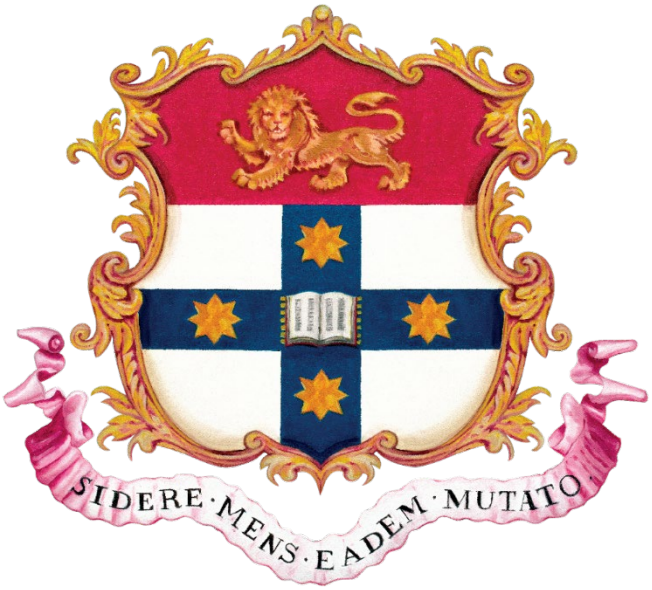
THIRTIETH ANNUAL WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT



THE UNIVERSITY OF SYDNEY

MEMORANDUM FOR RESPONDENT

ON BEHALF OF	AGAINST
Equatoriana Geoscience Ltd	Drone Eye plc
1907 Calvo Rd	1899 Peace Avenue
Oceanside	Capital City
Equatoriana	Mediterraneo
RESPONDENT	**CLAIMANT**

COUNSEL

Maya Eswaran Sofia Mendes Harriet Walker Kathy Zhang

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS

Abbreviation	Term
/	And
§(§).	Section(s)
¶(¶)	Paragraph(s)
Air Systems	Air Systems plc
Arbitration Agreement	Article 20 of the Purchase and Supply Agreement
Art(s).	Article(s)
CEO	Chief Executive Officer
cf.	Compare
Ch.	Chapter
cl.	Clause
Cl. Memo.	CLAIMANT Memorandum
COO	Chief Operating Officer
Entire Agreement Clause	Article 21 of the Purchase and Supply Agreement
Equatoriana's *Public Tender Act*	Law No. 23978 (Public Tender Act)
Ex. C#	CLAIMANT's Exhibit Number
Ex. R#	RESPONDENT's Exhibit Number
fn.	Footnote
HE2020	Hawk Eye 2020
IBA	International Bar Association
ICC	The International Court of Arbitration
ICCA	The International Commercial Contract Act of Equatoriana
ICSID	International Centre for Settlement of Investment Disputes
KE2010	Kestrel Eye 2010
Ltd	Limited
NoA	Notice of Arbitration
NPD Program	The Northern Part Development Program
p(p).	Page(s)
PCA	Permanent Court of Arbitration
PO1	Procedural Order Number 1, dated 7 October 2022
PO2	Procedural Order Number 2, dated 7 November 2022
RNoA	Response to the Notice of Arbitration
the Minister	The Minister of Natural Resources and Development of Equatoriana
the Parties	CLAIMANT and RESPONDENT
the PSA	The Purchase and Supply Agreement
the Tribunal	The Arbitral Tribunal
UN	The United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
Vol.	Volume

INDEX OF AUTHORITIES

TREATIES, CONVENTIONS AND RULES

UN Corruption Convention	United Nations Convention Against Corruption, opened for signature 9 December 2003 (entered into force 14 December 2005)	¶¶52, 59
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2016	¶¶106, 109, 110, 113, 119, 122, 136, 138, 139
ULIS	Convention relating to a Uniform Law on the International Sale of Goods 1964	¶¶98, 120
VCLT	Vienna Convention on the Law of Treaties, opened for signature 23 May 1969 (entered into force 27 January 1980)	¶¶87, 88

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Austria 15 June 1994	SCH-4318 June 15 1994 Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft	¶¶29, 138, 139
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BSG Resources Limited	*BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v. Republic of Guinea* Procedural Order No. 14 on Document Inspection of 28 August 2017 ICSID Case No. Arb/14/22	¶62
Buenos Aires	*Buenos Aires 10/12/1997* Ad Hoc Arbitration, 10 December 1997	¶139

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Fougerollem S.A.	*Fougerollem S.A. v. Ministry of Defence of the Syrian Arab Republic* Award of 31 March 1988 Administrative Tribunal of Damascus, Syria XV Y.B. COM. ARB	¶32
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Glamis Gold	*Glamis Gold Ltd. v. The United States of America* UNCITRAL/NAFTA Procedural Order No.2 (Revised), 31 May 2005	¶76
Glencore	*Glencore Finance (Bermuda) Limited v Plurinational State of Bolivia* Procedural Order No 2 (Decision on Bifurcation) of 31 January 2018 PCA Case No 2016-39	¶¶76, 78
ICC Case No. 2020/003	Final Award of 2011, ICC Case No. 2020/003	¶¶22, 134

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ICC Case No. 23570/MK	Final Award of 2018, ICC Case No. 23570/MK	¶¶29, 139
ICC Case No. 9474	Interim Award of 1999, ICC Case No. 9474	¶134
Lao Holdings	*Lao Holdings N.V. v Lao People's Democratic Republic* Ruling on Motion to Amend the Provisional Measures Order of 30 May 2014 ICSID Case No. Arb(AF)/12/6	¶62
Lighthouse Corp	*Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC. v Democratic Republic of Timor-Leste* Procedural Order No. 3 on Bifurcation and Related Requests of 8 July 2016 ICSID Case No. Arb/15/2	¶84
Malicorp	*Malicorp v. Egypt* Award of 7 March 2006 CRCICA Case No. 382/2004	¶5
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MOX Plant	*Ireland v. United Kingdom ('The MOX Plant Case')* Order No. 3 Suspension of Proceedings on jurisdiction and Merits and Request for Further Provisional Measures of 24 June 2003 PCA Case No. 2002-01	¶71
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Patel v Mozambique	*Patel Engineering Limited (India) v Republic of Mozambique* Procedural Order No 6 of 30 November 2022 PCA Case No 2020-21	¶72
Philip Morris	*Philip Morris Asia Limited v. The Commonwealth of Australia* Procedural order No. 8 of 14 April 2014 PCA Case No. 2012-12	¶76

Quiborax v Bolivia	*Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* Decision on Provisional Measures of 26 February 2010 ICSID Case No. Arb/06/2	¶64
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Sanum	*Sanum Investments Limited v Lao People's Democratic Republic* PCA Case No. 2013-13	¶44
S.D. Myers	*S.D. Myers, Inc. v Government of Canada* Procedural Order No. 17 NAFTA, UNCITRAL	¶¶38, 41, 57
SGS v Philippines	*SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* Decision of the Tribunal on Objections to Jurisdiction of 29 January 2004 ICSID Case No. Arb/02/6	¶71
SPP v Egypt	*Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* Decision on Preliminary Objections to Jurisdiction of 27 November 1985 ICSID Case No. Arb/84/3	¶71

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Union Fenosa Gas	*Union Fenosa Gas, S.A. v. Arab Republic of Egypt* Award of 31 August 2018 ICSID Case No. Arb/14/4	¶¶43, 44, 59
Van Zyl v Lesotho	*Van Zyl v. Lesotho* Procedural Order No. 1: Suspension, Bifurcation and Procedural Timeline of 3 November 2016 PCA Case No. 2016-21	¶¶38, 41, 76
Wena Hotels	*Wena Hotels Limited v Arab Republic of Egypt* Award of 8 December 2000 ICSID Case No. Arb/98/4	¶¶42, 44, 59
Westmoreland	*Westmoreland Coal Company v Government of Canada* Procedural Order No 3 (Decision on Bifurcation) of 20 October 2020 ICSID Case No. UNCT/20/3	¶76
Westwater Resources	*Westwater Resources, Inc. v. Republic of Turkey* Procedural Order No 2 of 28 April 2020 ICSID Case No. Arb/18/46	¶84
World Duty Free	*World Duty Free Company Limited v. Republic of Kenya* Award of 4 October 2006 ICSID Case No. Arb/00/7	¶59

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Mewett	*Commonwealth of Australia v Mewett* (1997) 146 ALR 299	¶15
Searle	*Searle v Commonwealth* (2019) 376 ALR 512	¶22
TCL	*TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] FCAFC 83	¶59
Traxys Europe S.A.	*Traxys Europe S.A. v. Balaji Coke Industry Pvt Ltd., Federal Court* [2012] FCA 276	¶33
Canada		
Canada Inc v Ontario Inc	*10443204 Canada Inc v 2701835 Ontario Inc*, 2022 ONCA 745 Ontario Court of Appeal, Canada, 2022	¶131
Karaha Bodas Company LLC	*Karaha Bodas Company LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara and P.T. PLN (Persero)* Alberta Court of Queen's Bench, Canada, 2004	¶33
Caribbean Community		
BCB Holdings	*BCB Holdings Limited and The Belize Bank Limited v The Attorney General of Belize* [2013] CCJ 5 (AJ) Caribbean Court of Justice, Appellate Jurisdiction	¶14
European Union		
Commission v CAS	*Commission of the European Communities v CAS Succhi di Frutta SpA2* Case C-496/99 P Court of Justice of the European Nation, General Court (Sixth Chamber)	¶53

Beijing Jianlong Heavy Industry Group	*Beijing Jianlong Heavy Industry Group v Golden Ocean Group Ltd & Ors* [2013] EWHC 1063 (Comm) High Court (England and Wales)	¶35
Dallah Real Estate	*Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2008] EWHC 1901 (Comm) High Court (England and Wales)	¶13
E. Euro. Eng'g Ltd	*E. Euro. Eng'g Ltd v. Vijay Constr. (Pty) Ltd* [2017] EWHC 797 High Court (England and Wales)	¶34
Enka	*Enka v Chubb* [2020] UKSC 38 UK Supreme Court	¶¶4, 13
Fiona Trust	*Fiona Trust and Holding Corporation and others v Privalov and others* [2007] 1 Bus LR 1719 House of Lords	¶35
IPCO	*IPCO (Nigeria) v NNPC* [2005] EWHC 726 (Comm) High Courts (England and Wales)	¶59
Maclaine Watson	*Maclaine Watson & Co. v. Int'l Tin Council* [1987] 1 WLR 1711 High Court (England and Wales)	¶11
Page	*Commissioners of Crown Lands v Page* [1960] 2 QB 274 England and Wales Court of Appeal (Civil Division)	¶22
Proforce Recruit	*Proforce Recruit Ltd v The Rugby Group Ltd* [2006] EWCA Civ 69 English and Wales Court of Appeal (Civil Division)	¶104
Sulamerica	*Sulamerica CIA Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2012] EWCA Civ 638 England and Wales Court of Appeal (Civil Division)	¶13
Svenska Petroleum	*Svenska Petroleum Exploration AB v. Lithuania* [2006] EWCA Civ 1529 English and Wales Court of Appeal (Civil Division)	¶11

Vasant	*Vasant v National Health Service Commissioning Board* [2019] EWCA Civ 1245 English and Wales Court of Appeal	¶104
Westacre	*Westacre Investments Inc v. Jugoimport-SDRP Holding Co Ltd* [1999] EWCA Civ 1401 English and Wales Court of Appeal	¶34

United States

Cedar Petrochemicals	*Cedar Petrochemicals, Inc., v Dongbu Hannong Chemical Co., Ltd* 2011 WL 4494602 United States District Court for the Southern District of New York	¶105
Electrocaft	*Electrocraft Arkansas, Inc. v. Super Elec. Motors, LTD* No. 4:09cv00318 SWW (E.D. Ark. Aug. 19, 2010) United States District Court, E.D. Arkansas, Western Division	¶120
Parsons	Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA) 508 F.2d 969 (2d Cir. 1974) U.S. Court of Appeals, Second Circuit	¶33
Teevee Toons	*Teevee Toons, Inc. v Gerhard Schubert GBMH* 2006 WL 2463537 United States District Court for the Southern District of New York	¶105

SUMMARY OF FACTS

1. On **20 March 2020**, Equatoriana Geoscience Ltd (**RESPONDENT**), a state-owned enterprise (**SOE**), issued a tender for four 'state-of-the-art' Unmanned Aerial Systems (**drones**). The drones were to be used for geological surveillance as part of the Equatorianian government's Northern Part Development Program (**NPD Program**). RESPONDENT entered into negotiations with two bidders, Drone Eye plc (**CLAIMANT**) and Air Systems plc (**Air Systems**).
2. Despite Air Systems initially submitting a more attractive bid, negotiations were cut short and on **4 November 2020** Mr. Field, RESPONDENT's COO, agreed to buy six of CLAIMANT's Kestrel Eye 2010s (**KE2010s**). The final negotiations between Mr. Bluntschli and Mr. Field occurred at Mr. Bluntschli's beach house, without other members of the negotiation team present, and resulted in significant changes to the scope of the tender.
3. On **1 December 2020**, CLAIMANT and RESPONDENT (**the Parties**) entered into the Purchase and Supply Agreement (***PSA***). The *PSA* was signed by the Equatorianian Minister of Natural Resources and Development (**the Minister**) as required for its validity. It was also known to the Parties that for Art. 20 of the *PSA* (**Arbitration Agreement**) to be valid, it required approval from the Equatorianian Parliament through a vote. A vote was never held.
4. In **February 2021**, two months after the *PSA* was signed, CLAIMANT publicly presented its new drone, the Hawk Eye 2020 (**HE2020**) at an air show in Mediterraneo. The HE2020 is technologically superior to the KE2010. However, during the negotiations of the *PSA*, CLAIMANT asserted that the KE2010 was its 'newest' model and was 'state-of-the-art'. CLAIMANT never mentioned the existence of the HE2020, nor its imminent release to the market, to RESPONDENT.
5. On **21 May 2022**, charges were brought against Mr. Field by Equatoriana's public prosecutor for corruption and bribery. It was reported that Mr. Field had received bribes to an offshore account relating to other contracts he negotiated as part of the NPD Program. The public prosecutor is currently investigating whether corrupt payments were made to Mr. Field in relation to the *PSA*.
6. The Parties met on **27 May 2022** to try and resolve the issues surrounding the *PSA*. However, the Parties were unable to reach an agreement. RESPONDENT terminated the *PSA* on **30 May 2022**.
7. On **14 July 2022**, CLAIMANT submitted a request for arbitration.

STATEMENT OF RESPONDENT'S ARGUMENTS

1. This dispute concerns two main issues: whether corrupt payments were made in the procurement of the *PSA* and whether misrepresentations were made about the nature of the drones sold by CLAIMANT to RESPONDENT. At this stage, the Tribunal must decide four preliminary questions: first, its own jurisdiction; secondly, whether a stay should be granted; thirdly, the applicable law of the *PSA*; and fourthly, whether RESPONDENT can rely on Art. 3.2.5 of Equatoriana's *International Commercial Contract Act* (***ICCA***).
2. The Tribunal has no jurisdiction to hear these proceedings (**A**). The Arbitration Agreement was never valid because the Parliament of Equatoriana has not approved it, as required under the Equatorianian Constitution. Nevertheless, CLAIMANT was willing to enter the Arbitration Agreement knowing that approval may never be granted, and initiated arbitration proceedings despite being aware of this defect. Even if the Tribunal finds that parliamentary approval was not required, any award made by this Tribunal would risk being unenforceable.
3. If the Tribunal finds that the Arbitration Agreement is valid, RESPONDENT requests that it stay proceedings until the criminal investigation into Mr. Field has concluded (**B**). RESPONDENT raises legitimate allegations that the *PSA* was procured by corruption. A stay will uphold fairness and due process by allowing the evidence gathered during the investigation to be available to the Tribunal. A stay will also reduce the risk of inconsistent findings between this Tribunal and an Equatorianian Court. Further, a stay will not cause prejudice to CLAIMANT, nor would it unduly delay proceedings. Alternatively, RESPONDENT requests the Tribunal bifurcate proceedings and decide the issue of corruption in the second stage of the hearing once the investigation is complete.
4. The *United Nations Convention on Contracts for the International Sale of Goods* (***CISG***) does not apply to the *PSA* (**C**). The KE2010 is an aircraft under Art. 2(e) *CISG*, and therefore the *PSA* is beyond the scope of the *CISG*. Further, the Parties impliedly excluded the application of the *CISG* by designating the law of Equatoriana as the governing law of the contract in Art. 20 of the *PSA*.
5. Even if the *CISG* applies to the *PSA*, RESPONDENT can rely on Art. 3.2.5 of the *ICCA* to avoid the *PSA* on the grounds of fraudulent non-disclosure and fraudulent misrepresentation (**D**). This is because the *CISG* does not govern cases of fraud. Further, Art. 3.2.5 *ICCA*, as a domestic contractual remedy, has not been displaced by the *CISG*'s application, in particular by Art. 35 of the *CISG* concerning non-confirming goods. CLAIMANT's descriptions of the KE2010 as the 'newest' model and as 'state-of-the-art' in circumstances where it was about to release an updated model, the HE2020, amounted to fraudulent misrepresentation and non-disclosure. On this basis, RESPONDENT validly avoided the *PSA*.

ISSUE A: THE TRIBUNAL DOES NOT HAVE JURISDICTION

1. This Tribunal does not have jurisdiction as there is no valid arbitration agreement. The Arbitration Agreement in the *PSA* is invalid as approval by the Equatorianian Parliament had not been given, as required under the Equatorianian Constitution [*PCA Rules*, Art. 1(1); *NoA*, ¶14; *RNoA*, ¶21]. CLAIMANT was aware that approval was required and had not been given [*Ex. C7*, ¶¶6, 11]. Therefore, the Arbitration Agreement was never valid and the Tribunal lacks jurisdiction (**I**). If the Arbitration Agreement is valid, and this Tribunal has jurisdiction, Equatorianian courts are unlikely to enforce any award rendered (**II**).

I. The Arbitration Agreement is invalid

2. RESPONDENT did not have capacity to enter into the Arbitration Agreement, as distinct from the *PSA*. Capacity refers to a party's ability to enter binding contractual relations under its domestic law [*Poudret/Besson*, pp. 182-183; *Gaillard/Savage*, p. 453]. Under Equatorianian law, SOEs, such as RESPONDENT, require parliamentary approval to have capacity to enter into arbitration agreements in 'administrative contracts' [*NoA*, ¶14; *RNoA*, ¶21]. The *PSA* is an 'administrative contract' requiring parliamentary approval (**A**). RESPONDENT lacked capacity to enter into the Arbitration Agreement without parliamentary approval (**B**). No approval was granted (**C**). Further, RESPONDENT acted in good faith at all times and is not barred from avoiding the Arbitration Agreement (**D**). Thus, the Arbitration Agreement is invalid, and the Tribunal does not have jurisdiction.

A. The *PSA* is an administrative contract requiring parliamentary approval

3. CLAIMANT argues that the *PSA* is not an administrative contract and therefore the parliamentary approval requirement under the Equatorianian Constitution does not apply [*Cl. Memo.*, p. 4]. This is incorrect. Under Art. 75 of the Equatorianian Constitution, SOEs can only conclude a valid arbitration agreement to foreign-seated arbitration when the contract is for 'administrative purposes' with the approval of Parliament [*NoA*, ¶14; *RNoA*, ¶21; *PO2*, ¶31]. It is not in dispute that this is a 'foreign-seated arbitration' and RESPONDENT is an SOE.

4. After contracting on the basis that parliamentary approval was required, CLAIMANT now argues that the *PSA* is not an administrative contract. Whether the *PSA* is an administrative contract under Art. 75 of the Equatorianian Constitution is purely a question of Equatorianian law. As such, CLAIMANT's reliance on Thai national law to interpret the Equatorianian Constitution is misguided [*Cl. Memo.*, ¶13; *Ex. C2*, *Enka*, ¶285]. The *PSA* is an administrative contract because it was concluded for public works (**1**) and the Parties understood the *PSA* to be an administrative contract (**2**).

1. The *PSA* concerns public works

5. Under Equatorianian legal doctrine, 'administrative contracts' generally include 'contracts relating to public works' [*PO2*, ¶31]. The *PSA* is a contract relating to public works. First, RESPONDENT is an SOE established by statute for the sole purpose of administering the Equatorianian government's NPD Program, with the State as its sole shareholder [*RNoA*, ¶3; *Ex. C2*; *PO2*, ¶5; *Malicorp*, ¶¶52-54]. Second, the subject of the *PSA* was the sale of drones to be used for the NPD Program, as evidenced by the recitals to the *PSA* [*Ex. C2*].
6. CLAIMANT relies on two facts to argue that the *PSA* is not an administrative contract. First, CLAIMANT argues the *PSA* 'cannot qualify as administrative' because 'the data [to be] collected by RESPONDENT [with the drones] was not intended to be disclosed to the public domain' [*Cl. Memo.*, ¶20]. However, the data collected was to be used for mining and development of public land for the benefit of Northern Equatoriana [*Ex. R2*; *NoA*, ¶3]. This purpose satisfies the requirements of an 'administrative contract' as defined by CLAIMANT (to provide a 'public service') and under the Equatorianian Constitution ('contracts for public works') [*Cl. Memo.*, ¶21; *PO2*, ¶31].
7. Secondly, CLAIMANT mistakenly argues that, as RESPONDENT is a for-profit organisation, the *PSA* is not 'public' or 'administrative' [*Cl. Memo.*, ¶16]. However, it is common for SOEs to earn profits, which are reinvested into public works. RESPONDENT's profits were to be used for the public purpose of 'develop[ing] [Equatoriana's] northern provinces' [*RNoA*, ¶5]. In any case, it would be contrary to the public interest if RESPONDENT was not run 'commercially'. States and SOEs are obliged to use public funds efficiently [*PO2*, ¶5; *Cl. Memo.*, p. 5, ¶17]. Therefore, RESPONDENT's for-profit operations do not preclude the *PSA* from being an administrative contract.
8. Finally, CLAIMANT may argue that the *PSA* is merely 'preparatory' to public works (i.e., it is a preliminary contract to the substantive NPD Program mining project). Under Equatorianian law, it is uncertain whether 'preparatory' contracts are the same as contracts for public works [*PO2*, ¶29]. RESPONDENT submits that the *PSA* is not a preparatory contract as the KE2010s were purchased to collect 'geological and geophysical data for the proper exploitation of… natural resources' [*Ex. C2*; *Tabbarah*, pp. 394-395]. Such data is critical to the mining project. Therefore, the *PSA* should not be considered a 'preparatory' contract.

2. The Parties understood the *PSA* to be an administrative contract

9. In any case, the Parties' communications demonstrate a common view that the *PSA* was an 'administrative contract' requiring parliamentary approval. CLAIMANT understood the *PSA* to be 'a contract for public infrastructure', requiring both 'approval by Parliament… if such contracts contain an arbitration clause', and 'approval by the Minister in charge' [*Ex. C7*, ¶6]. This view was

shared by RESPONDENT [*PO2*, ¶29]. Therefore, both Parties agreed that parliamentary approval was required for the Arbitration Agreement to be valid.

B. The Arbitration Agreement cannot be valid without parliamentary approval

10. The Arbitration Agreement is invalid without parliamentary approval. The requirement for approval is a limitation on RESPONDENT's capacity to enter into agreements for foreign-seated arbitration (**1**). RESPONDENT can rely on its domestic law capacity limitations (**2**).

1. Parliamentary approval limits RESPONDENT's capacity to enter arbitration agreements

11. The requirement for parliamentary approval imposed by the Equatorianian Constitution limits RESPONDENT's capacity to enter arbitration agreements. Capacity is an essential legal requirement for contractual validity [*Poudret/Besson*, pp. 182-183; *General Newspapers Pty Ltd*, p. 173; *Born (2021)*, p. 91]. RESPONDENT, as a legal entity created by statute, cannot act beyond the powers conferred by its constitutive legislation [*Svenska Petroleum*, ¶25; *Maclaine Watson*, ¶712; *Born*, §5.03[B]; *RNoA*, ¶3]. Therefore, RESPONDENT only has capacity to enter arbitration agreements for foreign-seated arbitration concerning administrative contracts where it has obtained parliamentary approval. Without capacity, the Arbitration Agreement was never valid [*Born*, §5.03].

12. CLAIMANT mistakenly characterises this issue as one of 'conditional arbitrability'. This is a situation where matters incapable of being arbitrated (non-arbitrable) become arbitrable when certain prior conditions are fulfilled (such as approval by Parliament). CLAIMANT argues that the Equatorianian constitutional requirement is an impermissible restriction on arbitration [*Cl. Memo.*, ¶¶36, 39-41]. This is erroneous as it conflates capacity (a rule of contractual validity) with non-arbitrability (prohibitions against arbitration of particular categories of disputes) [*Born*, §6.02[E]]. The Equatorianian Constitution does not impose a blanket prohibition on arbitrating administrative contract disputes. It only limits the ability of SOEs to submit such disputes to foreign-seated arbitrations.

2. RESPONDENT is bound by capacity limitations in the Equatorianian Constitution

13. RESPONDENT must comply with the Equatorianian constitutional restriction on capacity, which precluded it from entering into a valid arbitration agreement [*Poudret/Besson*, pp. 192-193]. Capacity is decided under the governing law of the Arbitration Agreement or alternatively the jurisdiction where RESPONDENT is incorporated, which in either case is Equatorianian law [*Ex. C2*, Art. 20(d); *Enka*, ¶70; *Sulamerica*, ¶¶9, 25; *Dallah Real Estate*, ¶¶84, 95-98; *Moses*, p. 209; *Dicey*, ¶30-002].

14. CLAIMANT argues that the signed *PSA* is binding regardless of domestic rules [*Cl. Memo.*, ¶¶37-38]. However, the notion that a State cannot rely on its internal laws to challenge the validity of an arbitration agreement is not a settled principle of law and has not been followed in jurisdictions such as England, France, Italy, Belgium, Ghana and Belize [*Poudret/Besson*, pp. 192-193; *BCB*

Holdings Limited, ¶31; *Balkan Energy Ghana*]. These jurisdictions recognise the importance of capacity requirements, particularly where the other contracting party is aware of them. CLAIMANT was aware of the restrictions in the Equatorianian Constitution and that parliamentary approval for the Arbitration Agreement had not been obtained [*Below*, ¶17].

15. Parliamentary approval is not an arbitrary requirement. It is in the public interest for States and SOEs entering contracts to be subject to special requirements [*Sornarajah*, p. 86]. This is because they must be guided by community interests [*AMINOIL Arbitration*, p. 90; *Mewett*, p. 226; *Audit*, p. 108]. Parliamentary approval is only required where an SOE seeks to subject an Equatorianian administrative contract to foreign seated arbitration [*RNoA*, ¶21]. The requirement for parliamentary approval directly upholds Equatoriana's right to determine the extent to which its public administrative contract disputes are exposed to a foreign seated arbitral tribunal. Even though RESPONDENT is not the State, it uses public funds and is publicly controlled [*PO2*, ¶¶5, 7]. As such, the public interest justifications for capacity requirements apply.

C. Parliamentary approval of the *PSA* has not been obtained

16. Neither express nor implied parliamentary approval was given for RESPONDENT to enter into the Arbitration Agreement. Under the Equatorianian Constitution, parliamentary approval requires 'express approval based on a formal vote' [*PO2*, ¶34]. This leaves no scope for implied approval. Nevertheless, neither express nor implied approval has been given for three reasons.

17. First, the Arbitration Agreement was not presented to Parliament, nor voted upon. The initial debate scheduled for November 2020 was cancelled after a Covid-19 outbreak [*Ex. C7*, ¶9; *RNoA*, ¶13]. CLAIMANT may argue that the Arbitration Agreement had been impliedly approved because it was later mentioned before Parliament in July 2021 [*Ex. C7*, ¶15]. A mere mention cannot constitute implied approval as the Arbitration Agreement had not been debated or voted on.

18. Secondly, CLAIMANT argues that the Equatorianian Parliament ought to have been aware of the Arbitration Agreement because it was covered by *The Citizen*, Equatoriana's leading investigative journal, and its failure to object constitutes implied approval [*NoA*, ¶13; *Ex. C7*, ¶12]. This is misguided. Where Parliament does not vote the Arbitration Agreement, it is not presumed to be valid. Rather, the Arbitration Agreement is *invalid* until a formal parliamentary vote passes.

19. Thirdly, CLAIMANT may argue that the approval given by the Minister, Mr. Barbosa, constitutes implied approval by Parliament. However, under the Equatorianian Constitution the Minister lacks any powers to supplant parliamentary approval, especially as the Minister himself is not a member of Parliament [*PO2*, ¶¶34, 35, 37]. Regardless, the Minister's signing of the *PSA* did not concern the Arbitration Agreement, but instead related to approval needed for contracts valued at

EUR 25,000,000 or more [*PO2*, ¶37]. In the absence of parliamentary approval, the Arbitration Agreement was never valid.

D. RESPONDENT can avoid the Arbitration Agreement

20. CLAIMANT argues that because RESPONDENT agreed to amend the Arbitration Agreement, it would be bad faith for RESPONDENT to now challenge its validity [*Cl. Memo.*, pp. 7-8, ¶¶34-35]. This is incorrect for three reasons. First, a lack of capacity cannot be waived by ratification (**1**). Secondly, CLAIMANT had actual knowledge that parliamentary approval was needed for a valid Arbitration Agreement and that approval had not been given (**2**). Third, and in any case, RESPONDENT acted in good faith and did not make any representations inconsistent with its incapacity to enter the Arbitration Agreement (**3**).

1. RESPONDENT is not bound by the Arbitration Agreement as capacity cannot be waived

21. In May 2021, the Parties amended the Arbitration Agreement to include the *UNCITRAL Expedited Arbitration Rules 2021* (for disputes under EUR 1,000,000) and the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* [*Ex. C9*]. CLAIMANT argues that this amendment represents the Parties' agreement to be bound by the Arbitration Agreement [*Cl. Memo.*, ¶34].

22. However, capacity to contract is an inherent requirement of contractual formation. This is because capacity enables a party to enter contractual relations [*Page*, p. 292; *Searle*, ¶99; *Restatement (Second) Of Contracts*, ¶229; *Paul Bennett IV*, p. 1670]. The amendment to the Arbitration Agreement cannot amount to a 'waiver' of RESPONDENT's incapacity. An amendment to an instrument which was never valid does not cure its invalidity. RESPONDENT's lack of capacity can only be remedied through retrospective parliamentary approval, which has not been granted [*PO2*, ¶¶30, 34].

23. Further, the amendment to the Arbitration Agreement must be viewed in the context of the Parties' mutual understanding that parliamentary approval had not yet been given. The amendments provided for 'transparent and cost-efficient proceedings' which would be palatable to Parliament, particularly the right-wing populist party with anti-arbitration sentiments [*Ex. C7*, ¶15; *NoA*, ¶16]. The amendment was not an alternative to parliamentary approval; rather, they made the Arbitration Agreement more acceptable to an already reluctant Parliament. Neither was the amendment capable of waiving RESPONDENT's incapacity.

2. CLAIMANT had knowledge that the Arbitration Agreement required Parliament's approval

24. CLAIMANT knew that parliamentary approval was required. Ms. Porter, CLAIMANT's in-house legal counsel, conducted an independent examination of Equatorianian law [*Ex. C7*, ¶6]. As a senior lawyer with over a decade of experience with CLAIMANT, Ms. Porter concluded that the *PSA* would require 'approval by Parliament' [*Ex. C7*, ¶¶1, 6]. This requirement was also expressly communicated by RESPONDENT to CLAIMANT's negotiator, Mr. Bluntschli [*Ex. C7*, ¶7].

25. Further, despite being aware of the need for parliamentary approval, CLAIMANT did not take reasonable steps to protect its interest in arbitration. CLAIMANT could easily have included parliamentary approval as a condition precedent in the *PSA* [*Redfern/Hunter*, ¶3-28]. Instead, it simply assumed parliamentary approval had been given [*Ex. C7*, ¶8]. Indeed, when CLAIMANT was informed by RESPONDENT that the parliamentary debate had been cancelled and approval had not been given, it nevertheless proceeded to sign the *PSA* [*Ex. C2*, ¶9, *Ex. R4*]. It was only in May 2022, over a year after the *PSA* was signed, that CLAIMANT searched for any express approval from Parliament [*Ex. C7*, ¶11; *PO2*, ¶30]. These are not the actions of a prudent commercial party. From the outset, CLAIMANT accepted the risk that the Arbitration Agreement may not be validated by Parliament.

3. RESPONDENT is not estopped from denying the validity of the Arbitration Agreement and acted in good faith

26. CLAIMANT argues that RESPONDENT is acting in bad faith by denying the validity of the Arbitration Agreement [*Ex. C7*, ¶15; *Cl. Memo.*, ¶¶34-35]. This is untrue for three reasons.

27. First, RESPONDENT acted consistently with parliamentary approval being a requirement for the Arbitration Agreement to be valid. After the public signing ceremony, the Minister assured Mr. Bluntschli that parliamentary approval 'would be forthcoming after the Christmas break', indicating it remained necessary [*Ex. C7*, ¶9]. Furthermore, the representation by the Minister that the cancellation of the parliamentary debate was not an 'obstacle' only related to his approval of the *PSA* and not the validity of the Arbitration Agreement [*Above*, ¶19].

28. Secondly, RESPONDENT cannot unilaterally approve the Arbitration Agreement. RESPONDENT is not the government of Equatoriana and, in any case, only the Parliament can grant approval [*RNoA*, ¶13]. Lastly, RESPONDENT acted in good faith by attempting to negotiate a compromise with CLAIMANT and engaged in 'several calls and meetings' over the course of a year to resolve the dispute [*NoA*, ¶13]. Contrary to what CLAIMANT implies, there is no obligation on parties to reach agreement after negotiations, and the failure to do so cannot be characterised as bad faith.

29. As such, if CLAIMANT were to raise estoppel to suggest RESPONDENT is barred from denying the Arbitration Agreement's validity, it would not succeed because RESPONDENT consistently maintained that parliamentary approval was required, and CLAIMANT had actual knowledge of this [*Austria 15 June 1994*; *Germany June 25, 1997*; *Germany September 15, 2004*; *ICC Case No. 23570/MK*].

II. If this Tribunal finds it has jurisdiction, its award is unlikely to be enforced

30. Even if the Tribunal finds that the Arbitration Agreement is valid, and that it has jurisdiction to hear the dispute, its award would likely be unenforceable. This Tribunal is obliged to render an enforceable award [*Redfern/Hunter*, p. 386; *Lew/Mistelis/Kröll*, p. 537; *Horvath*, p. 135; *Aksen*,

pp. 429-435; *Brekoulakis*, ¶2-36]. If the Tribunal finds it is incapable of rendering an enforceable award it should decline jurisdiction [*PCA Rules*, Art. 17(1); *van den Berg*, pp. 114-145; *Boog*, ¶2]. Enforcement would be sought in Equatoriana, as RESPONDENT, an Equatorianian SOE, only has assets in Equatoriana. An award made by the Tribunal would be unenforceable on two bases: first, an Equatorianian court would find that RESPONDENT was under some incapacity (**A**); and secondly, that enforcement would be against public policy (**B**).

A. Equatorianian courts may refuse enforcement where RESPONDENT lacked capacity

31. Equatorianian courts may not enforce an award where RESPONDENT did not have capacity to enter the Arbitration Agreement. If this Tribunal finds the Arbitration Agreement is valid on the basis that parliamentary approval is *not* required, Equatorianian courts would invoke Art. V(1)(a) of the *NY Convention* to refuse enforcement because RESPONDENT was, under the law applicable to it, under some incapacity [*NY Convention*, Art. V(1)(a); *Poudret/Besson*, pp. 182-183; *Wilske/Fox*, pp. 284-5; *Anzorena*, p. 615; *Henin/Digón*, pp. 553, 576-80; *Ragno*, p. 159; *Born*, ¶26-05[C][1]].

32. RESPONDENT will be under some incapacity where it is under a legal restriction [*Gaillard/Bermann*, Art. V(1)(a)]. Incapacity is to be assessed by reference to the 'law governing [the party's] personal status' [*Travaux préparatoires*, p. 7]. In *Fougerollem S.A.*, a Syrian court refused enforcement because the arbitration agreement had been entered into without preliminary advice from the Syrian Council of State, in breach of Syrian law [*Fougerollem S.A.*; *SAEPA and SIAPE*, p. 737]. RESPONDENT was under some incapacity when it concluded the *PSA* because Equatorianian law requires parliamentary approval to enter the Arbitration Agreement [*Anzorena*, p. 631; *Nacimiento*, p. 218; *Wilske/Fox*, p. 272]. Thus, Equatoriana's courts would likely refuse enforcement.

B. Equatorianian courts are unlikely to enforce an award contrary to public policy

33. Under Art. V(2)(b) of the *NY Convention*, any award rendered by this Tribunal will be unenforceable where enforcement of the award would be against Equatoriana's public policy [*Maurer*, p. 61; *Hanotiau/Caprasse*, pp. 787, 802]. Courts will refuse to enforce an award which violates 'fundamental, core questions of morality and justice in [the] jurisdiction [where enforcement is sought]' [*Traxys Europe S.A.*, ¶105; *Hebei Import*, p. 41; *Karaha Bodas Company LLC*, p. 306; *Parsons & Whittemore Overseas*, p. 974; *Gaillard/Savage*, p. 996].

34. If an Equatorianian court finds that the *PSA* was obtained by corruption, as RESPONDENT submits is likely in Issue B, it would be against Equatoriana's public policy to enforce any award. This is because Art. 15 of Equatoriana's *Anti-Corruption Act* prohibits the performance of contracts where 'undue benefits were granted or promised'. Equatorianian courts will refuse to enforce an award

which requires the performance of an act prohibited by the law, or which 'ignore palpable and indisputable illegality' [*Westacre*, p. 593; *E. Euro. Eng'g Ltd*, ¶¶131-32; *Born*, §26-05[C].

35. RESPONDENT accepts that, in accordance with the doctrine of separability, to invalidate the Arbitration Agreement, the corrupt conduct must have induced the entrance into the Arbitration Agreement and not just the *PSA* [*Cl. Memo.*, ¶26; *Fiona Trust*, ¶13; *Beijing Jianlong Heavy Industry Group*, ¶23; *UNCITRAL Model Law*, Art. 16]. However, even if corruption does not go to the Arbitration Agreement, the enforcement of an award relying on a contract tainted by corruption would be illegal and against Equatoriana's public policy. This Tribunal should exercise its discretion to decline jurisdiction as it cannot be confident of rendering an enforceable award.

CONCLUSION

36. The Tribunal does not have jurisdiction to hear this dispute. The Arbitration Agreement is invalid as RESPONDENT did not have capacity to enter it without express parliamentary approval, which has not been given. CLAIMANT had full knowledge of the requirement for parliamentary approval and cannot claim RESPONDENT is acting in bad faith. In any case, if this Tribunal finds it has jurisdiction, Equatorianian courts will not enforce an award where RESPONDENT was under some incapacity or where it goes against public policy. Thus, the Tribunal should decline jurisdiction.

ISSUE B: THE PROCEEDINGS SHOULD BE STAYED, OR IN THE ALTERNATIVE, BIFURCATED

37. As established above, the Arbitration Agreement was never valid (**Issue A**). If the Tribunal instead finds it has jurisdiction, it must consider whether the *PSA* was procured through bribery. The ongoing Equatorianian criminal investigation into the execution of the *PSA* warrants a temporary stay of proceedings (**I**), or in the alternative, bifurcation of proceedings (**II**) [*RNoA*, ¶¶23, 29]. CLAIMANT opposes the proposed stay and bifurcation [*Cl. Memo.*, ¶42].

38. It is common ground that this Tribunal has a broad discretion to stay or bifurcate proceedings [*UNCITRAL Model Law*, Art. 19(1); *PCA Rules*, Art. 17(1); *S.D. Myers*, ¶7; *Bilcon v Canada*, ¶15; *Van Zyl v Lesotho*, ¶20; *Cairn UK*, ¶102; *Groselj*, p. 577; *Cl. Memo.*, ¶43]. In exercising its discretion, the Tribunal must 'avoid unnecessary delay and expense and … provide a fair and efficient process for resolving the parties' disputes' [*PCA Rules*, Art. 17(1)]. It is in the interests of procedural justice and efficiency that the issue of corruption be addressed after the conclusion of the criminal investigation [*RNoA*, ¶29; cf. *Cl. Memo.*, ¶57]. This will allow the best available evidence to be presented to the Tribunal in ruling on the issue of corruption.

I. The Tribunal should stay proceedings

39. RESPONDENT requests proceedings be stayed until the Equatorianian criminal investigation into Mr. Field is concluded [*RNoA*, ¶29]. The expected duration of the stay is nine months, from April 2023 until December 2023 [*Ex. R2*; *RNoA*, ¶23].

40. CLAIMANT has failed to put forward a test for this Tribunal to consider. CLAIMANT's position is that a stay of proceedings should be refused on four bases: (1) insufficient evidence to ground an allegation of corruption; (2) undue delay resulting from a stay; (3) financial harm caused to CLAIMANT; and (4) the Tribunal should decide independently, without 'judicial guidance' from the Equatorianian courts [*Cl. Memo.*, ¶¶44, 48-49]. RESPONDENT addresses these propositions below.

41. A stay should be granted where doing so improves procedural efficiency. Four considerations weigh in favour of this Tribunal granting a stay [*Groselj*, p. 577; *Van Zyl v Lesotho*, ¶31; *Bilcon v Canada*, ¶24; *S.D. Myers*, ¶10]. First, there is a legitimate allegation of corruption (**A**); secondly, the criminal investigation into Mr. Field goes to the core of the dispute (**B**); thirdly, a stay is necessary in the interests of fairness and due process (**C**); and fourthly, it will not cause undue delay (**D**).

A. There is sufficient evidence to ground a legitimate allegation of corruption

42. At this stage of proceedings, RESPONDENT only needs to show that the claim of corruption is legitimate and not brought as a tactical move against CLAIMANT [*Wena Hotels*, ¶116-117]. Therefore, it is unnecessary for RESPONDENT to demonstrate the 'unequivocal guilt' of Mr. Field for this Tribunal to grant a stay [cf. *Cl. Memo.*, ¶45].

43. CLAIMANT argues that there is no 'crucial evidence' for an allegation of corruption and a stay should not be ordered [*Cl. Memo.*, ¶45]. Corruption is often proved through 'subtle symptoms' revealed by the accumulation of circumstantial evidence known as 'red flags', because the very nature of corruption is that such conduct is intentionally concealed [*Union Fenosa Gas*, ¶7.52; *Metal-Tech*, ¶¶243, 293; *Oostergetel*, ¶303; *Alstom*, ¶56; *ICC Corruption Guidelines*, p. 5; *Kaplan/Pryles/Bao*, p. 218; *Fraport AG*, ¶479]. RESPONDENT submits that the facts, taken together, demonstrate a substantial risk that the *PSA* was procured by corruption. These include the charges against Mr. Field and arrest of Mr. Bluntschli (**1**), the unfavourable fee structure in the *PSA* (**2**), the significant role played by Mr. Field in procuring the *PSA* (**3**), and the unusual change to the tender scope (**4**). Any assertion by CLAIMANT that the request for a stay is a dilatory tactic should be firmly rejected.

1. The main negotiators of the *PSA* have engaged in financial crimes

44. The main negotiators of the *PSA*, Mr. Field for RESPONDENT and Mr. Bluntschli for CLAIMANT, have both recently engaged in financial crimes for personal gain [*Ex. C3*, ¶2]. Charges have been brought against Mr. Field for receiving payments to his offshore accounts in connection with two

contracts awarded under the NPD Program [*Ex. C5*; *RNoA*, ¶16]. Mr. Field is also under investigation for his conduct in relation to the *PSA* [*RNoA*, ¶16]. Further, Mr. Bluntschli was arrested for private tax evasion after concealing clandestine payments from his offshore account to unknown recipients [*RNoA*, ¶16; *PO2*, ¶¶40, 43; *Ex. C3*, ¶2]. The legal repercussions against Mr. Field and Mr. Bluntschli reveal a pattern of corrupt behaviour that may have been repeated with the *PSA* and demonstrate that RESPONDENT's claim of corruption is reasonable and legitimate [*RNoA*, ¶16; *Union Fenosa Gas*, ¶7.53; *Wena Hotels*, ¶117-8; *Sanum*, ¶111].

45. CLAIMANT may argue that it found 'no suspicious payments' from its accounts to Equatorianian accounts [*Ex. C3*, ¶7]. However, CLAIMANT's review fails to address the possible use of offshore or personal accounts. Overall, the pattern of dishonest financial criminal behaviour of the two main negotiators support RESPONDENT's allegations of corruption.

2. The fee structure under the *PSA* was substantially modified in CLAIMANT's favour

46. During the negotiations, the fee structure for maintenance and service under the *PSA* was significantly modified to advance CLAIMANT's interests. The changes have resulted in RESPONDENT making more payments, in number and value, for the same amount of work. Therefore, the substantial variation to the maintenance fee structure provides scope to disguise the payment of bribes. CLAIMANT has not provided any commercial justification for the changes.

47. RESPONDENT was required to pay an annual fee for maintenance and service work under the *PSA*. The cost for the annual maintenance fee per drone was reduced from EUR 500,000 to EUR 480,000 [*PO2*, ¶27]. This is a discount of EUR 20,000 per drone (and EUR 120,000 overall). However, the scope of the maintenance work covered by this annual fee was also reduced. The original fee covered work under both Annexures B and C; the new fee *only* covers work under Annexure B [*PO2*, ¶27]. RESPONDENT now has to pay additional fees for services and parts under Annexure C which are expected to be required in 80% of cases. The services under Annexure C have been estimated at EUR 1,480,000 per year [*PO2*, ¶27]. This is significantly more than the discount to RESPONDENT through the reduced annual fee. The arrangement will result in more payments, totalling a greater amount, being made to CLAIMANT.

48. Furthermore, the total price for maintenance and services under the *PSA* is EUR 13,000,000, amounting to almost 30% of the total contract price of EUR 44,000,000 [*PO2*, ¶27; *NoA*, ¶7]. This is exorbitant compared to the usual range of 3 – 5% of the contract price [*Ex. R1*, ¶6]. Overall, RESPONDENT is now paying significantly more in return for less services. This is a 'red flag', indicating the potential for concealed bribery payments [*Rana/Sanson*, pp. 44-45].

3. The *PSA* was modified by Mr. Field acting alone for RESPONDENT

49. The changes to the *PSA* were made in unusual circumstances. First, the variations were made unilaterally by Mr. Field at a private getaway at Mr. Bluntschli's beach house [*Ex. R1*, ¶4]. Significantly, this was the only meeting Mr. Field attended as the sole representative of CLAIMANT. At all other negotiations, Ms. Bourgeois was present [*Ex. R1*, ¶2].

50. CLAIMANT submits that Ms. Bourgeois' absence at the beach house is a coincidence, attributable to her contraction of Covid-19 [*Cl. Memo.*, ¶45]. However, Ms. Bourgeois was heavily involved with negotiating the *PSA*, and she was 'surprised' that negotiations with the more competitive bidder were terminated in favour of the amended *PSA* with CLAIMANT [*Ex. R1*, ¶5]. CLAIMANT may argue that Ms. Bourgeois is merely Mr. Field's assistant and it is not significant that he failed to discuss company affairs with her. However, Ms. Bourgeois is more than an administrative assistant. She had contributed to the tender process from the beginning and was well-qualified, with her experience as a project manager, to assess the bids [*Ex. R1*, ¶2]. In the context of Mr. Field and Mr. Bluntschli's illegal financial practices, it is suspicious that a significant decision was reached in the only meeting that another negotiator of RESPONDENT was unable to attend.

4. The expansion of the scope of the tender was unusual

51. The *PSA*'s recitals reveal that there was an expansion of the scope of the tender [*Ex. C2*]. The order was increased to 6 drones, despite RESPONDENT originally seeking 4 drones [*Ex. R1*, ¶5; *R2*; *Ex. C1*]. The increase was based on 'a possible additional use of the aircrafts' to deliver cargo [*Ex. C2*]. This expansion was unusual for three reasons.

52. First, the change was made by Mr. Field acting independently during a public tender process under *Equatoriana's Public Tender Act*. Public procurement is particularly vulnerable to corruption [*OECD Recommendation*, p. 5; *PO2*, ¶5; *Ex. C1*]. Therefore, public procurement processes should be based on 'transparency, competition and objective criteria' [*UN Corruption Convention*, Art. 9(1)]. 'Transparency' involves undertaking processes visibly and limiting the discretion of officials [*Marique*, p. 95]. Consequently, it is significant that Mr. Field alone decided to amend the scope of the tender and accept CLAIMANT's bid during his weekend getaway with Mr. Bluntschli.

53. Secondly, the change to the tender was made after bids were received and negotiations with Air Systems were terminated despite Air Systems making a better offer [*Ex. R1*, ¶¶3, 5]. This is contrary to the principles of transparency and equal treatment of bidders in the public procurement process [*EIGE Case*, ¶37; *Commission v CAS*, ¶118; *London Underground*, ¶86]. Furthermore, Mr. Field's choice of single source procurement – selecting one vendor when two or more can supply the required good – is known to increase the risk of corruption [*OECD Recommendation*, p. 8]. The only other instance where such a change has happened was for another contract

negotiated by Mr. Field, which is the subject of one of the bribery charges brought against him [*Ex. R2*].

54. Thirdly, there was no change to the objectives of the NPD Program that required drones to transport goods. Therefore, the justification for expanding the tender's scope is questionable, especially given the KE2010 has only transported goods in 'exceptional circumstances' [*PO2*, ¶22]. Considered cumulatively, these circumstances reveal a legitimate risk of corruption concerning the *PSA*. Thus, CLAIMANT cannot assert that the allegation is baseless.

B. The criminal investigation will have an impact on the arbitration proceedings

55. A stay is warranted because the criminal investigation will impact the arbitration proceedings. The subject of the investigation goes to the core of this dispute (**1**); and the outcome of the investigation may give rise to enforcement issues if this Tribunal proceeds without a stay (**2**).

1. The subject of the investigation goes to the core of the dispute

56. A stay of proceedings is justified where parallel proceedings go to the core of this dispute [*Naud*, p. 512]. The ongoing investigation concerns the possible bribery of Mr. Field in relation to the *PSA* [*RNoA*, ¶29]. Therefore, the investigation is directed at the identical issue and fact scenario before this Tribunal – whether the *PSA* is tainted by corruption. The question of corruption is relevant to this Tribunal because a contract obtained by bribery is prohibited from being performed under Art. 15 of Equatoriana's *Anti-Corruption Act* and a finding of bribery will result in a breach of CLAIMANT's obligations under Art. 2(h) of the *PSA* [*RNoA*, ¶2; *Ex. C2*]. Therefore, the evidence elucidated by the criminal investigation will be directly relevant to these proceedings and will assist the Tribunal to fill gaps in the evidentiary record [*Naud*, p. 512].

2. A stay will minimise the risk of enforcement issues

57. This Tribunal has a duty to ensure the efficient conduct of proceedings and resolve the dispute expeditiously [*PCA Rules*, Art. 17(1); *Mercereau*, ¶17; *E Holding v Z Ltd*, ¶35; *Cairn UK*, ¶104; *S.D. Myers*, ¶10; *Groselj*, p. 576]. As Mr. Field has already been charged with two counts of bribery relating to contracts concluded for the NPD Program, there is a real risk that charges will also be brought against Mr. Field concerning the *PSA*. Consequently, the Tribunal risks making an inconsistent decision with the Equatorianian court hearing Mr. Field's case.

58. If CLAIMANT is successful, this Tribunal's award will be sought to be enforced in Equatoriana. If the Equatorianian courts find Mr. Field guilty of corruption, RESPONDENT is likely to challenge the enforceability of the award to avoid complying with the award and breaching Art. 15 of Equatoriana's *Anti-Corruption Act* [*RNoA*, ¶¶2, 23]. Effort and expense in advancing this arbitration will be wasted if the award is unenforceable. A stay of proceedings reduces the risk of inconsistent findings by allowing evidence from the investigation to be available to the Tribunal.

59. If domestic courts rule differently on corruption, enforcement is likely to be refused for being contrary to public policy [*NY Convention*, Article V(2); *UNCITRAL Model Law*, Art. 36(1)(b)(ii); *PO1*, ¶3; *Redfern/Hunter*, p. 625]. Public policy is construed as 'the fundamental conceptions of morality and justice' of the forum [*Hebei Import*, p. 233; *TCL*, ¶79; *Alstom*; ¶71; *IPCO*, ¶13; *Deutsche Schachtbau*, p. 254.]. Bribery meets this standard, as evinced by the *Anti-Corruption Act*, and the conclusion that bribery is contrary to transnational public policy is widely accepted [*World Duty Free*, ¶157; *Metal Tech*, ¶290; *Union Fenosa Gas*, ¶7.84; *Wena Hotels*, ¶111; *Hebei Import*, p. 233; *Alstom*, ¶72; *Low*, p. 341; *Redfern/Hunter*, p. 644; *UN Corruption Convention*, p. iii; *RNoA*, ¶23].

C. A stay upholds fairness and due process

60. RESPONDENT's proposed stay will achieve procedural justice and efficiency for both Parties. First, a stay will allow RESPONDENT to present its case fully and fairly (**1**). Secondly, CLAIMANT will not suffer prejudice as a result of the stay (**2**).

1. A stay is necessary for RESPONDENT to present its case fully and fairly

61. Each party is entitled to a full opportunity to present its case [*UNCITRAL Model Law*, Art. 18; *PCA Rules*, Art. 17(1)]. A stay will allow the best available evidence to be presented to the Tribunal and enable RESPONDENT to present its case fully for four reasons [*Kaplan/Pryles/Bao*, p. 214; *Naud*, p. 512].

62. First, the parallel criminal investigation limits the evidence available to the Tribunal. CLAIMANT submits that the Tribunal should 'rule on its own' instead of drawing on factual findings in domestic proceedings [*Cl. Memo.*, ¶50]. However, domestic criminal authorities have broader investigatory powers, such as the power to compel production of documents [*Redfern/Hunter* p. 427; *Kaplan/Pryles/Bao*, p. 217]. Original documents may be seized by Equatorianian authorities during the investigation [*Naud*, p. 512; *Lao Holdings*, ¶¶39-40]. This Tribunal should stay proceedings and make strategic use of fact-finding in the Equatorianian domestic legal system [*Rose*, p. 220; *TSA v Argentina*, ¶165; *Betz*, p. 274]. If criminal proceedings are commenced, the Tribunal will likely be able to inspect the case documents because jurisdictions often have domestic legislation giving access to interested third parties [*Betz*, p. 274; *Swiss Criminal Procedure Code*, Art. 101(3); *Criminal Procedure Rules UK*, Rule 5.7; *Federal Court Rules (Australia)*, Rule 2.32; *BSG Resources*, ¶5]. It is possible that similar provisions in Equatoriana may assist the Tribunal.

63. Secondly, the criminal prosecutor may be better placed to obtain evidence from Mr. Bluntschli, where CLAIMANT has already demonstrated an unwillingness to do so by refusing to reasonably compensate Mr. Bluntschli for his attendance [*Ex. C3*, ¶11]. CLAIMANT may argue that this Tribunal can request the assistance of Danubian courts to compel Mr. Bluntschli to attend [*UNCITRAL Model Law*, Art. 27]. However, this will likely be ineffective as he is employed by a

Mediterranean company and likely lives outside the jurisdiction of Danubian courts [*Redfern/Hunter*, pp. 311, 387].

64. Thirdly, where there is a parallel criminal investigation, the Tribunal should consider the impact of the investigation on the witnesses [*Betz*, p. 274]. The privilege against self-incrimination is part of transnational procedural public policy and tribunals should recognise the pressure exerted on witnesses by criminal investigation [*Betz*, p. 270; *Mosk/Ginsburg*, p. 358; *Quiborax v Bolivia*, ¶146; *Walker*, p. 1]. If compelled to testify, Mr. Field may feel pressured to give a false statement to avoid criminal sanctions. Therefore, the integrity of the arbitration proceedings and reliability of witness testimony is better preserved if Equatorianian authorities conduct the investigation into Mr. Field.

65. Finally, CLAIMANT may assert that the findings of the criminal investigation will be unreliable by questioning the impartiality of the prosecutor, Ms. Fonseca [*Letter by Langweiler*]. These concerns would be unfounded. Ms. Fonseca is one of the 'best-known' criminal lawyers in Equatoriana and is qualified to conduct the investigation [*PO2*, ¶44; *RNoA*, ¶15]. Furthermore, although her brother-in-law is the CEO of the bidder that competed against CLAIMANT (Air Systems), there is no indication that charging Mr. Field would benefit Air Systems [*Ex. R2*]. Air Systems cannot be awarded the contract as the NPD Program has been terminated [*Ex. C3*, ¶5; *NoA*, ¶13].

66. In any case, the Tribunal can determine the weight and materiality of evidence [*PCA Rules*, Art. 27(4); *UNCITRAL Model Law*, Art. 19(2)]. This Tribunal is an impartial and independent body, demonstrated by the declarations of impartiality of the appointed arbitrators, and will be well-placed to assess the evidence before it and reach an independent decision [*IBA Guidelines*, pp. 4-17; *Statement of Impartiality and Independence by Bertha von Suttner*; *Declaration of Acceptance and Statement of Impartiality by Asser*]. Therefore, any concern of unreliability of the Equatorianian investigation is ameliorated by the objectivity and independence of this Tribunal.

2. CLAIMANT will not suffer prejudice as a result of the stay

67. This Tribunal has a duty to treat the parties with equality and a stay of proceedings must not cause material prejudice [*UNCITRAL Model Law*, Art. 18; *PCA Rules*, Art. 17(1); *Cairn UK*, ¶114]. CLAIMANT's position is that a stay will cause it to suffer financial loss, identified as the contract price (EUR 44 million) and the cost of proceedings [*Cl. Memo.*, ¶¶48, 49]. However, this loss does not amount to material prejudice violating CLAIMANT's right to equal treatment [*Cairn UK*, ¶114].

68. First, CLAIMANT fails to identify how a delay in receiving damages will cause material prejudice [*Cl. Memo.*, ¶49]. It is highly unlikely that the *PSA* is CLAIMANT's only revenue-generating contract. CLAIMANT had almost two years to construct 3 drones, when it has capacity to build 5 drones per year [*NoA*, ¶1]. CLAIMANT acquired 3 nearly completed drones and the next 3 drones only needed to be delivered on 31 December 2022, 1 July 2023, and 31 December 2023 [*Ex. C2*, Art. 2(c), (d);

Ex. C4]. A lack of income from the *PSA* will not compromise CLAIMANT's business operations because it is unlikely to be operating at under half of its production capacity. Even if this is not the case, CLAIMANT has not shown why it cannot enter contracts with other parties. A delay in receiving any damages will not cause material harm to CLAIMANT's business [cf. *Cairn UK*, ¶117].

69. Secondly, any financial detriment is capable of being remedied and CLAIMANT will not suffer material prejudice as a result of a stay. CLAIMANT's cost of proceedings can be addressed through a costs order. This Tribunal has a broad discretion to award costs, including the legal fees incurred by the Parties [*PCA Rules*, Arts. 42, 40(2)]. Furthermore, if successful, CLAIMANT will likely receive interest along with damages to fully compensate CLAIMANT its loss [*Redfern/Hunter*, p. 515].

70. Thirdly, CLAIMANT argues that it will suffer prejudice if there is any delay in it receiving damages [*Cl. Memo.*, ¶¶48, 49]. Even if these proceedings continue without a stay and CLAIMANT is successful, a final award will not be rendered for a significant period of time given that arbitration proceedings take on average 13.8 – 26 months [*Aceris Law*]. Therefore, this Tribunal should not give excessive weight to CLAIMANT's interest in receiving damages as soon as possible where a stay would allow RESPONDENT to present its case fully and fairly.

D. A stay will not result in undue delay or procedural inefficiency

71. The Tribunal should exercise its discretion to stay proceedings because a stay will not cause undue delay. CLAIMANT objects to a stay on the basis that it will delay these proceedings unreasonably [*Cl. Memo.*, ¶48]. The proposed nine months suspension is a reasonable period in light of the procedural efficiencies that may be obtained from the stay [Above, ¶62]. Tribunals have found stays of six months, eighteen months and three years to be of a reasonable duration in the circumstances [*Cairn UK*, ¶79; *SPP v Egypt*, ¶88; *SGS v Philippines*, ¶177; *Mox Plant Case*, ¶¶29-30; *RSM*, ¶58].

72. In support of its argument, CLAIMANT relies on *Patel v Mozambique*, which concerned a stay of proceedings in a PCA arbitration pending a final decision by another arbitral tribunal, to argue that a stay would unduly delay this arbitration [*Cl. Memo.*, ¶48]. CLAIMANT has not identified any salient features of the case. In fact, *Patel v Mozambique* has little relevance to the present scenario. A stay of proceedings was declined in *Patel v Mozambique* because the later tribunal was constituted on the basis of a different agreement and it had made a partial award declaring that it would not expand its jurisdiction to exclude or collide with the PCA tribunal [*Patel v Mozambique*, ¶¶40-41]. The tribunal's decision to refuse a stay was not based on any ideas of procedural efficiency or delay.

73. CLAIMANT also objects on the basis that it is uncertain when criminal proceedings will be concluded [*Cl. Memo.*, ¶48]. This concern is unfounded for two reasons. First, a stay is only requested until the conclusion of the criminal investigation, not the court proceedings [*RNoA*,

¶¶23, 29; *Cl. Memo.*, ¶48]. Moreover, if a stay were requested until the conclusion of the court proceedings, the July 2024 timeline is reliable [*RNoA*, ¶24]. Criminal proceedings will be expedited by the specialised judicial organ and appeals are only available on points of law [*RNoA*, ¶24; *PO2*, ¶4]. Therefore, an appeal would not cause undue delay [cf. *Cl. Memo.*, ¶48].

74. Secondly, there is sufficient certainty in the end date of the investigation [*Case No. 300273-2013*, ¶27]. The prosecutor, Ms. Fonseca, publicly committed to concluding the investigation by the end of 2023 [*RNoA*, ¶16]. The significant media attention provides further incentive to achieve the specified timeframe [*Ex. R2*]. Ms. Fonseca is highly experienced and, within five months of commencing the investigation, had already charged Mr. Field on two counts of bribery [*RNoA*, ¶16]. CLAIMANT has provided no evidence that the timeline of the investigation is uncertain.

II. The Tribunal should bifurcate proceedings

75. In the alternative, if this Tribunal declines to stay proceedings, RESPONDENT respectfully requests that the Tribunal bifurcate proceedings and rule on the issues of jurisdiction (**Issue A**); the applicability of the *CISG* (**Issue C**); and Art. 3.2.5 of the *ICCA* (**Issue D**) in the preliminary phase. The merits issue of whether the *PSA* is void for corruption should be addressed in the second phase of proceedings, after the conclusion of the criminal investigation [*RNoA*, ¶25; *PO2*, ¶52].

76. It is common ground that the Tribunal has the power to order bifurcation [*Cl. Memo.*, ¶¶43, 54; *UNCITRAL Model Law*, Art. 19(2); *PCA Rules*, Art. 17(1); *RWE v Netherlands*, ¶44]. CLAIMANT has not proposed a test beyond urging the Tribunal to consider why the proceedings should be bifurcated [*Cl. Memo.*, ¶52]. RESPONDENT submits that there are three crucial factors to be considered by this Tribunal in deciding whether to exercise the discretion to order bifurcation. First, if the objection raised is serious and substantial; secondly, whether the objection will materially reduce the proceedings at the next stage or clarify part of the claim; and thirdly, if the objection can be raised without prejudging the merits of the dispute (*'Phillip Morris factors'*) [*Philip Morris*, ¶109; *Glamis Gold*, pp.2-3; *Westmoreland*, ¶¶15, 47]. Similar to a stay, in ruling on requests for bifurcation, the overarching principle is the need to ensure procedural justice and efficiency, although the specific requirements may differ [*Van Zyl v Lesotho*, ¶46; *Glencore*, ¶38; *Apotex*, ¶10].

77. Bifurcation is procedurally the fairest and most efficient method of proceeding, besides a stay, for three reasons. First, RESPONDENT's claim of corruption is serious and substantial (**A**). Secondly, bifurcation will achieve procedural efficiency (**B**). Thirdly, the preliminary issues are not intertwined with the merits of the claim (**C**).

A. RESPONDENT's claim of corruption is substantial and not frivolous

78. RESPONDENT's claim of corruption is not 'frivolous or vexatious' [*Resolute Forest*, ¶4.4; *RWE v Netherlands*, ¶44]. There is some debate as to whether a 'higher threshold' applies, requiring the

objection to be 'sufficiently serious' to justify bifurcation [*Glencore*, ¶42; *Eco Oro*, ¶51]. This Tribunal should apply the 'frivolous or vexatious' standard and determine if the objections are credible and brought in good faith. Any further analysis into whether the objection is 'serious and substantial' may entail a preview into the substantive arguments [*Resolute Forest*, ¶4.4]. In any case, RESPONDENT's claim of corruption satisfies both the lower and higher threshold.

79. First, RESPONDENT's allegation of corruption in the conclusion of the *PSA* is credible, capable of being argued, and brought in good faith. CLAIMANT objects to bifurcation by arguing that the evidence provided is 'not strong enough' to merit bifurcation [*Cl. Memo.*, ¶53]. RESPONDENT disputes this. The circumstances of the conclusion of the *PSA* give rise to a reasonable suspicion of corruption and RESPONDENT's allegation is bona fide [*Above*, ¶¶42-54]. Therefore, RESPONDENT's allegation of corruption is not frivolous or vexatious.

80. Secondly, the allegation of corruption is sufficiently serious to warrant bifurcation. A finding of corruption will result in CLAIMANT breaching its obligations under Art. 2(h) of the *PSA* and Equatoriana's *Anti-Corruption Act* will prohibit the *PSA* from being performed [*RNoA*, ¶2; *Ex. C2*]. These consequences will prevent CLAIMANT from succeeding in its claim for damages and justifies bifurcating proceedings to ensure that this allegation is assessed fully and fairly.

B. Bifurcation will achieve procedural efficiency

81. Bifurcation will materially reduce the proceedings and increase the efficiency of this arbitration. The preliminary resolution of Issues A, C and D serves the imperative of procedural efficiency. The proceedings will be concluded, and CLAIMANT will be unsuccessful, if RESPONDENT succeeds on either of two grounds. First, this arbitration will be disposed of if this Tribunal rules in favour of RESPONDENT and finds that it does not have jurisdiction. Secondly, a finding in RESPONDENT's favour that the *CISG* does not apply or that Art. 3.2.5 of the *ICCA* applies means that the *PSA* will be rendered invalid for CLAIMANT's fraudulent misrepresentations.

82. CLAIMANT may submit that as the issue of corruption goes to the validity of the *PSA*, it should be considered as early as possible in the interests of procedural economy. RESPONDENT disputes this. Corruption is a distinct and alternative basis for the invalidity of the *PSA* and there are two other grounds on which the *PSA* can be invalidated [*Above*, ¶81]. Consequently, even though a finding of corruption will invalidate the *PSA*, the substantial time, effort and expenditure required for this Tribunal to investigate and rule on the issue of corruption may be saved if RESPONDENT is successful on the issue of jurisdiction or fraudulent misrepresentation. It is procedurally efficient to address these issues earlier in proceedings, whilst the issue of corruption is dealt with following the conclusion of the criminal investigation.

C. There is no intertwining of the preliminary phase and the merits phase

83. The issues to be considered in the preliminary phase of bifurcated proceedings must not be intertwined with the merits such that an early resolution of the question is impractical [*Phillip Morris*, ¶63; *Allende v Chile*, ¶¶102]. RESPONDENT submits that bifurcation is appropriate as the issue of corruption invalidating the *PSA* is separate from the issues of jurisdiction, the applicability of the *CISG*, and Art. 3.2.5 of the *ICCA* to be heard in the preliminary phase. CLAIMANT argues at several points that the allegations of corruption do not affect the procedural phase and therefore the proceedings should not be bifurcated [*Cl. Memo.*, ¶¶53, 55]. Respectfully, CLAIMANT has drawn the incorrect conclusion. The separation of the allegations of corruption, which RESPONDENT seeks to have heard in the second phase of the hearings, from the remaining issues to be heard in the preliminary phase, supports bifurcation.

84. Contradictorily, CLAIMANT also asserts that bifurcation should not be ordered on the basis that the procedural and merits issues use 'the same evidence' regarding bribery [*Cl. Memo.*, ¶55]. However, a degree of overlap between the evidence relevant to jurisdictional questions and evidence relevant to the merits is not an obstacle to bifurcation [*Allende v Chile*, ¶106; *Lighthouse Corp*, ¶25(b)]. RESPONDENT submits that a preliminary ruling on corruption in relation to jurisdiction will not affect RESPONDENT's argument of corruption under the *PSA* in the merits phase. Whilst there is some overlap in the relevant evidence, the merits phase considers the question of whether the *PSA* is tainted by corruption, whereas the jurisdictional phase is based on whether the Arbitration Agreement has been procured by bribery. This overlap is not substantial and the Tribunal will not be pre-judging the merits when ruling on the preliminary issues [*Allende v Chile*, ¶106; *Westwater Resources*, ¶15].

CONCLUSION

85. A stay of proceedings until the conclusion of the criminal investigation in Equatoriana is in the best interests of both Parties, in order for the best available evidence to be before this Tribunal when addressing the issue of corruption. In the alternative, this Tribunal should order bifurcation. Bifurcation is a fair, efficient, and economical way to proceed in this matter. There will be substantial savings in terms of time and cost if each of RESPONDENT's objections are decided before the burdens of discovery, briefing and hearing on the merits are imposed.

ISSUE C: THE *CISG* DOES NOT GOVERN THE *PSA*

86. CLAIMANT seeks to establish that the *PSA*, which concerns the sale of six KE2010s, is governed by the *CISG*. It is not in dispute that the requirements of Art. 1(1) *CISG* are satisfied as CLAIMANT and RESPONDENT have their places of business in *CISG* contracting states [*PO1*, ¶3; *Cl. Memo.*, ¶65]. However, the *PSA* is not governed by the *CISG* because the sale of aircraft, such as the KE2010, is explicitly excluded from the *CISG*'s sphere of application under Art. 2(e) (**I**). Even if the KE2010 is not an aircraft under Art. 2(e), the *CISG* has been implicitly excluded by the Parties' designation of 'Equatorianian law' as the governing law of the *PSA* (**II**).

I. The KE2010 is an aircraft for the purposes of the *CISG*

87. The central question for the Tribunal is whether the KE2010 is an aircraft under Art. 2(e) *CISG*. There is no express definition of aircraft in the *CISG*. Therefore, the Tribunal must determine the meaning of aircraft in accordance with established principles of treaty interpretation [*CISG*, Art. 7(1); *VCLT*, Art. 31]. An aircraft should be defined as a vehicle capable of flight and capable of carrying cargo. The KE2010 meets this definition (**A**). In seeking to establish that the KE2010 is not an aircraft under the *CISG*, CLAIMANT erroneously relies on the intended purpose of the vehicle (**B**), the size of the vehicle (**C**) and whether the vehicle is subject to domestic registration requirements (**D**) [*Cl. Memo.*, ¶¶69, 75, 77]. Even if the Tribunal were to accept these factors as being determinative, the KE2010 would still be an aircraft under the *CISG*.

A. The KE2010 is an aircraft as it is capable of flight and carrying goods

88. Interpretation of the term 'aircraft' in Art. 2(e) *CISG* begins with the 'ordinary meaning' of the term, in its context and in light of the object and purpose of the *CISG* [*VCLT*, Art. 31(1); *Janssen/DiMatteo*, pp. 84, 94, 95; *Magnus in Janssen and Meyer*, p. 53; *Lookofsky*, p. 31; *Brunner/Wagner*, ¶6]. It is common ground between the Parties that one aspect of the ordinary meaning of aircraft is that it must be a vehicle capable of flight [*Cl. Memo.*, ¶75]. It is also uncontroversial that not every object capable of flight is an aircraft under Art. 2(e); for instance, model planes, or kites [*Hachem*, Art. 2 ¶33]. However, it is in dispute what other features a vehicle must possess to be subject to Art. 2(e).

89. To promote uniform application in the interpretation of the *CISG*, the Tribunal should have regard to supplementary sources such as *CISG* scholarship and *travaux préparatoire* in interpreting the term 'aircraft' [*CISG*, Art. 7(1); *Honnold*, Art. 7 ¶¶88, 92; *Janssen/DiMatteo*, pp. 94-95; *Lookofsky*, pp. 33, 37; *Brunner/Wagner*, p. 84]. An aircraft, as understood by *CISG* commentators, must be capable of transporting persons or goods [*Kröll/Mistelis/Viscasillas*, ¶41; *Hachem*, Art. 2 ¶¶31, 33; *Schwenzer/Hachem*, Art. 2 ¶30; *Ferrari (2011)*, pp. 146–8; *Herber/Czerwenka*, Art. 2 ¶13; *Saidov (2003)*, p. 4]. This requirement has also been accepted by CLAIMANT [*Cl. Memo.*, ¶¶74-75].

90. The KE2010 falls within the definition of aircraft as it is a vehicle capable of flight and is capable of carrying cargo. First, the KE2010 is capable of flight. The KE2010 is an 'unmanned aerial system' with a 'helicopter-like design', which is capable of 'line-of-sight' flights [*Ex. C2*; *NoA*, ¶9; *Ex. C4*]. CLAIMANT argues that the KE2010 is not 'fit for travelling… over a long distance' [*Cl. Memo.*, ¶76]. This is incorrect as the KE2010 was produced for long-distance geo-surveillance and is capable of up to 13 hours of continuous flight [*PO2*, ¶12; *Ex. C4*]. The KE2010's maximum operating altitude is 5000 m, which is within the flying range of helicopters [*Ex. C1*]. Therefore, not only is the KE2010 capable of flight, but its attributes are equivalent to a helicopter.

91. Secondly, the KE2010 is capable of carrying cargo. The KE2010 can carry a load of up to 245 kg and regularly carries surveillance equipment on board [*NoA*, ¶9; *Ex. C2*, Art. 2(a); *Ex. C3*, ¶2; *PO2*, ¶9]. CLAIMANT may argue that the KE2010 is 'engineered… for surveillance purposes' because the surveillance equipment fills the central payload bay and must be removed to transport cargo [*PO2*, ¶9]. However, the KE2010 has previously been used to carry medicine and equipment [*PO2*, ¶9]. Further, RESPONDENT purchased six KE2010s, two of which were to have an additional front payload bay, which increased payload volume by 25% [*PO2*, ¶¶10, 23]. Finally, any likening of the surveillance equipment to fixtures would be a mischaracterisation. The surveillance equipment can be removed easily 'on short notice' [*PO2*, ¶9]. The KE2010 is functionally capable of flight and carrying cargo and therefore it should be classified as an aircraft under Art. 2(e) *CISG*.

B. CLAIMANT's intended use of the KE2010 is irrelevant to the interpretation of Art. 2(e) *CISG*

92. CLAIMANT defines an aircraft as a vehicle which is intended by the contracting parties to carry goods or persons [*Cl. Memo.*, ¶75]. This differs from RESPONDENT's interpretation of Art. 2(e) as CLAIMANT relies on the subjective intended use of the vehicle. CLAIMANT argues that the Parties never intended the KE2010s to carry goods or persons; rather, the intended use was for surveillance [*Cl. Memo.*, ¶75]. Contrary to CLAIMANT's assertion, a vehicle does not need to have the *intended* function of transporting persons or goods to be an aircraft, as long as it is functionally *capable* of doing so. It would create uncertainty in the application of Art. 2(e) *CISG* if an aircraft is defined based on its intended purpose: the same vehicle may be categorised differently, depending on the intentions of the contracting parties. The primary objective of the *CISG* is to provide legal certainty and 'uniformity in its application' [*CISG*, Art. 7(1); *Schwenzer/Hachem* pp. 6-7; *Spohnheimer*, Art. 2 ¶39]. Assessing the capabilities of a vehicle, instead of the buyer's intended purpose, relies on objective standards and facilitates greater consistency in the application of the *CISG*.

93. In any event, even if the intended use of the vehicle was relevant, the Parties' communications show that CLAIMANT intended the KE2010s to carry cargo, as well as conduct geo-surveillance. CLAIMANT relies on the call for tender to assert that the KE2010s were not intended to carry goods

or persons [*Cl. Memo.*, ¶75]. However, the terms of the *PSA* and the Parties' conduct makes it clear that they intended the KE2010 to carry medicine and carry out surveillance. The recitals in the *PSA* state that, 'whereas in the process of the negotiations the scope of the agreement to be awarded was changed to reflect… a possible *additional use of the aircrafts*' (emphasis added) [*Ex. C2*]. This 'additional use' is described in the speech given by the Minister as the transportation of spare parts or medicine to remote areas of the Northern Part of Equatoriana [*Ex. R2*]. Therefore, before the *PSA* was concluded, the Parties understood that the KE2010s were intended to be used to carry both surveillance equipment *and* other cargo.

C. The size of the KE2010 is not relevant in interpreting whether a vehicle is an aircraft

94. CLAIMANT argues that the KE2010 'greatly differ[s]' in size compared to a 'common commercial airplane' and cannot be characterised as an aircraft [*Cl. Memo.*, ¶77]. CLAIMANT's argument is flawed for two reasons. First, any attempt by CLAIMANT to define an aircraft based on size is mistaken. It is widely accepted by the *CISG* community that size is not a relevant consideration for the exclusions under Art. 2(e) [*Andersen*, p. 34; *Honnold*, p. 54; *Khoo*, pp. 34-40; *Hachem*, Art. 2 ¶31; *Ferrari (2011)*, p. 146]. During the drafting of the *CISG*, consideration was given to the tonnage of a 'vessel' (another exclusion in Art. 2(e)) as a requirement, but this approach was abandoned [*Honnold*, p. 54; *YB II (1971)*, p. 56 ¶55; *YB VIII (1977)*, p. 27 ¶¶29-32]. Similarly, the UNCITRAL Working Group on the International Sale of Goods was unable to make a distinction based on size for the exclusion of 'ships' under Art. 2(e) *CISG* [*Honnold*, p. 54; *Ferrari (2011)*, p. 146; *YB VI (1975)* p. 51 ¶28].

95. Reasoning by analogy between the exclusion of 'aircraft', 'ships' and 'vessels' ensures that the common rationale underlying the exclusion of these goods in Art. 2(e) is maintained [*Hachem*, Art. 2 ¶¶31, 33; *Schwenzer/Hachem (2016)*, Art. 2 ¶30; *Ferrari (2011*), pp. 146-8; *Schlechtriem/Butler (2009)*, ¶30]. Commentators agree that the exclusion of 'ships' and 'vessels' under Art. 2(e) *CISG* turns on the functional characteristics of the watercraft, not their size [*Hachem*, Art. 2 ¶31; *Ferrari (2011)*, p. 146; *Schlechtriem*, p. 16; *Saidov*, p. 9]. This line of reasoning should extend to aircraft [*Schwenzer/Hachem (2016)*, Art. 2 ¶30; *Ferrari (2011)*, pp. 146-8; *Schlechtriem/Butler (2009)*, ¶30]. Therefore, the size of the KE2010 is not relevant in determining whether it is an aircraft.

96. Secondly, even if this Tribunal considers size to be a relevant factor, the KE2010 is a large-scale commercial vehicle and would be an aircraft. CLAIMANT compares the payload and size of the KE2010 to a commercial passenger plane to argue that the KE2010 is too small to qualify as an aircraft [*Cl. Memo.*, ¶77]. However, CLAIMANT incorrectly cites the length of the KE2010 as 63 cm. In fact, the KE2010 is 6.3 m long, 2.35 m tall, and 7.55 m wide, which is comparable to a helicopter [*Ex. C4*]. This size also overcomes academic commentary that 'drones should not be considered

aircraft at all' because 'aircraft of *insignificant size* will be rare' (emphasis added) [*Hachem*, Art. 2 ¶31]. Therefore, the KE2010 would not fall outside the definition of aircraft based on its size.

D. Registration requirements are not relevant to whether a good is an aircraft

97. CLAIMANT argues that the KE2010 is not an aircraft because there was no requirement to register it in Equatoriana under the *Aviation Safety Act* [*Cl. Memo.*, ¶¶69-70]. However, a registration requirement is not a relevant factor in determining whether a vehicle is an aircraft under Art. 2(e) *CISG* (**1**). In any case, even if registration is relevant, the only reason that the KE2010 does not need to be registered in Equatoriana is because it is operated by an SOE (**2**).

1. A registration requirement is not a relevant feature of an aircraft

98. The drafting history of the *CISG* indicates that a domestic requirement for registration is no longer a relevant factor in considering whether a vehicle is an aircraft. Registration was a determinative feature of an aircraft under Art. 5(1)(b) *ULIS*, the predecessor provision to Art. 2(e) *CISG* [*Hachem*, Art. 2 ¶28; *Khoo*, p. 37 ¶2.6.]. The rationale for the exclusion was that ships, vessels and aircraft were subject to inconsistent registration requirements across different jurisdictions [*Schwenzer/Schlechtriem*, Art. 7 ¶24]. These registration requirements were prerequisites for passing title, as is the case in Equatoriana [*Ex. R5*, Art. 10]. However, when drafting Art. 2(e) *CISG*, the registration requirement was removed to avoid the inconsistent treatment of the same goods based on their location of sale and use [*Ferrari (1995)*, p. 82; *Loewe*, pp. 82-83; *Enderlein/Maskow (1992)*, ¶7.1; *YB VI (1975)* p. 51 ¶28; *Schwenzer/Hachem*, Art. 2 ¶27]. Thus, using registration as a factor to classify vehicles as aircraft under Art. 2(e) *CISG* ignores the deliberate intention of the drafters of the *CISG* [*Ferrari (1995)*, p. 81; *Khoo*, p. 37 ¶2.6].

99. Furthermore, domestic law cannot be used to determine the features of an 'aircraft' under the *CISG*. As an international treaty, the *CISG* should be interpreted autonomously and only by reference to recognised international sources; one nation's domestic law cannot be relied upon as an extrinsic aid to interpretation [*CISG*, Art. 7(1); *Viscasillas*, Art. 7 ¶¶18, 19; *Hachem*, Art. 7 ¶9; *Praštalo*, p. 25]. Even CLAIMANT acknowledged that there were differing registration requirements between the four jurisdictions where it had previously sold the KE2010 [*PO2*, ¶20]. The logical consequence of CLAIMANT's argument is that the interpretation of 'aircraft' under the *CISG* would be different across jurisdictions depending on their domestic registration requirements. Therefore, the Tribunal should not rely on domestic registration requirements in interpreting the *CISG*.

2. The KE2010 is exempt from registration in Equatoriana due to RESPONDENT's SOE status

100. Even if registration requirements are relevant to the definition of an aircraft, no weight should be given to the fact that the KE2010 does not need to be registered in Equatoriana. The KE2010s were only exempt from registration under the Equatorianian *Aviation Safety Act* because they were

to be owned and operated by an SOE, RESPONDENT [*Ex. R5*, Art. 10; *Ex. C7*, ¶5]. Indeed, the functional characteristics of the KE2010 means that it falls within the definition of an aircraft under Art. 1(a) *Aviation Safety Act*, as it is a vehicle used for moving 'objects in the air without any mechanical connection to the ground' [*Ex. R5*, Art. 1(a)]. To avoid doubt, Art. 1(a) *Aviation Safety Act* was amended to explicitly clarify that unmanned aerial vehicles are aircrafts [*PO2*, ¶51].

101. Further, the KE2010s were treated as aircrafts by Equatorianian authorities. The KE2010s were expected to operate in the same sphere as 'other forms of aerial traffic' and were required to display a clearly visible product number on their tail [*Ex. R1*, ¶7; *PO2*, ¶21]. This was to ensure they were identifiable in case of alleged violations of privacy or interferences with aerial traffic [*PO2*, ¶21]. The safety risks posed by the KE2010s – due to their size and functional capabilities – required the Equatorianian authorities to treat them as aircraft, regardless of the registration requirement.

II. In the alternative, the *CISG* has been excluded by the Parties

102. The Parties impliedly excluded the application of the *CISG* to the *PSA* when the Parties chose the law of Equatoriana as the governing law of the *PSA* [*Ex. C2*, Art. 20(d); cf. *Cl. Memo.*, ¶83]. There is broad consensus that the *CISG* may be excluded implicitly (**A**). Further, Art. 21 of the *PSA* (**Merger Clause**) does not prevent the Tribunal from considering the circumstances surrounding the *PSA* to determine if the Parties intended to exclude the *CISG* (**B**). Finally, the circumstances show that the Parties intended Equatorianian domestic law to apply to the *PSA* (**C**).

A. The *CISG* may be excluded implicitly

103. CLAIMANT concedes that the *CISG* may be excluded implicitly [*Cl. Memo.*, ¶83]. There is broad academic consensus that the *CISG* can be excluded implicitly [*Honnold (2021)*, p. 134; *Hachem*, Art. 6 ¶¶3-4; *Mistelis*, Art. 6 ¶¶14, 15]. This is because the availability of an implicit exclusion recognises party autonomy, freedom of contract, and the non-mandatory nature of the *CISG* [*CISG*, Art. 6; *CLOUT Case No 229*]. Implicit exclusion of the *CISG* is further justified by its drafting history: a proposal that parties may only exclude the *CISG* expressly was rejected [*Official Records*, pp. 85-86; *YB II (1971)*, p. 55 ¶¶43-46; *YB VIII (1977)*, p. 29 ¶¶56-58]. The Tribunal should find that the *CISG* can be implicitly excluded by the Parties.

B. The Merger Clause does not prevent recourse to surrounding circumstances

104. CLAIMANT may argue that the Merger Clause bars the Tribunal from considering surrounding circumstances to determine the Parties' intention to exclude the *CISG* [*CISG*, Art. 8; *PSA*, Arts. 20, 21]. A merger clause may either exclude references to collateral oral agreements only, or it may also bar recourse to external materials for interpretation [*Schmidt-Kessel*, Art. 8 ¶39; *Proforce Recruit*, ¶¶41, 59, 61; *Vasant*, ¶46]. However, the Parties must have intended for the Merger Clause to have this effect; which is not the case here [*CISG-AC Opinion No. 3*, n. 4.5; *Ex. C3*, ¶3].

105. The effect of the Merger Clause must be determined by the words of the clause, as well as the Parties' statements, negotiations and all other relevant circumstances [*CISG*, Art. 8(3); *CISG-AC Opinion No. 3*, ¶4; *UNCITRAL Case Digest*, Art. 8 ¶26; *Schmidt-Kessel*, Art. 8 ¶21, 22, 39; *Lookofsky*, pp. 43, 44; *Honnold*, p. 105, 109; *Teevee Toons*, ¶8; *Cedar Petrochemicals*, ¶5]. The Merger Clause provides that the *PSA* 'contains the entire agreement between the Parties.' The phrase 'entire agreement' indicates that the clause limits the obligations of the Parties to the signed contractual document and prevents collateral and implied obligations. However, this does not prevent the use of surrounding circumstances to interpret the *PSA*. This is consistent with Mr. Cremer, CLAIMANT's CEO's, intended purpose for the Merger Clause: to ensure that the Parties' commitments under the *PSA* 'could all be deduced from the contractual document' [*Ex. C3*, ¶3; *PO2*, ¶39].

106. Furthermore, this position is also consistent with Art. 2.1.17 *UNIDROIT Principles*, incorporated into Equatoriana's domestic law through the *ICCA*. Art. 2.1.17 prohibits prior statements from being used to contradict or supplement the contents of a contract but permits them to be used for interpretation [*Brödermann*, p. 59; *Vogenauer*, Art. 2.1.17 no. 6; *Official Commentary*, Art. 2.1.17, p. 65]. Under the principles of interpretation in the *CISG* and in Equatoriana's domestic law, the Merger Clause does not prevent this Tribunal from considering the surrounding circumstances of the *PSA*.

C. The Parties intended to exclude the *CISG*

107. The Parties' designation of Equatorianian law in Art. 20 of the *PSA*, which states that '[t]he agreement is governed by the law of Equatoriana', implicitly excludes the *CISG* in light of the circumstances. CLAIMANT asserts that a designation of Equatorianian law in the *PSA* is a reference to the *CISG* because Equatoriana is a *CISG* contracting state [*Cl. Memo.*, ¶¶63-4; *PO1*, ¶3]. The correct approach is to consider the surrounding circumstances of the *PSA*, as required by the *CISG*'s interpretive rules, to determine if the Parties agreed on an implied exclusion [*Honnold (2021)*, pp. 134-5; *Dubrovnik Lectures*, p. 97; *Lookofsky*, pp. 27-8; *CISG*, Art. 8]. There is no inconsistency in this Tribunal applying the *CISG* to determine if it has been impliedly excluded because the *CISG* determines its sphere of application autonomously [*Hachem*, Art. 6 ¶5].

108. The Parties intended to invoke the domestic sales law of Equatoriana for two reasons. First, a number of references were made to Equatorianian domestic law in the call for tender and *PSA*. To be considered for the award of the tender, it was necessary that CLAIMANT's bid complied with Equatoriana's *Law No. 23978 (Public Tender Act)* [*Ex. C1*]. Further, the call for tender made clear that a violation of warranties given by the bidder would entitle RESPONDENT to terminate the contract 'in accordance with applicable Equatorianian law' [*Ex. C1*]. Thus, throughout the tender process, the Parties were required to conduct themselves in accordance with domestic

Equatorianian law. The *PSA* also required the seller to comply with 'obligations arising from the anti-corruption legislation listed in Annex E' [*Ex. C2*, Art. 2(h)]. It is likely that this is a reference to Equatoriana's domestic *Anti-Corruption Act* [*RNoA*, ¶23]. The call for tender and the *PSA* itself demonstrate that the Parties intended the domestic law of Equatoriana to apply.

109. Secondly, the Parties would not have intended the *CISG* to apply when it was unclear whether the KE2010s were aircraft and therefore excluded from the scope of the *CISG*. In contrast, the *UNIDROIT Principles*, which have been adopted into Equatorianian law through its *ICCA*, does not exclude aircraft from its scope of application. This Tribunal should find that the Parties' choice of Equatorianian law, in circumstances where the *PSA* includes numerous references to the domestic law of Equatoriana, indicates the Parties' intention to exclude the *CISG*'s application.

110. CLAIMANT may argue that the language in the *PSA* indicates that the Parties implicitly intended for the *CISG* to apply despite the sale of aircraft being beyond the scope of the *CISG* [*Honnold*, pp. 56, 81; *Lookofsky*, p. 18; *Spohnheimer*, Art. 2 ¶40; *Kritzer*, p. 27; *Spagnolo*, pp. 21, 22]. CLAIMANT may argue that Ms. Horacia Porter amended Art. 18 of the *PSA* (**Termination Clause**) to use the term 'fundamental breach' and reflect the wording of Art. 25 *CISG* [*Ex. C2*, Art. 18(1); *Ex. C7*, ¶18]. However, the concept of fundamentality is not unique to the *CISG*. It is also found in Art. 7.3.1 of the *UNIDROIT Principles* (and therefore the *ICCA*) which defines a failure to perform as a 'fundamental non-performance'. Therefore, the use of 'fundamental breach' does not conclusively determine the Parties' intent to invoke the *CISG*; it can equally indicate an intention to apply the *ICCA*, the domestic law of Equatoriana.

111. Further, the change to the Termination Clause was made 'personally' and unilaterally by CLAIMANT's lawyer after receiving a draft from RESPONDENT [*Ex. C7*, ¶18]. The change was not negotiated or discussed. It cannot be implied from the use of 'fundamental breach' that the Parties intended the *CISG* to apply. Instead, they implicitly excluded it for the reasons above.

CONCLUSION

112. The KE2010 is an aircraft because it can fly and carry cargo. Therefore, its sale is beyond the scope of the *CISG* pursuant to Art. 2(e) *CISG*. In the alternative, the Parties have implicitly excluded the *CISG*. In either case, the *PSA* will not be governed by the *CISG*, and the governing law of the *PSA* will be Equatoriana's domestic law, the *ICCA*.

ISSUE D: ART. 3.2.5 OF THE *ICCA* APPLIES TO THE *PSA*

113. If, contrary to RESPONDENT's submissions in Issue C, the Tribunal finds that the *CISG* is the governing law of the *PSA*, it should nevertheless find that Art. 3.2.5 of Equatoriana's *ICCA* applies. Under Art. 3.2.5 *ICCA*, which is identical to the corresponding provision in the *UNIDROIT Principles*, a party may avoid a contract when it has been led to conclude it by another party's fraudulent representation or fraudulent non-disclosure of information [*UNIDROIT*, Art. 3.2.5; *NoA*, ¶22]. CLAIMANT acted fraudulently by describing the KE2010 as its newest, state-of-the-art drone, when it in fact had a newer model, the HE2020.

114. Issues of fraudulent misrepresentation and fraudulent non-disclosure of information are not expressly governed by the *CISG*. Therefore, such issues are to be settled in conformity with general principles, or the applicable law as determined by the rules of private international law [*CISG*, Art. 7(2)]. The applicable law here is the law of Equatoriana, which includes the *ICCA*, as the Parties expressly incorporated a choice of law clause in favour of Equatorianian law in Art. 20(d) of the *PSA* [*Ex. C2*]. As such, even if the Tribunal concludes that the choice of law clause is a reference to the *CISG*, where there is a gap in the *CISG*, domestic Equatorianian law applies.

115. CLAIMANT now denies the application of Art. 3.2.5 *ICCA*. It argues that Art. 35 of the *CISG*, which concerns whether a good conforms to its description, is applicable and this means that there is no gap in the *CISG* [*Cl. Memo.*, ¶91]. Further, CLAIMANT argues that, even if Art. 3.2.5 *ICCA* did apply, its conduct was not fraudulent [*Cl. Memo.*, ¶89]. Art. 3.2.5 *ICCA* applies for three reasons. First, the *CISG* does not govern cases of fraud and the *ICCA* fills this gap (**I**). Secondly, the elements of Art. 3.2.5 *ICCA* are met as CLAIMANT led RESPONDENT to conclude the contract through both fraudulent misrepresentations and fraudulent non-disclosure of information (**II**). Lastly, RESPONDENT validly avoided the *PSA* (**III**).

I. The ICCA applies to the PSA

116. The *CISG* covers innocent and negligent misrepresentation, but not fraudulent misrepresentation [*Schwenzer (2016)*, p. 617, ¶49; *Honnold*, ¶65; *Galston/Smit*, p. 618, ¶50]. CLAIMANT accepts that the *ICCA* will apply 'where the *CISG* is not applicable', but incorrectly argues that Art. 35 *CISG* is applicable to fraudulent misrepresentation [*Cl. Memo.*, ¶¶90-91; *CISG*, Art. 35]. Art. 35 of the *CISG* does not apply in cases of fraud, nor are there any other provisions in the *CISG* dealing with fraud (**A**). In the absence of provisions on fraud under the *CISG*, the *ICCA* fills this gap (**B**).

A. The *CISG* does not apply in cases of fraud

117. The *CISG* is not applicable where a party's conduct is fraudulent. CLAIMANT is correct that the *CISG* is 'completely comprehensive and exhaustive' regarding issues of conformity of the goods [*CISG*, Art. 35]. However, the failure by CLAIMANT to disclose to RESPONDENT that its newest,

state-of-the-art drone was the HE2020 and not the KE2010 is an issue of fraudulent misrepresentation and non-disclosure, *not* a question of conformity [*Cl. Memo.*, ¶91]. Conformity under Art. 35 *CISG* does not cover the same circumstances as those covered by Art. 3.2.5 *ICCA* [*Schwenzer/Hachem*, p. 81; *Schroeter*, p. 584; c.f., *Honnold*, p. 80]. This is for five reasons.

118. First, fraud is an issue of contractual validity and the *CISG* does not govern contractual validity [*CISG*, Art. 4(a); *Honnold*, p. 79; *Lookofsky (2005)*, p. 90; *Bonell*, p. 129]. This is because the *CISG* only governs conduct which gives rise to contract formation and the rights and obligations of parties under the contract [*Honnold*, p. 96; *Schlechtriem/Schwenzer (2022)*, p. 81; *Ferrari* (2003), p. 226; *Kritzer*, p. 86; *Galston/Smit*, ¶1-37; *YB IX (1978)*, pp. 65-66]. A finding of non-conformity under the *CISG*, for example, does not render the underlying contract invalid or void, but rather amounts to a breach of contract [*CISG*, Arts. 35(1), 71, 72]. In comparison, where one party induces another to enter a contract by a fraudulent misrepresentation, this negates the underlying consent that the induced party gave to enter the contract. It therefore becomes an issue of contract validity, which is outside the scope of the *CISG*.

119. Secondly, a seller's state of mind is not relevant to a claim under Art. 35(2) *CISG*, whereas Art. 3.2.5 has an additional subjective state of mind requirement. Article 3.2.5 *ICCA* requires proof that the seller's representation was deliberate or reckless, with the goal of gaining an advantage to the other party's detriment [*Brödermann*, pp. 87-88]. Thirdly, Art. 35 *CISG* only applies to non-conformity in the quantity, quality, and nature of the goods. In contrast, Art. 3.2.5 *ICCA* can also relate to misrepresentations or non-disclosure unrelated to the contract goods, such as a party's misrepresentation about its ability to make payments or the nature of its business. Fourthly, Art. 35 is only enlivened once goods are delivered [*CISG*, Art. 35(1)]. In contrast, under Art. 3.2.5 *ICCA*, a party can avoid a contract *before* delivery has occurred (for example, if the misrepresentation pre-dates the delivery of the goods) [*UNIDROIT Principles*, Art. 3.2.14; *Schwenzer (2016)*, p. 606; *Bonell (1987)*, p. 47].

120. Finally, tortious conduct is outside the scope of sales law [*CISG-AC Opinion No. 12*, ¶2.1.4; *Electrocraft*, p. 11]. This is because the duty to not defraud, or intentionally harm, exists independently of any contractual interests; this is the 'unanimous opinion of legal writers' [*Schlechtriem (1986)*, p. 474]. This position was the same under the predecessor to the *CISG*, the *ULIS*, which did not regulate fraudulent torts [*ULIS*, Art. 89; *Dölle*, Art. 82-89; *Schlechtriem (1986)*, p. 474]. The *CISG* only seeks to govern contractual formation and does not apply to misrepresentation and fraudulent non-disclosure, which are instead regulated as tortious conduct. Thus, the *CISG* will not apply and instead domestic remedies address fraud and tortious conduct [*Kritzer*, p. 86; *Schwenzer (2016)*, p. 617, ¶49].

B. The *ICCA* fills the gap on issues of fraud in the *CISG*

121. As the *CISG* is silent on fraud, the *ICCA* applies to fill this gap [*CISG*, Art. 7(2); *Ferrari* (2003), p. 230; *Bonell* (1987), pp. 75-76; *Lookofsky (2005)*, p. 90]. It is generally recognised that parties to an international commercial agreement are free to choose the law applicable to their dispute [*Redfern/Hunter (4th ed)*, pp. 97, ¶2-38, 94, ¶2-34]. It is also common for the national law of a contracting party to be chosen [*Redfern/Hunter (4th ed*), p. 97, ¶2-40]. Therefore, it is not unusual that RESPONDENT has nominated its own domestic law. The Parties have freely submitted to the law of Equatoriana under the *PSA* [*PSA*, Art. 20]. This means that domestic Equatorianian jurisprudence on Art. 3.2.5 *ICCA* should be applied by this Tribunal, such as the 2010 decision of the Equatorianian Supreme Court interpreting the equivalent domestic provision of Art. 3.2.5 *ICCA* [*RNoA*, ¶18].

122. CLAIMANT mistakenly conflates the *ICCA* and *UNIDROIT Principles* in its submissions, referring to them interchangeably [*Cl. Memo*., p. 21, ¶91]. In any case, if it was found that the *UNIDROIT Principles* would apply as general principles of international law, rather than the *ICCA*, there would be no practical difference in substantive law, as the provisions are identical [*NoA*, ¶22; *CISG*, Art. 7(2)]. The remedy of avoidance sought by RESPONDENT is available under both the *UNIDROIT Principles* and the *ICCA* [*UNIDROIT Principles*, Art. 3.2.14]. It is more likely, however, that the *ICCA* and Equatorianian law applies as the chosen law of the Parties.

II. CLAIMANT acted fraudulently by representing the KE2010 to be the 'newest' and 'state-of-the-art' drone and failing to disclose the existence of the HE2020

123. If the Tribunal considers the issue of fraud under the *PSA*, as raised by CLAIMANT in its submissions (despite substantive claims on the issue being reserved for a different stage of the proceedings [*PO2*, ¶53]), the KE2010 is neither state-of-the-art, nor 'new', contrary to CLAIMANT's representations [*Cl. Memo*., p. 23, ¶95]. Having made those representations in circumstances where it was about to release the HE2020, CLAIMANT made an omission and a misrepresentation (**A**). This conduct amounted to fraud (**B**), and CLAIMANT has not raised a viable defence (**C**).

A. CLAIMANT failed to disclose the HE2020 and misrepresented the KE2010

124. CLAIMANT had an express obligation under Art. 3.2.5 *ICCA* to disclose the HE2020 to RESPONDENT based on the ruling of the Equatorianian Supreme Court [*RNoA*, ¶18] (**1**). Even if CLAIMANT was not under an obligation to disclose the HE2020, it was under an obligation not to misrepresent the KE2010 as the 'newest' model and/or 'state-of-the-art' when it knew that the release of the HE2020 would make the KE2010 an outdated model (**2**).

1. CLAIMANT was under an obligation to disclose the HE2020 to RESPONDENT

125. CLAIMANT acted fraudulently by failing to disclose the existence of the HE2020 to RESPONDENT, when RESPONDENT bargained for its 'newest' drone [*Ex. C1*; *Ex. R4*; *Ex. C2*]. The Equatorianian Supreme Court has previously found that 'an experienced private party contracting with a newly formed government entity is under far-reaching disclosure obligations covering all information potentially relevant for the government entity', extending to 'planned improvements to the product' [*RNoA*, ¶18]. While this decision concerned the Equatorianian *Contract Act*, and not the *ICCA*, there is no reason why an Equatorianian court would not interpret the *ICCA* as requiring similarly high disclosure obligations, as to interpret differently would create inconsistencies between otherwise identical provisions [*RNoA*, ¶18].

126. CLAIMANT was obliged to disclose the HE2020 to RESPONDENT as it was a 'planned improvement' of its product line and as this information was relevant to RESPONDENT's work as an SOE. CLAIMANT was an experienced private party, being a medium-sized company in operation for more than two decades across multiple jurisdictions [*PO2*, ¶1; *NoA*, ¶1]. In comparison, RESPONDENT was a much newer government entity, having only been established in 2016 [*NoA*, ¶3]. The HE2020 was a clear improvement in CLAIMANT's drone offering. The HE2020 has aa greater payload, service ceiling, and endurance than the KE2010, as well as the ability to conduct longer flights using satellite communication, as opposed to only line-of-sight navigation [*PO2*, ¶17]. Information about a more advanced drone was particularly relevant to RESPONDENT in the context that its drones would be used to conduct sensitive and technical operations in Northern Equatoriana, of which CLAIMANT was aware [*NoA*, ¶3; *RNoA*, ¶5].

127. CLAIMANT may argue that the HE2020 was not available to the market at the time the *PSA* was signed such that it was under no obligation to disclose it [*NoA*, ¶9]. However, at the time of contracting, the HE2020 was only months away from being publicly displayed at the Mediterranean air show in February 2021 [*NoA*, ¶10]. CLAIMANT was already in the test flight phase in the autumn of 2020, as the HE2020 had been in development since the technology was acquired by RESPONDENT in 2017 [*PO2*, ¶¶14, 15]. Indeed, even the name 'Hawk Eye *2020*' indicates that the model was anticipated to be ready in 2020, just as the KE2010 was released as a 2010 model. Further, the HE2020 technology was available on the market from other developers [*PO2*, ¶¶14, 15]. Despite this, even at the very end of 2020, Mr. Bluntschli still reiterated to RESPONDENT that the KE2010 was its newest model.

128. Additionally, CLAIMANT could deliver 3 HE2020s in 2022 which would have satisfied RESPONDENT's time frame under the *PSA*. Having made the decision to offer a tender, CLAIMANT had an obligation to ensure that its representations were correct. CLAIMANT breached this

obligation. In applying Art. 3.2.5 *ICCA* in line with Equatorianian law, this Tribunal should find that CLAIMANT acted fraudulently in failing to inform RESPONDENT of its newest drone, the HE2020.

2. The KE2010 was not the newest drone, nor was it state-of-the-art

129. CLAIMANT should not have used the term 'state-of-the-art' to describe the KE2010 when its technology was outdated compared to the HE2020 [*Ex. C4*, *Ex. R4*]. RESPONDENT agrees with CLAIMANT that the commonly accepted definition of 'state-of-the-art' is 'the most recently developed version of technology at a given time' [*Cl. Memo.*, ¶98]. CLAIMANT represented that the KE2010 was its 'present top model' in negotiations by Mr. Bluntschli and it was described as the 'latest UAS' in the recitals to the *PSA* [*Ex. C3*, ¶8; *Ex. R4*; *Ex. C8*; *Ex. C2*].

130. However, the KE2010 does not satisfy this definition. The KE2010 was developed over a decade ago in 2010, and has only had 'minor' improvements made since [*PO2*, ¶13; *Ex. C8*]. The last improvement to the KE2010 was made four years before the *PSA* was concluded [*PO2*, ¶13]. In fact, CLAIMANT plans to replace the KE2010 with a 'newly developed drone' using either helicopter-based, powered lift technology or 'newly acquired' aerodynamic lift technology [*PO2*, ¶¶13, 15]. The KE2010 could not be the 'most recently developed version of technology' at the time of contracting when other, more advanced technology existed and was available to CLAIMANT.

131. CLAIMANT argues that although the KE2010 did not use the most up-to-date technology for drones generally, it was still the most up-to-date for RESPONDENT's specific purposes [*Ex. C4*; *NoA*, ¶9; *Cl. Memo.*, ¶¶95, 99]. However, this ignores that the HE2020 was 'more suitable for missions in Northern Equatoriana' than the KE2010 due to its superior technology [*PO2*, ¶17]. Further, the Merger Clause is ineffective to exclude liability for these pre-contractual statements, as exemption clauses cannot exclude liability for fraud [*Ex. C3*, ¶3; *CISG-AC Opinion No. 17*, ¶¶2.7, 4.5; *Schlechtriem/Butler (2009)*, p. 33, ¶34; *Fontaine/de Ly*, pp. 384-385; *Darlington Futures*, p. 451; *Al-Hasawi v Nottingham*, ¶122; *Canada Inc. v. Ontario Inc*, ¶¶24-26]. Even if there was no express obligation on CLAIMANT to offer the HE2020 to RESPONDENT, it did have an obligation to not misrepresent the KE2010 as 'state-of-the-art' when more modern and sophisticated technology was available.

B. CLAIMANT's conduct amounted to fraud

132. CLAIMANT acted fraudulently by intending to lead RESPONDENT into error about the nature of the KE2010 to RESPONDENT's detriment [*Official Commentary*, Art. 3.2.5, p. 105; *du Plessis*, p. 498]. The supposedly new, state-of-the-art nature of the KE2010 was a material factor for RESPONDENT's decision to enter into the *PSA*. RESPONDENT consistently communicated to CLAIMANT that it was

crucial that its drones were new and state-of-the-art, which is reflected multiple times in the tender, the negotiations and the *PSA* itself [*Ex. C1*; *Ex. R4*; *Ex. C2*]. CLAIMANT itself agrees that the 'documents made clear that, given the difficult environment in which the UAS were to operate, they had to be state-of-the-art and based on the newest technology' [*RNoA*, ¶7]. Despite this, CLAIMANT argues that there is no misrepresentation when the KE2010 meets the minimum specifications set out in the tender [*Cl. Memo.*, ¶99]. However, the tender required the drones to be both technically compliant *and* the newest and most state-of-the-art model [*Ex. C1*].

133. The fact that CLAIMANT failed to disclose the HE2020 to RESPONDENT disadvantaged RESPONDENT for three reasons. First, CLAIMANT denied RESPONDENT the opportunity to even consider purchasing the HE2020, which allowed CLAIMANT to offload old drones that it has otherwise struggled to sell [*PO2*, ¶24]. This deprived RESPONDENT of access to the best available technology and the benefits of additional functionalities, such as better access to remote areas in Northern Equatoriana and improved surveillance results [*PO2*, ¶17]. Secondly, CLAIMANT's non-disclosure led RESPONDENT to believe it would be receiving 'state-of-the-art' technology for which it would be willing to pay a premium. It was made clear in negotiations that RESPONDENT would pay more for a drone with newer technology and additional uses [*Ex. C2*]. CLAIMANT knew this and intentionally took advantage of RESPONDENT.

134. Third, CLAIMANT may argue that the HE2020 may not have been viable for RESPONDENT's budget, as it was twice as expensive as the KE2010 [*Ex. C3*, ¶9]. However, based on the greater capabilities of the HE2020, it is possible that RESPONDENT could have purchased fewer HE2020s to do the job of four, or even six, KE2010s [*PO2*, ¶17]. Further, the KE2010s sold to RESPONDENT had originally been manufactured for another client and only required minor modifications for RESPONDENT [*NoA*, ¶8]. RESPONDENT therefore overpaid for old technology to CLAIMANT's gain. There is a clear 'causal link' between the misrepresentations and omissions and the *PSA*'s conclusion [*ICC Case No. 9474*]. If not for its misrepresentations and omissions, it is possible that CLAIMANT would not have been awarded the tender, and that RESPONDENT would not have entered the *PSA* at all. CLAIMANT not only led RESPONDENT to believe that the KE2010 was state-of-the-art technology, but it then exploited RESPONDENT's mistaken belief to its commercial benefit [*Ex. C2*; *Ex. C4*].

C. CLAIMANT cannot rely on supposed 'business secrets' to justify its non-disclosure

135. CLAIMANT may argue that it did not disclose the existence of the HE2020 as the technology had not yet been patented at the time of the tender and conclusion of the *PSA* and it was thus a 'business secret' [*Ex. C7*, ¶13]. However, this was clearly not a material concern for CLAIMANT,

who publicly presented the HE2020 at an air show in February 2021, before its patents were granted [*PO2*, ¶15].

136. Moreover, commercial parties are generally bound by obligations to maintain confidentiality in their negotiations, irrespective of whether a contract is concluded [see e.g., *UNIDROIT Principles*, Art. 2.1.16]. If CLAIMANT was particularly concerned about confidentiality, it could have required RESPONDENT to sign a confidentiality undertaking. In any case, CLAIMANT has not identified what practical risks would arise from the disclosure of the HE2020 as RESPONDENT was CLAIMANT's potential client and not a competitor in the field of drone development. RESPONDENT did not seek disclosure of trade secrets, but merely an honest description of whether the product on offer was 'state-of-the-art'.

III. RESPONDENT has not affirmed the *PSA*

137. RESPONDENT validly avoided the *PSA* when it terminated the *PSA* on 30 May 2022 on two bases: corruption and misrepresentation [*RNoA*, ¶19; *Ex. C8*]. In any case, RESPONDENT acted in good faith by continuing to negotiate with CLAIMANT once it discovered CLAIMANT had fraudulently mispresented the KE2010 and failed to disclose the HE2020 (**A**). Therefore, CLAIMANT has no basis for establishing an estoppel claim against RESPONDENT (**B**).

A. RESPONDENT acted in good faith

138. CLAIMANT may argue that RESPONDENT failed to act in good faith due to unsuccessful negotiations prior to the avoidance of the *PSA*. There is no question that the Parties are bound by the duty of good faith [*CISG*, Art. 7(1); *UNIDROIT Principles*, Art. 1.7(1); *Magnus*, p. 90; *Lookofsky*, p. 37; *Stockholm Chamber of Arbitration 30/04/20*; *Austria 15 June 1994*]. However, RESPONDENT upheld this duty. Following the discovery of the non-disclosure and misrepresentation, RESPONDENT engaged in negotiations for more than a year before terminating the *PSA* [*RNoA*, ¶18]. The failure to reach agreement does not amount to bad faith [*UNIDROIT Principles*, Art. 2.1.15(1); *ICC No. 10351*]. RESPONDENT was in fact acting in good faith by terminating the *PSA* and concluding negotiations once it knew it could no longer reach an agreement with CLAIMANT [*UNIDROIT Principles*, Art. 2.1.15(3)].

B. CLAIMANT cannot establish an estoppel claim

139. RESPONDENT acted clearly and consistently in avoiding the *PSA*. CLAIMANT cannot support a claim under estoppel [*UNIDROIT Principles*, Art. 1.8; *Austria 15 June 1994*; *Germany June 25, 1997*; *Germany, September 15 2004*; *ICC Case No. 23570/MK*]. CLAIMANT may submit that RESPONDENT acted inconsistently prior to terminating the *PSA* by failing to raise avoidance within a reasonable time after it knew of the purported breach, and then amending the Arbitration Agreement [*Ex.*

C7, ¶16; *UNIDROIT Principles*, Arts. 3.2.9, 3.2.12; *Russia 2007*; *Buenos Aires*]. However, this claim would fail for two reasons.

140. First, CLAIMANT itself admits that RESPONDENT had 'maintained from the beginning that the *PSA* was void as it had been obtained by corruption and due to CLAIMANT's alleged misrepresentation of the features of the drones' [*NoA*, ¶13]. As soon as RESPONDENT suspected corruption and misrepresentation, it communicated to CLAIMANT to stop its performance under the *PSA* [*Ex. C6*; *Ex. C2*, Art. 4; *Vogenauer*, p. 525; *Official Commentary*, Art. 3.2.9, p. 113; *Paris 1997*]. CLAIMANT accepts that, as early as March 2021, Mr. Field made allegations of misrepresentation to CLAIMANT and raised the prospect of termination [*Ex. C7*, ¶13]. RESPONDENT also did not confirm the *PSA* through performance: it did not make advance payments, nor pay the *PSA* instalments at the relevant times [*Ex. C2*, Art. 4]. In December 2021, RESPONDENT explicitly reserved its right to require repayment of any payments made under the *PSA* if corruption was found [*Ex. C6*]. RESPONDENT's conduct in avoiding the *PSA* was unambiguous and demonstrated that it did not treat the *PSA* as being operative.

141. Secondly, silence does not amount to affirmation, especially in circumstances where CLAIMANT never stated that it believed the *PSA* remained operative or acted as if it was operative [*Official Commentary*, Art. 1.8, p. 21]. Based on Equatorianian jurisprudence, government entities can avoid contracts affected by fraudulent non-disclosure more than a year after unsuccessful negotiations [*RNoA*, ¶18]. In any case, RESPONDENT's right to terminate the *PSA* was ongoing as the *PSA* provides for termination for a fundamental breach of contract under Art. 18 (such as inappropriate payments to any employee) [*Ex. C2*]. RESPONDENT continued to conduct itself as if the *PSA* had been avoided, giving official notice of termination in its letter of 30 May 2022 [*Official Commentary*, Art. 3.2.11, p. 115; *Ex. C8*]. At such point, it would be clear and obvious to CLAIMANT that the *PSA* had been terminated. There was no reasonable basis for CLAIMANT to conclude that the *PSA* had not been avoided.

CONCLUSION

142. Art. 3.2.5 of the *ICCA* applies to the *PSA* as the *CISG* does not cover fraud. This 'gap' in the *CISG* is filled by Equatorianian domestic law as selected by the Parties. Applying Art. 3.2.5 *ICCA*, CLAIMANT acted fraudulently in representing that the KE2010 was its newest drone and was 'state-of-the-art', whilst concealing the existence of the HE2020. RESPONDENT acted consistently and in good faith when terminating the *PSA* for misrepresentation. The *PSA* was validly avoided.

REQUEST FOR RELIEF

For the above reasons, Counsel for RESPONDENT requests the Tribunal order that:

(1) The Tribunal does not have jurisdiction to hear the dispute.
(2) If the Tribunal determines that it has jurisdiction, the Tribunal should order a stay of the proceedings or, in the alternative, bifurcate the proceedings.
(3) The governing law of the *PSA* is the domestic law of Equatoriana.
(4) RESPONDENT is entitled to rely on Art. 3.2.5 of the *ICCA*.
(5) RESPONDENT be paid the costs of this hearing including legal fees and expenditures.

CERTIFICATE OF VERIFICATION

We hereby confirm that only the persons whose names are listed below have written this memorandum.

Respectfully submitted

Sydney, 27 January 2023

Maya Eswaran

Sofia Mendes

Harriet Walker

Kathy Zhang