ALBERT LUDWIG UNIVERSITY OF FREIBURG

Memorandum for RESPONDENT

On Behalf Of

Equatoriana Geoscience Ltd
1907 Calvo Road
Oceanside, Equatoriana
– RESPONDENT –

Against

Drone Eye plc
1899 Peace Avenue
Capital City, Mediterraneo
– CLAIMANT –

LEONARD HELBRECHT • CORDULA VON HEYL• CHRISTINE HOHENDORF • PAULINA KIEFNER
SONJA SOKO • JOHANN WIGGER • ANTONIA WINGLER • JANIS WINKLER

Freiburg, Germany

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Achilles, Wilhelm-Albrecht	Kommentar zum UN-Kaufrechtsübereinkommen (CISG) Cologne (2019), 2nd ed. cited as: *Achilles* in para: 89
Alexandrov, Stanimir	Corruption in International Investment Arbitration in: The American Journal of International Law, Vol. 109, No. 3 (2015) pp. 702–707 cited as: *Alexandrov, AJIL* in paras: 33, 45, 48
Anand, Gauri	India: Power of Arbitral Tribunal to Grant Declaratory Relief available at: https://www.mondaq.com/india/arbitration--dispute-resolution/1216648/power-of-arbitral-tribunal-to-grant-declaratory-relief last accessed: 26 January 2023 cited as: *Anand* in para: 57
Audit, Bernard	La vente international de merchandises: convention des Nations-Unies du 11 Avril 1980 Paris (1990) cited as: *Audit* in para: 73

Audit, Bernard
Transnational Arbitration and State Contracts
in: Centre for Studies and Research, International Law and International Relations (1987)
pp. 77–121
cited as: *Audit, CILIR*
in para: 21

Bao Cao, Tran
Proving Corruption Allegations in International Arbitration
Wellington (2017)
cited as: *Bao Cao*
in paras: 33, 45, 48

Berman, Herold
Force Majeure and the Denial of an Export License under Soviet Law: A Comment on Jordan Investments LTD. v. Soiuzneftexport
in: Harvard Law Review Vol. 73, No. 6 (1960)
pp. 1128–1146
cited as: *Berman, HLR*
in para: 23

Besson, Sébastien
Corruption and Arbitration: Impact of Criminal Investigation
in: Dossier of the ICC Institute of World Business Law, Vol. 13 (2015)
pp. 103–113
cited as: *Besson, DICC*
in paras: 40, 45, 47

Bianca, C. Massimo
Bonell, Michael Joachim
Commentary on the International Sales Law
Milan (1987)
cited as: *Bianca/Bonell*
in para: 73

Bishara, Assad
The Standard of Proof for Corruption in International Arbitration
in: Manchester Journal of International Economic Law, Vol. 16, No. 3 (2019)
pp. 441–470
cited as: *Bishara, MJIEL*
in para: 45

Booysen, Hercules
Administrative Custom and the Ultra Vires Doctrine
in: South African Law Journal, Vol. 92, No. 3 (1975)
pp. 291–298
cited as: *Booysen, SALJ*
in para: 13

Born, Gary
Bribery and an Arbitrator's Task
Kluwer Arbitration Blog
available at:
http://arbitrationblog.kluwerarbitration.com/2011/10/11/bribery-and-an-arbitrators-task/
last accessed: 26 January 2023
cited as: *Born, AB*
in paras: 33, 45, 48

Born, Gary
International Commercial Arbitration
The Hague (2021), 3rd ed.
cited as: *Born*
in para: 16, 17, 24

Böckstiegel, Karl-Heinz — Enterprise v. State: The New David and Goliath? The Clayton Utz Lecture
in: The Journal of the London Court of International Arbitration, Vol. 21, No. 1 (2007)
pp. 93–104
cited as: *Böckstiegel, JLCIA*
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Brödermann, Eckart — UNIDROIT Principles of International Commercial Contracts
Baden-Baden (2018)
cited as: *Brödermann*
in paras: 95, 103, 115, 117

Brunner, Christoph (ed.)
Gottlieb, Benjamin (ed.) — Commentary on the UN Sales Law (CISG)
Alphen aan den Rijn (2019)
cited as: *Brunner/Gottlieb/Author*
in para: 72

Cambridge University Press — Cambridge Dictionary
available at: https://dictionary.cambridge.org/dictionary/english
last accessed: 26 January 2023
cited as: *Cambridge*
in para: 104

Campbell, Enid — Ostensible Authority in Public Law
in: Federal Law Review, Vol. 27, No. 1 (1999)
pp. 1–18
cited as: *Campbell, FLR*
in para: 13

Chamlongrasdr, Dhisadee
Tension in Domestic and International Law on Capacity to Enter into Arbitration Agreements: A Survey on Legal Restrictions
in: European Business Law Review, Vol. 16, No. 2 (2005)
pp. 275–310
cited as: *Chamlongrasdr, EBLR*
in paras: 16, 24

Cheng, Tai-Heng
Entchev, Ivo
State Incapacity and Sovereign Immunity in International Arbitration
in: Singapore Academy of Law Journal, Vol. 26, Special Issue (2014)
pp. 942–974
cited as: *Cheng/Entchev, SAcLJ*
in para: 16

Codrea, Codrin
Nemo potest venire contra factum proprium. The coherence principle in European contract law
in: CES Working Papers, Vol. 10, No. 3 (2018)
pp. 357–370
cited as: *Codrea, CESWP*
in para: 20

Concepción, Carlos
Combating Corruption and Fraud from an International Arbitration Perspective
in: Dispute Resolution International, Vol. 11, No. 1 (2017)
pp. 23–46
cited as: *Concepción, DRI*
in paras: 45, 47

Daouda, Cisse Amed
The Validity of International Commercial Arbitration Agreement
in: Global Journal of Politics and Law Research, Vol. 4,
No. 5 (2016)
pp. 10–50
cited as: *Daouda, GJPLR*
in para: 16

Diebold, Nicolas
Standards of Non-Discrimination in International Economic Law
in: The International and Comparative Law Quarterly, Vol. 60
No. 4 (2011)
pp. 831–865
cited as: *Diebold, ICLQ*
in para: 30

Díez-Picazo y Ponce De León, Luis (ed.)
La Compraventa Internacional de Mercaderias
Madrid (1998)
cited as: *Diez-Picazo/Author*
in paras: 72, 73

Drescher, Ingo (ed.)
Fleischer, Holger (ed.)
Schmidt, Karsten (ed.)
Grunewald, Barbara (Vol. ed.)
Münchener Kommentar zum Handelsgesetzbuch, Band 5:
§§ 343–406 HGB, CISG
Munich (2021), 5th ed.
cited as: *MüKo-HGB/Author*
in paras: 73, 89

Drude, Joachim
Fiat iustitia, ne pereat mundus: A Novel Approach to Corruption and Investment Arbitration
in: Journal of International Arbitration
pp. 665–718
cited as: *Drude, JIA*
in para: 49

Dunand, Patrick
Kostytska, Maria
Declaratory Relief in International Arbitration
in: Journal of International Arbitration, Vol. 29, No. 1 (2012)
pp. 1–18
cited as: *Dunand/Kostytska, JIA*
in para: 57

Elliott, Mark
The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law
in: The Cambridge Law Journal, Vol. 58, No. 1 (1999)
pp. 129–158
cited as: *Elliott, CLJ*
in para: 13

Fandiño, Mariana Bernal
El deber de coherencia en los contratos y la regla del Venire contra Factum Proprium
in: Revista Colombiana de Derecho Internacional, Vol. 6, No. 13 (2008)
pp. 291–321
cited as: *Fandiño, RCDI*
in para: 20

Fazilatfar, Hossein
Transnational Public Policy: Does it Function from Arbitrability to Enforcement?
in: City University of Hong Kong Law Review, Vol. 3, No. 2 (2012)
pp. 289–313
cited as: *Fazilatfar, CityULR*
in paras: 19, 24

Feris, José
Torkomyan, Stephanie
Impact of Parallel Criminal Proceedings on Procedure and Evidence in International Arbitration
in: ICC Dispute Resolution Bulletin, No. 3 (2019)
pp. 50–60
cited as: *Feris/Torkomyan, ICC Disp*R
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Fouchard, Philippe
Gaillard, Emmanuel (ed.)
Goldman, Berthold
Savage, John (ed.)
Fouchard, Gaillard, Goldman on international commercial arbitration
The Hague (1999)
cited as: *Fouchard et al.*
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Freimuth, David
Financial evaluation of the Airbus A380Neo program
Oslo (2016)
cited as: *Freimuth*
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Gaillard, Emmanuel
The emergence of transnational responses to corruption in international arbitration
in: Arbitration International, Vol. 35, No. 1 (2019)
pp. 1–19
cited as: *Gaillard, AI*
in paras: 33, 48

Gay, Oohnagh
Benwell, Richard
The Separation of Powers
available at:
https://researchbriefings.files.parliament.uk/documents/SN06053/SN06053.pdf
last accessed: 26 January 2023
cited as: *Gay/Benwell*
in para: 13

Gilbride, Gerard
The Merger Clause and the Danann Case
in: Brooklyn Law Review, Vol. 27, No. 2 (1961)
pp. 269–272
cited as: *Gilbride, BLR*
in para: 103

Groselj, Luka
Stay of arbitration proceedings – Some examples from arbitral practice
in: ASA Bulletin, Vol. 36, No. 3 (2018)
pp. 560–577
cited as: *Groselj, ASA*
in paras: 38, 40

Hanotiau, Bernard
The Issue of Non-Signatory States
in: The American Review of International Arbitration, Vol. 23, No. 3 (2012)
pp. 379–405
cited as: *Hanotiau, ARIA*
in para: 12

Haugeneder, Florian
Corruption in Investor-State Arbitration
in: Journal of World Investment & Trade, Vol. 10, No. 3 (2009)
pp. 323–340
cited as: *Haugeneder, JWIT*
in paras: 33, 45, 48

Haugeneder, Florian
Liebscher, Christoph
Corruption and Investment Arbitration: Substantive Standards and Proof
in: Austrian Arbitration Yearbook (2009)
pp. 539–564
cited as: *Haugeneder/Liebscher, AAY*
in para: 45

Herber, Rolf
Czerwenka, Beate
Internationales Kaufrecht
Munich (1991)
cited as: *Herber/Czerwenka*
in para: 73

Honnold, John (ed.)
Flechtner, Harry (ed.)
Uniform Law for International Sales under the 1980 United Nations Convention
Alphen aan den Rijn (2009), 4th ed.
cited as: *Honnold/Flechtner*
in para: 89

Horvath, Günther
Khan, Katherine
Addressing Corruption in Commercial Arbitration: How Do Arbitral Tribunals Evaluate and Adjudicate Contractual Relationships Tainted by Corruption?
in: Romanian Arbitration Journal. Vol. 10, No. 3 (2016)
pp. 72–90
cited as: *Horvath/Khan, RRA*
in para: 45

Hwang, Michael
Lim, Kevin
Corruption in Arbitration – Law and Reality (2012)
available at: https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media013261720320840corruption_in_arbitration_paper_draft_248.pdf
last accessed: 26 January 2023
cited as: *Hwang/Lim*
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International Council for Commercial Arbitration
ICCA's Guide to the Interpretation of the 1958 New York Convention
The Hague (2011)
cited as: *ICCA Guide*
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International Institute for the Unification of Private Law
Unidroit Principles of International Commercial Contracts
Rome (2016)
cited as: *Official Comments*
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Kapeliuk, Daphna
Arbitrability
in: Max Planck Encyclopedia of International Procedural Law (2020)
cited as: *Kapeliuk, MPEiPro*
in para: 16

Kotuby, Charles
Sobota, Luke
General Principles of Law and International Due Process
Oxford (2018)
cited as: *Kotuby/Sobota*
in paras: 20, 21

Kramer, Ernst
Die Gültigkeit der Verträge nach den UNIDROIT Principles of International Commercial Contracts
in: Zeitschrift für Europäisches Privatrecht, Vol. 7, No. 2 (1999)
pp. 209–228
cited as: *Kramer, ZEuP*
in para: 124

Kröll, Stefan (ed.)
Mistelis, Loukas (ed.)
Perales Viscasillas, María Pilar (ed.)
UN Convention on Contracts for the International Sale of Goods (CISG)
Munich (2018), 2nd ed.
cited as: *Kröll et al./Author*
in paras: 73, 87, 89

Lalive, Pierre
Transnational (or Truly International) Public Policy and International Arbitration
in: Comparative Arbitration, Practice and Public Policy in Arbitration, Vol. 3 (1986)
pp. 258–318
cited as: *Lalive, CAPaPP*
in para: 16

Leimgruber, Stefan
Declaratory Relief in International Commercial Arbitration
in: ASA Bulletin, Vol. 40, No. 3 (2022)
pp. 467–489
cited as: *Leimgruber, ASA*
in para: 57

Lew, Julian
Mistelis, Loukas
Kröll, Stefan
Comparative International Commercial Arbitration
The Hague (2003)
cited as: *Lew/Mistelis/Kröll*
in para: 16

Maravilla, Christopher Scott
The Ability of a State-Owned Enterprise to Declare Force Majeure Based Upon Actions of the State
in: Chicago-Kent Journal of International and Comparative Law, Vol. 2 (2002)
pp. 82–90
cited as: *Maravilla, JICL*
in paras: 21, 23

Marzolini, Paolo
The Involvement of States and State-Owned Entities in International Arbitration – The International Conventions and Swiss Perspectives
in: Romanian Arbitration Journal, Vol. 6, No. 2 (2012)
pp. 27–37
cited as: *Marzolini, RRA*
in para: 24

McRae, Donald
General Agreement on Tariffs and Trade
available at: https://legal.un.org/avl/pdf/ha/gatt/gatt_e.pdf
last accessed: 26 January 2023
cited as: *McRae*
in paras: 28, 30

Meyer, Olaf
Die privatautonome Abbedingung der vorvertraglichen Abreden
in: Rabels Zeitschrift für ausländisches und internationales Privatrecht, Vol. 72, No. 3 (2008)
pp. 562–600
cited as: *Meyer, RabelsZ*
in para: 103

Mughal, Muniar Ahmad
The Law of Ultra Vires
Available at: http://dx.doi.org/10.2139/ssrn.1913575
last accessed: 26 January 2023
cited as: *Mughal*
in para: 13

Neumayer, Karl H.
Ming, Catherine
Dessemontet, François (ed.)
Convention de Vienne sur les contrats de vente internationale de merchandise
Lausanne (1993)
cited as: *Neumayer/Ming*
in para: 73

Oxford University Press
Oxford English Dictionary
available at: https://www.oed.com/
last accessed: 26 January 2023
cited as: *Oxford*
in para: 104

Pavić, Vladimir
Hay, Peter (ed.)
Vekas, Lajos (ed.)
Elkana, Yehuda (ed.)
Dimitrijevic, Nenad (ed.)
'Non-Signatories' and the Long Arm of Arbitral Jurisdiction
in: Resolving International Conflicts – Liber Amicorum Tibor Varady, CEU Press, (2009)
pp. 213–229
cited as: *Pavić, CEUP*
in para: 20

Pereira, Cesar Guimarães — Arbitration and State Parties: Developments in Brazilian Case Law Arising from Compagás
in: ADR News (2011)
pp. 10–12
cited as: *Pereira, ADRN*
in para: 20

Pickering, Murray — The Company as a Separate Legal Entity
in: The Modern Law Review, Vol. 31, No. 5 (1968)
pp. 481–511
cited as: *Pickering, MLR*
in para: 21

Piltz, Burghard — Internationales Kaufrecht
Munich (2008), 2nd ed.
cited as: *Piltz*
in para: 73

Popa, Luminita
Carlig, Ramona — Allegations and Findings of Corruption in Commercial and Investment Arbitration
in: Romanian Arbitration Journal, Vol. 11 No. 1 (2017)
pp. 26–31
cited as: *Popa/Carlig, RRA*
in para: 45

Racine, Jean-Baptiste
Observations – Cour d'appel de Paris (1re Ch. C) 10 septembre 1998; Cour d'appel de Paris (1re Ch. C) 7 septembre 1999; Cour d'appel de Paris (1re Ch. C) 20 avril 2000; Cour d'appel de Paris (1re Ch. C) 1er mars 2001
in: Revue de l'Arbitrage, Vol. 3 (2001)
pp. 559–596
cited as: *Racine on CA 7 Sep 1999 and CA Paris 20 Apr 2000*
in para: 59

Rauscher, Thomas (ed.)
Krüger, Wolfgang (ed.)
Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen, Band 1: §§ 1–354 ZPO
Munich (2020), 6th ed.
cited as: *MüKo-ZPO/Author*
in para: 57

Redfern, Alan
Hunter, Martin
Law and Practice of International Commercial Arbitration
London (2004), 4th ed.
cited as: *Redfern/Hunter*
in paras: 16, 17, 19, 24, 32

Reinhart, Gert
UN-Kaufrecht
Heidelberg (1991)
cited as: *Reinhart*
in para: 73

Säcker, Franz Jürgen (ed.) **Rixecker**, Roland (ed.) **Oetker**, Hartmut (ed.) **Limperg**, Bettina (ed.) **Westermann**, Harm Peter (Vol. ed.)	Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 4: §§ 433–534 BGB, Finanzierungsleasing, CISG Munich (2019), 8th ed. cited as: *MüKo-BGB/Author* in paras: 73, 78, 87
Saenger, Ingo	Zivilprozessordnung Baden-Baden (2021), 9th ed. cited as: *Saenger/Author* in para: 57
Schlechtriem, Peter **Schwenzer**, Ingeborg (ed.) **Schroeter**, Ulrich (ed.)	Commentary on the UN Convention on the International Sale of Goods (CISG) Oxford (2022), 5th ed. cited as: *Schlechtriem/Schwenzer/Author* in paras: 72, 73, 87, 89
Schlechtriem, Peter **Schwenzer**, Ingeborg (ed.) **Schroeter**, Ulrich (ed.)	Kommentar zum UN-Kaufrecht (CISG) Munich (2019), 7th ed. cited as: *Schlechtriem/Schwenzer/Schroeter/Author* in paras: 72, 73, 78
Schlechtriem, Peter	Internationales UN-Kaufrecht Tuebingen (2005), 3rd ed. cited as: *Schlechtriem* in para: 83

Srinivasan, Divya
Pathak, Harshad
Panjwani, Pratyush
Varma, Punya
Effect of bribery in international commercial arbitration
in: International Journal of Public Law and Policy, Vol. 4, No. 2 (2014)
pp. 131–146
cited as: *Srinivasan et al., IJPLP*
in paras: 32, 45

Staudinger, Julius von
Kaiser,
Dagmar (Vol. ed.)
Magnus, Ulrich
Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2, Recht der Schuldverhältnisse, Wiener UN-Kaufrecht: (CISG)
Berlin (2018)
cited as: *Staudinger/Magnus*
in paras: 72, 73, 87, 89

Stoyanov, Marie
Eyskens, Werner
Bourgeois, Valentin
Fernandez-Bertier, Michaël
Procedural interplay between investment arbitration and criminal proceedings in the context of corruption allegations
in: Belgian Review of Arbitration, No. 1 (2018)
pp. 7–40
cited as: *Stoyanov et al., BRA*
in para: 40

Trebilcock, Michael
Giri, Shiva
The National Treatment Principle in International Trade Law,
in: American Law & Economics Association Annual Meetings, Paper 8
Toronto (2004)
cited as: *Trebilcock/Giri, ALEA*
in para: 30

UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards
Vienna (2016)
cited as: *UNCITRAL Secretariat*
in para: 16

United Nations Conference on Contracts for the International Sale of Goods United Nations Conference for the International Sale of Goods – Official Records
New York (1981)
cited as: *Official Records*
in paras: 65, 72

United Nations Conference on Contracts for the International Sale of Goods United Nations Commission on International Trade Law – Yearbook, Vol. 6 (1975)
New York (1976)
cited as: *UNCITRAL Yb 1975*
in paras: 65, 72

United Nations Conference on Trade and Development Chapter 1: Non-tariff-measures: definitions and basic facts
available at: https://unctad.org/system/files/official-document/ditctab2019d4_ch1_en.pdf
last accessed: 26 January 2023
cited as: *UNCTAD*
in para: 29

Veldman, Jeroen
Boeger, Nina (ed.)
Villiers, Charlotte (ed.)
The Separate Legal Entity and the Architecture of the Modern Corporation
in: Shaping the Corporate Landscape: Towards Corporate Reform and Enterprise Diversity
Oxford (2018)
cited as: *Veldman*
in para: 21

Vile, Maurice
Constitutionalism and the Separation of Power
Indianapolis (1998)
cited as: *Vile*
in para: 13

Vogenauer, Stefan (ed.)
Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)
Oxford (2015), 2nd ed.
cited as: *Vogenauer/Author*
in paras: 95, 103, 115, 117, 122, 124

Waqas, Muhammad
Rehman, Zahoor
Separate Legal Entity of Corporation: The Corporate Veil
in: International Journal of Social Sciences and Management, Vol. 3, No. 1 (2016)
pp. 1–4
cited as: *Waqas/Rehman, IJSSM*
in para: 21

Wendler, Carsten
Corruption in Investment Treaty Arbitration: A Balanced Approach to Corruption Issues
Cologne (2016)
cited as: *Wendler*
in paras: 33, 45, 48, 50

Witz, Wolfgang	Internationales Einheitliches Kaufrecht
Salger, Hanns-Christian	Frankfurt am Main (2016), 2nd ed.
Lorenz, Manuel	cited as: *Witz/Salger/Lorenz*
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Wolff, Reinmar (ed.)	New York Convention
	Munich (2012)
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INDEX OF ABBREVIATIONS

Art./Arts.	Article/Articles
BGB	Bürgerliches Gesetzbuch (German Civil Code)
cf.	confer
ed.	editor/edition
et al.	et alii (and others)
EUR	Euro, €
HGB	Handelsgesetzbuch (German Commercial Code)
Ltd	Limited
No.	Number
NoA	Notice of Arbitration
p./pp.	page/pages
plc	Private Limited Company
para./paras.	paragraph/paragraphs
PO	Procedural Order
RNoA	Response to the Notice of Arbitration
SOE	state-owned entity
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
v	versus
Vol.	Volume
vol. ed.	volume editor
ZPO	Zivilprozessordnung (German Code of Civil Procedure)

INDEX OF LEGAL SOURCES

CISG	United Nations Convention on Contracts for the International Sale of Goods
Danubian Arbitration Law	Verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments
EC	Equatorianian Constitution
GATT	General Agreement on Tariffs and Trade
ICCA	International Commercial Contracts Act of Equatoriana, based on the UNIDROIT Principles of International Commercial Contracts 2016
NYC	Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention")
PCA Rules	PCA Arbitration Rules 2012
Swiss PILA	Swiss Private International Law Act of December 1987

ULFC	Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods
ULIS	Convention Relating to a Uniform Law on the International Sale of Goods
UNCAC	United Nations Convention against Corruption
UNCITRAL Transparency Rules	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2016

STATEMENT OF FACTS

The parties to this arbitration are Drone Eye plc [hereafter: CLAIMANT] and Equatoriana Geoscience Ltd [hereafter: RESPONDENT].

CLAIMANT is a medium-sized producer of Unmanned Aerial Vehicles [hereafter: UAVs] based in Mediterraneo, whose systems are primarily used for geo-science exploration.

RESPONDENT is a private company owned by the Ministry of Natural Resources and Development of Equatoriana. RESPONDENT was set up in 2016 when the government announced its "Northern Part Development Program" [hereafter: NP Development Program]. RESPONDENT's objective is to organize the exploration and possible development of expected natural resources in the Northern Part of Equatoriana as well as improving its infrastructure.

In 2020, CLAIMANT and RESPONDENT [hereafter: the Parties] entered into a Purchase and Supply Agreement [hereafter: the Agreement]. It concerns the acquisition of six Kestrel Eye 2010 UAVs [hereafter: Kestrel Eye 2010] and comprehensive maintenance services.

20 Mar 2020 RESPONDENT opens a tender process for the purchase of four state-of-the-art UAVs for the collection of geological and geophysical data [*Exhibit C1, p. 9*].

Spring 2020 RESPONDENT enters into negotiations with two bidders: CLAIMANT and Air Systems plc [*Exhibit R1, p. 32, para. 3*]. The negotiations are led by Mr. Bluntschli, CLAIMANT's COO at the time [*Exhibit C3, p. 13, para. 2*], and by Mr. Field, RESPONDENT's COO at the time [*RNoA, p. 28, para. 8*].

Nov 2020 After Mr. Bluntschli invited Mr. Field to his beach house for the weekend [*Exhibit R1, p. 32, para. 4*], the Parties extend the scope of the Agreement to the sale of six Kestrel Eye 2010 drones instead of four [*NoA, p. 5, paras. 4-5*]. Furthermore, the maintenance part changes considerably [*Exhibit R1, p. 32, para. 6*].

27 Nov 2020 A parliamentary debate about the approval of the arbitration agreement stipulated in Art. 20 of the Agreement [hereafter: Arbitration Clause] is scheduled but is called off on short notice [*Exhibit C7, p. 18, para. 9*].

29 Nov 2020 CLAIMANT provides further information about the Kestrel Eye 2010 by stating that it is suitable for transport and describing it as CLAIMANT's top model for RESPONDENT's purposes [*Exhibit R4, p. 35*].

1 Dec 2020 The Agreement is concluded and signed by CLAIMANT's CEO, Mr. Cremer, RESPONDENT's CEO, Ms. Queen, and the Minister of Natural Resources and Development, Mr. Barbosa [hereafter: the Minister] [*Exhibit C2, pp. 10-12; Exhibit C3, p. 13, para. 4*].

Feb 2021 CLAIMANT launches a new drone with advanced capabilities: the Hawk Eye 2020 [*NoA, p. 5, para. 10*]. RESPONDENT immediately raises claims of fraud [*Exhibit C7, p. 19, para. 13*].

27 May 2021 The Parties amend the Arbitration Clause [*Exhibit C9, p. 22*].

3 Jul 2021 The journal The Citizen publishes an article in which corruption allegations are brought in the context of the NP Development Program and against Mr. Field, RESPONDENT's main negotiator [*Exhibit C5, p. 16*].

3 Dec 2021 The Prime Minister calls for early elections as a consequence of the public outcry following the published articles. These result in a new government [*NoA, p. 5, para. 11*].

27 Dec 2021 RESPONDENT informs CLAIMANT by email of a moratorium which the new government decided [*Exhibit C6, p. 17*].

22 May 2022 The Citizen publishes a second article reinforcing the corruption allegations against Mr. Field. It also reports that the Equatorianian public prosecution can prove the involvement of Mr. Field in two cases of corruption and pressed charges against him [*Exhibit R2, p. 33*].

30 May 2022 RESPONDENT avoids the Agreement [*Exhibit C8, pp. 20-21*].

15 Jul 2022 CLAIMANT files for arbitration at the Permanent Court of Arbitration [*Letter by Langweiler, p. 3*].

INTRODUCTION

Every once in a while, something that is false can start off successfully, but with time the Truth is sure to prevail.

Prometheus decided one day to sculpt a statue of *Truth*. As he was called away by Jupiter, he left deceitful *Dolos* in charge of his workshop. Fired by ambition, *Dolos* used the time at his disposal to fashion a figure of like appearance and similar in every limb to *Truth*. When he had almost completed the remarkable piece, he ran out of clay with which to make the feet. The master returned so *Dolos* sat down quickly in hasty fear. Prometheus, marvelling the likeness of the statues, chose to make it appear that his skill deserved the credit and infused them both with life: *Truth* walked with measured steps, while her abbreviated twin stood stuck in her tracks. That forgery thus acquired the name of Falsehood, and as we can see, you will not get far with it [*Aesop, Phaedrus*].

Just like *Dolos* in Aesop's fable, CLAIMANT's attempt at deceit can only be successful in the short-term. CLAIMANT misrepresented its drones as state-of-the-art but sold RESPONDENT the outdated Kestrel Eye 2010, that does not at all fulfil this promise. Moreover, CLAIMANT most likely bribed RESPONDENT's former COO to obtain the contract. Knowing that the Tribunal does not have the necessary means to prove its misconduct, CLAIMANT now hopes for quick proceedings to hinder truth from prevailing.

CLAIMANT must accept that the dispute is to be resolved in front of an Equatorianian court instead of the Tribunal. The Arbitration Clause is invalid due to the lack of parliamentary approval, which is required by the Equatorianian Constitution. In any case, the Arbitration Clause was only included in the Agreement due to CLAIMANT's corrupt conduct, resulting in the Clause's invalidity (**Issue 1**).

Similarly to *Dolos*' fear of consequences for his actions, CLAIMANT fears the evidence that the Equatorianian public prosecution will reveal. To prove CLAIMANT's misconduct, the Tribunal must await the criminal investigations. Otherwise, it risks upholding a contract obtained by corruption and rendering an unenforceable award in violation of public policy (**Issue 2**).

In an attempt to evade the disclosure obligations existing under Equatorianian law, CLAIMANT seeks to apply the CISG to the Agreement. However, Art. 2(e) CISG excludes sales of aircraft from the CISG. The Kestrel Eye 2010 is an aircraft, and the Agreement is thus excluded (**Issue 3**).

Just as *Dolos*' forgery gave way to *Truth* in the end, CLAIMANT's fraudulent misrepresentation of the outdated drones cannot result in any contractual effect. The CISG does not govern fraud and thus does not supersede Art. 3.2.5 ICCA. The provision is further applicable as CLAIMANT fraudulently misrepresented the Kestrel Eye 2010 and violated its disclosure obligation regarding its new model, thereby leading RESPONDENT to conclude the Agreement (**Issue 4**).

ISSUE 1: THE ARBITRAL TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THE DISPUTE

1 During the Parties' negotiations, Equatoriana's then Minister of Natural Resources and Development submitted a proposal to Parliament to approve the Arbitration Clause as required by Art. 75 Equatorianian Constitution [hereafter: EC]. However, the proposal was withdrawn on the day of the debate [*RNoA, p. 29, para. 13*]. On 1 December 2020, the Parties signed the Agreement [*Exhibit C2, p. 12*]. In February 2021, RESPONDENT learned that CLAIMANT had developed a new UAV much more suited to RESPONDENT's needs [*NoA, p. 5, para. 10; Exhibit C7, p. 19, para. 13*]. On 30 May 2022, RESPONDENT consequently avoided the Agreement [*Exhibit C8, pp. 20-21*].

2 CLAIMANT now alleges that this avoidance constitutes a breach of contract and has initiated arbitral proceedings against RESPONDENT. However, the Tribunal does not have jurisdiction to hear the dispute as the Arbitration Clause is invalid due to a lack of parliamentary approval (**A**). Furthermore, the bribes most likely paid by CLAIMANT invalidate the Arbitration Clause (**B**).

A. The Lack of Parliamentary Approval Invalidates the Arbitration Clause

3 The missing parliamentary approval invalidates the Arbitration Clause. Pursuant to Art. 75 EC, in contracts concluded for administrative purposes, a state-owned entity [hereafter: SOE] can only validly submit to arbitration seated in a different state or with a foreign party with the consent of Parliament [*RNoA, p. 30, para. 21*]. Since this approval was never obtained (**I**), the Arbitration Clause is invalid (**II**).

I. The Necessary Parliamentary Approval Was Not Obtained

4 The mandatory parliamentary approval was not obtained. Since the Agreement is an administrative contract concluded with a foreign company, the Arbitration Clause requires the approval of Parliament (**1**). However, Parliament did not approve the Arbitration Clause (**2**). Further, the parliamentary approval cannot be replaced by the Minister's signature (**3**).

1. The Arbitration Clause Requires the Approval of the Equatorianian Parliament

5 The Arbitration Clause requires parliamentary approval since the Agreement qualifies as an administrative contract. According to Art. 75 EC, in administrative contracts, SOEs can only submit to arbitration seated in a different state or with a foreign party with the consent of the Parliament via a formal vote [*RNoA, p. 30, para. 21; PO2, p. 48, para. 34*]. An administrative

contract, as opposed to other commercial contracts, relates to public works or is concluded for administrative purposes [*RNoA, p. 30, para. 21; cf. PO2, pp. 47-48, para. 31*].

6 CLAIMANT has its seat of business in Mediterraneo [*NoA, p. 4, para. 1*] and is thus a foreign party. As it was aware from the beginning [*NoA, pp. 4-5, paras. 3-4*], the purpose of the Agreement was to acquire drones for the Northern Part Development Program [hereafter: NP Development Program]. The NP Development Program was set up to improve the infrastructure and exploit the natural resources in the northern parts of Equatoriana [*Exhibit C5, p. 16*]. The drones acquired by RESPONDENT were intended to play a central role in the NP Development Program [*RNoA, p. 28, para. 5*]. Their use as part of the NP Development Program was explicitly set out in the Call for Tender [*Exhibit C1, p. 9*] as well as the Agreement's preamble [*Exhibit C2, p. 10, Preamble*]. Thus, the drones are directly involved in the public works within the NP Development Program. Moreover, CLAIMANT's contractual obligation was not only to deliver the drones, but also to provide additional surveillance equipment necessary for some public works [*NoA, p. 5, para. 8; Exhibit C2, p. 10, Art. 2(a)*] and to provide maintenance services for four years following the delivery [*Exhibit C2, p. 11, Art. 2(e), (f)*]. Therefore, CLAIMANT would have been closely involved in the public works of the NP Development Program until at least 2027. Consequently, the Agreement concerns public works and thus constitutes an administrative contract concluded with a foreign party.

7 In consequence, the Arbitration Clause requires parliamentary approval under Art. 75 EC, as the Agreement is an administrative contract, concluded with a foreign party.

2. The Equatorianian Parliament Did Not Approve the Arbitration Clause

8 The Parliament did not approve the Arbitration Clause. Art. 75 EC requires Parliament to consent to an Arbitration Clause through a formal vote [*PO2, p. 48, para. 34*]. After the parliamentary debate had been called off on short notice, the approval was never obtained [*Exhibit C7, p. 18, para. 9*].

9 CLAIMANT argues that Parliament may validate the Arbitration Clause retroactively [*Claimant, para. 16*]. However, this has happened only once before in a truly exceptional case [*PO2, p. 47, para. 30*]. In this exceptional case, the debate was cancelled due to a power outage and concerned an entirely uncontroversial matter [*PO2, p. 47, para. 30*].

10 The present case is an entirely different situation. The request of approval was withdrawn from the agenda on the day of the debate by the Minister without any reasons being provided [*RNoA, p. 29, para. 13; PO2, p. 47, para. 29*]. Since more than twenty members of the majority coalition were absent [*RNoA, p. 29, para. 13*], it stands to reason that the Minister simply feared a rejection of its

proposal. This conclusion is underscored by the fact that just days before, another arbitration agreement was only approved by a very small majority [*RNoA, p. 29, para. 13*].

11 More importantly, however, the Parliament will not validate the Arbitration Clause retroactively. It is inconceivable that the new majority coalition would validate the Arbitration Agreement despite the new government's moratorium on all contracts related to the NP Development Program and the ongoing criminal investigation of the contracts connected to it [*cf. Exhibit C6, p. 17; Exhibit R2, p. 33*]. Therefore, Parliament has neither approved the Arbitration Clause, nor will it grant it retroactively.

3. The Minister's Signature Does Not Replace the Parliamentary Approval

12 Contrary to CLAIMANT's assertion, the Minister's signature of approval [*Claimant, para. 7*] cannot replace the missing parliamentary approval. CLAIMANT submits that "[t]here was apparent authority that the Minister had the power to bind […] the Equatoriana [*sic*] Government" [*Claimant, paras. 8-9*]. However, whether the Minister was able to bind the state as a third party to the arbitration is irrelevant to the case. Even assuming that CLAIMANT's submission is pertinent, a state can only be bound by an arbitration agreement of one of its entities if the state unequivocally expresses its intention to be bound [*Fouchard et. al., paras. 508-511; Hanotiau, ARIA, p. 379*]. Therefore, it is well established that a signature by a minister intended to authorise a project is insufficient to bind the state itself to an arbitration agreement [*ICC Case No. 12923; ICC Case No. 8035; ICC Case No. 6769; CA Paris 12 Jul 1984; Fouchard et. al., paras. 508-511*]. The contract explicitly states that the Minister gives a mere approval to the Arbitration Clause [*Exhibit C2, p. 12*]. Thus, the government of Equatoriana is not bound by the Arbitration Clause.

13 CLAIMANT implies that the Minister's approval is sufficient to render the restriction of Art. 75 EC irrelevant [*Claimant, paras. 7-9*]. In fact, the Minister's signature cannot replace the parliamentary approval as he lacks the power to approve the Arbitration Clause on his own [*PO2, p. 47, para. 34*]. Art. 75 EC explicitly states that in foreign seated arbitration the respective minister and the Parliament have to approve the Arbitration Clause [*RNoA, p. 30, para. 21*]. These cumulative requirements are an expression of the separation of powers, which constitutes the main pillar of constitutional administrative law [*Elliott, CLJ, p. 130; Booysen, SALJ, p. 291; Vile, p. 2; Gay/Benwell, p. 3; Mughal, p. 4; Campbell, FLR, p. 17*]. In the present dispute, only the Minister, who is not a member of Parliament [*PO2, p. 47, para. 35*], approved the Agreement with his signature as part of the executive branch, while the Parliament did not approve the Arbitration Clause. Therefore, the Minister lacks the power to approve the Arbitration Clause on its own.

14 Accordingly, the Arbitration Clause is invalid under Art. 75 EC as it requires the approval of Parliament which was not obtained and cannot be replaced by the Minister's signature.

II. The Violation of the Constitution Invalidates the Arbitration Clause

15 The violation of Art. 75 EC invalidates the Arbitration Clause. Art. 75 EC applies as a restriction on RESPONDENT's capacity (**1**). Therefore, the Arbitration Clause is null and void in the sense of Art. II(3) NYC (**2**). Finally, in contrast to CLAIMANT's assertion, RESPONDENT can invoke Art. 75 EC to challenge the Tribunal's jurisdiction (**3**).

1. Art. 75 EC Applies as a Restriction on RESPONDENT's Capacity under Art. V(1)(a) NYC

16 Art. 75 EC is applicable to the Arbitration Clause pursuant to Art. V(1)(a) NYC as it restricts RESPONDENT's capacity to submit to arbitration. According to Art. V(1)(a) NYC, a party's capacity to conclude a valid arbitration agreement is governed by the law applicable to the respective party. The law applicable to a legal entity is the law of their incorporation or seat [*ICC Case No. 9899; ICC Case No. 7373; Sup Ct Lithuania 5 Mar 2007; Kapeliuk, MPEiPro, para. 3; Fouchard et al., para. 537; Lalive, CAPaPP, para. 137; Chamlongrasdr, EBLR, p. 277; Lew/Mistelis/Kröll, para. 6.50; Born, pp. 668, 769; Daouda, GJPLR, p. 20*]. Capacity refers to a natural or legal person's ability to be party to an agreement [*ICC Case No. 14203; Svenska Petroleum v Lithuania, EWHC 4 Nov 2005; UNCITRAL Secretariat, p. 135; Cheng/Entchev, SAcLJ, p. 945*]. Thus, provisions which restrict the conclusion of arbitration agreements by SOEs concern their capacity to validly submit to arbitration [*Born, p. 774, ICCA Guide, p. 84; Redfern/Hunter, para. 3.28*]. This is, for example, supported by the wording of Art. 177(2) Swiss PILA and the official French version of Art. II(1) European Arbitration Convention, which CLAIMANT cites in support of its position [*NoA, p. 7, para.* 18]. Both refer to a state-entity's "capacity" to conclude an arbitration agreement. Under Art. 75 EC, a SOE can submit to foreign-seated arbitration with the consent of both the respective minister and the Parliament only. Thus, the provision restricts the capacity of SOEs to conclude a valid arbitration agreement. Consequently, Art. 75 EC applies pursuant to Art. V(1)(a) NYC as it restricts RESPONDENT's capacity.

2. The Arbitration Clause is Null and Void in the Sense of Art. II(3) NYC

17 The Arbitration Clause is null and void in the sense of Art. II(3) NYC. Where one party is incapable of validly submitting to arbitration, the arbitration agreement is null and void in the sense of Art. II(3) NYC [*Ct App Sweden 17 Dec 2007; Wijsmuller v US, US DC New York 20 Sep 1979; Born, p. 766; ICCA Guide, p. 52; Redfern/Hunter, para. 3.25; van den Berg, p. 156; Wolff/Wilske/Fox, Art. V, para. 100*]. RESPONDENT's capacity to submit to arbitration is limited by Art. 75 EC. Since the

mandatory approval of the Parliament was never obtained, RESPONDENT lacks the capacity to submit to arbitration. Therefore, the Arbitration Clause is null and void in the sense of Art. II(3) NYC.

3. RESPONDENT Can Invoke Art. 75 EC to Challenge the Tribunal's Jurisdiction

18 RESPONDENT can rely on Art. 75 EC to contest the validity of the Arbitration Clause. According to CLAIMANT, an SOE cannot rely on domestic law to evade an arbitration agreement [*NoA, p. 7, para. 18*]. Moreover, CLAIMANT submits that Art. 75 EC could not be applied as it is "discriminatory towards CLAIMANT" [*Claimant, para. 31*]. Contrary to CLAIMANT's arguments, RESPONDENT is not estopped from invoking Art. 75 EC (**a**) and it cannot be classified as a discriminatory provision (**b**).

a. RESPONDENT Is Not Estopped from Invoking Art. 75 EC

19 RESPONDENT can invoke Art. 75 EC to challenge the jurisdiction of the Tribunal. CLAIMANT argues that an SOE cannot invoke its domestic law to contest the validity of an arbitration agreement, as that would be contrary to the principle of good faith [*NoA, p. 7, para. 18*]. A similar principle is found in Art. II(1) European Arbitration Convention and Art. 177(2) Swiss PILA, which CLAIMANT has also mentioned [*NoA, p. 7, para. 18*]. In this vein, other courts and tribunals have prohibited state entities from relying on their incapacity to submit to arbitration based on the related doctrines of *estoppel* or *venire contra factum proprium* [*Ad hoc 18 Nov 1984; Ad hoc 14 Jan 1982; ICC Case No. 10623; ICC Case No. 2521; Trib PI Tunis 17 Oct 1987; Redfern/Hunter, para. 3.28; Fazilatfar, CityULR, p. 300*]. However, this rationale does not apply in the present case. As RESPONDENT is a legal entity separate from the State of Equatoriana, it does not act contradictorily to its own behaviour by invoking its lack of capacity (**aa**). Additionally, CLAIMANT was aware of RESPONDENT's lack of capacity and therefore had no legitimate expectation in the validity of the Arbitration Clause (**bb**).

aa. RESPONDENT Itself Did Not Behave Contradictorily

20 RESPONDENT cannot be accused of contradictory behaviour based on the conduct of the state of Equatoriana. The related doctrines of *estoppel* and *venire contra factum proprium,* which CLAIMANT seems to rely on, preclude a person from asserting something contrary to what was implied by previous actions of the same person [*Ad hoc 18 Oct 1923; ICC Case No. 21537; PCA 31 Aug 2011; Paranaense v Carioca Passarelli, STJ Brazil 20 Oct 2011; Kotuby/Sobota, p. 121; Fandiño, RCDI, p. 294; Pereira, ADRN, p. 12; Codrea, CESWP, p. 359; Pavić, CEUP, p. 224; cf. ICC Case No. 1939*]. Thus, a state may be estopped from denying its own capacity. However, RESPONDENT'S lack of capacity

stems from the missing approval of the Parliament of the Equatorianian State, who RESPONDENT cannot be equated with. Instead, the parliamentary approval is a sovereign act in relation to RESPONDENT.

21 Firstly, RESPONDENT is a separate legal entity incorporated as a limited company. As a general principle of corporate law, a corporation is a distinct legal person, independent of its shareholders, parent companies or subsidiaries [*PCA 23 May 2011; ICSID 1 Mar 2011; ICSID 18 Apr 2008; Ad hoc 4 May 1999; IUSCT 27 Feb 1986; Prest v Petrodel, UKSC 12 Jun 2013; Adams v Cape Industries, EWCA 27 Jul 1989; Belgium v Spain, ICJ 5 Feb 1970; E.B.M. v Dominion, JCPC 11 Jun 1937; Thomson v Sterling, EWHC 27 Mar 1924; Gramophone v Stanley, EWCA 27 Mar 1908; Salomon v Salomon, UKHL 16 Nov 1897; Pickering, MLR, pp. 501-502; Waqas/Rehman, IJSSM, p. 2; Veldman, pp. 64-65; Böckstiegel, JLCIA, p. 100; Kotuby/Sobota, p. 140*]. This principle applies equally to a state-owned company, as its relation to the state should lead neither to discrimination nor to privileges [*Böckstiegel, JLCIA, p. 100; Audit, CILIR, p. 90; Maravilla, JICL, p. 82*]. While RESPONDENT is fully owned by the Equatorianian State, it is a private commercial company and operates as such, including the generation of its own profits [*NoA, p. 4, para. 2; PO2, p. 44, para. 5*] and the conclusion of contracts such as the Agreement [*Exhibit C2, p. 10*].

22 Secondly, RESPONDENT had no ability to influence its own capacity. CLAIMANT might argue that RESPONDENT, while being an entity separate from the state in principle, in fact colluded with the state, whose lack of approval should therefore be attributed to RESPONDENT. However, RESPONDENT had asked the Ministry for approval by Parliament [*PO2, p. 47, para. 29*]. The sudden withdrawal of the proposal for parliamentary approval by the Minister [R*NoA, p. 29, para. 13*] as well as the lack of further attempts to pass it [*PO2, p. 47, para. 30*] were out of the control of RESPONDENT. RESPONDENT, as a private company [*NoA, p. 4, para. 2*], does not have the power to circumvent or modify constitutional provisions. Consequently, the invalidity of the Arbitration Clause is a sovereign act that cannot be attributed to RESPONDENT.

23 Thirdly, this result is underscored by a comparison with the treatment of SOEs claiming *force majeure* in international arbitration. It is generally recognised that a SOE may claim *force majeure* even due to acts of its own home state, as long as the SOE possesses a legal identity distinct from that of the state, is not in collusion with the host state to bring about the state action and the action of the host state is an act of sovereignty [*ICSID 20 May 1992; FTAC 19 Jun 1958; Czanikow v Zagranicznego, UKHL 6 Jul 1978; Maravilla, JICL, p. 90; Böckstiegel, JLCIA, p. 99; Berman, HLR, pp. 1131-1132*]. RESPONDENT fulfils all these criteria. There is no apparent reason why RESPONDENT should be treated as part of the state when it comes to its capacity but then be able to rely on its corporate

veil if it raised a *force majeure* defence in the merits. Therefore, RESPONDENT did not act contradictorily.

bb. CLAIMANT Had No Legitimate Expectation in the Validity of the Arbitration Clause

24 CLAIMANT had no legitimate expectation that the Arbitration Clause was valid. Where courts and tribunals have denied state-entities from relying on their incapacity, the other party had a legitimate expectation in the validity of the arbitration agreement [*cf. Ad hoc 18 Nov 1984; Ad hoc 14 Jan 1982; ICC Case No. 10623; ICC Case No. 2521; Trib PI Tunis 17 Oct 1987; Redfern/Hunter, para. 3.28; Fazilatfar, CityULR, p. 300*]. As argued by the tribunal in *ICC Case No. 4381*, "one must take into account the fact that the defect which affected the arbitration agreement had not been brought to the knowledge of the claimant at the time the agreement was entered into". In contrast, where a party was aware of the agreement's invalidity, the other party may invoke its incapacity [*Marzolini, RRA, p. 36; Born, p. 778; Chamlongrasdr, EBLR, p. 280*]. In the present case, CLAIMANT lacks such an expectation in the validity of the Arbitration Clause:

25 Contrary to CLAIMANT's assertion [*Claimant, paras. 28-29*], CLAIMANT was fully aware of the constitutional requirements. Both Mr. Bluntschli, CLAIMANT's former COO representing CLAIMANT in the negotiations [*Exhibit C3, p. 13, para. 2*], and Ms. Porter, CLAIMANT's inhouse legal advisor concerning the Agreement [*Exhibit C7, p. 18, paras. 2-3*], knew about the requirement of parliamentary approval as imposed by Art. 75 EC [*Exhibit R4, p. 35; Exhibit C7, p. 18, para. 6*]. Additionally, on 29 November 2020, the Minister let Mr. Bluntschli know that the parliamentary debate had been called off [*Exhibit R4, p. 35*]. Aware that the parliamentary approval had not been acquired despite it being a condition for the Arbitration Clause's validity, CLAIMANT signed the Agreement and the Arbitration Clause on 1 December 2020 [*Exhibit C2, p. 12*]. Thus, CLAIMANT had knowledge of all legal and factual circumstances that establish the invalidity of the Arbitration Clause.

26 Moreover, contrary to CLAIMANT's submission [*Claimant, paras. 21-22*], the Arbitration Clause was not ratified by its later amendment. The change of the wording of the Arbitration Clause was intended to settle the political controversy around the Agreement, as CLAIMANT knew [*Exhibit C7, p. 19, para. 14*]. The amendment provides for arbitration under the UNCITRAL Expedited Arbitration Rules for disputes amounting to less than EUR 1,000,000, and includes the UNCITRAL Transparency Rules [*Exhibit C9, p. 22*]. This amendment was used by the socialist government to counter the criticism of arbitration by the opposition in Parliament [*Exhibit C7, p. 19, para. 15*]. Therefore, neither RESPONDENT nor CLAIMANT intended

to ratify the Arbitration Clause by amending it. Accordingly, CLAIMANT cannot rely on the amendment to claim a legitimate belief in its validity.

27 CLAIMANT cannot rely on the principle of *estoppel*, since RESPONDENT did not behave contradictorily, and CLAIMANT had no legitimate expectation in the validity of the Arbitration Clause.

b. Art. 75 EC Cannot Be Classified as a Discriminatory Provision

28 RESPONDENT can rely on Art. 75 EC to object to the validity of the Arbitration Clause as it cannot be classified as a „discriminatory provision". CLAIMANT argues that RESPONDENT cannot invoke Art. 75 EC as it violates non-discriminatory principles of international economical law [*Claimant, para. 31*]. CLAIMANT derives this principle from the "General Agreement on Tariffs and Trade" [hereafter: GATT] [*Claimant, para. 32*], which aims to reduce unjustified barriers to international trade by regulating tariffs and trade-barriers [*GATT Preamble; McRae, p. 2*].

29 However, the GATT does not apply to the case at hand. The GATT governs only restrictions that can „potentially have an economic effect on international trade in goods, changing quantities traded, or prices or both" [*UNCTAD, p. 13*]. In the present scenario, neither the quantity of goods nor any kind of pricing are affected by Art. 75 EC. Instead, it imposes restrictions on arbitration as a method of dispute resolution. Consequently, the present dispute is not governed by the substantive scope of the GATT, which therefore cannot be applied directly.

30 Even under a more general understanding, Art. 75 EC cannot be classified as a discriminatory provision. CLAIMANT argues that Art. 75 EC violates non-discrimination principles, such as those imposed by the GATT [*Claimant, paras. 30-32*]. Thereby it refers to the "national-treatment principle", stipulated in Art. III GATT. The national-treatment principle provides that imported products should not be subject to treatment through taxes, laws or regulations that affords protection to domestic production [*Diebold, ICLQ, p. 831; McRae, p. 3; Trebilcock/Giri, ALEA, p. 1*]. In a more general approach, the national-treatment principle aims to ensure fair conditions on the market for foreign companies. Art. 75 EC restricts a method of dispute resolution for SOEs only. Therefore, Art. 75 EC affords no market-advantage to domestic companies. Thus, Art. 75 EC cannot be classified as a violation of a more general understanding of the non-discrimination-principle.

31 Due to the lack of parliamentary approval, RESPONDENT lacks the capacity to conclude a valid arbitration agreement. Therefore, the Arbitration Clause is invalid in the sense of Art. II(3) NYC, which RESPONDENT is also entitled to invoke.

B. CLAIMANT's Corruption Invalidates the Arbitration Clause

32 CLAIMANT's corruption renders the Arbitration Clause invalid. In general, the validity of an arbitration agreement stands independently of the underlying contract [*Art. 23(1) PCA Rules; Redfern/Hunter, para. 2.96; Fouchard et al., para. 391*]. However, corruption renders an arbitration agreement invalid if it directly relates to that clause [*ICC Case No. 10329; ICC Case No. 4145; Fiona Trust v Privalov, UKHL 17 Oct 2007; BGer 2 Sep 1993; National Iranian Oil Co v Crescent, EWHC 4 Mar 2016; Srinivasan et al., IJPLAP, p. 135*]. The bribes most likely paid to Mr. Field invalidate the Arbitration Clause as they relate directly to it.

33 CLAIMANT most likely bribed Mr. Field to be rewarded with a larger contract [*see below, paras. 40-44*], which invalidates the Arbitration Clause. An agreement obtained by corruption violates international public policy [*CA Paris 5 Apr 2022*; *CA Paris 16 May 2017; ICSID 18 May 2022; ICSID 31 Aug 2018; ICSID 8 Mar 2017; ICSID 6 Dec 2016; ICSID 4 Oct 2006; Wendler, pp. 83, 111; Bao Cao, pp. 17-18; Alexandrov, AJIL, p. 703; Wolff/Wolff, Art. V, para. 576; Haugeneder, JWIT, p. 328; Born, AB; Gaillard, AI, p. 14; ICCA Guide, pp. 107-108*]. Therefore, an arbitration agreement procured by corruption is null and void. The Agreement's and thereby the Arbitration Clause's conclusion was mainly negotiated by Mr. Field, who is now being investigated for corruption in connection with the Agreement [*Exhibit R2, p. 33*]. Additionally, the Agreement's preamble states that the changes in the Agreement's scope have induced the conclusion of its clauses [*Exhibit C2, p. 10, Preamble*]. Therefore, the bribes which were most likely paid to Mr. Field to enlarge the Agreement's scope have led directly to its terms, including the Arbitration Clause.

34 Therefore, CLAIMANT's likely corruption invalidates the Arbitration Clause.

CONCLUSION OF THE FIRST ISSUE

35 The Parties did not validly conclude an arbitration agreement. According to Art. 75 EC, the present Arbitration Clause requires ratification by Parliament which was never obtained. The conduct of the Minister cannot replace the missing parliamentary approval. Therefore, RESPONDENT lacks the capacity to submit the dispute to arbitration, rendering the Arbitration Clause invalid. Moreover, the bribes most likely paid by CLAIMANT invalidate the Arbitration Clause. Accordingly, the Tribunal does not have jurisdiction to hear the present dispute.

ISSUE 2: THE ARBITRAL TRIBUNAL SHOULD STAY OR AT LEAST BIFURCATE THE PROCEEDINGS

36 The Citizen, Equatoriana's leading investigative journal, revealed in two articles that Mr. Field, the former COO of RESPONDENT was involved in a major corruption scheme [*Exhibit C5, p. 16; Exhibit R2, p. 33*]. Ms. Fonseca, the public prosecutor of Equatoriana, stated that she was able to prove that Mr. Field accepted payments for awarding contracts on behalf of RESPONDENT in at least two cases [*Exhibit R2, p. 33*]. The prosecution is already pressing charges against him and will continue to investigate all contracts in the conclusion of which Mr. Field was involved [*Exhibit R2, p. 33*]. As Mr. Field also played a major role in the conclusion of the Agreement, it is likely that this contract was obtained by corruption as well. The outcome of the investigations is thus essential for the decision of the Tribunal. Consequently, it should stay the arbitral proceedings until the investigations are concluded. Alternatively, the Tribunal should bifurcate the proceedings and only decide on those issues which do not depend on the result of the criminal investigations.

37 It is within the discretion of arbitral tribunals to stay or bifurcate the proceedings [*PCA PO4 3 Nov 2021; PCA PO19 10 Aug 2015; PCA PO8 14 Apr 2014*]. According to Art. 17(1) PCA Rules, the tribunal shall "conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and […] each party is given a reasonable opportunity of presenting its case. […] [It] shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process".

38 When deciding upon RESPONDENT's request to stay the proceedings, the Tribunal must balance the parties' interests [*PCA PO4 3 Nov 2021; PCA PO3 31 Mar 2017; SCAI PO15 10 Jul 2015 as cited in ASA 3/2018, p. 640; Ad hoc PO3 16 Nov 2010 as cited in ASA 3/2018, p. 644; Groselj, ASA, p. 571; Feris/Torkomyan, ICC DispR Bull., p. 51*]. In the case at hand, the circumstances require a stay (**A**) whereas CLAIMANT's concerns are unsubstantiated (**B**). If the Tribunal does not see fit to stay the proceedings, it should bifurcate them (**C**).

A. The Circumstances of the Case Require a Stay of the Proceedings

39 Contrary to CLAIMANT's assertion, the circumstances of the case constitute compelling reasons to stay the proceedings [*Claimant, paras. 57, 68*]. The outcome of the criminal proceedings is material to the decision of the Tribunal (**I**). Further, the Tribunal must await the outcome of the investigations to make an informed decision as only the prosecution has sufficient means to produce the relevant evidence (**II**). Otherwise, it risks rendering an unenforceable award (**III**) and a violation of RESPONDENT's right to present its case (**IV**). Lastly, in terms of efficiency, a stay of the proceedings saves time and costs (**V**).

I. The Outcome of the Criminal Proceedings Is Material to the Tribunal's Decision

40 CLAIMANT argues that RESPONDENT does not provide sufficient evidence of its corruption allegations to warrant a stay [*Claimant, para. 55*]. By doing so, it refers to standards of proof which are applied in international arbitration to rule whether a contract was tainted by corruption [*Claimant, paras. 43-44*]. RESPONDENT, however, does not have to prove the allegations conclusively for a stay to be granted. The very reason why it wants to stay the proceedings is to await if the prosecution uncovers evidence that proves the corruption. If a stay of the proceedings is requested due to parallel proceedings, tribunals only need to consider whether the outcome of these proceedings is material to its decision [*PCA PO4 3 Nov 2021; PCA PO3 31 Mar 2017; ICC Case 2016 as cited in ASA 3/2018, p. 636; Ad hoc PO3 16 Nov 2010 as cited in ASA 3/2018, pp. 645-646; Besson, DICC, p. 106; Groselj, ASA, p. 571; Stoyanov et al., BRA, p. 25; Feris/Torkomyan, ICC DispR Bull., p. 53; cf. PCA 24 Oct 2014*]. Whether CLAIMANT bribed Mr. Field to conclude the Agreement is material to the decision of the Tribunal. The outcome of the investigations is crucial as several indications substantiate the suspicion that CLAIMANT bribed Mr. Field.

41 Firstly, Mr. Field is involved in multiple cases of corruption surrounding the NP Development Program. The public prosecutor was already able to prove that Mr. Field accepted payments for awarding contracts to two companies on behalf of RESPONDENT and pressed charges against him [*Exhibit R2, p. 33*]. Mr. Field received considerable payments to his offshore accounts shortly before major contracts negotiated by him were concluded [*Exhibit C5, p. 16*]. Further, the Mediterranean tax authorities found two offshore accounts which belong to CLAIMANT's negotiator, Mr. Bluntschli. From these accounts, larger sums had been transferred to other offshore accounts. Mr. Bluntschli has so far stayed silent about the purpose of the transfers [*PO2, p. 49, para. 40*]. In addition, there have been two previous incidents of corruption with CLAIMANT's company in the past which are known to the public [*PO2, p. 44, para. 3*].

42 Secondly, the divergence between the conditions set out in the Call for Tender and the Agreement indicate corruption. RESPONDENT asked for the submission of offers including four drones and two years of maintenance services [*Exhibit C1, p. 9*]. However, after Mr. Field was invited to spend a weekend at the beach house of CLAIMANT's COO [*Exhibit R1, p. 32, para. 4*] he suddenly agreed to acquire two additional drones and accepted a significant cost increase for the maintenance services [*Exhibit C2, p. 10-11*]. Similarly, one of the contracts proven to be obtained by bribery also had such unusual changes before its conclusion [*RNoA, p. 28, para. 11; Exhibit R2, p. 33*].

43 Thirdly, works that had previously been included in the basic services were now priced separately [*Exhibit R1, p. 32, para. 6*]. This amounted to further expenditures of nearly

EUR 6,000,000 [*PO2, p. 47, para. 27*]. While the price for the drones itself was reduced [*RNoA, p. 28, para. 10*], this made the new contractual terms seem favourable only at first glance, as the overall increased price was hidden in the additional services. The new pricing scheme raises suspicion that its only purpose was to conceal the actual costs for RESPONDENT.

44 Lastly, CLAIMANT denies the corruption by stating that it reviewed all payments made to Equatorianian accounts and was not able to find any suspicious expenditures. It further states that it established clear ethical rules to prevent corruption [*Claimant, paras. 40-41*]. However, the relevant accounts of Mr. Field are not located in Equatoriana but on offshore accounts. Furthermore, the implementation of internal rules does not guarantee that these were not broken. As the outcome of the investigations is material to the decision of the Tribunal and numerous indications strongly suggest that the Agreement was obtained by corruption the Tribunal should stay the proceedings.

II. Only the Prosecution Has Sufficient Means to Produce the Relevant Evidence

45 CLAIMANT argues that it is common for tribunals to investigate corruption, thereby implying that the Tribunal is competent to investigate the corruption allegations and should therefore conduct the proceedings without recourse to the investigations [*Claimant, para. 66*]. However, only the prosecution has sufficient means to obtain the pertinent evidence. As corrupt conduct is often concealed [*ICSID 19 Aug 2013*; *ICSID 22 Jun 2010; Wendler, pp. 123, 409; Bao Cao, p. 19; Srinivasan et al., IJPLP, p. 140; Haugeneder, JWIT, p. 332; Haugeneder/Liebscher, AAY, p. 5; Bishara, MJIEL, p. 460*], it is difficult to prove, especially without the coercive powers of courts and prosecutors [*Srinivasan et al., IJPLP, p. 140; Hwang/Lim, p. 14; Alexandrov, AJIL, p. 703; Concepción, DRI, p. 36; Born, AB; Besson, DICC, p. 103; cf. Horvath/Khan, RRA, p. 84; Popa/Carlig, RRA, p. 26*].

46 Ms. Fonseca, the Equatorianian public prosecutor, can obtain the relevant evidence. She has broad investigative powers which also extend to third parties [*RNoA, p. 30, para. 23*]. Further, she can produce evidence from parties in Equatoriana and from CLAIMANT. CLAIMANT is located in Mediterraneo which is, like Equatoriana, a member state of the United Nations Convention against Corruption [hereafter: UNCAC] [*PO1, p. 43, III.3*]. Member states can rely on the legal assistance of one another for obtaining evidence abroad [*Art. 46 UNCAC*]. Ms. Fonseca can obtain evidence from all parties involved in the corrupt conduct.

47 The Tribunal does not have sufficient means to obtain the relevant evidence. Tribunals are entitled to request the production of documents, exhibits, or other evidence from the parties [*Art. 27(3) PCA Rules*]. However, they cannot compel the production of the requested evidence [*Concepción, DRI, p. 39; Besson, DICC, p. 103; Hwang/Lim, p. 13*]. It is likely that the parties of the corrupt acts concealed their conduct. Thus, without the power to compel document

production or to subpoena witnesses to testify the Tribunal does not have sufficient means to produce evidence. This is corroborated by the fact that the two persons mainly involved in the potential bribery, Mr. Field and Mr. Bluntschli, no longer work for CLAIMANT and RESPONDENT [*Exhibit C3, p. 13, para. 2; RNoA, p. 29, para. 15*]. As the Tribunal has no power over third parties, it cannot subpoena the most important witnesses to the case at hand. Thus, only the prosecution has sufficient possibilities to produce reliable evidence.

III. Continuing the Proceedings Bears the Risk of Rendering an Unenforceable Award

48 Continuing the proceedings bears the risk of rendering an unenforceable award. It is generally acknowledged that a contract obtained by corruption violates international public policy [*CA Paris 5 Apr 2022*; *CA Paris 16 May 2017; ICSID 18 May 2022; ICSID 31 Aug 2018; ICSID 8 Mar 2017; ICSID 6 Dec 2016; ICSID 4 Oct 2006; Wendler, pp. 83, 111; Bao Cao, pp. 17-18; Alexandrov, AJIL, p. 703; Wolff/Wolff, Art. V, para. 576; Haugeneder, JWTT, p. 328; Born, AB; Gaillard, AI, p. 14; ICCA Guide, pp. 107-108*]. According to Art. V(2)(b) NYC, an award that violates public policy is unenforceable. As a result of the lack of reliable evidence the Tribunal risks mistakenly denying the corruption allegations by continuing the proceedings. The award would be unenforceable if evidence proving the corruption is uncovered during the investigations.

49 In jurisdictions which deviate from the doctrine that a contract obtained by corruption violates public policy, such contracts are voidable by the innocent party rather than automatically becoming void [*BGer 21 Feb 2003; Honeywell v Meydan, EWCH 30 Apr 2014; Drude, JIA, p. 683*]. However, in the case at hand, the enforcing jurisdiction does not follow this approach. As RESPONDENT is an SOE that did not generate its own revenue until recently and only operated in the context of the NP Development Program, its assets lie in Equatoriana. A potential award would thus need to be enforced there. Art. 15 Equatorianian Anti-Corruption Act prohibits "to either directly or indirectly perform a contract for the conclusion of which undue benefits were granted or promised" [*RNoA, p. 27, para. 2*]. Thus, a contract obtained by corruption is void from the beginning and not just voidable. An award upholding such a contract would still violate public policy. Continuing the proceedings bears the risk of rendering an unenforceable award.

IV. Continuing the Proceedings Would Violate RESPONDENT's Right to Present Its Case

50 Denying RESPONDENT's application to stay the proceedings would violate its right to present its case. According to Art. 18 Danubian Arbitration Law, "[…] each party shall be given a full opportunity of presenting his case". Continuing the proceedings as planned would mean that the evidence obtained by the prosecution would never reach the Tribunal and would not be considered when rendering an award. Due to the nature of corruption, the claiming party is usually not able

to produce any reliable evidence on its own [*Wendler, p. 123*]. Thus, RESPONDENT must rely on the evidence found during the investigations to be able to plead its case. Denying RESPONDENT this possibility would violate its right to present its case.

51 A violation of this right would risk that the award would be set aside. According to Art. 34(2)(ii) Danubian Arbitration Law, an award may be set aside if a party was not able to present its case. As RESPONDENT would not be able to present its case, the award could be set aside.

V. A Stay of the Proceedings Promotes Efficiency

52 CLAIMANT argues that a stay would only lead to increased costs and time spent for the proceedings [*Claimant, para. 57*]. However, by awaiting the investigations, the Tribunal can rely on the result of the investigations when rendering an award and the money and time normally spent on evidence production would be saved. If the Tribunal decides that the contract is valid, but in fact, the contract was obtained by corruption, the award would be unenforceable. In this case, the expenditures and time spent on the proceedings would have been wasted. This would be avoided if the Tribunal orders to stay the proceedings. Thus, a stay prevents that needless costs and time are spent for the proceedings. A stay of the proceedings promotes efficiency.

B. CLAIMANT'S Concerns Are Unsubstantiated

53 CLAIMANT's concerns regarding RESPONDENT's request to stay the proceedings are unsubstantiated. The public prosecution conducts the proceedings impartially (**I**) and the delay would be reasonable (**II**). Lastly, equal treatment would still be respected (**III**).

I. The Public Prosecution Is Impartial

54 CLAIMANT alleges that the Equatorianian prosecution is not independent since Ms. Fonseca's brother-in-law is the CEO of the other bidder in the tender process, and her future daughter-in-law was Mr. Field's assistant who temporarily worked for the prosecution [*Claimant, paras 47, 64*]. However, there are no indications that Ms. Fonseca has ever violated her professional obligations. Quite the contrary, she is one of the best-known criminal lawyers of Equatoriana and earned the trust of the head of public prosecution [*PO2, p. 49, para. 44*]. The independence of her investigations is further ensured by the fact that she is part of a team [*Exhibit R2, p. 33*]. Moreover, Ms. Fonseca herself has vocally criticised that public officials did not carry out their occupation professionally and abused their position to gain personal advantages [*PO2, p. 49, para. 44*]. It cannot be assumed that she will jeopardise her professional obligations, risk her career and detrimental legal consequences just to ensure the conviction of a suspect she has no personal connection with. Thus, it is ensured that the investigations will be conducted unbiasedly.

II. The Delay Would Be Reasonable

55 CLAIMANT alleges that a stay of the proceedings would constitute an unreasonable delay [*Claimant, para. 57*]. However, the delay would be reasonable as a stay would only delay the proceedings insignificantly (**1**), would not impose any financial disadvantage on CLAIMANT (**2**), and the parties have to await the outcome of the investigations anyway to achieve legal certainty (**3**).

1. The Delay Would Be Insignificant

56 The delay would be insignificant. The procedural timetable scheduled the first hearing for March 2023 [*PO1, p. 43 IV.*]. This hearing will not address the question of whether the contract is tainted by corruption [*PO1, p. 42, III.1*]. This will be discussed in a subsequent meeting. The investigations by Ms. Fonseca will be concluded by the end of 2023 at the latest [*Exhibit R2, p. 33*]. Thus, the delay would only amount to a couple of months and would be insignificant.

2. A Stay of the Proceedings Does Not Impose a Financial Disadvantage on CLAIMANT

57 A stay or bifurcation of the proceedings does not impose a financial disadvantage on CLAIMANT. Declaratory awards do not oblige the parties to perform any actions and are not enforceable [*BGH 27 Sep 1972; Anand; Dunand/Kostytska, JIA, p. 2; MüKo-ZPO/Becker-Eberhard, § 256 para. 1; Saenger/Saenger, § 256 para. 1; Leimgruber, ASA, p. 467*]. Yet, CLAIMANT only requests a declaratory relief. If it truly was in financial difficulties, it would have demanded the performance of the contract. However, CLAIMANT only asks for declaratory relief and did not quantify any damages [*NoA, p. 8, para. 23*]. Its own conduct implies that it does not depend on a quick decision.

58 Further, according to Art. 7.4.9 ICCA, "[i]f a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment […]". If the investigations do not uncover enough evidence to prove that the Agreement is tainted by bribery, the additional time spent on the proceedings would be included in the calculation of interest. Thus, a stay would not impose a financial disadvantage on CLAIMANT.

3. The Enforcement Proceedings Will Be Stayed until the Investigations Are Concluded

59 If monetary relief would be awarded to CLAIMANT, that award could only be enforced after the criminal proceedings were concluded. The *Luxembourg Cour d'appel* stayed the enforcement proceedings of an arbitral award until parallel criminal proceedings were concluded [*CA Luxembourg 2 Dec 2021*]. The criminal proceedings examined whether one of the parties committed fraud. The *Cour d'appel* based its decision on Art. 3 of the Code of Criminal Procedure of Luxembourg stipulating that civil proceedings are stayed if their outcome depends

on the judgment of criminal courts. The same applies in France [*Racine on CA Paris 7 Sep 1999 and CA Paris 20 Apr 2000*]. Likewise, in Equatoriana, judgments of criminal courts are binding for civil courts; civil proceedings are therefore stayed if their outcome depends on pending criminal proceedings [*PO2, p.49, para. 46*]. Whether the award is in accordance with public policy depends on the question of whether CLAIMANT bribed Mr. Field. This will be examined during the criminal proceedings. Hence, the enforcement court will stay the proceedings until the criminal court renders a decision. This is relevant as an award would be enforced in Equatoriana. Thus, the Parties must await the outcome of the investigations in any case.

III. CLAIMANT'S Right to Equal Treatment Is Not Violated by Staying the Proceedings

60 CLAIMANT alleges that a stay violates its right to equal treatment by claiming that Ms. Fonseca is not impartial [*Claimant, para. 64*]. The investigations, however, are conducted independently [*see above, para. 54*]. Further, a stay would not financially disadvantage CLAIMANT. It is also possible that the investigations result in a conclusion which is favourable for CLAIMANT. CLAIMANT's concerns are therefore unsubstantiated and equal treatment would still be respected.

C. The Tribunal Should at Least Bifurcate the Proceedings

61 Should the Tribunal not see fit to stay the proceedings, it should at least bifurcate them so that it may solely decide on the issues which do not depend on the result of the investigations. All the reasons listed in support of a stay also speak for a bifurcation. When deciding upon a bifurcation, tribunals consider whether such a measure could dispose of a considerable part of the proceedings [*PCA PO2 31 Jan 2018; PCA PO2 21 Apr 2017; PCA PO4 19 Apr 2017; ICSID PO3 7 Jun 2022; ICSID PO2 19 Oct 2020; ICSID PO3 9 Oct 2019; ICSID PO3 24 Jun 2019; ICSID PO3 5 Dec 2018; Ad hoc 8 Jun 2009*]. In case of a bifurcation, the Tribunal would first rule whether the Agreement is invalid due to CLAIMANT's fraudulent misrepresentation [*RNoA, p. 31, para. 27*]. If the Tribunal concluded that CLAIMANT committed fraud, it would not have to decide whether the corruption allegations are substantiated. This would dispose of a considerable part of the merits and save significant time and costs. Thus, the Tribunal should at least bifurcate the proceedings.

CONCLUSION OF THE SECOND ISSUE

62 The Tribunal is respectfully asked to stay or alternatively bifurcate the arbitral proceedings until the criminal investigations against Mr. Field are concluded. Otherwise, it risks rendering an unenforceable award and imposing needless costs on the Parties. Furthermore, CLAIMANT's concerns are unsubstantiated as a stay or bifurcation would not be detrimental to the Parties.

ISSUE 3: THE PURCHASE AND SUPPLY AGREEMENT IS NOT GOVERNED BY THE CISG

63 CLAIMANT seeks to evade the application of Equatorianian domestic law in the misguided hope that it could then avoid consequences for its fraudulent actions. In pursuit of this goal, CLAIMANT firstly argues that the Parties' choice of Equatorianian law includes the CISG as a part of the chosen law. Be that as it may, that choice would necessarily also include the CISG's own conditions for application. Art. 2(e) CISG stipulates precisely such a condition by stating that the CISG does not apply to sales of aircraft. The Kestrel Eye 2010 is an aircraft. Thus, its sale is excluded by Art. 2(e) CISG (**A**). In an attempt to salvage the application of the CISG to the Agreement, CLAIMANT asserts that Art. 2(e) CISG only applies to a specific group of aircraft that pass a three-factor test devised by CLAIMANT itself. However, such a limitation has no place under Art. 2(e) CISG, which excludes all sales of aircraft without exception (**B**). Finally, CLAIMANT asserts that even if the Agreement was in principle excluded by Art. 2(e) CISG, the Parties opted into the CISG despite its substantive inapplicability. This is not the case (**C**). The CISG does not apply to the Agreement, which is thus only subject to Equatorianian domestic law.

A. The Sale of the Kestrel Eye 2010 Is Excluded under Art. 2(e) CISG

64 The sale of the Kestrel Eye 2010 is the sale of an aircraft and therefore excluded under Art. 2(e) CISG. Art. 2(e) CISG states that the CISG does not apply to sales of "ships, vessels, hovercraft or aircraft". The Kestrel Eye 2010 is an over 6 m long helicopter drone that operates at altitudes of up to 6000 m [*Exhibit C4, p. 15*] and uses the same airspace as any other aircraft [*Exhibit C7, p. 18, para. 2*]. The Parties even repeatedly labelled the Kestrel Eye 2010 an aircraft themselves [*Exhibit C1, p. 9; Exhibit C2, pp. 10-11, Preamble, Art. 3(1)(b); RNoA, p. 28, para. 6*]. The Kestrel Eye 2010 is an aircraft. Its sale is therefore excluded under Art. 2(e) CISG.

B. Art. 2(e) CISG Excludes the Sale of All Aircraft without Exception

65 Art. 2(e) CISG excludes all sales of aircraft. The wording does not indicate any further limitations, which was precisely the drafters' intention. To avoid raising "questions of interpretation as to which ships, vessels, or aircraft were subject to this Convention, […] the sale of <u>all</u> ships, vessels and aircraft was excluded from the application of this Convention" [*Official Records, Art. 2, p. 16, para. 9, emphasis added; cf. UNCITRAL Yb 1975, p. 51, para. 28*]. The unambiguous exclusion of all aircraft sales is confirmed by the existing case law [*MAC 18 Dec 1998; CC 1 Dec 2010; Ct App Piraeus 2008; Gerechtshof Arnhem 12 Sep 2006; RB Middelburg 2 Apr 2008; National Bank v Ayers Aviation, US Bankr Ct Georgia 25 Jul 2002*].

66 Despite this, CLAIMANT attempts to confine the scope of Art. 2(e) CISG by arguing that aircraft must pass a three-factor test to be considered aircraft in the sense of Art. 2(e) CISG. CLAIMANT asserts the following three conditions for the application of Art. 2(e) CISG: the aircraft must be subject to registration, it must be privately owned, and it must be intended to be used for transport [*Claimant, para. 106*]. However, registration is not a prerequisite for the exclusion of aircraft under Art. 2(e) CISG (**I**). The ownership status of the aircraft is irrelevant as well (**II**). Finally, Art. 2(e) CISG is applicable irrespective of the purpose of the drones (**III**).

I. Art. 2(e) CISG Does Not Only Exclude Sales of Aircraft that Are Subject to Registration

67 Whether the Kestrel Eye 2010 is subject to registration is irrelevant for Art. 2(e) CISG. CLAIMANT argues that the Kestrel Eye 2010 is not an aircraft under Art. 2(e) CISG as it does not have to be registered in Equatoriana in the case at hand [*Claimant, paras. 90, 93*]. Firstly, CLAIMANT justifies such a requirement by referring to the predecessors of Art. 2(e) CISG [*Claimant, paras. 101-103*]. Secondly, CLAIMANT asserts that the definition of "aircraft" should only refer to aircraft subject to registration as this is the definition under several domestic aviation acts [*Claimant, paras. 108-117*].

68 However, CLAIMANT cannot rely on its external sources to justify a registration-based definition of "aircraft" under Art. 2(e) CISG (**1**). Contrary to CLAIMANT's assertion, the legislative history of Art. 2(e) CISG is precisely what prohibits the application of a registration requirement (**2**).

1. CLAIMANT Cannot Rely on Its External Legal Sources to Interpret the CISG

69 CLAIMANT cannot rely on the three domestic aviation acts that it cites to justify a registration-based definition of "aircraft" under Art. 2(e) CISG. Firstly, the definitions cited by CLAIMANT [*Claimant, paras. 109, 112, 117*] do not presuppose registration for vehicles to be considered aircraft at all. Secondly, the general premise of CLAIMANT's argument is intrinsically flawed. CLAIMANT bases its argument on the assertion that terms which are not explicitly defined in the CISG must be defined according to other external sources [*Claimant, para. 108*].

70 However, Art. 7(1) CISG states that when interpreting the CISG, "regard is to be had to its international character and the need to promote uniformity in its application". This provision mandates an autonomous interpretation of the CISG, i.e., the meaning of the CISG's provisions must be determined independently from any domestic preconception [*ICC Case No. 15313; ICDR 23 Oct 2007; NAI 15 Oct 2002; BGer 28 May 2019; BGer 2 Apr 2015; OGH 29 Jun 2017; BGH 2 Mar 2005; Smallmon v Transport, HC New Zealand 30 Jul 2010; Superior Ct Quebec 10 Jan 2020; Gerechtshof Den Haag 22 Feb 2014*]. Therefore, CLAIMANT's argument is in violation of Art. 7(1) CISG by stipulating an interpretation of Art. 2(e) CISG based on domestic legal sources.

71 Additionally, CLAIMANT uses these three examples to argue that there is a common understanding regarding the registration-based definition among "common law jurisdictions and signatories of the CISG" [*Claimant, para. 117*]. However, even if CLAIMANT's understanding of these provisions were correct, three incidental examples would not prove a consensus amongst all ninety-five Contracting States of the CISG. Moreover, the fact that the countries named by CLAIMANT are common law jurisdictions is insignificant as there are also many Contracting States of the CISG which are civil law jurisdictions. In conclusion, CLAIMANT cannot rely on its external sources to justify a registration-based definition of "aircraft" under Art. 2(e) CISG.

2. The Drafting History of Art. 2(e) CISG Prohibits Registration as a Requirement

72 The drafting history of Art. 2(e) CISG establishes that the registration of an aircraft is not a requirement for its exclusion. Unlike Art. 2(e) CISG, its predecessors (Art. 5(1)(b) ULIS and Art. 1(6)(b) ULFC) only excluded the sale "of any ship, vessel or aircraft, which is or will be subject to registration". The drafters intentionally did not include such a requirement in Art. 2(e) CISG as it caused too much legal uncertainty. The rules specifying which ships, vessels and aircraft must be registered differ widely between countries. It is difficult to determine which law governs the registration, so that the relevant place of registration would often be unknown at the time of the sale. As a result, it would often be unclear whether the CISG applies or not. To avoid such interpretational discussions about which aircraft the CISG applies to, all sales of aircraft were excluded [*Official Records, Art. 2, p. 16, para. 9; UNCITRAL Yb 1975, p. 51, para. 28; Diez-Picazo/Caffarena Laporta, Art. 2, p. 66; Schlechtriem/Schwenzer/Hachem, Art. 2, para. 28; Brunner/Gottlieb/Brunner/Maier/Stacher, Art. 2, para. 14; Schlechtriem/Schwenzer/Schroeter/Ferrari, Art. 2, para. 38; Staudinger/Magnus, Art. 2, para. 44*]. Thus, the drafting history of Art. 2(e) CISG prohibits applying registration as a prerequisite.

73 Acknowledging the requirement's intentional removal, CLAIMANT asserts that this requirement must be read into Art. 2(e) CISG regardless by citing *Hachem* [*Claimant, paras. 101, 103*]. In fact, *Hachem* emphasises that "the registration requirement was dropped" due to the uncertainty it caused [*Schlechtriem/Schwenzer/Hachem, Art. 2, para. 28*]. Other scholars also unanimously agree that registration cannot be a requirement under Art. 2(e) CISG in light of the provision's drafting history [*Audit, p. 33; Piltz, Art. 2, para. 2.52; Kröll et al./Spohnheimer, Art. 2, para. 41; Schlechtriem/Schwenzer/Schroeter/Ferrari, Art. 2, para. 38; Diez-Picazo/Caffarena Laporta, Art. 2, pp. 65-66; Bianca/Bonell, Art. 2, para. 2.6; Reinhart, Art. 2, para. 7; Herber/Czerwenka, Art. 2, para. 13; MüKo-HGB/Mankowski, Art. 2, para. 28; Neumayer/Ming, Art. 2, p. 59; MüKo-BGB/Huber, Art. 2, para. 20; Staudinger/Magnus, Art. 2, para. 44; Witz/Salger/Lorenz, Art. 2, para. 9*]. In conclusion, the

drafting history prohibits registration as a prerequisite for Art. 2(e) CISG. CLAIMANT's external sources do not justify such a condition either. Thus, Art. 2(e) CISG excludes the sale of the Kestrel Eye 2010 regardless of any registration.

II. Whether Aircraft Are Privately Owned Is Irrelevant

74 Whether an aircraft is privately owned or state-owned is irrelevant under Art. 2(e) CISG. CLAIMANT mistakenly asserts that Art. 19 of the International Convention on Civil Aviation determines Equatoriana as the relevant place of registration [*Claimant, para. 96*]. Art. 19 ICAO states that the "registration of aircraft in any contracting State shall be made in accordance with its laws and regulations". Evidently, this provision does not regulate where the aircraft must be registered. Nevertheless, CLAIMANT then argues that private ownership is a condition for Art. 2(e) CISG because it is a prerequisite for the registration obligation in Equatoriana [*Claimant, para. 106*]. Finally, CLAIMANT adds that state-owned aircraft are often exempt from registration "across other similar jurisdictions, for example Singapore" [*Claimant, para. 94*].

75 Even if CLAIMANT were correct in assuming that Equatorianian law governed the registration, private ownership could not be a criterion for the exclusion of aircraft under Art. 2(e) CISG. Firstly, as stated, the drafting history of Art. 2(e) CISG prohibits applying the obligation to register as a condition for the exclusion of aircraft. Consequently, which law governs the registration and what the conditions for such an obligation are in the respective state is irrelevant. Secondly, CLAIMANT cannot rely on external sources to interpret Art. 2(e) CISG, as this once again violates the principle of autonomous interpretation stipulated by Art. 7(1) CISG. Thirdly, two examples are hardly proof of an international consensus that only privately owned aircraft must be registered. For example, this is not the case in India, China, or the USA [*Arts. 2(d), 3 Indian Civil Aviation Requirements Section 2 Series F Part I; §§ 40102(a)(6), 44102 Title 49 US Code; Art. 7 Civil Aviation Law of the People's Republic of China*]. In conclusion, the ownership status of an aircraft is irrelevant under Art. 2(e) CISG.

III. Art. 2(e) CISG Excludes the Sale of the Kestrel Eye 2010 Regardless of Its Purpose

76 Art. 2(e) CISG excludes the Agreement from the CISG's scope regardless of the drones' purpose. Art. 2(e) CISG does not only exclude aircraft intended to be used as a means of transport (**1**). In any case, the Kestrel Eye 2010 is intended to be used for transport and would consequently be excluded either way (**2**).

1. A Limitation of Art. 2(e) CISG to Sales of Aircraft Intended for Transport Is Unjustified

77 A restriction of the scope of Art. 2(e) CISG to aircraft intended to be used for transport is unjustified. CLAIMANT advocates such a restriction but does not offer an explanation as to why this should be the case [*Claimant, para. 104*]. The wording of Art. 2(e) CISG offers no indication for such a restriction. The drafting history of Art. 2(e) CISG and the drafters' intention even demand the contrary – an unrestricted exclusion of all aircraft [*see above, paras. 65, 72*]. CLAIMANT argues that the approach taken to aircraft in the UK Civil Aviation Act 2012 should also be taken to aircraft under Art. 2(e) CISG. However, CLAIMANT cannot rely on the UK Civil Aviation Act 2012 [*Claimant, para. 98-99*] to justify either the transport requirement or the geographical limitation of the flight. This is inadmissible in light of the autonomous interpretation of the CISG as set out in Art. 7(1) CISG.

78 Moreover, a requirement for the vehicle's purpose to be transport would create legal uncertainty due to the lack of a clear rule. For example, it is disputed whether sports watercraft such as rafts or canoes are intended to be used for transport [*affirmatively: MüKo-BGB/Huber, Art. 2, para. 22; opposing: Schlechtriem/Schwenzer/Schroeter/Ferrari, Art. 2, para. 41*]. It would be unforeseeable to the parties whether the CISG is applicable, as different courts and tribunals would apply different understandings of "transport". In conclusion, there is no justification for limiting the scope of Art. 2(e) CISG to aircraft intended to be used as a means of transport.

2. In Any Case, the Kestrel Eye 2010 Is Intended for Transport

79 Even if Art. 2(e) CISG required the purpose of aircraft to be transport, the Kestrel Eye 2010 would still be excluded as it is intended for transport. CLAIMANT asserts that "[i]t is clear from the designs of the Kestrel Eye that [it] is not designed to carry people or goods" [*Claimant, para. 104*]. In fact, the design indicates the opposite. The Kestrel Eye 2010 has payload bays for carrying equipment or cargo weighing up to 306 kg [*Exhibit C4, p. 15; PO2, pp. 44-45, paras. 9-10*]. Moreover, the drones' general purpose is to aerially transport the otherwise immobile surveillance equipment [*cf. Exhibit C2, p. 10, Art. 2(a), (b); Exhibit R2, p. 33*]. The equipment is not permanently fixed to the drone but can be loaded into and out of the payload bay whenever needed [*cf. PO2, p. 44, para. 9*].

80 The Kestrel Eye 2010 is not only objectively suitable to serve a transport purpose but was also bought by RESPONDENT with precisely such a use in mind. In their speeches at the time, the Minister and Ms. Queen emphasised that the scope of the Agreement was subsequently enlarged due to the drones' suitability for transport [*Exhibit R2, p. 33*]. This is reflected in the Preamble of the Agreement [*Exhibit C2, p. 10, Preamble*]. CLAIMANT's COO, who negotiated the contract with

RESPONDENT, even advertised the Kestrel Eye 2010's technology which "naturally also makes it suitable for other purposes in particular to bring high value and sensitive loads to the remote areas" [*Exhibit R4, p. 35*]. Therefore, CLAIMANT's assertion that the drones are not intended for transport is incorrect.

81 In conclusion, the sale of the Kestrel Eye 2010 is excluded under Art. 2(e) CISG, regardless of its registration or purpose.

C. The Parties Did Not Opt into the CISG

82 The Parties did not opt into the CISG despite its substantive inapplicability. Firstly, CLAIMANT argues that RESPONDENT's lack of opposition to the modified termination clause shows that it was also not opposed to the CISG governing the Agreement [*Claimant, para. 123*]. However, agreeing to adjusting a single clause in the Agreement to slightly reflect a single provision of the CISG says nothing about RESPONDENT's opinion on applying all the remaining provisions of the CISG as well. To the contrary, if the applicability of the CISG had been intended, there would have been no need to specifically adapt only this particular clause.

83 Secondly, CLAIMANT argues that the choice-of-law clause not only includes the CISG, but actually constitutes an active opting into the CISG despite Art. 2(e) CISG [*Claimant, paras. 84, 119, 122*]. However, even if the choice of Equatorianian law includes the CISG, then it also includes the CISG's own conditions for application [*Schlechtriem, p. 15, para. 20*]. Thus, the Parties' choice of Equatorianian law would also include Art. 2(e) CISG, which stipulates conditions for application that the Agreement does not meet. Therefore, the Parties' choice of Equatorianian law could not be interpreted as the Parties' choice to opt into the CISG despite Art. 2(e) CISG in any case. In conclusion, the Parties did not opt into the CISG.

CONCLUSION OF THE THIRD ISSUE

84 The Kestrel Eye 2010 is an aircraft. Its sale is thus excluded under Art. 2(e) CISG. Despite the unambiguous wording of the provision, the drafters' explicit intention and the case law supporting the unrestricted application of Art. 2(e) CISG, CLAIMANT contests that Art. 2(e) CISG excludes the sale of all aircraft sales. However, all the limitations posited by CLAIMANT either contradict the drafting history of Art. 2(e) CISG, cause legal uncertainty, or simply lack justification. In closing, the only reasonable way to apply Art. 2(e) CISG is excluding all aircraft sales without complicated restrictions, precisely as the drafters intended. As the Parties also did not opt into the CISG despite its substantive inapplicability, the Agreement is not governed by the CISG. It is solely subject to Equatorianian domestic law, which the Parties agreed on in Art. 20(d) of the Agreement.

ISSUE 4: IF THE AGREEMENT WERE GOVERNED BY THE CISG, RESPONDENT COULD STILL RELY ON ART. 3.2.5 ICCA

85 While negotiating with RESPONDENT about the sale of the Kestrel Eye 2010, CLAIMANT was already in possession of a newer model, better suited for RESPONDENT's purposes – the Hawk Eye 2020. Instead of disclosing the existence of the new model, as CLAIMANT was obliged to do under Equatorianian law, CLAIMANT misrepresented the Kestrel Eye 2010 as state-of-the-art and the top model for RESPONDENT's purposes. CLAIMANT intended to dispose of Kestrel Eye 2010 UAVs which it still had in stock after a deal with an insolvent buyer fell through.

86 Contrary to CLAIMANT's submission, CLAIMANT's fraud is governed by the respective Equatorianian provision – Art. 3.2.5 ICCA. The CISG does not supersede Art. 3.2.5 ICCA (**A**). CLAIMANT defrauded RESPONDENT pursuant to Art. 3.2.5 ICCA (**B**). Moreover, CLAIMANT cannot rely on the ICCA's provisions on time limits and confirmation to exclude the applicability of Art. 3.2.5 ICCA (**C**).

A. The CISG Does Not Supersede Art. 3.2.5 ICCA

87 CLAIMANT submits that Art. 3.2.5 ICCA is not applicable as the CISG supersedes it [*Claimant, paras. 81-86; NoA, p. 7, para. 22*]. However, the CISG does not supersede Art. 3.2.5 ICCA. The CISG only supersedes domestic law where the CISG's provisions conclusively regulate a matter [*BGer 28 May 2019; OGH 29 Jun 2017; Nonwovens v Pack Line, Sup Ct New York 12 Mar 2015*]. Art. 4(a) CISG states that matters concerning the validity of the contract – which is exactly what Art. 3.2.5 ICCA regulates – are excluded from the CISG's scope. Only if the CISG's provisions implicitly offer a conclusive regulation of an issue regarding contract validity can the CISG supersede domestic provisions [*Kröll et al./Djordjević, Art. 4, para. 15; Staudinger/Magnus, Art. 4, para. 43; Schlechtriem/Schwenzer/Hachem, Art. 4, para. 18; MüKo-BGB/Huber, Art. 4, para. 29*].

88 CLAIMANT argues in the Notice of Arbitration that the case at hand is about the conformity of the Kestrel Eye 2010, a matter governed by Art. 35 CISG [*NoA, p. 7, para. 22*]. However, the present dispute is not a mere matter of conformity of the goods but concerned with fraud which the CISG does not regulate (**I**). Further, the question of whether CLAIMANT committed fraud must be assessed directly under domestic law and not under a CISG standard (**II**).

I. The CISG Does Not Supersede Domestic Remedies on Fraud

89 The CISG does not supersede domestic provisions regulating fraud. Courts and scholars universally acknowledge that the CISG neither explicitly nor implicitly contains a comprehensive regulation of fraud and therefore does not supersede the respective domestic

remedies [*OLG Dresden 27 May 2010; OLG Hamm 2 Apr 2009; OLG Hamburg 5 Oct 1998; Eastern Materials v Jamer, US DC New Jersey 25 Oct 2019; Electrocraft Arkansas v Super Electric Motors, US DC Arkansas 23 Dec 2009; Paper v Lebbing Engineering, US DC Ohio 26 Mar 2009; Teevee v Schubert, US DC New York 23 Aug 2006; Honnold/Flechtner, Art. 4, para. 65; Schlechtriem/Schwenzer/Schroeter, Intro to Arts. 14-24, para. 126; Staudinger/Magnus, Art. 4, para. 52; Müko-HGB/Mankowski, Art. 4, para. 33; Achilles, Art. 4, para. 11; Kröll et al./Djordjević, Art. 4, para. 23*]. Art. 3.2.5 ICCA specifically regulates cases of fraud. Thus, the CISG does not supersede Art. 3.2.5 ICCA.

II. Whether CLAIMANT Committed Fraud Must Be Assessed under Art. 3.2.5 ICCA

90 Whether CLAIMANT committed fraud must be assessed solely according to Art. 3.2.5 ICCA. CLAIMANT might argue that one must evaluate whether fraud was committed under an autonomous standard of the CISG before resorting to Art. 3.2.5 ICCA. Such an argument might be made in an attempt to steer clear of the disclosure obligation which exists under Equatorianian law [*cf. RNoA, pp. 29-30, para. 18*]. As follows from Art. 7(1) CISG, the CISG's scope of application must be assessed uniformly. Reversely, one could suggest that it must also be uniformly determined which cases the CISG does not govern conclusively.

91 However, this approach must be rejected as it is inherently impractical. It would require an autonomous definition of fraud under the CISG, even though the CISG does not offer a single point of reference for developing such a definition. Courts and tribunals would have to invent an internationally acceptable definition of fraud out of thin air, for which they would have to resort to legal sources outside the CISG in any case. Accordingly, the existing case law dealing with fraud in contracts governed by the CISG has not addressed such an approach and has instead applied the relevant national provisions directly [*OLG Hamm 12 Sep 2011; OLG Hamm 2 Apr 2009; HG St. Gallen 24 Aug 1995; KG St. Gallen 13 May 2008; Eastern Materials v Jamer, US DC New Jersey 25 Oct 2019; Urica v Pharmaplast, US DC California 8 Aug 2014; Teevee v Schubert, US DC New York 23 Aug 2006*]. Consequently, one must assess whether CLAIMANT committed fraud under Equatorianian domestic law, namely Art. 3.2.5 ICCA.

B. CLAIMANT Defrauded RESPONDENT Pursuant to Art. 3.2.5 ICCA

92 CLAIMANT defrauded RESPONDENT pursuant to Art. 3.2.5 ICCA. Art. 3.2.5 ICCA stipulates that "[a] party may avoid the contract when it has been led to conclude the contract by the other party's fraudulent representation, including language or practices, or fraudulent non-disclosure of circumstances which, according to reasonable standards of fair dealing, the latter party should have disclosed".

93 CLAIMANT seeks to interpret Art. 3.2.5 ICCA in accordance with Section 2 and 3 of the English Fraud Act 2006 [*Claimant, paras. 147-149, 157-159*]. However, one cannot simply apply a foreign country's law with a different wording to interpret the ICCA. Instead, it must be interpreted in line with sources that specifically concern the ICCA. These are the interpretations offered by Equatorianian courts and sources treating the UNIDROIT Principles, which the ICCA is identical to [*NoA, p. 7, para. 22; PO2, p. 49, para. 49*].

94 CLAIMANT misrepresented the Kestrel Eye 2010 (**I**), violated its obligation to disclose the existence of the Hawk Eye 2020 (**II**), and thereby led RESPONDENT into concluding the Agreement (**III**). Furthermore, CLAIMANT intended to defraud RESPONDENT (**IV**).

I. CLAIMANT Misrepresented the Kestrel Eye 2010

95 Contrary to CLAIMANT's assertion [*Claimant, para. 152*], CLAIMANT misrepresented the Kestrel Eye 2010 prior to the conclusion of the Agreement. A misrepresentation in the sense of Art. 3.2.5 ICCA is any statement that is based on false facts [*Official Comments, Art. 3.2.5, para. 1; Brödermann, Art. 3.2.5, para. 1; Vogenauer/Du Plessis, Art. 3.2.5, para. 11*]. CLAIMANT misrepresented the Kestrel Eye 2010's characteristics by describing it as its "top model for [RESPONDENT's] purposes" [*Exhibit R4, p. 35*] (**1**) and as a "state-of-the-art" drone [*Exhibit C2, p.10, 11, Preamble, Art. 2(f)*] (**2**).

1. CLAIMANT Falsely Described the Kestrel Eye 2010 as Its Top Model for RESPONDENT's Purposes

96 CLAIMANT falsely described the Kestrel Eye 2010 as its "top model for [RESPONDENT's] purposes" [*Exhibit R4, p. 35*]. The Kestrel Eye 2010 was not the top model for RESPONDENT's purposes (**a**) when CLAIMANT made the statement (**b**).

a. The Kestrel Eye 2010 Is Not the Top Model for RESPONDENT's Purposes

97 CLAIMANT argues that the Kestrel Eye 2010 was CLAIMANT's top model because it satisfies all minimum requirements stated in the Call for Tender [*Claimant, para. 152*]. However, according to the understanding of a reasonable person – the standard set out in Art. 4.2(2) ICCA for interpreting statements of the parties – "the top model" is not just any suitable model, but the most suitable one. The Kestrel Eye 2010 is less suitable for RESPONDENT's purposes than the Hawk Eye 2020:

98 RESPONDENT wanted to purchase drones for two reasons. Firstly, it planned to use the drones for the collection of geological and geophysical data in the northern provinces of Equatoriana, as RESPONDENT stated in its Call for Tender [*Exhibit C1, p. 9*]. Secondly, RESPONDENT intended to

use the drones for the transport of urgently needed spare parts or medicine to remote areas of the northern part of Equatoriana [*Exhibit R2, p. 33*]. The Parties extended the scope of the Agreement to reflect a possible additional use of the drones [*Exhibit C2, p. 10, Preamble*]. CLAIMANT's COO, Mr. Bluntschli, explicitly advertised that the Kestrel Eye 2010 is suitable to transport high value and sensitive loads in an email to RESPONDENT prior to the conclusion of the Agreement [*Exhibit R4, p. 35*].

99 The Tribunal has already established that the Hawk Eye 2020 is better suited for collecting geological data in the northern part of Equatoriana than the Kestrel Eye 2010 [*PO2, pp. 45-46, para. 17*]. The Hawk Eye 2020 has longer endurance and a satellite communication system that, unlike the Kestrel Eye 2010, allows missions beyond the line of sight [*PO2, pp. 45-46, para. 17*]. In contrast to the Kestrel Eye 2010, this longer range would even allow for several missions in a single flight [*PO2, pp. 45-46, para. 17*].

100 The Hawk Eye 2020 is better suited for transport as well. It offers 2.200 kg [*Exhibit R3, p. 34*] of payload capacity compared to the maximum of 306 kg [*Exhibit C4, p. 15; PO2, p. 45, para. 10*] offered by the Kestrel Eye 2010, which is a more than seven-fold increase.

101 CLAIMANT argues that the Kestrel Eye 2010 is still its top model because the Kestrel Eye 2010 is cheaper than the Hawk Eye 2020 [*Claimant, para. 153*]. However, the higher price of the Hawk Eye 2020 does not render it less suitable. RESPONDENT could have bought three Hawk Eye 2020 for the price of six Kestrel Eye 2010 [*cf. Exhibit C3, p. 14, para. 9*]. Three Hawk Eye 2020 would have been more useful than the six Kestrel Eye 2010 for RESPONDENT. Unlike the Kestrel Eye 2010, the Hawk Eye 2020 can complete several missions in one flight and can transport seven times as much cargo as the outdated Kestrel Eye 2010 [*Exhibit R3, p. 34; Exhibit C4, p. 15; PO2, pp. 45, 46, para. 10, 17*]. Consequently, the Hawk Eye 2020 offers a significantly better cost-benefit ratio and, therefore, is more suitable. The Kestrel Eye 2010 is not the top model for RESPONDENT's purposes.

b. The Kestrel Eye 2010 Was Already Not the Top Model at the Time of CLAIMANT's Statement

102 CLAIMANT argues that when its COO made this statement in his email of 29 November 2022 [*Exhibit R4, p. 35*], the Kestrel Eye 2010 was CLAIMANT's top model because the Hawk Eye 2020 had not yet been officially presented [*Claimant, para. 152*]. Nevertheless, CLAIMANT already possessed the final version of the Hawk Eye 2020 at this point. The drone was already in its final testing phase [*PO2, p. 45, para. 14*]. The first Kestrel Eye 2010 were supposed to be delivered in 2022 [*Exhibit C2, pp. 10-11, Art. 2(d); NoA, p. 5, para. 8*]. Likewise, CLAIMANT would

have been able to deliver three Hawk Eye 2020 in 2022 [*PO2, p. 45, para. 14*]. Contrary to CLAIMANT's assumption [*Claimant, para. 152*], it is not unusual in such complex technical developments for the first orders to be accepted before the official launch of the product. Especially in the field of aircraft, this is a common practice [*Freimuth, pp. 25-26*]. Consequently, the Hawk Eye 2020 was already the top model for RESPONDENT's purposes at the time of this statement.

c. This Statement Must Be Considered despite the Merger Clause

103 CLAIMANT might argue that the representation of the Kestrel Eye 2010 as its top model must be disregarded because of the merger clause. It could contend that Art. 21 of the Agreement renders all pre-contractual statements irrelevant as it states that "[t]his document contains the entire agreement between the Parties" [*Exhibit C2, p. 12*]. However, CLAIMANT's statement must be taken into account despite the merger clause. Under the ICCA, a merger clause can only exclude contractual obligations deriving from pre-contractual statements, but not remedies on fraud [*Vogenauer/Vogenauer, Art. 2.1.17, para. 7; Brödermann, Art. 2.1.17, para. 2; Meyer, RabelsZ, p. 593*]. Otherwise, one could effectively waive Art. 3.2.5 ICCA by including a merger clause in the contract [*cf. Danann Realty v Harris, Ct App New York 5 Mar 1959; Gilbride, BLR, p. 269*]. Waiving Art. 3.2.5 is prohibited by Art. 3.1.4 ICCA, which states that "[t]he provisions on fraud […] are mandatory." Thus, the description of the Kestrel Eye 2010 as CLAIMANT's top model is a relevant statement for Art. 3.2.5 ICCA.

2. CLAIMANT Falsely Represented the Kestrel Eye 2010 as a State-of-the-Art Drone

104 CLAIMANT falsely represented the Kestrel Eye 2010 as being "state-of-the-art" [*Exhibit C2, p.10, 11, Preamble, Art. 2(f)*]. The Parties did not define this term. Thus, pursuant to Art. 4.2(2) ICCA, one must apply the understanding of a reasonable person of the same kind as the other party. State-of-the-art usually means "belonging or relating to the latest and most sophisticated stage of technological development; having or using the latest techniques or equipment" [*Oxford, "state-of-the-art"; cf. Cambridge, "state-of-the-art"*].

105 The Kestrel Eye 2010, which was launched ten years before the Call for Tender [*Exhibit C8, p. 20*], does not belong to the latest and most sophisticated stage of technological development. That ten-year-old drones are outdated is demonstrated by the fact that the Hawk Eye 2020 took only three years to develop [*NoA, p. 5, para. 10*], which means that the development cycles in the industry are comparatively short.

106 Moreover, the specifications of the Kestrel Eye 2010 cannot compete with those of a truly state-of-the-art drone like the Hawk Eye 2020: The Kestrel Eye 2010 uses a radio communication link that limits flights to line-of-sight distance [*NoA, p. 5, para. 9*]. Modern drones like the Hawk Eye 2020, on the contrary, use satellite communication that allows a range of several thousand kilometres [*Exhibit R3, p. 34*]. Additionally, faulty or delayed starts of the Kestrel Eye 2010 are twice as likely (more than 1/10) as of the Hawk Eye 2020 (1/20) [*Exhibit C4, p. 15; Exhibit R3, p. 34*]. Thus, CLAIMANT falsely represented the Kestrel Eye 2010 as being "state-of-the-art".

II. CLAIMANT Violated Its Disclosure Obligation

107 Moreover, CLAIMANT violated its disclosure obligation under Equatorianian law by not disclosing the existence of the Hawk Eye 2020. The Equatorianian Supreme Court has acknowledged the right to avoid a contract under the national equivalent of Art. 3.2.5 ICCA because of a violation of a disclosure obligation in a comparable case. It established that an experienced private party contracting with a newly formed SOE is under far-reaching disclosure obligations covering all information potentially relevant for the SOE. That disclosure obligation also extends to planned improvements to the product [*RNoA, pp. 29-30, para. 18; Exhibit C7, p. 19, para. 17*].

108 In the common law country Equatoriana [*PO1, p. 43, III.3*], the Supreme Court is the highest authority for the interpretation of the ICCA. The Tribunal should adopt the decision as the relevant facts of the cases are comparable (**1**). This is not changed by CLAIMANT's submission that Equatorianian courts have the reputation of deciding in favour of the state and its entities in cases of doubt (**2**).

1. The Relevant Facts of the Cases Are Comparable

109 The relevant facts of the case decided by the Supreme Court and the case at hand are comparable: Firstly, CLAIMANT is an experienced private party. It was established in 2000 [*PO2, p. 44, para. 1*] and has since then become a medium-sized company [*NoA, p. 4, para. 1*]. Its output of around five drones per year equals a revenue of approximately EUR 50,000,000 [*cf. Exhibit R4, p. 35*]. CLAIMANT has already traded with private companies and SOEs from various states [*cf. Exhibit C7, p. 18, para. 2; Exhibit R1, p. 32, para. 7*]. Consequently, it is an experienced private party.

110 Secondly, RESPONDENT is a newly formed government entity. It was established in 2016 [*PO2, p. 44, para. 4*] and did not start to generate its own revenues until 2019 [*PO2, p. 44, para. 7*], only around a year before the Call for Tender was opened [*cf. Exhibit C1, p. 9*]. Thus, it is a newly formed government entity.

111 Thirdly, the existence of a newer, better-suited model was relevant for RESPONDENT. As depicted earlier, the Hawk Eye 2020 would have served both of RESPONDENT's purposes – data collection and transport – in a better way and even offers a better cost-benefit ratio. Just like the Kestrel Eye 2010, it could be delivered from 2022 onwards. Thus, the Hawk Eye 2020 would have been the more reasonable choice for RESPONDENT. Consequently, the information about its existence was relevant to RESPONDENT.

112 CLAIMANT notes that the Supreme Court's case involves two domestic parties, while the case at hand is international in nature [*Claimant, para. 161*]. However, it remains unclear why this should lead to a restriction of the disclosure obligation. In fact, a disclosure obligation is even more important when the other party comes from another country. This makes enquiries about the other party's business more difficult.

113 The relevant facts of the case decided by the Supreme Court and the case at hand are comparable.

2. The Ruling Must Be Adopted Regardless of CLAIMANT's Objection against the Courts

114 CLAIMANT argues that the Tribunal should disregard the precedent because Equatorianian courts "have a reputation of deciding in favour of the state and its entities in case of doubt" [*Claimant, para. 161*]. However, this does not change the authority of the ruling. A mere reputation cannot result in the consequence that court rulings no longer have precedential value in a common law country. This would undermine the rationale of a legal system based on case law. The Parties have deliberately chosen this jurisdiction including its case law and considered it an equitable law to govern their contract. Consequently, the ruling must be adopted.

III. CLAIMANT's Behaviour Led RESPONDENT to Conclude the Contract

115 By misrepresenting the Kestrel Eye 2010's characteristics and not disclosing the Hawk Eye 2020, CLAIMANT led RESPONDENT to conclude the contract. Art. 3.2.5 ICCA requires a causal link between the fraudulent behaviour and the contract conclusion [*Brödermann, Art. 3.2.5, para. 1; Vogenauer/Du Plessis, Art. 3.2.5, para. 23*]. However, it does not require that the defrauded party would not have concluded the contract at all without the fraudulent conduct. Rather, there is already a causal link if the contract would not have been concluded on the same terms [*Vogenauer/Du Plessis, Art. 3.2.5, para. 24*].

116 As it is more suitable and offers the better cost-benefit ratio, RESPONDENT would have preferred the Hawk Eye 2020 over the Kestrel Eye 2010 if it had been aware of the new model. If it had known during the tender process that CLAIMANT was selling an outdated model, RESPONDENT would have at least renegotiated to reflect this in the purchase price or would not have purchased

the Kestrel Eye 2010 at all. At worst, RESPONDENT therefore would not have entered the contract in the first place or, at best, would not have concluded it on the present terms. Thus, the fraudulent conduct led RESPONDENT to conclude the contract.

IV. CLAIMANT Intended to Defraud RESPONDENT

117 CLAIMANT acted with the intent to defraud RESPONDENT. Art. 3.2.5 ICCA demands that the defrauding party "intended to lead the other party into error and thereby to gain an advantage to the detriment of the other party" [*Official Comments, Art. 3.2.5, para. 2; cf. Vogenauer/Du Plessis, Art. 3.2.5, para. 6; Brödermann, Art. 3.2.5, para. 1*].

118 CLAIMANT disputes any intent to defraud RESPONDENT, claiming it did not see any relevance of the information for RESPONDENT [*Claimant, paras. 153-154*]. Nevertheless, CLAIMANT must have been aware that not only its statements were incorrect, but also that the information about the Hawk Eye 2020 was relevant to RESPONDENT. As the manufacturer of both drones, it knew about all the technical specifications which demonstrate the superiority of the Hawk Eye 2020 in general and especially for RESPONDENT's purposes [*cf. Exhibit C4, p. 15; Exhibit R3, p. 34*]. Thus, CLAIMANT was aware that the Hawk Eye 2020 would have been the more suitable drone and information about it relevant for RESPONDENT.

119 CLAIMANT argues that it could not have had any intent to defraud RESPONDENT since CLAIMANT would not have benefitted from any misrepresentation or non-disclosure, as it could have sold the Hawk Eye 2020 to RESPONDENT for twice as much as the Kestrel Eye 2010 [*Claimant, para. 153*]. However, selling the Hawk Eye 2020 would not have increased CLAIMANT's profit. It knew that one Hawk Eye 2020 is as useful as several Kestrel Eye 2010. Thus, it was aware that RESPONDENT would have bought fewer Hawk Eye 2020 than Kestrel Eye 2010. As RESPONDENT initially preferred another supplier because of its cheaper offer [*Exhibit R1, p. 32, para. 3*], CLAIMANT had to lower its price per drone by 20 % [*Exhibit R1, p. 32, para.* 5] to be compatible and, therefore, was aware that a higher revenue from RESPONDENT was not possible. Instead, CLAIMANT's motive for selling was to liquidate the Kestrel Eye 2010, which had been bought back from an insolvent company [*cf. NoA, p. 5, para. 5*]. Therefore, CLAIMANT saw an advantage in selling the Kestrel Eye 2010 and concealing the Hawk Eye 2020. Thus, it intended to defraud RESPONDENT.

120 To conclude, CLAIMANT defrauded RESPONDENT in the sense of Art. 3.2.5 ICCA. It misrepresented facts, violated its disclosure obligation, and intentionally led RESPONDENT to conclude the Agreement.

C. The ICCA's Provisions on Confirmation and Time Limits Do Not Hinder Reliance on Art. 3.2.5 ICCA

121 CLAIMANT might argue that the ICCA's provisions on time limits (Art. 3.2.12 ICCA) and confirmation (Art. 3.2.9 ICCA) bar the application of Art. 3.2.5 ICCA. However, RESPONDENT neither exceeded the time limit to give notice of avoidance (**I**) nor confirmed the Agreement (**II**).

I. RESPONDENT Gave Notice of Avoidance in Due Time According to Art. 3.2.12 ICCA

122 RESPONDENT gave notice of avoidance within the time limit. Pursuant to Art. 3.2.12 ICCA, "[n]otice of avoidance shall be given within a reasonable time, having regard to the circumstances, after the avoiding party knew or could not have been unaware of the relevant facts […]". In general, the time span should be longer in cases of fraud than in cases of a mere mistake [*Vogenauer/Huber, Art. 3.2.12, para. 7*]. Furthermore, the Equatorianian Supreme Court specified the term "reasonable time". In the relevant decision, the Supreme Court ruled that a SOE had not exceeded the time limit when it had made the declaration of avoidance after more than a year of unsuccessful negotiations with a private party about the consequences of the non-disclosure [*RNoA, pp. 29-30, para. 18; Exhibit C7, p. 19, para. 17*].

123 As in the Supreme Court's case, RESPONDENT, an SOE, gave notice of avoidance approximately a year after it discovered the fraud [*Exhibit C8, p. 20; cf. Exhibit C7, p. 19, para. 13*]. Consequently, RESPONDENT gave the notice of avoidance within a reasonable time, in accordance with Art. 3.2.12 ICCA.

II. The Amendment Does Not Confirm the Agreement Pursuant to Art. 3.2.9 ICCA

124 RESPONDENT did not confirm the Agreement. CLAIMANT might assert that RESPONDENT did so by requesting the amendment of the Arbitration Clause [*cf. Exhibit C7, p. 19, para. 13*]. In doing so, it might rely on Art. 3.2.9 ICCA, which states that, "[i]f the party entitled to avoid the contract expressly or impliedly confirms the contract after the period of time for giving notice of avoidance has begun to run, avoidance of the contract is excluded". A confirmation requires a party to make clear that it considers the contract to be valid [*Official Comments, Art. 3.2.9; Vogenauer/Huber, Art. 3.2.9, para. 7-8; cf. Kramer, ZEuP, p. 225*].

125 As CLAIMANT knew, the amendment was merely included for political reasons. The amendment added the UNCITRAL Transparency Rules to the Arbitration Clause [*Exhibit C9, p. 22*]. The Equatorianian government needed to appease the right-wing party, which had agitated against the use of arbitration agreements, by increasing transparency [*Exhibit C7, p. 19, para. 15*]. This amended Arbitration Clause was used as an example of increased transparency during the following

parliamentary debate [*Exhibit C7, p. 19, para. 15*]. CLAIMANT's representatives themselves assumed that RESPONDENT only requested the amendment "to help [its] political friends for the upcoming parliamentary debate" [*Exhibit C7, p. 19, para. 14*]. Thus, the amendment does not reflect an intention of RESPONDENT to hold on to the Agreement. Accordingly, RESPONDENT did not confirm the Agreement.

CONCLUSION OF THE FOURTH ISSUE

126 RESPONDENT can rely on Art. 3.2.5 ICCA to avoid the Agreement. The CISG does not govern the matter and therefore does not supersede Art. 3.2.5 ICCA. The provision's prerequisites are fulfilled as CLAIMANT intentionally defrauded RESPONDENT with its false representation of the Kestrel Eye 2010 and with the non-disclosure of the Hawk Eye 2020. Moreover, the ICCA's provisions on time limits and confirmation do not hinder the application of Art. 3.2.5 ICCA. Thus, RESPONDENT can rely on Art. 3.2.5 ICCA to avoid the Agreement.

REQUEST FOR RELIEF

127 In response to the Tribunal's Procedural Orders and the Memorandum for CLAIMANT, Counsel makes the above submissions on behalf of RESPONDENT. For the reasons stated in this Memorandum, Counsel respectfully requests this Tribunal to declare that:

- The Arbitral Tribunal does not have jurisdiction to hear the dispute (**Issue 1**).
- Subsidiarily, the Proceedings will be stayed until the investigations against Mr. Field have been concluded, or alternatively bifurcated (**Issue 2**).
- The CISG does not govern the Agreement (**Issue 3**).
- RESPONDENT can rely on Art. 3.2.5 ICCA to avoid the Agreement (**Issue 4**).

CERTIFICATE

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. 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. Our university is competing in both the Vis East Moot and the Vienna Vis Moot. We are submitting two separately prepared, different Memoranda.

Leonard Helbrecht

Cordula von Heyl

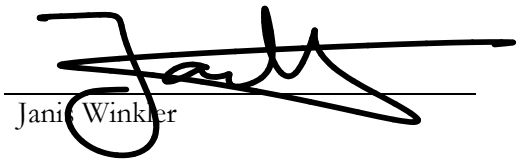
Christine Hohendorf

Paulina Kiefner

Sonja Sotty

Johann Wigger

Antonia Wingler



Janis Winkler