THIRTIETH ANNUAL

WILLEM C. VIS INTERNATIONAL ARBITRATION MOOT

# Memorandum for CLAIMANT

## University of Vienna

Case Reference: PCA CASE NO. 2022-76

| On behalf of: | Against: |
|---|---|
| **Drone Eye plc** | **Equatoriana Geoscience Ltd** |
| 1899 Peace Avenue | 1907 Calvo Rd |
| Capital City | Oceanside |
| Mediterraneo | Equatoriana |
| CLAIMANT | RESPONDENT |

Caroline Briedl • Julian Dorffner • Laurenz Faber • Antonia Hotter

Flavia Isidori • Anna-Lisa Landrichter • Lisa Naderer

2022/2023 • Vienna, Austria

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# Index of Abbreviations and Definitions

| | |
|---|---|
| Art | Article |
| CEO | Chief Executive Officer |
| cf | confer |
| CISG | United Nations Convention on Contracts for the International Sale of Goods (1980) |
| CLE | Constitutional Law of Equatoriana |
| COO | Chief Operating Officer |
| DAL | Danubian Arbitration Law |
| EAL | Equatorianian Arbitration Law |
| eg | Exempli gratia, for example |
| et al | et alii / et aliae / et alia, and others |
| et seq | et sequens, and the following |
| Exh C1 | Claimant Exhibit C1 |
| Exh C2 | Claimant Exhibit C2 |
| Exh C3 | Claimant Exhibit C3 |
| Exh C4 | Claimant Exhibit C4 |
| Exh C7 | Claimant Exhibit C7 |
| Exh C8 | Claimant Exhibit C8 |
| Exh C9 | Claimant Exhibit C9 |
| Exh R2 | Respondent Exhibit R2 |
| Exh R3 | Respondent Exhibit R3 |
| Exh R4 | Respondent Exhibit R4 |

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|---|---|
| Exh R5 | Respondent Exhibit R5 |
| ICC | International Chamber of Commerce |
| ICCA | International Commercial Contract Act |
| Ltd | Limited |
| Mr | Mister |
| Ms | Miss |
| NoA | Notice of Arbitration |
| NP Development Program | Northern Part Development Program |
| NYC | New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) |
| p, pp | Page, pages |
| para, paras | Paragraph, paragraphs |
| PICC | UNIDROIT Principles of International Commercial Contracts (2016) |
| PIL | Private International Law |
| plc | Public Limited Company |
| PO1 | Procedural Order No. 1 |
| PO2 | Procedural Order No. 2 |
| PSA | Purchase and Supply Agreement |
| RNoA | Response to the Notice of Arbitration |
| Sec | Section |
| SOE(s) | State-Owned Entity (State-Owned Entities) |
| UNCITRAL | United Nations Commission on International Trade Law |
| v | versus, against |

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| AC Opinion no 13 | CISG Advisory Council<br>**Opinion No 13**<br>**Inclusion of Standard Terms under the CISG**<br>2013<br>Cited in: para 137 |
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| Philip Morris Case | **PCA (Permanent Court of Arbitration)**<br>Procedural Order No 8<br>14 April 2014<br>Case No 2012–12<br>Philip Morris Asia Ltd v The Commonwealth of Australia<br>Cited in: para 53 |
| Salini Case | **ICC (International Chamber of Commerce)**<br>Award on the Suspension of the Proceedings and Jurisdiction<br>7 December 2001<br>Case No 1063/AER/ACS<br>Salini Costruttori SPA v The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority<br>Cited in: para 26 |
| Suez Case | **CIRDI (Centre international pour le règlement des différends relatifs aux investissements)**<br>Decision on Liability<br>30 July 2010<br>Case No ARB/03/19<br>Suez, Sociedad General de Aguas de Barcelona SA and InterAgua Servicios Integrales del Agua SA v The Argentine Republic<br>Cited in: para 53 |

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| Tulip Case | **CIRDI (Centre international pour le règlement des différends relatifs aux investissements)**<br>Decision on the Respondent's Request for Bifurcation under Art 41(2) of the ICSID Convention<br>02 November 2012<br>Case No ARB/11/28<br>Tulip Real Estate Investment and Development Netherlands BV v Republic of Turkey<br>Cited in: para 67 |

## AUSTRIA

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| Boiler Case | **Oberster Gerichtshof**<br>Supreme Court<br>2 April 2009<br>8 Ob 125/08b<br>Cited in: para 80 |
| Knitwear Case | **Oberster Gerichtshof**<br>Supreme Court<br>29 June 2017<br>8 Ob 104/16a<br>Cited in: para 115 |

## AUSTRALIA

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| Comandate Marine Case | **Federal Court**<br>20 December 2006<br>[2006] FCAFC 192<br>Comandate Marine Corp v Pan Australia Shipping Pty Ltd<br>Cited in: para 34 |
| Ferris Case | **New South Wales Court of Appeal**<br>17 August 1994<br>(1994) 34 NSWLR 474<br>Ferris v Plaister<br>Cited in: para 34 |

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| Neusser Oel Case | **Federal Court**<br>15 August 2005<br>[2005] FCA 1102<br>Walter Rau Neusser Oel und Fett AG v Cross Pac. Trading Ltd<br>Cited in: para 34 |

## CANADA

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| New World Case | **Supreme Court of British Columbia**<br>25 January 2011<br>[2010] BCSC 1496<br>New World Expedition Yachts LLC v P.R. Yacht Builders Ltd<br>Cited in: para 34 |

## EGYPT

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| Egyptian Authority Case | **Cour d'appel du Caire**<br>Cairo Court of Appeals<br>19 March 1997<br>Organisme des Antiquités v. G. Silver Night Company<br>published in Comité Français de l'Arbitrage<br>Revue de l'Arbitrage 1997, Issue 2<br>p 283<br>Cited in: para 26 |

## FRANCE

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| Bec Frères Case | **Cour d'appel de Paris**<br>Paris Court of Appeals<br>24 February 1994<br>First Chamber Section C, Appeal N 92.23638 & 92.23639<br>Ministère tunisien de l'Equipement v Société Bec Frères and Société Grands Travaux d'Afrique<br>Cited in: para 26 |

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| Embassy Construction Case | **Cour d'appel de Paris**<br>Paris Court of Appeals<br>13 June 1996<br>First Civil Law Chamber<br>Société KFTCIC v société Icori Estero and Others<br>in Comité Français de l'Arbitrage<br>Revue de l'Arbitrage 1997, Issue 2<br>p 251<br>Cited in: para 26 |
| Galakis Case | **Cour de Cassation**<br>Court of Cassation of France<br>2 May 1966<br>First Civil Law Chamber, Arrêt N 373, Pourvoi N 61-12.254<br>Trésor public v Galakis<br>published in Revista Brasileira de Arbitragem<br>Comitê Brasileiro de Arbitragem CBAr & IOB (2012)<br>p 204<br>Cited in: para 7 |
| Letter of Intent Case | **Cour d'appel de Paris**<br>Paris Court of Appeals<br>17 December 1991<br>First Supplementary Chamber<br>Société Gatoil v National Iranian Oil Company<br>in Comité Français de l'Arbitrage<br>Revue de l'Arbitrage 1993, Issue 2<br>p 281<br>Cited in: para 26 |

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| San Carlo Case | **Cour de Cassation**<br>Court of Cassation of France<br>14 April 1964<br>Office National Interprofessionnel des Céréales v Capitaine du S/S San Carlo<br>Cited in: para 7 |
| Soerni Case | **Cour de Cassation**<br>Court of Cassation of France<br>8 July 2009<br>First Civil Law Chamber, Pourvoi N 8 08-16025<br>Air Sea Broker Ltd v Société d'études et représentations navales et industrielles<br>Cited in: para 28 |

## GERMANY

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| Bowling Alley Case | **Bundesgerichtshof**<br>German Federal Supreme Court<br>28 May 2014<br>VIII ZR 410/12<br>Cited in: para 137 |
| Hygienic Tissues Case | **Bundesgerichtshof**<br>German Federal Supreme Court<br>3 November 1999<br>VIII ZR 287/98<br>Cited in: para 145 |
| Jeans Case | **Oberlandesgericht Düsseldorf**<br>Higher Regional CourtDüsseldorf<br>30 June 2015<br>I-21 U 14/15<br>Cited in: para 145 |

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| Live Fish Case | **Thüringer Oberlandesgericht**<br>Thuringian Higher Regional Court<br>26 May 1998<br>8 U 1667/97 (266)<br>Cited in: para 144 |
| New Zealand Mussels Case | **Oberlandesgericht Frankfurt am Main**<br>Court of Appeal Frankfurt am Main<br>20 April 1994<br>13 U 51/93<br>Cited in: para 117 |
| Power Station Case | Bundesgerichtshof<br>German Federal Supreme Court<br>2 July 1992<br>III ZR 84/91<br>cited in Rechtliches Gehör im Schiedsverfahren<br>NJW-RR 1993<br>p 444<br>Cited in: para 59 |
| Used Car Case | Oberlandesgericht Köln<br>Higher Regional Court Cologne<br>17 February 2017<br>19 U 101/16<br>Cited in: para 79 |

## ITALY

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| Ceramic Case | **Tribunale di Reggio Emilia**<br>District Court Reggio Emilia<br>12 April 2011<br>505/2010 R.G.<br>Fliesen Kiessling v Serenissima cir industrie ceramiche SpA<br>Cited in: para 145 |

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| Costruzioni Generali Case | **Corte Suprema di Cassazione, Sezione I Civile**<br>Court of Cassation of Italy<br>29 November 2021<br>No. 37266<br>Regione Calabria v Costruzioni Generali s.r.l.<br>Cited in: para 28 |
| Phosphore Case | **Corte di Cassazione**<br>Court of Cassation of Italy<br>9 May 1996<br>No. 4342<br>Société Arabe des Engrais Phosphates et Azotes and Société Industrielle d'Acide Phosphorique et d'Engrais v Gemanco srl<br>Cited in: para 26 |

## NEW ZEALAND

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| Truck Case | **Court of Appeal of New Zealand**<br>22 July 2011<br>[2011] NZCA 340/C A545/2010<br>Smallmon v. Transport Sales Limited<br>Cited in: para 86 |

## SWITZERLAND

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|---|---|
| Textile Machine Case | **Bundesgericht**<br>Swiss Federal Supreme Court<br>22 December 2000<br>4C.296/2000<br>Roland Schmidt GmbH v Textil-Werke Blumenegg AG<br>Cited in: para 129 |

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| Agricultural Machinery Case | **Tribunal fédéral**<br>Swiss Federal Supreme Court<br>13 October 1992<br>Cited in: para 27 |
| Blood Infusion Devices Case | **Obergericht des Kantons Luzern**<br>Court of Appeal Canton Lucerne<br>08 January 1997<br>11 95 123/357<br>Cited in: para 145 |
| Cementation Int Case | **Court of Justice of the Geneva Canton**<br>21 December 1983<br>State of Iran v Cementation International Ltd<br>unpublished; reported in Fouchard et al Footnote 367 on page 325<br>Cited in: para 26 |
| Cotton Case | **Tribunal fédéral**<br>Swiss Federal Supreme Court<br>15 September 2000<br>4C.105/2000<br>FCF SS v Adriafil Commerciale Srl<br>Cited in: para 115 |
| Electricity Meters Case | **Bundesgericht**<br>Swiss Federal Supreme Court<br>28 May 2019<br>4A_543/2018<br>Cited in: paras 79, 115, 118 |

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| Fincantieri Case | **Tribunal fédéral**<br>Swiss Federal Supreme Court<br>23 June 1992<br>Fincantieri-Cantieri Navali Italiani SpA v Oto Melara SpA, M. and others<br>Cited in: para 11 |
| Fitness Equipment Case | **Kantonsgericht Appenzell Ausserrhoden**<br>Court of First Instance Appenzell Ausserrhoden<br>09 March 2006<br>ER3 05 231<br>Cited in: para 145 |
| Laundry Machine Case | **Bundesgericht**<br>Swiss Federal Supreme Court<br>13 November 2003<br>4C.198/2003<br>Cited in: para 145 |

## TUNISIA

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| Tunisia Case | **Tribunal de première instance de Tunis**<br>Court of First Instance of Tunis<br>17 October 1987<br>BEC-GTAF v. Etat Tunisien<br>published in Comité Français de l'Arbitrage<br>Revue de l'Arbitrage 1988, Issue 4<br>p 732<br>Cited in: para 26 |

## UNITED KINGDOM

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| Capital Trust Case | **Court of Appeals (Civil Division)**<br>5 February 2002<br>[2002] EWCA Civ 135<br>Capital Trust Investment Ltd. v Radio Design AB & Ors<br>Cited in: para 34 |
| Fiona Trust Case | **House of Lords**<br>24 January 2007<br>[2006] EWHC 2583<br>Fiona Trust & Holding Corp v Yuri Privalov<br>Cited in: paras 33, 47, 72 |
| Gatoil Case | **High Court of Justice**<br>21 December 1988<br>Queen's Bench Division<br>Gatoil International Inc v National Iranian Oil Company<br>published in Albert Jan Van den Berg<br>ICCA Yearbook Commercial Arbitration 1992<br>Volume 17<br>Kluwer Law International & ICCA (1992)<br>p 587<br>Cited in: para 26 |
| Harbour Assurance Case | **High Court of Justice of England and Wales – Queen's Bench Division**<br>31 July 1991<br>[1992] 1 Lloyd's L Rep 81<br>Harbour Assurance Co Ltd v Kansa General International Insurance Co Ltd<br>Cited in: para 31 |

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| Honeywell Case | **High Court of England and Wales (Technology & Construction Court)**<br>30 April 2014<br>[2014] EWHC 1344 (TCC)<br>Honeywell International Middle East Ltd v Meydan Group LLG<br>Cited in: para 74 |
| Lesotho Case | **House of Lords**<br>30 June 2005<br>[2005] UKHL 43<br>Lesotho Highlands Development Authority v Impregilo SpA<br>Cited in: para 32 |
| Mutual Insurance Case | **Court of Appeal of England and Wales**<br>22 October 2013<br>[2013] EWCA Civ 3188<br>The London Steamship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain and the French State<br>Cited in: para 47 |
| Nat'l Iranian Oil Case | **High Court of Justice of England and Wales – Queen's Bench Division**<br>4 March 2016<br>[2016] EWHC 510 (Comm)<br>National Iranian Oil Co v Crescent Petroleum Co International Ltd<br>Cited in: para 33 |
| Premium Nafta Products Case | **House of Lords**<br>17 October 2007<br>[2007] UKHL 40<br>Premium Nafta Products Ltd and Others v Fili Shipping Company Ltd and Others<br>Cited in: para 33 |

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| Westacre Case | **Court of Appeals (Civil Division)**<br>12 May 1999<br>QBCMI 1998/0485/3<br>Westacre Investments Inc v Yogoimport SPDR and Others<br>Cited in: para 74 |
| XL Insurance Case | **High Court of Justice of England and Wales – Queen's Bench Division**<br>28 July 1999<br>[1999] EWHC J0728-12<br>XL Insurance Ltd v Owens Corning<br>Cited in: para 32 |

## UNITED STATES OF AMERICA

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| Asante Case | **U.S. District Court for the Northern District of California**<br>30 July 2001<br>C 01-20230 JW<br>Asante Technologies Inc v PMC-Sierra Inc<br>Cited in: para 115 |
| Prima Paint Case | **U.S. Supreme Court**<br>12 June 1967<br>388 U.S. 395<br>Prima Paint Corp v Flood & Conklin Mfg Co<br>Cited in: para 32 |
| Robert Lawrence Case | **U.S. Court of Appeals, Second Circuit**<br>28 October 1959<br>271 F.2d 402, 411<br>Robert Lawrence Co v Devonshire Fabrics Inc<br>Cited in: para 32 |

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| Westinghouse Case | **U.S. District Court for the District of New Jersey**<br>18 May 1989<br>714 F.Supp. 1362<br>Republic of the Philippines v Westinghouse Electric Corporation<br>Cited in: para 33 |

## Statement of Facts

Drone Eye plc ("**CLAIMANT**") is a medium-sized producer of drones, located in Mediterraneo, with an average annual output of five drones. Equatoriana Geoscience Ltd ("**RESPONDENT**") is an Equatorianian corporation tasked with the exploration of the natural resources and the development of the infrastructure in the Northern Part of Equatoriana ("**NP Development Program**"). It was set up by and is 100% owned by the State of Equatoriana.

After lengthy planning, RESPONDENT invited tenders for the supply of drones **in March 2020** in order to gather geological and geophysical data for the NP Development Program. In this international tender process, only two bidders advanced, an Equatorianian company and CLAIMANT. Due to the excellent quality of CLAIMANT's products and an extraordinarily large price reduction, CLAIMANT's bid posed an irresistible offer. RESPONDENT was indeed so convinced of CLAIMANT's drones that they decided to buy six instead of four of the Kestrel Eye 2010 drones.

Fully aware of the political significance of the NP Development Program, CLAIMANT always sought close coordination and cooperation with the political decision makers in Equatoriana. They thus actively involved the Equatorianian Minister of Natural Resources and Development, who also approved and signed the Purchase and Sales Agreement ("**PSA**") between CLAIMANT and RESPONDENT ("**the Parties**") on **1 December 2020**. Special consideration was given to the particularities that arise when contracting with state-owned entities ("**SOEs**"). The Parties thus agreed that any dispute arising in connection with the PSA should be settled by arbitration under the auspices and rules of the Permanent Court of Arbitration ("**PCA**"). After contract conclusion, the Minister himself repeatedly assured CLAIMANT that he would take care of the necessary formalities to implement this agreement in Equatoriana.

**In February 2021**, CLAIMANT expanded their product range by introducing a new drone model, the Hawk Eye 2020. Following its presentation, RESPONDENT at first seemed concerned that the Kestrel Eye 2010 drones were misrepresented and no longer up to the newest technical standard. To clear out any misunderstandings in advance, CLAIMANT therefore scheduled a meeting in **May 2021** to discuss the issue with RESPONDENT. However, in this meeting, RESPONDENT appeared to be content with their original choice and rather used the meeting to discuss changes to the existing arbitration clause.

Hence, CLAIMANT was irritated when they received an email by Wilhelmina Queen, RESPONDENT's CEO, on **27 December 2021.** With a new government in power and thus a new political agenda in Equatoriana, Ms Queen put all of RESPONDENT's contracts relating to the NP Development Program on hold. She justified this moratorium with a corruption scandal, in which RESPONDENT's former COO, Mr Field, is alleged to have participated.

After this unexpected moratorium, CLAIMANT attempted to reach an amicable solution to the issue, yet, these efforts were brushed aside by RESPONDENT. In the discussions, RESPONDENT demonstrated a lack of understanding accompanied with unsubstantiated accusations of corruption and misrepresentation. While CLAIMANT was in general taken aback by this hostile attitude, the allegations of misrepresentation came as a particular surprise, since this issue had already been settled more than a year before. CLAIMANT was all the more perplexed to receive a letter of avoidance by RESPONDENT only two days later on **30 May 2022**.

In light of RESPONDENT's reticence to collaborate, CLAIMANT was left with no other choice than to bring a claim for damages by submitting the Notice of Arbitration ("**NoA**") to the PCA on **15 July 2022**. In their Response to the Notice of Arbitration ("**RNoA**") of **15 August 2022**, RESPONDENT reiterated their blatant allegations on a substantive level. Additionally and in contradiction to their previous commitment, RESPONDENT challenged the jurisdiction of the newly-constituted arbitral tribunal ("**the Tribunal**"). RESPONDENT bases their jurisdictional objection on an alleged lack of the Equatorianian Parliament's approval to the Arbitration Agreement.

In addition, RESPONDENT further attempts to drag out the proceedings by applying for a stay or a bifurcation of the proceedings. They argue that the Tribunal shall postpone their assessment of the corruption allegations in light of ongoing criminal investigations in Equatoriana against Mr Field. These investigations are destined to be terminated **by the end of 2023**. CLAIMANT objects to this request as they are financially dependent on a prompt resolution of the present dispute.

## Summary of Arguments

*"We need clear rules to play the game. We need to have respect for the law. If you play a chess game but after two or three moves you can change the rules, how can people play with you?"* – Ai Weiwei

When joining the game, one must play by the rules. When a State concludes cross-border commercial contracts, they must abide by the rules of international trade. When they willingly submit to arbitration, they must accept the authority of the Tribunal. However, RESPONDENT disregards all these commitments. Rather, they resort to their domestic law and home courts at every possible instance. RESPONDENT wants to play the game, but only by its own rules.

**ISSUE 1: The Tribunal has jurisdiction to hear the dispute**

The Parties concluded a valid arbitration agreement. Under the applicable Danubian Law, consent to arbitration is not subject to parliamentary approval. RESPONDENT cannot invoke its own constitutional law to frustrate the Arbitration Agreement. Further, the Tribunal's jurisdiction is not impeded by RESPONDENT's fabricated corruption or misrepresentation allegations. Not the prejudiced home courts of RESPONDENT but this impartial Tribunal has jurisdiction to hear the case.

**ISSUE 2: The Tribunal shall not stay or bifurcate the proceedings**

The Parties agreed to settle their disputes through efficient arbitral proceedings. In an effort to introduce findings of domestic Equatorianian investigations, RESPONDENT has requested the proceedings be stayed or bifurcated. However, this is neither required by law nor in the interest of procedural and economic efficiency. Rather, it would deprive CLAIMANT of their procedural rights, pose an existential risk to their business and be contrary to the parties' common intent.

**ISSUE 3: The Purchase and Supply Agreement is governed by the CISG**

The Parties have subjected their Contract to the CISG as a convention specifically tailored to the international sale of goods. Since the sale of drones falls within the Convention's scope of application, the CISG governs the PSA. As set out in Art 2(e), only aircraft are exempt from the Convention. However, drones are not aircraft for the purposes of the CISG.

**ISSUE 4: RESPONDENT cannot rely on Art 3.2.5. ICCA of Equatoriana to avoid the contract**

RESPONDENT cannot rely on their own non-harmonised domestic law to avoid the PSA. Rather, the CISG supersedes the Equatorianian International Commercial Contract Act ("**ICCA**"). As the CISG provides solutions for all of RESPONDENT's allegations, it does not leave any room for the supplementary application of domestic remedies. In any case, RESPONDENT forfeited any potential right to avoid the PSA because they did not give notice within reasonable time.

# PART I: PROCEDURAL ISSUES

## I. THE TRIBUNAL HAS JURISDICTION PURSUANT TO A VALID ARBITRATION AGREEMENT

1 CLAIMANT requests the Tribunal to determine it has jurisdiction to hear the case pursuant to the valid arbitration agreement contained in Art 20 of the PSA [*Exh C2 pp 10–11*].

2 The Tribunal shall dismiss RESPONDENT's objections to this arbitration. RESPONDENT disputes the validity of the Arbitration Agreement on two grounds. First, RESPONDENT argues that the arbitration agreement is invalid due to a lack of approval by the Equatorianian Parliament. Second, they allege that the arbitration agreement is tainted by corruption and misrepresentation.

3 However, these allegations lack any legal basis. RESPONDENT's objections rather constitute a frivolous attempt to evade the dispute resolution mechanism they freely agreed to. As an SOE RESPONDENT seeks to benefit from the home court advantage of Equatorianian state courts who will likely rule in their favour without due regard for the merits of the case. However, the jurisdiction of this Tribunal prevails. The Arbitration Agreement is neither compromised by the alleged lack of parliamentary approval (**A**) nor was it concluded through corruption or by a misrepresentation of facts (**B**).

### A. The Arbitration Agreement is valid irrespective of approval by the Equatorianian Parliament

4 RESPONDENT disputes the validity of the Arbitration Agreement by invoking a breach of Art 75 of the Constitutional Law of Equatoriana ("**CLE**"). Under Art 75 CLE, certain contracts can only be submitted to arbitration with parliamentary approval. RESPONDENT claims that no such parliamentary approval was given. However, this objection fails for two reasons: First, Equatorianian law does not apply to the issue as it is governed by the law of Danubia instead (**1**). Second, even if Equatorianian Law were applied, RESPONDENT could not rely on Art 75 CLE due to its limited scope and widely recognised principles of international arbitration (**2**).

#### 1. The Constitutional Law of Equatoriana is not applicable as the issue raised by RESPONDENT is governed by Danubian law

5 When challenging the jurisdiction of this Tribunal, RESPONDENT presupposes that Art 75 CLE can be applied. However, this is incorrect. Since the issue concerns the objective arbitrability of the dispute (**a**), it is governed by Danubian law as the lex arbitri (**b**). The lex arbitri demands exclusive application (**c**). Thus, Art 75 CLE cannot be invoked.

**a. The issue raised by RESPONDENT concerns the objective arbitrability of the dispute**

6 Art 75 CLE provides that "*in contracts relating to public works or* [...] *concluded for administrative purposes*" (both "**Administrative Contracts**") the State of Equatoriana or its entities can only submit to arbitration subject to certain conditions [*RNoA p 30 para 21*]. When such contracts are concluded with foreign entities, Art 75 requires arbitration clauses to be approved by the Equatorianian Parliament. Thereby, this provision limits the objective arbitrability of disputes arising out of Administrative Contracts.

7 In contrast, Art 75 does not restrict RESPONDENT's capacity to enter into arbitration. The notion of capacity is set out by the New York Convention ("**NYC**"). Art V(1)(a) NYC provides for the application of the parties' personal law to the question of capacity [*Van den Berg p 277*]. This rule is based on the rationale that limitations of capacity aim to protect the incapacitated, eg minors [*Fouchard et al paras 533, 539*]. However, provisions like Art 75 CLE do not have such a protective purpose but rather reflect public policy considerations [*Diallo p 16*; *Fouchard et al para 539*; *Lew et al p 735*]. This is evidenced by the fact that Art 75 CLE does not contain a complete prohibition for SOEs to enter into arbitration. It merely imposes a procedure to follow. In doing so, the provision itself recognises that Equatorianian SOEs generally have the capacity to submit to arbitration. Consequently, approval requirements such as Art 75 CLE fall outside the NYC's scope of capacity [*Galakis Case p 206*; *San Carlo Case*; *Born I para 5.03[A]*; *Fouchard et al paras 533–540*; *Nasrollahi Shari et al p 760*].

8 Rather, Art 75 CLE concerns the objective arbitrability of the dispute. Objective arbitrability determines to what extent a certain subject-matter may be resolved by arbitration [*Born I para 6.01*; *Wegen/Barth p 59*]. Art 75 CLE submits Administrative Contracts as a subject-matter to an additional requirement. If this requirement is not adhered to, the dispute may not be settled by arbitration. Thus, Art 75 CLE limits the objective arbitrability of disputes arising out of Administrative Contracts. By basing their jurisdictional objection on Art 75 CLE, RESPONDENT denies the objective arbitrability of this dispute. The applicable law has to be determined accordingly.

**b. Danubian law governs the objective arbitrability of the dispute**

9 In Art 20 of their Purchase and Supply Agreement ("**PSA**"), the parties chose Danubia as the seat of their arbitration [*Exh C2 p 12*; *Exh C9 p 22*]. Thus, the curial law in this arbitration ("**lex arbitri**") is that of Danubia. It follows that Danubian law has the closest link to these arbitral proceedings [*cf Poudret/Besson para 117*; *Waincymer para 2.5*]. Being the legal home of the arbitration, Danubia is also the forum for potential setting-aside proceedings [*Art 6 DAL*; *Poudret/Besson para 115*].

10 For these reasons, it is well-established in arbitral practice and literature that the Tribunal must apply the Danubian provisions on objective arbitrability [*Balthasar I pp 14–15*; *Berger/Kellerhals paras 188–190*; *K. Berger p 333*; *C. Koller p 142*; *Poudret/Besson paras 117, 332–333*]. Therefore, Equatorianian law and in particular Art 75 CLE are not applicable.

#### c. There remains no place for the application of Art 75 CLE

11 While Danubian Law applies to the objective arbitrability of the dispute, RESPONDENT might allege that Art 75 CLE should be applied simultaneously as the law of a potential enforcement State. Yet, the law of an enforcement State cannot be applied at the stage of arbitral proceedings [*Fincantieri Case paras 15–17*; *Berger/Kellerhals paras 190–194*; *Blessing paras 787–800*; *Furrer et al para 12*; *Hanotiau p 160*; *Oetiker para 6*; *Poudret/Besson para 333*]. Instead, the law of the seat applies exclusively [*Joint Venture Case para 2.1.2.4.3*; *Haugeneder p 397*; *C. Koller p 142*].

12 First, it cannot be predicted during the arbitral proceedings where the award will later be enforced as this would require a prejudgement of the dispute [*C. Koller p 142*]. Second, most parties voluntarily comply even with an adverse award [*Blessing para 799*; *Tevendale/Cannon p 563*]. Third, State courts can only refuse enforcement due to non-arbitrability under narrow conditions and have rarely done so in the past [*Born I para 6.02[I]*; *Gill/Baker pp 74–75*; *Mante p 291*]. Finally, the primary duty of the Tribunal is to render a legally correct award rather than an enforceable one [*Blessing paras 798–799*; *cf Hanotiau p 160*].

13 Giving in to RESPONDENT's objection would therefore result in an unjustified extraterritorial application of Equatorianian law [*cf Lazareff p 538*]. It would lead to unpredictable domestic provisions hanging over foreign parties as a Sword of Damocles. In conclusion, there is no room for the application of Art 75 CLE. Under the lex arbitri, the dispute is capable of settlement by arbitration and the jurisdiction of this tribunal prevails.

### 2. Even if the Law of Equatoriana were applied, RESPONDENT could not invoke Art 75 CLE

14 Even if the Tribunal applied Equatorianian Law to the issue raised by RESPONDENT, they could not invoke Art 75 CLE. First, irrespective of its applicability in international arbitration, Art 75 CLE does not apply to the PSA as it is not an Administrative Contract (**a**). Second, invoking any provision of domestic law to frustrate the arbitration clause would go against widely recognised principles of international arbitration (**b**). Third, applying Art 75 CLE would contradict the Parties' previous conduct (**c**).

**a. The PSA is no Administrative Contract in the sense of Art 75 CLE**

15 Art 75 CLE distinguishes between Administrative and Non-Administrative Contracts. The approval requirements contained therein only apply to Administrative Contracts. The PSA, however, does not constitute such a contract.

16 Administrative Contracts are characterised by one party acting with state authority [*Frigates Case p 43*]. Such contracts concern public services that are essential to the functioning of a State [*Bank Guarantee Case p 33*]. Only these contracts merit the additional safety net of parliamentary approval.

17 This was also stressed by the award in ICC's *Decontamination Case*. There, the tribunal pointed out that a contract can only be deemed administrative if it is "***directly related*** *to the essence of the public service*" [*Decontamination Case paras 396–399*]. In contrast, contracts that are only indirectly linked to public functions cannot be regarded as "Administrative" [*Decontamination Case para 405*; *Ouerfelli p 300*]. The notion of Administrative Contracts is therefore much narrower than RESPONDENT presumes.

18 Thus, the PSA is no Administrative Contract as it was neither concluded via state authority nor relates directly to a public service. Rather, the PSA is a mere preparatory contract to enable the exploration of the northern provinces and subsequent development of infrastructure there. CLAIMANT was only to deliver the drones, not to perform any of the exploration itself, all the less participate in the later development of infrastructure. It follows that RESPONDENT's intention to use the drones within the NP Development Program does not suffice to render the PSA an Administrative Contract. While there is currently no Equatorianian jurisprudence on the matter [*PO2 p 47 para 29*], this Tribunal shall lead the way and deny the applicability of Art 75 CLE.

**b. Invoking Art 75 CLE to frustrate the Arbitration Agreement is prohibited by a general principle of international arbitration**

19 Even if Art 75 CLE were to be found applicable, RESPONDENT could not invoke it. It is widely recognised in international arbitration that SOEs like RESPONDENT cannot frustrate arbitration agreements by relying on their own law. This principle is based on several legal considerations. First, allowing SOEs to rely on internal restrictions regarding arbitration would give them a unilateral possibility to withdraw from an arbitration agreement. Second, this would lead to considerable legal uncertainty. Third, SOEs cannot frustrate arbitration agreements they freely entered due to estoppel and venire contra factum proprium. Fourth, the application of Art 75 CLE could result in a denial of

justice. Thus, this principle is equally reflected in arbitral practice, court decisions, national laws and international conventions.

20 When RESPONDENT concluded the PSA, they consented to the arbitration clause contained therein. RESPONDENT thereby accepted to be treated as a private party equal to CLAIMANT [*cf Lew et al p 733*]. Contrary to this contractual commitment, RESPONDENT now aims to gain procedural advantages over CLAIMANT by exploiting their position as an SOE. To this end, RESPONDENT relies on Art 75 CLE, a provision that can only be invoked by Public Entities and SOEs [*Military Modernisation Case pp 98 –99*; *Poudret/Besson p 193*]. Ultimately, the application of Art 75 CLE would provide only RESPONDENT with a unilateral opportunity to withdraw from arbitration.

21 If RESPONDENT could unilaterally withdraw from the Arbitration Agreement this would impede the effective resolution of the present dispute. SOEs like RESPONDENT regularly engage in commercial contracts with private parties [*Lew et al p 733*]. Such contracts frequently contain an arbitration clause because arbitration is a neutral and effective way to settle disputes between SOEs and private parties [*Lew et al p 734]*. When concluding contracts like the PSA, parties attribute high importance to a valid arbitration agreement. However, the validity of such arbitration agreements would be threatened if domestic restrictions like Art 75 CLE could be invoked in an international context. Such restrictions are largely unpredictable for foreign counterparties like CLAIMANT because they are typically unfamiliar with the law of the other State [*Iran Case para 58; Beisteiner p 64*]. Even when foreign parties are aware of a restriction, they cannot be expected to have a comprehensive understanding of the effects it might have under the local law [*cf Beisteiner p 64*].

22 Without due regard for these difficulties, however, RESPONDENT attempts to rely on Art 75 CLE. This contradicts the principles of venire contra factum proprium and estoppel. RESPONDENT and their sole shareholder, the State of Equatoriana, have always played an active role in international arbitration. For instance, Equatoriana is a Contracting State to the New York Convention, the PCA's Founding Conventions and regularly engages in PCA Arbitration [*PO1 p 43 III para 3; RNoA p 30 para 21*]. What is more, RESPONDENT has already concluded arbitration agreements, even in the context of the NP Development Program [*NoA pp 6–7 para 16; RNoA p 29 para 13*]. As for the PSA, the Parties likewise agreed from the very beginning of their negotiations that it would include an arbitration clause. Prior to the present dispute, RESPONDENT had never objected to this arbitration clause. Only now, RESPONDENT is trying to go back on their promises by invoking Art 75 CLE. This attempt runs contrary to RESPONDENT's clear and continuous commitment to arbitration [*cf IBM Case para 85; Born I para 5.03 [E]*] and, thus, violates the principles of both venire contra factum

proprium [*Government Authority Case paras 164–165*; *Balthasar I p 111*; *Lew et al p 737*] and estoppel [*Government Authority Case paras 164–165, 170*; *Born I para 5.03[E]*; *Fouchard et al para 538*].

23 Finally, if RESPONDENT could successfully invoke Art 75 CLE, CLAIMANT would have to resort to Equatorianian state courts. However, CLAIMANT cannot expect to receive a fair judgement there, as Equatorianian State courts tend to decide in favour of the State [*PO2 p 46 para 18*]. They are regarded as unreliable even by domestic parties [*PO2 p 47 para 28*]. Ultimately, this would result in a denial of justice for CLAIMANT [*cf Mann pp 27–28*; *Paulsson p 136; Schwebel et al pp 150–151*].

24 All considerations discussed above, (i) the discriminatory character of the provision, (ii) the legal uncertainty it creates, (iii) the principles of venire contra factum proprium and estoppel as well as (iv) the threat of a denial of justice, demonstrate that RESPONDENT cannot rely on Art 75 CLE.

25 Already in 1984, Kéba Mbaye, former Vice-President of the International Court of Justice and first President of the Supreme Court of Senegal, emphasised that "*a State must not be allowed to cite the provisions of its law in order to escape from an arbitration that it has already accepted*" [*Mbaye p 163*]. While some tribunals have reached this conclusion by applying the principles of venire contra factum proprium and estoppel [*Government Authority Case paras 164–165, 170; IBM Case para 85*], others have relied on legal certainty in international trade [*Administrative Contract Case para 23; Iran Case para 58*].

26 In the landmark case of *Benteler v Belgium*, the tribunal concluded that there now exists a general principle that prevents States from frustrating arbitration agreements by invoking their domestic law [*Benteler Case paras 28–32; Beisteiner pp 59–60; Lew et al p 737; Paulsson p 163*; *Pitkowitz p 108*]. As rightly pointed out in *Framatome*, it is irrelevant *"whether this principle is considered as international public policy, as appertaining to international commercial usages or to recognized principles of public international law and the law of international arbitration or lex mercatoria"* [*Framatome Case pp 108–109; Lalive p 292*]. Accordingly, this principle has been upheld by courts and arbitral tribunals around the world, in both civil law and common law jurisdictions [*Bec Frères Case p 9*; *Cementation Int Case*; *Egyptian Authority Case p 288; Embassy Construction Case p 255*; *Gatoil Case para 20; Iran Case para 58*; *Letter of Intent Case pp 284–285*; *Phosphore Case pp 742–743; Salini Case para 161*; *Tunisia Case; Keutgen/Dal pp 44–45; Knoepfler p 136*]. It is even incorporated in some national laws [*Art 177(2) Swiss PIL*; *Art 2(2) Spanish Arbitration Act*] as well as in Art II(1) of the European Convention on International Commercial Arbitration. Therefore, the tribunal should reject RESPONDENT's attempt to invoke Art 75 CLE.

**c. CLAIMANT could reasonably rely on RESPONDENT's commitment to arbitration**

27 RESPONDENT asserts that CLAIMANT cannot rely on any "*good faith argument*" to dispute the applicability of Art 75 CLE [*RNoA p 30 para 22*]. In doing so, however, RESPONDENT disregards widely accepted principles of arbitration (supra **b**) are to be applied irrespective of any good faith on the part of CLAIMANT [*Agricultural Machinery Case pp 74–76*; *Fouchard et al para 549*; *Poudret/Besson p 189*]. Instead, SOEs like RESPONDENT are barred from relying on their domestic restrictions in virtually all cases subject to exceptions only where this would be entirely inequitable.

28 In the present case, however, upholding the Tribunal's jurisdiction is not only the legally correct but also an equitable result. Due to RESPONDENT's previous conduct, CLAIMANT could reasonably rely on the Arbitration Agreement. On RESPONDENT's part, the PSA was signed by the Minister of Natural Resources. A Minister is presumed to have the power to act on behalf of the State [*Aminoil Case para 33; Manciaux p 94*] concerning all contracts within his field [*Soerni Case para 7*]. As regards the PSA, this idea was reinforced by the Minister claiming that the parliamentary approval was just a "formality" [*Exh C1 p 18 para 9*]. Additionally, RESPONDENT even started performing the contract by making the agreed advance payment [*PO2 p 47 para 30*; *Costruzioni Generali Case para 6.2.2*]. Thus, CLAIMANT had no reason to doubt RESPONDENT's commitment to arbitration. It follows that, in light of the Parties' previous conduct, rejecting the application of Art 75 CLE constitutes an equitable solution.

**B. The Arbitration Agreement is valid and not tainted by corruption or misrepresentation**

29 In their attempt to evade inconvenient contractual obligations, RESPONDENT has accused CLAIMANT of procuring the PSA by corruption and misrepresenting the facts. However, these allegations are unfounded. Moreover, they cannot invalidate the Arbitration Agreement. It already follows from the doctrine of separability that the validity of the Arbitration Agreement has to be determined independently from the sales contract (**1**). In light of this, CLAIMANT will demonstrate that the Arbitration Agreement itself is neither tainted by corruption nor by an alleged misrepresentation of facts (**2**).

**1. The Arbitration Agreement's validity must be determined independently from the sales contract**

30 RESPONDENT contests the arbitration agreement's validity by alleging that "*the Agreement and thus also the arbitration clause contained therein, would not have been concluded but for the bribes paid and the misrepresentation by Claimant*" [*RNoA p 30 para 20*].

31 Thereby, RESPONDENT takes the view that any corruption or misrepresentation leading to the PSA's invalidity would automatically also invalidate the Arbitration Agreement. This is, however, not the case. Rather, only defects that directly concern the Arbitration Agreement can lead to its invalidity [*Harbour Assurance Case para 86; Balthasar II p 12; Huda pp 28–29; Moses p 21; Waincymer p 132*].

32 This follows from the Danubian lex arbitri and the applicable arbitration rules. Art 16(1) of the Danubian Arbitration Law ("**DAL**") as well as Art 23(1) of the PCA Rules provide for the application of the doctrine of separability. The doctrine of separability has been adopted by courts and scholars all around the world [*Lesotho Case pp 1020–1021; Prima Paint Case; Robert Lawrence Case para 410; XL Insurance Case paras 27, 36*] and is even recognised under Equatorianian Law [*PO1 p 43 para 3*]. It provides that the arbitration clause is an agreement autonomous and juridically independent from the underlying contract it appears in [*Born I paras 3.01 et seq; Feehily pp 356–357; Fouchard et al para 391–392; Leboulanger p 5; Lew et al p 102; Redfern/Hunter pp 104–105*]. Thus, the Arbitral Tribunal's jurisdiction must be determined independently from a commercial contract's validity [*Born II para 2.04; Craig et al p 48; Poudret/Besson para 163*].

33 Tribunals and courts have constantly applied the separability doctrine in cases, where a sales contract was procured by corruption or a misrepresentation of facts. In the UK House of Lords' landmark decision *Fiona Trust*, Lord Justice Langmore aptly stated that, "*it is not enough to say that the bribery impeaches the whole contract unless there is some special reason for saying that the bribery impeaches the arbitration clause in particular*" [*Fiona Trust Case para 29*]. In short, the Arbitration Agreement itself must be tainted by corruption, which has since been continuously confirmed by case law and literature [*Nat'l Iranian Oil Case para 9; Premium Nafta Products Case para 19; Westinghouse Case para 1368; Born I para 5.06[D][1][b]; Rudzka p 28*].

34 The same holds true for RESPONDENT's misrepresentation allegations: they cannot hinder the Tribunal's jurisdiction, as long as "*none of the allegations of misrepresentation is directed to the separate arbitration agreement*" [*Comandate Marine Case para 218*]. Thus, an arbitration agreement remains valid, even if the sales contract it appears in was procured by a misrepresentation of facts [*Capital Trust Case; Ferris Case; New World Case paras 13, 15; Neusser Oel Case paras 89–90*].

35 Hence, to rule on its jurisdiction, the Tribunal needs to examine whether RESPONDENT's allegations specifically concern the Arbitration Agreement. CLAIMANT will show that this is not the case.

### 2. The Arbitration Agreement itself is not affected by corruption or misrepresentation

36 Shortly after an unexpected change of government in late 2021, the NP Development Program was put to a stop [*NoA p 5 para 11; Exh C3 p 13 para 5*]. Consequently, RESPONDENT could no longer use the drones it had bought from CLAIMANT. RESPONDENT is now trying to rid itself of unwanted contractual obligations by accusing CLAIMANT of corruption and misrepresenting the facts.

37 More specifically, RESPONDENT alleges that CLAIMANT would have paid bribes to Equatorianian government officials in order to be awarded the Contract [*Exh C3 p 14 para 8*]. Further, CLAIMANT is accused of misrepresenting the facts when labelling the sold drones as their "*top model*" [*Exh C8 p 10*; *RNoA p 29 para 17*].

38 However, even if the allegations were true, quod non, they do not concern the conclusion of the Arbitration Agreement. Rather, the purpose of any potential bribes would have only been to secure the Parties' Commercial Contract. The Arbitration Agreement, in contrast, would not have been the subject of any corrupt arrangements. As Equatorianian state courts have a notoriously bad reputation [*PO2 p 47 para 28*], any comparable contract would have included an arbitration clause. Even the second bidder to the tender, a company registered in Equatoriana, had insisted on arbitration [*PO2 p 47 para 28*]. It follows that RESPONDENT's allegations of corruption, even if they were true, cannot impede the Tribunal's jurisdiction.

39 Equally, RESPONDENT's accusations of misrepresentation do not concern the Arbitration Agreement. Rather, RESPONDENT alleges that CLAIMANT had "*misrepresented the quality of the drones*" [*RNoA p 29 para 17*]. Thus, the parties are only in dispute about a misrepresentation of the quality of the contractual good, but not the arbitration clause.

40 In conclusion, the Arbitration Agreement is valid. When applying the separability doctrine, it is clear that RESPONDENT's objections relate only to the Parties' commercial contract and do not concern their Arbitration Agreement. At a later stage of these proceedings, however, the Tribunal will find that these allegations are also substantively unfounded.

41 Thus, the Arbitration Agreement is neither compromised by the alleged lack of parliamentary approval nor is it tainted by any corruption or by a misrepresentation of facts.

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42 The parties' Arbitration Agreement, as agreed upon in Art 20 PSA, is valid. Under the applicable law of Danubia, the dispute is capable of settlement by arbitration. Even if Equatorianian law were to be applied, the validity of the Arbitration Agreement prevails as RESPONDENT cannot invoke Art 75

CLE. Further, the Arbitration Agreement is not affected by any corruption or misrepresentation by virtue of the separability doctrine. Consequently, the Tribunal has jurisdiction to hear the case.

## II. THE PROCEEDINGS SHOULD NEITHER BE STAYED NOR BIFURCATED

43 Ever since the change of government in Equatoriana, RESPONDENT has been attempting to evade the PSA and to obstruct the present arbitral proceedings. In another effort to undermine this arbitration and gain home field advantage before Equatorianian criminal courts, RESPONDENT requests the Tribunal to stay or bifurcate the proceedings if it finds itself competent [*RNoA p 31 para 29*].

44 RESPONDENT bases this request on the ongoing criminal investigations by the Equatorianian State against their former COO Mr David Field, who was involved in the negotiation of the PSA. To ensure that the Tribunal does not render *"an incorrect decision*" – as RESPONDENT puts it – [*RNoA pp 30–31 para 23*] they have requested the proceedings to be stayed until the investigations are completed. Alternatively, RESPONDENT asks the Tribunal to first only rule on those substantive issues that are not examined in the Equatorianian investigations.

45 However, CLAIMANT will demonstrate that these investigations do not have any bearing on the present dispute. Neither is there any legal rule that requires the Tribunal to stay or bifurcate the proceedings (**A**), nor should it do so in exercising its discretionary power (**B**). Consequently, the Tribunal shall continue the proceedings and thereby reject RESPONDENT's attempts to sabotage due process.

### A. The Tribunal is not obligated to stay or bifurcate the proceedings

46 First, the Tribunal does not have to await an Equatorianian judgement as it has the power to rule on all aspects of the present dispute itself (**1**). Second, the applicable procedural law does not provide for a principle of lis pendens and thus contains no obligation to stay (**2**). Third, even if such a principle were applicable in this arbitration, its requirements would not be met (**3**).

#### 1. The Tribunal does not have to await a judgement by Equatorianian courts

47 Disputes involving allegations of corruption are arbitrable even if these later turn out to be true [*Fiona Trust Case paras 44–45; Mutual Insurance Case paras 107–108, 199; Fathallah pp 70–71; Fouchard et al para 586; Komuczky p 9; Nueber pp 4–5; Redfern/Hunter p 120*]. Arbitral tribunals have the power to draw the private law consequences of criminal law provisions [*Fiona Trust Case para 44; Mourre p 101; Naud p 511; Redfern/Hunter p 120–121*]. Neither Danubian nor Equatorianian law restrict the

arbitrability of contracts potentially tainted by corruption [*PO2 p 47 para 31*]. Consequently, the Tribunal does not have to await a judgement but can decide on all aspects of the present dispute itself.

### 2. Under the applicable law, there is no principle of lis pendens

48 No legal provision under the applicable DAL or PCA Rules, in particular no principle of lis pendens, requires the Tribunal to stay or bifurcate. On the contrary, Art 8(2) DAL clarifies that arbitral proceedings may continue even if an action concerning the exact same dispute is pending before a state court. This is further underlined by the vast majority of legal scholars and case law rejecting the concept of lis pendens between state court and arbitral proceedings [*Busta Case paras 210–218; Born I para 27.03[A]; De Ly/Sheppard p 21; Gaillard pp 208–209; Sanz-Pastor/Madalena p 511*].

### 3. Even if there was a lis-pendens rule, the requirements are not met

49 In any case, the principle of lis pendens does not apply to the present dispute. While RESPONDENT may refer to pending criminal proceedings against Mr Field surrounding the NP Development Program [*RNoA p 29 para 16*], they do not concern the PSA [*RNoA p 30 para 23; Exh R2 p 33*]. Apart from that, all proceedings concerning the NP Development Program are of criminal nature and have a fundamentally different scope and object than this arbitration [*Naud p 511; Stoyanov et al p 19*]. In a similar setting, an arbitral tribunal rightly refused to stay the proceedings as the parties and the circumstances of the pending criminal investigations were entirely different *[Employee Case paras 74–75; Feris/Torkomyan p 53*]. Accordingly, the proceedings in Equatoriana do not constitute a case of lis pendens.

50 Apart from the criminal proceedings relating to other contracts of RESPONDENT, there are only preliminary investigations against Mr Field. However, the conduct of such investigations alone does not require a civil court or tribunal to stay its proceedings [*IPOC Case para C.6; Besson p 104; Mourre pp 114–115; Naud p 512*]. This also holds true in Equatoriana, where state courts may very well continue proceedings notwithstanding ongoing investigations or even pending charges [*PO2 p 49 para 46*].

51 In conclusion, neither the criminal proceedings against Mr Field, that are unrelated to the present dispute, nor the State of Equatoriana's basic investigations into the PSA require this Tribunal to stay or bifurcate the proceedings.

### B. Using its discretionary power the Tribunal should continue the proceedings

52 As there is no legal obligation to stay or bifurcate the present proceedings, the Tribunal has to decide on RESPONDENT's request in exercising its discretionary powers [*IPOC Case para C.6; Besson p 104; Castagna p 366; Kurkela pp 289–290; Naud p 517*]. Such discretion is conferred upon the Tribunal not only by the procedural law of the lex arbitri, but also by the mutually agreed PCA Rules. Art 19(2) DAL and Art 17(1) PCA Rules equally provide that the Tribunal should conduct the proceedings in "*such manner as it considers appropriate*".

53 However, the Tribunal must not exercise its procedural discretion in an arbitrary manner. Rather, it has to balance the Parties' needs and the interests at stake. The Tribunal has to consider their economic and procedural effects *[Apotex Case para 10; Glamis Gold case para 12; Glencore Case para 39; Philip Morris Case para 109; Esteban pp 23–24; Feris/Torkomyan pp 52–57; Mosquera para III ; Naud pp 517–518; Poudret/Besson pp 500–506; Tallerico/Behrendt p 298*]. This is highlighted by Art 17(1) PCA Rules stating that the Tribunal "*shall conduct the proceedings so as to avoid unnecessary delay and expense*" [*Daly et al p 66*]. It follows that a tribunal may only stay or bifurcate a dispute if this would lead to significantly more efficient proceedings [*Eco Oro Case para 50; Lighthouse Case para 20; Suez Case para 272; Blavi pp 47–48*; *Castagna p 380; Feris/Torkomyan p 55*].

54 However, in most cases a bifurcation of proceedings will not foster procedural efficiency. On the contrary, empirical data demonstrates that bifurcated proceedings take longer than non-bifurcated disputes [*Greenwood p 107*]. In case of doubt, tribunals should rather continue the proceedings to avoid unjustified delays and a potential denial of justice [*IPOC Case para C.6; Besson p 105; Kurkela p 291; Redfern/Hunter p 327*]. It rightly follows that there exists "*a bias in favour of continuing the arbitration*", especially when mere investigations are pending [*Besson p 104*].

55 In the present case, staying or bifurcating the proceedings would not lead to increased efficiency, but in fact have severe detrimental consequences.

56 First, CLAIMANT would be deprived of their fundamental procedural rights if the Tribunal did not establish the facts of the dispute on its own (**1**). Second, continuing the proceedings is in line with the Parties' intent of settling their dispute in the most time-efficient manner (**2**). Third, a stay or bifurcation would pose an existential threat to CLAIMANT's business (**3**). Fourth, a stay or bifurcation would result in unnecessary delays and costs as the procedural and substantive questions of the dispute are closely interrelated (**4**). All these factors show that the Tribunal shall move forward with the proceedings. In doing so, it shall not consider Art 15 of the Equatorianian Anti-Corruption Act, as the Tribunal's award will not conflict with this provision (**5**).

### 1. The Tribunal has to safeguard CLAIMANT's fundamental procedural rights

57 The Tribunal's freedom in conducting the proceedings is limited by fundamental procedural principles, primarily by the **equality between parties** and their **right to be heard** [*Gavrilovic Case para 85; Binder pp 330–331; Born I para 15.04[B][2]–[3]; Daly et al p 66; Holtzmann/Neuhaus p 550; Poudret/Besson p 470*]. International conventions [*eg Art V(1)(b) NYC*] and arbitration laws [*eg 33(1)(a) English Arbitration Act 1996*] equally stress their importance. Further, they are emphasised by both Art 18 and 34(2)(a)(ii) DAL and Art 17(1) PCA Rules.

58 Staying or bifurcating the present proceedings until criminal investigations in Equatoriana are concluded could only contribute to procedural efficiency if the Tribunal could later use the results of these investigations or proceedings. However, such use would violate CLAIMANT's procedural rights substantially. Hence, the Tribunal has to establish the facts on its own (**a**). In doing so, it must not rely on any findings of the Equatorianian authorities (**b**).

#### a. A criminal judgement rendered by Equatorianian courts does not have binding effect in the current arbitration

59 The parties' right to be heard is one of the pillars of international arbitration [*Berger p 374*]. Thus, a tribunal has to allow the parties to express themselves on all factual aspects of a dispute and discuss the evidence submitted [*IPOC Case para C.6; Power Station Case p 444; Born I para 15.04[B][1]*; *Fouchard et al para 1639; Poudret/Besson p 473*]. However, CLAIMANT would not be a party to any criminal proceedings against Mr Field in Equatoriana. Thus, CLAIMANT would not be able to make their case in these proceedings.

60 It follows that the findings of the Equatorianian courts do not have binding effect upon this Tribunal [*Besson p 108; Gojkovic p 3*; *Stoyanov et al p 35*]. Instead, to comply with CLAIMANT's right to be heard, the Tribunal has to establish the facts of the case on its own.

#### b. The Tribunal must not rely on any findings of the Equatorianian authorities

61 In establishing the facts of the case, the Tribunal shall refrain from using any results of the Equatorianian authorities. As these courts are biassed, relying on their findings would equally violate the Parties' fundamental procedural rights.

62 If the Tribunal relied on the findings of Equatorianian authorities, CLAIMANT's right to equal treatment as set out in Art 17(1) PCA Rules and Art 18 DAL would be at risk. This is because, RESPONDENT, an entity fully owned by the Equatorianian State, can expect preferential treatment

from Equatorianian authorities. Those authorities have a notoriously bad reputation and must be regarded as perjured [*PO2 p 46 para 18 and p 47 para 28*]. Their proceedings are even subject to a predefined time frame [*RNoA p 31 para 24*] and will therefore likely lack quality. Most importantly, however, special prosecutor Ms Fonseca herself is biassed and personally involved in the matter. Her brother-in-law was the CEO of the competing bidder in the tender process [*Exh R2 p 33*]. What is more, her son's fiancée was the assistant to RESPONDENT's former COO [*Exh R2 p 33; PO2 p 49 para 43*].

63 In short, the Tribunal shall establish the facts of the case on its own and must not rely on the findings of Equatorianian authorities. Otherwise, it would violate CLAIMANT's fundamental rights to equal treatment and to be heard. Since such a violation would give rise to annulment proceedings of the award, the entire proceedings would have to be carried out again later [*Art 34(2)(a)(ii) DAL; Binder p 332; Born I para 25.05[B][6]; Hobér p 257*]. Hence, a stay or bifurcation would not yield any gains in procedural efficiency.

**2. It is in line with the Parties' intention to continue the proceedings**

64 In exercising its discretion, the Tribunal must respect the intent of the parties when concluding their arbitration agreement [*Bentolila p 149*]. When submitting disputes to arbitration, reasonable parties intend to achieve time and cost-effective decision-making [*Born I para 1.02[B][7]*]. The State of Equatoriana, RESPONDENT's sole shareholder expressly recognized the efficiency of arbitration by ratifying the 1899 Hague Convention for the Pacific Settlement of International Disputes [*PO1 p 43 para 3*]. Art 16 of this convention states that arbitration is the "*most effective, and at the same time most equitable*" means of dispute resolution.

65 In the case at hand, the Parties clearly envisaged arbitration as a time-efficient means of dispute settlement. They even emphasised this by including the UNCITRAL Expedited Arbitration Rules 2021 into the arbitration agreement at the request of RESPONDENT [*NoA p 6 para 16*]. Such intent to conduct expedited proceedings under certain circumstances speaks against a potential stay or bifurcation of proceedings [*Benedettelli p 503*; *Blavi p 47*; *Naud p 514*].

**3. A stay or bifurcation would only lead to unnecessary costs and delay as the issues of substance and jurisdiction are closely intertwined**

66 RESPONDENT requests the Tribunal to stay or bifurcate the proceedings once it has established its jurisdiction. Yet, for establishing jurisdiction the Tribunal has to examine largely the same facts that will later also be needed to decide on the substantive issues of the case. This is because the Tribunal's

jurisdiction is dependent on the same considerations as the questions that RESPONDENT asks to postpone [*Emmis Case para 51*; *Lighthouse Case para 25*]. Hence, a stay or bifurcation would cause unnecessary costs and delay.

67 RESPONDENT's fabricated allegations of corruption are relevant for both the Tribunal's jurisdiction and the validity of the Parties' PSA. Therefore, their assessment will be based on the same evidence. Consequently, a stay or bifurcation would merely lead to a repetition of witness examinations and a reopening of already established facts. This would cause additional costs and waste the valuable time of the Tribunal [*Gavrilovic Case paras 74–79, 92–93*; *Tulip Case paras 37, 44*; *Benedettelli p 499; Toledo pp 195–196*]. Further, when witnesses are examined years after the disputed events, they will have already forgotten important details of the case.

### 4. CLAIMANT's economic survival depends on the continuance of the arbitral proceedings

68 In the PSA, CLAIMANT undertook to deliver 6 Kestrel Eye drones. Thus, the volume of the contract in dispute covers more than the average annual output of CLAIMANT [*NoA p 4 para 1*]. In other words, the profit CLAIMANT would stand to make from the PSA represents the majority of their yearly revenue. Now that RESPONDENT tries to avoid the PSA, CLAIMANT is at risk of missing out on a vital part of its income. Not only would CLAIMANT suffer an unforeseeable loss of profit, but they would also have to bear the drone's production costs. Further, CLAIMANT cannot make up for this economic hit as reselling the drones would only be possible with difficulties and at a considerable price reduction [*PO2 p 46 2 para 24*].

69 However, the adverse economic effects of RESPONDENT's attempt to withdraw from the PSA go far beyond the Contract itself. Due to extensive coverage in the relevant industry journals, CLAIMANT's reputation has unjustly suffered lasting damage already [*PO2 p 46 para 24*].

70 While RESPONDENT can easily dispose of several million euros [*PO2 p 44 para 7*], CLAIMANT does not possess a comparable war chest. Therefore, CLAIMANT should not be forced to take part in unnecessarily prolonged and, thus, costly proceedings.

### 5. Continuing the proceedings would not conflict with Art 15 of Equatoriana's Anti-Corruption Act

71 RESPONDENT ignores all the factors strongly advocating for a quick settlement of the Parties' dispute. In contrast, they allege that a continuation of the proceedings and a subsequent award of the Tribunal could potentially force them to breach Art 15 of their domestic Anti-Corruption Act ("**ACA**") [*RNoA*

*p 27 para 2 and p 30 para 23*]. According to Art 15 ACA, it is "*prohibited to either directly or indirectly perform a contract for the conclusion of which undue benefits were granted*".

72 However, by complying with a legitimate award rendered by this Tribunal RESPONDENT would not violate Art 15 ACA. First, the Tribunal is competent to decide on the civil law aspects of the Parties' Contract on its own [*Fiona Trust Case para 44; Mourre p 101; Redfern/Hunter pp 120–121*]. In this respect, a criminal conviction of Mr Field would not per se constitute evidence that the PSA itself is tainted by corruption [*Minister Case*].

73 Second, even if the Equatorianian criminal court found an indication that benefits were granted for the conclusion of the PSA complying with a differing decision of the Tribunal would not constitute a breach of Art 15 ACA. This is because the Equatorianian ACA must be interpreted in light of Art 34 of the UN Convention against Corruption, to which Equatoriana and Danubia are Contracting Parties [*POI p 43 para 3*]. Art 34 provides that when addressing the consequences of corruption, due regard must be given "*to the rights of third parties aquired in good faith.*" [*Rose et al p 352*]. While any potential acts of corruption would only have occurred between the individuals acting on behalf of the Parties, CLAIMANT themselves did conclude the PSA in good faith. From the outset of their dealings with RESPONDENT, CLAIMANT did everything in their powers to prevent any kind of corruption. They implemented a robust compliance system and clear ethical rules, which are directly aimed to prohibit the grant of any benefits to governmental employees [*Exh C3 p 14 para 11; PO2 p 44 para 3*]. CLAIMANT immediately carried out internal investigations after becoming aware about the allegations against RESPONDENT. In so doing, they could quickly determine that no suspicious payments had been made from their bank accounts [*Exh C3 p 13 para 7*]. Thus, CLAIMANT can reasonably rely on the contractual rights they acquired by concluding the PSA in good faith. Art 15 ACA must be applied and interpreted accordingly.

74 Finally, an award potentially differing from a decision of the Equatorianian criminal court would also be enforceable in Equatoriana. As Equatoriana is a Contracting State of the NYC [*POI p 43 para 3*], their courts must give effect to final arbitral awards subject only to the narrowly construed grounds for refusal of enforcement [*Born I para 26.03[B][5]; Redfern/Hunter p 623; UNCITRAL Secretariat Guide p 125*]. Among these grounds are considerations of a State's public policy, such as the prevention of corruption and the finality of an award [*Westacre Case p 21*; *Hwang/Lim pp 68–72*]. In that respect, however, case law and literature have repeatedly held that the public policy of an award's finality outweighed the public policy in favour of discouraging international commercial corruption [*Honeywell Case paras 173–185*; *Hwang/Lim pp 68–72*; *McEvoy*]. Following this approach,

Equatorianian state courts will equally respect the award of this Tribunal and not refuse enforcement due to Art 15 ACA.

75 Hence, complying with an award rendered by this Tribunal would not conflict with Art 15 ACA. Thus, this provision does not require the Tribunal to stay or bifurcate the proceedings. Instead, it shall safeguard procedural and economic efficiency and reject RESPONDENT's request.

* * *

76 In conclusion, the Tribunal shall reject RESPONDENT's request to stay or bifurcate the present proceedings. A stay or bifurcation is neither required by law nor in the interest of procedural and economic efficiency. Rather, such an unnecessary prolongation of proceedings would deprive CLAIMANT of their fundamental procedural rights, be contrary to the Parties' common intent and would pose an existential risk to CLAIMANT's business.

# PART II: SUBSTANTIVE ISSUES

77 There is a common thread running through all of RESPONDENT´s accusations: By resorting to domestic law whenever it seems convenient, they undermine the core objectives of the United Nations Convention on Contracts for the International Sale of Goods ("**CISG**"). Its international character and legal certainty are entirely neglected by their parochialism. However, RESPONDENT's attempt to evade a valid contract for pure party-political reasons fails: The CISG governs the PSA since drones are not exempt from its scope by virtue of Art 2(e) (**III**). Further, RESPONDENT cannot rely on Art 3.2.5 of their International Commercial Contract Act ("**ICCA**") to avoid the PSA: The CISG provides a solution for all their allegations and thereby applies exclusively (**IV**).

## III. The PSA is governed by the CISG

78 When concluding the PSA, the Parties chose the law of Equatoriana, a Contracting State of the CISG. Thus, the CISG applies by choice of law (**A**). A contract for the sale of drones is within the CISG's scope of application, as drones are not aircraft in the sense of Art 2(e) CISG (**B**). Therefore, the sale of the Kestrel Eye 2010 drones is governed by the CISG.

### A. The Parties agreed to apply the CISG

79 In Art 20(d) of the PSA, the Parties stipulated that Equatorianian Law governs their Sales Contract [*Exh C2 p 12*]. Since Equatoriana is a Contracting State of the CISG [*PO1 p 43 para 3*], the Convention forms an integral part of its national law [*Electricity Meters Case para 12*; *Used Car Case para 40*; *Kröll Introduction para 12*]. Therefore, the Parties' choice of Equatorianian Law also encompasses a choice

of the CISG. Further, the CISG's application already follows from its Art 1(1)(a), as both CLAIMANT and RESPONDENT are seated in Contracting States of the Convention.

80 While Art 6 CISG allows parties to exclude the application of the Convention, the Parties have not done so in the present case. For an exclusion to be valid, parties must express their mutual intent to this effect [*AC Opinion no 16 para 3*; *Hachem Art 6 para 11*; *Schroeter IV para 69*]. However, it is commonly held that such an intent cannot be inferred from a mere choice the law of a Contracting State without any further indication that the parties intended the non-harmonised domestic legal rules to apply [*Boiler Case para 22*; *AC Opinion no 16 para 4(b)(i)*; *Ferrari I Art 6 para 22*; *Hachem Art 6 paras 15, 17*; *Schroeter IV para 73*].

81 The fact that RESPONDENT is an SOE does not change this conclusion. Even a State's choice of its own law would not be considered an exclusion of the CISG where the State has ratified the Convention. To the contrary, the ratification of the CISG by the State justifies the conclusion that any intention to exclude the CISG must be clearly and unambiguously expressed [*Pereira p 18*]. It stands to reason that the same principles must apply – maiore ad minus – to an SOE and thus to RESPONDENT.

82 Given that such a clearly and unambiguously expressed exclusion is not evident from the file, the Parties' choice of Equatorianian Law does not qualify as an exclusion of the CISG but rather as the choice of Equatorianian Law as a whole – including the CISG.

### B. The CISG applies to the sale of Kestrel Eye 2010 as drones are not "aircraft" in the sense of Art 2(e) CISG

83 The PSA is a contract for the sale and maintenance of six Kestrel Eye 2010 drones [*Exh C2 p 10*]. CLAIMANT's preponderant contractual obligation concerns the delivery of these goods because, first and foremost, the value of the goods amounts to almost 80% of the contractual volume [*cf Exh C2 p 11 para 4*; *PO2 p 47 para 27*]. Thus, despite the minor service element of the PSA, the entire Contract falls within the CISG's scope of application [*cf Art 3(2) CISG*; *Ferrari I Art 3 paras 13, 15*; *Hachem Art 3 paras 18, 20*; *Mankowski I Art 3 para 13*; *Mistelis/Raymond para 18*; *P. Huber I Art 3 paras 13, 15*; *Wagner Art 3 para 9*]

84 In an effort to avoid the application of the CISG and apply seemingly advantageous rules of domestic law, RESPONDENT contends that the PSA falls under the scope of Art 2(e) CISG. Pursuant to this provision, the Convention does not apply to the sale of "*ships, vessels, hovercraft or* ***aircraft***".

85 However, RESPONDENT's efforts to qualify the Kestrel Eye 2010 as an "aircraft" in the sense of Art 2(e) must fail for the following reasons: As a general matter, Art 7(1) CISG requires an autonomous interpretation of the term "aircraft" (**1**). Drones in general and Kestrel Eye 2010 in particular differ

fundamentally from an "aircraft" as regards their intended use (**2**) and their functional characteristics (**3**) The drafters of the CISG deliberately chose not to exclude drones from the CISG's scope (**4**). In any event, a restrictive interpretation of the term aircraft is imperative as Art 2(e) CISG is a fundamentally flawed provision (**5**).

### 1. Art 7(1) CISG requires an autonomous interpretation of the term "aircraft"

86 In their effort to qualify the Kestrel Eye 2010 as an "aircraft" in the sense of Art 2(e) CISG and to give meaning to the term, RESPONDENT seems to refer to the Aviation Safety Act of Equatoriana [*Exh R5 p 36*; *RNoA p 31 para 26*]. However, in doing so, RESPONDENT fails to recognize that they cannot rely on domestic legal definitions [*cf Truck Case para 39*; *Ferrari I Art 7 para 9*; *Ferrari III pp 173–181*; *Gruber para 13*; *Saenger I Art 7 paras 2, 4*; *Schroeter IV paras 126–130*; *Perales Viscasillas para 13*; *Tørum p 387*] or international aviation treaties [*cf P. Huber I Art 2 para 23*] to define the notion of an aircraft under the CISG.

87 It is trite law that the provisions of the CISG must be interpreted uniformly and thus autonomously. This general principle of interpretation follows from Art 7(1) CISG and can also be inferred from its preamble. It is necessary to achieve the core objectives of the CISG, which are promotion of international trade and the creation of legal certainty.

88 Legal commentators have continuously emphasised that, under the CISG, certain aerial vehicles are not covered by the definition of an "aircraft". This applies to drones in particular [*Hachem Art 2 para 33*; *Mankowski II Art 2 para 48*], as will be demonstrated in the following.

### 2. Drones differ fundamentally in their purpose from "aircraft"

89 It is common ground among commentators that only such vehicles that are primarily destined for air transportation can be considered an "aircraft" in the sense of Art 2(e) CISG [*Ferrari I Art 2 para 42*; *Hachem Art 2 para 33*; *P. Huber I Art 2 para 23*; *Saenger I para 11*; *Spohnheimer para 46*]. This is particularly evident from the authentic Russian text of the Convention, which expressly refers to airborne **transport** vessels ("*судов водного и воздушного* ***транспорта***").

90 Yet, only where transportation is the primary purpose of an airborne vehicle, it is considered an "aircraft" within the meaning of Art 2(e) CISG. If transportation is only a subordinate purpose of a vehicle, however, this does not make it an "aircraft" [*Ferrari I Art 2 paras 41–42*; *P. Huber I Art 2 para 23*; *Tørum p 388*]. Therefore, drones are not aircraft as they do not serve the primary purpose of

transportation (**a**). This is all the more true for Kestrel Eye 2010 which is destined for data collection and aerial surveillance (**b**). Additionally, the Parties agreed to use Kestrel Eye accordingly (**c**).

**a. Drones in general are not destined for transportation**

91 To determine the purpose of an "aircraft" under Art 2(e), one must apply an objective and abstract standard: Accordingly, the purpose for which the vehicle was built is decisive. The contractually agreed purpose of a vehicle and its specific use in an individual case are irrelevant for this determination [*cf Military Submarine Case*; *P. Huber I Art 2 para 23*].

92 Predominantly, drones are designed to gather data with the help of surveillance equipment and not to transport goods [*Hodkinson/Johnson p 13*]. A world-wide comparison showed that hardly any drones are built for transportation [*Direction Générale des Entreprises*; *DRONEII Transportation Industry*]. Remarkably, even in the transportation industry itself, only seven percent of all drones serve the purpose of transportation. The vast majority, in contrast, is destined for mapping and surveying [*DRONEII Educational Services Industry, Insurance Industry, Professional, Scientific, and Technical Service Industry*].

93 Concerning their purpose, drones are largely comparable to satellites. They also serve the main purpose of gathering data with the help of surveillance equipment [*cf NASA Satellites*]. Therefore, it is uncontested that satellites are not "aircraft" within the meaning of the CISG [*Ferrari I Art 2 para 42*; *Hachem Art 2 para 33*; *P. Huber I Art 2 para 23*; *Magnus Art 2 para 48*; *Saenger I Art 2 para 11*; *Saenger II para 11*; *Spohnheimer para 46*; *Wagner Art 2 para 17.1*]. Just like drones, satellites are theoretically capable of transporting cargo, however, it is hardly ever their main purpose.

94 In keeping with the general objectives of the Convention to promote international trade and legal certainty [*cf Hachem Preamble para 9*; *Lookofsky II p 264*; *Spohnheimer para 44*; *Tørum p 382*], the uniform interpretation of the term "aircraft" must not lead to a distinction between the vast majority of drones, which are destined for surveillance on the one hand, and the very few, used for transportation, on the other. Rather, all drones must be subjected to the Convention altogether – just like satellites.

**b. Kestrel Eye 2010 in particular is not destined for transportation**

95 Even if the Tribunal were to conclude that those drones, which are built for transportation purposes can be considered an "aircraft" in the sense of Art 2(e), the drones in question – the Kestrel Eye 2010 – do not fall under this category.

96 The Kestrel Eye 210 is destined for data collection and aerial surveillance and not for transportation purposes: "*The shape and location of the payload bays in the Kestrel Eye 2010 as well as its excellent – but costly – "flight stability" are clearly engineered towards the use for surveillance purposes*" [*PO2 pp 44–45 para 9*]. In fact, drones tailored to transportation are available at a much lower price with larger and more favourably shaped payload bays [*PO2 pp 44–45 para 9*]. Further, when the Kestrel Eye 2010 is fully loaded with surveying equipment, there remains hardly any weight and volume capacity for transportation [*PO2 pp 44–45 paras 9–10*].

97 Therefore, even if one would analyse the purpose of Kestrel Eye 2010 in particular, it would not qualify as an aircraft under Art 2(e) CISG.

#### c. The Parties agreed to use Kestrel Eye 2010 for surveillance and data collection

98 In the PSA's preamble, the Parties reiterate that the acquisition of Kestrel Eye 2010 serves RESPONDENT's purpose "*to collect the relevant geological and geophysical data*" for the exploitation of natural resources [*Exh C2 p 10*]. The Parties emphasised this main purpose of their Contract throughout the negotiations [*Exh R4 p 35*; *cf Exh C1 p 9*; *Exh C2 p 10*; *RNoA p 27 paras 3, 6*]. It follows that neither the PSA nor RESPONDENT's tender documents specify any other intended use of Kestrel Eye 2010. [*Exh C1 p 9*; *Exh C2 pp 10–11*].

99 Although the Parties were aware that in theory the Kestrel Eye 2010 may carry "*urgently needed spare parts or medicine*" too, they only intended such use in very exceptional cases [*Exh R2 p 33*]. In fact, this subordinate purpose of Kestrel Eye 2010 was only introduced by RESPONDENT to better justify the conclusion of the PSA to the public [*cf Exh R2 p 33*; *Exh R4 p 35*].

100 In conclusion, the main purpose of both drones in general and Kestrel Eye 2010 in particular is surveillance and the collection of data rather than transportation. Further, the Parties intended to use the drones accordingly. Therefore, they fundamentally differ in their purpose from "aircraft" in the sense of Art 2(e) CISG and are not excluded from the scope of the Convention.

### 3. Drones differ from "aircraft" in their functional characteristics

101 Not all aerial vehicles are "aircraft". For example, model planes [*Ferrari I Art 2 para 42*; *P. Huber I Art 2 para 23*; *Magnus Art 2 para 48*; *Mankowski II Art 2 para 21*; *Saenger I Art 2 para 11*; *Saenger II para 11*; *Spohnheimer para 46*; *Wagner Art 2 para 17.1*], kites [*Ferrari I Art 2 para 42*; *Magnus Art 2 para 48*; *Mankowski II Art 2 para 21*] and satellites [*Ferrari I Art 2 para 42*; *Hachem Art 2 para 33*; *P. Huber I Art 2 para 23*; *Magnus Art 2 para 48*; *Saenger I Art 2 para 11*; *Saenger II para 11*;

*Spohnheimer para 46; Wagner Art 2 para 17.1*] do not fall under the exception of Art 2(e) CISG, even though they can be up to ten metres long [*Mc Fadden, Rc Airplane Projects*]. What all these objects have in common is that they are unmanned aerial vehicles. Equally, drones are by their very definition "unmanned aerial vehicles" and operated remotely [*Exh C4 p 15*] In contrast, aircraft in the sense of Art 2(e) are typically manned [*cf P. Huber I Art 2 para 23*].

102 Moreover, drones differ from manned aircraft in further functional characteristics, which goes to justify their different treatment under the CISG.

103 First, drones are operated with radio control technology. Thus, they can only be flown within a limited perimeter [*cf Groves p 310; Kurisada/Premachandra p 5; Tarr/Paynter pp 387–388*]. For example, Kestrel Eye 2010 only operates within line of sight [*NoA p 5 para 9*]. In contrast, aircraft are often capable of covering thousands of kilometres [*eg Cessna Skyhawk; Airbus A350-900*]. They do not have the technical constraints of establishing a link between the pilot and the aircraft.

104 Second, the operation of drones poses unique safety risks compared to manned aircraft [*Hodgkinson/Johnson p 12; Sehrawat p 2*]. The lack of an on-board pilot requires drones to be equipped with **other safety mechanisms.** To prevent unintended interference in case of radio link failure, drones typically provide for a detect-and-avoid mechanism [*Hodgkinson/Johnson p 114; Tarr/Paynter p 34*]. Manned aircraft, on the other hand, do not require this kind of mechanism to the extent drones do. Similar tools in aircraft merely correct human error and assist the pilot. They do not to take control of the whole aircraft [*Hodgkinson/Johnson p 45*].

105 Third, all around the world, flying a manned aircraft requires years of training and obtaining a licence [*cf Chicago Convention Annex I paras 2.1–2.10*]. In contrast, drones can often be operated without such a licence, be it either because of their size or because a State does not impose any such requirements. Even where a licence is necessary, it is much easier to obtain [*cf Chicago Convention Annex I paras 2.11–2.14; Tarr/Paynter p 60 for the US*].

106 To conclude, drones differ from aircraft in several essential characteristics: They are (i) operated unmanned and (ii) within a limited perimeter only, (iii) pose unique safety risks and (iv) are subject to different licence requirements. This also evidences the need for a different legal treatment under the CISG.

### 4. The drafters of the CISG did not exempt the sale of drones from the application of the Convention

107 When the CISG was drafted during the 1970s, drones had already been invented and used in both a civilian and military context for many years [*cf Hodgkinson/Johnson pp 3 et seq*]. Thus, the drafters of

the CISG could not have been unaware of drones when preparing the exception laid out in Art 2(e). Yet, the drafters did not mention drones in the provision. However, they deemed it necessary to clarify that hovercraft are also excluded from the Convention [*Hachem Art 2 para 28*]. If they even went so far as to expressly exclude goods as rare as a hovercraft from the CISG, they should and would have done so all the more for drones. It is fair to assume that the drafters of the Convention consciously left drones unmentioned in Art 2(e) CISG.

### 5. In any case, Art 2(e) CISG is a fundamentally flawed provision and must be interpreted restrictively so as to not include drones

108 It is important to note that Art 2(e) CISG has always been heavily criticised as a provision of fundamentally flawed character [*Hachem Art 2 para 1; U. Huber p 419; Tørum p 385*]. Historically, its existence stems from domestic legal registration requirements which must be met before operating a vehicle. In some jurisdictions, they are even a precondition for the transfer of property.

109 However, commentators agree that registration requirements do not justify an exclusion of "aircraft" from the Convention's scope [*Tørum p 385; cf Piltz para 2.51; Schroeter IV para 118*]. There is no overlap between domestic regulations and the CISG: Domestic registration requirements constitute provisions of public law. The CISG is an instrument of private law, regulating the obligations of the buyer and the seller [*Art 4 CISG*; *Eiselen para 2*]. Moreover, it explicitly does not concern itself with the transfer of property [*Art 4(b) CISG*; *Djordjević para 28*; *Ferrari I Art 4 para 13*], which might be regulated by these rules. Furthermore, domestic registration requirement rules do not per se interfere with the application of the CISG [*Piltz para 2.51*]. For example, cars are also regularly subject to such registration requirements; yet, their sale is undoubtedly covered by the Convention [*Mankowski I Art 2 para 9*; *Siehr para 19*].

110 In any event, even if there were special domestic registration requirements that could impact the relationship between the buyer and the seller, this would not in itself justify the exclusion of the CISG. Ultimately, it is the very function of a uniform sales law to ensure consistent treatment of matters that are within its scope in all Contracting States [*Winship p 1058*].

111 It is telling that even the drafters of the CISG were not convinced of the exclusion of aircraft from the scope of the CISG. Notably, in the drafting process of both the CISG and its predecessor the ULIS, the perceived need to exclude aircraft led to intense discussion [*Schlechtriem p 15*; *1980 Records pp 2–3*]. It has thus always been a highly disputed provision both in literature and in practice [*Hachem Art 2 para 1; Tørum p 385*]. That is also why at the 1977 annual meeting of UNCITRAL, the delegates even

voted to delete the exclusion of Art 2(e) as a whole. Whilst this decision was later reversed, no substantive reason was put forward to explain the reversal [*Winship p 1058*].

112 In summary, it is fair to say that the exclusion of "aircraft" from the scope of the Convention is flawed. While one cannot fully ignore its existence, Art 2(e) should at least be interpreted as narrowly as possible [*Schroeter IV para 118*]. It should thus be limited to the kind of aircraft for which this exception was originally designed: manned aircraft (supra **2**).

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113 In conclusion, Art 2(e) CISG does not exempt drones from the Convention's scope of application. When interpreted autonomously, drones differ from aircraft in both their purpose and other functional characteristics. In light of this, the CISG's drafters did not refer to drones in the provision. Finally, this is reinforced by the need to interpret Art 2(e) in the narrowest way possible. As the Convention applies to the sale of Kestrel Eye 2010, the Parties' choice of the CISG prevails. Hence, the CISG governs the PSA.

## IV. RESPONDENT cannot rely on Art 3.2.5 ICCA to avoid the PSA

114 Within its scope of application, the CISG preempts the applicability of domestic law (**A**). Whether a matter is within the CISG's scope must be determined autonomously (**B**). Following such an autonomous interpretation, RESPONDENT's declaration of avoidance is governed by the CISG (**C**). In any event, RESPONDENT cannot rely on Art 3.2.5 ICCA because they failed to give notice of avoidance within a reasonable time (**D**).

### A. Within its scope of application, the CISG preempts the applicability of domestic law

115 The CISG's priority over non-harmonised domestic law is supported by the preamble as well as Art 7 of the CISG, reinforced by legal doctrine [*Benedick paras 665–667; Ferrari II p 11*; *Honnold/Flechtner para 73*; *Schroeter I pp 553–555*] and case law [*Asante Case paras 29–31*; *Cotton Case para 31*; *Electricity Meters Case para 20*; *Knitwear Case para 13*]. If domestic provisions were applied alongside the CISG, this would increase legal uncertainty and lead to the "*very same ambiguities* [...] *that the CISG was designed to avoid*" [*Asante Case para 31*]. Further, it would undermine the promotion of international trade as emphasised by Art 7(1) CISG [*Knitwear Case para 21*; *Felemegas p 5*; *Sollund p 6*; *Zeller p 252*]. Pursuant to Art 7(2), even the general principles on which the CISG is based prevail over domestic law [*Magnus Art 7 para 38*; *Perales Viscasillas para 52*]. Thus, within its scope, the CISG applies exclusively.

### B. Whether a matter is governed by the CISG must be determined autonomously

116 RESPONDENT claims they are entitled to avoid the contract by means of Art 3.2.5 ICCA, arguing that CLAIMANT's description of the goods would qualify as a misrepresentation of facts [*RNoA p 31 para 27*]. In an effort to resort to their domestic law, RESPONDENT relies on Art 4(a) CISG [*RNoA p 31 para 28*]. This provision states that the CISG is not concerned with the "*validity of the contract*", "*except as otherwise expressly provided in this Convention*". However, RESPONDENT's attempt to circumvent the CISG's application fails because (i) the CISG's scope must be interpreted autonomously and (ii) the CISG does not exclude all issues of validity. Whether a matter falls within its scope, must be established by interpreting all provisions of the CISG (iii). In the present case, this leads to the application of the CISG. Thus, RESPONDENT cannot rely on Art 3.2.5 ICCA.

117 (i) The scope of the CISG must be interpreted autonomously [*Djordjević para 14*; *Ferrari I Art 4 paras 16, 23*; *Hachem Art 4 para 31*; *Harntnell pp 46–50*; *P. Huber I Art 4 para 6*; *Magnus Art 4 para 20*; *Wagner Art 7 para 6*]. Therefore, RESPONDENT's attempt to qualify the alleged "misrepresentation" as an issue of validity under Equatorianian law has no legal bearing. If every court was to interpret the borders of the CISG by resorting to domestic law, this would lead to enormous inconsistencies. Only by way of autonomous interpretation, uniform application of the CISG is ensured [*New Zealand Mussels Case*; *Bodenheimer paras 2, 7*; *Bonell p 74*; *Ferrari I Art 7 para 9*; *Ferrari II pp 140–141*; *Liguori pp 603–604*; *Perales Viscasillas paras 1–2, 7; Sollund pp 6–8, 11*].

118 (ii) When performing such an autonomous interpretation of Art 4(a), it bears noting that **not all issues of validity are excluded** from the CISG's scope [*Art 4(a) CISG: "except as otherwise expressly provided"*; *Djordjević para 15*; *Schroeter I pp 557–558*; *Schroeter II p 233*; *Schroeter III pp 102–103*]. Rather, issues of validity are governed by the CISG where the Convention provides a "*functionally-equivalent*" solution [*Electricity Meters Case paras 52–53*; *Benedick para 909*; *T. Koller I p 13*; *Magnus Art 4 para 12*]. For example, Art 11 CISG regulates issues of formal validity [*Benicke paras 912–917*; *Djordjević para 19*; *P. Huber I Art 4 para 18*; *Mankowski I Art 4 para 12*; *Saenger I Art 4 para 4*].

119 (iii) Whether RESPONDENT's alleged "misrepresentation" falls within the CISG's scope or is excluded by virtue of Art 4(a), must therefore be established by interpreting all of its provisions [*P. Huber III p 595*; *Schroeter I pp 557–558*; *Schroeter V paras 149–151*]. As these provisions provide a functionally-equivalent solution for the alleged breach of informational duties, the Convention applies to the facts invoked by RESPONDENT.

### C. The alleged "misrepresentation" is governed by the CISG

120 RESPONDENT bases their allegation of "misrepresentation" on three factual grounds: First, that at the stage of contract formation, CLAIMANT would have made wrong statements and thereby created a false impression about the drones' quality (**1**). Second, that CLAIMANT had an obligation to disclose the launch of its Hawk Eye (**2**). Third, that the drones are not in conformity with the requirements set out in the tender documents (**3**). In contrast, RESPONDENT does not invoke that CLAIMANT had any fraudulent intent (**4**). As the Convention provides a functionally-equivalent solution for all these matters, the CISG applies.

#### 1. Art 35 provides a solution to the alleged creation of a false idea through wrong statements

121 RESPONDENT alleges that during contract negotiations, Mr Bluntschli would have made false statements regarding the quality of the drones [*RNoA p 29 para 17*]. Unlike he had stated, Kestrel Eye 2010 would not be equipped with "*state-of-the-art*" technology and would not represent Drone Eye's "*latest model*" or "*top model*" [*Exh C8 p 20*]. RESPONDENT thereby claims that they would have concluded a contract in reliance on wrong statements about the goods' quality.

122 Irrespective of the fact that RESPONDENT's allegations are incorrect, the CISG supplies a solution for them: Art 35 CISG deals with all aspects relating to the conformity of the contractual goods [*Benedick para 527*; *Kröll Art 35 paras 13–14*; *Schmid p 248*; *Stoll p 258*]. Among others, it also covers allegations that the seller provides wrong information during negotiations. Under the CISG, such wrong information becomes part of the parties' contract [*Art 8 CISG*; *Köhler p 229*; *Schroeter I p 572*]. If the seller later fails to deliver accordingly, they are liable for non-conformity pursuant to Art 35 CISG [*Benedick para 561*; *Kock pp 185, 191*; *Schmid pp 268–269*; *Wahrenberger p 165*]. Unlike in other legal systems, a wrong statement before contract conclusion does therefore not constitute a ground for avoidance in the first place. As demonstrated, the CISG adapts the obligation of the seller instead.

123 If the Parties of the present proceedings had not included a merger clause into the PSA (infra **3**), Mr Bluntschli's statements would become part of the Contract [*Art 35 CISG*]. Thus, CLAIMANT would have to deliver their "*present top model*" [*Exh R4 p 35*], its "*newest Kestrel Eye 2010*" [*Exh C2 p 10*], to RESPONDENT. As the CISG thus regulates this matter exhaustively, there is no room to avoid the Contract by relying on RESPONDENT's non-harmonised domestic law (Art 3.2.5 ICCA).

124 By alleging that Kestrel Eye 2010 is not CLAIMANT's top model, however, they ignore a crucial part of Mr Bluntschli's statement: "***for your purposes***" [*Exh R4 p 35; emphasis added*]. Which product qualifies as a top model always depends on the buyer's desires and needs. For RESPONDENT, Kestrel

Eye 2010 clearly constitutes the top model: It allows maximum flexibility when it operates in remote territory. The communication link is entirely sufficient for the purposes of RESPONDENT [*NoA p 5 para 9*; *Exh C4 p 15*]. Hawk Eye 2020, on the other hand, would not be a top-model for RESPONDENT's purposes: It requires a small airfield to start and land the drone [*NoA p 5 para 10*]. Therefore, it is not well-suited for a thickly forested mountain area where RESPONDENT wants to use the drones [*NoA p 4 para 3*; *RNoA p 28 para 5*; *PO2 p 45 para 16*]. Additionally, six Hawk Eye 2020 drones would have been more than twice as expensive as six Kestrel Eye 2010 drones and therefore would have significantly exceeded the overall budget [*Exh C3 p 14 para 9*; *PO2 p 44 para 7*]. Thus, Kestrel Eye 2010 constitutes the top model for RESPONDENT's purposes.

125 In conclusion, the CISG provides a solution for the alleged creation of the wrong perception a party gets from another party's statements. Such statements become part of a party's contract, just like in the case at hand. As demonstrated, Kestrel Eye 2010 is in conformity with the PSA. Overall, RESPONDENT cannot rely on Art 3.2.5 ICCA to avoid the PSA.

### 2. Art 35 CISG provides a solution to the alleged omission to disclose relevant information

126 RESPONDENT also alleges that CLAIMANT would have been obliged to disclose the launch of their Hawk Eye 2020. To this end, RESPONDENT refers to a decision by the Equatorianian Supreme Court on Equatorianian domestic contract law [*Exh C8 p 21*; *RNoA p 29 para 17*]. According to this decision, "*an experienced private party contracting with a newly formed government entity is under far-reaching disclosure obligations*" [*RNoA pp 29–30 para 18*]. However, this holding does not apply to the present case as the applicable CISG exhaustively regulates the omission to disclose relevant information.

127 Just like Art 35 CISG regulates the consequences of false statements made during contract formation, it also regulates the **omission** of relevant information [*Schmid pp 268–269*; *Schwenzer II Art 35 para 7*]. If the seller omits information and the buyer thereby gets a wrong perception of the sold goods, the seller must deliver accordingly [*Schroeter I pp 572–573*]. Otherwise, they are liable for a breach of Art 35 CISG (non-conformity of the goods with the contract).

128 However, if the buyer was already aware or could not have been unaware of the omitted information, the latter has no impact on the seller's obligation [*Art 8(2) CISG*; *Art 35(3) CISG*; *Farnsworth para 2.4*; *Köhler p 232*; *Schroeter I p 573*]. In this case, the buyer does not need to be protected: After all, they did not rely on the seller's statement, or at least, their reliance is a consequence of their own negligence [*Bianca Art 35 para 2.8.1*; *Brunner/Schifferli Art 35 para 22*; *Kröll Art 35 para 155*].

129 This was also emphasised by the Swiss Federal Supreme Court in its *Textile Machine Case*: It was held that the buyer cannot claim a breach of contract if the seller was entitled to expect that the buyer concluded the contract in full knowledge of all information [*Textile Machine Case para 22*]. When the buyer could not have been unaware of certain information, the seller is not obliged to actively inform them.

130 Equally, RESPONDENT could not have been unaware of Hawk Eye's launch. This information was available to the public and "*generally known in the market*" [*PO2 p 45 para 15*]. Given that the PSA represents an international multi-million-euro contract, a reasonable person in the same position as RESPONDENT would have been aware of the launch [*Art 8(2) CISG*]. Therefore, CLAIMANT was under no obligation to actively inform RESPONDENT about it. Rather, RESPONDENT neglected their duty to inform themselves sufficiently. Consequently, RESPONDENT cannot claim a breach of contract. Most importantly, this shows that the CISG governs informational duties and domestic law is not applicable.

131 Further, an additional obligation to inform RESPONDENT could have resulted from Art 35(2)(b) CISG [*Benedick paras 284–295*; *Köhler pp 231, 233*; *Schmid pp 268–267*; *Schroeter I pp 573–574*]. According to this provision, the goods must be "*fit for any purpose expressly or impliedly made known to the seller*". Thus, if RESPONDENT had specifically communicated that they want a drone like Hawk Eye 2020, CLAIMANT would have potentially been under the obligation to inform them about the launch of their new product. However, RESPONDENT never made such statements to CLAIMANT. On the contrary, Hawk Eye 2020 does not bring added benefits for RESPONDENT's communicated purpose: surveillance and collection of data (supra **III.B.2**). Particularly, there was no reason to believe that any features of Hawk Eye 2020 could even remotely justify its exceedingly high price for RESPONDENT [*Exh C3 p 14 para 9*].

132 In conclusion, the CISG exhaustively governs the alleged omission to disclose relevant information. Concerning this matter, the CISG prevails over domestic law. Hence, the jurisprudence invoked by RESPONDENT is not applicable to the present case. Under the CISG, CLAIMANT was under no obligation to disclose the launch of Hawk Eye 2020.

### 3. Art 35 CISG provides a solution to the alleged non-conformity of goods with the contract

133 It has already been demonstrated that the CISG provides a solution for both the case that wrong statements were made by the seller during contract formation (supra **1**) and that certain information was not disclosed (supra **2**). Further, the CISG also regulates all other questions regarding the

conformity of the goods with the contract. The seller is not only under an obligation to deliver goods in accordance with their statements. Rather, they also have to comply with all other relevant circumstances that form part of a contract.

134 RESPONDENT alleges that their tender documents constitute such relevant circumstances [*Exh C8 p 20*; *RNoA p 28 para 7*]. However, the Parties included a merger clause in Art 21 of the PSA, stating that the "*document contains the entire agreement between the Parties*" [*Exh C2 p 12*]. This clause must be interpreted to the effect that extrinsic evidence that would otherwise supplement or contradict the terms of the writing is barred [*AC Opinion no 3 para 4.1*]. It is in the interest of both Parties to prohibit contradictions or supplements to their obligations: One can reasonably assume that CLAIMANT and RESPONDENT did not want the former, now arrested negotiators, Mr Bluntschli and Mr Field, to potentially adapt the contractual duties [*Exh C3 p 13 paras 2, 3, 6*; *PO2 p 48 para 39*]. Nevertheless, taking the negotiations into account for mere interpretation of the PSA is consistent with their aim of legal certainty. Therefore, in the present case RESPONDENT's tender documents do not form part of the Contract [*AC Opinion no 3 para 1.4*; *cf Brödermann I para 1*; *UNIDROIT Commentary Art 2.1.17 p 65*; *Vogenauer para 5*].

135 Consequently, the PSA alone determines the Parties' contractual obligations. According to the PSA, the seller undertakes to supply (i) the "*newest model of Kestrel Eye 2010*" which (ii) must be equipped with "*state-of-the-art*" technology [*Exh C2 p10*]. When trying to rely on Art 3.2.5 ICCA, RESPONDENT alleges that Kestrel Eye 2010 would not be in conformity with these requirements [*RNoA pp 28–29 paras 7, 17*]. However, Art 35 CISG exhaustively regulates this question relating to the conformity of the goods. Therefore, all concurrent rules of domestic law are inapplicable, as the CISG demands exclusive application (supra **A**). However, the contractual goods are in conformity with the PSA in any case:

136 (i) As trivial as it might sound, there is no reason whatsoever why Kestrel Eye 2010 would not be the "*newest model of Kestrel Eye 2010*". At the time of contract conclusion, Kestrel Eye 2010 was not only the newest version of the Kestrel Eye family but CLAIMANT's newest model on the market altogether [*cf NoA p 5 para 10:* "*February 2021*"; *Exh C3 p 13 para 4:* "*December 2020*"].

137 Even if one questions the meaning of the term "*newest model of Kestrel Eye 2010*", the internationally known rule of interpretation *contra proferentem* also applies under the CISG [*Bowling Alley Case paras 19, 21*; *Audit para 45; AC Opinion no 13 pp 18–19*; *Drasch p 6*; *Honnold/Flechtner para 107.1*; *T. Koller II pp 223, 239*; *Lookofsky I paras 2.12, 7.3*; *Magnus Art 8 para 18*; *Neumayer/Ming p 115*; *Schmidt-Kessel paras 47–48*; *Zuppi para 24].*

138 It states that the party that has drafted a certain term must bear the risk of its possible ambiguity. RESPONDENT drafted the label of the drone "*newest model of Kestrel Eye 2010*" [*Exh C7 p 19 para 18*]. If they now claim that this wording could be understood differently, they conceal that they themselves used this ambiguous term. Therefore, it must be interpreted against their interests ("*contra proferentem*").

139 (ii) Further, Kestrel Eye 2010 is clearly equipped with "*state-of-the-art*" technology. The term "*state-of-the-art*" means "*best and most modern **of its type***" [*Cambridge Academic Content Dictionary*; *emphasis added*]. At the time of the PSA's conclusion, Kestrel Eye 2010 was CLAIMANT's newest drone on the market and incorporated the most modern technology [*cf NoA p 5 para 10*; *Exh C3 p 13 para 4*]. In that respect, RESPONDENT merely submits that Hawk Eye 2020 was already in development when the PSA was signed [*Exh C8 p 20*]. At that time, however, the technological features of Hawk Eye 2020 were not yet fully developed: CLAIMANT had not even applied for any patents concerning the technology used in the Hawk Eye 2020 [*PO2 p 45 para 15*].

140 Moreover, state-of-the-art refers to the most modern **of its type**: Kestrel Eye 2010 stems from a different family of drones than Hawk Eye 2020, as the name already indicates. Further, the two drones look nothing alike: One flies with the help of rotors, whereas the other uses wings [*Exh C4 p 15*; *Exh R3 p 34*]. Consequently, Hawk Eye 2020 is not the successor of Kestrel Eye 2010, but rather an entirely different model. Hence, Kestrel Eye 2010 presents a state-of-the-art drone even after the development and launch of Hawk Eye 2020.

141 In conclusion, the CISG holds a solution to the wrongly alleged non-conformity of Kestrel Eye 2010 with the PSA. RESPONDENT cannot rely on Art 3.2.5 ICCA to avoid the contract (supra **A**). In any case, the sold drones are CLAIMANT's newest model and equipped with state-of-the-art technology.

#### 4. RESPONDENT does not invoke any fraudulent intent on CLAIMANT's part

142 RESPONDENT has made the three factual allegations discussed above (**1, 2, 3**). However, they have not submitted facts that would qualify as fraud under the autonomous understanding of the CISG and, thus, would fall outside of the Convention's scope. In particular, there was no fraudulent intent on CLAIMANT's part as evidenced by the fact that not even RESPONDENT alleges so. Yet, such intent is a necessary element of fraud as understood by the CISG [*Benedick paras 370–374*]. RESPONDENT's mere reference to Art 3.2.5 ICCA (Fraud) [*Exh C8 p21*; *RNoA p 30 paras 18, 27, 38*] does not constitute an allegation of fraud: No value must be given to domestic legal qualifications as the CISG must be interpreted autonomously [*Honnold/Flechtner para 65*; *P. Huber III p 595*; *Magnus Art 4 para 12*].

### D. In any event, RESPONDENT cannot rely on Art 3.2.5 ICCA because they failed to give notice of avoidance within a reasonable time

143 Even in the unlikely case that RESPONDENT were to successfully invoke Art 3.2.5 ICCA, they could still not avoid the PSA. RESPONDENT scheduled a meeting for May 2021 to talk about the alleged misrepresentation. From that point onwards, **RESPONDENT had positive knowledge** of the relevant facts [*Exh C7 p 19 paras 14, 19*]. However, they **waited an entire year** until they terminated the Contract and gave notice to CLAIMANT [*Exh C8 p20*]. Therefore, they cannot rely on Art 3.2.5 ICCA in any case because such a claim is forfeited pursuant to Art 39(1) CISG (**1**) and Art 3.2.12 ICCA (**2**).

#### 1. RESPONDENT forfeited any potential right of avoidance pursuant to Art 39(1) CISG

144 The CISG provides for a time limit in Art 39 (1) CISG: The buyer loses the right to rely on a lack of conformity if they do not give notice to the seller within reasonable time. This also applies to domestic tort claims concurrent to the CISG as was already held in German case law [*Live Fish Case paras 141, 154*; *Schwenzer II Art 39 para 32*].

145 The reasoning of the *Live Fish Case* applies even more to the present case as Art 3.2.5 is not a tort claim, but grants a contractual right to avoidance. The PSA is in principle governed by the CISG (supra **III**). Additionally, RESPONDENT has **not given notice** of avoidance **within reasonable time**: They waited an entire year after they obtained positive knowledge about the alleged misrepresentation [*Exh C7 p 19 paras 14, 19*]. Yet, only a declaration within a time frame of four weeks is considered reasonable by case law [*Blood Infusion Devices Case p 6*; *Ceramic Case pp 2–4*; *Hygienic Tissues Case*; *Jeans Case paras 36–39*] and legal doctrine [*Kröll Art 39 para 81*; *Schwenzer I pp 358–359*]. Some courts require parties to assert their rights within an even a shorter period of time [*Fitness Equipment Case para 14*; *Laundry Machine Case para 19*].

146 Thus, RESPONDENT's declaration of avoidance was not within reasonable time. Even when factoring in the complexity of the allegations and the need for a political decision, waiting for an entire year is undoubtedly excessive and thus unreasonable for the purposes of Art 39 (1) CISG. Therefore, any potential right of avoidance under Art 3.2.5 ICCA is barred by the CISG.

#### 2. Alternatively, RESPONDENT forfeited any potential right of avoidance pursuant to Art 3.2.12 ICCA

147 Should the Tribunal, however, not consider Art 39 CISG applicable in spite of the contrary case law, Art 3.2.12 ICCA sets a domestic time limit for exercising the right to avoid a contract: the avoiding party must give notice within "*reasonable*" time, after they "*knew or could not have been unaware of*

*the relevant facts*". Yet, after already being aware, RESPONDENT dropped the matter altogether and issued a declaration of avoidance only one year later. As under Art 39 CISG, this is no longer "*within a reasonable time*" under the Equatorianian domestic standard [*Art 3.2.12 ICCA*; *Brödermann II para 1*; *P. Huber II Art 3.2.12 para 6*]. After all, a large sum of money is at stake here, on which CLAIMANT's economic situation crucially depends [*NoA p 4 para 1*]. If RESPONDENT's unscrupulous attempt was successful, CLAIMANT would be deprived of all legal certainty regarding the future of the Contract.

148 RESPONDENT refers to a domestic case where a government entity was able to avoid the Contract "*after more than a year of* ***unsuccessful negotiations***" [*RNoA p 30 para 18*; *emphasis added*]. However, in the present case all negotiations were cut off entirely at the beginning of this one-year period [*Exh C7 p 19 para 16*]. Therefore, the case referred to by RESPONDENT is different than the present dispute.

149 In short, RESPONDENT's right to avoid the PSA would be forfeited in any case. Art 39 (1) CISG and, alternatively, Art 3.2.12 ICCA both set a time limit to exercise this right. RESPONDENT exceeded this limit in either case by a large margin. Their desperate attempt to wriggle out of the PSA – simply because it has turned into a political inconvenience – is therefore deemed to fail.

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150 Art 35 CISG provides a solution for all the allegations brought up by RESPONDENT to justify their invalid declaration of avoidance. It equally governs questions as to wrong statements made by a party, the omission to disclose certain information and all other matters relating to the conformity of the goods. As the CISG applies exclusively to these issues raised by RESPONDENT, they cannot base their avoidance on Art 3.2.5 ICCA. In any case, RESPONDENT forfeited any potential right to avoid the PSA because they did not give corresponding notice within a reasonable time.

## Request for Relief

In light of the foregoing submissions, CLAIMANT respectfully requests the Tribunal to find that:

1. It has jurisdiction to hear the case.
2. The proceedings shall be continued without a stay or bifurcation.
3. The CISG applies to the Contract between CLAIMANT and RESPONDENT and thus bars the application of Art 3.2.5 ICCA.

And to order that:

4. RESPONDENT bears the costs of this arbitration.

## Certificate

We hereby confirm that this Memorandum was written only by the persons whose names are listed below and who signed this certificate. Only those sources were used which are listed in indices.

Caroline Briedl

Julian Dorffner

Laurenz Faber

Antonia Hotter

Flavia Isidori

Anna-Lisa Landrichter

Lisa Naderer

Vienna, 8 December 2022