case,"* [*Clayton v Canada, ¶ 22*].

116. Interests of procedural fairness and equality of arms are inapplicable here. Issues of procedural fairness and equality of arms arises in relation to unlawfully obtained evidence where one of the parties to the arbitration is "*responsible for the theft,"* [*Khodykin, ¶12.28*]. However, any "theft" of Exhibit R3 would have been by the Equatorianian authorities, a third party to the arbitration, and not the RESPONDENT. Further, the status of the third party and whether it was 'disinterested' in the outcome of the arbitration is relevant [*Nicaragua v USA, ¶69*]. Here, Equatorianian police are distinct from RESPONDENT, and nothing shows it would be interested in the outcome of the arbitration. Thus, RESPONDENT did not violate any "*duties of good faith and respect for the arbitral process"* [*Fusimalohi v FIFA, ¶74; Adamu v FIFA, ¶70*].

117. In any case, the probative value of such evidence should outweigh the illegal procurement of Exhibit R3. In *Caratube*, the tribunal acknowledged the potential unfairness of allowing confidential evidence obtained through hacking to be admitted [*Caratube; Khodykin, ¶12.30*]. However, it also recognised that there was a need for the tribunal to have access to information to uphold a party's right to prove its case. Art. 26.2 of the FAI Arbitration Rules explicitly mentions the need to provide *"each party [with] a reasonable opportunity to present its case."* Failure to admit Exhibit R3 would render the risk of an award that would be *"artificial and factually wrong"* [*Caratube*]. For these reasons, the probative value of Exhibit R3 [*¶¶90–95 supra*] should outweigh concerns of its unlawful procurement.

iii. Even if Exhibit R3 was obtained through CLAIMANT's employee, that does not amount to it being "illegality" obtained such as to warrant its exclusion.

118. Even if Exhibit R3 was disclosed to RESPONDENT by one of CLAIMANT's employees, this does not make it "illegally obtained" evidence that is inadmissible. At most, it means that the employee

would have breached its confidentiality agreement with CLAIMANT [*PO2, ¶28*]. However, a breach of a confidentiality agreement only gives "*rise to contractual liability but not to an unlawful act to be taken into consideration in assessing the admissibility of material gathered through this confidentiality breach*" [*Rutz, ¶ 149*]. This is because it is unnecessary to exclude such evidence in order to vindicate the other party's rights under the confidentiality agreement. To the extent that CLAIMANT considers itself injured by its employee's conduct, it retains the right to initiate civil proceedings against the employee [*Sopinka/Lederman, p. 336*]. Thus, even if Exhibit R3 was disclosed to RESPONDENT by one of CLAIMANT's employees, it should still be admitted.

4. RESPONDENT's direct transmission of Exhibit R3 to the arbitrators does not justify the exclusion of Exhibit R3.

119. CLAIMANT asserts that Exhibit R3 should be excluded because RESPONDENT directly sent it to the not-yet-appointed party-nominated arbitrators [*Letter from Langweiler, p. 34*]. A failure to follow the proper procedure in submitting evidence does not justify excluding that evidence, unless it can be shown that this noncompliance has resulted in prejudice to the other party [*Sylvania v Iran, ¶3*]. To prove prejudice, it must be shown that the non-compliance had a "*material impact on the arbitral tribunal and the tribunal's decision"* for prejudice to be found [*Born, p. 3909*].

120. The fact that RESPONDENT sent the Exhibit R3 directly to the arbitrators has no material impact on the Tribunal or its decision. The end-result of the RESPONDENT sending Exhibit R3 directly to the arbitrators and if it did not is the same: Exhibit R3 would still ultimately have been transmitted by FAI to the Tribunal, and the Tribunal would still have had to examine Exhibit R3 in order to decide whether it should be excluded. Furthermore, both party-nominated arbitrators have declared that the fact that Exhibit R3 was directly transmitted to them has had no impact on their impartiality and independence [*Aqua's statement, p.2; Synonoun's statement, p.2*]. Evidently, the means by which RESPONDENT submitted Exhibit R3 has caused no real prejudice to CLAIMANT.

III. THE CISG IS INAPPLICABLE TO THE PSA.

A. The PSA is excluded from the CISG by Article 2(b) of the CISG because it was concluded as part of a reverse auction.

121. The CISG is not applicable to the PSA because the PSA is a sale by reverse auction, which is an "auction" excluded from the scope of the CISG. Article 2(b) of the CISG states that sales "by auction" are excluded from the CISG. The term "auction" is to be interpreted in good faith in accordance with the ordinary meaning of the terms in their context and in light of its object and purpose [*VCLT, Art. 31(1)*].

122. CLAIMANT mistakenly asserts that the reverse auction conducted by RESPONDENT does not qualify as an auction [*Cl. Memo., ¶130*]. On the contrary, the reverse auction here falls within the ordinary

meaning of an "auction" **[1]**. Further, excluding a reverse auction from the scope of the CISG is consistent with the object and purpose of Article 2(b) of the CISG **[2]**.

1. The reverse auction conducted by Respondent falls within the ordinary meaning of "auction" under Article 2(b) of the CISG.

123. The ordinary meaning of "auction" is a sale, publicly announced in advance, to the highest bidder by an acceptance of the best offer [*Kröll/Mistelis/ Viscasillas, Art.2, ¶27*; *Schlechtriem/Schwenzer, Art. 2, ¶21*]. The reverse auction conducted by RESPONDENT bears all these characteristics. First, the request for bids was announced on 3 January 2023, in advance of the presentation of initial proposals by bidders on 28 February 2023 [*Exh. C1*]. Second, the winner of the reverse auction was to be one of the two lowest bidders, which is essentially an acceptance of the best offer [*RfQ, ¶1c*]. Thus, a reverse auction falls within the ordinary meaning of an "auction" set out in Article 2(b) of the CISG.

2. The exclusion of reverse auctions from the CISG is consistent with the object and purpose of Article 2(b) of the CISG.

124. Treating reverse auctions as "auctions" under Article 2(b) of the CISG is consistent with the object and purpose of excluding auctions from the scope of the CISG.

125. First, auctions were excluded because, at the start of an auction, the auctioneer could not be certain of the identity (and thus the place of business) of the party with whom they would finally be contracting with, and thus could not be certain of whether the CISG would apply to the contract [*UNCITRAL YB II ¶58; Kröll/Mistelis/Viscasillas, Art.2, ¶27; Schlechtriem/Schwenzer, Art. 2, ¶20*]. This is precisely the case here: at the start of the reverse auction, Respondent could not be certain of the identity (and place of business) of the final two bidders, one of whom it would be contracting with, and thus could not be certain of whether the CISG would apply to the eventual contract.

126. Claimant argues that "*at the moment of a decision to award the procurement contract, …* RESPONDENT *is already aware of who the best bidder … is*" [*Cl. Memo. ¶ 137*], but this is immaterial. The question is not whether Respondent knows the final bidder's identity when it awards the contract; the question is whether Respondent knows the final bidder's identity at the *start of the auction*. As stated in the CISG's *travaux preparatoires* [*UNCITRAL YB II, ¶58*].

> *At auctions, buyers may not be identified. But even if the place of business of the successful bidder should be known to the seller, the applicable law could not depend on that circumstance since* ***at the opening of the auction*** *the seller could not know which buyer would make the purchase and hence could not know whether [the CISG] would apply. [emphasis added]*

127. In any event, the lack of knowledge of the bidder's identity is not the only rationale undergirding Article 2(b). Sales by auctions were excluded primarily because such sales are generally covered by special national provisions and usages [*Kröll/Mistelis/ Viscasillas, Art. 2, ¶27; Staudinger/Magnus, Art.*

2, ¶32]. The drafters of the CISG considered it desirable that such sales by auction remain subject to the relevant special national provisions [*Secretariat Commentary, p. 16*].

128. The reverse auction conducted by RESPONDENT is precisely subject to the Public Procurement Law of Equatoriana, which is a special national provision applicable to public procurement contracts in Equatoriana [*PSA, Art. 8*]. Thus, in line with the object and purpose behind Art 2(b), the PSA resulting from the reverse auction should be excluded from the CISG and remain subject to the special provisions of Equatorianian domestic law.

B. The PSA is not a sale of goods contract because the preponderant part of the PSA consisted of services.

129. Article 3(2) of the CISG provides that the CISG does not apply to "*contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services*". CLAIMANT contends that the sale of goods forms the preponderant part of the PSA, under either the "economic value" test or the "essential" test [*Cl. Memo., ¶119*]. RESPONDENT respectfully disagrees. In the first place, it is impossible to determine the value of the sale of goods obligations in the PSA under the "economic value" test **[1]**. Instead, applying the "essential" test, the preponderant part of the PSA consisted of services rather than the sale of goods **[2]**.

1. The value of the sale of goods obligations is impossible to determine under the "economic value" test.

130. It is impossible to apply the "economic value" test to the PSA because the value of the obligations in the PSA cannot be ascertained. The "economic value" test states that service obligations are a preponderant part of the contract if the economic value of service obligations is at least 50% [*Schlechtriem/Schwenzer, Art. 3, ¶18; Kröll/Mistelis/ Viscasillas, Art. 3, ¶18; Mankowski, Art. 3, ¶9*]. As CLAIMANT agrees, the "economic value" criterion would not apply if the economic value of the obligations cannot be assessed, for example where parties did not stipulate the respective values of the goods and services [*Cl. Memo., ¶120; Schlechtriem/Schwenzer, Art. 3, ¶19; CISG-AC4, ¶3.3*].

131. CLAIMANT erroneously applied the "economic value" test based on its internal calculations of the value of its obligations [*Cl. Memo., ¶121*]. There is no definitive rule for assessing the economic value of obligations in a contract, but relying on the internal calculation of one party must be untenable. Courts frequently look at the terms of the contract which stipulate the economic value of the goods and services [*Schlechtriem/Schwenzer, Art. 3 ¶19; Prada S.p.A, ¶21; Joaquim Marques, ¶2*]. Courts have also turned to the invoices sent and paid by parties to determine the value of the obligations [*Centerless grinding machine Case, ¶36; Construction materials Case II, ¶1.2.2*]. This shows that the value of contractual obligations should be assessed by reference to evidence that represents the

mutual intention of parties. CLAIMANT'S internal calculations, which only reflect its unilateral understanding, should be disregarded.

132. In the present case, the economic value of the obligations cannot be fully assessed by reference to the contract. The PSA states that the contract price is a lump sum of EUR 285,000,000 [*PO2, ¶35; PSA, Art. 7*]. It does not provide for a further breakdown of the contract price according to the economic value of the sale of goods and service obligations contained within. The "economic value" test is accordingly impossible to apply.

2. The correct application of the essential test finds that the preponderant part of the PSA consisted of services, not the sale of goods.

133. The essential criterion applies to the PSA because the "economic value" test is impossible to apply [*CISG-AC4, ¶3.3; Schlechtriem/Schwenzer, Art. 3 ¶19; Cylinder Case, ¶19*]. Under the "essential" test, the Tribunal should assess whether the parties saw the preponderant part of the PSA in the sale of goods obligations or in the services obligations, as expressed in the contractual documents and the surrounding circumstances [*Kröll/Mistelis/ Viscasillas, ¶19; Schlechtriem/Schwenzer, Art. 3 ¶19; Cylinder Case, ¶19; Window production plant Case, pp.5*]. In the present case, the Parties clearly intended that the service obligations were essential **[i]**, and the Parties' written contract reflects the essentiality that the Parties assigned to the service obligations **[ii]**.

i. Parties intended that the service obligations were essential.

134. Both Parties intended the service obligations in the PSA to be essential.

135. CLAIMANT was motivated to enter into the PSA to showcase the capability of its engineering services. CLAIMANT describes itself as an "*engineering* company specialised in the *planning*, *construction* and sale of plants for the production of green hydrogen and connected *services*" [*RfA, ¶1*]. CLAIMANT assigned considerable importance to the realisation of the project because CLAIMANT intended to showcase its new technology on a larger scale *and* show the advantages of its proprietary production process [*RfA, ¶5*]. Essentially, CLAIMANT is not a mere electrolyser manufacturer looking to showcase its electrolysers. Instead, its focus was on delivering the plant as a whole, with its services such as planning and construction considered essential parts of its deliverables. As CLAIMANT's CEO admits, the focus is on the delivery and *construction* of the plant [*Exh. C5,* ¶7]. Its electrolyser technology is entirely meaningless without the plant it is housed in. Therefore, CLAIMANT considered its service obligations to be the preponderant part of the Agreement.

136. RESPONDENT contracted with CLAIMANT on the basis that CLAIMANT could fulfil the required service obligations, without any consideration of any sale of goods obligations *per se*. The initial Request for Quotation by RESPONDENT was clearly stated to be for "*the engineering, planning, construction, and delivery of a plant*" and "*training and maintenance services for the first year of operation*", which

are entirely service obligations and involve no sale of goods [*RfQ, ¶1*]. The fact that CLAIMANT made its bid according to these requirements, and that RESPONDENT accepted the bid, shows that the service obligations were what RESPONDENT considered to be essential.

ii. The terms of the PSA show that Parties considered the service obligations to be essential.

137. The clauses in the PSA reflect most clearly that the Parties considered the service obligations to be essential. In particular, the preamble to the PSA, the contractual milestones, the payment schedule, and RESPONDENT's obligations are most relevant.

138. In the preamble to the PSA, it is stated that RESPONDENT's objective was to build up "*an infrastructure for the production of green hydrogen and possible derivatives*", in pursuance of which it "*intends to build a plant for the production of green hydrogen and possible derivates*" [*PSA, Preamble*]. RESPONDENT enlisted CLAIMANT, with both Parties "*committed to jointly building the plant and making it operational*" [*Ibid*]. Essentially, Parties intended for CLAIMANT to create a complete and operational green hydrogen production facility, which goes towards RESPONDENT fulfilling its goal to build up a green hydrogen infrastructure. Where the will of the parties was for one party to create a complete system for the other party and make it operational, services would be the preponderant part of the contract [*S.r.l Orintix, p.4*].

139. The Parties structured their contractual milestones around the services to be provided by CLAIMANT, rather than any goods to be sold. The five contractual milestones which CLAIMANT was bound to meet include the submission of "*permission planning*", "*final plans*", the start of "*building activities on-site*", a "*test run*" and a "*performance and acceptance test*" [*PSA, Art.3*]. They were entirely based on CLAIMANT'S timely execution of services including planning and construction, together with a check on the final quality of the rendered services.

140. Correspondingly, the payment schedule was set up to closely mirror the contractual milestones, enshrining the essentiality that Parties ascribed to the service obligations contained within. Each date of payment is after a particular service milestone has been met [*PSA, Art.7*]:

a. 1 October 2023, which is 30 days after the submission of permission planning;
b. 10 February 2024, which is 9 days after the submission of final plans;
c. 1 January 2025, after the commencement of building activities;
d. 10 October 2025, which is 9 days after the test run; and
e. 10 January 2026, which is 8 days after the handover of the plant.

141. Here, CLAIMANT is mistaken when it contended that the pricing structure of the PSA indicates the essentiality of the sale of goods, because payment is a lump sum which includes the price for goods and services [*Cl. Memo., ¶124*]. As the payment schedule demonstrates, the pricing structure was

not a mere lump sum to be paid at the end of performance. Rather, parts of the payment are made after the fulfilment of individual service milestones, precisely because Parties treat the fulfilment of service obligations to be paramount.

142. Therefore, the provision of services was not merely ancillary to the sale of goods obligations as CLAIMANT argues [*Cl. Memo., ¶127*]. Instead, the preponderant part of the PSA consists of services such as planning, construction, and maintenance of the Plant, reflected in the contractual milestones, RESPONDENT's obligations, and the PSA objectives.

C. The PSA does not constitute an international transaction because the Parties' places of business are not in different States.

143. Article 1(1)(a) of CISG provides that the CISG applies to contracts of sale of goods between parties "*whose places of business are in different States… when the States are Contracting States*". The requirement is not satisfied because both Parties have their places of business in Equatoriana.

144. CLAIMANT agrees that RESPONDENT has its place of business in Equatoriana. However, CLAIMANT argues that its place of business is in Mediterraneo [*Cl. Memo., ¶103*]. This is incorrect. Volta Transformer in Equatoriana is a market-leading large transformer manufacturer and a long-time business partner of CLAIMANT [*Exh.C3*]. It provides CLAIMANT with the necessary transformer, electrolyser stacks, and packaging services for the PSA [*RfQ, ¶11*]. Volta Transformer constitutes a place of business of CLAIMANT **[1]**. Further, Volta Transformer in Equatoriana, rather than CLAIMANT's Mediterraneo office, is the relevant place of business of CLAIMANT to determine the applicability of the CISG **[2]**.

1. Volta Transformer in Equatoriana is a place of business for CLAIMANT.

145. Volta Transformer in Equatoriana is a place of business for CLAIMANT. Whether a location constitutes a "place of business" should be decided on a case-by-case basis [*Ferrari, p.46*]. Contrary to CLAIMANT's position, whether a location constitutes a place of business is not absolutely determined by the requirements of stability and independence [*Cl. Memo., ¶104*]. The term "place of business" was undefined in the CISG precisely because of the lack of a uniform definition acceptable to all the drafters of the CISG [*Ferrari, p.46*]. The focus is on whether two entities have such close business and operational links that they can reasonably be taken as belonging to a single group entity [*Kröll/Mistelis/ Viscasillas, Art. 10, ¶21*]. Specifically, no parent-subsidiary relationship is required, and even legal entities not part of a group of companies can qualify as a place of business [*Kröll/Mistelis/ Viscasillas, Art. 10 ¶19*].

146. Indeed, Volta Transformer has such close business and operational links with CLAIMANT such that they are akin to a single group entity. At the forefront, Volta Transformer is a long-time business partner of CLAIMANT [*RfA, ¶8*]. Even its wholly-owned subsidiary, Volta Electrolyser, produces

electrolysers under a licence from CLAIMANT [*RfA*, ¶*11*]. CLAIMANT was even able to procure the involvement of Volta Transformer and Volta Electrolyser before the PSA was concluded [*RfA*, ¶*5*]. The constant and close business links was to the extent that Volta Family was comfortable to offer Volta Transformer for sale to CLAIMANT [*RfA*, ¶*11*].

147. Further, the extent of work to be carried out by Volta Transformer under the PSA suffices to render it a place of business of CLAIMANT. In *Target Corp,* a company, ERS, opened an Indianapolis facility and invested in substantial infrastructure for transport, inspection, repair and packaging. This was to accommodate the product volume ERS had to handle under its contract with Target [*Target Corp, p.4*]. The court therefore concluded that ERS' place of business for the purposes of its contracts with Target is the United States. [*Target Corp, p.4*]. Likewise, Volta Transformer provides not only the necessary transformer for the PSA, but also the delivery of 40% of the electrolyser stacks and all of the packaging services [*PO2*, ¶*5*]. Practically speaking, Volta Transformer amounts to a facility in Equatoriana for CLAIMANT. Therefore, CLAIMANT's place of business for the purposes of the PSA is in Equatoriana.

2. Volta Transformer in Equatoriana is Claimant's relevant place of business for the purpose of determining if the CISG is applicable.

148. Article 10(a) of CISG provides that "*if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance*". The Tribunal should apply a fact-driven test that examines the circumstances of the individual case, taking into account the expectation of parties [*Schlechtriem/Schwenzer, Art. 10,* ¶*5; Kröll/Mistelis/ Viscasillas, Art. 10, 23; Honnold/Fletchner, p. 219*]. Preference is given to the place of performance of the contract, because the provision itself points to the contract's "performance" rather than other aspects such as negotiation, conclusion, or termination [*Kröll/Mistelis/ Viscasillas, Art. 10,* ¶*31; Schlechtriem/Schwenzer, Art. 10,* ¶*7*].

149. In the present case, Equatoriana was the place of contractual performance. The main contractual obligations were to be performed in Equatoriana, including the delivery of the plant, the provision of maintenance and training services, the handover of the construction site, and the connection of the plant to Equatorianian infrastructure [*PSA, Art.2 &* 4].

150. Further, the key factor that allows the performance of the PSA is that CLAIMANT could procure the transformer from Volta Transformer in Equatoriana. The long lead times for transformers made the deadline unrealistic for other bidders, and only CLAIMANT could procure a transformer immediately [*Exh. C3*]. Therefore, Equatoriana is indispensable to the contract and its performance.

151. Other relevant circumstances point towards Equatoriana as the place of business with the closest relationship to the contract. First, CLAIMANT contracted with Volta Transformer in Equatoriana

to deliver the transformer and electrolyser stacks and provide packaging services [*PO2, ¶5*]. CLAIMANT effectively used Volta Transformer's location in Equatoriana as a crucial facility to fulfil the PSA, which is relevant to render Equatoriana the relevant place of business [*Target Corp, p.*4]. Second, Equatoriana is also the place where the goods are used in the assembly of the end product, that is, where the Plant is constructed and delivered [*Schlechtriem/Schwenzer, Art. 1, ¶5; PSA, Art. 4*]. Thirdly, it was required that at least 25% of the materials for the plant originated from Equatoriana [*RfQ, ¶9*]. The local content requirement was crucial, demonstrated by RESPONDENT's emphasis on local content and reciprocating assurances by CLAIMANT [*Exh. R1, ¶4*]. It follows that Parties intended Equatoriana to be the relevant place of business.

152. RESPONDENT argues that Mediterraneo is the relevant place of business because it was the business center of CLAIMANT and the location where the negotiations and signing of the contract took place [*Cl. Memo., ¶112*]. However, the mere fact that Mediterraneo is the principal place of business of CLAIMANT does not necessarily mean it has the closest relationship to the contract under Art 10(a) [*Schlechtriem/Schwenzer, Art. 10 ¶5; Zodiac Seats, ¶11*]. It is the place of performance which is decisive [*Schlechtriem/Schwenzer, Art. 10 ¶5*]. Further, CLAIMANT erroneously claimed that the PSA was signed in Mediterraneo, when it was actually signed in Equatoriana [*PSA, below Article 31*].

153. Since both RESPONDENT and CLAIMANT have their place of business in Equatoriana, the transaction lacks internationality and precludes the applicability of CISG.

IV. THE PARTIES VALIDLY EXCLUDED THE CISG'S APPLICATION TO THE PSA.

154. Even if the CISG is applicable to the PSA, Parties have validly excluded the CISG's application to the PSA. The exclusion of CISG is apparent in two ways. Firstly, the choice of law clause in the PSA amounts to an exclusion of CISG, as revealed by the drafting history to the Model Contract **[A]**. Secondly, the choice of law clause in the RfQ also amounts to an exclusion of CISG **[B]**.

A. The choice of law clause in the PSA excludes the CISG.

155. Article 6 of the CISG allows parties to exclude its application. Parties may do so expressly or impliedly [*Schlechtriem/Schwenzer, Art. 6, ¶21; Kröll/Mistelis/ Viscasillas, Art. 6, ¶16; Honnold, p.134; Steel bars case V, ¶58; Boiler case, p.8*]. CLAIMANT therefore erred in claiming that the CISG cannot be excluded implicitly [*Cl. Memo., ¶148*]. Similarly, CLAIMANT contended that the drafters' deletion of implied exclusion from the text of Article 6 shows parties cannot exclude CISG implicitly [*Cl. Memo., ¶148*]. However, such an inference cannot be made as the drafters also declined to stipulate in Article 6 that exclusion must be express [*Honnold, p. 134*].

156. Accordingly, Parties excluded the CISG through the choice of law clause in the PSA by stating an exclusion of conflict of laws principles **[1]**. As the choice of law clause in the PSA was taken from the Model Contract, the intention of Parties to exclude the CISG is supported by the drafting

history to the Model Contract **[2]**. The intention of Parties to exclude the CISG is also supported by the negotiation history to the PSA **[3]**. Finally, the merger clause in the PSA does not exclude the use of drafting history to the Model Contract for contractual interpretation **[4]**.

1. The exclusion of conflict of laws principles in the PSA amounts to an exclusion of the CISG.

157. The Parties stipulated that the PSA is "*governed by the law of Equatoriana* ***to the exclusion of its conflict of laws principles***" [*PSA, Art. 29*]. Contrary to CLAIMANT'S assertions [*Cl. Memo., ¶154*], the reference to the exclusion of "conflict of laws principles" leads to an exclusion of CISG.

158. A conflict of laws principle is a rule that is used to determine the applicable law when there are several potentially applicable laws [*Kröll/Mistelis/ Viscasillas, Introduction,* ¶11]. Aas CLAIMANT itself accepts [*Cl. Memo, ¶¶142–143*], Article 1 of the CISG sets out the conditions for determining whether the CISG is the applicable law to a contract. Thus, Article 1 functions as a kind of (unilateral) conflict of laws rule [*Kröll/Mistelis/ Viscasillas, Art. 1, ¶1; Schlechtriem/Schwenzer, Introduction,* ¶*5*].

159. Since the CISG is part of the law of a Contracting State [*Kröll/Mistelis/ Viscasillas, Art. 6 ¶18; Platte, pp. 427*], Article 1 of the CISG is part of Equatoriana's "conflict of laws principles". It has therefore been excluded by the choice of law clause. Since Article 1 is the very basis on which the CISG's applicability is established, the exclusion of Article 1 excludes the entire CISG from applying to the PSA.

2. The intention of Parties to exclude the CISG is supported by the drafting history to the Model Contract.

160. The implied exclusion of CISG can be confirmed by the intent of the parties to exclude, determined in accordance with Article 8 of CISG [*CISG-AC4, ¶3.1; Schlechtriem/Schwenzer, Art. 6, ¶26*]. The intention of parties relating to the choice of law clause is accordingly relevant. In turn, the choice of law clause in the PSA is taken from the Model Contract for the Purchase of Goods and Services by Equatorianian State Entities [*Exh. R1,* ¶*7*].

161. The drafting history of the Model Contract and prior negotiations to the PSA shows that Parties were aware of and intended to exclude the CISG. The intention of the Parties is to be determined in accordance with Article 8 of CISG [*CISG-AC16, ¶3.1; Schlechtriem/Schwenzer, Art. 6, ¶26*]. Article 8 provides that "*statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what the intent was*".

162. The choice of law clause in the PSA was taken from the 2022 Model Contract [*ARA, ¶19*]. The 2022 Model Contract does not explicitly select the CISG unlike the 2020 Model Contract, which states that "*The Agreement is governed by the CISG*" [*PO2, ¶10*]. Specifically, the clause was amended

in the 2022 Model Contract to remove the explicit mention of CISG "*to strengthen the role of Equatorianan Law*" [*PO2, ¶10*]. RESPONDENT used the amended 2022 Model Contract as the starting point to the negotiations with CLAIMANT [*Exh. R1,* ¶7]. Accordingly, RESPONDENT demonstrated its intent to exclude the CISG from subsequent contracts.

163. CLAIMANT could not have been unaware of RESPONDENT'S intention to exclude the CISG. CLAIMANT's main negotiator and head of legal had used the 2020 Model Contract in previous transactions [*Exh. R1, ¶11; PO2, ¶2*]. Further, the change to the choice of law clause was publicly announced by an official press release, which explicitly mentioned that the choice of law clause was amended "to strengthen the role of Equatorianian Law" [*PO2, ¶10*]. Therefore, CLAIMANT would have known of the change RESPONDENT's intent to exclude the CISG.

164. CLAIMANT suggests that it had implied its intent to apply the CISG through informing RESPONDENT that the CISG was the "gold standard" [*Cl. Memo., ¶161*]. However, the statement is at best a platitude. In fact, if CLAIMANT did assign such importance to the use of CISG, it would have ensured that the finalised choice of law provision did retain an express reference to the use of CISG. Instead, even after CLAIMANT left the issue of applicable law for its lawyers to discuss, it ultimately accepted the choice of law provision taken from the 2022 Model Contract [*Exh. R1, ¶11*]. Therefore, CLAIMANT likewise did not intend for the CISG to apply.

3. The intention of Parties to exclude the CISG is supported by the negotiation history to the PSA.

165. The Parties' intention to exclude the CISG is supported by the negotiation history of the PSA. CLAIMANT negotiated to exclude the right to terminate the PSA for convenience, requesting exclusion in exchange for lowering its price by 5% [*RfA,* ¶13]. Indeed, Parties eventually agreed on such an exclusion and formalized it in the PSA [*PSA, Art. 28*]. If the CISG were the applicable law, there would have been no reason for CLAIMANT to negotiate for this exclusion, because there is in no right to terminate for convenience under the CISG. In contrast, the domestic law of Equatoriana has a provision for governmental entities to terminate contracts for convenience [*PO1, ¶4*]. The fact that CLAIMANT thought it necessary to negotiate to exclude RESPONDENT'S right to terminate for convenience shows that CLAIMANT itself understood that Equatorianian domestic law, rather than the CISG, applied to the PSA.

4. The merger clause does not preclude the use of extrinsic material to interpret the PSA.

166. Article 31 of the PSA is a merger clause which provides that the document of the PSA "*contains the entire agreement between the Parties*". As part of the PSA, Article 31 is governed by the domestic law of Equatoriana [¶¶*5–7 supra*]. Under the contract law of Equatoriana, prior statements or agreements

may be used to interpret a contract, even if the contract contains a merger clause. Article 2.1.17 of the Equatorianian contract law provides that in "*a contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed*", "*evidence of prior statements or agreements… may be used to interpret the writing*" [*PICC, Art 2.1.17*]. Hence, extrinsic evidence, such as the drafting history of the Model Contract and the negotiation history to the PSA, may be relied upon to interpret the PSA [*ICC Case 16314, ¶116*; *ICC Case 9117, p.5; Official Comment, ¶2.1.17*].

B. The choice of law clause in the Request for Quotation excludes the CISG.

167. The exclusion of CISG can be inferred from parties' choice of an expressly specified domestic law in a contract [*Kröll/Mistelis/ Viscasillas, Art. 6, ¶18; CISG-AC16, ¶4.4; Asante Technologies, Inc. Case, ¶24; Citroen Case, p.17*]. For example, an Austrian court in *Citroen Case* found that the selection of Austrian Consumer Protection Act in a contract constituted an exclusion of the CISG [*Citroen Case, p.17*].

168. In the present case, Parties expressly chose specific statutes in the Equatorianian domestic law to apply to their contract. The Parties stipulated that the PSA "*should be interpreted in light of the Request for Quotation*" [*PSA, Art. 31*]. The Request for Quotation provided "*the Public Procurement Law of Equatoriana … governs the award of the contract*" [*RfQ, ¶8*]. This indicates the Public Procurement Law of Equatoriana applies to the formation – or at the very least to the offer – of the contract [*PO2, ¶32*]. The express choice of the Public Procurement Law of Equatoriana to govern part of the PSA is sufficient to exclude the CISG from the entirety of the PSA [*Inter Rao, ¶246*].

169. For example, in *Inter Rao*, the parties selected an Ecuadorian public procurement law to govern part of their contract. The Tribunal that the choice of the specified domestic law, even though it only regulated certain contractual issues, was sufficient to exclude CISG from applying to the entire contract [*Inter Rao,* ¶244]. Likewise, the selection of the Public Procurement Law of Equatoriana by the Parties to govern the award of the contract amounts to a total exclusion of the CISG from applying to the PSA.

V. REQUEST FOR RELIEF

170. For the above reasons, RESPONDENT respectfully requests the Tribunal to:

a. Dismiss the claim for a lack of jurisdiction, inadmissibility, or on grounds of procedure;
b. Declare Exhibit C7 inadmissible and Exhibit R3 admissible;
c. Declare that the is CISG inapplicable to the Agreement; and
d. Declare that the Parties have validly excluded the CISG's application.