

Thirty-Third Annual
Willem C. Vis (East) International Commercial Arbitration Moot Hong Kong
16th March – 22nd March 2026

Memorandum for RESPONDENT



Case Reference: ARB1991/25/VIS

ON BEHALF OF

AGAINST

RESPONDENT
Darwin Natural Food plc
Louis Liger Avenue 1704
Oceanside
Equatoriana

CLAIMANT
Orchis Worldwide Ltd
Orchid Bee Drive
Capital City
Mediterraneo

Boris Geshev | Maren Mueller | Oskar Obel | Louis Schaudt

22 JANUARY 2026



...

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TABLE OF CONTENTS

TABLE OF CONTENTS	V
INDEX OF ABBREVIATIONS	IX
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENTS	2
ISSUE 1: THE SIAC RULES 2025 APPLY TO THIS ARBITRATION	3
A. The arbitration commenced after 1 January 2025.....	3
B. The PARTIES did not agree otherwise	5
I. The PARTIES agreed on the SIAC Rules 2025	5
1. The term ‘current’ constitutes a dynamic reference.....	6
2. RESPONDENT is not bound by the intent of Botanical Garden.....	7
a) RESPONDENT is not bound by the intent of Botanical Garden, as the PARTIES concluded a new, individual contract	7
b) Even if considering general principles of fairness, RESPONDENT is not bound by the intent of Botanical Garden	8
II. Even if RESPONDENT is bound by Botanical Garden’s intent, the SIAC Rules 2025 apply 9	
1. Art. 8(1) CISG – A subjective interpretation of Botanical Garden’s intent leads to the application of the SIAC Rules 2025	9
2. Art. 8(2) CISG – An objective interpretation of Botanical Garden’s intent leads to the application of the SIAC Rules 2025	9
CONCLUSION ISSUE 1	10
ISSUE 2: THE ARBITRAL TRIBUNAL SHOULD ORDER THE DISCLOSURE OF THE ATJ AND LITSURE AGREEMENT	10
A. The Arbitral Tribunal should approve the Disclosure Request under the SIAC Rules 2025 10	
I. The Arbitral Tribunal can order disclosure under Art. 38.4 SIAC Rules 2025.....	10
II. The Arbitral Tribunal should order disclosure under Art. 38.4 SIAC Rules 2025.....	11



1. Under the present circumstances, the Disclosure Request should be approved according to Art. 38.4 SIAC Rules 2025	11
a) Disclosure is necessary to identify the true party to the case and to ensure enforceability	12
b) Disclosure is necessary regarding transparency and influence on the proceedings	13
c) Disclosure is necessary for cost allocation.....	14
d) Disclosure is necessary for security for costs	14
2. Additionally, under the guideline of the IBA Rules the Disclosure Request should be approved.....	15
a) The AtJ and LitSure Agreement are relevant to the case.....	16
b) The AtJ and LitSure Agreement are material to the outcome of the case.....	16
III. Granting the Disclosure Request would neither unduly favour RESPONDENT nor raise concerns as to parity.....	17
B. Even if the SIAC Rules 2016 apply, the Arbitral Tribunal should approve the Disclosure Request.....	18
I. The Arbitral Tribunal can approve the Disclosure Request under its general powers...	19
II. The Arbitral Tribunal should approve the Disclosure Request under its general powers	19
CONCLUSION ISSUE 2.....	20
ISSUE 3: RESPONDENT DOES NOT HAVE TO PAY ANY DAMAGES AND IN ANY CASE IS EXCUSED FROM LIABILITY	20
A. RESPONDENT's liability is excused pursuant to Art. 79 CISG.....	20
I. For the convenience of the Arbitral Tribunal, RESPONDENT will first rely on Art. 79 CISG	21
II. RESPONDENT's liability is excused as the failure to perform was due to an impediment beyond RESPONDENT's control.....	22
1. The PARTIES did not allocate the risk of failure due to government measures to RESPONDENT.....	22
2. The impediment is beyond RESPONDENT's control.....	23



III. RESPONDENT’s liability is excused as it could not reasonably be expected to have taken the impediment into account at the time of contract conclusion	23
IV. RESPONDENT’s liability is excused as it could not reasonably be expected to have avoided or overcome the impediment or its consequences	24
1. RESPONDENT could not have avoided the impediment by applying for an anticipatory permit	25
2. RESPONDENT could not have avoided the impediment by accepting delivery early..	26
3. RESPONDENT could not have overcome the impediment since it would have been required to act illegally.....	27
V. The failure to perform was due to the impediment	27
B. Even if RESPONDENT’s liability is not excused pursuant to Art. 79 CISG, RESPONDENT still would be excused under Clause 12 SA	27
CONCLUSION ISSUE 3	28
ISSUE 4: EVEN IF RESPONDENT HAD TO PAY DAMAGES AND WAS NOT EXCUSED FROM LIABILITY, THE DAMAGES COULD NOT BE CALCULATED AS CLAIMANT HAS DONE IT	28
A. The Arbitral Tribunal should not calculate CLAIMANT’s damages according to Art. 75 CISG	29
I. CLAIMANT did not fulfil the strict requirement of avoidance.....	29
1. CLAIMANT had no right to avoid the Sales Agreement	29
2. Even if CLAIMANT had the right to avoid the Sales Agreement, CLAIMANT did not declare the avoidance prior to the alleged cover sale.....	30
3. CLAIMANT declared the avoidance with its termination letter on 1 March 2024.....	31
II. CLAIMANT did not fulfil the requirement of concluding a cover sale	31
1. The Alleged Cover Sale has no temporal and material connection to the Sales Agreement	32
2. The October Contract has no material connection to the Sales Agreement.....	32
III. Since CLAIMANT never concluded a cover sale, the fact that a potential cover sale would be reasonable is irrelevant	33
B. Even if the Arbitral Tribunal calculates CLAIMANT’S damages according to Art. 75 CISG, CLAIMANT would be entitled to no more than USD 2,100,000.....	33



I. CLAIMANT’s damages should only be calculated on the basis of 2,700 Vanilla Orchids 33

II. The October Contract would not lead to any damages.....34

III. In any case, the Alleged Cover Sale would only lead to damages in the amount of
 USD 2,100,00035

CONCLUSION ISSUE 4.....35

INDEX OF AUTHORITIES XIII

INDEX OF CASESXXXVII

INDEX OF ARBITRAL AWARDSXLVII



INDEX OF ABBREVIATIONS

Alleged Cover Sale	Sales contract concluded between CLAIMANT and Herbal Cosmetics on 15 February 2024
AMA Protocol	SIAC-SIMC Arb-Med-Arb Protocol
Appendix I	Appendix I CITES
Appendix II	Appendix II CITES
Arbitral Tribunal	Arbitral tribunal in the case ARB1991/25/VIS
Arbitration Agreement	Clause 15 in the Sales Agreement between CLAIMANT and RESPONDENT
Art.	Article/Articles
AtJ Agreement	CLAIMANT's funding agreement with AtJ-Funding
AtJ-Funding	CLAIMANT's third-party funder, AtJ-Funding
Botanical Garden	Botanical Garden in Equatoriana
cf.	Confer (compare)
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CLAIMANT	Orchis Worldwide Ltd
CRCICA	Cairo Regional Centre for International Commercial Arbitration



DAL	Danubian Arbitration Law; a verbatim adoption of UNCITRAL Model Law on International Commercial Arbitration
Disclosure Request	RESPONDENT's claim for disclosure of the AtJ and LitSure Agreement
emph. add.	Emphasis added
Exh. C	Exhibit CLAIMANT 1-7
Exh. R	Exhibit RESPONDENT 1-4
FCA	Free Carrier
HKIAC	Hong Kong International Arbitration Centre
i.e.	Id est (that is)
IBA Rules	International Bar Association Rules on the Taking of Evidence in International Arbitration 2020
ibid.	Ibidem (in the same place)
ICC	International Chamber of Commerce
ICSID	International Centre for the Settlement of Investment Disputes
ICSID	International Centre for Settlement of Investment Disputes
Langweiler I	Letter by Langweiler concerning the Notice of Arbitration, p. 1
Langweiler II	Letter by Langweiler to SIAC, p. 41
LCIA	London Court of International Arbitration
LitSure	CLAIMANT's litigation risk insurance provider covering adverse costs
LitSure Agreement	Agreement between CLAIMANT and litigation risk insurance provider LitSure; Insurance for adverse cost coverage



Ltd	Limited
Model Clause	The SIAC-SIMC Arb-Med-Arb Model Clause
MfC	Memorandum for CLAIMANT
Mr.	Mister
Ms.	Miss
NoA	Notice of Arbitration
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
October Contract	CLAIMANT's option-based contract with Herbal Cosmetics
p./pp.	Page/Pages
para./paras.	Paragraph/Paragraphs
Parent Company	Darwin Natural Food Holding
PARTIES	CLAIMANT and RESPONDENT
PCA	Permanent Court of Arbitration
plc	Public limited company
PO1	Procedural Order No.1 on 9 October 2025
PO2	Procedural Order No.2 on 17 November 2025
RESPONDENT	Darwin Natural Food plc
RNoA	Response to the Notice of Arbitration
Sales Agreement or SA	Sales Agreement between CLAIMANT and RESPONDENT concluded on 1 December 2023
SIAC Rules	Singapore International Arbitration Centre Rules
SIAC Rules 2016	The 2016 version Singapore International Arbitration Centre Rules



SIAC Rules 2025	The 2025 version Singapore International Arbitration Centre Rules
SIMC	Singapore International Mediation Centre
Terminated Contract	contract concluded between CLAIMANT and Botanical Garden on 1 December 2021
TPF	Third-Party Funding
UNCITRAL	United Nations Commission On International Trade Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts
v.	Versus
Vanilla Orchid	Vanilla Planifolia Mediterraniensis



STATEMENT OF FACTS

- 1 The parties to this arbitration are Orchis Worldwide Ltd (**“CLAIMANT”**) and Darwin Natural Food plc (**“RESPONDENT”**); collectively the **“PARTIES”**). CLAIMANT is a leading company in the growing and sale of orchids. RESPONDENT is a natural food and spices producer.
- 2 The following chronology summarises the factual course of events prior to this arbitration:
- 3 On **1 DEC 2021**, CLAIMANT and Botanical Garden in Equatoriana (**“Botanical Garden”**) entered into a contract (**“Terminated Contract”**) regarding the sale of the Vanilla Planifolia Mediterraniensis (**“Vanilla Orchid”**) [*NoA, p. 3, para. 6*].
- 4 On **15 JUN 2022**, RESPONDENT informed CLAIMANT that it had acquired Botanical Garden and it would like to renegotiate the Terminated Contract [*Exb. C2, p. 9*].
- 5 On **25 AUG 2022**, the PARTIES terminated the Terminated Contract and concluded the Sales Agreement (**“Sales Agreement”** or **“SA”**), renegotiating essential contractual elements [*Exb. C3, p. 10, preamble*].
- 6 On **1 FEB 2024**, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (**“CITES”**) decided to include the Vanilla Orchid into Appendix I, prohibiting the commercial trade of the Vanilla Orchid [*Exb. R1, p. 37, para. 8*]. This was the first time that a species was included in Appendix I without a transition period [*Exb. C4, p. 14, para. 1; PO2, p. 57, para. 14*].
- 7 On **5 FEB 2024**, RESPONDENT duly applied for the now required import permit for Vanilla Orchids [*PO2, p. 57, para. 17*]. However, the responsible authorities unexpectedly suspended the issuing of such import permits, pending further ministerial guidance [*ibid.*].
- 8 On **8 FEB 2024**, Equatoriana announced a sudden policy shift towards a restrictive import permit regime [*RNoA, p. 33, para. 13*].
- 9 On **15 FEB 2024**, CLAIMANT amended an unrelated, already existing contract with Herbal Cosmetics (**“Alleged Cover Sale”**) [*NoA, p. 5, para. 24*]. Additionally, CLAIMANT concluded a new option-based contract with Herbal Cosmetics (**“October Contract”**) [*ibid.*].
- 10 On **1 MAR 2025**, CLAIMANT avoided the Sales Agreement [*Exb. R3, p. 39*].
- 11 On **31 JUL 2025**, CLAIMANT commenced the arbitration by filing the Notice of Arbitration [*Langweiler I, p. 1*].



SUMMARY OF ARGUMENTS

- 12 A captain is judged not by calm seas, but by how he navigates the storm. Even the first signs that the ship might be in distress revealed what kind of captain CLAIMANT truly is.
- 13 When market conditions tightened, it was not RESPONDENT who departed from the Sales Agreement. It was CLAIMANT, driven by its own deteriorating financial position, that chose to abandon ship at the first sign of difficulty. Faced with rough seas, CLAIMANT raised accusations rather than adjusting its course and taking the helm.
- 14 RESPONDENT, by contrast, remained anchored in the Sales Agreement as concluded. RESPONDENT acted consistently with the contractual terms and responded pragmatically to changed conditions. Where CLAIMANT attempts to attribute its own abandonment of the ship to a breach of contract, RESPONDENT did everything in its control to keep the Sales Agreement on course.
- 15 **Issue 1: The Arbitral Tribunal should apply the SIAC Rules 2025 to this arbitration**, as confirmed by the contracts drafting history and the PARTIES intent. Moreover, the arbitration commenced with the filing of its Notice on 31 July 2025. Therefore, the SIAC Rules 2025 apply pursuant to Art. 1.5.
- 16 **Issue 2: The Arbitral Tribunal should order the disclosure of the AtJ and LitSure Agreement**, as the SIAC Rules 2025 explicitly provide in Art. 38.4 for disclosure. Alternatively, under the SIAC Rules 2016 the Arbitral Tribunal should use its discretion, follow the IBA Rules and order the disclosure provided for thereunder.
- 17 **Issue 3: CLAIMANT is not entitled to damages**, as RESPONDENT is excused from liability under Art. 79 CISG and Clause 12 SA. An impediment beyond RESPONDENT's control caused its failure to perform. Moreover, this impediment was unforeseeable at the time of contract conclusion and RESPONDENT could not have reasonably avoided or overcome the impediment or its effects.
- 18 **Issue 4: Even if the Arbitral Tribunal found CLAIMANT is entitled to damages, it should not calculate the damages pursuant to Art. 75 CISG**, as CLAIMANT did not avoid the Sales Agreement and did not conclude a cover sale. In any case, CLAIMANT would only be entitled to damages no more than USD 2,100,000.



ISSUE 1: THE SIAC RULES 2025 APPLY TO THIS ARBITRATION

- 19 CLAIMANT chose to set sail under the SIAC Rules 2016, openly disregarding the PARTIES' agreement. By contrast, RESPONDENT has acted responsibly, seeking to steer the proceedings back on course by clarifying that the SIAC Rules 2025 should apply. CLAIMANT's manoeuvre reveals its true objective: to conceal the contents of its third-party funding agreements.
- 20 In an attempt to justify its course, CLAIMANT portrays the drafting of Clause 15 SA (**"Arbitration Agreement"**) as carefully charted, suggesting that the SIAC Rules 2016 were the only rules considered. Yet, the PARTIES conduct speaks for itself. The PARTIES intended the arbitration to proceed under the SIAC Rules 2025, not the 2016 version.
- 21 As a last resort, CLAIMANT seeks to rely on the alleged intent underlying the Terminated Contract with its former contractual partner. However, the PARTIES deliberately concluded an entirely new and independent Sales Agreement, rendering any prior intent irrelevant.
- 22 The PARTIES undisputedly agreed to resolve any arising dispute under the SIAC Rules [*Exh. C3, p. 13, Clause 15*]. The SIAC introduced a new version of its rules that entered into force on 1 January 2025. Since the PARTIES commenced their arbitration on 31 July 2025, the SIAC Rules 2025 apply, as Art. 1.5 reads:

"These Rules shall come into force on 1 January 2025 and, unless otherwise agreed by the parties, shall apply to any arbitration which is commenced on or after that date".

- 23 First, the arbitration commenced after 1 January 2025 **[A]**. Second, the PARTIES did not agree otherwise **[B]**.

A. The arbitration commenced after 1 January 2025

- 24 The Arbitral Tribunal determined that the arbitration has commenced on 31 July 2025 [*Letter by SIAC I, p. 24, para. 2*]. Therefore, by initiating mediation proceedings on 19 December 2024 and filing the notice of arbitration on 31 July 2025 [*Langweiler I, p. 1*], the SIAC Rules 2025 apply.
- 25 CLAIMANT argues that the initiation of mediation commenced arbitration, as the PARTIES contained the AMA Protocol and the language of the Arbitration Agreement is *"shockingly similar"* to the SIAC-SIMC AMA Model Clause (**"Model Clause"**) [*MfC, paras. 46ff.*]. However, the PARTIES deviated expressly from the Model Clause and the arbitration commenced with Notice of Arbitration.
- 26 The place of arbitration is Vindobona, Danubia [*Langweiler I, p. 1, para. 4; PO1, p. 53, para. IV*]. Thus, the Danubian Arbitration Law (**"DAL"**), a verbatim adoption of the UNCITRAL Model Law [*PO1, pp. 52f., para. III(4)*], serves as *lex arbitri*. Parties' consent to arbitrate is the foundation



of any arbitral proceeding. Interpreting Clause 15 SA (“**Arbitration Agreement**”) reveals that the PARTIES made use of their procedural freedom conferred upon them by Art. 19(1) DAL to agree on the SIAC Rules 2025 to govern this arbitration.

- 27 An interpretation under the CISG proves that the PARTIES agreed on mediation and arbitration to be two separate procedures, commencing independently from one another [*against MfC, paras. 46ff.*].
- 28 The PARTIES agree that the interpretation of the Arbitration Agreement is governed by the CISG [*PO1, pp. 52f., para. III(4)*]. To determine the parties’ true intentions when agreeing to arbitrate, Art. 8 CISG applies [*Château v Sabaté; Machine case; Schlechtriem/Schwenzer/Schroeter/Schmidt-Kessel II, Art. 8, para. 6*]. If the subjective intent cannot be established, an objective interpretation has to be applied. Art. 8(2) CISG takes the view of a reasonable businessperson in the same situation as the recipient of a statement or declaration [*Achilles, Art. 8, para. 3; Caemmerer/Schlechtriem/Eberstein/Junge II, Art. 8, para. 7*].
- 29 Such an interpretation must be applied to the PARTIES intent regarding the AMA Protocol. Under the AMA Protocol, a notice of arbitration is filed first, after which the arbitral proceedings are placed on hold and the dispute is referred to the SIMC [*AMA Protocol 2025, paras. 2ff.*]. Upon completion of the mediation, the matter is remitted to the arbitral tribunal [*AMA Protocol 2025, paras. 7f.*]. The arbitral tribunal will then either give effect to any settlement through a consent award or, if no settlement is reached, resume and continue the arbitration [*AMA Protocol 2025, paras. 8f.*].
- 30 Since the Arbitration Agreement is largely based upon the Model Clause provided for under the SIAC Rules 2025, it is no surprise that the wording between the Model Clause and the Arbitration Agreement is “*shockingly similar*” [*MfC, para. 49*]. However, CLAIMANT fails to realise that both clauses differ in a fundamental aspect.
- 31 The original Model Clause reads in its relevant parts:
- “The parties further agree that **following the commencement of arbitration**, they will attempt in good faith to resolve the Dispute through mediation at the Singapore International Mediation Centre (“SIMC”), in accordance with the SIAC-SIMC Arb-Med-Arb Protocol for the time being in force”*
[*emph. add.*].
- 32 The Model Clause was modified by making mediation “*the first step of the dispute-resolution process*” [*Exh. C3, p. 13, Clause 15*]. Therefore, the Arbitration Agreement as agreed between CLAIMANT and RESPONDENT now reads in its relevant parts:



*“The parties further agree that at the **first step of the dispute resolution process**, they will attempt in good faith to resolve the Dispute through mediation at the Singapore International Mediation Centre (“SIMC”)” [Exh. C3, p. 13, Clause 15, *emph. add.*].*

- 33 The PARTIES amended the Model Clause by removing arbitration as a first step, thereby separating the commencement of mediation and arbitration from another. Thus, under the plain language of the contract, to commence arbitration, either party must take two steps: first, CLAIMANT or RESPONDENT must request mediation providing a notice of mediation under Art. 2.1 SIMC Rules 2025. If mediation subsequently fails, arbitration still cannot take place. The aggrieved party must then take a second step, by providing an additional notice of arbitration, under Art. 6.1 SIAC Rules 2025. Then, and only then, arbitration commences.
- 34 Accordingly, CLAIMANT’s notice of mediation did not contain any reference to this arbitration proceeding or any other arbitration proceeding for that matter [PO2, p. 59, para. 30]. Rather, CLAIMANT filed a separate Notice of Arbitration [Langweiler I, p. 1]. Therefore, CLAIMANT understood commencement of arbitration to be a separate process to prior mediation.
- 35 Although arbitration and mediation cannot be separated, as mediation is a condition precedent to arbitration, both processes have their own commencement date. Consequently, arbitration commenced on 31 July 2025 and the SIAC Rules 2025 apply.

B. The PARTIES did not agree otherwise

- 36 Contrary to CLAIMANT the PARTIES did not ‘agree otherwise’ [MfC, para. 25].
- 37 To determine the parties’ true intentions when agreeing to arbitrate, Art. 8 CISG applies [see *supra*, para. 28]. Art. 8(1) CISG establishes the so-called ‘subjective intent’ [TETA case; Kröll/Mistelis/Perales Viscasillas/Kröll, Art. 8, para. 8]. ‘Subjective intent’ may be inferred when the addressee “*knows or could not be unaware of the intent of the party who made the statement or engaged in the conduct in question*” [travaux préparatoires, p. 18].
- 38 The PARTIES agreed on the SIAC Rules 2025 [I]. Even if RESPONDENT is bound by Botanical Garden’s intent, the SIAC Rules 2025 apply [II].

I. The PARTIES agreed on the SIAC Rules 2025

- 39 Determining the true intent of the PARTIES when agreeing to arbitrate pursuant to Art. 8 CISG shows that the PARTIES are bound exclusively by the SIAC Rules 2025. First, the analysis of the term ‘current’ supports the application of the SIAC Rules 2025 [1]. Second, RESPONDENT is not bound by the intent of Botanical Garden, as the PARTIES concluded a new, individual contract [2].



1. The term 'current' constitutes a dynamic reference

- 40 CLAIMANT argues that the plain language of the Arbitration Agreement, i.e. the term 'current', indicates that the parties wanted the SIAC Rules 2016 to govern this arbitration [*MfC, paras.20ff.*]. It rightfully submits that in “*absence of express language of the contrary*” [*MfC, para. 21*], arbitration will be governed by the arbitration rules in force at the time the arbitration is commenced, not the time the arbitration agreement was reached [*MfC, para. 21*].
- 41 In the Arbitration Agreement, the wording of the Model Clause was changed from arbitration commencing in accordance with the SIAC Rules ‘in time being in force’ to arbitration commencing in accordance with the ‘current’ SIAC Rules. On that basis, CLAIMANT somehow argues that the term ‘current’ is more specific than ‘time being in force’, “*less specific words could have been chosen*” and therefore the rules existing at the time of contract conclusion apply [*MfC, para. 24*]. This seems to be based on a flawed understanding of both the meaning of the Model Clause and the terms ‘current’ and ‘time being in force’ in international arbitration [*against MfC, para. 24*].
- 42 However, it is universally accepted that ‘time being in force’ clearly refers to the rules in force at the time of the commencement of the arbitration [*Car & Cars v. Volkswagen; Black v. Jurong; Choong/et al., paras. 5.04ff.*]. In contrast, already the fact that ‘current’ is open to two possible interpretations demonstrates that it cannot be more specific than ‘time being in force’.
- 43 In international arbitration, it is generally accepted that proceedings are governed by institutional rules in effect at the commencement of arbitration [*Wiegand/Altenkirch, para. 15; Arroyo/Pair, para. 29; Greenberg/Mange, p. 213*]. The reference to arbitration rules of a specific arbitration centre constitutes a dynamic reference [*SCC EA 2016/082; AQZ v. ARA; Mobil Oil v. Asamera Oil*]. If parties intend to exclude the dynamic application of revised rules and instead apply a specific version, they must provide for this in their agreement [*SCC EA 2016/082; AQZ v. ARA*].
- 44 The PARTIES referred to the ‘current’ SIAC Rules [*Exh. C3, p. 13, Clause 15*]. They did not specify which exact version of the SIAC Rules [*ibid.*]. At the time of contract conclusion, the SIAC Rules 2016 were in force. However, both PARTIES could not have been unaware that the SIAC Rules 2016 are not the only existing version of the SIAC Rules. The cover of the SIAC Rules 2016 explicitly states that these are the 6th edition, which alone was sufficient to put both PARTIES on notice that the rules, which were in force at the time of the conclusion of the Terminated Agreement, were not guaranteed to remain unchanged indefinitely.
- 45 Therefore, the PARTIES could not have been unaware that SIAC has long administered arbitration and that its rules are occasionally consolidated and amended. Since the PARTIES did not specify a particular version of the SIAC Rules, they intended the arbitration framework to retain its dynamic



effect, automatically incorporating subsequent modifications to the SIAC Rules. Importantly, the PARTIES agreed in Clause 1.2 SA that “*references to statutes include amendments and reenactments*”.

46 As the Arbitration Agreement does not explicitly refer to a particular version of the SIAC Rules, the term ‘current’ constitutes a dynamic reference, thus the SIAC Rules 2025 apply.

2. RESPONDENT is not bound by the intent of Botanical Garden

47 After Botanical Garden, an Equatorianian research institution [*Exh. C2, p. 9, para. 1*], ran into serious financial problems, it was acquired by RESPONDENT in 2022 [*ibid.*]. The PARTIES then terminated the Terminated Contract and concluded the Sales Agreement in August 2022 [*Exh. C3, p. 10, preamble*]. The Sales Agreement is loosely orientated on this Terminated Contract between CLAIMANT and Botanical Garden [*cf. PO2, p. 56, para. 8*].

48 CLAIMANT therefore argues that RESPONDENT is bound by the intent of Botanical Garden [*MfC, paras. 30ff.*]. CLAIMANT’s argument rests entirely on the assertion that RESPONDENT intended to have the exact same contract as Botanical Garden, except for few specific amendments [*ibid.*].

49 However, RESPONDENT is not bound by the intent of Botanical Garden, as the PARTIES concluded a new, individual contract [a]. Even if considering general principles of fairness, RESPONDENT is not bound by the intent of Botanical Garden [b].

a) RESPONDENT is not bound by the intent of Botanical Garden, as the PARTIES concluded a new, individual contract

50 A new contract is concluded, where parties expressly declare their intent to terminate the original contract and replace it with a new one [*Hau/Poseck/Gebrlein, § 311, para. 38*]. This must be determined by way of interpretation in accordance with Art. 8 CISG [*Viscasillas, p. 172; cf. Plane case*].

51 When interpreting intent under Art. 8(1) CISG all relevant circumstances including the wording, drafting history and construction of the contract are to be considered [*Art. 8(3) CISG; Kröll/Mistelis/Perales Viscasillas/Cuppi, Art. 8, para. 29; Schlechtriem/Schwenzer/Schroeter/Schmidt-Kessel II, Art. 8, paras. 33, 43*]. Art. 8(3) CISG applies to both a subjective and objective interpretation [*TETA case; Schlechtriem/Schwenzer/Schroeter/Schmidt-Kessel II, Art. 8, para. 31*].

52 First, the PARTIES altered the essential terms of the Sales Agreement through several major changes. The PARTIES replaced Botanical Garden as the buyer [*NoA, p. 3, para. 9*], increased the quantity by 1,000%, from 300 Vanilla Orchids to 3,000 ± 10 % [*NoA, p. 3, para. 9; RNoA, p. 31, para. 5*], amended the delivery schedule [*NoA, p. 3, para. 9; RNoA, p. 32, paras. 6, 7*], reduced the contract price from USD 2,200 to USD 2,000 per Orchid [*RNoA, p. 32, para. 7*] and finally, changed the delivery terms [*RNoA, p. 32, paras. 6, 7*]. Even if RESPONDENT assumed all other



commitments and liabilities, it intentionally reopened and renegotiated the Terminated Contract, creating new obligations with respect to the amended terms, rather than simply assuming the pre-existing ones.

53 Second, the PARTIES explicitly stated in the Sales Agreement: “[t]he Agreement replaces the earlier agreement between Seller and the Botanical Gardens of Equatoriana concluded on 1 December 2021, which is hereby terminated” [Exh. C3, p. 10, preamble]. This confirms that both PARTIES wanted to conclude a new contract, rather than transferring an existing one with a “few specific amendments” [MfC, para. 30].

54 Since the contract has been renegotiated in key areas and therefore constitutes a new contract in its own right, the original intent of Botanical Garden is irrelevant.

b) Even if considering general principles of fairness, RESPONDENT is not bound by the intent of Botanical Garden

55 CLAIMANT argues that general principles of fairness indicate that the intent of Botanical Garden should be considered, as it assumes that RESPONDENT would have the same intent [MfC, para. 27]. It rests its argumentation on the assertion that the Terminated Contract was intended to directly benefit RESPONDENT [MfC, para. 40].

56 CLAIMANT relies on various legal standards. But after lengthy discussion and weighing different arguments, CLAIMANT itself concludes that the legal standards do not apply to the present case [MfC, para. 37]. Somehow, CLAIMANT still argues that “it would only be fair and equitable to consider the intent of Botanical Garden as the intent of Respondent, when considering the Contract” [MfC, para. 40].

57 CLAIMANT’s conclusion is based solely on the personal impression of its own CEO, Ms. Giorgia Theophrastus [MfC, para. 40]. She asserts that the Terminated Contract was concluded exclusively in RESPONDENT’s interest [Exh. C1, p. 8, para. 10]. This assertion originated from the fact that RESPONDENT and Botanical Garden allegedly cooperated very closely [MfC, para. 40].

58 CLAIMANT hereby omits that RESPONDENT merely acted as a sponsor of Botanical Garden’s research facilities [PO2, pp. 55f., para. 5]. RESPONDENT did not participate in any contract negotiations nor in any other business activities [ibid.]. Consequently, there was no relevant relationship between Botanical Garden and RESPONDENT that could support the accusation that Botanical Garden concluded the Terminated Contract in RESPONDENT’s interest [MfC, para. 40].

59 As the PARTIES concluded a new, individual contract, RESPONDENT is not bound by Botanical Garden’s intent. This is not contradicted by general principles of fairness.



II. Even if RESPONDENT is bound by Botanical Garden's intent, the SIAC Rules 2025 apply

60 Even if RESPONDENT is bound by Botanical Garden's intent, the SIAC Rules 2025 apply, as CLAIMANT and Botanical Garden did not agree on the SIAC Rules 2016. Botanical Garden had the subjective intent [1] and the objective intent [2] to apply the SIAC Rules 2025.

1. Art. 8(1) CISG – A subjective interpretation of Botanical Garden's intent leads to the application of the SIAC Rules 2025

61 As stated above, established case law consistently interprets references to institutional rules as dynamic references [*see supra, para. 43*].

62 CLAIMANT and Botanical Garden did not specifically agree on the SIAC Rules 2016 but rather referred to the 'current' SIAC Rules [*Exh. C3, p. 13, Clause 15*]. At the time the contract was concluded, the SIAC Rules were already in their 6th edition. CLAIMANT and Botanical Garden therefore could have hardly been unaware that the SIAC Rules are subject to periodic revision. This assessment follows directly from CLAIMANT's and Ms. Gobley's, Botanical Gardens chief contract officer, extensive experience in international commercial contracting [*cf. NoA, pp. 3f, paras. 6, 8f., 21ff.; Exh. C1, p. 8, para. 8*]. Such experience necessarily entails an understanding that institutional rules may be revised over time. The discussions between CLAIMANT and Botanical Garden did not concern the content of any specific SIAC provisions but were limited only to the AMA Protocol [*Exh. C7, p. 21; Exh. C1, p. 8, para. 8*].

63 Therefore, a subjective interpretation of Botanical Gardens intent regarding the Arbitration Agreement does not explicitly refer to a particular version of the SIAC Rules. The term 'current' constitutes a dynamic reference, thus the SIAC Rules 2025 apply.

2. Art. 8(2) CISG – An objective interpretation of Botanical Garden's intent leads to the application of the SIAC Rules 2025

64 Even if the subjective intent cannot be established, an objective interpretation pursuant to Art. 8(2) CISG points to an agreement of the parties to apply the SIAC Rules 2025. Art. 8(2) CISG takes the view of a reasonable businessperson in the same situation as the recipient of a statement or declaration [*Achilles, Art. 8, para. 3; Caemmerer/Schlechtriem/Eberstein/Junge, Art. 8, para. 7; Bianca/Bonell/Farnsworth, Art. 8, para. 2.4*]. Since the relevant circumstances to be considered pursuant to Art. 8(3) CISG are identical, RESPONDENT refers to the facts above [*see supra, para. 62*].

65 Botanical Garden's intent proves that the Arbitration Agreement refers to the SIAC Rules 2025 as the applicable rules to this arbitration. Even if RESPONDENT is bound by Botanical Gardens intent, the Arbitration Agreement refers to the SIAC Rules 2025.



CONCLUSION ISSUE 1

The Arbitral Tribunal should apply the SIAC Rules 2025 to this arbitration, as confirmed by the contracts drafting history and the PARTIES intent. Moreover, the arbitration commenced with the filing of its Notice on 31 July 2025. Therefore, the SIAC Rules 2025 apply pursuant to Art. 1.5.

Issue 2: The Arbitral Tribunal should order the disclosure of the AtJ and LitSure Agreement

66 CLAIMANT is grasping for straws and thus attempts to portray the disclosure of its funding agreements as unwarranted. However, CLAIMANT has expressly acknowledged that it would have been unable to pursue this arbitration without external financial support [*PO2, p. 58, para. 20*]. Given this financial dependence, RESPONDENT fears that CLAIMANT's funders, AtJ-Funding and LitSure, exert significant influence over the conduct of the arbitration proceeding.

67 Additionally, RESPONDENT is concerned that a possible termination of CLAIMANT's funding agreement could result in an 'arbitral hit-and-run', leaving RESPONDENT without effective recovery of its costs if it prevails. In such circumstances, full disclosure of the AtJ-Funding agreement ("**AtJ Agreement**") and the LitSure insurance agreement ("**LitSure Agreement**") is necessary.

68 CLAIMANT disregards this necessity by shielding itself behind the assertion that disclosure is impossible [*MfC, paras. 50ff.*]. Hereby it fails to address the broader developments in international arbitration regarding TPF. The Arbitral Tribunal should approve RESPONDENT's claim for disclosure of the AtJ and LitSure Agreement under Art. 38.4 SIAC Rules 2025 [**A**]. Even if the SIAC Rules 2016 apply, the Arbitral Tribunal should approve RESPONDENT's Disclosure Request under its general case management powers [**B**].

A. The Arbitral Tribunal should approve the Disclosure Request under the SIAC Rules 2025

69 Contrary to CLAIMANT's assertions [*MfC, paras. 59ff.*], according to Art. 38.4 SIAC Rules 2025, the Arbitral Tribunal may order disclosure of information about any TPF agreement, including the funder's interest in the outcome and any commitment to cover adverse costs.

70 The Arbitral Tribunal can order disclosure [**I**] and should approve the Disclosure Request [**II**] under Art. 38.4 SIAC Rules 2025. Granting the Disclosure Request would neither unduly favour RESPONDENT nor raise concerns as to parity [**III**].

I. The Arbitral Tribunal can order disclosure under Art. 38.4 SIAC Rules 2025

71 RESPONDENT agrees with CLAIMANT that Art. 38 SIAC Rules 2025 provides a broad regulation for disclosure of TPF agreements [*MfC, para. 59*]. This is supported by wording and structure of



Art. 38 SIAC Rules 2025, as well as developments of institutional rules and international best practices.

- 72 TPF raises well-recognised concerns in arbitration: undisclosed conflicts of interest may jeopardise an award [*Baltag/Feldman/Macedo/Fremuth-Wolf*, p. 52], a risk of an ‘arbitral hit-and-run’, where the funder profits if the claim succeeds but disappears and bears no adverse costs if the funded party loses [*ICSID ARB/07/13*; *ICSID ARB/08/9*; *ICSID ARB/12/10*; *Darwazeh/Leleu*, p. 131], and funders may unduly influence the conduct of the proceedings [*DNQ v. DNR*; *Nieumveld/Sabani*, p. 4; *Hoffmann*, p. 45; *Howie/Moysa*, p. 485; *Steinitz*, p. 1323; *Truszczyński*, p. 1655; *Waye*, pp. 253f.; *Goldsmith/Melchionda I*, p. 58; *Pardau*, p. 76].
- 73 To address these concerns, Art. 38.4 SIAC Rules 2025 authorises an arbitral tribunal to “order the disclosure of the information referred to in Rule 38.1” and, after hearing the parties, to require disclosure of further information concerning the TPF agreement “as it sees fit”. This includes, in explicit terms, details of the funder’s economic “interest in the outcome of the proceedings” and whether the funder has “committed to undertake adverse costs liability” [*Art. 38.4 SIAC Rules 2025*].
- 74 This broad wording reflects a clear institutional trend across leading arbitral rules to address risks relating to impartiality, costs, and funder influence [*DNQ v. DNR*; *Nieumveld/Sabani*, p. 4; *Hoffmann*, p. 45; *Howie/Moysa*, p. 485; *Steinitz*, p. 1323; *Truszczyński*, p. 1655; *Waye*, pp. 253f.; *Goldsmith/Melchionda I*, p. 58; *Pardau*, p. 76]. Art. 38 SIAC Rules 2025 was inspired by these trends and experience in international arbitration regarding TPF [*Highlights SIAC Rules 2025*].
- 75 Accordingly, disclosure of the AtJ and LitSure Agreement squarely falls within the Arbitral Tribunal’s procedural powers under the SIAC Rules 2025.

II. The Arbitral Tribunal should order disclosure under Art. 38.4 SIAC Rules 2025

- 76 Contrary to CLAIMANT [*MfC*, paras. 59ff.], the Arbitral Tribunal should follow established guidelines in international arbitration and approve the Disclosure Request pursuant to Art. 38.4 SIAC Rules 2025 [1]. Additionally [*against MfC*, paras. 54f.], following the IBA Rules leads to the same conclusion [2].

1. Under the present circumstances, the Disclosure Request should be approved according to Art. 38.4 SIAC Rules 2025

- 77 CLAIMANT argues that, despite the broad wording of Art. 38.4 SIAC Rules 2025, the Arbitral Tribunal is constrained because it must take CLAIMANT’s view into account [*MfC*, para. 59]. CLAIMANT further maintains that ordering disclosure would violate procedural fairness and is therefore not permissible [*ibid.*]. However, CLAIMANT not only disregards RESPONDENT’s view on the case, it also discounts that procedural fairness does not preclude disclosure by itself.



78 Disclosure has long been recognised as permissible when it is necessary to ensure the overall fairness and integrity of the proceedings [*ICSID ARB/12/6*; *PCA 2023-20*; *Goeler*, pp. 141ff.]. This is consistent with an arbitral tribunal's duty to conduct a fair and balanced arbitration [*ibid.*].

79 Furthermore, CLAIMANT's reliance on the award *ICSID Arb/12/6* from 2021 to prove that disclosure would be unfair is misplaced [*MfC*, para. 65]. The arbitral tribunal's decision to order disclosure was not based solely, or even primarily, on the claimant's prior failure to pay costs in another proceeding [*ICSID ARB/12/6*]. On the contrary, in *ICSID Arb/12/6* the arbitral tribunal stated several factors that justify disclosure of TPF agreements including:

- to identify the true party to the case,
- for transparency,
- for the arbitral tribunal to fairly decide how costs should be allocated at the end of arbitration
- and if an application for security for costs is requested.

80 CLAIMANT unnecessarily focuses on alleged conflicts of interest, apparently on the assumption that RESPONDENT intends to rely on such an argument [*MfC*, paras. 61f.]. This assumption is misplaced. The Arbitral Tribunal has already examined and resolved issues concerning the independence of the Arbitral Tribunal in relation to any third-party funder [*PO2*, p. 58, para 21]. Accordingly, RESPONDENT will not rely on any alleged conflict of interest. Rather, consistent with arbitral practice, RESPONDENT will rely on the following arguments.

81 The LitSure and AtJ Agreement should be disclosed to identify the true party to the case [a], regarding transparency and influence of the funders [b], cost allocation [c] and security for costs [d].

a) Disclosure is necessary to identify the true party to the case and to ensure enforceability

82 In the present case, it is unclear which rights have been assigned to AtJ-Funding under the respective funding agreement.

83 An assignment of the claim to a third-party funder before the initiation of arbitral proceedings can render a party's claim inadmissible [*ICSID ARB/97/4*; *ICSID ARB/97/3*; *SCC 79/2005*; *SCC 24/2007*; *ICSID ARB/07/15*; *Hoffmann*, pp. 142ff.; *Jauernig/Stürner*, Art. 398, paras. 14f.; *Säcker/et al/Kieninger*, Art. 398, para. 94; *Goldsmith/Melchionda II*, p. 232; *Goeler*, pp. 243f.]. If the claim is inadmissible, enforceability of an award is jeopardised because the resulting award may be outside the factual scope of the arbitration agreement [*Art. V(1)(c) NYC*].



84 The AtJ Agreement contains a calculation method that could serve as a basis for determining the value of assigned rights [PO2, pp. 58f., para. 26]. However, it is uncertain whether any assignment occurred prior to the arbitration, and whether CLAIMANT retains a genuine interest in pursuing the claim. As a result, it remains questionable whether it has legal standing and who is the true party in interest of the claim. This casts doubt on the enforceability of any award that may be rendered.

85 Therefore, the AtJ Agreement should be disclosed to ensure enforceability.

b) Disclosure is necessary regarding transparency and influence on the proceedings

86 Particularly where a party is financially dependent on external funding to secure access to justice [cf. *Howie/Moysa*, p. 471; *CLARB*, p. 11], the funder has a direct economic interest and exercises control or influence over the funded party's conduct of the arbitration [*Frutos-Petersen/et al., General Standard 6*; *Scherer/Goldsmith/Flechet*, p. 658; *Pinheiro/Chitalia*, p. 287].

87 Therefore, an arbitral tribunal may order disclosure of a TPF agreement where necessary to identify the influence of a funder and protect the integrity and transparency of the proceedings [*ICSID ARB/07/15*; *ICSID ARB/12/6*; *Howie/Moysa*, p. 485; *ICCA Reports No. 4*, p. 107; *Hoffmann*, p. 159]. Furthermore, the influence of a funder combined with its economic interest can lead to exaggerated and inflated claims beyond their value [*Darwazeh/Leleu*, p. 130].

88 In the present case, there is insufficient transparency regarding AtJ-Funding's economic interest and its influence over CLAIMANT's conduct [*RNoA*, p. 34, para. 19]. The AtJ Agreement contains no threshold or limiting mechanism [PO2, pp. 58f., para. 26], allowing AtJ-Funding to block any settlement at any stage of the proceedings, maximising the potential revenue. AtJ-Funding is a commercial "rough funder" with a direct financial stake [*Exb. R4*, p. 40, para. 5]. It may exercise control through rights typically contained in funding agreements, such as influence over strategy, settlement or termination. This is further reinforced, as AtJ-Funding has "not submitted to the code of conduct of the funding industry" [*Exb. R4*, p. 40, para. 6].

89 Furthermore, due to its strong economic interest combined with its potential influence over CLAIMANT, it is highly likely that AtJ-Funding may encourage the exaggeration of claims or pressure CLAIMANT to pursue additional claims. This risk has already materialised, as demonstrated by CLAIMANT's decision to assert a claim amounting to USD 3,300,000, although the amount in dispute is, if anything, USD 2,100,000 [see *infra*, para. 218]. Taken together, these circumstances warrant disclosure of the AtJ Agreement to determine the extent of influence and safeguard the transparency of the proceedings.



c) Disclosure is necessary for cost allocation

- 90 As arbitral practice evidences, disclosure may become relevant for an arbitral tribunal's assessment of costs [*ICSID ARB/12/6*; *ICC 7006*; *ICSID ARB/05/15*; *ICSID ARB/07/15*; *ICSID ARB/05/14*; *SCC 24/2007*; *Goeler*, pp. 367ff.; *Scherer/Goldsmith/Flechet*, p. 650]; in particular to understand whether and to what extent party costs were actually funded to ensure a fair allocation of costs at a later stage of the proceedings [*ibid.*].
- 91 Disclosure is particularly relevant for the Arbitral Tribunal's assessment of costs, as CLAIMANT has already announced its intention to seek recovery of its funding costs in these proceedings [*PO2*, p. 59, para. 27]. It remains unclear what CLAIMANT's actual costs are and to what extent such costs have been funded by LitSure and AtJ-Funding.
- 92 Furthermore, in the case *Green Hydro v. Equatoriana RenPower*, following the disclosure of the AtJ-Funding agreement, AtJ-Funding was ordered to assume part of the opposing party's legal costs after the funded party became insolvent [*Exh. R4*, p. 40]. RESPONDENT has a legitimate interest in understanding the scope and structure of the AtJ Agreement, as CLAIMANT may also become insolvent [*PO2*, p. 58, para. 20]. In such a scenario, the question would arise whether AtJ-Funding could be required to assume all or part of RESPONDENT's legal costs.
- 93 Therefore, in order to safeguard the integrity of the costs decision and to avoid any risk of overcompensation, disclosure of the relevant LitSure and AtJ Agreement is necessary.

d) Disclosure is necessary for security for costs

- 94 CLAIMANT argues that disclosure of the TPF agreements is not necessary for a decision of the Arbitral Tribunal regarding security for costs because LitSure provides adverse costs coverage [*MfC*, para. 72]. According to CLAIMANT, this allegedly eliminates any risk for RESPONDENT to effectively recover its costs if it prevails [*ibid.*].
- 95 Disclosure of TPF agreements is particularly justified where the non-funded party intends to request security for costs [*ICSID ARB/12/6*]. Almost all funding agreements contain clauses governing the early termination of the funding relationship under various circumstances defined by the funder [*Hoffmann*, p. 45; cf. *Sinclair v. Buttonwood et al.*].
- 96 Therefore, the risk of an 'arbitral hit-and-run' arises, i.e. a scenario in which the funder profits if the claim succeeds but can withdraw or avoid liability for adverse costs if the claim fails [*ICSID ARB/07/13*; *ICSID ARB/08/9*; *ICSID ARB/12/10*; *Darvazeh/Lelen*, p. 131; *Hoffmann*, p. 45]. In such circumstances, institutional rules allow a party to request security for costs [*Art. 48.1 SIAC Rules 2025*; *Art. 25.2 LCIA 2020*; *Art. 53 ICSID 2022*; *Art. 24 HKIAC 2018*]. Accordingly, for the arbitral tribunal to decide on security for costs, it must assess whether adverse



costs are genuinely covered and whether the non-funded party will have effective recourse if it prevails [*Hoffmann*, pp. 297f.; *Darwazeh/Leleu*, p. 138; *ICC Dossier/Scherer*, p. 98; cf. *Scherer/Goldsmith/Flechet*, p. 650]. For this assessment, TPF Agreements must be disclosed [*ibid.*].

97 CLAIMANT has openly admitted that it would not be able to pursue this arbitration without external financial support [*NoA*, p. 6, para. 34; *PO2*, p. 58, para. 20]. However, AtJ-Funding, CLAIMANT's main funder, declared it would not pay for adverse costs as it is too expensive [*PO2*, p. 58, para. 25]. To ensure adverse costs are covered, CLAIMANT approached LitSure [*ibid.*]. Yet, it is unclear to which extent LitSure is willing to pay for adverse costs.

98 Under these circumstances, RESPONDENT has expressly indicated its intention to request security for costs [*RNoA*, p. 34, para. 20]. Accordingly, for the Arbitral Tribunal to decide on security for costs, it must assess whether LitSure genuinely covers adverse costs and whether RESPONDENT will have effective recourse if it prevails. The Arbitral Tribunal can only do so, if it orders disclosure of the LitSure Agreement. Since RESPONDENT has already stated its intention to request security for costs [*ibid.*], and can do so at any time in this stage of the proceedings [*Art. 48.1 SIAC Rules 2025*; cf. *Choong/et al.*, para. 12.29], RESPONDENT's Disclosure Request is not premature [*against MfC*, para. 72].

99 Therefore, for the Arbitral Tribunal to properly decide on security for costs the LitSure Agreement should be disclosed.

2. Additionally, under the guideline of the IBA Rules the Disclosure Request should be approved

100 CLAIMANT asserts that the LitSure and AtJ Agreement are not material to the case [*MfC*, paras. 63ff.]. Yet, it fails to provide a legal basis for this assertion or to define how materiality is assessed [*MfC*, para. 63]. To establish a legal basis on how to assess materiality, RESPONDENT suggests that the IBA Rules should be used as guiding standards.

101 RESPONDENT has already shown that Art. 38.4 SIAC Rules 2025 itself provides sufficient guidance on disclosure. Following that guidance alone, the Arbitral Tribunal should approve RESPONDENT's Disclosure Request [*see supra paras. 71ff.*]. However, following the IBA Rules leads to the same conclusion.

102 It is established arbitral practice that arbitral tribunals do rely on the IBA Rules even if parties have not explicitly agreed to apply them in their arbitration agreement [*LCIA 91305*; *Halliburton v. Chubb*], because they resemble best practice in arbitration [*Müller/Favelli*, p. 85; cf. *Halliburton v. Chubb*]. Furthermore, it is desirable for the tribunal to adopt the IBA Rules in cases where the



parties come from different legal backgrounds [*Kubalczyk, p. 97*]. CLAIMANT is located in a civil law and RESPONDENT in a common law jurisdiction [*PO2, p. 59, para. 33*].

103 Pursuant to Art. 9(2)(a) IBA Rules, evidence should only be excluded for a “*lack of sufficient relevance to the case and materiality to its outcome*”. However, contrary to CLAIMANT [*MfC, paras. 63ff.*], the AtJ and LitSure Agreement are relevant to the case [a] and material the outcome of the case [b]. Consequently, RESPONDENT’s Disclosure Request should be approved.

a) The AtJ and LitSure Agreement are relevant to the case

104 Under Art. 9(2)(a), 3(3) IBA Rules, a document is “*relevant to the case*” when it is likely that it will prove a fact from which legal conclusions are drawn [*Zuberbühler/Hoffmann/Oettiker/Rohner, pp. 67f., para. 128; Khodykin/Mulcahy/Fletcher, para. 6.96*]. The decisive consideration is that the document must assist in establishing facts to which the law will be applied [*ibid.*]. Relevance can also encompass procedural matters, not just substantive issues [*Zuberbühler/Hoffmann/Oettiker/Rohner, p. 66, para. 123; Goeler, p. 195*].

105 **The AtJ Agreement is relevant:** Although the AtJ Agreement does not cover adverse costs [*PO2, p. 58, para. 25*], it remains relevant to the case. Its disclosure is necessary to assess AtJ-Funding’s potential influence, any assignment of rights and to ensure transparency and the enforceability of the award [*see supra, paras. 82ff.*].

106 **The LitSure Agreement is relevant:** It is uncertain under which conditions LitSure committed to cover adverse cost. This creates a genuine risk that RESPONDENT could be left without effective recourse if it prevails [*see supra, paras. 94ff.*]. Disclosure of the LitSure Agreement is therefore necessary to prove whether adverse costs are covered.

b) The AtJ and LitSure Agreement are material to the outcome of the case

107 Under Art. 9(2)(a), 3(3) IBA Rules, a document is “*material to [the case’s] outcome*” when it is likely that it will allow a complete consideration of the factual issues before an arbitral tribunal and is significant for its decision [*Zuberbühler/Hoffmann/Oettiker/Rohner, pp. 67f., para. 128; Khodykin/Mulcahy/Fletcher, para. 6.103*]. The document must contribute to establishing the factual basis upon which legal conclusions are drawn by an arbitral tribunal [*Zuberbühler/Hoffmann/Oettiker/Rohner, pp. 67f., para. 128; Khodykin/Mulcahy/Fletcher, paras. 6.96ff.*]. The concept of materiality encompasses not only substantive issues, but also procedural considerations [*Zuberbühler/Hoffmann/Oettiker/Rohner, p. 66, para. 123; Goeler, p. 195*].

108 **The AtJ Agreement is material:** The absence of thresholds could lead one to believe that a claimant retains full autonomy over settlement decisions [*cf. Hoffmann, p. 49*]. In reality, however, a funded party typically cannot accept a settlement without the funder’s consent [*Hoffmann, pp. 52f.*].



Goldsmith/Melchionda I, Rogers, pp. 57f.; Egger, p. 195, para. 5.59], allowing AtJ-Funding to block any settlement at will. Without a predefined threshold obliging acceptance at a certain level, AtJ-Funding's veto power remains unlimited, which significantly undermines CLAIMANT's procedural independence. Beyond a funder's general influence on the proceedings [*see supra, para. 82ff.*], the absence of thresholds reinforces that disclosure of the AtJ Agreement is needed to assess the extent of AtJ-Funding's control.

109 TPF agreements should be disclosed regarding cost allocation where a funder's involvement goes beyond being merely "*invisible*" [*De Brabandere/Lepaltak, p. 19; Goeler, pp. 374f.*]. If a funder is substantially involved, arbitral tribunals are entitled to assess whether and how that involvement affected the proceedings in order to consider this information in a fair allocation of costs [*ibid.*].

110 In the present case, AtJ-Funding is not bound by industry conduct standards [*Exh. R4, p. 40, para. 6*], and operates without settlement thresholds [*PO2, p. 58, para. 20*], allowing it to block any settlement with RESPONDENT. These circumstances create a real risk that AtJ-Funding confirms its reputation as a "*rough funder*" [*Exh. R4, p. 40, para. 5*], influences procedural decisions, prolongs the proceedings, or increases costs in pursuit of its own return.

111 Without disclosure of the AtJ Agreement, the Arbitral Tribunal cannot assess the true extent of AtJ-Funding's control or determine whether delays or cost increases result from the funder or the PARTIES. Disclosure is therefore essential to enable the Arbitral Tribunal to account for any funder-driven interference and to ensure that cost consequences fall where they properly belong.

112 In any case, disclosure is required in light of the possible transfer of claims to AtJ-Funding before the arbitration commenced [*see supra, paras. 82ff.*]. The Arbitral Tribunal must therefore examine the funding agreement in order to determine CLAIMANT's standing and to decide whether CLAIMANT remains entitled to pursue the claims in its own name [*see supra, para. 82ff.*]. Therefore, the AtJ Agreement is material to the case.

113 **The LitSure Agreement is material:** Since it is unclear to which extent LitSure covers for an adverse cost award [*see supra, para. 94ff.*], disclosure of the LitSure Agreement is necessary for the Arbitral Tribunal to make an informed decision regarding any security for costs application. Therefore, the LitSure Agreement is material to the outcome of the case.

III. Granting the Disclosure Request would neither unduly favour RESPONDENT nor raise concerns as to parity

114 **First**, CLAIMANT submits that disclosure would violate procedural fairness because TPF agreements contain sensitive and potentially privileged information.



- 115 While TPF was originally intended to give financially disadvantaged parties access to justice, modern TPF practice has created new circumstances that require full transparency [*Darwazeh/Leleu*, p. 125; *Cremades*, pp. 6f.]. Therefore, disclosure of TPF is an essential prerequisite for maintaining equality of arms and procedural fairness [*Darwazeh/Leleu*, p. 125; *Pinheiro/Chitalia*, p. 272].
- 116 While fairness and equality of arms are indeed fundamental principles, they cut both ways: fairness and equality of arms are precisely the reason why disclosure is required. In light of the present circumstances, disclosure ensures transparency regarding the funding structure, potential influence, and cost exposure, thereby promoting a fair procedure rather than undermining it [*see supra*, paras. 76ff.]. In any case, the AtJ Agreement itself expressly permits disclosure when ordered by an arbitral tribunal. Accordingly, CLAIMANT cannot rely on privilege of the AtJ Agreement to deny its disclosure [*PO2*, p. 58, para. 24].
- 117 **Second**, CLAIMANT argues that disclosure would unduly favour RESPONDENT by enabling it to strategically prolong proceedings or make speculative inferences [*MfC*, paras. 66ff.].
- 118 The AtJ Agreement merely defines a funding cap and the funder's compensation in the event of success [*PO2*, pp. 58f., para. 26]. It does not reveal any litigation strategy or tactical decisions. In particular, the absence of settlement thresholds confirms that the AtJ Agreement does not dictate when, or on what terms, CLAIMANT may settle, nor does it restrict how the arbitration is to be conducted [*ibid.*]. Accordingly, no meaningful conclusions can be drawn from the agreement regarding CLAIMANT's procedural strategy or conduct.
- 119 Consequently, granting the Disclosure Request would neither raise concerns as to equality nor unduly favour RESPONDENT, but rather ensure equality of information and fair proceedings.
- 120 **Third**, CLAIMANT argues that ordering disclosure would undermine parity and fairness by forcing a smaller, funded party to reveal sensitive strategic and financial information, while RESPONDENT, supported by its Parent Company, would face no comparable obligation [*MfC*, paras. 70f.].
- 121 However, CLAIMANT cannot refuse disclosure merely because RESPONDENT has a parent company. Intra-group financing is excluded from the definition of TPF [*Darwazeh/Leleu*, p. 127]. Thus, parent companies are not third-party funders [*ICSID ARB/24/16*; *Darwazeh/Leleu*, p. 127], and are not object to disclosure of TPF under the SIAC Rules.
- B. Even if the SIAC Rules 2016 apply, the Arbitral Tribunal should approve the Disclosure Request**
- 122 It is true that under the SIAC Rules 2016 no specific provision for disclosure of TPF agreements exist [*MfC*, para. 51]. However, even where no specific disclosure mechanisms or practices exist, a TPF agreement is treated like any other piece of documentary evidence [*Goeler*, p. 133;



cf. Blackaby/Wilbraham, p. 721, para. 26.59]. Disclosure could be necessary for the arbitral tribunal to decide on the relevant procedural issue, provided that it has the power to order document production [*ibid.*].

123 The Arbitral Tribunal can approve the Disclosure Request under its general powers [II]. The Arbitral Tribunal should approve the Disclosure Request under its general powers [III].

I. The Arbitral Tribunal can approve the Disclosure Request under its general powers

124 CLAIMANT argues that the SIAC Rules 2016 do not authorize the Arbitral Tribunal to order disclosure of TPF agreements, as such funding is neither mentioned nor regulated and no express procedural power exists [*MfC, paras. 52ff.*].

125 Pursuant to Art. 27(f) SIAC Rules 2016, Art. 17(2)(d) DAL, the Arbitral Tribunal has the power to order the disclosure of a document if it is “*relevant to the case and material to the outcome*”. Therefore, the Arbitral Tribunal can approve the Disclosure Request when applying general standards.

126 While CLAIMANT relies on a SIAC Practice Note to argue that the disclosure of TPF agreements under Art. 27(f) SIAC Rules 2016, Art. 17(2)(d) DAL is limited [*MfC, paras. 54f.*], the very information the Practice Note identifies can only be determined from the funding agreement. Without access to the funding agreement, any attempt to identify the existence of the funding, “*the identity of the funder*”, “*details of the funder’s interest in the outcome of the proceedings*” and “*whether the funder has committed to undertake adverse cost liability*” [*PN – 01/17, para. 5*], would be incomplete or speculative. In simple terms, the Practice Note inherently assumes disclosure of the funding agreement as it is the only source containing the necessary details.

127 Therefore, the Arbitral Tribunal can approve the Disclosure Request when applying general standards under the SIAC Rules 2016.

II. The Arbitral Tribunal should approve the Disclosure Request under its general powers

128 The prerequisites “*relevant to the case and material to the outcome*” are comparable to Art. 3(3) IBA Rules [*Choong/et al., para. 12.20*]. Thus, the Arbitral Tribunal should consider Art. 3(3) IBA Rules for interpretative guidance when determining the scope of “*relevance*” and “*materiality*” under Art. 27(f) SIAC Rules 2016 [*ibid.*]. The IBA Rules apply as guidance, even if not expressly agreed [*see supra, para. 102*].

129 As shown above, the requirements of relevance and materiality under the IBA Rules are satisfied [*see supra, paras. 104ff.*]. Therefore, there are no procedural barriers to disclosure under the SIAC Rules 2016. Guided by the IBA Rules, the Arbitral Tribunal has the power to order disclosure of the funding arrangements even under Art. 27(f) SIAC Rules 2016 and should exercise



this power of document production to safeguard procedural fairness and the integrity of the proceedings.

130 Therefore, even if the SIAC Rules 2016 were applicable, the Arbitral Tribunal can and should approve RESPONDENT's Disclosure Request.

CONCLUSION ISSUE 2

The Arbitral Tribunal should order the disclosure of the AtJ and LitSure Agreement, as the SIAC Rules 2025 explicitly provide in Art. 38.4 for disclosure. Alternatively, under the SIAC Rules 2016 the Arbitral Tribunal should use its discretion, follow the IBA Rules and order the disclosure provided for thereunder.

ISSUE 3: RESPONDENT DOES NOT HAVE TO PAY ANY DAMAGES AND IN ANY CASE IS EXCUSED FROM LIABILITY

131 The collapse of the delivery of the 3,300 Vanilla Orchids was only the consequence of a regulatory blockade. The introduction of sudden import requirements, combined with the Equatorian authorities' policy shift towards a restrictive import permit regime, rendered performance legally impossible. The administrative landscape changed fundamentally due to external political pressures, burying the transaction under a weight of legal impossibility that no reasonable buyer could have overcome. CLAIMANT's attempt to frame this sovereign act as a mere failure of RESPONDENT to meet its "*burden of proof*" [MfC, para. 75] is as opportunistic as it is legally hollow. Refusal of permits constitutes an unavoidable force majeure impediment under Art. 79 CISG: beyond the control of any party, unforeseeable and sufficient to render performance impossible.

132 RESPONDENT does not contend that it breached the Sales Agreement. However, RESPONDENT's liability is excused pursuant to Art. 79 CISG [A]. Even if RESPONDENT's liability is not excused pursuant to Art. 79 CISG, RESPONDENT still would be excused under Clause 12 SA [B].

A. RESPONDENT's liability is excused pursuant to Art. 79 CISG

133 For the convenience of the Arbitral Tribunal, RESPONDENT will first rely on Art. 79 CISG [I]. RESPONDENT will demonstrate against CLAIMANT's assumption [MfC, para. 83] that the new import restrictions and sudden policy shift towards a restrictive import permit regime was an impediment entirely beyond its control [II]. RESPONDENT's liability is excused as it could not reasonably be expected to have taken the impediment into account at the time of contract conclusion [III] and could not have avoided or overcome it [IV]. Additionally, the failure to perform was due to the impediment [V].



I. For the convenience of the Arbitral Tribunal, RESPONDENT will first rely on Art. 79 CISG

134 CLAIMANT has notably failed to address any potential conflict between Art. 79 CISG and Clause 12 SA. This is flawed, since the contractual clause substitutes the excuse of liability under the CISG. The PARTIES deviated from Art. 79 CISG by agreeing on different requirements for the excuse of liability in Clause 12 SA. Therefore, Clause 12 SA substitutes Art. 79 CISG.

135 Clause 12 SA reads as follows:

12. FORCE MAJEURE

12.1 Events. A Party is not liable for failure or delay caused by events beyond its reasonable control, including but not limited to acts of God, extreme weather, epidemics/pandemics, quarantine restrictions, embargoes, government measures, strikes, war, civil unrest, natural disasters, and carrier-wide disruptions.

12.2 Notice & Mitigation. The affected Party shall notify the other within 5 days of becoming aware and use reasonable endeavours to mitigate the effects. Performance times are extended accordingly. [Exh. C3, p. 13, Clause 12 SA].

136 Modifications under the CISG are subject to party autonomy [Schlechtriem/Schwenzer/Schroeter/Ferrari I, Art. 6, para. 36; Kröll/Mistelís/Perales Viscasillas/Mistelís, Art. 6, para. 25; Spagnolo, para. 2.04]. Due to the dispositive nature of Art. 79 CISG [Gsell/et al./Bach, Art. 79, para. 4], parties may agree on contractual clauses that exceed the CISG [Hau/Poseck/Saenger, Art. 6, para. 8]. Such clauses may exclude broader liability or stipulate stricter liability [ISL/et al./DiMatteo, Chapter 22, para. 132; Säcker/et al./Huber, Art. 79, para. 33; Staudinger/Magnus para. 65]. The PARTIES intent is assessed under Art. 8 CISG [see supra, para. 28].

137 Clause 12 SA does not mirror the structure of Art. 79 CISG but rearranges and limits the exemption requirements. Unlike Art. 79 CISG, Clause 12 SA

- **provides** a specific catalogue of events, specifically including government measures,
- **omits** the foreseeability requirement,
- **does not require** avoidance or prior overcoming of the impediment,
- **limits** the obligation to use ‘reasonable endeavours’ solely to the effects of the impediment, rather than to the impediment itself and
- **introduces** a strict five-day notice period for the affected party and ties legal consequences (i.e. extension of performance time) directly to compliance with this procedure.



138 Since the PARTIES selectively omitted foreseeability, prior availability and the duty to overcome the impediment itself, while specifying certain requirements, Clause 12 SA substitutes Art. 79 CISG.

139 Despite the substitution, CLAIMANT only relies on Art. 79 CISG [*MfC, paras. 75ff.*]. Therefore, for the convenience of the Arbitral Tribunal, RESPONDENT will follow CLAIMANT's structure and prove its exemption under Art. 79 CISG first.

II. RESPONDENT's liability is excused as the failure to perform was due to an impediment beyond RESPONDENT's control

140 Under Art. 79(1) CISG, a party is not liable for a failure to perform its obligations if it proves that the failure was due to an impediment. An impediment is generally defined as an unmanageable risk or a totally exceptional event, which creates an extraordinary and disproportionate burden that prevents the fulfilment of contractual duties [*Chinese goods case; Digest, Art. 79, p. 375, para. 10*].

141 RESPONDENT wants to clarify that it does not rely on "economic difficulties" as an impediment to excuse its liability [*against MfC, para. 83*]. CLAIMANT itself recognises that "the change of law regarding the licensing requirements may constitute an impediment" [*MfC, para. 82*].

142 The reclassification of the Vanilla Orchid from Appendix II to Appendix I results in the introduction of strict import permit requirements with immediate effect [*NoA, p. 4, para. 17; Exh. C4, p. 14, para. 1*]. This, combined with Equatoriana's sudden policy shift towards a restrictive import permit regime [*PO2, p. 58, para. 18*], form the impediment. Since it was impossible for RESPONDENT to obtain the required import permits, its liability is excused.

143 The PARTIES did not allocate the risk of failure due to government measures to RESPONDENT [1]. Therefore, the impediment was beyond its control [2].

1. The PARTIES did not allocate the risk of failure due to government measures to RESPONDENT

144 The risk of failing to obtain the import permits due to government measures falls not within RESPONDENT's sphere of risk [*against MfC, paras. 77ff.*]. As correctly established by CLAIMANT, a correct application of Art. 79 CISG must focus on whether the party assumed the specific risk of the event at the time of contract conclusion [*MfC, paras. 77ff.*].

145 Only an impediment lying outside a party's sphere of risk can lead to an excuse under Art. 79 CISG. Whether an impediment falls within that sphere is determined primarily by the contract's allocation of risk [*Schlechtriem/Schwenzler/Schroeter/Schwenzler/Köhler I, Art. 79, para. 11*]. An implied or general obligation to obtain a license is a duty of reasonable diligence rather than an absolute guarantee, unless the contract explicitly establishes the consequences for failing to obtain a license [*Anglo-Russian case; Bridge, p. 296, paras. 5.16ff.*].



146 Clause 5.1(b) SA establishes that “[t]he Buyer shall obtain all import permits”. CLAIMANT incorrectly argues that RESPONDENT “assumed responsibility for any change of circumstances regarding the ability to import the orchids” [MfC, paras. 77ff].

147 If the PARTIES had intended Clause 5.1(b) SA to cover the risk of permit refusal, they would have expressly addressed such possibilities at that point. Instead, the PARTIES allocated the consequences of permit refusal to Clause 12 SA, which specifically governs excusing events, including government measures [see *supra*, para. 137]. Accordingly, the risk of non-issuance of import permits was neither expressly assumed under Clause 5.1(b) SA nor can such assumption be implied, as this would render the explicit exemption regime of Clause 12 SA devoid of meaning. Thus, the PARTIES did not allocate the risk of failure due to government measures to RESPONDENT.

2. The impediment is beyond RESPONDENT’s control

148 An impediment outside a party’s sphere of influence is generally considered beyond a party’s control [Hau/Poseck/Saenger, Art. 79, para. 5; Drescher/et al./Sommerfeld, Art. 79, para. 26]. Government measures, like the enactment of new import restrictions or the refusal by officials to grant permits naturally lay outside a party’s sphere of influence and therefore form an impediment beyond its control [Kröll/Mistelis/Perales Viscasillas/Atamer, Art. 79, para. 46; Gsell/et al/Bach, Art. 79, para. 29; Drescher/et al./Sommerfeld, Art. 79, paras. 36f.; Digest, Art. 79, p. 375, para. 11; Schlechtriem/Schwenzler/Schroeter/Schwenzler/Köhler I, Art. 79, para. 17].

149 Although Equatoriana initially opposed the CITES recommendation, the Ministry of Agriculture caved to intense NGO pressure by adopting a restrictive approach to permits, making it legally impossible to procure a permit for commercial purposes [PO2, p. 58, para. 18; cf. Exh. C4, p. 14]. RESPONDENT acted with due diligence by attempting to apply for the permit but was informed by the relevant authority on 14 February 2024 that no permits would be issued [PO2, p. 57, para. 17].

150 Since RESPONDENT had neither influence over the introduction of import permits nor Equatoriana’s sudden policy shift towards a restrictive import permit regime, the impediment was beyond RESPONDENT’s control.

III. RESPONDENT’s liability is excused as it could not reasonably be expected to have taken the impediment into account at the time of contract conclusion

151 CLAIMANT states that the impediment “was clearly foreseeable at the time of execution of the Contract” [MfC, para. 89]. However, CLAIMANT ignores that the impediment does not need to be foreseeable at the time of the execution of the contract but rather at the time of contract conclusion.

152 A party can reasonably be expected to take an impediment into account, if the impediment is foreseeable at the time of contract conclusion [Brunner/Gottlieb/Brunner, Art. 79, para. 39]. The



impediment is foreseeable, when a reasonable businessperson under Art. 8(2) CISG would have been knowledgeable of or could determine its existence because of the relevant circumstances [*Kröll/Mistelis/Perales Viscasillas/Atamer, Art. 79, para. 52*]. Extraordinary and unprecedented events are unforeseeable and thus qualify as an excuse under Art. 79 CISG [*Raw materials case*].

153 **Factual timeline:** The only relevant point in time when foreseeability must be assessed is 25 August 2022, the date when the Sales Agreement was concluded [*NoA, p. 3, para. 9*]. At this time, the Vanilla Orchid was only on Appendix II of CITES. There was no public indication of a pending reclassification into Appendix I [*Exh. C4, p. 14, paras. 2f.*]. The first sign of the reclassification did not occur until September 2023, when a controversial discussion about the potential reclassification arose [*ibid.*]. Later in February 2024, CITES decided to reclassify the Vanilla Orchid to Appendix I with immediate effect, resulting in the introduction of strict import permit requirements [*Exh. C4, p. 14, para. 1*].

154 Thus, at the time of contract conclusion, a reasonable businessperson would not have expected the introduction of strict import permit requirements.

155 **Shift in permit granting regime:** Equatoriana was known for following CITES obligations leniently [*PO2, p. 57, para. 14*]. RESPONDENT's reliance on the Equatorianian authorities' permit practice was grounded in years of consistent behaviour. The authorities historically supported the commercial trade of the Vanilla Orchid [*cf. Exh. C4, p. 14, para. 11*]. They frequently granted permits for commercial exceptions even during international restrictions [*Exh. C4, p. 14, para. 11*].

156 The abrupt reversal of this policy in February 2024 was not a foreseeable evolution of the law. Instead, it was a reactive political pivot caused by an aggressive activist campaign in January 2024, therefore after the contract conclusion [*NoA, p. 4, para. 16; Exh. C3, p. 10, preamble*]. This campaign, which CLAIMANT fails to address, created a social pressure that forced the government to abandon its own precedents [*Exh. R1, p. 37, para. 8*]. Consequently, the shift in the permit granting regime was an extraordinary and unprecedented event.

157 CLAIMANT wants to retroactively impose a duty of prophecy on a 2022 agreement [*MfC, para. 89*]. However, the introduction of sudden import requirements and the policy shift towards a restrictive import permit regime were unforeseeable for RESPONDENT at contract conclusion.

IV. RESPONDENT's liability is excused as it could not reasonably be expected to have avoided or overcome the impediment or its consequences

158 CLAIMANT incorrectly argues that RESPONDENT "*had several reasonable alternatives*" to avoid or overcome the impediment or its consequences [*MfC, para. 93*].



159 The difference between avoid and overcome is purely temporal [*Gsell/et al/Bach, Art. 79, para. 43*]. To avoid means actions taken before the impediment, whereas to overcome means actions taken after the impediment [*ibid.*]. The extent to which a party must attempt to avoid or overcome an impediment is limited by the standard of reasonableness [*Kröll/Mistelis/Perales Viscasillas/Atamer, Art. 79, para. 56; Brunner, p. 321*].

160 An obligor is required to act like a ‘diligent merchant’ in the same circumstances and is not expected to take measures that entail unreasonable sacrifice [*Gsell/et al./Bach, Art. 79, para. 46; Kröll/Mistelis/Perales Viscasillas/Atamer, Art. 79, para. 56; cf. ICC 8790*]. In addition, consideration must be given to whether an obligor’s profitability is restricted in order to avoid or overcome the impediment [*Gsell/et al/Bach, Art. 79, paras. 48f.*].

161 RESPONDENT could not have avoided the impediment by applying for an anticipatory permit [1] or by accepting delivery early [2]. RESPONDENT could not have overcome the impediment since it would have been required to act illegally [3].

1. RESPONDENT could not have avoided the impediment by applying for an anticipatory permit

162 CLAIMANT argues that RESPONDENT could have avoided the impediment by applying for an anticipatory permit in November 2023 [*MfC, para. 93*]. An impediment is avoidable only if a party can anticipate it beforehand [*Gsell/et al./Bach, Art. 79, para. 43*]. Anticipation is assessed according to the standard of a reasonable businessperson under Art. 8(2) CISG [*see supra, para. 28*].

163 Art. XV(1)(c) CITES establishes that amendments only enter into force after 90 days. CITES included the Vanilla Orchid in Appendix I on 1 February 2024 [*NoA, p. 4, para. 17*]. Therefore, import permits would have been introduced on 1 May 2024. However, CITES departed from the usual 90-day transition period and instead applied the inclusion with ‘immediate effect’ [*PO2, p. 57, para. 14*]. Since the PARTIES agreed on a delivery period until 31 March 2024, a delivery would have been possible without an import permit. CITES had never introduced an amendment with ‘immediate effect’ [*ibid.*]. This made it impossible for RESPONDENT to anticipate, months in advance, the sudden need to obtain a permit.

164 More importantly, it would have been unreasonable to expect RESPONDENT to have applied for the anticipatory permit in November 2023 [*against MfC, para. 93*]. Up until 8 February 2024, Equatoriana followed CITES obligations leniently and frequently granted import permits [*see supra, para. 155*]. Equatoriana’s sudden shift towards a restrictive import permit regime made it impossible for RESPONDENT to anticipate, months in advance, the sudden need to obtain a permit.



2. RESPONDENT could not have avoided the impediment by accepting delivery early

165 CLAIMANT argues that RESPONDENT could have avoided the impediment by accepting an earlier delivery [*MfC, para. 93*]. However, there are several reasons why accepting delivery early would have been unreasonable.

166 **Earlier delivery would be unreasonable due to double transport costs:** CLAIMANT could have argued that RESPONDENT would have been required to accept double transport costs as it assumed transport risk [*Exb. C3, p. 11, Clause 4*]. However, RESPONDENT already chose 27 March 2024 as the delivery date [*NoA, p. 4, para. 14; Exb. C3, p. 11, Clause 4.2*]. Therefore, it would have been unreasonable for RESPONDENT to bear double transport costs and accept delivery prior to March, losing the flexibility which justified assuming the transport risk [*RNoA, p. 32, paras. 6f.*].

167 **Earlier delivery would be unreasonable due to storage in unsuitable transport containers:** Accepting earlier delivery would require storing the Vanilla Orchids in unsuitable transport containers [*PO2, p. 57, para. 15*]. Storage in these transport containers would have resulted in losses of at least 20% under normal weather conditions [*ibid.*], since these containers are not designed for the long-term preservation of delicate botanical life in fluctuating climates [*RNoA, p. 32, para. 8*]. Thus, during the adverse weather conditions for the January to March period, the risk of a total 100% loss was highly probable [*PO2, p. 57, para. 15*].

168 Therefore, it would have been unreasonable for RESPONDENT to store the Vanilla Orchids in unsuitable transport containers, in a manner that ensures their destruction.

169 **Alternatively, earlier delivery would be unreasonable due to storage in unsuitable greenhouses:** Planting the Vanilla Orchids in RESPONDENT's existing old greenhouses, was equally unsuitable. Although storing Vanilla Orchids in these old greenhouses might have avoided an immediate total loss upon arrival, they lacked the specialized climate control and solar technology of the new facilities [*RNoA, p. 32, para. 8*]. Therefore, "*it was very likely that over the course of the three years, more than double the number*" of the Vanilla Orchids would die in these old greenhouses [*PO2, p. 57, para. 15*]. Furthermore, the storage in the old greenhouses would lead to energy costs at least three times higher than those of the new greenhouses [*ibid.*].

170 Therefore, it would have been unreasonable for RESPONDENT to store the Vanilla Orchids in unsuitable greenhouses and bear triple energy costs prior to March, in a manner that ensures their slow death.

171 **Earlier delivery would be unreasonable due threatening public backlash:** Beyond the quantifiable financial and biological losses, accepting early delivery would have exposed RESPONDENT to severe immaterial losses. The threat of further loss of reputation and aggressive



actions by environmental NGOs was a significant factor [cf. *Exh. C4*, p. 14, para. 6; *RNoA*, p. 33, para. 12]. Forcing the delivery into unsuitable facilities would have provided further ammunition for NGO campaigns, potentially leading to additional regulatory scrutiny or public backlash.

3. RESPONDENT could not have overcome the impediment since it would have been required to act illegally

172 A party cannot be required to perform an obligation if doing so would force them to commit an illegal act under the laws of the place of performance [*Bridge*, p. 304, para. 5.32; *Gsell/et al/Bach*, Art. 79, para. 44]. For example, a party cannot be expected to smuggle goods to circumvent an export or import restriction to overcome an impediment [*Gsell/et al/Bach*, Art. 79, para. 44].

173 The only legal option for RESPONDENT to overcome the impediment or its consequences, was to apply for the required import permit. RESPONDENT applied for the permit on 5 February 2024. However, the authorities refused to grant such permit and thus RESPONDENT was not able obtain it. Any other way to import the Vanilla Orchids would have been illegal [*RNoA*, p. 35, para. 24].

V. The failure to perform was due to the impediment

174 Finally, an impediment beyond a party's control needs to be the exclusive cause for the failure to perform [*Brunner*, p. 340; *Hau/Poseck/Saenger*, Art. 6, para. 8]. The obligor must prove that the damages would not have occurred if they had performed properly [*Kröll/Mistelis/Perales Viscasillas/Atamer*, Art. 79, para. 59].

175 RESPONDENT has established that the only reason it did not obtain the import permits was the introduction of sudden import restrictions combined with a shift in the authorities' import permit regime [*see supra*, paras. 140ff.].

B. Even if RESPONDENT's liability is not excused pursuant to Art. 79 CISG, RESPONDENT still would be excused under Clause 12 SA

176 As RESPONDENT is already excused from liability under the strict requirements of Art. 79 CISG [*see supra*, paras. 140ff.], it necessarily follows that RESPONDENT is likewise excused under Clause 12.1 SA, which provides for an even broader basis [*see supra*, paras. 134ff.]. Therefore, the only question that arises, is if RESPONDENT met the requirements under Clause 12.2 SA. Clause 12.2 SA reads as follows:

12.2 Notice & Mitigation. The affected Party shall notify the other within 5 days of becoming aware and use reasonable endeavours to mitigate the effects. Performance times are extended accordingly. [*Exh. C3*, p. 13, Clause 12.2, *emph. add.*].

177 However, in cases, where a government prohibition renders performance illegal or impossible, courts have held that the obligation to perform is excused for the duration of the illegality [*Patch*



v. Solar; Pacific v. Mouton; Andersen v. Mars; Glen Hollow v. Wal-Mart; Shelton, p. 462, para. 1]. Contrary to CLAIMANT's assertions [MfC, para. 94], RESPONDENT gave timely notice in accordance with Clause 12.2 SA. The PARTIES spoke by telephone on 1 February 2024, the same day the CITES decision was adopted. CLAIMANT was therefore informed of the impediment immediately.

178 A more detailed notice followed on 10 February 2024. The extensive consequences of the import permits were not clear before that time [see *supra*, paras. 153ff.]. Only after a statement by the responsible Minister on 8 February 2024, it became apparent that Equatoriana would shift towards a restrictive import permit regime [RNoA, p. 33, para. 13]. RESPONDENT could not reasonably have become aware of this, affecting performance earlier [see *supra*, paras. 153ff.]. The notice given on 10 February 2024 thus fell within the five-day notification period required by Clause 12.2 SA.

179 RESPONDENT also used 'reasonable endeavours' by applying for the permit on 5 February 2024. Consequently, the performance time was extended, ensuring that RESPONDENT was not in breach of its obligations. Therefore, RESPONDENT is also excused under Clause 12 SA.

CONCLUSION ISSUE 3

CLAIMANT is not entitled to damages, as RESPONDENT is excused from liability under Art. 79 CISG and Clause 12 SA. An impediment beyond RESPONDENT's control caused its failure to perform. Moreover, this impediment was unforeseeable at the time of contract conclusion and RESPONDENT could not have reasonably avoided or overcome the impediment or its effects.

ISSUE 4: EVEN IF RESPONDENT HAD TO PAY DAMAGES AND WAS NOT EXCUSED FROM LIABILITY, THE DAMAGES COULD NOT BE CALCULATED AS CLAIMANT HAS DONE IT

180 CLAIMANT seeks to reframe its own impatience as lawful mitigation. Although the contract was never validly avoided, CLAIMANT unilaterally proceeded with an alleged cover sale in February, at a time when RESPONDENT was still acting in good faith and actively pursuing the required permits. Instead of allowing RESPONDENT the time contractually required to perform, CLAIMANT acted prematurely and without legal basis, thereby foreclosing any realistic opportunity for performance.

181 The Alleged Cover Sale was neither necessary nor proportionate at such an early stage. It was rather a strategic decision taken too soon, in a situation that was still evolving and for which RESPONDENT bears no fault. CLAIMANT now attempts to shift the consequences of its own conduct onto RESPONDENT by claiming damages of USD 3,300,000; damages which only occurred because of CLAIMANT's hasty action.

182 Therefore, the Arbitral Tribunal should find that CLAIMANT's damages cannot be calculated on the basis of Art. 75 CISG as the requirements are not fulfilled [A]. Even if CLAIMANT were able to



calculate damages on the basis of Art. 75 CISG, CLAIMANT would only be entitled to damages no more than USD 2,100,000 [B].

A. The Arbitral Tribunal should not calculate CLAIMANT's damages according to Art. 75 CISG

183 In order to calculate damages pursuant to Art. 75 CISG, the strict requirements must be fully complied with. CLAIMANT has not fulfilled the requirements of Art. 75 CISG, as it reads:

*“If the contract **is avoided** and if, in a reasonable manner and within a reasonable time **after avoidance**, the buyer has bought goods in replacement or the seller **has resold the goods**, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction”* [emph. added].

184 As CLAIMANT concluded the alleged cover sale before the declaration of avoidance, CLAIMANT did not fulfil the requirements of avoidance [I] nor of concluding a cover sale [II].

I. CLAIMANT did not fulfil the strict requirement of avoidance

185 CLAIMANT has failed to demonstrate the occurrence of any fundamental breach and did not declare avoidance prior to the alleged cover sale. RESPONDENT did not fundamentally breach the contract, thus not giving CLAIMANT a right to avoid the Sales Agreement [1]. Even if CLAIMANT had the right to avoid the Sales Agreement, it did not declare the avoidance prior to the alleged cover sale [2]. CLAIMANT declared the avoidance with its email on 1 March 2024 [3].

1. CLAIMANT had no right to avoid the Sales Agreement

186 A contract may be avoided according to Art. 72 CISG due to an anticipatory, fundamental breach of contract. Under Art. 25 CISG, a breach is fundamental only where it causes a substantial disadvantage to the aggrieved party and this consequence was reasonably foreseeable to the breaching party [*Converters case; Hungarian tools case; Digest, p. 114, para. 4; CISG S.C., Art. 25, p. 26, para. 4; Graffi, p. 339; Lurger, p. 91; Egger, p. 5, para. 9*]. A substantial disadvantage may be assumed where a party seriously, expressly and unequivocally denies its contractual obligations [*Italian shoes case I; Stoll, p. 622; Schlechtriem/Schwenzer/Schroeter/Fountoulakis I, Art. 72, para. 35*].

187 A breach of this kind must destroy the very basis of the contractual obligations, depriving the aggrieved party from what it would have been entitled to expect under the contract [*Hungarian tools case; Honsell/Brunner/Hurni Art. 72, para. 3; Drescher/et al./Sommerfeld, Art. 72, para. 3; Schlechtriem/Schwenzer/Schroeter/Fountoulakis I, Art. 72, para. 13*]. Consequently, Art. 25 CISG must be interpreted restrictively, such that in case of doubt, no fundamental breach is to be assumed [*Chinese wire rod case I; Chinese wire rod case II; PET rolls case; Packaging plant case; Digest, p. 114, para. 5*].



188 On 10 February 2024, RESPONDENT still had more than six weeks until the agreed delivery date of 27 March 2024 [*cf. NoA, p. 4, para. 14*]. On 10 February 2024, no permit decision had been taken as the authorities' suspension was issued only on 14 February 2024 [*PO2, p. 57, para. 17*]. With the permit process still ongoing on 10 February 2024, RESPONDENT was neither in a position nor under any obligation to make a final and irrevocable refusal on performance. Therefore, RESPONDENT neither denied seriously, expressly or unequivocally its contractual obligations nor expressed any lack of interest in the Vanilla Orchids.

189 Even if RESPONDENT's communication constituted a refusal, it did not amount to a fundamental breach. CLAIMANT was not deprived of its contractual expectations, nor would any such deprivation be reasonably foreseeable to RESPONDENT on 10 February 2024. As the permit procedure was still ongoing and more than six weeks remained until the contractual delivery date [*cf. NoA, p. 4, para. 14*], RESPONDENT could have never foreseen that this conduct would provoke such a hasty reaction from CLAIMANT.

190 In the absence of a serious, express and definite refusal of RESPONDENT's contractual obligations, RESPONDENT did not breach the contract fundamentally. In any case, where doubts remain, such doubts should be resolved against avoidance.

2. Even if CLAIMANT had the right to avoid the Sales Agreement, CLAIMANT did not declare the avoidance prior to the alleged cover sale

191 CLAIMANT correctly observes that the CISG does not recognise “*ipso facto avoidance*” [*MfC, para. 105*]. CLAIMANT mistakenly proceeds on the assumption that the principle of ‘good faith’ may be used to overcome notice requirement of Art. 26 CISG [*ibid.*].

192 Under Art. 7(1) CISG, good faith operates as an interpretative guideline for the CISG [*ICC 8611; Keily, p. 23; Sim, para. III.B.1.d*] and governs the manner in which parties exercise their contractual rights and obligations [*Tepeš/Markovinović, p. 33*]. This interpretative function, however, applies only where the provisions of the CISG are ambiguous or incomplete [*Tepeš/Markovinović, p. 17*]. This is to ensure that good faith cannot be used to expand the scope of the CISG by introducing rights or effects not intended by the CISG's drafters [*ibid.*].

193 The wording of Art. 26 CISG, however, is neither ambiguous nor vague as it establishes: “*A declaration of avoidance of the contract is effective only if made by notice to the other party*”. The strong wording of Art. 26 CISG therefore stipulates that a party entitled to avoid the contract must always inform the breaching party that it exercises its right of avoidance [*Tunnel excavator case; Sausages case; Earthmoving equipment case; Italian boots case; Digest, p. 296, para. 10; Schlechtriem/Schwenzer/Schroeter/Fountoulakis I, Art. 26, para. 1; Magnus, p. 426*].



194 CLAIMANT proceeds to justify the alleged inapplicability of the notice requirement under Art. 26 CISG by relying on Art. 72(3) CISG [*MfC, paras. 104ff.*]. In doing so, CLAIMANT mistakenly confuses the distinct notice requirements of Art. 26 CISG and Art. 72(2) CISG, which serve different purposes and operate at different stages. However, Art. 72(3) CISG does not support CLAIMANT's view. According to CLAIMANT, based on good faith, Art. 26 CISG does not apply because RESPONDENT allegedly refused to perform. Instead, Art. 72(3) CISG only concerns the notice, required under Art. 72(2) CISG, which the party intending to declare a contract avoided must give to the other party.

195 CLAIMANT did not declare the contract avoided on 10 February 2024 or any time before concluding the alleged cover sale. CLAIMANT could easily have declared avoidance by any means: orally, by email, by phone, by fax, or even by telegram. Yet, CLAIMANT did nothing until 1 March 2024. Therefore, in any case, an effective avoidance was only issued on that date [*Exh. R3, p. 39, para. 2.*].

196 Finally, CLAIMANT itself expressly concedes that “*Claimant's position is inconsistent with the explicit language of Art. 75 CISG, which states that the cover sale take place after avoidance?*” [*MfC, para. 106.*]. If CLAIMANT had applied the facts to its correctly identified mandatory requirement of concluding the cover sale after avoiding the Sales Agreement, it would have come to the conclusion that it has not met the requirement under Art. 75 CISG. Consequently, in the absence of any effective declaration of avoidance, CLAIMANT had no right to conclude the Alleged Cover Sale.

3. CLAIMANT declared the avoidance with its termination letter on 1 March 2024

197 Although domestic legal systems use different terms like termination, cancellation or rescission, under the CISG all such concepts are covered by the single term ‘avoidance’ [*CISG Op. No 5, para 2.1, fn. 9.*]. In *Suzhou Kunyuan v. Capital Asset*, CIETAC examined the relationship between ‘termination’ and ‘avoidance’ under the CISG. It held that, although the claimant employed the term ‘terminate’, this was substantively equivalent to a declaration of avoidance under the CISG [*ibid.*].

198 Regardless of terminology – termination or avoidance – they both describe the same legal effect. How CLAIMANT labels its own conduct is therefore immaterial. What matters is that CLAIMANT avoided the contract with its email the earliest on 1 March 2024 [*Exh. R3, p. 39.*]. Consequently, CLAIMANT only acquired the right to conclude a cover sale after 1 March 2024. The Alleged Cover Sale, therefore, cannot qualify as a cover sale.

II. CLAIMANT did not fulfil the requirement of concluding a cover sale

199 A cover sale must be connected to the avoided contract through a temporal and material connection [*Iron molybdenum case; Brunner/Gottlieb/Brunner/Schmidt-Abrendts/Czarnecki, Art. 75,*



para. 4]. This temporal and material connection is satisfied only where the sold goods were specifically intended for performance under the original contract [*Drescher/et al./Sommerfeld, Art. 75, para. 10; Gsell/et al/Bach, Art. 75, para. 10*]. Temporally, the goods must become available through the avoidance [*Iron molybdenum case; Drescher/et al./Sommerfeld, Art. 75, para. 10; CISG Op. No 8, para. 2.3.2*]. Materially, the goods must correspond both in quality and quantity [*ibid.*].

200 Neither the Alleged Cover Sale has [1] nor the October Contract [2] has a temporal and material connection to the Sales Agreement.

1. The Alleged Cover Sale has no temporal and material connection to the Sales Agreement

201 **First**, the Alleged Cover Sale has no material connection to the avoidance of the Sales Agreement, it solely modified the contract between CLAIMANT and Herbal Cosmetics from January 2022.

202 Pursuant to Art. 29 CISG, parties may orally modify their contract by agreement. The legal consequences of such a modifying agreement are determined by the parties' intent [*Staudinger/Magnus, Art. 29, para. 10*]. Where relevant, this intent must be assessed in accordance with the interpretative criteria set out in Art. 8 CISG [*see supra, para. 28*].

203 CLAIMANT and Herbal Cosmetics were already bound by a long-standing contractual relationship [*Exh. C6, p. 16, para. 7*]. The Alleged Cover Sale was not a cover sale, but a restructuring of existing obligations under the January 2022 contract. It merely brought forward delivery dates that had already been agreed, while the rest of the contract “*was to remain in force*”, as confirmed by CLAIMANT's own Head of Sales, Mr. Haarmann [*Exh. C6, p. 17, para. 10*]. This is further reinforced by the fact that a USD 2,500,000 down payment from the contract in January 2022 was simply repurposed to pay for the Alleged Cover Sale [*ibid.*], showing continuity rather than replacement of contractual performance.

204 **Second**, the Alleged Cover Sale has no temporal connection to the avoidance of the Sales Agreement. However, since no avoidance existed prior to the Alleged Cover Sale [*see supra, paras. 191ff.*], the Vanilla Orchids did not become available through the avoidance. Furthermore, CLAIMANT overlooks that the alleged overlap exists only because it concluded a second contract for the same Vanilla Orchids while the Sales Agreement with RESPONDENT was still in force [*MfC, para. 118*].

205 Consequently, both the material and temporal requirements under Art. 75 CISG are not met.

2. The October Contract has no material connection to the Sales Agreement

206 The October Contract cannot constitute a cover sale, as it lacks the required material and temporal connection to the Sales Agreement. CLAIMANT sold only 2,000 Vanilla Orchids to



Herbal Cosmetics [NoA, p. 5, para. 27] whereas the Sales Agreement required 3,000 ± 10% [Exh. C3, p. 10, Clause. 2.1]. Moreover, the Vanilla Orchids delivered in the October Contract will not bloom until July 2025 [NoA, p. 5, para. 21]. In contrast, the Vanilla Orchids designated for the Sales Agreement bloomed in July 2024 [Exh. C6, p. 16, para. 9]. Accordingly, this contract likewise does not qualify as a cover sale.

III. Since CLAIMANT never concluded a cover sale, the fact that a potential cover sale would be reasonable is irrelevant

207 CLAIMANT wrongly accuses RESPONDENT of arguing that the cover sale was unreasonable [MfC, p. 33, para. 108]. Rather RESPONDENT contends that there was no cover sale at all [RNoA, p. 35, para. 26]. Even if one were to assume that a cover sale did occur, RESPONDENT acknowledges the statement in Procedural Order No. 2 that such a cover sale would have been reasonable [PO2, p. 59, para. 29] - a point CLAIMANT apparently overlooks.

B. Even if the Arbitral Tribunal calculates CLAIMANT's damages according to Art. 75 CISG, CLAIMANT would be entitled to no more than USD 2,100,000

208 Even if CLAIMANT's damages were to be calculated on the basis of Art. 75 CISG, CLAIMANT would be solely entitled to damages no more than USD 2,100,000 [against MfC, para. 131]. Moreover, CLAIMANT failed to properly demonstrate how damages should be calculated.

209 Under Art. 75 CISG, the aggrieved party may recover the difference between the contract price and the cover sale price. The aggrieved party may therefore claim the disadvantageous difference between these two prices [Italian shoes case II; Kröll/Mistelis/Perales Viscasillas/Djordjević, Art. 75, para. 31; Gsell/et al/Bach, Art. 75, para. 21]. The difference is calculated in the following manner:

$$\left(\text{Damages} = \underbrace{\text{Contract Price}}_{\text{quantity of goods * purchase price}} - \underbrace{\text{Cover Sale Price}}_{\text{quantity of goods * purchase price}} \right)$$

210 Regardless of which contract is assumed to be the cover sale, one always comes to the conclusion that CLAIMANT is not entitled to claim the USD 3,300,000. CLAIMANT's damages should only be calculated on the basis of 2,700 Vanilla Orchids [I]. If the cover sale is the October Contract, CLAIMANT would not be entitled to any damages [II]. If the cover sale is the Alleged Cover Sale, CLAIMANT would only be entitled to USD 2,100,000 [III].

I. CLAIMANT's damages should only be calculated on the basis of 2,700 Vanilla Orchids

211 A contract may allow flexibility in performance by setting a quantity range rather than a fixed amount. In the *Diammonium phosphate case*, decided by CRCICA on 19 February 2023, the arbitral tribunal dealt with a contract that allowed the quantity to vary by ±10% depending on the vessel



used. The arbitral tribunal held that the party responsible for arranging the transport decides the quantity, since it chooses the vessel and therefore its capacity.

212 If contracts entitle one party to choose the quantity within a set range, the parties accepted that the party entitled to choose the quantity was free to decide any amount within that range [*Apple juice concentrate case*]. This means that the counterparty accepted the possibility that only the minimum amount would be chosen [*ibid.*]. If damages were calculated based on a higher quantity, this agreed balance would be reversed and the party entitled to choose the quantity would be made liable for more than it contractually agreed to accept [*ibid.*]. For that reason, any claim for damages must be based on the minimum only [*ibid.*].

213 RESPONDENT was the party responsible for arranging the transport under the Sales Agreement [*Exh. C3, p. 11, Clause 4*]. It was RESPONDENT who had to choose the vessel including its capacity [*Exh. C3, p. 11, Clause 4.5*]. Therefore, it was RESPONDENT and not CLAIMANT which was entitled to choose the quantity.

214 Since RESPONDENT was the party entitled to choose within the range of 3,000 Vanilla Orchids $\pm 10\%$, CLAIMANT accepted the possibility that RESPONDENT would choose the minimum amount of 2,700 Vanilla Orchids. If CLAIMANT could calculate its damage based on a higher amount, RESPONDENT would be liable for more than it contractually agreed to. Thus, CLAIMANT can only calculate its damage based on the minimum amount of 2,700 Vanilla Orchids.

II. The October Contract would not lead to any damages

215 Even if the October Contract constituted a cover sale, it would not lead to any damages.

$$\left(\begin{array}{l} \text{USD - 1,000,000} = \text{USD 5,400,000} \quad - \quad \text{USD 6,400,000} \\ \quad \quad \quad \underbrace{\hspace{10em}} \quad \quad \quad \underbrace{\hspace{10em}} \\ \quad \quad \quad 2,700 \text{ Orchids} * \text{USD 2,000} \quad \quad \quad 2,000 \text{ Orchids} * \text{USD 3,200} \end{array} \right)$$

216 Since CLAIMANT can only calculate its damage based on the minimum amount of 2,700 Vanilla Orchids at USD 2,000 per Vanilla Orchid [*Exh. C3, p 10, Clauses 2.1, 3.1*], the contract price amounts to USD 5,400,000. Under the October Contract, CLAIMANT sold 2,000 Vanilla Orchids at USD 3,200 per Vanilla Orchid, yielding a total price of USD 6,400,000.

217 Contrary to CLAIMANT [*against MfC, para. 131*], this transaction generated a **profit of USD 1,000,000** rather than a loss [*RNoA, p. 35, para. 26*]. Accordingly, CLAIMANT cannot claim any compensation under the Art. 75 CISG.



III. In any case, the Alleged Cover Sale would only lead to damages in the amount of USD 2,100,000

218 Contrary to all facts, even if the Alleged Cover Sale were a cover sale, CLAIMANT would still be entitled to only USD 2,100,000. CLAIMANT's damage claim is excessive. CLAIMANT must calculate its damages on the basis of 2,700 Vanilla Orchids [*see supra, paras. 211ff.*], leading to the following calculation:

$$\left(\begin{array}{r} \text{USD 2,100,000} = \text{USD 5,400,000} - \text{USD 3,300,000} \\ \text{2,700 Orchids * USD 2,000} \quad \quad \quad \text{3,300 Orchids * USD 1,000} \end{array} \right)$$

219 Since CLAIMANT can only calculate its damage based on the minimum amount of 2,700 Vanilla Orchids at USD 2,000 per Vanilla Orchid [*Exh. C3, p 10, Clauses 2.1, 3.1*], the contract price amounts to USD 5,400,000. Under the Alleged Cover Sale, CLAIMANT sold 3,300 Vanilla Orchids at USD 1,000 per Vanilla Orchid [*Exh. C6, p. 17, para. 15*], amounting to a cover sale price of USD 3,300,000. Upon deducting the Alleged Cover Sale price of USD 3,300,000 from the contract price of USD 5,400,000, damages of USD 2,100,000 remain. In any case, CLAIMANT would therefore only be entitled to USD 2,100,000 instead of USD 3,300,000.

CONCLUSION ISSUE 4

Even if the Arbitral Tribunal found CLAIMANT is entitled to damages, it should not calculate the damages pursuant to Art. 75 CISG, as CLAIMANT did not avoid the Sales Agreement and did not conclude a cover sale. In any case, CLAIMANT would only be entitled to damages no more than USD 2,100,000.

REQUEST FOR RELIEF

In light of the foregoing submissions, RESPONDENT respectfully requests the Arbitral Tribunal to adjudge and declare that:

- The Arbitral Tribunal should apply the SIAC Rules 2025 to this arbitration [**Issue 1**];
- The Arbitral Tribunal should order disclosure of the AtJ and LiSure Agreement [**Issue 2**];
- CLAIMANT is not entitled to damages [**Issue 3**];
- Even if the Arbitral Tribunal found CLAIMANT is entitled to damages, CLAIMANT would only be entitled to damages no more than USD 2,100,000 [**Issue 4**].

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- 50



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	Conflicts of Interest between	72
	Claimholders, Lawyers and	74
	Litigation Entrepreneurs	
	In: <i>Bond Law Review</i> (2008)	
	Volume 19, Issue 1	
	pp. 225-274	
Cited as: <i>Wiegand/Altenkirch</i>	WIEGAND, NICOLAS/ALTENKIRCH, MARKUS	Cited in
	HKIAC Administered Arbitration	43
	Rules: Article-by-Article	
	Commentary	
	Baden-Baden (2021/22)	
Cited as: <i>Zuberbühler/Hoffmann/ Oetiker/Rohner</i>	ZUBERBÜHLER, TOBIAS/ HOFMANN, DIETER/OETIKER, CHRISTIAN/ROHNER, THOMAS	Cited in
	IBA Rules of Evidence:	104
	Commentary on the IBA Rules on	107
	the Taking of Evidence in	
	International Arbitration	
	2 nd edition	
	Zurich (2022)	



INDEX OF CASES

AUSTRIA

Cited as:	<i>Tunnel excavator case</i>	COURT OF APPEAL GRAZ	Cited in
		29 July 2004	173
		Case No. 5 R 93/04t	
		CISG-online 1627	
		Case name: Walter Bau AG et al. v. General Kommerz Handelsges. mbH	

GERMANY

Cited as:	<i>Hungarian tools case</i>	GERMAN SUPREME COURT	Cited in
		24 September 2014	186
		Case No. VIII ZR 394/12	187
		CISG-online 2545	
		Case name: Hungarian injection moulding tools case	
Cited as:	<i>Plane case</i>	GERMAN SUPREME COURT	Cited in
		09 March 2023	50
		Case No. IX ZR 90/22	



Cited as:	<i>Italian shoes case I</i>	COURT OF APPEAL DÜSSELDORF	Cited in
		22 July 2004	186
		Case No. I-6 U 210/03	
		CISG-online 916	
		Case name: Italian shoes case XXV	
Cited as:	<i>Iron molybdenum case</i>	COURT OF APPEAL HAMBURG	Cited in
		28 February 1997	199
		Case No. 1 U 167/95	
		CISG-online 261	
		Case name: Iron Molybdenum Case	
Cited as:	<i>Italian boots case</i>	COURT OF APPEAL KOBLENZ	Cited in
		21 November 2007	193
		Case No. 1 U 486/07	
		CISG-online 1733	
		Case name: Italian boots case	
Cited as:	<i>Apple juice concentrate case</i>	COURT OF APPEAL MUNICH	Cited in
		16 February 1994	212
		Case No. 7 U 5659/92	
		In: NJW (1994)	
		pp. 886-888	



Cited as:	<i>Italian shoes case II</i>	COURT OF APPEAL STUTTGART	Cited in
		31 August 1989	209
		Case No. 3 KfH O 97/89 CISG-online 11	
		Case name Italian shoes case III	
Cited as:	<i>Machine case</i>	COURT OF APPEAL STUTTGART	Cited in
		15 May 2006	28
		Case No. 5 U 21/06	
		CISG-online 1414	
		Case name: Moist towelettes production machine case	
LATVIA			
Cited as:	<i>Sausages case</i>	DISTRICT COURT LIMBAŽI	Cited in
		20 November 2007	193
		Case No. C21025707	
		CISG-online 2606	
		Case name Sausages case	

*New Zealand*

Cited as:	<i>Earthmoving equipment case</i>	HIGH COURT OF NEW ZEALAND	Cited in
		03 June 2020	193
		Case No. [2020] NZHC 1201	
		CISG-online 6475	
		Case name: National Plant and Equipment Pty Ltd v. P Mundy Heavy Equipment Ltd	

SINGAPORE

Cited as:	<i>AQZ v. ARA</i>	SINGAPORE HIGH COURT	Cited in
		13 February 2015	43
		Case No. [2015] SGHC 49	
		<i>AQZ v. ARA</i>	
Cited as:	<i>DNQ v. DNR</i>	SINGAPORE HIGH COURT	Cited in
		19 JUNE 2025	72
		Case No. [2025] SGHC 152	74
		<i>DNQ v. DNR</i>	



Cited as:	<i>Car & Cars v. Volkswagen</i>	HIGH COURT OF SINGAPORE	Cited in
		19 October 2009	42
		Case No. 136/2009	
		Car v. Cars Pte Ltd. v. Volkswagen AG; Volkswagen Group Singapore Pte Ltd.	
Cited as:	<i>Black v. Jurong</i>	COURT OF APPEAL OF SINGAPORE	Cited in
		July 2004	42
		Case No. CA 125/2003	
		Black and Veatch Singapore Pte Ltd. v. Jurong Engineering	
SWITZERLAND			
Cited as:	<i>TETA case</i>	SWISS FEDERAL SUPREME COURT	Cited in
		05 April 2005	37
		Case No. 4C.474/2004	51
		CISG-online 1012	
		Case name: TETA case 1	



Cited as:	<i>Packaging plant case</i>	SWISS FEDERAL SUPREME COURT	Cited in
		18 May 2009	187
		Case No. 4A_68/2009	
		CISG-online 1900	
		Case name: Filling and packaging plant case	
Cited as:	<i>Chinese wire rod case I</i>	SWISS FEDERAL SUPREME COURT	Cited in
		23 September 2013	187
		Case No. 4A 264/2013	
		CISG-online 2560	
		Case name: Chinese wire rod case I	
Cited as:	<i>Chinese wire rod case II</i>	SWISS FEDERAL SUPREME COURT	Cited in
		02 April 2015	187
		Case No. 4A_614/2014	
		CISG-online 2592	
		Case name: Chinese wire rod case II	



Cited as:	<i>PET rolls case</i>	COURT OF FIRST INSTANCE CANTON ZUG	Cited in 187
		10 December 2020	
		Case No. A3 2019 9	
		CISG-online 5926	
		Case name: PET rolls case	
Cited as:	<i>Converters case</i>	COMMERCIAL COURT CANTON AARGAU	Cited in 186
		10 March 2010	
		Case No. HOR.2008.42/rl/tv	
		CISG-online 2176	
		Case name: Converters case	
<i>United Kingdom</i>			
Cited as:	<i>Anglo-Russian case</i>	COURT OF APPEAL (CIVIL DIVISION)	Cited in 145
		15 June 1917	
		Case No. [1917] 2 K.B. 679	
		Anglo-Russian Merchant traders, Limited, and John Batt & Co. (London), Limited	



Cited as:	<i>Halliburton v. Chubb</i>	COURT OF APPEAL (CIVIL DIVISION)	Cited in
		27 November 2020	102
		Case No. [2020] Uksc 48	
		Halliburton Company v. Chubb Bermuda Insurance Ltd.	
Cited as:	<i>Sinclair v. Buttonwood et al.</i>	HIGH COURT OF JUSTICE	Cited in
		20 May 2013	95
		Case No. [2013] Ewhc 1193	
		Harcus Sinclair Buttonwood Legal Capital Limited, Rylatt Chubb, Alternative Real Estate Fund Limited, Roskill Advisors (Cayman) Limited	
UNITED STATES			
Cited as:	<i>Patch v. Solar</i>	COURT OF APPEALS	Cited in
		29 May 1945	177
		Case No. 149 F.2d 558	
		Patch v. Solar Corporation	



Cited as:	<i>Pacific v. Mouton</i>	COURT OF APPEALS	Cited in
		18 August 1950	177
		Case No. 184 F.2d 141	
		Pacific Trading Co., Inc., v. Mouton Rice Milling Co	
Cited as:	<i>Mobil Oil v. Asamera Oil</i>	COURT OF APPEALS	Cited in
		19 December 1977	43
		Case No. 43 N.Y.2d 276	
		Mobil Oil Indonesia inc. v. Asamera Oil (Indonesia) Ltd, et al.	
Cited as:	<i>Andersen v. Mars</i>	COURT OF APPEALS	Cited in
		31 January 1985	177
		Case No. 164 Cal.App.3d 326	
		G.W. Andersen Construction Co. v. Mars Sales	
Cited as:	<i>Glen Hollow v. Wal-Mart</i>	COURT OF APPEALS	Cited in
		20 April 1998	177
		Case No. 139 F.3d 901	
		Glen Hollow Partnership v. Wal- Mart Stores, Inc.	



Cited as:	<i>Château v Sabaté</i>	COURT OF APPEALS	Cited in
		5 May 2003	28
		Case No. 02-15727	
		CISG-online 767	
		Case name: Chateau des Charmes Wines Ltd.. v. Sabaté USA, Inc. et al.	
Cited as:	<i>Raw materials case</i>	DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS	Cited in
		6 July 2004	152
		Case No. 1:03-cv-01154	
		CISG-online 925	
		Case name: Raw Materials Inc. v. Manfred Forberich GmbH & Co. KG	



INDEX OF ARBITRAL AWARDS

CAIRO REGIONAL CENTRE FOR COMERCIAL ARBITRATION (CRCICA)

Cited as:	<i>Diammonium phosphate case</i>	CRCICA No. 1527/2021	Cited in
		Final Award	211
		19 February 2023	
		CISG-online 6272	
		Case name: Diammonium phosphate case	

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION (CIETEC)

Cited as:	<i>Suzhou Kunyuan v. Capital Asset</i>	CIETAC Case No. M20231624	Cited in
		Final Award	197
		30 May 2023	
		CISG-online 7408	
		Case name: Suzhou Kunyuan Optoelectronics v. Capital Asset Exchange and Trading	

Court of Arbitration of the Hamburg Chamber of Commerce

Cited as:	<i>Chinese goods case</i>	21 March 1996	Cited in
		Partial Award (on the merits)	140
		CISG-online 187	
		Case name: <i>Chinese goods case</i>	



Cited as:	<i>ICSID ARB/05/14</i>	ICSID Case No. ARB/05/14	Cited in
		Order of the Committee discontinuing the proceeding and decision on costs	90
		28 April 2011	
		RSM Production Corporation v. Grenada	
Cited as:	<i>ICSID ARB/05/15</i>	ICSID Case No. ARB/05/15	Cited in
		Final Award	90
		1 June 2009	
		Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt	
		Available at: https://www.italaw.com/sites/default/files/case-documents/ita0786_0.pdf (consulted on 22.01.2026)	
Cited as:	<i>ICSID ARB/07/13</i>	ICSID CASE NO. ARB/07/13	Cited in
		16 July 2010	72
		S&T Oil Equipment and Machinery Ltd. v. Romania	96



Cited as:	<i>ICSID ARB/07/15</i>	ICSID Case No. ARB/07/15 and ARB/05/18	Cited in
			83
		Final Award	87
		3 March 2010	90
		Ron Fuchs and Ioannis Kardassopoulos v. The Republic of Georgia	
		Available at: https://www.italaw.com/sites/default/files/case-documents/ita0347.pdf (consulted on 22.01.2026)	

Cited as:	<i>ICSID ARB/08/9</i>	ICSID CASE NO. ARB/08/9	Cited in
		Order of Discontinuance of the Proceeding	72 96
		28 May 2015	
		Ambiente Ufficio S.P.A. and Others v. The Argentine Republic	



Cited as: ; <i>ICSID ARB/12/6</i>	ICSID Case No. ARB/12/6	Cited in
	Final Award	78
	29 May 2021	79
	Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan	87 90
	Available at: https://www.italaw.com/sites/default/files/case-documents/180522.pdf (consulted on 22.01.2026)	95
Cited as: ; <i>ICSID ARB/24/16</i>	ICSID Case No. ARB 24/16	Cited in
	Procedural Order No. 1	121
	25 October 2024	
	Spentech Engineering Limited v. United Arab Emirates	
	Available at: https://www.italaw.com/sites/default/files/case-documents/italaw1826640.pdf (consulted on 22.01.2026)	
Cited as: - <i>ICSID ARB/12/10</i>	ICSID CASE NO. ARB/12/10	Cited in
	Decision on Saint Lucia's request for security for cost	72 96
	13 August 2014	
	RSM Production Corporation v. Saint Lucia	



Cited as:	<i>ICSID ARB/97/3</i>	ICSID Case No. ARB/97/3	Cited in
		Decision on Jurisdiction	83
		Compañía de Aguas del Aconquija, S.A. & Vivendi Universal S.A.,	
		14 November 2005	
Cited as:	<i>ICSID ARB/97/4</i>	ICSID Case No. ARB/97/4	Cited in
		Decision of the Tribunal on Objections to Jurisdiction	83
		Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic	
		24 May 1999	
London Court of International Arbitration (LCIA)			
Cited as:	<i>LCIA 91305</i>	LCIA Case No. 91305	Cited in
		Final Award	102
		4 March 2011	

**Permanent Court of Arbitration (PCA)**Cited as: ; *PCA 2023-20***PCA No. 2023-20**

Cited in

Procedural Order No. 4

78

26 September 2025

Lynton Trading Ltd. (USA) v. The Republic
of Ecuador

Available at:

[https://www.italaw.com/sites/default/files
/case-documents/italaw1827274.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw1827274.pdf)

(consulted on 22.01.2026)

SCC Arbitration Institute (SCC)Cited as: ; *SCC 79/2005***SCC Case No 79/2005**

Cited in

Final Award

83

12 September 2010

RosInvestCo UK Ltd. v. The Russian
Federation,

Available at:

[https://www.italaw.com/sites/default/files
/case-documents/ita0720.pdf](https://www.italaw.com/sites/default/files/case-documents/ita0720.pdf)

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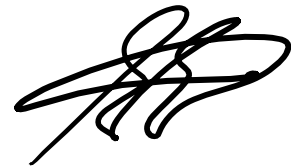
Cited as:	<i>SCC 24/2007</i>	SCC Case No 24/2007	Cited in
		Finale Award	83
		20 July 2012	90
		Quasar de Valores and others v. The Russian Federation	
		Available at: https://www.italaw.com/sites/default/files/case-documents/ita1075.pdf (consulted on 22.01.2026)	
Cited as:	<i>SCC EA 2016/082</i>	SCC CASE NO. EA 2016/082	Cited in
		Award on Emergency Measures	43
		30 May 2016	
		Evrobalt LLC v. The Republic of Moldova	

CERTIFICATE OF VERIFICATION

We hereby confirm that this Memorandum was written only by the persons who signed below.
We also confirm that we did not receive any assistance during the writing process from any person that is not a member of this team.



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Mannheim, 22 January 2026