THIRTIETH ANNUAL WILLEM C. VIS

INTERNATIONAL COMMERCIAL ARBITRATION MOOT

31 MARCH – 6 APRIL 2023

MEMORANDUM FOR RESPONDENT

ON BEHALF OF:

Equatoriana Geoscience Ltd
1907 Calvo Rd
Oceanside, Equatoriana

(RESPONDENT)

AGAINST:

Drone Eye plc
1899 Peace Avenue
Capital City, Mediterraneo

(CLAIMANT)

COUNSEL

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Treaties and legislation

Abbreviation	Citation
Air Navigation Regulations	Air Navigation (101 - Unmanned Aircraft Operations) Regulations 2019 (S 833/2019 Sing)
ASA	Aviation Safety Act of Equatoriana (*Exh. R 5*)
CFR	Code of Federal Regulations
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980
DMAC	The Drone and Model Aircraft Code
EC	Constitution of Equatoriana
European Convention	European Convention on International Commercial Arbitration, Geneva, 21 April 1961
ML	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
NYC	The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958
PCA Rules	Permanent Court of Arbitration Arbitration Rules 2012
Swiss PIL	Swiss Federal Act on Private International Law (SR 291)
ULIS	Convention relating to a Uniform Law on the International Sale of Goods, The Hague, 1 July 1964
VCLT	Vienna Convention on the Law of Treaties, Vienna, 23 May 1969

Draft Law	Draft of a Law for the Unification of Certain Rules relating to Validity of Contracts of International Sale of Goods 1972

Cases

Abbreviation	**Citation**	**Cited at paras.**
Bad Ass Coffee	*Bad Ass Coffee Co. of Hawaii Inc. v. Bad Ass Enterprises Inc*. [2007] A.J. No. 1080	50
BCY	*BCY v BCZ* [2017] 3 SLR 357	23, 24, 25, 26, 27
CBS	*CBS v CBP* [2021] SGCA 4	37, 48
Cedar Petrochemicals	*Cedar Petrochemicals, Inc. v. Dongbu Hannong Chemical Co., Ltd.*, No. 1:2006cv03972 - Document 118 (S.D.N.Y. 2011)	84
China Machine	*China Machine New Energy Corp. v. Jaguar Energy Guatemala LLC and another* [2020] SGCA 12	37
Coromandel Land	*Coromandel Land Trust Ltd v. Milk T Invs. Ltd,* [2009] CIV-2009-419-000232 (Hamilton High Ct.)	37, 48
Dingxi	*Dingxi Longhai Dairy, Ltd. v Becwood Technology Group, LLC*, No. 0:2008cv00762 - Document 153 (D. Minn. 2010)	110
Euro. Gas Turbines	*Euro. Gas Turbines SA v. Westman Int'l Ltd* (1993) XX Y.B. Comm. Arb. 198 (Paris Cour d'Appel)	50

Geneva Pharmaceuticals	Geneva Pharmaceutical Technology Corp. v. Barr Laboratories, Inc., 201 F. Supp. 2d. 236 (S.D.N.Y. 2002)	98, 99, 106
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Miami Valley Paper	*Miami Valley Paper LLC v. Lebbing Engineering & Consulting GmbH*, No. 1:2005cv00702 - Document 56 (S.D. Ohio 2009)	110
TeeVee Tunes	*Teevee Toons, Inc. v. Gerhard Schubert GmbH*, 2006 U.S. Dist. LEXIS 59455 (S.D. N.Y. 2006).	84

Arbitral awards

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Benteler	*Benteler (F.R. Germany) v. Belgian State and S.A. ABC*, Award, 1983 Ad hoc Arbitration	28
Cairn Energy	*Cairn Energy PLC and Cairn UK Holdings Limited v The Republic of India,* Procedural Order No. 3, Decision on the Respondent's Application for a Stay of the Proceedings, PCA Case No 2016-07, 2017 Permanent Court of Arbitration	32
Case No. 1/1998	Maritime Commission at the Chamber of Commerce and Industry of the Russian Federation Case No. 1/1998 of 18 December 1998	67, 80

Case No. T-23/97	Yugoslav Chamber of Economy Arbitration Proceeding 15. April 1999, award No. T-23/97	87, 88
Cayman Power	*Cayman Power Barge I, Ltd. v. 1. The State of the Dominican Republic, 2. Corporacion Dominicana de Electricidad*, Preliminary Arbitration Decision on the Jurisdiction of the Arbitral Tribunal, ICC Case No. 11772/KGA/CCO, 2003 International Chamber of Commerce	29
ICC Case No. 4381	*Sentence rendue dans l'affaire no. 4381 en 1986*, ICC Case No. 4381, 1986 International Chamber of Commerce	30
Log house case	Korkein oikeus, 14 October 2005 (log house), CISG-Online 1882	79

Books

Abbreviation	**Citation**	**Cited at paras.**
Bantekas	*Ilias Bantekas et al. UNCITRAL Model Law on International Commercial Arbitration: A Commentary (Cambridge, United Kingdom: Cambridge University Press, 2020)*	17, 18, 19
Born	Born, Gary. International Commercial Arbitration 3rd ed (Alphen aan den Rijn, The Netherlands: Wolters Kluwer, 2021)	20, 23, 30, 32, 37, 48, 50,
Cambridge Dictionary	*Cambridge Dictionary*	10

Daly	Daly, Brooks *et al.* A Guide to the PCA Arbitration Rules (Oxford University Press, Oxford: United Kingdom, 2016)	32
Ferrari	Franco Ferrari. *Contracts for the International Sale of Goods: Applicability and Applications of the 1980 United Nations Sales Convention* (Leiden: Martinus Nijhoff Publishers, 2012)	74, 78
Ferrari II	Franco Ferrari & Marco Torsello. *International sales law--CISG in a nutshell*, 1st ed (St. Paul, MN: West Academic Publishing, 2014)	96
Honnold	John Honnold. *Uniform Law for International Sales Under the 1980 United Nations Convention*, 4th ed (Cambridge, MA: Kluwer Law International, 2009)	70
Kröll et al.	Stefan Kröll *et al*. eds. *UN Convention on Contracts for the International Sale of Goods (CISG): A Commentary*, 1st ed (München: Beck, 2011)	70, 74, 83
Kurkela/Turunen	Matti S. Kurkela & Santtu Turunen. Due Process in International Commercial Arbitration (Oxford University Press, Oxford: United Kingdom, 2010, 2nd edition)	37
Merriam-Webster Dictionary	*Merriam-Webster Dictionary*	10

Oxford English Dictionary	*Oxford English Dictionary*, 3rd ed	10, 65
Schwenzer et al.	Ingeborg Schwenzer & Ulrich G. Schroeter, eds. *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 5th ed (New York: Oxford University Press, 2022)	83, 90, 106, 108, 109

Articles

Abbreviation	**Citation**	**Cited at paras.**
Ali/Repousis	Ali Shahla & Repousis G. Odysseas, "Article 27 - Court Assistance in Taking Evidence" in Ilias Bantekas et al., *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (Cambridge, United Kingdom: Cambridge University Press, 2020)	41
Baizeau/Hayes	Domitille Baizeau & Tessa Hayes, "The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte" in Andrea Menaker, *International Arbitration and the Rule of Law: Contribution and Conformity* (Alphen aan den Rijn, The Netherlands: Kluwer Law International B.V., 2017)	49, 40
Born 2014	Born, "The Law Governing International Arbitration Agreements: An International Perspective" (2014) 26 SAcLJ 814	26

Hwang/Lim	Kevin Lim & Michael Hwang, "Corruption in Arbitration – Law and Reality" (2012) 8:1 Asian International Arbitration Journal 1	44
Malik/Kamat	Deeksha Malik & Geetanjali Kamat, "Corruption in International Commercial Arbitration: Arbitrability, Admissibility & Adjudication" (2018) 5:1 The Arbitration Brief 1	44
Schroeter	Ulrich G. Schroeter, "Defining the Borders of Uniform International Contract Law: The CISG and Remedies for Innocent, Negligent, or Fraudulent Misrepresentation" (2013) 58 Vill. L. Rev. 553	100, 101, 108, 109
Srinivasan et al.	Srinivasan, Divya et al., "Effect of bribery in international commercial arbitration" (2014) 4:2 Int. J. Public Law and Policy 131	44
Suresh	Aditya Suresh. "Interpreting Merger Clauses in Contracts Governed by the CISG: Delineating the Scope for the Use of Extrinsic Evidence" (2021) 26 Unif. L. Rev. 223	84

Reports

Abbreviation	**Citation**	**Cited at paras.**
Analytical Commentary	United Nations. *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* A/CN.9/264 (25 March 1985)	37

Convention Commentary	United Nations. *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (2016)	19
Explanatory Documentation	Muna Ndulo. *The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980): Explanatory Documentation prepared for Commonwealth Jurisdictions* (October 1991)	70
Official Records	United Nations. Official Records: *Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees* A/CONF.97/19 (1981)	70, 74, 75, 78, 79, 96, 103, 108
Opinion No. 3	CISG Advisory Council. *CISG-AC Opinion No 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG* (23 October 2004)	83, 84
Tunc	André Tunc. *Commentary on the Hague Conventions of the 1st of July 1964 on International Sale of Goods and the Formation of the Contract of Sale* (1964)	70

INDEX OF ABBREVIATIONS

Abbreviation	Explanation
Art. / Arts.	Article / Articles
Call for Tender	Call for Tender by Equatoriana Geoscience (Exh. C 1)
Claimant	Drone Eye plc
CM	Memorandum for Claimant in the Arbitral Proceedings PCA Case No. 2022-76
Exh.	Exhibit
Hawk Eye	Hawk Eye 2020
Ibid	In the same place
Infra	See below
Kestrel Eye	Kestrel Eye 2010
Langweiler	Letter by Langweiler to Arbitral Tribunal dated 13 September 2022
Liberal Party	Equatoriana's Liberal Party
Minister	The Minister of Natural Resources and Development, Mr. Rodrigo Barbosa
NOA	Notice of Arbitration dated 14 July 2022
NPDP	Northern Part Development Program
p. / pp.	Page / Pages
para. / paras.	Paragraph / Paragraphs
Parliament	The Parliament of Equatoriana
Parties	The Claimant and Respondent
PCA	Permanent Court of Arbitration
PO1	Procedural Order No. 1 dated 7 October 2022
PO2	Procedural Order No. 2 dated 7 November 2022

PSA	Purchase and Supply Agreement concluded between the Claimant and Respondent on 1 December 2020 (*Exh. C 2*)
Public Prosecutor	Ms. Fonseca, the public prosecutor specially appointed to investigate allegations of corruption in relation to the NPDP
Respondent	Equatoriana Geoscience Ltd
RNOA	Response to the Notice of Arbitration dated 15 August 2022
s. / ss.	Section / Sections
Socialist Party	Equatoriana's Socialist Party
SOE	State-owned enterprises
Supra	See above
Tribunal	Arbitral Tribunal
UAS	Unmanned Aerial Systems

STATEMENT OF FACTS

Equatoriana Geoscience Ltd ("**RESPONDENT**") is a company wholly owned by Equatoriana's Ministry of Natural Resources and Development. RESPONDENT was established as part of the NPDP, the aim of which was to promote the development of Equatoriana's northern provinces. *Drone Eye plc* ("**CLAIMANT**") is a company based in Mediterraneo that manufactures Unmanned Aerial Systems ("**UAS**"). CLAIMANT and RESPONDENT (the "**Parties**") entered into a contract for the sale and purchase of the Claimant's UAS.

2017	CLAIMANT began the development of the Hawk Eye.
20 March 2020	RESPONDENT invited tenders for the supply of four (4) UAS to be used in connection with the NPDP. The Call for Tender clearly requested for "state-of-the-art" UAS. CLAIMANT was eventually awarded the tender.
Early November 2020	The negotiations for the PSA were conducted without Ms. Bourgeois. Following the negotiations, the scope of the PSA was increased from four to six UAS; standard maintenance obligations had to be purchased separately; and the period of maintenance was extended from two years to four years.
29 November 2020	CLAIMANT's COO, Mr. Bluntschli, sent an email to RESPONDENT stating that the Kestrel Eye was CLAIMANT's "latest" and "present top model", and that it was "state-of-the-art". Shortly thereafter, Mr. Bluntschli was arrested for tax evasion in connection with two offshore accounts containing more than USD 8 million.
1 December 2020	A PSA was signed by the Parties. As part of the PSA terms, RESPONDENT agreed to purchase six units of CLAIMANT's Kestrel Eye alongside maintenance and servicing coverage by CLAIMANT. The PSA repeated CLAIMANT's earlier representations that the Kestrel Eye was "state-of-the-art", and that it was CLAIMANT's "latest" and "newest model". Additionally, at the time the PSA was signed, CLAIMANT knew that RESPONDENT could only enter into the Arbitration Agreement with the approval of the Equatorianian Parliament and that no such approval had been given.

February 2021	CLAIMANT presented its newest UAS, the Hawk Eye, at an air show in Mediterraneo. Following this, RESPONDENT expressed its concern to CLAIMANT that the Kestrel Eye was neither CLAIMANT's newest model nor state-of-the-art.
May 2021	The Parties met to discuss RESPONDENT's concerns. However, those concerns were not raised at the meeting. Instead, the Parties agreed to amend the arbitration agreement contained in the PSA.
3 July 2021	*The Citizen*, Equatoriana's leading investigative journal, published a series of articles on its examination of the Panama Papers, which disclosed serious problems of corruption surrounding the NPDP.
3 December 2021	The then-Prime Minister of Equatoriana resigned and called for early elections. A new government was formed within the same month. A moratorium on the NPDP—and the performance of all contracts connected thereto—was declared.
27 December 2021	RESPONDENT informed CLAIMANT that, pursuant to the moratorium, the PSA would be put on hold until further notice.
January 2022	Ms. Fonseca, a well-known criminal lawyer, was appointed as special public prosecutor to investigate the endemic corruption surrounding the NPDP.
21 May 2022	Ms. Fonseca announced that RESPONDENT's former COO, Mr. Field, had been charged for payments made to his offshore accounts in connection with two other NPDP contracts. She also announced that she would investigate all other contracts concluded by Mr. Field for signs of corruption. These investigations are expected to be concluded by the end of 2023.
30 May 2022	RESPONDENT declared the PSA avoided and the negotiations terminated.

SUMMARY OF ARGUMENTS

I. THE ARBITRAL TRIBUNAL HAS NO JURISDICTION TO HEAR THIS CASE

The Arbitration Agreement is invalid. First, the Arbitration Agreement is invalid under Equatorianian law. This is because an agreement to arbitrate the PSA requires parliamentary authorisation under Equatorianian law, but there was no parliamentary authorisation of the Arbitration Agreement. Second, Equatorianian law governs RESPONDENT's capacity to enter into an arbitration agreement, and/or alternatively, governs the Arbitration Agreement. In either case, it is not contrary to international public policy for RESPONDENT to rely on Art. 75 EC.

II. THE PROCEEDINGS SHOULD BE STAYED OR IN THE ALTERNATIVE, BIFURCATED

The proceedings should be stayed until ongoing investigations into Mr. Field are concluded so that RESPONDENT is treated with equality and given a reasonable opportunity to present its case. Refusing a stay increases the risk that the Tribunal renders an unenforceable decision and will result in unnecessary expenses. A stay will not result in unnecessary delay and will not materially prejudice CLAIMANT. Alternatively, the proceedings should be bifurcated between the issue of invalidity of the contract due to corruption and the other contested issues, as that will result in cost and time savings and will not prejudice CLAIMANT.

III. THE PSA IS NOT GOVERNED BY THE CISG

The PSA is *not* governed by the CISG because the PSA is a contract for the sale of 'aircraft' within the meaning of Art. 2(e) CISG excluding it from the scope of the CISG. Furthermore, a contextual interpretation of the choice-of-law clause in the PSA will reveal that the Parties impliedly agreed that the PSA should be governed by the ICCA (to the exclusion of the CISG).

IV. RESPONDENT CAN RELY ON ART. 3.2.5 ICCA TO AVOID THE PSA

Even if the Tribunal finds that the PSA is governed by the CISG, RESPONDENT can rely on Art. 3.2.5 ICCA to avoid the PSA. The CISG does not govern issues concerning validity. Further and in the alternative, none of the CISG provisions govern the allegation of fraudulent misrepresentation, including Art. 35 CISG which CLAIMANT seeks to rely upon. Alternatively, if the Tribunal finds that the CISG governs the allegation of fraudulent misrepresentation, the RESPONDENT is still entitled to rely on Art. 3.2.5 ICCA to avoid the PSA.

ARGUMENTS

I. THE TRIBUNAL HAS NO JURISDICTION TO HEAR THE DISPUTE

1 The present dispute arises out of an agreement for the sale and purchase of UAS, which CLAIMANT asserts contains the Parties' agreement to arbitrate. CLAIMANT makes this argument despite knowing full well that under the Constitution of Equatoriana ("**EC**"), parliamentary approval is required before an SOE, like RESPONDENT, can consent to arbitration (*Exh. C 7, para. 6; RNOA, para. 21*), and that no such parliamentary approval was in fact obtained.

2 Instead, CLAIMANT now puts forth a whole range of arguments as to why the Arbitration Agreement is valid. CLAIMANT argues that:

(a) The Arbitration Agreement satisfies the formal requirements of a valid arbitration agreement under the ML and the NYC (*CM, paras. 3-8*);

(b) Parliamentary approval is not required because the approval by the Minister is sufficient and Art. 75 EC is inapplicable as Danubian law governs the Arbitration Agreement and reliance on Art. 75 EC would be contrary to good faith and general principles of international arbitration (*CM, paras. 9-15*);

(c) Even if Art. 75 EC is applicable, the PSA is not an administrative contract and hence no parliamentary approval is required (*CM, paras. 16-17*);

(d) RESPONDENT's behaviour "can only be understood" in a way that parliamentary approval had been obtained (*CM, paras. 18-19*); and

(e) The Tribunal has jurisdiction even if the PSA is invalid (*CM, paras. 20-21*).

3 RESPONDENT does not dispute that the Arbitration Agreement satisfies the formal requirements of a valid arbitration agreement under the ML and the NYC (*supra, para. 2(a)*). Similarly, RESPONDENT does not dispute that the invalidity of the PSA does not in and of itself render the Arbitration Agreement invalid (*supra, para. 2(e)*).

4 However, CLAIMANT is mistaken insofar as CLAIMANT argues that Parliamentary approval is not required, or that Parliamentary approval had been "*understood*" by CLAIMANT to be obtained. The Tribunal does not have jurisdiction to hear the dispute precisely because RESPONDENT did not obtain parliamentary approval to enter into any arbitration agreement, in contravention of Art. 75 EC [***A***]. Equatorianian law is the applicable law because it is the law

that governs RESPONDENT's capacity to enter into an arbitration agreement, and/or in the alternative, the law that governs the arbitration agreement [***B***].

A. The Arbitration Agreement is invalid under Equatorianian law

5 The Arbitration Agreement is invalid under Equatorianian law because the PSA is an "administrative contract" that requires parliamentary authorisation [***1***], and parliamentary authorisation was not obtained in relation to the Arbitration Agreement [***2***].

1. The PSA is an "administrative contract" that requires parliamentary authorisation under Equatorianian law

6 Contrary to CLAIMANT's assertion, the PSA is an "administrative contract". CLAIMANT has relied heavily on the fact that current Equatorianian case law defining the meaning of an "administrative contract" covers only cases for the actual construction of infrastructure (*CM, para. 16*). However, this does not by itself mean that a preparatory contract like the PSA, which was entered into for the purpose of developing Equatoriana's northern provinces is excluded from being considered as an "administrative *contract*".

7 Art. 75 EC provides that:

> "*in contracts **relating to** public works or other contracts concluded for administrative purposes the State of Equatoriana or its entities may submit to arbitration only with consent of the respective minister. If the other party is a foreign entity or the arbitration is seated in a different state Parliament has to consent to this submission*" (*RNOA, para 21*) (emphasis added).

8 Contracts "*relating to public works*" are generally referred to as "*administrative contracts*" in the legal doctrine of Equatoriana (*PO2, para. 31*).

9 It is evident from the plain wording of Art. 75 EC that an administrative contract is one "*relating to*" public works. Nowhere in Art. 75 EC does it require that the contract be for the *actual* construction of the public works in question. The words "relating to" must be interpreted broadly. The Oxford English Dictionary defines "to relate" as "*to have some connection with*", whilst the Cambridge Dictionary defines "relate to" as "*to be connected to*". For this reason, CLAIMANT's contention that the PSA is not an administrative contract because "*there are no concrete plans to build an infrastructure*" is incorrect (*CM, para. 17*).

10 Contrary to CLAIMANT's position, the PSA falls squarely within the meaning of a contract "*relating to public works*":

(a) "*Public works*" are generally defined as construction or engineering operations carried out by or for the State or local government on behalf of the community (*Oxford English Dictionary; Cambridge Dictionary; Merriam-Webster Dictionary*).

(b) The PSA is clearly a contract relating to construction or engineering operations. The PSA is a contract for the procurement of the UAS to be used by RESPONDENT as part of NPDP (*PSA, preamble*). As CLAIMANT has recognised, under the NPDP, "*Respondent's objective was to organize the* ***exploration and possible development of the expected natural resources*** *in [the northern part of Equatoriana] as well as* ***improving the infrastructure***" (*NOA, para. 3*) (emphasis added). Procuring the UAS was the "o*nly feasible and reasonable way*" for RESPONDENT to achieve its objective (*RNOA, para. 6*).

(c) Contrary to CLAIMANT's arguments, the use for the data obtained by RESPONDENT is not "*unknown*" to CLAIMANT, and the PSA can be "*linked to create an actual infrastructure*" (*CM, para. 17*). The data collected was intended to allow RESPONDENT to discover and exploit the natural resources of the northern part of Equatoriana (*RNOA, para. 3; NOA, para. 3*). The "*infrastructure to be built was to be largely financed and maintained*" by the revenue generated from the exploitation of these natural resources (*RNOA, para. 5*). The exploitation is made possible by the UAS procured through the PSA. CLAIMANT itself admits that it is aware that the PSA was "*a contract for public infrastructure*" (*Exh. C 7, para.* 6).

(d) Further, the construction or engineering operations under the NPDP were carried out by the State for the community (*Exh. C 5*). RESPONDENT is "*entirely owned by the Ministry of Natural Resources and Development of Equatoriana*" (*NOA, para. 2*) and was "*set up by the former Government of Equatoriana in connection with its Northern Part Development Program*" (*RNOA, para. 3*). Therefore, all of RESPONDENT's operations are carried out on behalf of the State.

It thus cannot seriously be disputed that the PSA is a contract "*relating to*" public works. As such, pursuant to Art. 75 EC, it is a contract requiring parliamentary authorisation.

2. There was no parliamentary authorisation of the Arbitration Agreement

11 It is undisputed that the Minister signed the Arbitration Agreement without Parliament's prior approval (*Exh C 7, para 9*), or that the Arbitration Agreement was not subsequently ratified by Parliament. An express approval based on a formal vote must be obtained. The Minister's signature is insufficient to replace such an approval (*PO2, para. 34*).

12 Despite this, CLAIMANT argues that parliamentary approval is not required as the Minister's approval is sufficient (*CM, para. 9*), and that CLAIMANT could only have understood RESPONDENT's behaviour in a way that parliamentary approval was given (*CM, para. 9*).

13 CLAIMANT's argument that the Minister's approval is sufficient is based on an erroneous submission that that Danubian law is relevant and that it would be contrary to good faith and general principles of international arbitration if RESPONDENT was allowed to rely on their own set of rules. This will be addressed below (*infra, paras. 28-31*).

14 As for CLAIMANT's argument that RESPONDENT's behaviour "*can only be understood in a way that the parliament approved the Arbitration Clause*" (*CM, paras. 18-19*), this has to be rejected *in toto*. Firstly, CLAIMANT does not even explain how its own unilateral understanding is relevant. It is a fact that parliamentary approval was not obtained, and that the Minister "*lacks any powers to replace such an approval*" (*PO2, para. 34*). In any event, CLAIMANT could not have such a mistaken understanding. CLAIMANT itself has admitted in its own witness statement that they were aware of the lack of parliamentary approval when the PSA was signed (*Exh. C 7, para. 9*). Further, CLAIMANT did not bother to check if parliamentary approval was subsequently obtained. As there was no parliamentary authorisation of the Arbitration Agreement, it is invalid under Art. 75 EC.

B. Equatorianian law is the applicable law as the law governing RESPONDENT's capacity to enter into an arbitration agreement, and/ or alternatively, as the law governing the Arbitration Agreement

15 CLAIMANT asserts that Art. 75 EC is not applicable because the Arbitration Agreement is governed by Danubian law and that it would be contrary to good faith if RESPONDENT could rely on their own "set of rules" (*CM, para. 11*). However, Equatorianian law is applicable because it governs RESPONDENT's capacity to enter into an arbitration agreement **[*1*]**. Further and/or in the alternative, Equatorianian law governs the Arbitration Agreement itself **[*2*]**. In

either case, it is not contrary to international public policy for RESPONDENT to avoid the Arbitration Agreement by means of domestic legislation because CLAIMANT was aware of the formal requirements under the EC **[*3*]**.

1. Equatorianian law governs RESPONDENT's capacity to enter into an arbitration agreement

16 CLAIMANT's position that Art. 75 EC does not apply to the Arbitration Agreement is misconceived, as Equatorianian law governs RESPONDENT's capacity to enter into an arbitration agreement based on Art. 34 ML.

17 Art. 34(2)(a)(i) ML states that an arbitral award may be set aside if a party to an arbitration agreement "*was under some incapacity*". The provision considers that there is "***no valid agreement*** *between the parties…if one of the parties was not legally capable of entering into the agreement to arbitrate*" (*Bantekas, p. 866*) (emphasis added). Although the provision relates to the setting aside of arbitral awards, arbitral tribunals ought to follow the same principles when deciding if an arbitration agreement is valid, in order to "*minimise the risk of setting aside on grounds of incapacity*" (*Bantekas, p. 869*).

18 In relation to Art. 34(2)(a)(i) ML, it is generally agreed that the law of the party's place of incorporation governs the capacity of legal persons to enter into arbitration agreements (*Bantekas, p. 868*). In this case, Equatorianian law, which is the law of RESPONDENT's place of incorporation, governs the RESPONDENT's capacity to enter into an arbitration agreement.

19 This interpretation is consistent with Art. V NYC, which Art. 34 ML was aligned with (*Bantekas, p. 860*). Art. V(1)(a) NYC states that recognition and enforcement of the award may be refused if either Party was "***under the law applicable to them****, under some incapacity*" (emphasis added) at the "*time of conclusion of [the contract containing] the arbitration agreement*" (*Convention Commentary, p. 140*). The *travaux préparatoires* to the NYC shows that the expression "*law applicable to them*" was meant to be determined "*according to the law governing [a party's] personal status*" (*Convention Commentary, p. 139*). For corporations (such as RESPONDENT), the applicable law is usually "*the law of the place of incorporation or the place of business of the entity at issue*" (*Convention Commentary, p. 139*).

20 As RESPONDENT was incorporated in Equatoriana, Equatorianian law governs RESPONDENT's capacity to enter into an arbitration agreement. Where a party lacks capacity to enter into an arbitration agreement, the arbitration agreement is invalid (*Born, p. 765*).

21 For this reason, CLAIMANT's argument that Danubian law (and not Equatorianian law) is the applicable law governing the arbitration agreement (which is also denied) is ultimately irrelevant. CLAIMANT has omitted to consider whether RESPONDENT even had the capacity to enter into a valid arbitration Agreement in the first place.

2. Further and/or in the alternative, Equatorianian law governs the Arbitration Agreement itself

22 In any event, CLAIMANT's argument that Danubian law governs the Arbitration Agreement as the Parties did not impliedly agree on the applicable law is misplaced (*CM, para. 12*). This is because the Parties did impliedly agree to Equatorianian law as the law governing the Arbitration Agreement.

23 International arbitration tribunals typically determine the law governing an arbitration agreement based on whether the parties have made an express or implied choice of law to govern the arbitration agreement. This is the prescribed approach under Art. V(1)(a) NYC and Art. 34(2)(a)(i) ML, as well as at common law. It is only in the absence of any express or implied choice that the law of the seat becomes relevant (*Born, p. 567; BCY, para. 40*). However, when parties make an express or implied choice of law (as in the present case), there is no room for the law of the seat to apply.

24 On the facts, the Parties have impliedly chosen Equatorianian law to govern the Arbitration Agreement. The choice of law clause in the PSA stipulates that "*[t]he agreement is governed by the law of Equatoriana*" (*Exh. C 2, Art. 20(d)*) and so the natural inference should be that the Parties intended the express choice of law to govern and determine the construction of all the clauses in the agreement which they signed, including the arbitration agreement (*BCY, para. 59*).

25 The reasoning of the Singapore High Court in *BCY* is appropriate and applicable to the present case. In *BCY*, the court held that if the choice of law clause:

> *"stipulates that the 'agreement' is to be governed by one country's system of law, the natural inference should be that parties intend the express choice of law to 'govern and*

determine the construction of all the clauses in the agreement which they signed ***<u>including the arbitration agreement</u>****'"* (*BCY, para. 59*). (emphasis added)

The court held that "*[t]o say that the word* ***'agreement'*** *contemplates all the clauses in the main contract save for the arbitration clause would in fact be inconsistent with its ordinary meaning*" (*BCY, para. 59*) (emphasis added).

26 The approach in *BCY* is persuasive and has been adopted in a "*considerable body of arbitral authority applying both common law and civil law rules*" (*Born 2014, para. 37*). This is also consistent with the approach set out in the NYC and ML.

27 The facts of the present case are on all fours with those of *BCY*. Applying the approach in *BCY*, Art. 20 PSA is a choice of law clause stipulating that "*[t]he* ***agreement*** *is governed by the law of Equatoriana*" (emphasis added). Thus, there is a rebuttable presumption that the Parties have impliedly selected Equatoriana law to govern the Arbitration Agreement. To adopt an alternative interpretation of the Parties' intentions would be inconsistent with the ordinary meaning of Art. 20 PSA. Furthermore, the fact that Danubia was chosen as the place of arbitration is insufficient to displace this presumption (*BCY, para. 68*) and CLAIMANT has not provided other evidence to rebut this presumption either. Thus, the law governing the Arbitration Agreement is Equatorianian law.

3. In either case, it is not contrary to international public policy for RESPONDENT to rely on Art. 75 EC as CLAIMANT was aware of Art. 75 EC.

28 RESPONDENT does not dispute that it is under the duty to act in good faith. Nonetheless, reliance on Art. 75 EC does not contravene the principle of good faith in the present case. CLAIMANT has referred to the Swiss PIL and European Convention in support of their assertion that RESPONDENT relying on its domestic law is contrary to good faith but neither are applicable to the proceedings (*PO2, para. 33*). Furthermore, CLAIMANT's reliance on the case of *Benteler* is misconceived as that case was decided in accordance with the European Convention. CLAIMANT fails to explain how these authorities are relevant to the present arbitration.

29 In fact, it is only in an exceptional case that a tribunal ought to reject a party's reliance on domestic legislation – namely, when the other party is not aware of the domestic legislation relied on by that party. For instance, in *Cayman Power*, the respondent submitted that the

agreement was invalid as it contravened its domestic law prohibiting it from submitting to binding arbitration. The tribunal stated that the purpose behind the duty to act in good faith was to prevent a party from "*subsequently denying what it had signed, alleging its lack of power or capacity,* ***thus deceiving the other contracting Party***" (*Cayman Power, para. 46*) (emphasis added). RESPONDENT did not deceive CLAIMANT. Contrarily, CLAIMANT was aware of the requirement of parliamentary authorisation under the EC at the time the agreement was entered into and thus cannot invoke a good faith argument.

30 The same outcome was reached in *ICC Case No. 4381 of 1986* (*Born, p. 776*), where the tribunal rejected the respondent's submission that the agreement was invalid on the grounds that the agreement had not received governmental approvals required by the Iranian Constitution. The tribunal relied heavily on the fact that the claimant was not aware of the requirement of governmental approval under the Iranian Constitution at the time the agreement was entered into. The tribunal noted that it would be against international public policy for the respondent to rely the requirements of the Iranian law to invalidate the agreement after it had "*failed in its duty to mention*" such requirements to the claimant.

31 The decisions above are manifestly different from the present facts. CLAIMANT was well aware that under the EC, the PSA was "*a contract for public infrastructure*" (*Exh. C 7, para. 6*) and that "*an approval by Parliament is required if such contracts contain an arbitration clause*" (*Exh. C 7, para. 6*). In fact, CLAIMANT's own witness, Horacia Porter, has admitted that she knew of the requirement in Art. 75 EC that parliamentary approval had to be obtained, but took no further steps to ascertain whether such approval was subsequently obtained (*Exh C 7, para. 10*). In these circumstances, RESPONDENT is neither in contravention of the duty to act in good faith, nor can it be contrary to international public policy for RESPONDENT to rely on Art. 75 EC.

II. THE PROCEEDINGS SHOULD BE STAYED UNTIL THE ONGOING INVESTIGATIONS INTO MR. FIELD ARE CONCLUDED OR, ALTERNATIVELY, BIFURCATED

32 Even if the Tribunal finds that it has jurisdiction to hear the dispute, the Tribunal should nonetheless stay the proceedings, or alternatively, bifurcate the issue of the invalidity of the contract due to corruption from the other issues to be determined. The Tribunal has the power to stay or bifurcate the proceedings pursuant to Art. 17(1) PCA Rules and reflected in Art.

19(2) ML where "*the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate*" (*Born, §15.07[Q]; Daly, para. 5.03; Cairn Energy, para. 102*).

33 While CLAIMANT does not dispute that the Tribunal has these powers, CLAIMANT argues that the Tribunal should not stay or bifurcate the proceedings as:

(a) The Tribunal "*has the power and duty to establish the facts for itself*" (*CM, para. 23*);

(b) A stay is not necessary as there is "*no credible allegation or any proof*" that the PSA is tainted by corruption (*CM, para. 28*);

(c) "The facts presented by Respondent would not be objective" (*CM, para. 28*); and

(d) A stay or bifurcation "would create unjustified delays and costs" (*CM, para. 35*).

34 CLAIMANT fails to recognise that a stay or bifurcation is necessary for RESPONDENT to have a reasonable opportunity to present its case and ensure that any award by the Tribunal is enforceable. Therefore, the proceedings should be stayed until the ongoing investigation against Mr. Field is concluded [***A***]. Alternatively, the proceedings should be bifurcated between the issue of invalidity of the contract due to corruption and the other contested issues [***B***].

A. The proceedings should be stayed until the ongoing investigation against Mr. Field is concluded

35 Contrary to CLAIMANT's submissions, the proceedings should be stayed until the ongoing investigation against Mr. Field is concluded so that RESPONDENT is treated with equality and given a reasonable opportunity of presenting its case [***1***]. Refusing a stay increases the risk that the Tribunal renders an unenforceable decision because RESPONDENT was either denied a reasonable opportunity of presenting its case or that the decision is contrary to public policy [***2***]. Moreover, refusing a stay will result in unnecessary expenses [***3***]. Conversely, a stay will not result in unnecessary delay and will not materially prejudice CLAIMANT [***4***].

1. A stay is required so that RESPONDENT is treated with equality and given a reasonable opportunity of presenting its case

36 A stay is required so that RESPONDENT is treated with equality and given a reasonable opportunity of presenting its case pursuant to Art. 17(1) PCA Rules and Art. 18 ML. CLAIMANT alleges that "*there will be no disadvantages [to Respondent] if the proceedings [are] continued*" (*CM, para. 37*), failing to recognise that RESPONDENT will be denied a reasonable opportunity of presenting its case and will not be treated with equality without a stay.

37 For RESPONDENT to have a reasonable opportunity to present its case, it must have the opportunity to bring all relevant evidence before the arbitrator (*Kurkela/Turunen, p. 38*). In *Coromandel Land*, an arbitral award could not be enforced as a party did not have the opportunity to present all relevant evidence before the arbitrator (*para. 60*). The right to be treated equally and given a reasonable opportunity of presenting one's case encapsulates basic notions of fairness and fair process (*Analytical Commentary, Art. 19, para. 7; China Machine, para. 90; CBS, para. 51*). It is unfair for RESPONDENT to set out its case without all evidence on corruption when the burden is on RESPONDENT to prove the existence of corruption (*PCA Rules, Art. 27(1)*). Refusing a stay will result in CLAIMANT having a "disproportionate opportunity to present its case" which is "*fundamentally unjust*" (*Born, §15.04[B]*).

38 RESPONDENT will not be treated with equality and given a reasonable opportunity of presenting its case without a stay because the Tribunal does not have the same level of investigative powers as the Public Prosecutor [***a***]. A thorough investigation into the corruption allegations is necessary because the facts surrounding the conclusion of the PSA strongly suggests that the PSA is tainted by corruption [***b***]. A thorough investigation into corruption can only be performed with the Public Prosecutor's wide powers [***c***]. Any evidence uncovered by the public prosecutor will be objective and useful in the Arbitral proceedings [***d***].

a) The Tribunal does not have the same investigative powers as the Public Prosecutor

39 CLAIMANT's submissions that the Tribunal has power to assess and weigh the evidence before it under Art. 27(4) PCA Rules (*CM, para. 25*) misses the point. Art. 27(4) and Art. 17(3) PCA Rules only refers to the Tribunal's powers to weigh the evidence and hear expert witnesses that are *placed before it*, and not the Tribunal's own powers to uncover evidence and compel witnesses to appear before it (*Baizeau/Hayes, p. 256*). In this regard, CLAIMANT has not explained how the Tribunal is empowered in the way that the Public Prosecutor is.

40 The Public Prosecutor has broader investigative powers than the Tribunal because the Tribunal "*[lacks] police powers which would aid it in gathering evidence*" (*Baizeau/Hayes, p. 248*). Art. 27(3) PCA Rules only provides that a tribunal "*may require the parties to produce documents, exhibits or other evidence*" and may "*perform a site visit*". This does *not* empower the Tribunal to compel third parties to give evidence. This includes Mr. Bluntschli—a key

figure in the negotiations and hence an important witness in connection with the corruption allegations—who has refused to testify (*Exh. C 3, para. 11*).

41 The power of the Tribunal to request the courts' assistance in compelling third parties to furnish evidence under Art. 27 ML (*Ali/Repousis, p. 726*) is inadequate for present purposes. First, such requests are subject to judicial discretion (*Ali/Repousis, p. 723*). Second, the Tribunal is limited to requesting the assistance from Danubian courts rather than Equatorianian courts (*Ali/Repousis, p. 719*), which is unhelpful as key witnesses are likely to be outside Danubia. Third, such requests will incur unjustified expenses because these relevant witnesses will be examined by the Public Prosecutor in due course.

b) A thorough investigation into the corruption allegations is necessary because the facts surrounding the conclusion of the PSA strongly suggests that the PSA is tainted by corruption

42 CLAIMANT asserts that "*there is no evidence to justify a stay or bifurcate the proceedings*" (*CM, para. 29*). That is patently untrue. There are many 'red flags' surrounding the PSA that suggest that it was procured through corruption:

(a) The number of UAS to be procured was significantly increased from four—as originally requested by RESPONDENT (*Exh. C 1*)—to six (*Art. 2 PSA*). Such a significant expansion of the PSA's scope is suspicious because the purpose of a tender is to acquire comparable offers and changing the scope of the contract defeats that purpose (*Exh. R 2*). A similar variation has occurred only in connection with another contract managed by Mr. Field underlying one of the bribery charges against him (*RNOA, para. 11*);

(b) CLAIMANT's service and maintenance obligations were extended from two to four years and was priced much higher under the PSA than initially envisaged (*RNOA, para. 10; Exh. R 1, para. 6*). Standard maintenance services necessary in 80% of cases (*PO2, para. 27*)—which were originally covered by the basic flat fee—have to be purchased separately under the PSA (*Exh. R 1*). This resulted in the maintenance part amounting to EUR 11,520,000 which is significantly overpriced, as an exhaustive maintenance contract should only amount to five percent of the purchase price of a UAS (*Exh. R 1, para. 6*) (approximately EUR 2,400,000 for six UAS priced at EUR 8,000,000).

(c) The total price payable by RESPONDENT under the PSA is EUR 55,520,000 (*Table 1, infra*). This amount is above the maximum of what was authorised by RESPONDENT's

supervisory board (i.e. EUR 55 million) (*PO2, para. 7*), suggesting that it had been deliberately structured for CLAIMANT to gain the maximum amount from RESPONDENT to pay the bribes to Mr. Field;

Item	**Price per unit (€)**	**Quantity**	**Price**
Equipped Kestrel Eye	8,000,000.00	4	32,000,000.00
Unequipped Kestrel Eye	6,000,000.00	2	12,000,000.00
Service and maintenance	11,520,000.00	-	11,520,000.00
		Total	55,520,000.00

Table 1

(d) There have been two previous corruption incidents within CLAIMANT's company in the past (*PO2, para. 3*). The fact that CLAIMANT's main negotiator, Mr. Bluntschli, has been arrested for private tax evasion after maintaining "*two offshore accounts containing more than USD 8 million*" shows that his integrity is questionable (*Exh. C 3, para. 2; PO2, para. 40*). Further, "*[f]rom one of the accounts larger sums had been transferred to three other offshore accounts*" belonging to unknown persons (*ibid*). Mr. Bluntschli has "*stayed silent about the origin of the money and the purpose of the transfers*" (*ibid*) and refused to testify in these proceedings (*Exh. C 3, para. 11*). There is a distinct possibility that these undeclared transactions are related to bribes in connection with the PSA. The success of CLAIMANT's "*clear ethical rules*" (*Exh. C 3, para. 1*) are, at best, doubtful.

43 No authority has been cited to support CLAIMANT's bare assertion that a stay can only be ordered if there is "*probable cause*" to show that the contract is tainted by corruption (*CM, para. 29*). In any case, CLAIMANT's focus on the standard of proof required for a finding of corruption (*CM, para. 30*) is misplaced because the issue before the Tribunal is *not* whether corruption taints the contract, but whether the proceedings should be stayed until sufficient evidence of corruption has been gathered.

c) A thorough investigation into corruption can only be performed with the Public Prosecutor's wide powers

44 The Public Prosecutor's broad investigative powers are necessary to perform a thorough investigation. This is because corruption is inherently difficult to detect (*Srinivasan et al., p. 140; Hwang/Lim, para. 28*) and tribunals have themselves expressed the view that corruption is "*notoriously difficult*" to prove because of its covert nature (*Malik/Kamat, p. 16*). For reasons

canvassed above, RESPONDENT respectfully submits that this Tribunal is not equipped to perform an equally thorough investigation into the corruption allegations.

45 RESPONDENT reiterates that unless *thorough* investigations into the corruption allegations are carried out with the Public Prosecutor's wide powers, the question of whether the PSA is tainted with corruption cannot be determined based on the evidence currently available (*Exh. C 8*). Specifically, CLAIMANT's self-serving assertion that it has "*found no suspicious payments*" from its accounts to Equatorianian accounts (*Exh. C 3, para 7*) and that no "*solid evidence that Mr. Field entered the contract while behaving in a corrupt manner*" has surfaced (*CM, para. 30*) is not determinative.

d) Any evidence uncovered by the Public Prosecutor will be objective and useful in these proceedings

46 Any evidence uncovered by the Public Prosecutor will be objective and useful in these proceedings. CLAIMANT has alleged that that any "*facts presented by RESPONDENT would not be objective*" due to the Public Prosecutor's ties with the Liberal Party (*CM, para. 33*). That allegation is not only baseless but also irrelevant. RESPONDENT is only requesting the Tribunal to rely on the *objective evidence*—e.g. documents, communications, and witness statements—uncovered through the Public Prosecutor's investigations. CLAIMANT themselves have admitted that any evidence uncovered by the public prosecutor will be "*relevant*" to the proceedings (*CM, para. 26*). In any event, the Tribunal is entitled to weigh the evidence independently (*Art. 27(4) PCA Rules*), thus safeguarding these proceedings from any bias on the part of the Public Prosecutor (the existence of which RESPONDENT denies).

47 More fundamentally, even if the head of the public prosecution office is "*a leading figure of the liberal party*" and has criticised the NPDP (*CM, para. 33*) and the specially appointed public prosecutor, Ms. Fonseca, has "*family ties which profited from Mr. Field's arrest*" (*CM, para. 33*), these facts are not sufficient in themselves to justify a conclusion that an organ of Equatoriana's criminal justice system will perform its duties in a biased manner.

2. Refusing a stay is likely to result in an unenforceable award

a) Refusing a stay will result in an unenforceable award because Respondent will be denied a reasonable opportunity to present its case

48 A stay is required so that RESPONDENT is given a reasonable opportunity of presenting its case (*supra, paras. 36-47*). If RESPONDENT is not be given a reasonable opportunity to present its case, any award rendered by this Tribunal will be liable to be set aside (*Art. 34(2)(a)(ii) ML*) or held unenforceable (*Art. V(1)(b) NYC; Art. 36(1)(a)(ii) ML*). There is clear authority showing how awards may be set aside or refused enforcement owing to an arbitrator's failure to permit a party to present material evidence (*Born, pg. 3860; Judgment of 30 May 2008; Coromandel Land, para. 60*). In *CBS*, an award was set aside on grounds that the tribunal did not allow one party to call witnesses to give oral evidence, thus depriving that party of a reasonable opportunity to present its case (*paras. 22, 79, 112*).

b) Refusing a stay increases the risk that the Tribunal renders a decision that is unenforceable as it is contrary to public policy

49 Refusing a stay will increase the risk that the Tribunal renders a decision unenforceable in Equatoriana as it is contrary to Equatorianian public policy. If the Tribunal refuses a stay, the Tribunal will not have all the evidence procured from the criminal investigations to decide on the issue of corruption, hence likely deciding that corruption does not taint the PSA and that damages should be awarded to CLAIMANT based on breach of contract. It is likely that CLAIMANT would enforce the award in Equatoriana as RESPONDENT's main assets are in Equatoriana, as a state-owned company conducting its main business there (*PO2, para.* 5). However, should the Equatorianian criminal court come to a decision that the PSA was obtained through corruption, any such award from the Tribunal is likely to be unenforceable in Equatoriana as it is contrary to public policy.

50 Under Art V(2)(b) NYC, an award may be refused enforcement if it is contrary to public policy. Public policy requires a consideration of both domestic and international principles (*Born, §26.05[C][e]*). Under Equatorianian law, it is very likely that a finding by the tribunal inconsistent with the criminal court will lead to the award being considered contrary to public policy, as the Equatoriana Anti-Corruption Act states that a company is "*prohibited to either directly or indirectly perform a contract for the conclusion of which undue benefits were granted or promised*" (*RNOA, paras. 2*). Furthermore, in Equatoriana, the judgement of the

criminal court is binding on a civil court (*PO2, para. 46*), reflecting the need for any civil action to be consistent with the criminal investigations and the primacy of the criminal investigations. International case law and academic commentary establish that awards enforcing a contract procured by corruption would not be recognised based on public policy considerations (*Born, §26.05[C][i][ii], Bad Ass Coffee, para. 66; Euro. Gas Turbines, p. 198*).

3. Refusing a stay will result in unnecessary expenses

51 CLAIMANT's allegation that a stay will result in unjustified costs (*CM, para.* 35) ignores the fact refusing a stay will result in unnecessary expenses contravening Art. 17(1) PCA Rules which states that the Tribunal "*shall conduct the proceedings so as to avoid unnecessary delay and expense*". Refusing a stay results in unnecessary expenses because parties have to spend resources on procuring expert witnesses and evidence relating to the invalidity of the contract due to corruption, including requesting the courts for assistance (*supra, para. 41*), even though that evidence is already going to be procured by the Public Prosecutor through the criminal investigations. Furthermore, the evidence procured through the Tribunal is likely to be unsatisfactory in comparison to the evidence procured by the Public Prosecutor in exercise of its broader investigative powers (*supra, paras. 39-41*). Conversely, the Public Prosecutor's findings will obviate the need for an intensive factual inquiry by the Tribunal and save costs.

4. A stay will not result in unnecessary delay and will not materially prejudice CLAIMANT

52 RESPONDENT disagrees with CLAIMANT's submission that a stay results in unjustified delays (*CM, para. 45*). The Public Prosecutor has clarified that the criminal investigations against Mr. Field will be completed by end-2023 at the latest (*Exh. R 2*). RESPONDENT is requesting for proceedings to be stayed until the "***investigations*** *against Mr. Field concerning the taking of bribes in connection with the conclusion of the Agreement are concluded*" (*RNOA, para. 29*) and *not* until the conclusion of criminal proceedings against Mr. Field. The argument that a stay results in unnecessarily delay because of a protracted criminal trial is misconceived.

53 CLAIMANT's assertion that this arbitration will be delayed by approximately one and a half years (*CM, para. 35*) is baseless. Presently, the hearings for the questions raised in III.1 of PO1 are fixed for April 2023. Even if the Tribunal does not grant the stay, there is no indication that the factual inquiry into the substantive issues of misrepresentation and corruption will be complete by end-2023. Contrarily, the factual inquiry into the issue of corruption will be long-

drawn and tedious (*supra, para. 44*). Indeed, the Public Prosecutor's findings may even be released before the relevant evidence relating to corruption is presented to the Tribunal.

54 In any event, CLAIMANT will not be materially prejudiced by any delays resulting from a stay. CLAIMANT makes much of the fact that they will not be able to sell the drones that were customised for RESPONDENT (*CM, paras. 36-37*). Even if that is true—which RESPONDENT denies—CLAIMANT is not seeking an order of specific performance but instead seeking damages for RESPONDENT's alleged breach of contract (*NOA, para. 26(4)*). Thus, CLAIMANT will have to resell the drones even if the proceedings are not stayed to mitigate its losses (*Art. 77 CISG*). For completeness, CLAIMANT will be adequately compensated for any delays by an award of interest even if it eventually succeeds in this arbitration.

55 Even if these proceedings are not stayed and CLAIMANT succeeds in this arbitration, an Equatorianian court is likely to stay any application by CLAIMANT to enforce the award in Equatoriana until the parallel criminal proceedings are concluded. This is because enforcement proceedings "*are usually stayed by the [Equatorianian civil] courts if their outcome depends on ongoing criminal investigations as the judgment of the criminal court on a matter is binding on a civil court*" (*PO2, para. 46*).

B. Alternatively, the proceedings should be bifurcated between the issue of invalidity of the contract due to corruption and the other contested issues

56 Alternatively, the determination of the issue of the PSA's invalidity for corruption should be bifurcated from the other remaining issues. The former should be heard only after the criminal investigations against Mr. Field are complete (*PO2, para. 52*). As explained above, waiting for the outcome of the criminal investigations against Mr. Field is necessary to give RESPONDENT a reasonable opportunity to present its case (*supra, paras. 36-47*); secure the enforceability of any award rendered by the Tribunal (*supra, paras. 48-50*); and prevent unnecessary expense (as the outcome of the criminal investigations will save parties' the expense of undergoing the same factual inquiry) (*supra, paras. 51*). In the event that the Tribunal is not minded to grant a stay, the Tribunal should still order a bifurcation as this will result in cost and time savings [***1***] and will not result in unnecessary or unjustified delay [***2***].

1. A bifurcation will result in cost and time savings

57 Proceedings should be bifurcated if it results in cost and time savings (*Art. 17(1) PCA Rules*). Bifurcating these proceedings will also result in cost and time savings if the Tribunal's decision on the issue of misrepresentation disposes of the dispute. RESPONDENT has argued that the PSA is tainted by (*a*) misrepresentation and/or (*b*) corruption, both of which are independent grounds for holding that the PSA is invalid. If the Tribunal finds for RESPONDENT on the former, then the need to consider the latter falls away. By the time of the next oral hearings, there will be sufficient evidence before the Tribunal to determine if the PSA is tainted by misrepresentation but not corruption (*supra, paras. 44-45*). With a bifurcation, it is possible that RESPONDENT's arguments on misrepresentation may suffice to dispose of the proceedings.

58 In comparison, even if the Tribunal finds against RESPONDENT on the issue of misrepresentation, this will not result in significant additional costs and delay. The inquiry into misrepresentation (*infra, para. 92*) and the inquiry into corruption (*supra, para. 42*) are distinct and separate. The inquiry into misrepresentation will depend on the statements made by CLAIMANT's representatives and the understanding by RESPONDENT's representatives. This is factually and legally distinct from the inquiry into corruption (which depends on whether "*undue benefits were granted or promised*" to CLAIMANT's representatives (*RNOA, para. 2*)).

2. A bifurcation will not materially prejudice CLAIMANT

59 CLAIMANT asserts that a stay or bifurcation of the proceedings would create "*unjustified delays and costs*" (*CM, paras. 35-37*). However, CLAIMANT fails to deal with the concept of a stay separately from that of bifurcation. CLAIMANT does not explain how bifurcation will result in "*unjustified*" or "*unnecessary*" delay. As mentioned above, waiting for the outcome of the criminal investigations is necessary to give RESPONDENT a reasonable right to present its case. Bifurcating the issue of corruption will also give the Tribunal the opportunity to hear parties on all the other outstanding issues in the proceedings, and to the contrary, will help to minimise any delay caused by allowing the other issues to be heard and determined first.

III. THE PSA IS NOT GOVERNED BY THE CISG

60 It is CLAIMANT's position that the PSA is governed by the CISG (*NOA, paras. 20-21; CM, para. 40*) because Art. 2(d) PSA provides that "*[t]he agreement is governed by the* ***law of Equatoriana***". CLAIMANT argues that because Equatoriana is a party to the CISG, Art. 2(d)

PSA must be interpreted as an *implied* selection of the CISG (*CM, para. 43*). This presumably buttresses Claimant's further submission that the ICCA—specifically, Art. 3.2.5 ICCA—does not govern the PSA (*CM, para. 73*) and that various provisions of the CISG operate to forfeit RESPONDENT's claims of fraudulent misrepresentation (*CM, para. 86*).

61 RESPONDENT disagrees. The PSA is *not* governed by the CISG because the PSA is a contract for the sale of 'aircraft' within the meaning of Art. 2(e) CISG. The PSA is thus a contract that is excluded from the scope of the CISG [***A***]. Contrary to CLAIMANT's proposed interpretation of Art. 20(d) PSA, a contextual interpretation of that clause will reveal that the Parties intended to exclude the application of the CISG [***B***].

A. The PSA is a contract for the sale of 'aircraft' within the meaning of Art. 2(e) CISG

62 Danubia, Equatoriana, and Mediterraneo are signatories to the VCLT (*PO2, para. 50*). It is also agreed that "*Equatoriana, Mediterraneo and Danubia are Contracting States of the CISG*" (*PO1, para. 3*). The obligations between the three States *inter se* under the CISG are, therefore, governed by the terms of the VCLT. It follows that the term 'aircraft' as it appears in Art. 2(e) CISG must be approached consistently with the VCLT's interpretive principles.

63 CLAIMANT has vigorously asserted that the Kestrel Eye is not an 'aircraft' within the meaning of Art. 2(e) CISG (*CM, para. 47*). RESPONDENT begs to differ. As a starting point, the word 'aircraft' in Art. 2(e) CISG should be given its ordinary meaning; the Kestrel Eye is clearly an 'aircraft' within that meaning [***1***]. The purpose of Art. 2(e) CISG (*ie*, to pre-empt conflicts between the CISG and national aviation regulations) and the provision's drafting history confirms that the Tribunal should give the word 'aircraft' its plain meaning [***2***]. Contrary to CLAIMANT's interpretation of 'aircraft', the intended use of the Kestrel Eye is simply immaterial to whether it is an 'aircraft' within the meaning of Art. 2(e) CISG [***3***]. Even if CLAIMANT is correct in asserting that the intended use of the Kestrel Eye is relevant to its classification as an 'aircraft', the Kestrel Eye will *still* be an 'aircraft' on CLAIMANT's definition because the Parties intended that the Kestrel Eye be used by RESPONDENT to carry goods [***4***].

1. The Kestrel Eye is an 'aircraft' within the ordinary meaning of the word

64 As a starting point, Art. 31(1) VCLT provides that "*[a] treaty shall be interpreted in good faith in accordance with the* ***ordinary meaning*** *to be given to the terms of the treaty in*

their context and in the light of its object and purpose". In interpreting the word 'aircraft', the ordinary meaning of that word should supply the Tribunal with its first port of call.

65 The Oxford English Dictionary defines 'aircraft' to mean "*[a]ny of various* ***vehicles*** *capable of* ***flight***" and 'vehicle' to mean "*[a] general term for: anything by means of which people or* ***goods*** *may be conveyed, carried, or transported; a receptacle in which* ***something*** *is or may be placed in order to be moved*".

66 The Kestrel Eye is an 'aircraft' on the aforementioned definition. Clearly, the Kestrel Eye is capable of flight. There is also no dispute that the Kestrel Eye is designed to carry surveillance equipment from one location to another (*PO2, para. 9*). Although CLAIMANT disputes the efficiency of the Kestrel Eye in transporting goods (*CM, para. 54*), the evidence shows—and CLAIMANT's themselves have conceded—that the Kestrel Eye is capable of performing that task (*PO2, para. 9*; *CM, para. 56*). To that extent, the Kestrel Eye is a 'vehicle' capable of flight. It is, therefore, an 'aircraft'.

67 *Case No. 1/1998* is authority for the proposition that the reference to 'aircraft' in Art. 2(e) CISG should be given its ordinary meaning. The claimant in *Case No. 1/1998* sold a decommissioned submarine to the respondent on the understanding that the submarine would be scrapped for metal. In ruling that the decommissioned submarine was still a 'vessel' within the meaning of Art. 2(e) CISG, the tribunal reasoned that although the submarine's engine had been put out of commission, it was not "*[deprived] of the* ***general qualities*** *of a sea vessel*" and that "*as long as this submarine has the possibility to be afloat, though with assistance of other exterior appliances, it is to be regarded a sea vessel.*" The tribunal's focus on the "***general qualities*** *of a sea vessel*" indicates that it was taking an ordinary and commonsensical approach to interpreting Art. 2(e) CISG. Although this dispute is concerned with the meaning of 'aircraft' (and not 'vessels'), there is no reason why collocated words in Art. 2(e) CISG should be subject to different interpretive principles.

2. The purpose and drafting history of Art. 2(e) CISG confirms that the drafters intended for 'aircraft' to be given its ordinary meaning

68 An examination of Art. 2(e) CISG's "*object and purpose*" as well as the provision's drafting history confirms that the bare reference to 'aircraft' *simpliciter* was inserted without amelioration so that it would be interpreted simply and in keeping with its ordinary definition.

69 Art. 32(a) VCLT clarifies that "*[r]ecourse may be had to* ***supplementary means of interpretation****, including the* ***preparatory work of the treaty and the circumstances of its conclusion****, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 … leaves the meaning ambiguous or obscure*".

70 Art. 2(e) CISG's "*object and purpose*" is to exclude from the scope of the CISG transactions of aerial vehicles that are "*usually subject to special national rules*" (*Explanatory Documentation, para 1.28*). The CISG's drafters were concerned to "*avoid interferences with national duties to register [such] goods*" (*Kröll et al., p 50*). The simple reference to 'aircraft' was deliberately chosen over more elaborate formulations so that Art. 2(e) CISG could better accomplish this purpose:

(a) Art. 5(1)(b) ULIS (the predecessor to Art. 2(e) CISG) was drafted to exclude sales of "*any ship, vessel or aircraft,* ***which is or will be subject to registration***" as these are "*goods which are or will be subject to a special system of rules*" (*Tunc, p. 38*);

(b) However, the phrase "*subject to registration*" in Art. 5(1)(b) ULIS was apt to confuse rather than clarify because "*national legislation included many varieties or regulations that might (or might not) be deemed to include "registration"*" (*Honnold, p. 54*);

(c) The drafters of the CISG reasoned that because vehicles satisfying the dictionary definition of 'aircraft' will generally be subject to registration under domestic laws, pedantic questions of interpretation could be avoided and the original "*object and purpose*" of Art. 5(1)(b) ULIS could be better accomplished by creating a *blanket exclusion* on the sale of *all* 'aircrafts' (*Official Records, p. 16*).

71 Taking into account Art. 2(e) CISG's "*object and purpose*" and the circumstances in which its simplified language was agreed upon, it becomes clear that any 'aircraft' (on an ordinary definition of the word) that is *also* generally subject to national registration requirements must *a fortiori* be an 'aircraft' within the meaning of Art. 2(e) CISG.

72 The Tribunal would give effect to the drafters' intentions for Art. 2(e) CISG by recognising that the Kestrel Eye is an 'aircraft' within the meaning of that provision. The Kestrel Eye is an aerial vehicle that must be registered under various domestic laws subsequent to its acquisition. Under Equatorianian law, the Kestrel Eye is clearly an 'aircraft' within the meaning of Art. 1 ASA that, if acquired by private entities, must be registered pursuant to Art.

10 ASA. Two of the four countries to which the Kestrel Eye has been exported has legislation that would ordinarily require its registration (*PO2, para 20*). More generally, the Kestrel Eye would have to be registered if it were imported into the U.S. (*CFR, § 107.3*), Singapore (*Air Navigation Regulations*, *First Schedule*), or the U.K. (*DMAC*), all of which mandate registration for drones weighing in excess of 250 grammes.

73 CLAIMANT argues that because RESPONDENT is exempt—by virtue of Art. 10 ASA—from registering any units of the Kestrel Eye it acquires, the Kestrel Eye is not an 'aircraft' within the meaning of Art. 2(e) CISG (*CM, para. 65*). An exclusion of the PSA under that provision, CLAIMANT asserts, "*would not be in line with the rationale of Art. 2(e) CISG*" (*ibid*).

74 No authority was cited by CLAIMANT to support its contention that a vehicle's classification as an 'aircraft' under Art. 2(e) CISG depends on whether registration is compulsory in the circumstances of each particular transaction. In fact, CLAIMANT's position roundly contradicts the weight of authority. Spohnheimer notes that:

> "***[u]nlike under its predecessor (Art. 5(1)(b) ULIS), for the exception to apply it is not necessary that the vehicle be registered****, although the underlying rationale of this exception is that the application of the CISG might come in conflict with national provisions stating a duty to register. Consequently, Art. 5(e) [sic] applies* ***regardless of whether the vehicle actually has to be registered or not.***" (*Kröll et al., p 50*)

Spohnheimer's conclusion is entirely consistent with the broad consensus that Art. 2(e) CISG creates a carve-out for agreements based on the "*the type of goods sold*" (*Official Records, p. 16*; *Ferrari, p. 130*) and not extraneous factors like idiosyncrasies of national legislation or the purchaser's identity.

75 CLAIMANT's position, if accepted, would lead to the absurd conclusion that the Kestrel Eye's classification as an 'aircraft' may vary from one transaction to the next. Its classification would depend on whether the purchaser must procure registration of the UAS it acquires pursuant to the applicable aviation regulations. The list of potentially applicable regulations will multifurcate where the Kestrel Eye is sold, re-sold, or deployed across borders. It will be difficult (if not impossible) for CLAIMANT and its customers to identify with any degree of confidence the regulations that govern each particular transaction. It follows that on CLAIMANT's argument, CLAIMANT and its customers can have no reliable means of ascertaining if their contracts for the sale of the Kestrel Eye are excluded from the CISG unless and until

the matter is adjudicated upon. The Tribunal should be slow to give Art. 2(e) CISG an interpretation that would lock commercial parties into uncertainty and invite litigation—litigation that the drafters of the CISG expressly wished to avoid (*Official Records, p. 16*).

3. The intended use of the Kestrel Eye is immaterial to whether it is an 'aircraft' within the meaning of Art. 2(e) CISG

76 CLAIMANT has further submitted that "*[i]n order to be qualified as aircraft in the sense of Art. 2(e) CISG, the respective vehicles must inter alia be* ***intended to transport humans or goods***" (*CM, para. 48*).

77 As a preliminary point, CLAIMANT has not explained how the Tribunal can arrive at this definition consistently with the interpretive principles set out in the VCLT. The definition advanced by CLAIMANT is neither supported by the ordinary meaning of the word 'aircraft', nor is there anything in the text of the Convention or the *travaux préparatoires* to support the contention that a vehicle's classification as an 'aircraft' under Art. 2(e) CISG depends on its intended uses. Furthermore, the purpose of Art. 2(e) CISG is to pre-empt conflicts between the CISG and national aviation regulations (*supra, para. 70*). It is difficult to see how this objective will be meaningfully advanced on CLAIMANT's unsubstantiated theory that a vehicle's classification as an 'aircraft' depends on commercial parties' subjective intentions.

78 If the CISG's drafters intended to exclude a class of aerial vehicles that are procured for specific purposes, clear words of the kind appearing in Art. 2(a) CISG would have been used to achieve that result. Art. 2(a) CISG provides that the CISG does not apply to sales of "*goods bought* ***for personal, family or household use****, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use*" (emphasis added). This is the only head of Art. 2 CISG that was formulated around the parties' intentions as to the "*purpose of the acquisition of the goods*". Art. 2(e) CISG, by contrast, focuses on "*the kind of goods sold*" (*Official Records, p. 16; Ferrari*, *p 130*). The disparity between Arts. 2(a) and 2(e) CISG show that the purposes for which a putative 'aircraft' was acquired is simply irrelevant to its classification as such.

79 CLAIMANT cites *Log house case* for the proposition that only "*the intended use of [the Kestrel Eye] the goods according to the contract is relevant*" and that the Kestrel Eye's "*actual use*" does not fall to be considered. CLAIMANT's reliance on the *Log house case* is misplaced. *Log house case* was concerned with Art. 2(a) CISG. As explained in the preceding paragraph.

Art. 2(a) CISG excludes goods "*bought for personal, family or household use*". It cannot be seriously argued that the Kestrel Eye meets this description. More importantly, Art. 2(a) CISG and Art. 2(e) CISG serve entirely different purposes (*Official Records, p. 16*). The reasoning in *Log house case* is, therefore, simply irrelevant to the present dispute.

80 *Case No. 1/1998* is also authority for the proposition that the *intended* purposes to which goods sold will be applied are irrelevant in determining if Art. 2(e) CISG operates. As mentioned earlier (*supra, para. 67*), the claimant sold a decommissioned submarine to the defendant on the understanding that the submarine would be scrapped for metal. In breach of that understanding, the defendant displayed the submarine as a public exhibit. The claimant sought an order requiring the defendant to demolish the submarine. In concluding that the decommissioned submarine was a 'vessel', the tribunal placed no weight on the Parties' agreement as to the submarine's subsequent uses. The respondent's intended use of the submarine was wholly irrelevant. The submarine was a 'vessel' simply because it retained "*the general qualities of a sea vessel*". By parity of reasoning, an object must be an 'aircraft' within the meaning of Art. 2(e) CISG as long as it possesses the "*general qualities*" of an aircraft. Those "*general qualities*" are set out in the ordinary dictionary definition of 'aircraft' (*supra, para. 5*) and are demonstrably present in the Kestrel Eye (*supra, para. 66*).

4. Alternatively, even if CLAIMANT is correct that the intended use of the Kestrel Eye is relevant to its classification as an 'aircraft', it was the Parties' clear intention that the Kestrel Eye be used to carry goods

81 In any event, the Kestrel Eye is an 'aircraft' even on CLAIMANT's definition of the term because the PSA, when interpreted in light of the available contextual evidence, evinces a clear intention by the Parties that the Kestrel Eye should be deployed to carry goods in extenuating circumstances. The preamble to the PSA states that "*in the process of the negotiations the scope of the agreement to be awarded was changed to reflect new developments and* ***a possible additional use of the aircrafts***". That "*possible additional use*" refers to "*bring[ing] high value and sensitive other loads to the remote areas of the northern provinces*" (*Exh. R 4*) or—more concretely put—the "*use of the Kestrel Eye 2010 for the delivery of medicine or urgently needed spare parts*" (*PO2, para. 22*).

82 CLAIMANT has contended that Art. 21 PSA is a "merger clause", the effect of which is to "*derogate from Art. 8(3) CISG under Art. 6 CISG so that additional evidence apart from the*

text of the contract cannot be used for its interpretation" (*CM, para. 52*). CLAIMANT's position, therefore, is that Art. 21 PSA not only provides (*1*) that the terms of the parties' contract are to be found in the PSA exclusively, but also (*2*) that the only evidence that can relied on in interpreting those terms is the language of the PSA itself.

83 RESPONDENT disagrees. The Tribunal is entitled by virtue of Art. 8(3) CISG to interpret the PSA alongside all available contextual evidence notwithstanding Art. 21 PSA. Art. 8(3) CISG "*is a clear direction to the court to admit and consider all other evidence related to the negotiations which could reveal the parties real intent*" (*Kröll et al., p 150*). In principle, merger clauses like Art. 21 PSA may "*bar extrinsic evidence for the purpose of contract interpretation*" (*Schwenzer et al., p 89*). However, "*the extent to which a merger clause accomplishes [this] purpose* ***is a question of interpretation of the clause***" (*ibid*). Importantly, the CISG Advisory Council recently clarified that:

> "***Under the CISG, a Merger Clause does not generally have the effect of excluding extrinsic evidence for purposes of contract interpretation***. *However, the Merger Clause may prevent recourse to extrinsic evidence for this purpose if* ***specific wording****, together with all other relevant factors, make clear the parties' intent to derogate from Article 8 for purposes of contract interpretation.*" (*Opinion No. 3*) (Emphasis added.)

84 The effect of *Opinion No. 3* is that "*the interpretative rules under Article 8 are presumed to be applicable even where there is a merger clause included within the contract.* ***Thus, the party seeking to enforce the merger clause would be faced with the burden of proving whether and how the clause applies to the parties' contract***" (*Suresh*, *pp. 228-229*; *TeeVee Tunes*; *Cedar Petrochemicals*) (emphasis added). Commentators have also observed that "*a merger clause* ***phrased broadly*** *without* ***specifically excluding*** *the interpretative rules under the CISG may be inadequate to exclude the application of Article 8*" (*Suresh, p. 229*).

85 CLAIMANT has offered no explanation as to how the wording of Art. 21 PSA and "*other relevant factors*" evince a clear and mutual intention to derogate from Art. 8(3) CISG. Instead, CLAIMANT makes the bare assertion that "*[b]y including a merger clause into their contract, the parties derogate from Art. 8(3) CISG under Art. 6 CISG so that additional evidence apart from the text of the contract cannot be used for its interpretation*" (*CM, para. 52*). On the facts, Art. 21 PSA comprises only nine words reading "*[t]his document contains the entire agreement between the Parties*". Such sparse language must be inadequate to oust Art. 8(3) CISG.

B. The Parties impliedly excluded the application of the CISG by selecting Equatorianian law to govern the PSA

86 CLAIMANT has made lengthy submissions on how the express selection of Equatorianian law in Art. 20 PSA can only be interpreted as an implied selection of the CISG (*CM, para. 44*). The Tribunal should reject these submissions because they entirely ignore the fact that the Parties were trading in—and *knew* that they were trading in—'aircrafts'.

87 In *Case No. T-23/97*, the tribunal had to decide if an express choice of Yugoslav law was to be construed as an implied selection of Yugoslavian domestic law or the CISG. The tribunal opted for the former, reasoning that:

> "*since this was the sale of a ship, a special category of goods, it follows from the exception provided in CISG Article 2(e) that the reference to Yugoslav law in this case should not be understood as a reference to the CISG, but rather as a reference to the internal substantive law of Yugoslavia.*"

88 The reasoning in *Case No. T-23/97* applies equally to this dispute. The Parties knew that they were selling and purchasing 'aircraft' to which the CISG does not apply. It is CLAIMANT's evidence that:

> "*[Claimant's drones] are generally subject to the rules of the Aviation Safety regulations in the different jurisdictions. … As a consequence, whenever we are entering into negotiations with a potential customer, the legal department routinely checks the relevant Aviation Safety rules for potential registration, safety and/or operation requirements.*" (*Exh C 7, para 2-3*) (Emphasis added.)

On this footing, it is implausible that CLAIMANT entered into the PSA without knowing that there was *at least* a real possibility that the CISG would not govern the PSA unless clear words to the contrary were used. CLAIMANT's agreement to Art. 20 PSA can only mean that it was content for the PSA to be governed by the ICCA and it lies ill in the mouth now for CLAIMANT to argue that ambiguous words it agreed to should be construed in its favour.

IV. EVEN IF THE TRIBUNAL FINDS THAT THE PSA IS GOVERNED BY THE CISG, RESPONDENT CAN RELY ON ART. 3.2.5 ICCA TO AVOID THE PSA

89 Even if the Tribunal finds that the PSA is governed by the CISG, RESPONDENT can still rely on Art. 3.2.5 ICCA to avoid the PSA on grounds of fraudulent misrepresentation. For

context, RESPONDENT's position is that CLAIMANT engaged in "*fraudulent misrepresentation*" in 2020 by stating that the Kestrel Eye was (*1*) its "*newest model*", and (*2*) "*state-of-the-art*" (*RNOA, para. 27; infra, para. 92*). RESPONDENT made these representations despite having full knowledge that the Hawk Eye would be released to the market in a few months (*RNOA, para. 17*). In these circumstances, RESPONDENT is entitled to terminate—and did terminate by way of a letter dated 30 May 2022 (*Exh. C 8*)—the PSA on grounds of fraudulent misrepresentation pursuant to Art. 3.2.5 ICCA.

90 It is RESPONDENT's position that the ICCA governs the claim of fraudulent misrepresentation. This is because the Parties expressly contracted for the PSA to be "*governed by the law of Equatoriana*" (*PSA, Art. 20(d)*). This refers to both the CISG (to which Equatoriana is a Contracting State) and the ICCA. Since the CISG does not govern the claim of fraudulent representation, recourse toward the ICCA—which *does* govern that issue—is permitted as the "*ultima ratio*" (*Schwenzer et al., p. 90*).

91 CLAIMANT's position is that the CISG governs the claim of fraudulent misrepresentation. Preliminarily, RESPONDENT notes that CLAIMANT has tendered additional arguments that go beyond the ambit of the Tribunal's directions regarding the fourth issue (*CM, paras. 79, 86, 93*). This includes factual arguments on how CLAIMANT made no misrepresentations to RESPONDENT (*CM, paras. 73-78*). The Tribunal has expressly directed that the submissions on the fourth issue be confined to the question of "*whether or not Art. 3.2.5 ICCA can in principle be applied*" (*PO2, para. 53*) if the CISG applies.

92 For completeness, however, the following facts demonstrate that CLAIMANT's "*fraudulent misrepresentations*" and/or "*non-disclosure*" within the meaning of Art. 3.2.5 ICCA led RESPONDENT to conclude the contract:

(a) CLAIMANT responded to the Call for Tender, which clearly requested for "*state-of-the-art*" UAS (*Exh. C 1*);

(b) Before the PSA was signed, CLAIMANT sent an email dated 29 November 2020 to RESPONDENT stating that the Kestrel Eye was "*state-of-the-art*" and CLAIMANT's "*latest*" or "*present top model*" (*Exh. R 4*);

(c) It was repeated in the PSA that the Kestrel Eye was "*state-of-the-art*" and the CLAIMANT's "*latest*" or "*newest model*" (*PSA, Preamble; PSA, Art. 2(a)-2(d)*);

(d) RESPONDENT *expressly required* that any UAS it acquires be "*state-of-the*-art" and the supplier's "*newest*" or "*latest*" model (*Exh. C 1; PSA, Art. 2*);

(e) At no point during the Parties' extensive negotiations did CLAIMANT disclose the existence of the Hawk Eye, which was the "*more advanced*" model (*Exh. C 3, para. 9*), that was in development since early-2017 (*PO2, para. 15*);

(f) CLAIMANT made representations that were untrue and failed to disclose relevant facts concerning the Hawk Eye. Indeed, CLAIMANT had *no intention* of disabusing RESPONDENT or of revealing those relevant facts. This indicates CLAIMANT's clear intention to defraud; and

(g) CLAIMANT was induced to conclude the PSA because of RESPONDENT's dishonesty.

RESPONDENT reserves the right to make additional submissions on these factual issues as and when they arise in this arbitration.

93 CLAIMANT has also mischaracterised RESPONDENT's claim as one concerning "*an innocent misrepresentation which is … [not] fraudulent*" (*CM, para. 73*). The Tribunal has clearly instructed the Parties to make submissions on "*whether or not **Art. 3.2.5 ICCA** can in principle be applied*". Art. 3.2.5 ICCA is concerned exclusively with *fraudulent* misrepresentations. Moreover, it has been RESPONDENT's case throughout this arbitration—and even before that—that it is claiming fraudulent misrepresentation. CLAIMANT was aware of this: as early as 30 May 2022, RESPONDENT asserted that CLAIMANT "*engaged in serious misrepresentation*" and was thus "*avoid[ing] the [PSA] with immediate effects pursuant to **Article 3.2.5** [ICCA]*" (*Exh. C 8*). RESPONDENT repeated its assertion that CLAIMANT made "*serious misrepresentation[s] in the sense of **Art. 3.2.5 ICCA***" in the RNOA (*RNOA, paras. 17, 20-21, 27*). It is inappropriate for CLAIMANT to dodge the issue by reframing it as one for innocent or negligent misrepresentations (*CM, paras. 73-78*), which are fundamentally different claims.

94 In response to CLAIMANT's arguments that *are* consistent with the Tribunal's instructions (C*M, paras. 71-73*), RESPONDENT is entitled to rely on Art. 3.2.5 ICCA to avoid the PSA because the CISG does not govern its claim of fraudulent misrepresentation [***A***]. Alternatively, even if the CISG governs RESPONDENT's claim of fraudulent misrepresentation, RESPONDENT is still entitled to rely on Art. 3.2.5 ICCA to avoid the PSA [***B***].

A. RESPONDENT is entitled to rely on Art. 3.2.5 ICCA to avoid the PSA because the CISG does not govern its claim of fraudulent misrepresentation

95 Contrary to CLAIMANT's position, the CISG does not govern issues of validity (which includes questions of whether a contract may be avoided for fraudulent misrepresentation) [***1***]. Further and/or alternatively, none of the CISG's provisions—including Art. 35 CISG, which CLAIMANT invokes—govern the claim of fraudulent misrepresentation [***2***].

1. The CISG does not govern issues of validity, which include whether a contract may be avoided for fraudulent misrepresentation

96 The CISG does not govern issues of contractual validity, which include claims of fraudulent misrepresentation. The CISG "*does not constitute an "exhaustive body of rules*"" (*Ferrari II, p. 108*). Art. 4 CISG clearly sets out the scope of the CISG:

> *"This Convention* ***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. In particular, except as otherwise expressly provided in this Convention,* ***it is not concerned with: (a) the validity of the contract or any of its provisions or of any usage*** *... "* (Emphasis added.)

This limiting provision is intended to, and indeed, "*limits the scope of the Convention*" (*Official Records, p. 17*). The words "*governs only*" and "*it is not concerned with*" show that the drafters clearly intended for this to be a scoping provision that must be strictly adhered to.

97 CLAIMANT asserts that "*exclusions to the CISG should be interpreted as narrowly as possible*" (*CM, para. 71*). While this is undoubtedly true, it does not follow that Art. 4 CISG should be given an overly narrow interpretation. Such an approach would result in the CISG governing matters it was not meant to govern, including the present claim of fraudulent misrepresentation.

98 In *Geneva Pharmaceuticals*, a contract's validity was impugned on grounds of negligent misrepresentation. The court considered the meaning of 'validity' in Art. 4 CISG and held that "*any issue by which the domestic law would render the contract void,* ***voidable****, or unenforceable*" is an issue of validity (*Geneva Pharmaceuticals, p*. 282). On that basis, the court decided that domestic law—and not the CISG—applied (*ibid*, *pp. 282, 287*).

99 Applying *Geneva Pharmaceuticals*' interpretation of 'validity' to this dispute, the domestic law in question would be Equatoriana's Art. 3.2.5 ICCA. This provision states that

an aggrieved party "*may avoid the contract*" on grounds of fraudulent misrepresentation. Fraudulent misrepresentation is, therefore, an issue of 'validity' within the meaning of Art. 4 CISG that is not governed by the convention.

100 The CISG's drafting history confirms that the CISG does not govern claims of fraudulent misrepresentation. Art. 89 ULIS expressly stated that "*[i]n case of fraud, damages shall be determined by the rules applicable in respect of contracts of sale not governed by the present Law.*" The ULIS is the direct predecessor of the CISG and the absence of an equivalent position in the CISG "*should not be read as an indication of the CISG's position being different*" (*Schroeter, p. 585*). The omission of an equivalent article was intended to truncate the CISG's text (*ibid*). Ultimately, this omission makes no material difference because Art. 4 CISG is sufficient to remove issues of validity—including claims of fraudulent misrepresentation—from the scope of the CISG.

101 RESPONDENT's interpretation of 'validity' is supported by the fact that the *Draft of a Law for the Unification of Certain Rules relating to Validity of Contracts of International Sale of Goods 1972* was intended to comprehensively govern issues of validity. The Draft Law and the CISG were drafted by UNIDROIT at the same time (*Schroeter, p. 585*). Both documents were drafted to complement—and not overlap with—each other. Arts. 2 and 10 of the Draft Law made express provisions for instances where "*[a] party who was induced to conclude a contract by a mistake which was intentionally caused by the other party*".

2. Further and/or in the alternative, none of the CISG's provisions—including Art. 35 CISG, which CLAIMANT invokes—govern the claim of fraudulent misrepresentation

102 None of the CISG's provisions govern claims of fraudulent misrepresentation. Art. 35 CISG, which is the sole provision CLAIMANT relies on, does not govern claims of fraudulent misrepresentation in the way asserted by CLAIMANT (*CM, paras. 72, 79-85*). This is consistent with—and further buttresses—the foregoing argument that the CISG does not govern issues of validity. Moreover, even if the Tribunal does not accept RESPONDENT's submission that the CISG does not govern issues of validity (which includes fraudulent misrepresentation), the fact that none of the CISG's provisions may be applied to determine RESPONDENT's claim of fraudulent misrepresentation must mean that the CISG does not govern the issue.

103 The *travaux préparatoires* on Art. 4 CISG observes that "*there are no provisions in this Convention which expressly govern the validity of the contract or of any usage*" (*Official Records, p. 17*) that would trigger the caveat "*except as otherwise expressly provided in this Convention*" in Art. 4 CISG. The drafters only acknowledged a "*possibility of such a conflict in Art. [11 CISG], which provides that a contract of sale of goods need not be concluded in or [evidenced] by writing and is not subject to any other requirement as to form.*" (*ibid*). By contrast, no suggestion was made that Art. 35 CISG could operate as such an exception.

104 Arts. 35(1), 35(2)(a), and 35(2)(b) CISG—which CLAIMANT relied on extensively in its submissions (*CM, paras. 80-82*)—do not govern representations made prior to contract formation by seller. Still less is there anything in those provisions that remotely allude to a seller's fraudulent intentions. Art. 35(1) CISG simply states that:

> "*The seller must deliver goods which are of the quantity, quality, and description required by the contract and which are contained or packaged in the manner required by the contract.*"

Arts. 35(2)(a) and 35(2)(b) CISG read:

> "*Except where the parties have agreed otherwise, the goods do not* ***conform*** *with the contract unless they: (a) are* ***fit for the purposes*** *for which goods of the same description would ordinarily be used; (b) are* ***fit for any particular purpose*** *expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement …* "

It is clear that the mischief Art. 35 CISG was intended to address relates to mere contractual breaches by a seller, specifically a seller's failure to deliver goods fit for purpose. Nothing in Art. 35 CISG speaks to issues of fraudulent misrepresentation.

105 CLAIMANT has argued that the CISG governs claims of non-fraudulent misrepresentation (*CM, para. 72*). Specifically, CLAIMANT relies on academic commentary to the effect that Art. 35 CISG takes precedence over domestic laws that offer a remedy to buyers where sellers have made constituting negligent or innocent misrepresentation as to the quality of the goods sold (*ibid*).

106 There are two difficulties with this argument. First, the proposition advanced by CLAIMANT is roundly contradicted by the case law (*Geneva Pharmaceuticals, pp. 282, 287; supra, para. 98*). Second, even if the Tribunal accepts this proposition, non-fraudulent misrepresentations are not the issue in this dispute. This dispute concerns a claim of *fraudulent* misrepresentation. No authority has been cited by CLAIMANT to support the argument that Art. 35 CISG governs claims of fraudulent misrepresentation. To the contrary, there is a broad academic consensus that Art. 35 CISG does not govern claims of fraudulent misrepresentation (*Schwenzer et al., pp. 95-96, 833*). CLAIMANT has asserted that "*the issue of misrepresentation, if not fraudulent, is governed by the CISG*" and thereby concedes that Art. 35 CISG does not govern fraudulent misrepresentation (*CM, para.72*).

B. Alternatively, even if the CISG governs RESPONDENT's claim of fraudulent misrepresentation, RESPONDENT is still entitled to rely on Art. 3.2.5 ICCA to avoid the PSA

107 Even if the Tribunal is minded to decide that the operative facts giving rise to RESPONDENT's claim of fraudulent misrepresentation is governed by Art. 35 CISG, RESPONDENT is still entitled to rely on Art. 3.2.5 ICCA to avoid the PSA.

108 Even if conduct amounting to fraudulent misrepresentation gives rise to a claim under Art. 35 CISG, the presence of fraud creates "*special circumstances above and beyond the mere lack of conformity of the goods*" (*Schwenzer et al., p. 833*). Art. 35 CISG and domestic laws on fraudulent misrepresentation may be engaged by the same operative facts. Both regimes may offer identical remedies to an aggrieved buyer who entered into a contract on the strength of fraudulent misrepresentations as to the goods' qualities. But importantly, both regimes offer identical remedies for *different reasons*:

(a) Art. 35 CISG (read with Art. 45 CISG) provides "*remedies to the buyer if the seller **fails to perform any of his obligations under the contract** and this Convention and as the source for the buyer's right to claim damages*" (*Official Records, p. 37*) regardless of whether the seller acted fraudulently (*Schroeter, pp. 585-586*); whereas

(b) "*[D]omestic legal rule[s] on fraudulent misrepresentation deal with violations of the "**obligation of honesty**" ... or the "**general obligation of honesty in speaking**" ... which is a matter **different from mere breaches of contractual obligations***" (*ibid*).

109 In such situations, "*the buyer's remedies under domestic law for the seller's fraud or deceit are not excluded*" (*Schwenzer et al., p. 833*). It follows that both the CISG and ICCA should "*apply alongside each other*", allowing RESPONDENT "*with the choice of which rule to base [its] claims upon*" (*Schroeter, p. 585*). RESPONDENT should be able to elect between the full suite of remedies, which are offered to it for fundamentally different reasons.

110 This approach is amply supported by the decided cases. In *Miami Valley Paper*, an American company contracted to purchase a winder from a German company. The seller represented to the buyer that the winder would be shaftless—that representation, as it turned out, was untrue. The buyer claimed against the seller for *both* non-conformity amounting to fundamental breach of contract *and* fraudulent misrepresentation arising out of the same operative facts. Even though the same facts (*ie*, that the seller delivered a shaftless winder) gave rise to two distinct claims under the two legal regimes (*ie*, Ohio law and the CISG), the court applied Arts. 35 and 49 CISG in determining the claim for breach (*Miami Valley Paper, pp. 4-8*) whilst applying Ohio law in determining the claim for fraudulent misrepresentation (*Miami Valley Paper, p. 9*). The same approach was taken in *Dingxi* (*Dingxi, p. 2*).

111 The Tribunal should adopt the same approach to the present matter. Even on the assumption that Art. 35 CISG is is relevant here (which RESPONDENT denies), the facts that CLAIMANT has characterised as giving rise to a claim for breach of contract under Art. 35 CISG may equally be characterised as a claim for fraudulent misrepresentation under Art. 3.2.5 ICCA. RESPONDENT should, therefore, be entitled to rely on Art. 3.2.5 ICCA to avoid the PSA.

V. REQUEST FOR RELIEF

112 For the above reasons, RESPONDENT respectfully requests the Tribunal to:

(a) Declare that the Tribunal does not have jurisdiction to hear the case as there is no valid Arbitration Agreement;

(b) Stay or, in the alternative, bifurcate these proceedings until the investigations against Mr. Field are concluded;

(c) Declare that the PSA is not governed by the CISG;

(d) Declare that RESPONDENT can rely on Art. 3.2.5 ICCA to avoid the contract; and

(e) Award RESPONDENT the costs of these proceedings, including legal fees and expenditures.

Respectfully signed and submitted on 26 January 2023 by:

A.Heng	A.Lim	D.Loh	J.Abelarde
Asaph Heng	Austen Lim	Daniel Loh	Jolene Abelarde
R.Whang	S.Leong	V.Sim	C.N.Whang
Russell Whang	Shannen Leong	Vivien Sim	Whang Chia Ning