In the matter of arbitration under

Asian International Arbitration Centre Arbitration Rules

Case Reference: AIAC/INT/ADM-123-2021

UNIVERSITY OF BELGRADE

MEMORANDUM FOR CLAIMANT

CLAIMANT		RESPONDENT
ElGuP plc		JAJA Biofuel Ltd
156 Dendé Avenue		9601 Rudolf Diesel Street
Capital City	**v.**	Oceanside
Mediterraneo		Equatoriana

COUNSEL

ANJA KARADŽIĆ ♦ DUNJA TOMAŠEVIĆ ♦ DUŠAN JABLAN
JOVAN BEĆIRIĆ ♦ LUKA MILOŠEVIĆ ♦ LUKA STOJILKOVIĆ ♦ MILA PEJIĆ
NINA MITROVIĆ ♦ VUKAŠIN STANKOVIĆ ♦ ZORAN KOBAL ♦ ŽELJKO LOCI

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LIST OF ABBREVIATIONS

&	And
§	Section
¶/¶¶	Paragraph/paragraphs
AC	Appellate Court
AC Opinion	CISG Advisory Council Opinion
AG	Aktiengesellschaft, "Public Limited Company"
AIAC	Asian International Arbitration Centre
AMG	Amtsgericht
ARAMCO	Saudi Arabia v. Arabian American Oil Co.
Art.	Article
BGer	Bundesgerichtshof (Swiss Federal Supreme Court)
BGH	Bundesgerichtshof (Federal Court of Justice of Germany)
BGR	Bezirksgericht
CA	Court of Appeal
Cass. Civ	Cour de Cassation (The Court of Cassation of France)
CdA	Cour d'appel
CdC	Corte di Cassazione

CE	Claimant's Exhibit
CEO	Chief Executive Officer
CIArb	Chartered Institute of Arbitrators
CIETAC	China International Economic & Trade Arbitration Commission
CISG	United Nation Convention on Contracts for the International Sale of goods 1980
Claimant	ElGuP plc.
Co.	Company
Comm.	Commentary
COMPROMEX	Comisión para la Protección del Comercio Exterior de México
COO	Chief Operating Officer
DAL	Danubian Arbitration Law
DC	District Court
e.g.	Exempli gratia, "for example"
ed. / eds.	Editor / Editors
emph. Added	Emphasis added
et al.	Et alii / alia, "and others"
et seq.	Et sequitur / sequential, "and what follows"

etc.	Et cetera, "and so forth"
European Convention	European Convention on International Commercial Arbitration 1961
GH	Gerechtshof
GCoS	General Conditions of Sale
Hague Principles	Hague Principles on Choice of Law in International Commercial Contracts 2015
HC	High Court
HG	Handelsgericht
HoL	House of Lords
HR	Hoge raad (Supreme Court of the Netherlands)
i.e.	Id est, "that is"
IBA Rules	IBA Rules on Taking of Evidence in International Arbitration 2020
ICC	International Chamber of Commerce
ICC Court	International Chamber of Commerce Court of Arbitration
ICC Rules	Rules of Arbitration of the International Chamber of Commerce 2021
ICSID	International Center for Settlement of Investment Disputes
Inc.	Incorporated

KG	Kantonsgericht
LCIA	London Court of Arbitration
LG	Landgericht (District Court of Germany)
LGa	Landgericht (District Court of Austria)
LoA	Letter of Arbitration
LLC	Limited Liability Company
Memorandum	Memorandum for CLAIMANT submitted by the University in Belgrade Faculty of Law
Mr.	Mister
Ms.	Miss
No. / Nos.	Number / Numbers
NoA	Notice of Arbitration
NAI	Netherlands Arbitrage Institute
NYC	United Nations Convention of Recognition and Enforcement of Foreign Arbitral Awards 1958
OGH	Oberster Gerichtshof (Supreme Court of Austria)
OLG	Oberlandesgericht (High Court of Germany)
OLGa	Oberlandesgericht (High Court of Austria)
p./pp.	Page/pages

Para. /paras.	Paragraph/paragraphs
Parties	ElGuP plc, JAJA Biofuel ltd.
PICC	UNIDROIT Principles of International Commercial Contracts 2016
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
q.	Question
RE	RESPONDENT's Exhibit
RESPONDENT	JAJA Biofuel ltd
RNOA	Response to the notice of arbitration
RVK	Rechtbank van Koophandel
S.A.	Société anonyme, "Corporation"
SC	Supreme Court
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
Sec. Comm.	Secretariat Commentary
Srl.	Società a responsabilità limitata, "Limited liability ompany"
TC	Tribunal Commercial
TCL	Tribunal Cantonal

TS	Tribunal Supremo de España (Supreme Court of Spain)
Tribunal	Panel consisting of, Tenera Nigrescens, Georges Chavanne, Nikolaus von Jacquin (presiding arbitrator)
UCC	Uniform Commercial Code
UNCITRAL	United Nations Commission on International Trade Law
UNICTRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985
UNIDROIT	International Institute for the Unification of Private Law
USCA	United States Court of Appeal
v.	Versus, "against"
VCLT	Vienna Convention on the Law of Treaties 1969
Vol.	Volume

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	Supreme Court of Delaware 13 June 1961 *Wilmington Trust Co. v. Pennsylvania Co.* 40 Del. Ch. 1 (Del. 1961) 172 A.2d 63 Available at: https://casetext.com/case/wilmington-trust-co-v-pennsylvania-co-et-al	*Referred to in: ¶9 of the Memorandum* *(cited as: Wilmington v. Pennsylvania)*
	Supreme Court of Mississippi 07 December 1936 *Ammons v. Wilson Co.* 176 Miss. 645 (Miss. 1936) Available at: https://casetext.com/case/ammons-v-wilson-co	*Referred to in: ¶43 of the Memorandum* *(cited as: Ammons v. Wilson & Co)*

	Supreme Court of New Jersey 02 July 1992 *Weichert Co. Realtors v. Ryan* 128 N.J. 427 (N.J. 1992) Available at: https://casetext.com/case/weichert-co-realtors-v-ryan?resultsNav=false&q=acceptance%20can%20occur%20where%20the%20other%20party%20simply%20begins%20to%20perform%20the%20conduct%20within%20the%20terms%20of%20the%20offer%20CISG&p=1&tab=ps&jxs=&sort=relevance&type=case&find=#p435	*Referred to in: ¶43 of the Memorandum* *(cited as: Weichert Co. Realtors v.Ryan)*
	Supreme Court of South Dakota 14 April 1992 *Filanto S.p.A. v. Chillewich International Corp.* 91 CIV 3253 (CLB) Available at: https://scholar.google.com/scholar_case?case=7465841174193959179&q=Filanto+S.p.A.+v.+Chilewich&hl=en&as_sdt=2006&as_vis=1	*Referred to in: ¶¶31,43,48,67 of the Memorandum* *(cited as: Filanto Case)*
	District Court, M.D. Alabama 31 March 2010 *Belcher-Robinson, LLC v. Linamar Corporation* 3:09-cv-131-MEF Available at: https://cisg-online.org/search-for-cases?caseId=8008	*Referred to in: ¶62 of the Memorandum* *(cited as: Belcher-Robinson, LLC v. Linamar Corporation)*
	District Court, Delaware 13 May 2021 *AGB Contemporary A.G. v. Artemundi LLC* 20-1689 Available at: https://cisg-	*Referred to in: ¶22 of the Memorandum* *(cited as: AGB Contemporary A.G. v. Artemundi LLC)*

	online.org/files/cases/13495/fullTextFile/5581_43278317.pdf	
	District Court, N.D. Illinois, Eastern Division 07 December 1999 *Magellan International Corp. v. Salzgitter Handel GmbH* 76 F. Supp. 2d 919 (N.D. Ill. 1999) Available at: https://casetext.com/case/magellan-intern-corp-v-salzgitter-handel-gmbh	*Referred to in: ¶5 of the Memorandum* *(cited as: Magellan International Corp. v Salzgitter Handel GmbH)*
	District Court, D. Minnesota 31 June 2007 *Travelers Property Cas. v. Saint-Gobain Technical* 474 F. Supp. 2d 1075 Available at: https://casetext.com/case/travelers-property-cas-v-saint-gobain-technical	*Referred to in: ¶24 of the Memorandum* *(cited as: Travelers Property Cas. v. Saint-Gobain Technical)*
	District Court, S.D. New York 10 May 2002 *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.* 201 F. Supp. 2d 236 (S.D.N.Y. 2002) Available at: https://casetext.com/case/geneva-pharm-tech-corp-v-barr-laboratories-inc	*Referred to in: ¶5 of the Memorandum* *(cited as: Geneva Pharmaceuticals case)*
	District Court, S.D. New York 29 June 1990 *Don King Productions, Inc. v. Douglas* 742 F. Supp. 778 Available at: https://casetext.com/case/don-king-productions-inc-v-douglas-2	*Referred to in: ¶84 of the Memorandum* *(cited as: Don King Productions, Inc. v. Douglas)*

District Court, D. Oregon

05 December 2017

Meduri Farms, Inc. v. Dutchtecsource B.V.

3:17-cv-906-S

Available at:

https://scholar.google.com/scholar_case?case=12972142735784188065&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Referred to in: ¶22 of the Memorandum

(cited as: Meduri Farms, Inc. v. Dutchtecsource B.V.)

INDEX OF ARBITRAL AWARDS

CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION	10 June 2002 Case no: Available at: 1528 http://www.cisg-online.ch/content/api/cisg/urteile/1528.pdf	*Referred to in: ¶36 of the Memorandum* *(cited as: CIETAC, 10.06.2002)*
	4 February 2002 Case no: 986 Available at: https://iicl.law.pace.edu/cisg/case/china-february-4-2002-translation-available	*Referred to in: ¶14 of the Memorandum* *(cited as: CIETAC, 04.02.2002)*
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	1990 Award No: 6162 Available at: https://www.kluwerarbitration.com/document/IPN4092	*Referred to in: ¶96 of the Memorandum* *(cited as: ICC Award No. 6162)*
	November 1984 Award no: 4695 Available at: https://www.kluwerarbitration.com/document/IPN2491	*Referred to in: ¶85 of the Memorandum* *(cited as: ICC Award No. 4695)*
NETHERLANDS ARBITRAGE INSTITUTE	10 February 2005 Award no: 1621 Available at: https://cisg-online.org/search-for-cases?caseId=7540	*Referred to in: ¶67 of the Memorandum* *(cited as: NAI 10.02.2005)*
STOCKHOLM CHAMBER OF COMMERCE	05 June 1998 *Beijing Light Automobile Co. Ltd v. Conell Limited*	*Referred to in: ¶59 of the Memorandum*

Partnership *(cited as: SCC, 05.06.1998)*

Available at:

http://www.unilex.info/cisg/case/338

INDEX OF LEGAL ACTS, RULES AND OTHER SOURCES

AIAC RULES	Asian Intenational Arbitration Center Rules 2021 Available at: https://admin.aiac.world/uploads/ckupload/ckupload_20210801103608_18.pdf	*Referred to in: ¶¶13,81,124 of the Memorandum* *(cited as: AIAC Rules)*
CISG	United Nations, United Nations Convention on Contracts for the International Sales of Goods 1980 Available at: https://www.cisg.law.pace.edu/cisg/text/treaty.html	*Referred to in: throughout the Memorandum* *(cited as: CISG)*
CISG Advisory Council Opinion No. 13	*CISG-AC Opinion No. 13* *Inclusion of the Standard Terms Under the CISG* 20 January 2013 Available at: https://www.cisgac.com/cisgac-opinion-no13/	*Referred to in: throughout the Memorandum* *(cited as: AC Opinion 13)*
DANUBIAN ARBITRATION LAW	United Nations Commission on International Trade Law - Danubian Arbitration Law (UNCITRAL Model Law on International Commercial Arbitration) 1985 with amendments as adopted in 2006 Available at: https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07- 86998_Ebook.pdf	*Referred to in: throughout the Memorandum* *(cited as: DAL)*
ECICA	European Convention on International Commercial Arbitration European Commision for Europe	*Referred to in: ¶17 of the Memorandum* *(cited as: ECICA)*

	1961 Available at: https://treaties.un.org/doc/Treaties/1964/01/19640107%2002-01%20AM/Ch_XXII_02p.pdf	
NYC	United Nations Commission on International Trade Law New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 Available at: http://www.newyorkconvention.org/english	*Referred to in: throughout the Memorandum* *(cited as: NYC)*
PICC	UNIDROIT, *UNIDROIT Principles of International Commercial Contracts* International Institute for the Unification of Private Law 2010 Available at: https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/	*Referred to in: ¶¶14,24,84,87,118 of the Memorandum* *(cited as: PICC)*

STATEMENT OF FACTS

1. **ElGuP plc** (hereinafter: **CLAIMANT**) is one of the largest producers of RSPO-certified palm oil and palm kernel oil based in Mediterraneo. Its annual production is around 30,000t.
2. **JAJA Biofuel** (hereinafter: **RESPONDENT**) is a well-established producer of biofuel based in Equatoriana. In late 2018, RESPONDENT was acquired by Southern Commodities, a multinational conglomerate engaging in all kinds of commodities and their derivatives with its headquarters in Ruritania.
3. **In the period between 2010 and 2018**, CLAIMANT's COO, Mr. Chandra, concluded around forty contracts for the sale of palm kernel oil exclusively negotiated with Ms. Bupati, who, at the beginning of this period was Southern Commodities' Head of Contracting and is now RESPONDENT's Head of Purchase.
4. Among all of the contracts concluded, Ms. Bupati raised objections to the contract documents only in three cases, always within one week after she had obtained them. Moreover, even if Ms. Bupati signed most of these contracts, five have never been signed, and yet they were *all* performed. For all of these unsigned yet performed contracts, Ms. Bupati had further opened a letter of credit, 6 weeks before the actual shipping date, in line with practice established between Southern Commodities and CLAIMANT, and not as foreseen in Clause 7 (a) of the model contract.
5. On **28 March 2020**, CLAIMANT's COO, Mr. Chandra, and now RESPONDENT's Head of Purchase, Ms. Bupati, met at the Palm Oil Summit in Capital City in Mediterraneo. There, Mr. Chandra gave a quotation to Ms. Bupati of 20,000t of RSPO certified segregated palm oil under a favorable price of USD 900/t. They managed to settle all commercial terms for purchasing the entire available palm oil production of CLAIMANT.
6. On **1 April 2020**, Ms. Bupati sent a purchase offer for the exact same commercial terms negotiated at the Summit i.e., for 20,000t of RSPO-certified segregated palm oil per annum for the years 2021 - 2025 cif Oceanside, USD 900/t for the first year; thereafter market price minus 5%, to be delivered in up to six installments per annum, with delivery starting in January 2021.
7. On **9 April 2020**, Mr. Rain, Mr. Chandra's assistant, sent the contractual documents signed by Mr. Chandra to Ms. Bupati's assistant, Ms. Fauconnier. The accompanying letter explicitly mentioned that the Contract would be governed by the law of Mediterraneo and that the purchase would be subject to the CLAIMANT's General Conditions of Sale. The General

Conditions of Sale were not included in the letter as they were known to Ms. Bupati from her work for Southern Commodities.

8. On **3 May 2020**, Ms. Fauconnier contacted Mr. Rain to set up a meeting to discuss issues concerning the letter of credit which RESPONDENT was required to open under Clause 7(a) of the Contract. She wanted to specify the payment terms and determine which banks fell under the "acceptable banks".

9. On **29 October 2020,** CLAIMANT learned that RESPONDENT had allegedly stopped all further negotiations through an article published in Commodities News. The next day, on **30 October 2020**, CLAIMANT received a letter from RESPONDENT's CEO, Ms. Youni Lever declaring the termination of any further negotiations on the delivery of palm oil and additionally renouncing all existing contractual relations, allegedly due to information about CLAIMANT's infringements of basic RSPO standards.

10. On **03 November 2020**, Ms. Bupati confirmed Ms. Lever's letter. Over the course of the next month, there were several rounds of negotiations with Mr. Fotearth, RESPONDENT's CEO, however, to no avail. Equally, a mediation effort between the Parties under the AIAC Mediation Rules vastly failed to such an extent that it was not even possible to agree on the jurisdiction of the Arbitral Tribunal.

11. On **14 July 2021**, Mr. Joseph Langweiler, representative of CLAIMANT, sent the Notice of Arbitration (hereinafter **NoA**) on CLAIMANT's behalf.

12. On **14 August 2021**, Ms. Julia Clara Fasttrack, representative of RESPONDENT, sent the Response to the Notice of Arbitration (hereinafter **RNoA**).

INTRODUCTORY REMARKS ON FACTS, LEGAL ARGUMENTS AND APPLICABLE LAW

13. Arbitration Agreement contained in Art. 9 GCoS provides that the proceedings shall be conducted in accordance with 2021 AIAC Rules. Article 9 GCoS further provides that the Contract shall be governed by the substantive law of Danubia, while also choosing Danubia as the seat of arbitration. Danubian Arbitration Law (hereinafter: **DAL**), *lex arbitri*, is a verbatim adoption of the UNCITRAL Model Law with the 2006 amendments [*PO1, §III.3*] (hereinafter: **DAL, UML**). While Danubia and Equatoriana have adopted the Option 1 of Art. 7, Mediterraneo and Ruritania have the adopted Option 2. While Option 2 is freed from any requirements regarding arbitration agreement, Option 1 states that the arbitration agreement shall be in writing. According to Option 1(6) of Art. 7 DAL, the reference in a contract to any

document containing an arbitration clause is sufficient to fulfill this requirement. Thus, it is beyond dispute that the reference to arbitration agreement contained in GCoS [*CE3, table*] is sufficient under DAL to operate as a starting premise for the Tribunal in these proceedings in determining whether it has jurisdiction or not.

14. Danubia, Equatoriana and Mediterraneo are all member states of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: **the NYC**) [*PO1, §III.3*]. Equatoriana, Mediterraneo and Ruritania are Contracting States of the CISG, however, Danubia is not [*PO1, ¶3*]. General non-harmonized contract law of all three countries (Equatoriana, Mediterraneo and Ruritania) is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts (hereinafter PICC) [*PO2, q.47*].

15. Having in mind that the Parties agree that the applicable law to the sales contract, if concluded, is the law of Mediterraneo, including the CISG [*PO2, q.33*], provisions of Art. 8 CISG should serve as an interpretative tool for Parties' statements and conduct. The CISG sets hierarchy in the means of interpretation [*Art. 8 (1, 2) CISG, Brunner et al., 90*], which implies that in line with the Art. 8(1) CISG, statements and conduct of the parties are to firstly be interpreted according to the actual intent of the parties when such intent was known to the other party or the other party could not have been unaware of such intent. When a party was unaware of the other party's intent, Art. 8(2) CISG provides that statements and conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. Pursuant to Art. 8(3) CISG, in determining the intent of a party or the understanding that a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties. Moreover, it is generally considered that Art. 8 CISG should be interpreted as the hypothetical understanding of a reasonable person of the same kind as the other party under the same circumstances [*Schmidt/Kessel, 155; Calnan, 49; OGH, 20.03.1997; HGer Aargau, 26.11.2008; ICC Case No.11849; TS, 17.01.2008*].

16. Whether GCoS have been validly incorporated into the Contract (and the accompanying arbitration agreement) will be elaborated in detail in the ensuing sections of this Memorandum, but it should be stated at the outset, that the valid inclusion of the GCoS into the Contract can be established, *inter alia,* by reference to a practice established between the Parties.

17. Article 9 CISG dictates that Parties are bound by any practices they have established between themselves *[Brunner et al., 100; Schmidt-Kessel, 181; Mazzotta, 105*]. Practice is defined as conduct

established between the participants in a contract during a certain time and number of contracts for the fulfillment of their respective obligations that are, due to their repetition in time, binding upon them and thus are incorporated into the contract *[OGH, 31.08.2005*]. Furthermore, the parties must recognize their conduct as practice *[OGH, 06.02.1996*], so that they can justifiably expect the proceeding of such conduct in the future *[Schmidt-Kessel, 185*].

18. Such relevant practice indeed exists in the case at hand. Parties' representatives in charge of contract negotiations, Mr. Chandra and Ms. Bupati, had been in a "long lasting and successful business relationship" *[CE2, ¶2*] from 2010-2018 which gave rise to around 40 contracts which were always governed by CLAIMANT's GCoS *[PO2, q.7*], and consisted of the same contract template (FOFSA/PORAM 81) *[CE2, ¶7; CE4, ¶2*]. The difference between subject-matters of the contract (such as in this case palm oil and palm kernel oil) is immaterial for confirming the existence of a practice between the parties *[Schroeter, 301*]. Thus, the contracting practices between the two should be taken into account in these proceedings, as well as the fact that all 40 contracts were governed by CLAIMANT's GCoS *[PO2, q.7*].

19. In the case at hand, the only modification regarding the GCoS, based on Parties' correspondence, is the law governing the sale (law of Mediterraneo instead of Danubia), while GCoS would apply to all other issues and left intact the seat of arbitration [*CE4, ¶¶ 3, 4*].

20. The main dispute between the Parties arose from the fact that RESPONDENT arbitrarily terminated "the negotiations" of the Contract on 30 October 2020 [*CE7, ¶2*], whereas CLAIMANT opines that a valid Contract was formed many months earlier [*CE3; NoA, ¶7*]. The first question to be resolved in these proceedings is whether the Parties have concluded a contract in 2020 (***§I.***). If the Tribunal decides in the affirmative, another matter in controversy between them is whether Claimant's GCoS were validly included into the contract. Finally, there is a dispute between the Parties as to whether they have validly agreed on the jurisdiction of the Arbitral Tribunal (***§III.***), to be precise, which law governs the Arbitration Agreement (***§III.1.***), as well as whether the CISG is applicable to the conclusion of the Arbitration Agreement (***§III.2.***) if the Tribunal finds its governing law to be Mediterraneo.

21. CLAIMANT will address these points of divergence, as directed by the Tribunal's Procedural Order No. 1, and prove that on the basis of the above mentioned facts and the applicable law:

- The Tribunal should confirm that the Parties entered into a binding contract in 2020 (***§I.***);
- The Tribunal should confirm that Claimant's GCoS have been validly included into the Contract *(**§II.***);

- The Parties have validly agreed on the jurisdiction of the Tribunal (***§III.1.***);
- The law of Danubia governs the Arbitration Agreement (***§III.1.***);
- In the event that the law of Mediterraneo is applicable to the Arbitration Agreement, the CISG is inapplicable to its conclusion (***§III.2.***).

I. THE PARTIES VALIDLY CONCLUDED A CONTRACT IN 2020

22. Upon meeting at the Palm Oil Summit on 28 March 2020, the Parties' representatives Ms. Bupati and Mr. Chandra both expressed their fervent interest in concluding a contract for the sale of palm oil. Following the negotiations commenced at the Summit, on 1 April 2020, RESPONDENT made a "Purchase Offer" which dictated the quantity, quality, delivery terms and price of the palm oil to be delivered [*CE1, ¶12; CE2, ¶3*], which CLAIMANT expressly accepted eight days later [*CE4, ¶2*].

23. In an attempt to justify non-performance of its contractual obligations RESPONDENT now maintains that the Parties never entered into a valid contract but were still at the stage of negotiations [*RNoA, ¶16*]. RESPONDENT asserts that even if the Tribunal finds its employee made the binding offer, CLAIMANT's e-mail of 9 April 2020 constituted a counter-offer [*RNoA, ¶16*], which was never accepted due to the absence of RESPONDENT's signature on the contractual documentation [*RNoA, ¶17*]. However, RESPONDENT appears to omit the fact that, according to Arts. 14 - 24 CISG, a contract is concluded only through a valid offer and its acceptance, completely free from form requirements pursuant to Art. 11 CISG, and as no state made any reservations pursuant to Art. 96 CISG, the contract requires no signature for validity [*PO2, q.34*].

24. Owing to RESPONDENT's unsubstantiated allegations, CLAIMANT submits that RESPONDENT made a sufficiently definite offer while demonstrating intention to be bound (**1.**), which was explicitly accepted by CLAIMANT (**2.**). Even if the Tribunal were to find that CLAIMANT's e-mail corresponds to a counter-offer instead of acceptance (**3.**), such a counter-offer was accepted by RESPONDENT (**4.**), resulting in a Contract that was properly formed.

1. RESPONDENT MADE A VALID OFFER

25. Under the CISG, a mere proposal becomes a valid offer once it is sufficiently definite, indicates the offeror's intention to be bound in case of an acceptance and is addressed to one or more specific persons [*Art. 14 CISG; Brunner et al.1, 122; DiMatteo et al., 53, 54; Furmston/Tolhurst, 23*]. As the offer was made directly to CLAIMANT [*CE2*], it is undisputed that the specificity requirement is fulfilled, and needs no further clarifications. Thus, contrary to RESPONDENT's allegations

[*RNoA, ¶16*], CLAIMANT submits that, according to the Parties' electronic communication and behindhand discussion, RESPONDENT made a sufficiently definite offer (**1.1.**) furthered by RESPONDENT's intention to be bound (**1.2.**).

1.1. RESPONDENT made a sufficiently definite offer in line with Art. 14 (1) CISG

26. An offer is sufficiently definite once it indicates the goods and expressly or implicitly provides for their quantity, as well as the price [*Art. 14(1) CISG*; *Zeller, 151; Mullis, 72; Schlechtriem, 105; Saunders/Rymsza*, *12; Eiselen/Bergenthal, 217*]. A proposal can be considered to be sufficiently definite only if it may serve as the *basis* of a contract, i.e. if it expresses the *essentialia negotii*, so that, if the proposal is accepted, it would yield a contract capable of being enforced [*Brunner et al.1, 125; Magellan International Corp. v Salzgitter Handel GmbH; DiMatteo, 200; Magnus, 16-17; Mullis, 72; Schwenzer et al., 132*]. Also, offers providing for the purchase of a "certain quantity for a number of years" [*Butler et al., 7; DiMatteo et al., 55; Geneva Pharmaceuticals case*], and for a purchase price determined at a later time, oftentimes adjusted to reflect market prices [*Brunner et al.1, 124; Cass. Civ, 04.01.1995; CdA, 22.04.1992*], have all been found sufficiently definite.

27. Given the above-stated requirements for a proposal to conclude the contract to be qualified as an offer under the CISG, it is beyond doubt that RESPONDENT's purchase order of 1 April 2020 constitutes an offer [*CE2, ¶3*]. Namely, RESPONDENT determined: (1) the goods (RSPO-certified segregated palm oil), (2) their quantity (20,000t per annum), as well as expressly determined (3) the price of USD 900/t for the first year, along with a provision which would establish it according to the market price at time of shipment (market price minus 5%) for the last 4 years of the contract [*CE2, ¶3*]. These elements, which mirrored the terms already agreed upon at the Summit, remained unaltered by CLAIMANT's e-mail of 9 April 2020 [*CE4*]. Therefore, RESPONDENT's proposal met all the requirements pertaining to sufficient definiteness of an offer under the CISG.

1.2. RESPONDENT exhibited intention to be bound through its statements and conduct

28. Along with the prerequisite of sufficient definiteness, an offeror must exhibit intention to be bound in case of acceptance [*Art. 14(1) CISG; OGH, 18.07.1997*; *Zeller, 143*; *Cvetkovic*, *2002*; *Di Matteo, 187; Schwenzer/Mohs, 240; Sec. Comm. Art. 12 (CISG Art. 14), 20; Mullis, 70*] in order for an offer to exist. Such an intention characterizes the distinctive line between an offer and a mere non-binding negotiation of the terms of the contract [*Brunner et. al., 122*; *Schroeter, 282*; *Mehren, 130; Bowen LJ, 268; DiMatteo2, 194*]. Therefore, by virtue of the hierarchy resulting from Art. 8 CISG, the language and conduct of the offeree which determines his intention of being bound, is to be

firstly interpreted according to the offeror's intent known by the other party [*Zuppi, 143; Mazzotta, 94, 95; Reiley, 89*]. Furthermore, even if one is to interpret these according to an understanding that a reasonable person were to have in the same circumstances [*Art. 8 (2) CISG; Schwenzer/Fountoulakis, 80; Schmidt/Kessel, 155; Calnan, 49; OGH, 20.03.1997; HG Aargau, 26.11.2008; ICC Case No.11849; TS, 17.01.2008*], the result would be the same.

29. Contrary to Respondent's allegations [*RNoA, ¶16*] the Parties were *not* still negotiating the terms of the Contract as RESPONDENT exhibited intention to be bound both through its statements (**1.2.1.**) and by its conduct (**1.2.2.**), and thus took a first step towards contract conclusion .

1.2.1. RESPONDENT's intention to be bound was expressed by its clear language

30. When assessing the intention of the parties, the starting point is the language used [*Staughton*, *305*]. In particular, "a man cannot get out of a contract by saying 'I did not intend to contract' if by his words he has done so" [*Storer v. Manchester City Council*]. The offeror must use language which would clearly indicate that the proposal is not an offer due to the offeror's lack of intention to contract [*Furmston/Tolhurst, 16*]. Formulations such as "this offer is subject to formal approval by our Board of Directors" expressly show such *lack* of intention [*Wilmington v. Pennsylvania*].

31. However, in the case at hand, the Parties agreed orally at the Palm Oil Summit that Ms. Bupati was to get approval from their management *before* making a firm offer [*RNoA, ¶8; NoA, ¶5*]. Thus, when Ms. Bupati sent a "Purchase order" on 1 April 2020 [*CE2*], CLAIMANT had no reason to believe that such an approval was not given. Considering Ms. Bupati's position as Head of Contracting and her 10-year long position as Head of Purchase before [*CE2, ¶2; RE3, ¶3*], she can reasonably be trusted to know the proper language of expressing reservations when making purchase orders. As a matter of fact, RESPONDENT itself admits that the approval was given before sending the e-mail of 1 April 2020 and that indeed an offer was made [*RNoA, ¶9*].

32. Moreover, specific language used in the early stages of arbitral proceedings serves as a smoking gun in confirming the existence of a purchase *offer* as well. Namely, even RESPONDENT's attorney, Ms. Fasttrack, explicitly labeled RESPONDENT's proposal as an *offer* three times in the ***"facts"*** part of the RNoA [*RNoA, ¶¶8, 9, 12; RE3, ¶2, 3*]. It is only reasonable to expect that an attorney would use correct legal terminology such as "offer" in official documents, but especially when trying to argue the opposite [*RNoA, ¶16*].

33. Therefore, since the language employed by RESPONDENT and its attorney confirms its intention of being bound by its offer, the Tribunal should find that an offer satisfying all CISG requirements was indeed made on 1 April 2020.

1.2.2. RESPONDENT's intention to be bound was expressed by its conduct

34. Under the CISG due consideration may also be given to conduct exhibited *after* the conclusion of the contract [*HoL, 01.06.2009; BGH, 11.12.1996; BGR St. Gallen, 03.07.1997*], in confirming oferror's intent to be bound. If the offeror's behavior when making a proposal proves the offeree correct in believing his proposal was in fact an offer, then the offeror cannot argue that it was not his intention to make an offer [*Furmston/Tolhurst, 22*].

35. After thirty-three days of sending an offer RESPONDENT inquired about which banks are deemed "acceptable" under Clause 7(a) of the Contract [*RE2, ¶3; CE5, ¶4*] in order to "avoid comparable problems in the *present contract"* with the ones it had with its previous supplier [*PO2, q.22*]. The reasoning behind this inquiry shows not only RESPONDENT's awareness of the fact the Contract was already concluded at this point, but also their intention of being bound in case of acceptance, as they began contract performance. Corroborating this, RESPONDENT took a step further, by contacting several of these acceptable banks to get quotations as to the terms for the letter of credit [*CE1, ¶15; PO2, q.23*]. Art. 54 CISG stipulates a duty to take steps in enabling payment of the purchase price being made, and an "undertaking to issue a letter of credit" derives from such an obligation [*CIETAC, 04.02.2002; BGR der Saane, 20.02.1997; Downs Investments v. Perwaja Steel; Compromex, 11.30.1998*]. Thus, it is evident that RESPONDENT started executing its contractual duties of enabling payment of the contractually agreed price [*NOA, ¶8; CE1, ¶15; CE5, ¶4; PO2, q.23*]. On the other hand, CLAIMANT also commenced its activities in reliance to the Contract by contacting several shipping companies to get quotation for the first shipment [*PO2, q.23*], thus demonstrating its understanding that the Parties have indeed entered into the Contract.

36. Where the parties are relying on an assumption established by their conduct, promise or representation, the doctrine of estoppel prevents them from denying that assumption when it would be unjust to do so *[Beatson et al., 116-117; Calnan, 195*]. Courts have recognized that estoppel stems from the principle of good faith in Art. 7 CISG and is thus applicable to contracts concluded under it *[OLG Karlsruhe, 25.06.1997; OLG München, 15.09.2004*]. The undisclosed subjective intentions are, therefore, immaterial in a commercial transaction, especially when contradicted by objective conduct *[Klopfenstein v Pargeter*].

37. Thus, when Ms. Fauconnier inquired about the "recognized banks", she fortified CLAIMANT's understanding that the Contract was formed. It makes no sense, commercial or otherwise, to have RESPONDENT execute its contractual duties if it had not concluded a contract in the first place. Therefore, CLAIMANT asks the Tribunal to declare that the contract was concluded.

2. CLAIMANT'S E-MAIL OF 9 APRIL 2020 CONSTITUTED A VALID ACCEPTANCE

38. By virtue of Art. 15 CISG offer becomes effective once it reaches the offeree [*Butler, 9; Brunner et al.1, 131; Ferrari/Torsello, 183; RVK Tongeren, 25.01.2005*] i.e., is made orally or delivered to him by other means, to his place of business or mailing address [*Art. 24 CISG; Ferrari/Torsello, 183; Leete, 11; Felemegas, 119; Nolan, 72*]. In the case at hand, CLAIMANT itself confirmed that it received the offer [*CE1, ¶12*] and that it accepted it [*CE4, ¶2*]. Thus, it was effective which fulfill the precondition to a valid acceptance.

39. An acceptance, however, needs to fulfill four necessary conditions so that, together with a valid offer, it may lay the foundation of a traditionally crafted contract in the sense of Art. 23 CISG. Those requirements are: effectiveness, non-withdrawal, assent and unqualifiedness [*Mullis, 84; Gaetan/Donfack, 111; UN DOC. A/CONF. 97/5; Ferrari/Torsello,188*]. The first two conditions are uncontestedly met.

40. Firstly, acceptance ensues at the moment assent reaches the offeror [*Art. 18(2) CISG; Ferrari/Torsello, 192; ICC Award 7844; Furmston/Tolhurst, 66; VLM Food Trading Case; MCB, 10.01.1992*]. As RESPONDENT wanted to clarify certain terms from the contractual documentation which were sent in the e-mail which were incorporated in the acceptance, it is undisputed that this condition is fulfilled.

41. Secondly, as withdrawal of an acceptance must reach the offeror before or along with the acceptance [*Art. 22 CISG; Schroeter, 388; Mullis, 100; Ferrari, 317; Zeller, 232*], and no communication between the Parties ensued until RESPONDENT started with the contract execution, one must conclude that the acceptance was not withdrawn either.

42. Therefore, Claimant's acceptance indicated assent to the offeror (**2.1.**), was unqualified and thus rendered the acceptance valid (**2.2.**).

2.1. CLAIMANT's acceptance indicated assent to an offer

43. Pursuant to Art. 18 CISG, "a statement made by or other conduct of the offeree indicating assent to an offer is an acceptance" [*Art. 18(1) CISG; Mullis 85; DC Delaware 13.05.2021; DC Oregon 05.12.2017; Zeller, 148*; *Schwenzer/Fountoulakis, 154*]. Firstly, to indicate assent, an offeree must use decisive language [*Furmston/Tolhurst, 90; Ferrari/Torsello, 188-189*]. Whether a statement indicates assent, or is unambiguous, must be determined by interpretation employing Art. 8 CISG. For example, communication in the form of "I accept your offer" will constitute an acceptance [*Furmston/Tolhurst, 90; Ferrari/Torsello, 188-189*]. Furthermore, as confirmed in case-law, an email confirmation in response to a purchase order outlining the item, quantity, price, and place of

delivery of the goods *constitutes an acceptance* to the purchase order [*VLM Food Trading Intern, Inc. v. Illinois Trading Co*].

44. In the present case, Mr. Forrest Rain did exactly that - responded on behalf of CLAIMANT in the email dated 9 April 2020 which reads: *"*…I have inserted the terms of your offer, **which we accept***"* [*CE4*, ¶*2*]. Thus, the requirement that the acceptance should come in the form of a statement, in which the intention to assent is exhibited, is fulfilled in line with Art. 18(1) CISG. CLAIMANT underlines that pursuant to Arts. 8 (1) & (2) CISG, RESPONDENT could not have been unaware of CLAIMANT's intent, as it was explicitly stated, and any reasonable person would have had the same understanding of that statement.

2.2. CLAIMANT's acceptance was unqualified under Art. 19 CISG

45. The fourth requirement for a valid acceptance is that the assent must be *unqualified* [A*rt. 19(1)*; *Mullis, 88; Kim, 44; Mun Lee, 213; Ferrari/Torsello 188*]. Under the mirror image rule, the acceptance must "mirror" the offer in order to be unqualified [*Art. 19 CISG (1,2); Schwenzer/Hachem/Kee, 151; Furmston/Tolhurst, 84; Ferrari/Torsello1, 196-197; Schroeter, 351; Travelers Property Casualty Co. v. Saint-Gobain*]. That means, assent must be given *without* any modifications (…) or additions [*Art. 19(1) CISG*; *Art. 2.1.11 PICC*; *Scott/Kraus, §61; Schroeter, 359*]. In the case at hand, the acceptance fully mirrors the offer as *no* additions were made to the initially given offer. This is because RESPONDENT's offer of 1 April 2020 incorporates the underlying assumptions for the final Contract as reached during the Palm Oil Summit, as will be explained below.

46. It is held that during the negotiations one party defines its GCoS as a *prerequisite to the conclusion of a contract* and the other party does *not object*, that serves as sufficient evidence that the other party accepted the inclusion of the GCoS [*Naudé, 388*]. The offeror's silence in response to the attachment of standard terms and conditions may only be interpreted as assent if practice (Art. 9 CISG) exists, or if additional circumstances justify it [*Brunner et al.2, 145*].

47. In the case at hand, Mr Chandra expressly communicated to Ms. Bupati: "under CLAIMANT's new policy, contracts should be governed by the law of Mediterraneo while the remaining terms would be those of the previous contracts, **including CLAIMANT's GCoS**" [*PO2, q.13*]. Thus, Mr. Chandra made it clear that the inclusion of their GCoS [*RNoA, ¶10; PO2, q.13*], and the substitution of the governing law [*CE1, ¶13; CE2, ¶3*] *preconditioned contract conclusion* [*CE1, ¶11*].

48. Furthermore, Respondent *never objected* to the application of the GCoS, either in the Contract at question or in the previous 8 contracts concluded and executed between the Parties' representatives [*PO2, q.2*] As practice was established that Ms Bupati would object to certain

"unacceptable terms" one week after she obtained contract documents [*PO2, q.9*], silence to the attachment of standard terms may therefore only be interpreted as assent. Moreover, not only that RESPONDENT acknowledged the change to the law of Mediterraneo [*NoA, ¶6*], but it deemed the change acceptable as well [*CE2, ¶6*].

49. Hence, Respondent attempts to ignore the fact that it accepted the inclusion of the GCoS and the change of the governing law during negotiations [*RNoA, ¶10*; *PO2, q.13*] should be disregarded. This further means that the reference to them in Mr. Rain's e-mail merely mirrored terms agreed between the Parties aforehand and does not represent a *"qualified"* acceptance in the sense of Art. 19 (2) & (3) CISG.

3. IN ANY EVENT, CLAIMANT'S E-MAIL FROM 9 APRIL 2020 DID NOT CONSTITUTE A COUNTER-OFFER

50. RESPONDENT aims to portray Mr. Rain's e-mail from 9 April 2020 [*CE4*] as counteroffer [*RNoA, ¶17*]. However, not only that it does not constitute a counter-offer but an acceptance, for the reasons explained above, it can also not be considered as counter-offer, considering that the reference to the GCoS would not *materially* alter the initially proposed terms.

51. Although Art. 19(3) CISG prescribes that the inclusion of certain terms in the acceptance, such as a dispute resolution clause, constitutes a material alteration of the offer [*Brunner et al. 1, 147*], additions consistent with practices which bind the parties [*Art. 9 CISG; Bridge, 68; Schwenzer/Fountoulakis, 91*] will not be considered as crippling to the conclusion of the contract [*Ferrari, 282; Schröter, 353*], i.e. will not be considered as material. Therefore, despite the language of Art. 19(3) CISG a dispute resolution clause may prove immaterial, due to usages between the parties but also due to special circumstances of the case [*OGH, 20.03.1997*].

52. The same issue of whether the arbitration clause regulating dispute resolution materially alters the offer, was addressed in *Filanto v. Chillewhich*. In that case, the court found that in light of the extensive course of prior dealing between these parties, Filanto was certainly under a duty to alert Chilewich in timely fashion to its objections to the terms of the arbitration clause – particularly since Chilewich had repeatedly referred it to the contract in question and since Filanto commenced performance by opening a letter of credit [*Filanto case*].

53. In the case at hand, Mr. Chandra merely followed prior dealings of including the arbitration clause within the GCoS in the contract. As every single contract concluded between him and Ms. Bupati always incorporated an arbitration clause within the GCoS, and especially as the last 8 incorporated the post-2016 GCoS [*PO2, q.7*], it was only reasonable for Ms. Bupati to expect that

the arbitration clause along with the GCoS would be included into this contract as well. Moreover, Mr. Chandra had not stopped reminding Ms. Bupati before, during *and* after contract conclusion of both the application of the GCoS and the arbitration clause therein [*CE4 ¶4; RNoA ¶10*], as only a good business partner would. CLAIMANT has not only acted in good faith, but went beyond mere due diligence, and persistently reminded RESPONDENT of this, giving them time to object in case they wanted to deviate from these practices - which RESPONDENT has not done.

54. Hence, Ms Bupati was certainly under a duty to alert the CLAIMANT in timely fashion to RESPONDENT's objections to the inclusion of the arbitration clause – just as Filanto should have alerted Chilewich. Thus, it could only be expected from Ms. Bupati to have objected to inclusion of GCoS at any given point throughout the negotiation and the conclusion of the contract.

55. Furthermore, as the inclusion of the arbitration clause and the GCoS went in favor of RESPONDENT, it is surely to be considered as an immaterial "alteration". Namely, modifications which go in favor of the offeror are considered as *immaterial* and do not require a counter-acceptance, even if that modification is enumerated in the CISG as one, which alters the offer *materialy* [OGH, 20.03.1997].

56. Therefore, as Respondent explicitly asked for arbitration under the auspices of *non-industry related* institution [*CE2, ¶ 8*], and considering the current post-2016 arbitration clause sent by CLAIMANT already portrays RESPONDENT's wish, the inclusion of this arbitration clause in the GCoS actually benefits the RESPONDENT. Furthermore, Ms Bupati's concerns regarding transparency [*CE2, ¶ 8*], are guided by concerns in investment arbitration, and cannot be reconciled with the confidential nature of commercial arbitration. Hence, there is nothing in CLAIMANT's GCoS that negates RESPONDENT's interest, and consequently CLAIMANT's e-mail of 10 April 2020 does not add material alterations to RESPONDENT's offer.

57. Under Art. 19(2) CISG, which should be applied in this case, all immaterial alterations must be objected to with undue delay, as otherwise, the contract will consist of the initial terms *and* the added ones [Art. 19 (2) CISG; *Ferrari, 281; Schlechtriem/Butler, 80*]. Notably, not even a time span as brief as 5 days after the purported acceptance can be considered as a timely objection [*CIETAC, 10.06.2002*].

58. With this in mind, it can safely be concluded that the acceptance which referred to the GCoS yielded a valid contract, as RESPONDENT had not even contacted CLAIMANT until *25 days after* the conclusion of the contract [*PO2, q.21*], i.e. CLAIMANT's e-mail of 10 April 2020, let alone objected to the inclusion of the GCoS.

59. With all of this in mind, even if the Tribunal considered the inclusion of the GCoS as an "addition" to the offer, CLAIMANT prompts the Tribunal to find that the Contract was still concluded on the basis of the terms mentioned in CLAIMANT's e-mail of 10 April 2020, since that addition would have been *immaterial* and would have not been objected to timely in the sense of Art. 19(2).

4. ALTERNATIVELY, EVEN IF CLAIMANT'S E-MAIL OF 9 APRIL 2020 IS TO CONSTITUTE A COUNTER-OFFER, IT WAS ACCEPTED BY VIRTUE OF ART. 18 CISG

60. In the unlikely case that, despite all of the above, the Tribunal were to find that CLAIMANT's e-mail of 9 April 2020 constituted a counter-offer instead of acceptance and therefore materially altered initial terms, it would nevertheless have to find that the said counter-offer was accepted by the RESPONDENT, both through active conduct (**4.1.**) and tacitly (**4.2.**).

4.1. CLAIMANT's counter-offer was actively accepted

61. If the Tribunal finds that RESPONDENT's allegations pertaining to the existence of a counter-offer are founded [*RNoA, ¶17*], RESPONDENT actively accepted such counter-offer. It is accepted that a contract may spring into existence by any means - including by conduct, although in order for assent to be given in this manner, the offeree must do something "important in connection with the contract or has to have performed an important part of the contract" [*Zeller, 175*]. One of these actions is the buyer's main, primary, and essential obligation under the CISG - to pay the price [*Mohs*, *793; DeVan Daggett, 273*].

62. Art. 54 CISG stipulates that the buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract to enable payment to be made [*Art. 54 CISG; Baasch Andersen, 522; SC of Queensland, 17.11.2000; Compromex, 30.11.1998*], such as opening a letter of credit [*Honnold, 464*; *Schlechtriem/Butler, 157; SC of Queensland, 17.11.2000*]. The importance of this obligation can also be seen through the consequences of failure to comply with it - as failure in establishing a letter of credit would constitute a fundamental breach of contract in accordance with Art. 25 CISG [*Honnold, 351*; *Baasch Andersen, 530; Maskow, 395; Mohs, 841-842; SC of Queensland, 17.11.2000*].

63. Respondent made an inquiry aiming to determine the names of the banks which would classify as "acceptable" in the sense of the Clause 7(1) of the Contract [*NOA, ¶8; CE1, ¶15; RE2, ¶3*], and went a step further by contacting those banks to get quotations as to the terms for the letter of credit [*PO2, q.23*]. By means of this demeanor, it is clear that RESPONDENT started executing its

primary contractual duty of providing CLAIMANT with the payment. Therefore, RESPONDENT is amiss to argue that the alleged counter-offer was not accepted **as a contract may not be performed prior to being concluded.**

4.2. CLAIMANT's counter-offer was at least tacitly accepted

64. Apart from the active conduct, RESPONDENT at least accepted the alleged counter-offer tacitly. As CISG is governed by the *principle of informality,* a contract of sale does not have to be concluded in or evidenced by writing or be subjected to any other form requirement [*Art. 11 CISG; Saunders/Rymsza, 10*; *Honnold, 180; Mun Lee, 209; Ferrari, 264; Schwenzer, 333; Schmit/Kessel, 203*]. Therefore, it can be concluded by any means, including oral communication, conduct or even silence of an offeree under given circumstances [*UCC, §2-206; Mazzotta, 128; Viscasillas, 185; Ferrari, 265; Jenkins, 273; KG Freiburg, 11.10.2004; RVK, 25.01.2005*]. As silence does not generally constitute acceptance, there must be facts substantiating that by being silent, the offeree is in fact expressing his assent to the offer [*Furmston/Tolhurst, 102*]. For example, prior dealings of the parties may provide a time frame under which they consider it *reasonable* to give notification of non-acceptance of the counter-offer [*Scott/Kraus, §69(3); Esenkulova, 27; Filanto case*]. After that time has passed, the offeror is left with an understanding that, by staying silent, the offeree indicates his assent to the proposed terms [*Furmston/Tolhurst, 107, Ammons v. Wilson & Co; Weichert Co. Realtors v. Ryan*].

65. In the present case, a time span of one week became customary for CLAIMANT and Ms. Bupati, as she would "typically object" to the added contractual terms within this time frame in her past dealings with CLAIMANT [*PO2, q.9*]. However, this time around, RESPONDENT had not even attempted to communicate with CLAIMANT in any way until a month after the conclusion of this Contract [*PO2, q.21*], much less objected to it. Thus, CLAIMANT was steered into understanding that the Contract was in fact concluded.

66. In summary, rivaling RESPONDENT's assertions, CLAIMANT submits that the Contract was indeed a product of the meeting of the minds between the Parties, as RESPONDENT made a sufficiently definite offer accompanied by intention to be bound, and ultimately accepted by CLAIMANT. If the Tribunal were to hold that CLAIMANT made a counter-offer instead of accepting existing offer, such a counter-offer was nevertheless accepted. As a result, the Tribunal is to find that a Contract between the Parties has indeed been concluded in 2020.

II. CLAIMANT'S GCoS HAVE BEEN VALIDLY INCLUDED INTO THE CONTRACT

67. Despite the fact that the CISG does not contain any provisions expressly dealing with the incorporation of standard terms, it has been unanimously held both in doctrine and in case-law that this issue is governed by articles dealing with interpretation (Arts. 7, 8 CISG), practices and usages (Art. 9 CISG) as well as contract formation (Arts. 14 - 24 CISG) [*AC Opinion 13, ¶¶1.2,1.3,1.4*; *Schroeter, 289; Ferrari, 232*; *Huber, 30*; *OGH, 31.08.2005; OGH, 06.02.1996; Court de Cassation, 16.07.1998; Chateau des Charmes Wines Ltd. v. Sabaté USA, Inc. et al.; Hoge Raad, 28.01.2005; OLG Frankfurt, 26.06.2006; HG des Kantons Bern, 19.05.2008*; *BGH, 31.10.2001*; *OLG Zweibrücken*, *31.03.1998*; *OLG München*, *11.03.1998*].

68. Although it seemed undisputed at the time of the conclusion of the Contract that CLAIMANT's GCoS form a part of it (See §I), RESPONDENT now objects that they have not been validly included into the Contract. However, not only have CLAIMANT'S GCoS been validly incorporated by a clear reference (**1.**), but even if additional requirements are needed for valid incorporation of standard terms into the contract, all of them are fulfilled (**2.**). Furthermore, RESPONDENT omitted to timely object to the incorporation of CLAIMANT's GCoS, thus making them part of the Contract (**3.**). In any event, the Parties' representatives have established a practice to include GCoS into their contracts, which amounts to their valid incorporation into the Contract (**4.**).

1. A CLEAR REFERENCE IS IN ITSELF SUFFICIENT IN ORDER TO MAKE GCoS A PART OF THE CONTRACT

69. In order for standard terms to be validly incorporated into a contract, a mere reference to the terms in question suffices [*AC Opinion 13, ¶1.7; Schwenzer/Hacheem/Kee*, *166*; *Schroeter*, *292*; *Magnus*, *320; Meškić*, *37*; *LG Coburg*, *12.12.2006*; *OLG Linz, 08.08.2005*; *OGH, 17.12.2003*; *Filanto Case*; *RBK Tongeren*, *25.01.2005*]. Not even the transmission of the standard terms' text is necessary as it goes beyond the clear rules contained in Arts. 8, 14 & 18 CISG and their underlying principles to require contractual conduct which is not even required in domestic law [*Eiselen*, *12/234*; *Kruisinga*, *73*; *OGH*, *17.12.2003*].

70. Most notably, for standard terms to be seen as a part of a contract, the offeror's intention to incorporate the standard terms must be apparent to the recipient [*Schroeter*, *292*; *Huber, 31*]. In light of that, it has been established that this requirement will usually demand a clear and understandable reference to the standard terms in the offer, according to Art. 8(2) CISG [*AC*

Opinion 13, ¶¶*2.5, 2.13, 3.4; Magnus*, *315*; *BGH*, *31.10.2001*; *OLG Zweibrücken*, *31.03.1998*; *LG Coburg*, *12.12.2006*; *OGH, 17.12.2003*].

71. It is a common place that the intention to incorporate the standard terms into the contract can be evident from a noticeable reference during the parties' prior negotiations [*Naudé*, *388*; *OGH, 31.08.2005*]. In such an instance, a party should be considered aware that the GCoS were part of the agreement, according to Arts. 8(1) & (3) CISG [*DiMatteo et al., 64*; *TC Nivelles 19.09.1995*]. In light of that, it is undisputed that during the Summit in March 2020, Mr. Chandra told Ms. Bupati that CLAIMANT intends to use its modified GCoS in their future dealings [*NOA*, ¶*7*; *RNoA, ¶10*]. Therefore, RESPONDENT was adequately notified of CLAIMANT'S intention to incorporate the GCoS even before the conclusion of the Contract.

72. Furthermore, the reference to the GCoS was further reflected in the contractual documentation. Namely, the Contract prepared by CLAIMANT explicitly mentioned that the purchase of palm oil would be subject to CLAIMANT'S GCoS [*CE3*]. Not only is the incorporation clause on the very first page of the contract, but it was highlighted by using a different font, and outlined amongst the most important details of the Contract. The fact that the reference was conspicuous means that even a person without any business knowledge could have noticed it, let alone a reasonable person of such expertise as Ms. Bupati. She has been concluding commercial contracts for over 10 years [*RE3*, ¶*2*], and thus has substantial business experience.

73. Finally, if a party specifies that it is only prepared to contract on its own standard terms, and the other party does not object, the incorporation of said terms is deemed accepted [*Naudé*, *396*; *DiMatteo, 81; OGH*, *06.02.1996*; *LG Innsbruck*, *09.07.2004*; *OLG München*, *14.01.2009*]. In the present case, CLAIMANT indicated that it would conclude a contract only under its GCoS [*NOA,* ¶*7; CE1*, ¶*11*]. On the other hand, RESPONDENT has never objected to the GCoS during the entirety of their business relationship. Consequently, RESPONDENT'S inactivity amounted to consent to the incorporation of the GCoS.

74. Having in mind everything mentioned, CLAIMANT's reference to the GCoS in the Contract documentation, coupled with the fact that RESPONDENT was aware and could not have been aware of said reference, suffices for a valid inclusion of GCoS into the Contract.

2. EVEN IF ADDITIONAL REQUIREMENTS WERE NEEDED FOR VALID INCORPORATION OF STANDARD TERMS INTO THE CONTRACT, ALL OF THEM ARE FULFILLED

75. Even though a mere reference to the GCoS is sufficient to incorporate them into the Contract (See **1.1.**), additional requirements for their incorporation into the contract are also fulfilled. The

knowledge of a RESPONDENT'S representative suffices to make it aware of the GCoS's content (**2.1.**). The GCoS's text does not have to be provided for every individual transaction in a long-lasting business relationship, even when it has undergone subsequent changes, on the condition that such changes are beneficial to the other party (**2.2.**). Finally, the GCoS text was available on CLAIMANT'S website (**2.3.**).

2.1. Ms. Bupati's knowledge of the GCoS is sufficient to make RESPONDENT aware of their contents

76. RESPONDENT wrongfully claims that Ms. Bupati's knowledge of the GCoS, because they were only sent to Southern Commodities, is insufficient to render RESPONDENT aware of their content [*RNoA, ¶13*]. Such a statement is in stark contrast with stance from the case law which confirms that the business relationship between a company and another company's representative is relevant in the context of incorporating the standard terms into the contract [*OLG Innsbruck, 05.02.2005*].

77. RESPONDENT's insisting on the difference of legal personalities between RESPONDENT and Southern Commodities, its parent company, is relying on pure formalism and avoidance of the economic reality. After all, following the acquisition by Southern Commodities, RESPONDENT became a 100% subsidiary of Southern Commodities [*PO2*, q.*4*] that controls RESPONDENT in various aspects. Its plans were to centralize *its* business under the roof of RESPONDENT [*NOA*, ¶*4*; *CE2*, ¶*2*], to increase RESPONDENT'S production of biofuel [*CE6*, ¶*4*] and to set up and control its management. Namely, aside from Ms. Bupati, RESPONDENT'S whole management [*RE3*, ¶*5*], including the CEO, was installed by its mother company, Southern Commodities [*RE1*, ¶*1*]. Southern Commodities, RESPONDENT'S parent company, is a multinational conglomerate which operated directly in the palm oil industry [*PO2*, ¶*6*]. Furthermore, of the 40 employees who had previously worked in the palm kernel oil unit of Southern Commodities, 36 in total moved to work for RESPONDENT [*PO2*, q.*5*]. Thus, even though RESPONDENT is a distinct company from Southern Commodities, their relationship is such that Southern Commodities controls the business operations of RESPONDENT. Therefore, emphasizing on differences between these two companies serves no benefit to Respondent.

78. Moreover, everything above mentioned is crucial when deciding that RESPONDENT is aware of the content of GCoS. Namely, all contracts concluded by RESPONDENT are handled by its Head of Contracts, Ms. Bupati [*CE2*; *CE7*, ¶*2*]. She had been in that same function for Southern Commodities for around 9 years (from 2010 – 2019) [*RE3*, ¶*2*]. Consequently, her experience in

the palm kernel oil market and connection to the palm oil producers was the very reason she was appointed as the Head of Contracts for RESPONDENT [*RE3*, ¶*4*]. To claim that her own knowledge of CLAIMANT'S GCoS was insufficient because she is working for RESPONDENT [*RNoA, ¶13*] would be contrary to the very purpose of her appointment. Furthermore, Ms. Bupati's knowledge of CLAIMANT'S GCoS is beyond doubt (see section **2.2.** below).

79. Consequently, as CLAIMANT'S GCoS were known to Ms. Bupati during her work at Southern Commodities (see below), such knowledge should also be imputed to RESPONDENT.

2.2. In a long-lasting business relationship, the text of the GCoS does not have to be re-sent, even when they have been changed subsequently, provided that such change is to the other party's benefit

80. Not only is a mere REFERENCE in the offer sufficient to make the standard terms part of the offer (see **1.1.**), it is all the more sufficient in cases in which the offeree already has actual and positive knowledge of the standard terms' content (Art. 8(1) CISG) at the moment he receives the offer for their incorporation into the contract [*Schroeter, 289; Ferrari/Fletcher/Brand, 270; TC Nivelles, 19.09.1995*]. In a long-lasting business relationships, where the standard terms have been given to the other party at the beginning of such relationship, it is not necessary to send them every time a contract is concluded [*Schroeter, 300; Naudé, 395; AC Opinion 13, ¶¶2.6,3.6; Huber/Mullis*, *32; OGH, 14.01.2002; SCC, 05.06.1998; OGH, 31.08.2005*]. In order to qualify as a practice in the sense of Art. 9(1) CISG, conduct between the parties should consist of behavior patterns frequently upheld during a certain period in a way that parties in good faith can rely on the fact that the practices will be followed in future occasions [*Schwenzer/Hacheem/Kee, 167-168; Schmidt-Kessel, 185; Viscasillas, 158; OGH*, *31.08.2005*]. A practice is therefore binding on the parties only if the parties' relationship has lasted for some time and the practice has appeared in multiple contracts [*Schwenzer/Hacheem/Kee, 313; Amtsgericht Duisburg, 13.04.2000*].

81. Such a long-lasting business RELATIONSHIP is certainly present between the Parties in the case at hand, i.e. between their representatives as they have already been contracting from 2010 to 2018 and have concluded over 40 contracts [*CE1*, ¶*2*; *CE4*, ¶*2*; *RNoA*, ¶*18*; *RE3*, ¶*2*]. Not only has Ms. Bupati said so herself [*CE2*, ¶*2*], but the intention to preserve the business relationship was all the clearer when she showed great interest in purchasing the entire available production of palm oil from CLAIMANT from 2021 onwards for five years [*NOA*, ¶*5*].

82. Mr. Chandra SENT CLAIMANT'S GCoS in 2011, at the beginning of the business relationship with Ms. Bupati which revolved around 40 concluded contracts based on the same contract template

[*RNoA*, ¶*11; NOA*, ¶*7*; *PO2,* q.*7; CE1*, ¶*4*; *CE4,* ¶*2*, *CE3*] and Ms. Bupati cannot exclude that they were re-sent in 2016, upon their change [*RNoA*, ¶*13*; *PO2*, q.*7*] and that eight contracts were concluded and executed upon such a change, whereas the amended GCoS formed part of each of these contracts and two of them were not signed [*PO2*, q.*7*].

83. Furthermore, the 2016 CHANGE in the GCoS (even in the unlikely case that its text was not sent to Respondent's representative) operates in RESPONDENT's favor. It is generally understood that modifications in favor of the counterparty, in particular, do not require a counter-acceptance [*Ferrari*, *291*; *Schwenzer/Hachem/Kee*, *152*; *Furmston/Tolhurst*, *68*; *OGH, 20.03.1997*; *Belcher-Robinson, L.L.C. v. Linamar Corp.*].

84. The change in QUESTION in this case, regards the change of dispute resolution policy since the 2016 edition of the GCoS refers to a non-industry related arbitration institution and not arbitration under the rules of a commodity arbitration institution [*RNoA, ¶11*]. The change itself is such that it complies with RESPONDENT's concerns. Namely, during the negotiations Ms. Bupati explicitly stated that "at least we should select non-industry related arbitration institutions and provide some sort of transparency", as she "had forgotten that Mr. Chandra informed her" about the change in the arbitration clause i.e. the change to a non-industry related arbitration institution [*CE2*, ¶*6*]. CLAIMANT'S most recent edition of GCoS calls for the settlement by arbitration in accordance with the AIAC Arbitration Rules, a non-industry related arbitration institution [*RE4*]. Transparency concerns, on the other hand, are guided by RESPONDENT'S concerns in investment arbitration, and cannot be reconciled with the confidential nature of commercial arbitration. Therefore, there is nothing in CLAIMANT's GCoS that negates RESPONDENT's interest. Quite the contrary, together with the 5 year contract under favorable commercial terms, RESPONDENT got a non-industry related arbitration institution as a dispute resolution venue.

85. As a matter of fact, the ONLY provision in GCoS that RESPONDENT essentially now has issue with is Clause 4 which gives CLAIMANT an additional period of time of two months to remedy the problems with individual suppliers, before RESPONDENT could have terminated the Contract for cause [*RNoA*, ¶*20*]. However, such a provision has never been changed during the entire course of the Parties' business relationship, i.e. ever since they were transmitted to Ms. Bupati in 2011 [*RNoA*, ¶*11*] and formed part of every single contract the Parties have ever concluded [*CE1*, ¶*3*]. Therefore, the 2016 changes of the GCoS cannot be considered to affect the existing business relationship between the Parties.

2.3. In any event, CLAIMANT's GCoS were readily available on its website

86. Because of the fact that in today's world it is unreasonable to expect for the standard terms to be transmitted every single time a contract is concluded, the "making available test" was devised [*Schroeter*, *299*]. This test establishes more flexible standards regarding the implementation of GCoS and it applies under the CISG in accordance with Arts. 14 and 8(2), (3) CISG [*Magnus*, *319*; *Huber*, *127*].

87. It is up to the offeree to enquire about the contents of the standard terms, according to the principle of good faith [*Eiselen*, *13/234*; *Schmidt-Kessel*, *174*; *Huber*, *127*; *LG Coburg*, *12.12.2006*; *LG Heilbronn*, *15.09.1997*; *TC Nivelles*, *19.09.1995*]. The central point is that the offeree must have had the possibility to reasonably take notice of and record the standard terms [*Schwenzer/Hacheem/Kee*, *166*; *Schroeter*, *301*]. The offeror may ensure the offeree's required awareness of the standard terms' text through availability on the internet [*Schroeter*, *299*; *AC Opinion 13*, ¶*3.4*]. In today's world of modern communication, inquiry about the standard terms does not pose a challenge to participants in international transactions [*Eiselen*, *13/234*]. Although not easily accessible, the GCoS were made available on CLAIMANT'S website [*PO2*, q.*18*]. This in itself prevents RESPONDENT from arguing that it could not have been aware of their contents.

3. FAILURE TO OBJECT TO THE INCORPORATION OF CLAIMANT'S GCOS IN A TIMELY MANNER MAKES THEM A PART OF THE CONTRACT

88. An indication of assent to a set of standard terms may be made by statement, oral or written, or by conduct [*OLG Frankfurt, 30.04.2000*; *OLG Frankfurt, 23.05.1995*; *Hof Arnhem, 10.02.2005; Compromex*, *29.04.1996*]. Standard terms must neither be read, nor expressly confirmed or signed by the parties [*Schroeter, 311*]. Additionally, the wording of Art. 18 (1) CISG shows that silence in conjunction with other circumstances, such as practices established between the parties, can indicate a declaration as well [*Schroeter, 339; Viscasillas, 158; CdA Grenoble, 21.10.1999; RKV, 19.03.2003; Filanto Case*]. If the parties have a practice of accepting without notice, or if other circumstances indicate that silence is reasonable, silence or inactivity may be a valid method of acceptance [*DiMatteo et al., 60*]. By failing to express disagreement with the standard terms, the buyer impliedly accepts them allowing the seller to rely on the buyer's acceptance [*Magnus*, *318-319*; *Schroeter*, *311*; *Hof Arnhem*, *10.02.2005*].

89. In the present case, there is an existing practice between the Parties' representatives that unless Ms. Bupati objects within a week, a contract is concluded with the terms of the contractual documents [*NoA*, ¶*19*]. There have been at least five cases in the past, during the contractual

relationship of CLAIMANT and RESPONDENT'S parent company, Southern Commodities, where RESPONDENT did not sign the contract but it was nonetheless subsequently performed [*CE1*, ¶*3*; *CE5*, ¶7; *RE3*, ¶*3*]. This practice can also be extended to the inclusion of CLAIMANT'S GCoS because they form part of the contract.

90. Furthermore, even though Respondent never objected to the application of either version of CLAIMANT'S GCoS (2011 or 2016), they were nevertheless applied to each contract. RESPONDENT had not objected within a week made customary by Ms. Bupati during her time at Southern Commodities [*CE1*, ¶*14*; *PO2*, q.*9*]. Therefore, RESPONDENT impliedly agreed to incorporate CLAIMANT'S GCoS through an established practice.

91. In addition, the practice of implicit inclusion of contractual documents further extends to the opening of the letter of credit (See §I, **1.2.2.**). Standard terms can therefore be impliedly accepted if the other party *begins* to perform its obligation without objecting to them [*AC Opinion 13*, ¶*2.13; CdA Grenoble, 21.10.1999; OGH, 06.02.2005; Zuppi, 152*].

4. IN ANY EVENT, CLAIMANT'S GCOS HAVE BEEN VALIDLY INCLUDED AS PART OF A PRACTICE ESTABLISHED BETWEEN THE PARTIES' REPRESENTATIVES

92. Standard terms can, in and of themselves, as a contractual document, be incorporated into a contract through a practice established between the parties [*Schwenzer/Hacheem/Kee, 166; Schroeter, 309; Schmidt-Kessel, 185*]. By virtue of an established practice, neither the reference to the standard terms nor their transmission is required [*AC Opinion 13*, ¶*2.7; OGH, 14.01.2002*].

93. As the conclusion of the Contract was exactly in line with the procedure the Parties have established during the entirety of their contractual relationship (2011 – 2018) [*CE1*, ¶*13*], the inclusion of CLAIMANT's GCos formed part of that procedure, as all contracts concluded declared CLAIMANT's GCoS to be applicable [*PO2,* q.*7*].

94. Even if Respondent claims that the change in GCoS has stopped the previously established practice, a new practice has subsequently been formed from 2016 to 2018. In the said period of time, Mr. Chandra and Ms. Bupati have concluded eight contracts, which were all dealt with according to the same conclusion procedure, and two of which have not been signed but have nonetheless been performed. All of the contracts declared CLAIMANT's GCoS to be applicable [*PO2*, q.*7*]. Therefore, Respondent's claims contradict its own conduct, because it continued to utilize the GCoS in the same manner as before the change in 2016.

95. In any event, even if Ms. Bupati wished to exclude the application of the existing practice, a one-sided termination has effect only with regards to future contracts [*Schmidt-Kessel, 186; Viscasillas,*

167; *ICC Ct Arb, 8817/12.1997*; *CdA Grenoble*, *13.09.1995*]. The previously tacitly accepted practice cannot be derogated without an express agreement between the parties. Therefore, the ongoing practice is still applicable [*ICC Ct Arb, 8817/12.1997*]. Since CLAIMANT never consented to such a change in practice, the new practice was not established.

96. For all the reasons aforementioned, CLAIMANT's GCoS have been validly included into the Contract.

III. THE PARTIES VALIDLY AGREED ON THE JURISDICTION OF THE ARBITRAL TRIBUNAL

97. Not only that RESPONDENT objects to valid incorporation of the GCoS into the Contract, but it specifically objects to incorporation of the Arbitration Agreement contained therein. Cognizant of the fact that the GCoS have been validly incorporated into the Contract under *lex causae* (CISG), as demonstrated in sec. II above, RESPONDENT bases its argumentation on the operation of the same (Mediterranean) law which allegedly leads to a different result when it comes to incorporation of the Arbitration Agreement [*RNoA, ¶14*]. In doing so, RESPONDENT neglects the fact that the Arbitration Agreement is severable from the contract in which it is contained in, and that a different set of law may govern the formation and validity of the Arbitration Agreement and the Sale Contract in which it is contained in [*Lew et al., 107*; *Waincymer, 135; Gaillard/Savage, 212; Born1, 313, 354; Born2, 819; XL Insurance Case*]. With this in mind, and given the background of this dispute, it is CLAIMANT'S submission that Danubian law, as *lex arbitri*, governs the conclusion and validity of the Arbitration Agreement (**1.**) and that, alternatively, even if Mediterranean law is to be found applicable to the Arbitration Agreement, its contents do not include the CISG (**2.**).

1. THE ARBITRATION AGREEMENT IS GOVERNED BY THE LAW OF DANUBIA

98. Contrary to RESPONDENT'S allegation, the Arbitration Agreement is governed by Danubian and not by Mediterranean law. According to the doctrine of separability (**1.1.**) and the principle of dépeçage (**1.2.**), the laws governing the arbitration agreement and the main contract may differ. The Parties implicitly agreed on Danubian law as the law governing the Arbitration Agreement (**1.3.**). The said choice of law governing the Arbitration Agreement can be inferred from the designation of the seat of arbitration itself (**1.1.1.**), the negotiations between the Parties (**1.1.2.**) and through application of the validation principle (**1.1.3.**). Even if the Tribunal finds that the law governing the arbitration agreement was never expressly agreed upon, Danubian law should be

applied as the law of the seat of arbitration in accordance with the default rule provided by Art. V(1)(a) NYC, Art. 34(2)(a)(i) and Art. 36(1)(a)(i) DAL (**1.4.**). In addition, if the Tribunal decides that the default rule is also not applicable, the law of the seat of arbitration should apply as the one with the closest and most real connection to the Arbitration Agreement (**1.5.**).

1.1. In accordance with the doctrine of separability, the Arbitration Agreement is an autonomous agreement and therefore may be governed by a different law

99. It is undisputed that the law governing the contract may differ from a law governing arbitration agreement contained therein [*Craig et al., 48; Gaillard/Savage, 199; Sulamerica Case ¶11 Poudret/Besson, 142; Miles/Goh, 386; Channel Case ¶67*]. Consequently, separate inquiry into determining proper law applicable to the arbitration agreement itself is necessary [*Nazzini, 3*].

100. The doctrine of separability emphasizes that an arbitration agreement, as a component of the main contract, is autonomous and separate [*Waincymer, 132; Craig et al., 48; Lew et al., 102; Leboulanger, 5; Feehily, 382; Huda, 26; Molfa, 166*]. The main contract and the arbitration agreement are different by nature as the latter deals with procedural issues, while the main contract concerns substantive rights and duties of the parties [*Lew et al., 102; Kröll2, 47; Waincymer, 135; Leboulanger, 14; Pitkowitz, 519*]. Therefore, the arbitration agreement is "*an agreement within an agreement*" [*XL Insurance Case, 19*], and should be treated as if it is a separate document [*Harbour Assurance Case, 92*; *Premium Nafta Case ¶19*].

101. When the arbitration agreement is considered a part of a contract, it does not simply constitute a single provision of the main agreement, but an independent agreement of a special nature [*Born3, 177; Berger, 319; BG Swiss, 07.10.1993*]. In a recent landmark decision by UK Supreme Court the Rt Hon. Lord Popplewell LJ made a specific point that *"one of the purposes for which an arbitration agreement is treated as separate and severable is that of applying the curial law which, where the parties have chosen a different arbitration seat - and hence curial law - from the law applicable to their contract, is distinct from the latter system of law"* [*Enka v Chubb ¶64*].

102. Art. 23(1) AIAC Rules confirms the doctrine of separability by stating: *"An arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract."*. The doctrine of separability is also recognized in Art. 16(1) and Art. 21(2) DAL, as *lex arbitri*. In addition, this doctrine is well-recognized in the laws of Mediterraneo, Equatoriana and Danubia, as all three states incorporated the Hague Principles, which embrace the separability doctrine in Art. 7. Thus, it should be beyond dispute that the doctrine of separability gives the Arbitration Agreement autonomous existence.

103. One of the most important consequences of the doctrine of separability is that an arbitration agreement may be governed by a different law than the law applicable to the main contract [*Lew et al., 107*; *Waincymer, 135; Gaillard/Savage, 212; Born1, 313, 354; Born2, 819*].

1.2. Even if the separability doctrine is not applicable, the same conclusion arises from the principle of dépeçage

104. It is a well-established rule in private international law that the parties to a dispute, by virtue of the autonomy of will, can apply different laws to govern different parts of their contracts [*Gaillard/Savage, 794; Tweeddale/Tweeddale, 183; Cheshire et al., 54; Moses, 76; Baniassadi 63; USCA, Jul 28, 1980; Nike Informatic System Ltd v Avac Systems Ltd*]. This principle, also known as the principle of dépeçage, allows parties to take full advantage of their autonomy regards the choice of law [*Vita Food Products Inc v Unus Shipping Co*].

105. Party's autonomy is a cornerstone of arbitral practice [*Art 1.1 PICC; Art. 6 CISG; Art. 28 UML; Born1, 82; Janssen/Spilker, 135; Basedow, 32; Sitaru, 335; Steingruber,; Magnus, 519*]. The arbitration clause may, more than any other clause be governed by a different law, not only because a different subject matter governs it, but also because under the separability doctrine an arbitration clause is considered as a different agreement from the main contract. [*Enka v. Chubb ¶40; see above 1.1*]. Possibility to apply different laws to the arbitration agreement and to the underlying contract is a familiar example of the principle of dépeçage [*Born1, 2876; Danielowicz 237; Lalive, 49; Enka v. Chubb*]. The parties may choose the law applicable to the whole contract, or only to a part of it, or even to a single clause of the contract [*Broome v Antler's Hunting Club case; Don King Production v Douglas case*]. The principle of dépeçage permits partial or multiple choice of law i.e. subjecting separate parts of the contract to different laws [*HCCH Comm. Art. 2(2) 37; Gertz 179*].

106. Hague Principles, which were incorporated into the national conflict of law rules in Danubia and in Mediterraneo [*PO2, ¶36*], specifically provide in Art. 2(2) the possibility for the Parties to apply different law to govern their Arbitration Agreement i.e. to apply the principle of dépeçage to one specific provision of their contract, the Arbitration Agreement [*ICC Award No 4695; ICC Award No 4402; ICC Award No 3100*].

107. It is not necessary for the parties to expressly provide for the application of dépeçage, it can be applied implicitly by choosing different laws to govern different clauses of the contract [*Duaso Cales, 6*]. By allowing the parties to choose the applicable "rules of law", modern statutes on arbitration clearly validate such choice, and it is not even necessary to justify that choice by establishing that certain "parts" of the contract can be distinguished [*Gaillard/Savage 794; Art. 28*

UNCITRAL Model Law; Art. 1054 Netherlands Code of Civil Procedure; Art. 187 Swiss Private International Law Statute; Art. 1051 German ZPO; Saudi Arabia v. Arabian American Oil Co.].

1.3. The Parties implicitly agreed on the law of Danubia as the law governing the Arbitration Agreement

108. The principles of interpretation applied to arbitration agreements are basically the same as those applied to all contracts [*Gaillard/Savage, 256*]. To determine the parties' agreement on the governing law for an arbitration agreement, one must ascertain the parties' shared intention at the time of the conclusion of the agreement. These principles of interpretation are enshrined in both the law of Mediterraneo (with or without CISG) and the law of Danubia (Art. 8 CISG, Arts. 4.1, 4.2, 4.3 PICC).

109. The parties' intention may be expressed or inferred [*Collins et al., 1539-1540*]. To identify such intention, written instruments as well as non-written instruments, including negotiations and parties' conduct, should be referred to [*Born1, 742*].

1.3.1. The designation of the seat of arbitration itself is to be interpreted as an implied choice of law governing the Arbitration Agreement

110. While drafting their contract parties rarely choose specific law applicable to their arbitration agreement [*Nazzini, 1; Born4, 526*]. When the parties determined the seat of arbitration, it is inevitably interpreted as an implied choice of the law of the seat to govern their arbitration agreement [*Lew, 190; Born2, 829; Miles/Goh, 390; Lew et al., 416; Flannery, 11*; *Nazzini, 11, 18; FirstLink Investments Case, ¶¶14, 16; XL Insurance Case; Sulamerica Case, ¶29; Kabab-Ji S.A.L. v. Kout Food Group*]. There is a strong presumption that parties tacitly wanted to govern the arbitration agreement under the law of the seat of arbitration [*Ashford, 33; Craig et al., 54 et seq; Van den Berg, 124; Blessing, 174; Gaillard/Savage, 226; Trukhtanov, 144; Matermaco v. PPM Cranes; ICC Case No 1507; ICC Case No 4392*].

111. The English Court of Appeal emphasized *"it seems "natural to regard" a choice of seat as an implied choice of the law applicable to the arbitration agreement"* and in addition on this basis *"there is a "strong presumption" that a choice of seat is an implied choice of the law which is to govern the arbitration agreement"* [*Enka v. Chubb ¶66*]. The Commercial Court of England also held that the choice of Stockholm as the seat for any arbitration demonstrated a "*strong indicator of an implied choice of Swedish law to govern the validity and interpretation of the arbitration agreement*" [*Carpatsky Petroleum Corpn v PJSC Ukrnafta case ¶70*].

112. Thus, although the Parties never explicitly agreed on the law of Danubia to be the governing law of the Arbitration Agreement, they have made an implicit choice by designating Danubia as the seat of arbitration.

1.3.2. The choice of law governing the Arbitration Agreement can be deducted from the correspondence between the Parties

113. The Parties' intention can also be inferred from the negotiations between them. In the present case, it is true that during the negotiations, the Parties' have not explicitly decided upon the specific law to govern their Arbitration Agreement. The wording of the e-mails exchanged between Ms. Bupati and Mr. Chandra, and their assistants Ms. Fauconnier and Mr. Rain, clearly indicates that the law of Mediterraneo was intended to be applied only to the main underlying contract. To be specific, the law of Mediterraneo was always mentioned as the law governing the "*the sales cobtract*" [*CE2*] or "*the sale*" [*CE4*]. There was no explicit reference to the Arbitration Agreement therein.

114. At this point, CLAIMANT kindly reminds the Tribunal that the Arbitration Agreement contained in Art. 9 of GCoS [*RE4*] was modified by determining the law of Mediterraneo instead of law of Danubia as the law governing the main contract [*CE4*]. Simultaneously, the seat of arbitration clause was left untouched. CLAIMANT emphasizes that the said combination of changing the law applicable to the main agreement, while leaving the seat of arbitration unchanged, should be interpreted as an implicit choice of law of the seat of arbitration as the law governing the arbitration agreement, as it was undoubtedly such in the previous iteration of the dispute resolution clause. Namely, before the modification made in January 2020 [*CE1, ¶13*], GCoS inevitably designated Danubian law as the proper law of the Arbitration Agreement (since Danubia was selected as the seat of arbitration and Danubian law was selected as the law governing the main contract).

115. Bearing in mind all the facts stated above, it is clear that the Parties never intended to change the law governing the Arbitration Agreement, but only the law governing the Sale, thus making the law of Danubia applicable to the Arbitration Agreement.

1.3.3. In any case, the same inference emerges from the validation principle

116. Furthermore, the Parties' intention can also be derived by applying the so called "*validation principle*", established by Art. V(1)(a) NYC [*Born4, 611; Nacimiento, 205; Schramm et al., 37 et seq; Van den Berg, 282, 283*]. This principle provides for application of the law of that state which will

validate, rather than nullify, the parties' arbitration agreement [*Born4, 529*]. It is definitely not reasonable to presume that the parties' intention was to have a null and void arbitration agreement.

117. It is a natural presumption that the parties could not reasonably have intended one of the most significant clauses in their contract i.e. arbitration agreement to be invalid [*Enka v. Chubb case*]. This approach was reaffirmed in many court rulings and arbitration awards. In the Award in ICC Case No. 11869, it was stated that "*arbitration agreements should be interpreted in a way that leads to their validity in order to give effect to the intention of the parties to submit their disputes to arbitration*". It is reasonable to presume that parties cannot have intended to conclude an invalid contract and therefore they cannot have chosen a law which causes it to be void, even in part [*Gaillard/Savage, 797; ICC Award in Case No. 6162*].

118. Having in mind the severable nature of the arbitration agreement, its putative invalidity under the law governing the main contract indicates that the arbitration agreement was not intended to be governed by the same law [*Enka v. Chubb* ¶*97*]. In the decision of England and Wales Court of Appeal, Moore-Bick LJ stated that contracting parties are certainly unlikely to have intended a choice of governing law for the contract to apply to an arbitration agreement if there is "*at least a serious risk*" that a choice of that law would "*significantly undermine*" their arbitration agreement [*Sulamérica case* ¶31]. The United Kingdom Supreme Court emphasized that *"An interpretation which would without doubt mean that an arbitration clause is void and of no legal effect at all gives rise to a very powerful inference that such a meaning could not rationally have been intended"* [*Enka v Chubb* ¶*106*]. In the ruling of the Commercial Court of England, the Hon. Justice Toulson noted that "*the fact that the arbitration clause would arguably have been invalid under New York law was itself a strong reason for interpreting the choice of New York law to govern the insurance policy as not extending to the arbitration agreement"* [*XL Insurance ltd. v. Owens Corning*].

119. RESPONDENT claims that the Arbitration Agreement would be invalid under the law of Mediterraneo [*RNoA*, ¶14]. Danubian general contract law, for the inclusion of standard conditions, in which the arbitration clause is contained, only requires a clear statement that such conditions shall apply [*PO1, 47*]. Such a statement is clearly made on the first page of the contract documentation [*CE3, table*].

120. During negotiations RESPONDENT never objected to the arbitration agreement as such, but only to an arbitration agreement by which the disputes that may arise from the contract would be submitted to arbitration conducted by an organization that exclusively deals with palm oil [*CE2*]. RESPONDENT's wishes were met, since CLAIMANT changed its GCoS and the Arbitration

Agreement contained therein in 2016 to call for AIAC (earlier KLRCA) arbitral institution. Thus, it is clear that RESPONDENT'S claims contradict Art. V(1)(a) and the validation principle. It would be natural to apply Danubian law and give effect to the presumed will of the Parties to arbitrate, thus making the Arbitration Agreement valid.

1.4. Even if the Tribunal deems that there was no implied choice, the default choice-of-law rule from Art. V(1)(a) NYC and Arts. 34(2)(a)(i) and Art. 36(1)(a)(i) DAL that the law of the seat of arbitration applies

121. Art. V(1)(a) NYC, Art. 34(2)(a)(i) and Art. 36(1)(a)(i) DAL provide that, in absence of the Parties' choice, the law of the seat of arbitration governs the arbitration agreement [*Born4, 514; Schramm et al., 37, 54; Elsing, 91; Kern, 2; König, 130; Blackaby et al., 178, 220*]. Court decisions almost unanimously support this approach. Swedish Supreme Court, for example, held that "*no particular provision concerning the applicable law for the arbitration agreement itself was indicated. In such circumstances the issue of the validity of the arbitration clause should be determined in accordance with the law of the state in which the arbitration proceedings have taken place*" [*A.I. Trade Finance, Inc. v. Bulgarian Foreign Trade Bank*].

122. The Tribunal should also consider the fact that the courts around the globe have predominately adjudicated in favor of the law of the seat of arbitration, precisely in 51% of all cases where the law governing arbitration agreement was disputed [*Scherer/Jensen, 4*]. In case of doubt, this Tribunal should also follow such path.

1.5. Danubian law has the closest and most real connection with the Arbitration Agreement

123. Furthermore, if the Tribunal finds that there was no implicit choice of law governing the Arbitration Agreement, and the aforementioned default rule from NYC and DAL is not applicable, the law of the seat of arbitration shall apply as the law with the closest and most real connection with the Arbitration Agreement, as the seat of arbitration is the place of performance of the arbitration agreement [*Berger, 315; Czernich, 185; Maniruzzaman, 377*].

124. Singapore High Court observed that "*the arbitral seat is the juridical center of gravity which gives life and effect to an arbitration agreement*" [*FirstLink Investments v. GT Payment*]. Where the parties overlooked to determine which law will govern their arbitration agreement, the tribunal should find the "objective connecting factor" i.e. the law of the seat of arbitration as the system of law that is most closely connected to the arbitration agreement [*Scherer/Jensen 15; Hague Gerechtshof, 04.08.1993. ¶¶8-9; Kabab-Ji S.A.L. v. Kout Food Group*].

125. Due to the nature of arbitration agreements, it is emphasized that they are "*almost inevitably subject to the law of the arbitral seat*" [*Born1, 550*]. It appears that the law of the seat of arbitration, as an indicator for the proper law of the arbitration agreements prevails [e.g. *Sonatrach v. Ferrell; Infowars Ltd vs Equinox Corporation; BGH, 21.09.2005*].

126. English Court of Appeal held that "*It would be rare for the law of the (separable) arbitration agreement to be different from the law of the seat of the arbitration*" because the arbitration agreement will normally "*have a closer and more real connection with the place where the parties have chosen to arbitrate than with the place of the law of the underlying contract in cases where the parties have deliberately chosen to arbitrate in one place disputes which have arisen under a contract governed by the law of another place*" [*C v D*]. A similar decision was rendered by the England and Wales High Court, in which it was emphasized that the arbitration agreement is governed by English law as law of the seat of arbitration because "*it has its closest and most real connection with England, because the seat of the arbitration is here*" [*Abuja International Hotels Ltd. v Meridien Sas Case, ¶21*].

127. RESPONDENT erroneously claims that the Arbitration Agreement is governed by the substantive law of Mediterraneo while neglecting the fact that the Arbitration Agreement is separable from the contract in which it is embedded in, and that different sets of laws govern the conclusion of the Sale Contract and the Arbitration Agreement contained in the GCoS.

128. Before the modification of the choice-of-law provision in GCoS, the law governing the Sale Contract was Danubian contract law and Danubia was selected as the seat of arbitration. Therefore, it is indisputable that the Arbitration Agreement was hitherto governed by the law of Danubia. By referring the change of applicable law only to the Sale Contract, it is clear that the Parties' intentions were not to change the established practice regarding the law governing the Arbitration Agreement, which was the law of Danubia. From the wording of e-mails exchanged between the Parties, it is evident that RESPONDENT was aware that only the law governing the "*sale*"/ "*sales contract*" was intended to be modified [*CE2, ¶13*; *CE4, ¶3; CE5, ¶2, RNoA, ¶10; PO2, q.13*]. RESPONDENT did not raise any objections regarding the change. Therefore, by leaving the seat of arbitration clause untouched, the Parties implicitly agreed upon the application of Danubian law to the Arbitration Agreement. Moreover, the validation principle also supports the said claim.

129. In case the Tribunal finds that a common intention cannot be derived from the Parties' negotiations, it shall nevertheless apply the law of Danubia to the Arbitration Agreement, as the law of the seat of arbitration by virtue of the default choice-of-law rule from Art. V(1)(a) NYC and equivalent provisions of DAL [*PO2, q.32*]. Furthermore, because Danubia, as the seat of

arbitration, is the place of performance of the Arbitration Agreement, Danubian law should apply as the law with the closest and most real connection with the Arbitration Agreement.

130. In conclusion, all the approaches as explained above lead to the same result – the law applicable to the Arbitration Agreement is the law of Danubia as the law of the seat of arbitration.

2. EVEN IF THE TRIBUNAL FINDS THAT THE ARBITRATION AGREEMENT IS TO BE GOVERNED BY THE LAW OF MEDITERRANEO, THE CISG DOES NOT APPLY TO THE CONCLUSION OF THE ARBITRATION AGREEMENT

131. Contrary to the RESPONDENT's allegations, Art. 4 CISG provides that the Convention is exclusively concerned with international sale of goods and rights and obligations of the seller and the buyer arising from said contracts. It is not aimed, nor suitable to govern conclusion and validity of arbitration agreement, being agreement of procedural legal nature (**2.1.**). Hence, the CISG should not apply to the arbitration agreements, even if it forms part of the otherwise applicable law (**2.2.**). This is supported by lack of Parties' consent on the CISG as the applicable law to Arbitration Agreement (**2.3**.) and strengthened by Tribunal's discretion to disregard CISG as the law applicable to Arbitration Agreement (**2.4.**).

2.1. Arbitration agreements produce procedural effects due to their procedural nature

132. Arbitration agreements are considered to be procedural contracts. A procedural contract is a contract with direct effect to the procedure, i.e., associated with any of the types of proceeding [*Belohlavek, 25*]. If the dispute is to arise, these contracts either regulate the manner of enforcement of substantive right, as such, and/or the steps to be taken in the proceedings [*Rozenhalova, 64*]. It is undisputed that arbitration agreement is a procedural contract [*Kröll, 81, 82; Wagner/Siebeck 320; Viscasillas/Muñoz, 75; Vorobey, 38; Djordjevic, 77; Lew et al., 39, 45, 46*].

133. Procedural nature of the latter cannot be dependent upon its format, whether it is the subject matter of separate agreement, or whether it is included in the main contract of sale [*Kröll1, 81*; *Zapato Case; Gutta-Werke AG v. Dörken-Gutta Pol. and Ewald Dörken AG*]. Thus, inclusion of Arbitration Agreement as part of GCoS, in the main contract, does not alter its procedural nature and the Arbitration Agreement will remain conceptually and legally independent [*BGH, 30.01.1957; GACC Turkey, 13.04.2018*].

134. Therefore, legal regimen of the main contract is not going to be extended to Arbitration Agreement. This would be in accordance with doctrine of separability and possibility that different set of rules can govern the two (*see sec. 1.1. above*)

2.2. Arbitration agreements fall outside the sphere and scope of application of the CISG

135. Arts. 1- 6 CISG defining its sphere of application indicate that the Convention is to be applied to contracts of international sale of goods [*Kröll et al., 63; Huber, 232; Schwenzer/Tebel, 745*]. Even though a precise definition of "contract of sale of goods", is not provided in the text of the Convention, it can be deduced from Art. 30, 35 and 53 CISG, that the sales contract is concerned with the delivery of goods and the transfer of the property therein for the payment of a certain price, non-of which are obligations arising from arbitration agreements [*Kröll et al., 485; Piltz, 393; Butler, 797*]. It stands true that the letter contains a number of subsidiary contractual obligations for the parties, in particular, the general obligation to seek resolution of the dispute only via arbitration [*Koch, 283; Flechtner/Lookofsky, 93, 97*]. Still, they are classified as procedural contracts, or at least substantive contracts concerning procedural matters [*Djordjevic, 79*]. The mere existence of such additional contractual obligations does not convert arbitration agreements into sales contract [*Viscasillas/Muñoz, 75; Wagner/Siebeck, 320*].

136. The CISG is primarily concerned with contracts and substantive questions and not the procedure. "Procedural matters" are deemed excluded from its scope both in doctrine and in case-law [*Kröll, 81, 82; Wagner/Siebeck 320; Viscasillas/Muñoz, 75; Vorobey, 38; Djordjevic, 77; Lew et al., 39, 45, 46; Fillers, 686*; *Ferrari, 107; Bundesgreicht, Switzerland 11.6.2000*]. This is supported by drafting history of the CISG which demonstrates that delegates paid no attention to the role of arbitration agreements or the fact that mentioning of "terms… relating to settlement disputes" would expand the sphere and scope of CISG otherwise determined by Art. 1-6 CISG [*1980 Vienna Diplomatic Conference Summary Records of Meetings of the First Committee*].

137. There should be no automatism in applying CISG to the issues of conclusion of Arbitration Agreement, given the specially tailored rules exist that determine applicable laws to different aspects of the latter– its formation, formal and substantive validity [*Da Silveira, 25–32; Djordjevic, 80; Waincymer, 282, 298; Giammarco/Grimm, 46, 47; Kronke, 458, 459; DC Duisburg 17.04.1996; CCCZ 26.04.1995*]. This leads to the conclusion that even if the law of Medtierraneo is governing the conclusion of Arbitration Agreement, the CISG is not to be applied. This is in line with doctrine of separability (*see sec. 1.1. above*) and further supported by Danubian courts' view as they have generally rejected the application of the CISG to arbitration clauses contained in sales contracts even if the law governing the arbitration agreement was the law of a Contracting State [*PO1*].

138. Thus, procedural nature of arbitration agreements puts an end to the discussion concerning the application of the CISG to the conclusion of Arbitration Agreement [*Gaillard et al., 62, 237-238; Blackaby et al., 50, 149; Mustill/Boyd, 62; Craig et al., 50*] unless there is a positive choice by the parties for the CISG's application [*Kröll1, 66; Kröll2; Schmidt-Ahrendts, 216; Kröll et al., 45; Koch, 285; Da Silveira, 25–32; Djordjevic 80; Waincymer, 282, 298; Giammarco/Grimm, 46, 47; Kronke, 458, 459*]. Since Parties have never made such positive choice (*see sec. 4.3 below*), CISG cannot be applied to Arbitration Agreement.

2.3. Parties never agreed on the CISG being the governing law of the conclusion of arbitration agreement

139. Party autonomy is a guiding principle in determining the applicable law, endorsed in national laws and by international arbitral institutions and international instruments [*Art. 1.1 PICC; Art. 28 UML; Blackaby et al., 365; Born, 82; Janssen/Spilker, 135; Basedow, 32; Sitaru, 335; Magnus, 519*]. Since the the CISG validates party autonomy as its general principle underlying Art. 6 CISG [*Djordjević/Pavić, 8, Winship, 1–33; Magnus, 519*], automatic application of the CISG to the arbitration agreements without consulting the parties' intent would be contradictory to the Convention itself [*BGH, 04.12.1996; Gabor, 697*].

140. From the first stages of the contract conclusion [*CE1, ¶7; CE2, ¶4*] and in the contract itself [*CE3*], the CISG was never mentioned in connection to the Arbitration Agreement (or sales contract for that matter). In the accompanying letter sent by CLAIMANT on 9 April 2020 it was expressly stated that the sale will be governed by the law of Mediterraneo, without ever mentioning the CISG or the Arbitration Agreement [*CE4, ¶4*]. The first and only time the CISG was mentioned is on 15 June 2021, more than a year after contract conclusion, in CLAIMANT'S attorney's letter to the AIAC where he stated that the even if the contract of sale is to be governed by the law of Mediterraneo with the exclusion of CISG [NOA, ¶17].

141. Parties are in agreement that all other provisions related to the contract of sale, shall be governed by the law of Mediterraneo with the inclusion of the CISG, but no such consensus was made relating Arbitration Agreement [*PO2, q.33*].

142. In conclusion, absent explicit agreement on the CISG's application to Arbitration Agreement, the Tribunal should conclude that the CISG does not govern the Arbitration Agreement, and therefore its conclusion.

2.4. Tribunal is not obligated to apply CISG to formation of arbitration agreement

143. Last but not least, arbitral tribunal is not bound to apply the CISG [*Kröll1, 59; Djordjevic/Pavic, 15; Hachem et al., ¶11; Mayer, 287; Mourre 43, 44; Schmidt-Ahrendts, 214; Huber, 60,62; Schwenzer, 22 Magnus1,53*] since its application is not mandatory [*TCL du Jura, 03.11.2004; TCL du Canton de Vaud, 11.04.2002; CdC 19.06.2000*]. Parties have deliberately chosen an arbitration institution - AIAC, which, in Art. 13 (5) of its Rules grants arbitrators the freedom to apply the law they deem most appropriate. Such freedom derives from the supranational nature of arbitration, which is not connected to one specific country, thus arbitrators are not bound by the specific national provisions of private international law and applicable laws as their counterparts - judges of national courts, would be [*Giammarco/Grimm, 46,47*; *F. De Ly, 5; Gaillard, 107; Janssen/Spilker, 137; Kröll1, 65*]. Consequently, they do not have a *lex fori* in the sense of a state court and therefore they have wider discretion in deciding which law to apply [*Kröll1, 64; Gaillard, 107*]. Therefore, Tribunal should find that the CISG is not applicable to the conclusion of the Arbitration Agreement, unless the parties have manifested intention to apply such provision (*See sec. 1.2 above*).

144. That the above mentioned understanding is correct is supported by a decision in *Triulzi Cesare SRL v. Xinyi Group (Glass) Co. Ltd*, holding that an arbitral award cannot be successfully attacked with the argument that the arbitrator failed to apply the CISG where the institution rules allows the application of the law which the arbitrator deems "appropriate" [*SGHC 30.10.2014*].

145. In the case at hand, the rules governing the arbitration proceedings are AIAC Rules. According to Art. 13(5) AIAC Rules, arbitral tribunal has the power to determine the law governing the Arbitration Agreement in the absence of any agreement by the Parties. Consequently, if the Tribunal finds that the Parties have not impliedly agreed to application of the law of Danubia, as CLAIMANT insists they have, then the Tribunal must also find that the CISG, as part of Mediterraneo law, is ill-suited for application to the issue of conclusion of Arbitration Agreement.

146. In conclusion, even if the Tribunal is to find that the Arbitration Agreement is governed by Mediterraneo law, it is the non-harmonized law of Mediterraneo that governs formation of Arbitration Agreement, and not the CISG.

REQUEST FOR RELIEF

147. On the basis of foregoing arguments CLAIMANT respectfully requests the Tribunal, while dismissing all contrary requests and submissions by Respondent,

TO ADJUDGE AND DECLARE that:

a) the Arbitral Tribunal has jurisdiction to hear the case;

b) the Parties entered into a valid contract for the delivery of 20,000t/annum of RSPO-certified palm oil for the years 2021 – 2025;

c) CLAIMANT's GCoS were validly included into that Contract and exclude any termination of the Contract for temporary infringements of the RSPO requirements before CLAIMANT was given a suitable period of one month to remove such infringements by its suppliers;

d) RESPONDENT has not validly avoided the Contract either for mistake or for a

fundamental breach of contract;

e) It is to order RESPONDENT to compensate CLAIMANT for the damages incurred for the failure to accept the deliveries of the quantities for the year 2021 in the amount of USD 200,000 plus

interest thereon;

f) It is to order RESPONDENT to perform the Contract for the years 2022 – 2025;

g) It is to order RESPONDENT to bear the costs of these arbitration proceedings, including the cost

incurred by CLAIMANT for legal representation.

On behalf of ElGuP plc,

COUNSEL

Anja Karadžić ♦ Dunja Tomašević ♦ Dušan Jablan ♦ Jovan Bećirić ♦ Luka Milošević

Luka Stojilković ♦ Mila Pejić ♦ Nina Mitrović ♦ Vukašin Stanković

Zoran Kobal ♦ Željko Loci

(signed)

Belgrade, 9 December 2021