TWENTY NINTH ANNUAL
WILLEM C. VIS INTERNATIONAL COMMERCIAL
ARBITRATION MOOT

MEMORANDUM FOR CLAIMANT

RUPRECHT-KARLS-UNIVERSITÄT HEIDELBERG

CASE REFERENCE: AIAC/INT/ADM-123-2021

ON BEHALF OF:	**AGAINST:**
ElGuP plc	JAJA Biofuel Ltd
156 Dendé Avenue	9601 Rudolf Diesel Street
Capital City	Oceanside
Mediterraneo	Equatoriana
CLAIMANT	RESPONDENT

MORITZ F. BÖBEL • LEA DEGER • NOËMI SIMON • ELENA STEGMANN • TOBIAS THOMER

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TABLE OF ABBREVIATIONS

Abbreviation	Explanation
AIAC	2021 AIAC Rules – Global Solution
Art.	Article
Artt.	Articles
BCCI	Bulgarian Chamber of Commerce and Industry
cf.	*confer* (compare)
Chap.	Chapter
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980
CISG-online	Internet database on CISG decisions and materials, available at http://www.cisg-online.ch
DAL	Danubian Arbitration Law
DCL	Danubian Contract Law
DCoL	Danubian Conflict of Law Rules
Dutch Civil Code	Civil Code of the Netherlands
ed.	edition
emph. add.	emphasis added
et al.	*et alii* (and others)
et seq.	*et sequens* (and following)
et seqq.	*et sequentes* (and following; more than one page/paragraph)
etc.	*et cetera* (and rest)
Exh. C	CLAIMANT's Exhibit

Abbreviation	Explanation
Exh. R	RESPONDENT's Exhibit
fn.	Footnote
GCoS	General Conditions of Sale
i.e.	*id est* (that is)
ibid.	*ibidem* (the same place)
ICC	International Chamber of Commerce
infra	See below
MCL	Mediterranean Contract Law
MfC	Memorandum for CLAIMANT
No.	Number
NoA	Notice of Arbitration
NYC	Convention on the Recognition and Enforcement of foreign arbitral awards
p.	page
para.	paragraph
paras.	paragraphs
PO1	Procedural Order Number 1
PO2	Procedural Order Number 2
pp.	pages
Response	Response to the Notice of Arbitration
RSPO	Roundtable on Sustainable Palm Oil

Abbreviation	Explanation
sc.	*scilicet* (to wit)
Spanish Arbitration Act	Spanish Arbitration Act 2003
supra	See above
Swiss PILA	Swiss Federal Act on Private International Law (PILA)
Tribunal	Arbitral Tribunal
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration
UNIDROIT	International Institute for the Unification of Private Law
UTR	UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration
v.	versus
Vol.	Volume

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STATEMENT OF FACTS

The Parties to this Arbitration are *ElGuP plc* ("**CLAIMANT**"), based in Mediterraneo and *JAJA Biofuel Ltd* ("**RESPONDENT**"), based in Equatoriana (both the "**Parties**"). CLAIMANT is one of the largest producers of RSPO-certified palm kernel oil. RESPONDENT is a well-established producer of biofuel. Since 2018, it is a 100% subsidiary of the Ruritanian multinational conglomerate Southern Commodities.

The Arbitration relates to whether the Parties have entered into a sales contract for the delivery of 20,000t RSPO-certified palm oil *per annum* for the years 2021-2025 (the "**Sales Contract**").

2010 – 2018	Mr Chandra, representing CLAIMANT, and Ms Bupati, then representing Southern Commodities, concluded four to five contracts *per annum* (at least 40 in total) for the delivery of palm kernel oil.
Late 2018	Southern Commodities acquired RESPONDENT and transferred its palm kernel oil unit to RESPONDENT. Subsequently, CLAIMANT delivered the oil ordered by Southern Commodities since then directly to RESPONDENT.
28/3/2020	At the Palm Oil Summit, Ms Bupati, now representing RESPONDENT, and Mr Chandra negotiated a long-term contract under which CLAIMANT was to deliver its entire production of RSPO-certified palm oil to RESPONDENT.
1/4/2020	RESPONDENT ordered 20,000t *per annum* of RSPO-certified palm oil as discussed at the Palm Oil Summit for the years 2021-2025.
9/4/2020	CLAIMANT signed the contractual documents that declared CLAIMANT's General Conditions of Sale ("**GCoS**") applicable and sent the documents to RESPONDENT. The accompanying email stated that Mediterranean law governs the Sales Contract as discussed at the Palm Oil Summit.
Early May 2020	RESPONDENT requested a list of acceptable banks for the letter of credit that it was required to open under the Sales Contract. In a call, CLAIMANT pointed out to RESPONDENT that CLAIMANT had not yet received a signed copy of the Sales Contract. RESPONDENT was to investigate that but never came back to it.
30/5/2020	RESPONDENT contacted several acceptable banks for the letter of credit.
29/10/2020	CLAIMANT learned from an article in Commodities News that RESPONDENT had allegedly terminated the contract negotiations with CLAIMANT.
30/10/2020	RESPONDENT terminated the "negotiations" with CLAIMANT via letter.
15/7/2021	After Mediation vastly failed, CLAIMANT initiated the Arbitral Proceedings.

SUMMARY OF ARGUMENT

Pacta sunt servanda.

The Sales Contract that the Parties concluded was meant to be the solution to a precarious situation both Parties found themselves in. Thus, it was more than merely the legally binding agreement on the delivery of palm oil. RESPONDENT was in dire need of palm oil. CLAIMANT wanted to sell large parts of its production to a reliable partner. RESPONDENT led CLAIMANT to believe that it wanted to re-establish the long-lasting and fruitful relationship CLAIMANT had pursued with Southern Commodities. Expecting to have found the reliable partner it was looking for, CLAIMANT treated both companies alike and offered RESPONDENT not only conditions that were under market price but also trusted it with large parts of its palm oil production. Having gladly accepted these privileged terms, RESPONDENT now tries to evade the suddenly unwanted contractual obligations under legal pretenses on every feasible level.

Part I: The Parties Validly Agreed on the Jurisdiction of the Arbitral Tribunal

The Parties concluded a valid Arbitration Agreement that confers jurisdiction to hear the case to the Arbitral Tribunal (the "**Tribunal**"). The Arbitration Agreement as a procedural contract must be interpreted separately from the Sales Contract. The Parties subjected the Arbitration Agreement to Danubian law by choosing Danubia as Seat of Arbitration. Under Danubian law, the Arbitration Agreement was validly included in the Sales Contract and meets the formal requirements. Besides that, even if the Law of Mediterraneo were to apply—excluding or including the CISG—the Parties concluded a valid Arbitration Agreement.

Part II: The Parties Validly Concluded the Sales Contract in 2020

In 2020, the Parties validly concluded the Sales Contract. RESPONDENT placed an offer on 1 April 2020. With its reply on 9 April 2020, CLAIMANT accepted the offer, which led to the valid Sales Contract. Even if CLAIMANT's reply constitutes a counteroffer, RESPONDENT accepted this offer impliedly either by silence or by other conduct.

Part III: The GCoS Were Validly Included in the Sales Contract

The GCoS were validly included in the Sales Contract. The requirements to include standard terms in a contract are met. First, CLAIMANT made a clear reference that the GCoS apply. Second, CLAIMANT did not have to make the GCoS available again. RESPONDENT was aware of their content. Besides that, the application of the GCoS was part of the Party Practice.

ARGUMENT

PART I: THE PARTIES VALIDLY AGREED ON THE JURISDICTION OF THE TRIBUNAL

1 CLAIMANT requests the Arbitral Tribunal to find that it has jurisdiction to hear to case. This is because the Parties validly concluded the Arbitration Agreement.

2 On 7 October 2021, the Parties chose the 2021 AIAC Rules – Global Solution ("**AIAC**") as the rules governing this Arbitration [*PO1-II, p. 46*]. Pursuant to Rule 20.1 AIAC, the Tribunal "shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement". This provision expresses the generally recognized competence-competence [*cf.* BORN, *p. 1051*; *ICC Award 6515/1994*].

3 Danubian law governs the Arbitration Agreement under which the Tribunal has jurisdiction [**I**]. Even if the Tribunal were to find that Mediterranean law—*including* or *excluding* the CISG—were to apply, *quod non*, the Tribunal still has jurisdiction because the Parties' Arbitration Agreement is valid under Mediterranean law [**II**].

I. THE ARBITRATION AGREEMENT IS VALID UNDER THE APPLICABLE DANUBIAN LAW

4 Danubian law governs the Arbitration Agreement because the Parties chose Danubia as Seat of Arbitration [**A**]. The Arbitration Agreement is substantively and formally valid [**B**].

A. DANUBIAN LAW GOVERNS THE ARBITRATION AGREEMENT

5 Danubian law governs the Arbitration Agreement. The law governing the arbitration agreement can differ from the law governing the main contract [*Austrian Supreme Court, 22 February 2007*; *ICC Case No. 1507*; *ICC Case No. 9302*; LEW/MISTELIS/KRÖLL, *Chap. 6 paras. 6 et seqq.*; GRAFFI, *p. 23*]. This follows from the Doctrine of Separability, which civil and common law jurisdictions around the world adopted [BALTHASAR/*Balthasar, Part. I para. 24*; FEEHILY, *pp. 356 et seq.*; BORN, *pp. 375 et seq.*; *Hecht v. Busiman's, p. 845*; *Fiona Trust & Holding Corp v. Privalov, para. 12*]. Moreover, Art. 16(1) Danubian Arbitration Law ("**DAL**"), a verbatim adoption of the UNCITRAL Model Law, recognizes the Doctrine of Separability, as does Art. 20.1(a) AIAC with the identical provision.

6 The Arbitration Clause ("**Art. 9 GCoS**"), expressly provides for Danubia as Seat of Arbitration. Art. 9 GCoS also contains a choice of law clause which states that "[t]his contract shall be governed by the substantive law of Danubia" [*Exh. R4, p. 32*]. However, CLAIMANT informed RESPONDENT at the Summit that the Sales Contract is submitted to Mediterranean and not

Danubian law [*Exh. C2, p. 12*]. When the Parties concluded the Arbitration Agreement, neither of them indicated to change the Seat of Arbitration as well. CLAIMANT only changed the law applicable to the Sales Contract as its lawyer advised [*Exh. C1, para. 13*]. RESPONDENT agreed to this change [*PO2-33, p. 52*].

7 There is no mandatory conflict of law provision for the Tribunal to determine the law governing the Arbitration Agreement. However, Danubia and Equatoriana—where the award will be enforced—are member states of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**NYC**") [*PO1-III(3), p. 47*]. In order to ensure an enforceable award, the Tribunal should apply Art. V(1)(a) NYC as the relevant conflict of law rule [*cf. PO2-32, p. 52*]. Courts adopted this approach [*cf. Swiss Federal Court 1995, pp. 7 et seq.*; *Ground Mace Case, p. 21 para. 51*]. Although the NYC primarily deals with the recognition and enforcement of arbitral awards, it also applies to determine the law applicable to arbitration agreements [*Bevrachting v. Fallimento*; *Ground Mace Case, p. 21 para. 51*; BORN, *p.* 531; WOLFF/*Wilske/Fox, Art. V para. 111*; SCHERER, *p. 668*; SCHWENZER/BEIMEL, *p. 52*].

8 Danubian law governs the Arbitration Agreement as per Art. V(1)(a) NYC. Art. V(1)(a) NYC provides for two steps: primarily, a tribunal must recognize the parties' agreement. If there is no indication of a valid party agreement, the law of the seat of arbitration applies as a default rule [BORN, *p. 1051*; TARAWALI/GERARDY, *p. 213*]. Furthermore, Rule 13.5(a) AIAC recognizes that the parties' agreement primarily determines the applicable law.

9 The Parties have not explicitly chosen a law to govern the Arbitration Agreement. However, the Parties implicitly chose Danubian law by choosing Danubia as Seat of Arbitration [**1**]. The explicit choice of law for the Sales Contract does not extend to the Arbitration Agreement [**2**]. Alternatively—if the Tribunal were to find that there has not been an implicit choice of law—Danubian law governs the Arbitration Agreement as per the default rule of Art. V(1)(a) NYC [**3**].

1. The Parties Chose Danubian Law by Choosing Danubia as Seat of Arbitration

10 The choice of Danubia as Seat of the Arbitration implies, as per the Parties' intent, the choice of law for the Arbitration Agreement. Reasonable parties prefer consistency between the law at the seat of the arbitration (the "**Curial Law**") and the law governing the arbitration agreement [**a**]. Scholars, Courts and Tribunals adopted this approach [**b**]. Moreover, the *in favorem validitatis* approach confirms the application of the Curial Law [**c**].

a. Reasonable Parties Prefer Consistency between the Curial Law and the Law Governing the Arbitration Agreement

11 Reasonable parties prefer consistency between the Curial Law and the law governing the arbitration agreement rather than between the law governing the arbitration agreement and the main contract. Conflicts between the Curial Law and the law governing the arbitration agreement can lead to major complications in the decision-making process [VAN DEN BERG, *p. 292*; BERGER I, *pp. 320 et seq.*; KOLLER, § 3/61; EPPING, *pp. 55 et seq.*]. Even more so, these complications subsequently influence the setting aside proceedings before a state court [*ibid.*]. This problem was pointed out by scholars [SCHLOSSER, *p. 246*] and is particularly relevant for the case at hand:

12 Applying Mediterranean law, as the law of the Sales Contract, to the Arbitration Agreement could lead to major problems. In contrast to Danubia, Mediterraneo is a contracting state of the CISG. Whether the CISG applies to arbitration agreements is highly disputed: a Danubian state court would assess the validity of the Arbitration Agreement under Mediterranean law *excluding* the CISG [*PO1-III(4), p. 47*]. Conversely, a state court in Equatoriana, where RESPONDENT holds its assets, would assess the validity of the Arbitration Agreement under Mediterranean law *including* the CISG [*PO1-III(4), p. 47*]. Under Mediterranean contract law ("**MCL**") *excluding* the CISG, the Arbitration Agreement is at lower risk of invalidity than *including* the CISG. This is because the CISG imposes significantly stricter requirements on the inclusion of standard terms [*cf. infra paras. 56 et seqq.*]. Therefore, the Arbitration Agreement is at a higher risk of invalidity in Equatoriana [*infra para. 18*]. Consequently, the Tribunal might render an unenforceable award because Equatorianian state courts do apply the CISG. These complications can be avoided entirely if Danubian law—that does not include the CISG—applies.

13 In contrast, the Parties have no interest in applying the law of the Sales Contract also to the Arbitration Agreement. The interpretation of the Arbitration Agreement and the Sales Contract under different sets of law has no negative effect on the conduct of the Arbitral Proceedings [*cf.* EPPING, *p. 56*]. It seems that RESPONDENT is trying to escape its responsibilities by submitting that the Parties chose a law under which their Arbitration Agreement would be invalid.

b. Leading Authorities Apply the Law of the Seat to the Arbitration Agreement

14 By choosing a seat of arbitration, parties choose the Curial Law as the law governing the arbitration agreement. This holds true, even if there is an explicit choice of the law governing

the main contract. Scholars [BERGER I, *p. 320*; VAN DEN BERG, *p. 293*; SCHLOSSER, *para. 254*], arbitral tribunals [*ICC Award 6149/1990*; *ICC Award 6719/1994*; *BCCI Award 52/65*], and state courts in both common and civil law systems [*FirstLink* (*Singapore)*; *Rocco Giuseppe v. Federal Commerce (Italy)*; *Japan Educational v. Feld* (*Japan)*; *Misr Insurance v. MV Dominion* (*Egypt)*] confirm this result.

15 The High Court of Singapore held in its *FirstLink* decision in 2014 that the choice of seat also implies the choice in favor of the law of the seat. *FirstLink* addresses which law governs the arbitration agreement. It found that selecting an arbitral seat presupposes the parties' intention to have that law of the seat recognize and enforce the arbitration agreement [*FirstLink, para. 14*]. It held "that parties have implicitly selected the law of the seat to govern matters including the supervisory court's powers to determine a jurisdictional dispute in relation to the validity of an arbitration agreement" [*FirstLink, para. 15*]. The High Court of Singapore stressed that this result provides consistency [*ibid.*]. As both Parties are reasonable businesspeople, they wanted consistency of the law of the Seat and the law governing the Arbitration Agreement. This rationale applies to the case at hand: by selecting Danubia as Arbitral Seat, the Parties' intended to have that law governing the Arbitration Agreement. Further, such an approach avoids the difficulties mentioned above [*supra paras. 11 et seq.*].

c. The *in Favorem Validitatis* Approach Confirms Applying the Curial Law

16 Moreover, it is widely acknowledged that an arbitration agreement should be interpreted under the law under which it is valid. Scholars refer to this approach as *in favorem validitatis* [PIKA, *p. 511*; SCHERER, *p. 670*]. Statuary law of different countries explicitly recognize it [*cf. Art. 78(2) of the Swiss PILA*; *Art. 10:166 Dutch Civil Code*; *Art. 9(6) 2003 Spanish Arbitration Act*]. This principle ensures that the parties' consensus to arbitrate is upheld to the extent possible under the most favorable of several possibly relevant legal systems [SCHERER, *p. 670*].

17 Accordingly, the Tribunal should apply the law of the Seat in the present case. The Parties consented to arbitrate. Mr Chandra told Ms Bupati at the Palm Oil Summit that for CLAIMANT agreeing on anything but arbitration would be very difficult [*Exh. C1-11, p. 10*]. Arbitration as a dispute resolution method is a common business practice in the palm oil industry [*PO2-11, p. 49*]. Ms Bupati did not object to arbitration but suggested to select a non-industry related arbitration institution which the GCoS, however, already provided for [*Response-12, p. 27*]. Thus, the Parties' consented to arbitrate.

18 Conversely, this consensus is thwarted when applying the law of the Sales Contract. The Arbitration Agreement is included in the Sales Contract as a standard term. Under Mediterranean law—as the law of the Sales Contract—the requirements to include standard terms are highly disputed and unclear [*infra paras. 49 et seqq.*]. There is a serious risk that the Arbitration Agreement would be invalid under Mediterranean law. Under Danubian law, however, the requirements to include standard terms are low [*PO1-III(3), p. 47*]. Thus, by applying the law of the Seat, the Parties' consensus to arbitrate is upheld.

2. The Choice of Mediterranean Law Does Not Extend to the Arbitration Agreement

19 The express choice of Mediterranean law for the Sales Contract does not indicate the Parties' intent to subject their Arbitration Agreement to the same law. First, the wording shows that the Parties did not intend for the choice of law for the Sales Contract to extend to the Arbitration Agreement [**a**]. Second, the nature of arbitration agreements speaks against applying the law of the main contract [**b**]. Third, the 2020 *Enka v. Chubb* decision provides further guidelines for the Tribunal to rule in favor of the law of the Seat [**c**]. Lastly, *Sulamerica* established the exception *Enka v. Chubb* confirmed [**d**].

a. The Wording Shows That the Parties Did Not Intend for the Choice of Law of the Sales Contract to Extend to the Arbitration Agreement

20 The wording of the Parties' correspondence shows that they did not intend for the choice of law for the Sales Contract to extend to the Arbitration Agreement. The Tribunal may assess the Parties' intention by interpreting the choice of law for the Sales Contract [*cf.* SCHERER, *p. 675*]. When parties use narrow wording (*e.g.*, "the contract is subject to the law of X"), it indicates that this choice is limited to the main contract [SCHERER, *p. 675*]. In the case at hand, the Parties always explicitly spoke about changing the law of the "Sales Contract" to Mediterraneo [*Exh. C1-13, p. 10*; *Exh. C4, p. 17*; *Exh. C2, p. 12*]. CLAIMANT deliberately used such clear and specific wording. An interpretation giving this choice of law a wider meaning than anticipated would contradict the Parties' intention. Claimant gave RESPONDENT no indication that this law would extend to the Arbitration Agreement. RESPONDENT even introduced "the sales contract" in their written correspondence for the first time [*Exh. C2, p. 12*]. Thus, CLAIMANT could justifiably trust that it was understood correctly. This shows that the Parties did not intend for the choice of law of the Sales Contract to extend to the Arbitration Agreement.

b. The Nature of Arbitration Agreements Speaks Against Applying the Law of the Main Contract

21 Furthermore, the nature of arbitration agreements speaks against applying the law of the main contract. The Arbitration Agreement is a separate contract [*cf. supra para. 5*]. It is different in its terms, character and objectives from the Parties' underlying commercial contract [*cf.* BORN, *p. 535*]. The Arbitration Agreement's function is solely to stipulate a mechanism to settle possible disputes [*ibid.*]. In contrast, the Sales Contract exclusively governs the economic transaction.

c. The 2020 *Enka v. Chubb* Decision Provides Further Guidelines for the Tribunal

22 The 2020 *Enka v. Chubb* decision provides further guidelines for the Tribunal to rule in favor of the law of the Seat. The UK Supreme Court had to deal with the question, which law applies to an arbitration agreement. To determine the law applicable, the Supreme Court followed the three-stage enquiry of the UK Court of Appeal's 2012 *Sulamerica* decision: (i) express or (ii) implied choice of law and if none (iii), closest connection [*Sulamerica, para. 25*]. In *Enka v. Chubb*, the parties did not explicitly choose a law governing the main contract [*Enka v. Chubb, paras. 149 et seq*.]—an approach similar to the NYC. The UK Supreme Court applied the closest-connection test and stated that the law of the seat of arbitration applies [*Enka v. Chubb, para. 156*]. However, it stated *obiter* that if there were a choice of law for the main contract, this law should also govern the arbitration agreement [*Enka v. Chubb, paras. 53 et seq.*]. Thus, at first glance this decision seems to speak against CLAIMANT's submission. Yet, at a closer look, the very opposite is the case.

23 The UK Supreme Court explicitly stated: "[a]dditional factors which may, however negate such an inference [i.e. to apply the choice of law of the main contract] and may in some cases imply that the arbitration agreement was intended to be governed by the law of the seat are: "[…] the existence of a **serious risk** that—if governed by same law as the main contract—the **arbitration agreement would be ineffective**." [*Enka v. Chubb, para. 170(vi), emph. add.*]. In the present case, the Parties wanted a valid Arbitration Agreement. Under Mediterranean law, there is a serious risk that the Arbitration Agreement is ineffective [*supra para. 18*].

24 The UK Supreme Court furthermore stated that this exception can even be reinforced by circumstances indicating that the Parties deliberately chose the seat as a neutral forum for the arbitration [*Enka v. Chubb, para. 170(vi), similarily: Carpatsky Petroleum v. PJSC Ukrnafta, para. 70*]. CLAIMANT has its seat in Mediterraneo [*NoA-1, p. 4*]. RESPONDENT's seat is in

Equatoriana [*NoA-2, p. 4*]. Thus, Danubia provides a neutral forum for the Arbitration. Therefore, the exception the UK Supreme Court established applies to the present case.

d. *Sulamerica* Established and Applied the Exception *Enka v. Chubb* Confirmed

25 RESPONDENT cannot argue that the exception *Enka v. Chubb* confirmed do not apply in the present case. The UK Supreme Court relied in *Enka v. Chubb* on the *Sulamerica* decision of the UK Court of Appeal of 2012 [*Enka v. Chubb, paras. 104, 123, 217*]. In *Sulamerica*, there was an explicit choice of Brazilian law for the main contract; the seat of arbitration was London. The UK Court of Appeal held that in absence of any indication to the contrary, the parties in principle intended their entire relationship to be governed by the same system of law [*Sulamerica, para. 11*], *i.e.*, the law of the main contract. Yet, in this case the UK Court of Appeal decided that the law of the seat was applicable to the arbitration agreement [*ibid. para. 15*]. It held that Brazilian law would significantly undermine the agreement [*ibid. paras. 31 et seq.*]. The same rationale applies to the present case [*supra para. 18*].

3. Alternatively, Danubian Law Governs the Arbitration Agreement Because of the Default Rule

26 Even if the Tribunal were to find that the Parties did not choose Danubian law, Danubian law applies by virtue of the default rule in Art. V(1)(a) NYC. If the parties have not chosen a law governing the arbitration agreement, Art. V(1)(a) NYC leads to the law of the country where the award was made, *i.e.*, the law of the seat of arbitration [BALTHASAR/*Solomon, Part II para. 28, 213*; WOLFF/*Ehle, Art. I para. 99*]. If the Tribunal does not find any indication on the choice of law for Danubia, Danubian law still applies as the law of the Seat.

B. THE ARBITRATION AGREEMENT IS SUBSTANTIVELY AND FORMALLY VALID

27 The Parties concluded a valid Arbitration Agreement. It is substantively valid under Danubian Law [**1**] Furthermore, it meets all the formal requirements [**2**].

1. The Parties Concluded a Substantively Valid Arbitration Agreement

28 The Parties concluded the Arbitration Agreement by validly including Art. 9 GCoS in their Sales Contract. Under Danubian Contract Law ("**DCL**"), a standard term is validly included in an existing contract when the user makes a clear statement that such conditions will apply [*PO1-III(3), p. 47*]. They do not need to be made available [*ibid.*]. First, Art. 9 GCoS is a standard term [**a**]. Second, the Parties included Art. 9 GCoS in the Sales Contract [**b**]. Lastly, the discussion on transparency did not hinder the inclusion of Art. 9 GCoS [**c**].

a. The Arbitration Clause Is a Standard Term under DCL

29 Art. 9 GCoS is a standard term under DCL. The DCL is based on the Unidroit Principles [*PO2-35, p. 53*]. Under DCL, a standard term requires three cumulative criteria: to be drafted in advance, for general and repeated use by one party, and that it was used without negotiations [*cf.* BRÖDERMANN, *Art. 2.1.19 p. 62*].

30 First, CLAIMANT drafted Art. 9 GCoS in advance [*cf. Response-10, p. 26*]. Second, CLAIMANT uses Art. 9 GCoS in the 2020 version of its GCoS for all its contracts thus, generally and repeatedly [*cf. Exh. C1-13, p. 10*]. Third, the Parties did not negotiate Art. 9 GCoS neither by changing the applicable law to the Sales Contract [**aa**] nor by RESPONDENT mentioning to apply the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("**UTR**") [**bb**].

aa. The Parties Did Not Negotiate When Changing the Applicable Law to the Sales Contract

31 The Parties did not negotiate Art. 9 GCoS when they changed the applicable law for the Sales Contract to the law of Mediterraneo. Under DCL, to "negotiate" means that the opposite party must have had a real opportunity to influence the content [*cf.* VOGENAUER/*Naudé, Art. 2.1.19 para. 3*]. CLAIMANT unilaterally proposed to change the applicable law to the law of Mediterraneo. RESPONDENT agreed without even further inquiring [*Exh. C2, p. 12*]. RESPONDENT was at no point able to influence the choice of law for the Sales Contract. Thus, negotiations about the applicable law never took place.

bb. The Parties Did Not Negotiate When They Discussed Applying the UTR

32 When the Parties discussed applying the UTR, they did not negotiate Art. 9 GCoS. They never wanted to change its content. They only considered applying the transparency rules additionally. Art. 9 GCoS should apply in any event. Its content does not withstand applying the UTR. If parties add further agreements, those do not affect the character of a standard term. Thus, the Parties did not negotiate Art. 9 GCoS.

b. CLAIMANT Validly Included Art. 9 GCoS in the Sales Contract

33 CLAIMANT validly included Art. 9 GCoS in the Sales Contract. The Sales Contract is validly concluded. Whether the Parties concluded a contract is to be assessed under Mediterranean law *including* the CISG [*infra paras. 91 et seqq.*]. The Tribunal may apply the Danubian conflict of law rules which are a verbatim adoption of the Hague Principles ("**DCoL**") [*PO2-36, p. 53*; *cf.*

RAUSCHER, *para. 509*]. As per Art. 2(1) DCoL, the law governing the question whether parties concluded a contract is subject to the law chosen by the parties. The Parties chose Mediterranean law *including* the CISG to govern the Sales Contract.

34 In its email, as well as in the contract template, CLAIMANT made a clear statement that its GCoS—containing Art. 9—will apply. Thereby, CLAIMANT validly included Art. 9 GCoS as a standard term in the existing Sales Contract.

c. The Discussion on Transparency Did Not Hinder the Inclusion of Art. 9 GCoS

35 The discussion on transparency did not hinder the inclusion of Art. 9 GCoS. CLAIMANT was aware of the importance of that detail to RESPONDENT. Mr Rain acknowledged Ms Bupati's suggestion to apply the UTR. After having received her offer, he immediately sought legal guidance on the scope of application of the UTR [*Exh. C5-5, p. 18*]. The lawyer confirmed that these only apply in treaty-based investor-state arbitration [*cf. ibid.*]. Mr Rain then got back to Ms. Fauconnier and informed her of this [*ibid.*]. She agreed that the UTR were not suitable for the Sales Contract [*ibid*.]. No further discussion took place. Instead, RESPONDENT was satisfied [*cf. ibid.*]. If transparency had really been an ongoing issue, Ms. Fauconnier could have simply brought it up again. The question on transparency had been solved amicably and therefore did not affect the inclusion of Art. 9 GCoS.

36 Alternatively, if the Tribunal were to find that RESPONDENT agreed to arbitration only under the reservation that a transparency mechanism would be implemented, the Arbitration Agreement would nevertheless be valid: The Parties then—failing any indication to the contrary on either side—agreed to provide for "some sort of transparency" [*cf. Exh. C2, p. 12*] which has to be understood as a request to the Tribunal to ensure a standard of transparency, for example by applying the UTR analogously. Accordingly, the issue of transparency did not remain open and in no event, is there a lack of agreement.

2. The Arbitration Agreement Meets All Formal Requirements

37 The Parties' Arbitration Agreement fulfills the formal requirements of the NYC. The Arbitration Agreement fulfills Art. II(2) second option NYC [**a**]. Alternatively, the Arbitration Agreement is still valid under the More Favorable Law Rule of Art. VII NYC [**b**].

a. The Arbitration Agreement Fulfills the Formal Requirements of Art. II(2) NYC

38 The Parties' Arbitration Agreement meets the "in writing" requirement of Art. II(2) NYC. By making a reference to the GCoS in an exchange of emails, the Parties met the requirements of

Art. II(2) second option NYC. A reference to another document containing the arbitration clause in an exchange of documents fulfills Art. II(2) second option NYC [VAN DEN BERG, *p. 210*; WOLFF/*Wolff, Art. II para. 137*]. The arbitration agreement does not need to be contained in the exchanged documents themselves [*ibid.*]. Regarding the NYC's general aim to facilitate recognition of arbitration agreements, it demands to interpret the form requirement open to evolving business practices, such as including general terms [WOLFF/*Wolff, Art. II para. 109*].

39 Those requirements were met. CLAIMANT made a reference to the GCoS containing the Arbitration Agreement in the exchange of emails between the Parties [**aa**]. RESPONDENT is in no need of protection, thus this general reference to the GCoS suffices [**bb**].

aa. CLAIMANT Made a Reference to the GCoS Containing the Arbitration Agreement in the Exchange of Emails

40 CLAIMANT made a reference to its GCoS containing the Arbitration Agreement in the exchange of emails between the Parties. An exchange of emails falls under the scope of Art. II(2) second option NYC although the provision does not explicitly mention emails. The provision is to be seen as non-exhaustive [WOLFF/*Wolff, Art. II para. 104*; BORN, *p. 716*; *Proctor v. Schellenberg, para. 18*; *2006 UNCITRAL Recommendation No. 1*]. Art. II(2) NYC also encompasses modern communication under the second option "exchange of letters and telegrams" [*Chloe Z Fishing co., Inc v. Odyssey Re (London) Ltd*; WOLFF/*Wolff, Art. II para. 130*; BORN, *p. 724*; KRONKE/ S*chramm et al., p. 75*].

41 On 1 April 2020, RESPONDENT sent an offer to CLAIMANT via email, already mentioning arbitration [*Exh. C2, p. 12*]. CLAIMANT replied on 9 April 2020, also via email, and stated that the GCoS—containing Art. 9—apply [*Exh. C4, p. 17*]. RESPONDENT then replied via email, "thank you for the contractual documentation" [*Exh. R2, p. 30*]. It hereby referred to CLAIMANT'S email containing the contractual documents as well as the reference to the GCoS. Thus, by the written reference in the email to the GCoS, CLAIMANT and RESPONDENT concluded an Arbitration Agreement by reference contained in an exchange of emails.

bb. This General Reference Is Sufficient Because RESPONDENT Is in No Need of Protection

42 To meet the "in writing" requirement of the NYC, this general reference to the GCoS is sufficient. A specific reference to the Arbitration Clause is not necessary. A general reference

suffices because it fulfills both objectives of Art. II(2) NYC—securing evidence and protecting parties from hidden arbitration clauses.

43 First, the general reference suffices for the purpose of Art. II(2) NYC to secure evidence. The provision does not require a party to make the other one aware of an arbitration clause contained in the main contract [WOLFF/*Wolff, Art. II para. 138*]. The form requirement's purpose is to prove that the parties concluded an arbitration agreement [WOLFF/*Wolff, Art. II paras. 79 et seq.*]. The Arbitration Agreement itself is contained in writing in the GCoS [*Exh. R4, p. 32*]. Hence, the existence of the Arbitration Agreement can be easily proven.

44 Second, this general reference also sufficed to protect RESPONDENT from a hidden arbitration clause. Different jurisdictions from both civil and common law countries held that when both parties are experienced businesspeople operating in an industry in which arbitration is a standard practice, the arbitration agreement by general reference is valid [*cf. G. S. A. v. T. Ltd (Switzerland).*; *Tradax Export S.A. v. Amoco Iran Oil Co. (Switzerland); JMA Investments v. C. Rijkaart B.V. (USA); David Threlkeld & Co. v. Metallegesellschaft Ltd (USA); Aceros Prefabricados, S.A. v. TradeArbed (USA)*]. Even more so, if the other party was actually aware of the arbitration clause in the standard conditions, this party is in no need of protection [*Aceros Prefabricados, S.A. v. TradeArbed. (USA)*; *Bomar Oil N. V. v. Entreprise Tunisienne d'activitès Pétrolières (France)*]. In such cases, it is also irrelevant that the user did not enclose the general conditions to the contract [*Aceros Prefabricados, S.A. v. TradeArbed*].

45 CLAIMANT made a reference to its GCoS in the contractual document, as well as in the email which it was attached to [*Exh. C3, p. 13*; *Exh. C4, p. 17*]. Ms Bupati—representing RESPONDENT—is an experienced, well-recognized businessperson. In the palm oil industry, arbitration is a standard practice [*PO2-11, p. 49*]. Additionally, Ms Bupati was always aware of the Arbitration Clause otherwise she would not have suggested which institution to choose [*Exh. C2, p. 12*]. Hence, RESPONDENT was always positively aware of Art. 9 GCoS and in no need of protection. Therefore, the warning function cannot be invoked here. The general reference CLAIMANT made in its email meets the requirements of Art. II(2) NYC.

b. Alternatively, the Arbitration Agreement Is Valid under Art. VII NYC

46 Even if the Tribunal were to find that the Arbitration Agreement does not meet the requirements of Art. II(2) NYC, the Arbitration Agreement is valid under the NYC. As per Art. VII NYC, the more favorable provision of the national law of Danubia ("**DAL**") applies to determine the formal validity of the Arbitration Agreement. Art. VII NYC permits to apply the Curial Law in

cases in which this law is more favorable for the party seeking enforcement than the NYC [*Ground Mace Case, para. 26*; VAN DEN BERG, *pp. 86 et seq.*; HAAS, *p. 436 para. 16*]. The form requirement of the applicable DAL provision, Art. 7(6) DAL, is more favorable than Art. II(2) NYC. Art. 7(6) DAL states that the reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is made to make the clause part of the contract. It is a verbatim adoption of Art. 7 Opt. 1 UNCITRAL Model Law. Thus, Art. 7(6) DAL does not require any form of the reference at all. It only requires an arbitration clause which is validly included under the applicable contract law [WOLFF/*Wolff, Art. II para. 144*]. The Parties validly included the Arbitration Agreement in the Sales Contract [*supra para. 33*]. Therefore, Art. VII NYC permits to apply Art. 7(6) DAL instead of Art. II(2) NYC. All further provisions of the NYC will remain applicable [KRONKE/*Schramm et al., p. 48*; LEW/MISTELIS/KRÖLL, *Chap. 6 paras. 26 et seq.*]. The Arbitration Agreement is formally valid.

II. EVEN IF THE TRIBUNAL WERE TO FIND THAT MEDITERRANEAN LAW APPLIES, IT HAS JURISDICTION

47 Even if the Tribunal were to find that the law of Mediterraneo applies, the Tribunal has jurisdiction. Under MCL excluding the CISG, the Arbitration Agreement is valid [**A**]. The result is not altered even if the Tribunal were to find that the CISG applies [**B**].

A. MCL APPLIES AND ACCORDINGLY THE ARBITRATION AGREEMENT IS VALID

48 The CISG does not apply because it does not apply to arbitration agreements [**1**]. Rather, MCL determines the validity of the arbitration agreement. Furthermore, the requirements set out by MCL are fulfilled [**2**].

1. The CISG Does Not Apply to the Arbitration Agreement

49 The CISG does not apply to the Arbitration Agreement. First, the wording of the CISG shows that arbitration agreements do not fall within its scope of application [**a**]. In addition, the recent judgement of the German Federal Court which applies the CISG to arbitration agreements, does not apply in the present case [**b**].

a. Arbitration Agreements Do Not Fall Within the Scope of Application of the CISG

50 As the CISG is the Convention for the International Sale of Goods, arbitration agreements do not fall within its scope of application [*cf.* KRÖLL I, *p. 72*; *Gutta-Werke AG v. Dörken-Gutta Pol, para. 15*]. As per Artt. 1- 3, the CISG's scope of application is limited to contracts of sale.

An arbitration agreement is not a contract of sale [PIKA, *p. 512*; *ICC Case No. 5832*]. An arbitration agreement is concerned with disputes, using procedure specified in the agreement while a contract of sale is concerned with commercial terms of an economic transaction [BORN, *p. 535*; LIONNET/LIONNET, *p. 170*].

51 Moreover, as per Art. 4, the CISG governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract [*cf.* MÜKO/*Huber*, *Art. 4 para. 43*]. The rights and obligations arising out of an arbitration agreement are different from those arising out of a contract of sale [KOCH, *p. 283*]. The parties' obligations to an arbitration agreement are limited to cooperation in the arbitral proceedings [*ibid.*]. In particular, the CISG, *e.g.*, regarding the limited possibility of withdrawal, is tailored to international sales contracts, not to arbitration agreements, which may prevent its applicability in the event of a breach of arbitration agreements [PIKA, *p. 512*]. For these reasons, the rights and obligations arising out of an arbitration agreement do not fit to those under Art. 4 CISG.

52 Art. 19(3) and Art. 81(1) CISG mentioning arbitration clauses do not affect this result [*Replacement Parts For Ships Case, para. 56*; KRÖLL II, *p. 47*; SCHLECHTRIEM/BUTLER, *para. 41*; *Plastic Granulate Case, para. 2.1.1*; NEUMAYER/MING, *p. 250 para. 14*]. Those Articles merely endorse the well-recognized Doctrine of Separability [MÜKO/*Huber, Art. 4 para. 43*]. Art. 19(3) and Art. 81(1) CISG only take up widespread principles of interpretation and transfer them to the CISG [*Replacement Parts For Ships Case, para. 56*]. Thus, Art. 19(3) and Art. 81(1) CISG do not imply that the CISG is applicable to arbitration agreements.

b. The 2020 *Ground Mace Case* Does Not Apply to the Present Case

53 This result holds true even in light of the 2020 *Ground Mace Case*, a judgement of the German Federal Court. Its facts differ from those of the case at hand. In its judgment of 26 November 2020, the German Federal Court dealt with the application of the CISG to arbitration agreements. It explicitly left the question whether the CISG applies to arbitration agreements open for cases in which the requirements of Art. II(2) NYC are fulfilled [*Ground Mace Case, para. 37*; *similar*: THODE, *para. C.*; *Sour Cherries Case II, para. 20*]. As the requirements of Art. II(2) NYC are fulfilled in the case at hand [*supra paras. 38 et seqq.*], the rationale of the *Ground Mace Case* does not apply.

2. The Arbitration Clause Was Validly Included in the Contract under MCL

54 Under MCL, the Parties validly included Art. 9 GCoS in the Sales Contract. As per Art. 2.1.19(1) MCL, the general rules on contractual formation apply when one or both parties

use standard terms. Specific indication of assent to the standard terms is not necessary. It suffices if the addressee generally accepts the offer or counteroffer for the terms to apply [VOGENAUER/*Naudé, Art. 2.1.19 para. 6*]. The Parties agreed on applying the GCoS [*cf. infra para. 69*].

55 Moreover, CLAIMANT took reasonable steps to bring Art. 9 GCoS to the attention of RESPONDENT. Under MCL a reference to the GCoS is sufficient [*cf.* KÜHL/HINGST, *p. 53*; SCHLECHTRIEM/SCHWENZER/SCHROETER/*Schmidt-Kessel, Art. 8 para. 53 fn. 388*; *Official Comment 2016 Ed, Art. 2.1.19 Comment 3*]. The inclusion by mere reference is consistent with the reality that standard terms are normally not read even when they are sent [VOGENAUER/*Naudé, Art. 2.1.19 para. 19*]. In its email, CLAIMANT expressly referred to the application of the GCoS [*Exh. C4, p. 17*]. This reference is sufficient to include those in the Sales Contract. A reasonable third person in the position of RESPONDENT would understand the intention to include Art. 9 GCoS in the Sales Contract [*cf.* VOGENAUER/*Naudé, Art. 2.1.19 para. 14*]. Thus, the Parties validly included Art. 9 GCoS under MCL.

B. EVEN IF THE TRIBUNAL WERE TO FIND THAT THE CISG APPLIES, THE ARBITRATION AGREEMENT IS VALID

56 Even if the Tribunal were to find that the CISG applies to the Arbitration Agreement, it is still valid. Unlike the MCL, the CISG contains no special provisions to include standard terms. Artt. 14-24 in conjunction with Art. 8 CISG apply [SCHLECHTRIEM/SCHWENZER/*Schroeter, Art. 14 para. 40*; *Propane Gas Case, para. 25*].

57 It is generally accepted that the CISG sets up two requirements to include standard terms in a contract: First, the user must make a reference to the standard terms [FERRARI/KIENINGER/MANKOWSKI/*Mankowski, intro to Artt. 14 et seq. para. 26*; SCHLECHTRIEM/SCHWENZER/*Schroeter, Art. 14 para. 43*]. CLAIMANT made a reference to the GCoS [*infra para. 92*].

58 Second, the terms must have been made available to the other party. However, the user does not have to make the terms available if the other party is aware of its content [*Spacers For Insulation Glass Case*; EISELEN, *CISG-AC No. 13, comment 2.6*; SCHLECHTRIEM/SCHWENZER/*Schroeter, Art. 14 para. 46*; STAUDINGER/*Magnus, Art. 14 para. 41*]. RESPONDENT was aware of the content of the Arbitration Clause [*infra para. 101*].

III. CONCLUSION

59 The Parties concluded an Arbitration Agreement that confers jurisdiction to the Tribunal. The Arbitration Agreement must be interpreted separately from the Sales Contract. The Parties subjected their Arbitration Agreement to Danubian law by choosing Danubia as Seat of Arbitration. Under Danubian law, the Arbitration Agreement was validly included in the Sales Contract and meets the formal requirements. Even if the Tribunal were to apply the Law of Mediterraneo, the Parties concluded a valid Arbitration Agreement. First, the CISG does not apply to the Arbitration Agreement. Second, even if the CISG were to apply, *quod non*, the Arbitration Agreement is valid because it was validly included in the Sales Contract.

PART II: THE PARTIES CONCLUDED THE SALES CONTRACT IN 2020

60 CLAIMANT requests the Tribunal to find that the Parties concluded the Sales Contract in 2020. The Parties agree that Mediterranean Law including the CISG governs the Sales Contract [*PO2-33, p. 52*]. The CISG applies a strict threshold for the avoidance and termination of a contract. RESPONDENT wants to bypass these requirements. It tries to avoid the Sales Contract through the back door by claiming it was never concluded. However, this attempt is deemed to fail. The Parties validly concluded the Sales Contract on 9 April 2020 [**I**]. Even if the Tribunal were to find otherwise, CLAIMANT placed an offer to RESPONDENT on 9 April 2020 which RESPONDENT impliedly accepted either by silence on 17 April 2020, or by other conduct on 3 May 2020 [**II**].

I. THE PARTIES CONCLUDED THE SALES CONTRACT ON 9 APRIL 2020

61 On 1 April 2020, RESPONDENT made a contract offer by email [**A**]. CLAIMANT accepted this offer on 9 April 2020 by sending RESPONDENT the signed contractual documents [**B**].

A. Respondent PLACED AN OFFER VIA EMAIL ON 1 APRIL 2020

62 Ms Bupati, Head of Purchasing for RESPONDENT [*PO2-12, p. 49*], sent an offer for the Sales Contract via email on 1 April 2020 to Mr Chandra, representing CLAIMANT. Under Art. 14(1) CISG, an offer needs to indicate the offeror's intention to be legally bound.

63 Art. 8 CISG determines whether the proposing party is willing to be bound [HONNOLD, *Art. 14 para. 134*]. RESPONDENT's declaration is to be examined in the sense of Art. 8(2), (3) CISG according to the understanding of a reasonable person of the same kind as the other party would have had in the same circumstances [*cf. Treibacher Industry AG v. Allegheny Technologies, p. 6*]. Ms Bupati's email on 1 April 2020 [**1**] and the negotiations between Ms Bupati and

Mr Chandra at the Palm Oil Summit in Capital City in Mediterraneo on 28 March 2020 (the "**Summit**") [**2**] lead to a reasonable person's understanding that RESPONDENT had the intention to be legally bound.

1. Ms Bupati's Email Shows RESPONDENT's Intention to Be Legally Bound

64 A reasonable person would understand Ms Bupati's email as an expression of RESPONDENT's intention to be legally bound because she chose the words "offer" and "order" [*Exh. C2, p. 12*]. Case law shows that under the CISG the choice of words is a key factor to determine whether a party intends to be bound. In the *Plotters Case* decided by the Commercial Court Canton St. Gall in 1995, the court derived the intention to be bound from the words "order", "we order" and "immediate delivery" [*Plotters Case, p. 9*]. Applying this rationale, the wording used by Ms Bupati carries serious weight in determining RESPONDENT's intention to be bound. As in the *Plotters Case*, Ms Bupati used the word "order" [*Exh. C2, p. 12*]. Even more so, she titled the subject of her email "Purchase offer" [*ibid.*]. This wording is a textbook example of making one's intention to be bound clear: In a business environment, an "order" generally triggers delivery [GABLER, *p. 54*; *Law Insider*]. The same standard must be applied to RESPONDENT's choice of words.

65 Moreover, Ms Bupati presumed in her email that CLAIMANT's acceptance would lead to a valid contract. Since Ms Bupati is a conscientious businessperson, she must communicate precisely [*cf. Italian Knitwear Case III, para. 22*]. A reasonable person of the same kind as Mr Chandra can therefore rely on her statements. On 1 April 2020, Ms Bupati said that Ms Fauconnier "will take care of further discussions, **if any**, and the **implementation** of the contract" [*Exh. C2, p. 12, emph. add.*]. By stating "if any", RESPONDENT emphasized that no points of discussion were open. Ms Bupati further underlined this by transferring the final steps of "implementation" to Ms Fauconnier, her assistant. Thus, the email on 1 April 2020 is a legally binding offer.

2. The Negotiations at the Summit Show RESPONDENT's Intention to Be Bound

66 The negotiations between Ms Bupati and Mr Chandra at the Summit show RESPONDENT's intention to be bound as per the understanding of a reasonable person (Art. 8 CISG). They demonstrate that Ms Bupati would only approach CLAIMANT with a definite, legally binding offer. At the Summit, Ms Bupati and Mr Chandra agreed on the commercial terms of the Sales Contract [*Exh. C2, p. 12*; *PO2-13, p. 49*]. Ms Bupati wanted to discuss these commercial terms with RESPONDENT's management before making a firm offer [*Response-8, p. 26*]. She

demonstrated that a firm offer depended solely on this confirmation. She received such confirmation [*ibid.*]. Her email on 1 April 2020 was a legally binding offer.

67 Furthermore, RESPONDENT showed at the Summit that it depended on CLAIMANT. As per Art. 8(3) CISG, one must consider all relevant circumstances of the case to determine the understanding of a reasonable person [KRÖLL/MISTELIS/PERALES VISCALIS/*Zuppi, Art. 8 para. 29*; *Rock Resource Ltd v. Altos Hornos de México, para. 81*]. Therefore, the relationship of one party to the other also must be taken into consideration [*cf. Ethyl Acetate Case, pp. 3 et. seq.*]. CLAIMANT gave Ms Bupati the opportunity to conclude a contract for a rare commodity at a favorable price [*NoA-5, p. 5*; *Exh. C2, p. 12*]. Given the limited availability of RSPO-certified palm oil, RESPONDENT needed CLAIMANT to fulfill its ambitious sustainability goals [*Response-4, p. 26*]. This circumstance made it discernable for CLAIMANT that RESPONDENT found itself in a precarious position. The fact that RESPONDENT visited several oil producers and still concluded only one additional contract until October 2020 [*PO2-28, p. 52*] further demonstrates RESPONDENT's need for CLAIMANT's goods. Moreover, Ms Bupati expressed the urgency to conclude a contract with CLAIMANT in wanting to purchase CLAIMANT's entire available production for five years [*NoA-5, p. 5*]. Thus, it was reasonable for CLAIMANT to expect that Ms Bupati had the intention to be bound on 1 April 2020.

B. Claimant ACCEPTED THE OFFER VIA EMAIL ON 9 APRIL 2020

68 CLAIMANT accepted the offer on 9 April 2020 by sending RESPONDENT the signed contractual documents via email. Mr Rain, Mr Chandra's assistant, inserted the terms of RESPONDENT's offer into CLAIMANT's contractual template and explicitly stated that CLAIMANT accepted them [*Exh. C4, p. 17*]. RESPONDENT cannot argue that CLAIMANT's acceptance is a counteroffer. As per Art. 19 CISG, a reply to an offer only constitutes a counteroffer and not an acceptance if it alters the offer materially [*Orcia Australia Pty Ltd v. Aston Evaporative Service, LLC, para. 29*]. The contractual documents did not constitute such a material alteration. First, the GCoS did not alter the offer [**1**]. Second, neither the requirements for the termination of the Sales Contract contained in Art. 4 of the GCoS [**2**] nor the Arbitration Clause contained in Art. 9 GCoS [**3**] altered the terms of RESPONDENT's offer.

1. The fact that CLAIMANT Mentioned the GCoS Did Not Alter the Offer

69 The fact that CLAIMANT mentioned the GCoS in its acceptance did not alter the offer. The Parties were aware that in the event of a contract conclusion the GCoS should apply. CLAIMANT's reply logically cannot alter the offer if RESPONDENT knew that the Parties would

apply the GCoS before it made its offer. Ms Bupati stated in her email that RESPONDENT was strongly interested in securing a long-term supply at the conditions she and Mr Chandra "**discussed at the Summit**" and placed her order in light of the conditions "**as agreed at the Summit**" [*Exh. C2, p. 12, emph. add.*]. At the Summit, Mr Chandra mentioned that a possible contract would include the GCoS [*PO2-13, p. 49*]. When placing an order in accordance with the conditions "**as agreed at the Summit**", Ms Bupati therefore also referred to the GCoS in her email on 1 April 2020 [*cf. Exh. C1-4, p. 9, emph. add.*]. Additionally, CLAIMANT's standard terms were the only standard terms ever used for the contracts Ms Bupati and Mr Chandra concluded [*ibid.*]. Therefore, the GCoS as such did not alter RESPONDENT's offer.

2. The Termination Clause in Art. 4 GCoS Did Not Alter the Terms of the Offer

70 Art. 4 GCoS does not constitute an alteration. As per Art. 4 GCoS, CLAIMANT is entitled to an additional period of two months to remedy problems with the individual suppliers before the contracting partner can terminate the contract [*NoA-21, p. 7*]. Ms Bupati already referred to Art. 4 in her offer as she referred to the GCoS as such [*supra para. 69*]. Therefore, Art. 4 GCoS did not alter the offer.

71 Even if the Tribunal were to find otherwise, Art. 4 GCoS would not alter the offer materially because Art. 4 GCoS is a trade usage. Trade usages can refute the presumption contained in Art. 19(3) CISG that a change in the extent of one's party liability alters the terms of the offer materially [*cf.* KRÖLL/MISTELIS/PERALES VISCASILLAS/*Ferrari, Art. 19 para.* 10; ACHILLES, *Art. 19 para. 2*; *Monoammonium Phosphate Case, p. 4*]. Trade usages are rules of commerce which are regularly observed by those involved in a particular industry or marketplace [SCHLECHTRIEM/SCHWENZER/*Schmidt-Kessel, Art. 9 para. 12*]. The content of Art. 4 GCoS is common in the palm oil industry in the part of the world where the Parties are based [*PO2-31, p.* 52].

72 Under Art. 9(2) CISG, trade usages apply when the Parties knew or ought to have known them. Ms Bupati and Mr Chandra have been active in the palm oil business for more than ten years [*Exh. C1-3, p. 9*]. Therefore, they both at least ought to have known the content of Art. 4 GCoS. Thus, the alteration is not material. Under Art. 19(2) CISG, a reply to an offer which contains additional terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror, without undue delay, objects to the discrepancy. RESPONDENT did not object to Art. 4 GCoS.

3. Art. 9 GCoS Did Not Alter the Terms of the Offer

73 The Arbitration Clause in Art. 9 GCoS did not alter RESPONDENT's offer because the provision complies with Ms Bupati's suggestion. At the Summit, Mr Chandra told Ms Bupati that for CLAIMANT agreeing on anything but arbitration would be verry difficult [*Exh. C1-11, p. 10*]. Thus, Ms Bupati knew that the Arbitration Agreement was essential for CLAIMANT. Therefore, she must have known that the Sales Contract would contain the Arbitration Agreement. In addition, it is common business practice in the palm oil industry to include arbitration clauses in general conditions [*PO2-11, p. 49*]. Ms Bupati suggested selecting a non-industry related institution [*Exh. C2, p. 12*]. Since 2016, the GCoS submit disputes to the AIAC, not to an institution exclusively dealing with palm oil [*Exh. C1-4, p. 9*; *Exh. R4, p. 32*]. Thus, the GCoS were already in line with Ms Bupati's suggestions. CLAIMANT had also informed Ms Bupati about this change in 2016 [*Exh. C1-4, p. 9*]. Therefore, Art. 9 GCoS did not alter RESPONDENT's offer. Consequently, CLAIMANT's reply does not constitute a counteroffer. The Parties concluded the Sales Contract on 9 April 2020.

II. EVEN IF THE PARTIES DID NOT CONCLUDE THE CONTRACT ON 9 APRIL 2020, RESPONDENT ACCEPTED CLAIMANT'S OFFER IMPLIEDLY

74 Even if the Tribunal were to find that the Parties did not conclude the Sales Contract on 9 April 2020, the Parties concluded the Sales Contract afterwards. In this scenario, CLAIMANT made an offer to RESPONDENT on 9 April 2020 as counteroffer pursuant to Art. 19(1) CISG. RESPONDENT accepted this offer impliedly by silence [**A**]. Alternatively, RESPONDENT accepted the offer impliedly by other conduct [**B**].

A. Respondent ACCEPTED THE OFFER SILENTLY

75 RESPONDENT accepted CLAIMANT's offer silently on 17 April 2020 because CLAIMANT and Ms Bupati established a Party Practice which includes that Ms Bupati's silence—after receiving the contractual documents—constitutes acceptance [**1**]. This Practice also applies between the Parties even though CLAIMANT's contracting partner changed [**2**].

1. The Party Practice between Ms Bupati and Mr Chandra Shows That Ms Bupati's Silence after Receiving the Contractual Documents Constitutes Acceptance

76 There is a practice between Ms Bupati and CLAIMANT to conclude a contract regardless of missing bilaterally signed contractual documents unless Ms Bupati objects to them within a week. Acceptance in the sense of Art. 18(1) CISG is any statement or other conduct expressing consent to the offer. Silence alone constitutes acceptance when it is coupled with circumstances

assuring the offeree's assent [*Secretariat Commentary, Art. 16 Example 16a*]. A party practice can be such a factor [*Teta Case I, para. 13*; C*alzados Magnanni v. Shoes General International S.a.r.l, p. 2 para. 11*]. In several cases, Ms Bupati did not return a signed version of the contractual documents [*Exh. C1-3, p. 9*]. Nevertheless, RESPONDENT always performed subsequently as set out in the contractual documents [*Exh. C1-3, p. 9*; *Exh. R3-3, p. 31*; *NoA-19, p. 7*]. By contrast, on three occasions in which she did not agree to the terms she objected within a maximum of a week [*Exh. C1-14, p. 11*; *PO2-9, p. 49*]. Ms Bupati and CLAIMANT followed this practice in at least 40 contracts [*Response-18, p. 28*].

2. The Established Party Practice Applies between the Parties

77 The practice that Ms Bupati and CLAIMANT established also applies between CLAIMANT and RESPONDENT even though Ms Bupati changed her employer from the parent company—Southern Commodities—to RESPONDENT, the subsidiary. First, because the Parties explicitly re-established the Party Practice [**a**]. Second, the change of CLAIMANT's contracting party did not influence the continuance of the Party Practice—especially because the same persons concluded the contracts [**b**]. Lastly, RESPONDENT acts inconsistently if it declares the Party Practice inapplicable [**c**].

a. The Re-Established Party Practice Governs the Relationship Between the Parties

78 The Party Practice applies because the Parties agreed to re-establish it at the Summit. Ms Bupati referred to this re-established Party Practice in her email from 1 April 2020. She stated that it was good to see Mr Chandra at the Summit to "**catch up** and to **re-establish**" their "**long-lasting** and **successful** business relationship" in her new position [*Exh. C2, p. 12*; *emph. add.*]. In principle, parties establish a practice by following a behavior with a certain frequency over a certain period [*Tantalum Powder Case II, para. 15*; SCHLECHTRIEM/SCHWENZER/*Schmidt-Kessel, Art. 9 para. 8*]. However, parties can just as well agree to apply a practice at their first conclusion of a contract [*cf. Propane Gase Case, para. 27*]. Following the principle of party autonomy (Art. 6 CISG), the Parties' agreement displaces the CISG and its requirements for a party practice [KRÖLL/MISTELIS/PERALES VISCASILLAS/*Perales Viscasillas, Art. 9 para. 4*]. Practices that apply to a legal relationship without any agreement must especially apply if there is an explicit agreement to do so. Therefore, the Parties were able to agree to tie in with an established Party Practice.

79 The Party Practice is part of the business relationship to which Ms Bupati referred in her email [*supra para. 76*]. As Ms Bupati's wording carries legal weight [*supra para. 64*], the

Parties agreed to tie in with the practice by catching up and re-establishing their business relationship. The business relationship was successful and long-lasting. Thus, it was in RESPONDENT's interest to continue it. As Ms Bupati has the capacity to legally bind RESPONDENT [*PO2-12, p. 49*], the Parties' agreement to re-establish the Party Practice binds RESPONDENT.

80 The Parties' behavior underlines that they have re-established the Party Practice. They performed the contract conclusion exactly like Mr Chandra and Ms Bupati always did. The fact that Ms Bupati placed an order via email and asked for the commercial terms discussed before is in line with the procedure she and Mr Chandra had established [*Exh.C1-12 et seq., p. 10*]. As in previous contracts, Mr Chandra included the terms discussed before in CLAIMANT's template [*NoA-7, p. 5*]. Additionally, CLAIMANT—as always—explicitly mentioned the GCoS in the accompanying letter [*NoA-7, p. 5*; *C1-4, p. 9*]. The circumstance that CLAIMANT was not worried at any time about the missing signed version of the Sales Contract [*NoA-8, p. 5*] further demonstrates the existence of the Party Practice. In fact, CLAIMANT only requested for the signed contractual documents to be returned for its files and the necessary paperwork [*Exh. C4, p. 12, Exh. C5-3, p. 18*]. The Parties agreed to re-establish the Party Practice.

b. The Change of CLAIMANT's Contracting Party Did Not Influence the Application of the Party Practice

81 The change of CLAIMANT's contracting party has no influence on the fact that the Party Practice continued to apply. First, this is because RESPONDENT and Southern Commodities are part of the same corporate group [**aa**]. Second, this is because Ms Bupati concluded the contracts for Southern Commodities as well as for RESPONDENT [**bb**].

aa. The Established Party Practice Applies Because RESPONDENT and Southern Commodities Are Part of the Same Corporate Group

82 RESPONDENT is a 100% subsidiary of Southern Commodities [*PO2-4, p. 48*]—meaning both are part of the same corporate group. Thus, Southern Commodities' knowledge of the Party Practice—among other knowledge [*infra para. 105*]—is attributable to RESPONDENT. The Party Practice governs the Parties' legal relationship. Neither the CISG nor the MCL explicitly regulates the question if and when knowledge is attributable between a parent company and its subsidiary. Therefore, the Tribunal must rely on general principles of law that state courts and scholars have established [*cf. BGH Neue Juristische Wochenschrift 1984, p. 1953*; RISSE, *p. 858*]. Attributing the knowledge from the parent company to the acting subsidiary is an

exception to the principle of separate personhood. This exception applies because the case at hand requires to "pierce the corporate veil" [*cf.* LARSON; *Prest v. Petrodel Resources Ltd, para. 24*]: the Tribunal should attribute the knowledge that Southern Commodities acquired through Ms Bupati to RESPONDENT.

83 The reasons for that are threefold: First, if certain parts of a corporate group present themselves as a single unit, the other party can rely on an information exchange between the companies [*cf.* KATAN, *pp. 307 et seq.*]. RESPONDENT and Southern Commodities appeared as a single unit to CLAIMANT: Southern Commodities had ordered shipment directly to RESPONDENT although, Southern Commodities was still CLAIMANT's contracting party [*PO2-3, p. 48*]. Second, the corporate group tried to profit from common employees, namely Ms Bupati and ten employees now working for RESPONDENT in Equatoriana [*PO2-5, p. 48*]. RESPONDENT cannot on the one hand rely on the knowledge, experience and connections of its common employees and pretend on the other hand that they are blank sheets where it does not profit [*cf.* MACKIE, *p.* 3]. Lastly, because RESPONDENT is a 100% subsidiary of Southern Commodities, no other shareholders need protection against attributing Southern Commodities' knowledge to RESPONDENT [*cf.* DREXL, *p. 518*].

84 Conversely, CLAIMANT must be protected against the shift of knowledge within a corporate group that CLAIMANT justifiably perceived as a single unit [*cf. BGH Neue Juristische Wochenschrift 1990, p. 975*]. It violates the principle of good faith to put the simply structured company in a worse position than the more complex structured corporate group [*cf. ibid.*]. If the Tribunal were to find differently, it would provide RESPONDENT with an undue advantage due to its corporate groups legal structure. This could become a corporate trick to avoid responsibility and lead to a legal *carte blanche*.

bb. The Party Practice Applies Because Ms Bupati Concluded the Contracts for both Southern Commodities and RESPONDENT

85 The Party Practice applies because Ms Bupati concluded the contracts for Southern Commodities as well as for RESPONDENT [*NoA- 4, p. 5*; *PO2-12, p. 49*]. In her prior position she and Mr Chandra concluded at least 40 contracts. The Party Practice governed those contracts [*Response-18, p. 28*]. Ms Bupati therefore knew and understood CLAIMANT's and Southern Commodities' Practice as she herself established it. Art. 79(1), (2) CISG define a general principle that attributes the knowledge of the debtor's employees to the debtor [SCHLECHTRIEM/SCHWENZER/*Schwenzer, Art. 79 para. 41*; *Coke Case, p. 7*;

HONSELL/DORNIS, *Art. 40 para. 7;* STAUDINGER/*Magnus, Art. 79 para. 35*]. Ms Bupati is RESPONDENT's Head of Purchase [*Exh. R3, p. 31*]. Therefore, her knowledge of the Party Practice is attributed to RESPONDENT. The change of Ms Bupati's employer does not change this attribution because a natural person cannot "unknow" something solely by changing "the hat" [MACKIE, *p. 19*; SPINDLER, *p. 341*].

c. RESPONDENT Acts Inconsistently if It Submits That the Party Practice Is Inapplicable

86 RESPONDENT acts inconsistently because it submitted that the Party Practice is inapplicable. RESPONDENT largely benefitted from Ms Bupati's and Southern Commodities' relationship with Mr Chandra and CLAIMANT. CLAIMANT gave RESPONDENT the opportunity to conclude a contract for CLAIMANT's entire RSPO-certified palm oil production at a very favorable price. No reasonable businessperson would sell its entire five-year production to a buyer it does not trust. The unique proposal is based on Ms Bupati's relationship with CLAIMANT. Ms Bupati's experience in the palm kernel oil market and her connections to palm oil producers were one of the reasons why she became Head of Purchasing [*Exh. R3-4, p. 31*; *PO2-5*, p. *48*]. It was precisely RESPONDENT's intent to take advantage of Ms Bupati's connections. If RESPONDENT planned to use her relationship with CLAIMANT, it must accept the effects of this connection in its entirety. As this relationship contained the Party Practice [*supra para. 78*], RESPONDENT must also accept that the Party Practice applies in this case. Anything else is cherry picking.

B. ALTERNATIVELY, Respondent ACCEPTED THE OFFER BY OTHER CONDUCT

87 Even if RESPONDENT did not accept the offer by silence, it accepted CLAIMANT's offer by other conduct. RESPONDENT's email on 3 May 2020 and the fact that RESPONDENT contacted several of the acceptable banks on 30 May 2020 is crucial. Art. 8 CISG determines whether a certain act of the offeree constitutes conduct equivalent to an explicit acceptance [*Insulating Material Case, pp. 10 et seq.*; HONSELL/DORNIS, *Art. 18 para. 21*]. Ms Fauconnier asked CLAIMANT in her email on 3 May 2020 for a list of acceptable banks for the letter of credit "**in the sense of the contract**" [*Exh. R2, p. 30, emph. add.*]. The inquiry about acceptable banks constitutes the first step in a contractual performance. Such an inquiry would be useless without a contract concluded. In addition, by using the phrase "**in the sense of the contract**" [*Exh. R2, p. 30*] RESPONDENT explicitly presupposed the existing Sales Contract.

88 This especially applies because Ms Fauconnier even contacted several of the acceptable banks for the letter of credit on 30 May 2020 [*PO2-23, p. 51*]. A reasonable person would understand

this as intention to perform the Sales Contract. RESPONDENT was eager to open a letter of credit with one of those banks. The only reason for RESPONDENT not to open a letter of credit, laid outside the Parties' relationship: Ms Fauconnier could not work because she was diagnosed with COVID-19 and took a four-week vacation afterwards [*PO2-23, p. 51*]. Besides that, Ms Bupati explained to Ms Fauconnier that she never opens a letter of credit within the time span provided by Art. 7a of the Sales Contract when she and Mr Chandra conclude contracts long before the actual shipment [*Exh. C3, p. 14*; *PO2-23, p. 51*]. RESPONDENT accepted CLAIMANT's offer by other conduct. The Parties concluded the Sales Contract on 30 May 2020 at the latest.

III. CONCLUSION

89 The Parties concluded the Sales Contract in 2020. RESPONDENT merely tries to evade the suddenly unwanted Sales Contract to please the Equatorianian public. To prevent RESPONDENT from terminating a perfectly valid contract through the back door, the Tribunal is requested to find that the Parties validly concluded the Sales Contract on 9 April 2020. If the Tribunal were to find that CLAIMANT's reply to RESPONDENT's offer constituted a counteroffer, RESPONDENT accepted this offer silently. This is because the Party Practice shows that silence constitutes acceptance. Alternatively, RESPONDENT's unambiguous conduct leads to the conclusion of the Sales Contract no later than 30 May 2020.

PART III: THE GCOS WERE VALIDLY INCLUDED IN THE SALES CONTRACT

90 CLAIMANT requests the Tribunal to find that the GCoS were validly included in the Sales Contract. Consequently, Art. 4 and Art. 9 of the GCoS became Part of the Sale Contract. Art. 9 GCoS contains the Arbitration Clause [*cf. NoA-14, p. 6*] while Art. 4 GCoS provides for a period of two months to remedy a breach of contract [*PO2-31, p. 52*]. RESPONDENT only denies that the GCoS were validly included in the Sales Contract because it tries to circumvent applying Art. 4.

91 As the CISG does not provide special provisions on the inclusion of standard terms in a contract, Artt. 14-24 in conjunction with Art. 8 CISG apply [SCHLECHTRIEM/SCHWENZER/*Schroeter, Art. 14 para. 40*; *Travelers Property Casuality Co. v. Saint-Gobain Technical Fabrics Canada Ltd, p. 6*; *Propane Gas Case, para. 25*]. The CISG provides for two requirements to validly include standard terms in a contract: First, the user must make a reference to the standard terms and second, it must make them available to the other party [FERRARI/KIENINGER/MANKOWSKI/*Mankowski, intro to Artt. 14 et seqq. para. 26*;

*Sc*HLECHTRIEM/SCHWENZER/*Schroeter*, *Art. 14 para. 43*]. CLAIMANT made a reference to the GCoS at the Summit [**I**]. Besides that, CLAIMANT did not have to make the GCoS available again [**II**].

I. CLAIMANT MADE A REFERENCE TO THE GCOS AT THE SUMMIT

92 CLAIMANT referred to the GCoS during the Parties' discussions at the Summit. No requirements apply as to the form and clarity of such a reference [*cf. Euroflash Impression S.A.S. v. Arconvert S.p.A., pp. 18 et seq.*; *Gantry S.A. v. Research Consulting Marketing, para. 22*]. Instead, a reasonable person of the same kind as the other party must understand the reference [*Vine Wax Case, p. 12;* SCHLECHTRIEM/SCHWENZER/*Schroeter*, *Art. 14 para. 44*; EISELEN, *CISG-AC No. 13, rule 5*]. At the Summit, Mr Chandra informed Ms Bupati that the GCoS will apply [*PO2-13, p. 49*]. RESPONDENT must have understood this reference.

93 References to standard terms must be made before the acceptance of the contract [SCHWENZER/HACHEM/KEE, *para. 12.06*; HONSELL/DORNIS, *intro to Artt. 14 et seqq. para. 9*; *Dutch Plants Case I, para. 21*] and can be part of other communication apart from an offer or an acceptance [MAGNUS, *p. 315*]. Therefore, it is irrelevant that CLAIMANT did not make an offer at the Summit.

II. CLAIMANT DID NOT HAVE TO MAKE THE GCOS AVAILABLE AGAIN

94 CLAIMANT did not have to make the GCoS available again to include them in the Sales Contract. CLAIMANT had already met the requirement to make the GCoS available [**A**]. Even if CLAIMANT had not already met this requirement, RESPONDENT had a reasonable opportunity to obtain awareness of the GCoS [**B**].

A. Claimant HAD ALREADY MET THE REQUIREMENT TO MAKE THE GCOS AVAILABLE

95 CLAIMANT had already met the requirement to make the GCoS available. This is because RESPONDENT was aware of their content and the GCoS were part of the Party Practice. In the leading *Machinery Case* from 2001, the German Federal Court defined the requirements to validly include standard terms in contracts under the CISG: besides a reference, the user must transmit the terms or make them available in another way to the other party [*Machinery Case, para. 15*]. However, there are two widely recognized exceptions from this rule, lowering the standard for a party's conduct, to make the terms available and to include the standard terms [*cf.* MAGNUS, *p. 321*; SCHLECHTRIEM/SCHWENZER/*Schmidt-Kessel*, *Art. 8 para. 58*]. First, the user does not have to make the terms available again if the other party is aware of its content [*Spacers For Insulation Glass Case*; EISELEN, *CISG-AC No. 13, comment 2.6*;

SCHLECHTRIEM/SCHWENZER/*Schroeter*, *Art. 14 para. 46*; STAUDINGER/*Magnus*, *Art. 14 para. 41*]. Second, the same holds true, when applying the standard terms is part of the party practice [*Tantalum Powder Case I, para. 41; Dutch-Italian Sales Contracts Case, paras. 33 et seqq.*; SCHWENZER/HACHEM/KEE, *paras. 12.13 et seq.*; EISELEN, *CISG-AC No. 13, rule 3.4*].

96 CLAIMANT fulfills both exceptions. First, RESPONDENT was aware of the GCoS' content due to Ms Bupati's knowledge [**1**]. Second, Southern Commodities' knowledge of the GCoS is attributed to RESPONDENT because they are part of the same corporate group [**2**]. Third, the latest GCoS were additionally included in the Sales Contract because applying the GCoS was part of the Party Practice [**3**].

1. RESPONDENT Was Aware of the Content Due to Ms Bupati's Knowledge

97 RESPONDENT was aware of the GCoS's latest version due to Ms Bupati's knowledge which is attributed to RESPONDENT [*supra para. 85*]. This is sufficient to include standard terms. Requiring CLAIMANT to make the terms available again would be a pure formality and contradict the principle of good faith of Art. 7(1) CISG [*cf.* MAGNUS, *p. 322*; FERRARI/KIENINGER/MANKOWSKI/*Mankowski*, *intro to Artt. 14 et seqq para. 40*]. This knowledge protects RESPONDENT from the risks of unknown standard terms [*cf.* FERRARI/KIENINGER/MANKOWSKI/*Mankowski*, *intro to Artt. 14 et seqq. para. 40*; MÜKO/*Gruber*, *Art. 14 para. 32*]. First, RESPONDENT was aware of the entire 2016 version of the GCoS [**a**]. Second, it was aware of the 2020 amendments to the GCoS [**b**].

a. RESPONDENT Was Aware of the Entire 2016 Version of the GCoS

98 RESPONDENT was aware of the entire 2016 version of the GCoS. This suffices to include the entire 2016 version. First, CLAIMANT provided the pre-2016 version of the GCoS to Ms Bupati and expressly informed her about the changes in 2016 [**aa**]. Second, CLAIMANT could rely on Ms Bupati's ongoing knowledge of the GCoS even though Ms Bupati forgot about their amendments [**bb**].

aa. CLAIMANT Provided the Pre-2016 Version to Ms Bupati and Informed Her About the Changes

99 Ms Bupati was aware of the entire 2016 version of the GCoS. Since then, CLAIMANT only amended the arbitration clause [*Exh. C1-4, p. 9*]. CLAIMANT provided the pre-2016 version to Ms Bupati and informed her about the changes in 2016 [*PO2-18, p. 50*; *Response-12, p. 27*]. RESPONDENT itself did not have to receive a version of the GCoS. This is because Ms Bupati's

knowledge is attributed to RESPONDENT [*supra para. 85*]. Consequently, providing the terms to Ms Bupati and informing her about the changes is sufficient.

100 CLAIMANT sent the pre-2016 version of the GCoS to Southern Commodities in October 2011 [*Response-11, p. 27*]. Ms Bupati received them [*PO2-18, p. 50*]. She even had a closer look at them in 2014 in the context of an arbitration [*Response-11, p. 27*]. Therefore, she was aware of the pre-2016 version in its entirety. Apart from the arbitration clause, the GCoS have not changed since [*Exh. C1-4, p. 9*]. The fact that Ms Bupati lost the copy of the first GCoS in the meantime [*cf. PO2-18, p. 50*] does not affect this result: the loss of standard terms is at the risk of the other party [FERRARI/KIENINGER/MANKOWSKI/*Mankowski, intro to Artt. 14 et seqq. para. 40*]. Hence, RESPONDENT bears the risk of losing the standard terms.

101 RESPONDENT was aware of the content of the revised Arbitration Clause. In a phone call in 2016, CLAIMANT informed Ms Bupati that it would from now on use the Model Clause of the AIAC instead of the palm oil related institution FOSFA/PORAM [*Exh. C1-4, p. 9*; *Response-12, p. 27*]. If a standard term is common in international trade, the terms' user can rely on the other party's knowledge of this term [*cf.* SCHMIDT-KESSEL, *p. 3446*; KINDLER, *p. 229*; MAGNUS, *p. 322*]. Hence, CLAIMANT could rely on Ms Bupati's knowledge of the AIAC Model Clause as it is a common arbitration clause in international trade. Moreover, CLAIMANT informed Ms Bupati about the clause's individualized content [*PO2-7, p. 48*]. Ms Bupati, and therefore RESPONDENT [*supra para. 85*], was aware of the content of the Arbitration Clause used.

bb. CLAIMANT Could Rely on Ms Bupati's Ongoing Knowledge of the GCoS Even Though Ms Bupati Forgot about Their Amendments

102 CLAIMANT could rely on Ms Bupati's ongoing knowledge of the GCoS. The fact that Ms Bupati had forgotten about the modification of the Arbitration Clause when she wrote her email on 1 April 2020 [*Response-12, p. 27*] is irrelevant because CLAIMANT had already informed Ms Bupati. The established principles to include standard terms apply to the present case: in ongoing business relationships, it is sufficient that the standard terms have been sent to the other party on prior contract conclusions to include them [*Dutch-Italian Sales Contracts Case, paras. 34 et seq.*; SCHLECHTRIEM/SCHWENZER/*Schroeter, Art. 14 para. 58*; EISELEN, *CISG-AC No. 13, rule 3.4*]. The user is not obligated to provide the terms again [*ibid.*]. Rather, the user can rely on the addressee's ongoing awareness of the standard terms [SCHLECHTRIEM/SCHWENZER/*Schroeter, Art. 14 para. 58*; EISELEN, *CISG-AC No. 13, comment 3.6*]. It does not even matter whether the other party lost the terms in the

meantime [*supra para. 100*]. Consequently, the other party does not have to have the standard terms at hand when concluding a contract. If CLAIMANT could rely on RESPONDENT's awareness in cases in which RESPONDENT had lost the sent standard terms, CLAIMANT could *a fortiori* rely on RESPONDENT's awareness because Mr Chandra explicitly informed Ms Bupati. Thus, CLAIMANT could rely on Ms Bupati's ongoing knowledge of the modifications.

103 CLAIMANT could still assume that Ms Bupati was aware of the GCoS even though CLAIMANT and Southern Commodities concluded their last contract—including the GCoS—in June 2018 [*PO2-8, pp. 48 et seq.*]. This is because Ms Bupati still needs to be treated as having actual knowledge. The CISG does not address the question within which time span a party can rely on the other party's ongoing knowledge. However, the Tribunal may recourse to the rationale of Art. 39(2) CISG. Art. 39(2) CISG provides for a two-year period. *Prof. Schroeter* explicitly addressed this and introduced this approach [SCHLECHTRIEM/SCHWENZER/*Schroeter, Art. 14 para. 59*]. The two-year period begins with the conclusion of the last contract subject to the standard terms [*ibid.*]. Since the Parties concluded the Sales Contract at the latest on 30 May 2020 [*supra para. 88*], the two years have not yet passed. CLAIMANT could rely on Ms Bupati's ongoing knowledge. In conclusion, RESPONDENT was aware of the 2016 version and its revised Arbitration Clause.

b. RESPONDENT Was Aware of the 2020 Amendment to the GCoS

104 RESPONDENT was also aware of the 2020 amendment regarding the choice of Mediterranean law for the Sales Contract. RESPONDENT knew about the change of the choice of law clause and did not object [*PO2-33, p. 52*]. Therefore, CLAIMANT did not have to provide a revised version of the GCoS. RESPONDENT's knowledge is sufficient to include the revised GCoS.

2. Southern Commodities' Knowledge of the GCoS is Attributed to RESPONDENT because They are Part of the Same Corporate Group

105 Southern Commodities' knowledge of the GCoS is attributed to RESPONDENT because they are part of the same corporate group. CLAIMANT sent the GCoS to Southern Commodities in 2011 [*Response-11, p. 27*]. Southern Commodities was still aware of the current version because CLAIMANT always informed Ms Bupati about changes [*cf. supra para. 99*]. Whereas a natural person might forget about the details, the knowledge remains within the company the representative acquired it for [*cf. BGH Neue Juristische Wochenschrift 1995, p. 2160*]. As established above, Southern Commodities' knowledge is attributed to RESPONDENT because they are part of the same corporate group and acted as one unit towards CLAIMANT [*supra*

paras. 82 et seqq.]. The fact that Southern Commodities transferred its entire palm oil unit to RESPONDENT reinforces this result. Nothing indicates that Southern Commodities had not transferred the data pertaining to the recent palm oil contracts to RESPONDENT along with the rest of the unit. After all, RESPONDENT had all the information it needed to accept the delivery of palm oil Southern Commodities ordered on its behalf.

3. Additionally, the Latest GCoS Were Included in the Contract Because the Party Practice Contained Applying Them

106 The Party Practice contains that the latest GCoS are included in the contracts. Many scholars argue that the standard terms' user is not obligated to make the terms available again if the party practice mirrors the terms [*supra para. 95*]. Therefore, the GCoS became part of the Sales Contract even though RESPONDENT did not receive the GCoS. Mr Chandra and Ms Bupati had established a practice which applies to the Sales Contract [*supra paras. 77 et seqq.*].

107 To make the application of standard terms part of a practice, the terms must be validly included in the contracts which established the practice [*Tantalum Powder Case II, paras. 13 et seqq.*; *Industrial Equipment Case*; SCHLECHTRIEM/SCHWENZER/*Schroeter, Art. 14 para. 78*]. In the period of 2010-2018, Mr Chandra and Ms Bupati concluded at least 40 contracts which established a practice [*Response-18, p. 28*]. CLAIMANT validly included its GCoS in these contracts because it met the two corresponding requirements: First, CLAIMANT stated in all the emails accompanying the conclusion of the contracts that the GCoS apply [*Exh. C1-4, p. 9*]. Second, Ms Bupati received the GCoS [*PO2-18, p. 50*]. In consequence, applying the GCoS became part of the Party Practice.

108 The amendments to the GCoS in 2016 and 2020 also became part of the Party Practice. If the user of standard terms modifies their content and wants to include the new version in future contracts, it must meet the requirement of making the standard terms available [*cf.* SCHLECHTRIEM/SCHWENZER/*Schroeter, Art. 14 para. 65*]. CLAIMANT explained both modifications of the GCoS to Ms Bupati in detail [*supra paras. 101, 104*]. CLAIMANT could rely on her ongoing awareness [*supra para. 102*]. This is sufficient for the requirement to make the terms available [*supra para. 97*]. Thus, the modified GCoS became part of the Party Practice. CLAIMANT did not have to provide the GCoS to RESPONDENT.

B. Respondent HAD REASONABLE OPPORTUNITY TO OBTAIN AWARENESS OF THE GCOS

109 Even if Ms Bupati's knowledge is not attributed to RESPONDENT and the Party Practice does not apply, RESPONDENT had a reasonable opportunity to obtain awareness of the GCoS. In

addition to an explicit reference to the standard terms, a reasonable opportunity suffices to include the terms without transmitting them [*Vine Wax Case*, *p. 12*; *Tantalum Powder Case I*, *para. 43*; *Gantry S.A. v. Research Consulting Marketing*, *paras. 23 et seq.*; SCHLECHTRIEM/SCHWENZER/*Schmidt-Kessel*, *Art. 8 para. 59*; SOERGEL/*Lüderitz/Fenge*, *Art. 14 para. 10*].

110 A strict obligation of the standard terms' user to always provide the terms would contradict the case-by-case approach of Art. 8(2), (3) CISG and would be formalistic [PÖTTER/HÜBNER, *p. 340*; BERGER II, *p. 17*]. On the one hand, such a strict obligation contradicts the liberal spirit of the CISG [KINDLER, *p. 233*] and exceeds the principles of Artt. 8, 14 and 18 CISG [EISELEN, *p. 12*]. On the other hand, the requirement of a reasonable opportunity is in accordance with the broad wording of Art. 8 CISG [*Film Coating Machine Case*, *pp. 13 et seq.*; SCHLECHTRIEM/SCHWENZER/*Schmidt-Kessel*, *Art. 8 para. 59*; EISELEN, *p. 14*]. This allows for a fair solution in individual cases [BERGER II, *p. 18*] and provides a realistic commercial approach [EISELEN, *p. 14*].

111 Scholars as well as case law established a legal standard to determine whether the other party had a reasonable opportunity to become aware. Measured against these legal standards, RESPONDENT had a reasonable opportunity according to both, scholars [**1**] as well as case law [**2**].

1. Scholars' Principles Require RESPONDENT to Inquire About the GCoS

112 RESPONDENT had a reasonable opportunity to become aware of the GCoS' content. Such an opportunity is given if—upon inquiry—the other party can easily become aware of the terms [SCHLECHTRIEM/SCHWENZER/*Schmidt-Kessel*, *Art. 8 para. 60*]. CLAIMANT sent a prior version of the GCoS to Southern Commodities which Ms Bupati received on its behalf [*Response-11*, *p. 27*]. She knew that CLAIMANT would also send the GCoS to RESPONDENT, at least if requested. There is no indication to the contrary.

113 Furthermore, if a subsidiary has specific reason to suspect that the parent company has knowledge relevant for the subsidiaries' business, it can be required to try to obtain the information [KATAN, *p. 310*]. Standard terms constitute such relevant information as they are crucial for the conduct of business. The GCoS were made available to Southern Commodities [*cf. supra para. 99*] which Ms Bupati—and therefore RESPONDENT—was aware of. RESPONDENT was required to make an inquiry at Southern Commodities.

2. Case Law Confirms RESPONDENT's Obligation to Inquire Because of the Sales Contract's Significance

114 The principles established in the 2003 *Tantalum Powder Case I* before the Austrian Supreme Court support that it would have been reasonable for RESPONDENT to inquire. It set criteria for the reasonableness of obtaining awareness of standard terms. The court held that relevant factors are the duration, intensity, and importance of the business relationship [*Tantalum Powder Case I, para. 45*]. The relationship of Ms Bupati and Mr Chandra fulfills all three factors: first, the relationship lasted for a long time and was fruitful because they concluded at least 40 contracts in the period of eight years [*Response-18, p. 28*]. Furthermore, this relationship also affected the Parties at the time of the conclusion of this Sales Contract because the representatives were identical [*supra para. 85*]. Second, the Sales Contract is extraordinarily important: it was about the delivery of 20,000t of palm oil *per annum—i.e.,* 2/3 of CLAIMANT's annual production. Additionally, the Parties agreed upon a long-term supply while Ms Bupati's and Mr Chandra's prior negotiations only covered the delivery for one year [*PO2-8, p. 49*]. Lastly, RESPONDENT was dependent on CLAIMANT's supply of palm oil [*supra para. 67*]. Since all criteria are fulfilled, it was reasonable for RESPONDENT to become aware of the latest GCoS' content. The principles which case law and scholars established are fulfilled. The GCoS became part of the Sales Contract by CLAIMANT's explicit reference [*supra para. 92*].

III. CONCLUSION

115 RESPONDENT's submission that the GCoS were not validly included in the Sales Contract is merely the attempt of a continuous strategy to escape its contractual obligation. This does not convince. CLAIMANT fulfilled the requirements of the CISG to include standard terms in a contract. First, CLAIMANT made a clear reference to the GCoS. Second, CLAIMANT met the requirement to make the GCoS available. Accordingly, Art. 4 GCoS became part of the Contract which is why RESPONDENT is bound to the Sales Contract.

Pacta sunt servanda.

REQUEST FOR RELIEF

Based on the aforesaid, CLAIMANT respectfully requests the Tribunal to grant the relief set out herein below:

1) To declare that the Tribunal has jurisdiction to hear the case.
2) To declare that the Parties entered into a valid Sales Contract in 2020 for the delivery of 20,000t *per annum* of RSPO-certified palm oil for the years 2020-2025.
3) To declare that the GCoS were validly included in the Sales Contract.

Heidelberg, 9 December 2021

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