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WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

11-17 APRIL 2025, VIENNA

MEMORANDUM FOR CLAIMANT

NATIONAL UNIVERSITY OF SINGAPORE

ON BEHALF OF	**AGAINST**
GreenHydro Plc	Equatoriana RenPower Ltd.
1974 Russell Avenue	1 Russell Square
Capital City	Oceanside
Mediterraneo	Equatoriana
CLAIMANT	**RESPONDENT**

COUNSELS FOR CLAIMANT

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INDEX OF ABBREVIATIONS

¶ / ¶¶	Paragraph / paragraphs
§ / §§	Section / sections
Answer	Answer to the Request for Arbitration dated 14 August 2024
Art. / Arts.	Article / articles
BIT	Bilateral Investment Treaty
CEO	Chief Executive Officer
CISG	United Nations Convention on Contracts for the International Sale of Goods
Claimant	GreenHydro Plc
DAL	Danubian Arbitration Law
EAL	Equatorianian Arbitration Law
Exh.	Exhibit
EWCA	England and Wales Court of Appeal
EWHC	England and Wales High Court
FAI Letter	FAI Letter dated 20 September 2024
IBA Rules	International Bar Association Rules on the Taking of Evidence in International Arbitration
Infra	See below
LAP	Legal Advice Privilege
Letter by Langweiler	Letter by Joseph Langweiler dated 14 August 2024
Model Contract	Model Contract for the Purchase of Goods and Services by Equatorianian State Entities (2022)
Model Law	UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006)
n. / nn.	Note / notes
p. / pp.	Page / pages
Parties	GreenHydro Plc and Equatoriana RenPower Ltd.
PO 1	Procedural Order 1 dated 11 October 2024
PO 2	Procedural Order 2 dated 13 November 2024
PSA	Purchase and Service Agreement dated 17 July 2023
Request	Request for Arbitration dated 31 July 2024

Respondent	Equatoriana RenPower Ltd.
RFQ	Request for Quotation dated 3 January 2023
SICC	Singapore International Commercial Court
Supra	See above
USCA	United States Court of Appeal
UMA	United States United Mediation Act
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2016
WPP	Without Prejudice Privilege

STATEMENT OF FACTS

1. The Parties to this arbitration are GreenHydro Plc ("**Claimant**") and Equatoriana RenPower Ltd. ("**Respondent**") (collectively, "**Parties**"). Claimant is a medium-sized, innovative engineering company from Mediterraneo, specialising in delivering green hydrogen plants. Respondent is a fully government-owned Equatorianian company. Having sought to decarbonise Equatoriana's steel and transport industry, Respondent invited bids for the construction and delivery of a plant that produced green hydrogen and potential derivatives.

2. In support of Respondent's decarbonisation goals, coupled with the desire to showcase their patented technology on a larger scale, Claimant submitted an offer on a cost-only basis. Demonstrating further goodwill, Claimant accepted a further 5% price reduction in exchange for excluding Respondent's right to terminate the Purchase and Service Agreement ("**PSA**") for convenience.

3. On 17 July 2023, the PSA for the construction and delivery of a green hydrogen plant was concluded.

4. Claimant went above and beyond to ensure compliance with Respondent's 25% Equatorianian local content requirement. Even though the promising partnership with Equatorianian firm P2G did not materialise, Claimant indisputably met the 25% requirement.

5. On 29 February 2024, Respondent abruptly terminated the PSA, citing a 28-day delay in delivering the final plans. In doing so, Respondent relied on Equatorianian law, which permitted state entities to terminate contracts for convenience. This was notwithstanding the explicit prohibition against termination for convenience under Art. 28(2) PSA.

6. Claimant sought an amicable resolution by initiating a meeting with Respondent on 28 April 2024. Instead of addressing the breach, Respondent's CEO Mr. la Cour derailed the conversation by levying baseless allegations against Claimant, threatening police involvement.

7. On 12 May 2024, Claimant's main negotiator, Mr. Deiman, was arrested. Sensitive documents related to PSA negotiations were seized. While investigations fell through, a document containing Claimant's internal correspondence, which was part of documents seized from Mr. Deiman, was produced in Respondent's Exhibit R 3.

8. On the same day, Claimant's CEO, Mr. Cavendish, initiated another meeting with Mr. la Cour, who insisted on a significant price deduction as a precondition for continuing the PSA. On 25 May 2024, Respondent formally offered to proceed with the PSA only if Claimant agreed to a minimum price reduction of 10%. This was despite Respondent's knowledge that Claimant was already at a EUR 15 million deficit under the PSA.

9. In light of Respondent's persistent refusal to follow through with the PSA, Claimant was left with no choice but to file a Request for Arbitration on 31 July 2024. In their Answer dated 14 August 2024, Respondent attempts to delay proceedings by arguing that mediation should have preceded arbitration despite the absence of any meaningful attempt to mediate. In addition, they seek to defend their unjustified termination of the PSA. Claimant objects to this Answer as they are financially dependent on a prompt resolution of the dispute.

SUMMARY OF THE ARGUMENT

10. **Issue 1:** The Tribunal has jurisdiction under Art. 30 PSA. Non-fulfilment of the mediation requirement in Art. 30 PSA pertains to an issue of admissibility, rather than jurisdiction. The mediation requirement in Art. 30 PSA does not constitute a condition precedent, as it lacks the required explicit language and defined consequences. Even if construed as a condition precedent, the Tribunal should waive this requirement on grounds of futility. Separate from issues of jurisdiction and/or admissibility, this Tribunal should exercise its discretion to hear the claim in the interest of cost and time savings for both Parties.

11. **Issue 2:** This Tribunal should admit Exhibit C 7 and exclude Exhibit R 3.

    Exhibit C 7: Without prejudice privilege does not automatically attach to Exhibit C 7 by virtue of a 'without prejudice' label. Without prejudice privilege does not attach to C 7 as it does not pertain to the dispute in issue, nor does it contain an admission or concession by Respondent. The confidentiality provision enshrined in Art. 15 FAI Mediation Rules does not apply to Exhibit C 7 as mediation was never commenced.

    Exhibit R 3: Legal advice privilege attaches to Exhibit R 3 as contains legal advice communicated by counsel to Claimant. Legal advice privilege is not affected by Ms. Smith's position as in-house counsel, nor the fact that she advised on Equatorianian law, a jurisdiction in which she was not qualified. Further or in the alternative, Exhibit R 3 should be excluded as it was likely improperly obtained by Respondent.

12. **Issue 3:** The CISG is applicable to the PSA. Parties chose the law of Equatoriana to govern the PSA. The CISG is part of the law of Contracting State Equatoriana. Excluding its conflict of laws principles does not preclude CISG application. Parties have their places of business in different Contracting States per Art. 1(1) CISG. Claimant is incorporated and headquartered in Mediterraneo, which constitutes its place of business. Reverse auction is not an auction in the meaning of Art. 2(b) CISG. Only a contract concluded by auction is excluded. This prevents surprise CISG application. PSA was not concluded by reverse auction. During PSA negotiations, Parties became aware of their international relationship and could not be surprised by CISG applicability. PSA is a mixed contract with preponderant sales obligation under Art. 3(2) CISG. Economic value of Claimant's sales obligation exceeds 50% of total contract price. Delivery of goods was the essential criterion of PSA.

13. **Issue 4:** Parties have not excluded the CISG from applying to PSA. There is no express exclusion that satisfies Art. 6 CISG. Parties selected the law of Equatoriana to govern the PSA.

Selecting the law of a Contracting State, while remaining silent on the CISG, is insufficient to opt out of the CISG. There is no implied exclusion of the CISG. Parties did not intend to impliedly exclude the CISG by adopting Model Contract clause that removed reference to it. Respondent cannot rely on a previous draft of the Model Contract to evince Parties' intentions. Art. 31 PSA constitutes a merger clause. It clearly operates to prevent reliance on extrinsic evidence that contradicts what Parties agreed on. The ordinary meaning derived from Art. 29 PSA is that Parties did not intend to exclude the CISG. Respondent's use of extrinsic evidence to contradict Parties' intentions is precluded. Art. 29 PSA was supplied by Respondent. Even if Respondent can rely on extrinsic evidence to cast ambiguity on Parties' intentions, Art. 29 PSA should be interpreted *contra proferentem* against Respondent.

ARGUMENTS

PART I: THIS TRIBUNAL SHOULD NOT REJECT THE CLAIM FOR LACK OF JURISDICTION, ADMISSIBILITY, OR AS PART OF ITS DISCRETION.

14. This Tribunal has jurisdiction under the valid arbitration agreement contained in Art. 30 PSA *[**A**]*. The mediation requirement in Art. 30 PSA is not a condition precedent to arbitration *[**B**]*. Even if it is condition precedent, it is an issue of admissibility and does not affect the Tribunal's jurisdiction. In any event, the mediation requirement should be waived on grounds of futility *[**C**]*. Additionally, the Tribunal should exercise their discretion to hear the claim independently of jurisdiction and/or admissibility concerns *[**D**]*.

A. This Tribunal has jurisdiction to hear and decide the case under Art. 30 PSA

1. This Tribunal has the authority to decide on its own jurisdiction

15. The doctrine of *competence-competence*, a cornerstone principle of international arbitration, empowers this Tribunal to determine the scope of its own jurisdiction *[Born, §7.01]*. Under Art. 16(1) Model Law, which has been adopted by all relevant jurisdictions *[PO 1, ¶4]*, arbitral tribunals may rule on their own jurisdiction, including objections regarding the existence or validity of the arbitration agreement.

2. Danubian Arbitration Law governs the arbitration agreement

16. This Tribunal should hold that the law governing the arbitration agreement is the law of the seat, Danubian Arbitration Law ("**DAL**"). While there are various approaches to selecting the law governing the arbitration agreement, based on Art. 34(2)(a)(i) Model Law and Art. V(1)(a) New York Convention, the law of the arbitral seat should be applied *[Born, §4.04[A]]*. In any event, even if the law governing the PSA, Equatorianian Arbitration Law ("**EAL**"), is applied, there is no difference in outcome as both countries have adopted the Model Law *[PO 1, p. 50, ¶4]*.

3. Under Danubian Arbitration Law, Art. 30 PSA is a valid arbitration agreement

17. It is uncontentious that Art. 30 PSA grants this Tribunal jurisdiction over "*any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or validity thereof*" *[Exh. C 2, pp. 12-13, Art. 30]*. Significantly, Respondent has not challenged the validity, scope, or enforceability of the arbitration agreement. Rather, the Respondent's only challenge relates to the mediation requirement contained in Art. 30 PSA being a condition precedent to arbitration *[Answer, p. 27, ¶16]*.

B. *The claim is admissible and not precluded by the non-fulfilment of mediation requirement in Art. 30 PSA*

1. The non-fulfilment of mediation requirement is an issue of admissibility and not jurisdiction

18. Respondent makes the argument that the mediation requirement in Art. 30 PSA is a condition precedent that would bar this tribunal's jurisdiction. This is incorrect.

19. As a starting point, jurisdiction refers to "*the power of the tribunal to hear a case*", whereas admissibility refers to "*whether it is appropriate for the tribunal to hear [a case]*" *[BBA, ¶74; Waste Mgt, ¶58; SL Mining, ¶15; Born, §5.08[C][1]]*. Consequently, if a tribunal lacks jurisdiction, it is barred from hearing the dispute, and Parties must seek recourse in the domestic courts. Conversely, if condition precedents are issues of admissibility, the tribunal retains jurisdiction and will examine whether it is appropriate for them to hear the case (*ie,* through examining procedural or substantive prerequisites) *[Abaclat, ¶287]*.

20. There is an established international consensus of treating condition precedent to arbitration as issues of admissibility *[Hochtief, ¶96; Telefonica, ¶157]*, judicial decisions *[SL Mining, ¶21; C v D, ¶63; BG Group, pp. 7-8]* and academic commentary *[Born, §5.08[C][1]; Born/Šćekić, p. 228; Mills, p. 282, §6.4.1; Paulsson, p. 617; Merkin, p. 105]*. The EWHC's decision in *SL Mining* extensively reviewed international authorities, concluding that "*the weight of the international authorities is plainly overwhelmingly in support of a case that a challenge such as the present [i.e., lack of compliance with pre-arbitral dispute resolution process] does not go to jurisdiction" [SL Mining, ¶21]*. As observed by learned academic Gary Born, a better approach would be to presume that the pre-arbitration procedural requirement is an issue of admissibility unless the parties have otherwise agreed *[Born, §5.08[C][1]]*.

21. As a matter of policy, condition precedent requirements should be issues of admissibility rather than jurisdiction. Fragmenting such issues between domestic courts and arbitral tribunals creates uncertainty, delays and inconsistency *[Born, §5.08[C][1]; Born/Šćekić, pp. 228, 259; BG Group, p. 1212]*. This undermines the purpose behind pre-arbitration steps, which are designed to save costs and resolve disputes efficiently without resorting to arbitration *[Pryles, p. 159]*. The importance of efficiency is especially apparent here, where Claimant required timely project completion under PSA to secure its use for future reference projects *[PO2, p. 54, ¶23]*. Secondly, recourse to domestic courts might not always be possible. If a tribunal declines jurisdiction when pre-arbitral steps are unfulfilled, domestic courts may also decline jurisdiction due to the existence of an arbitration agreement *[Kajkowska, p. 178]*.

22. Problematically, a party may unilaterally render the entire arbitration clause inoperative simply by failing to attempt mediation *[Kajkowska, p. 177]*. This effectively denies parties access to any forum for dispute resolution, a result that many jurisdictions consider legally prohibitive and one that cannot possibly reflect the parties' intentions.

23. Accordingly, the mediation requirement in Art. 30 PSA pertains to admissibility and should not deprive this Tribunal of jurisdiction over the dispute.

2. <u>As an issue of admissibility, the Tribunal has discretion to determine the effect of the mediation requirement in Art. 30 PSA</u>

24. As an issue of admissibility, the mediation requirement in Art. 30 PSA is procedural in nature. Tribunals have broad discretion to determine the effect and compliance of procedural matters *[BG Group, p. 1207; Howsam, pp. 84-85; Dialysis Access, p. 383; NWA, ¶67; C v D, ¶63; Societe Nihon Plast, p. 146; Burlington, ¶1]*. In the interpretation of Art. 30 PSA, this Tribunal can and should rely on past negotiations and conduct of Parties in the exercise of its discretion *[PO 1, p. 51, ¶5; CISG, Art. 8(3)]*.

25. Respondent may attempt to invoke Equatorianian jurisprudence to argue that mediation requirements being a condition precedent *[Exh R1, p. 30, ¶8]* is misplaced for two reasons. First, as a matter of law, DAL applies, not EAL *[supra, ¶16]*. Second, Respondent's sole evidence of this alleged jurisprudence comes from Ms. Ritter, whose testimony lacks both legal foundation and precision. Ms. Ritter, while experienced in contract negotiations *[Exh. R 1, p. 1, ¶1]*, demonstrates no legal expertise that would qualify her to authoritatively interpret case law. Indeed, her own uncertainty about whether she even communicated this alleged jurisprudence to Mr. Deiman *[Exh. R 1, p. 30, ¶8]* further undermines the reliability of her broad, uncited assertions about Equatorianian law.

3. <u>The mediation requirement in Art. 30 PSA is not a condition precedent as it does not contain the required clear and explicit language</u>

26. Pre-arbitration requirement only constitutes a condition precedent when the arbitration agreement contains explicit language establishing both specific procedural requirements and defined consequences for non-compliance with the pre-arbitration requirements *[Figueres, p. 3; Born/Šćekić, p. 249; Berger 2, p. 4]*. The mere inclusion of the pre-arbitration requirements without more is insufficient.

27. This position has been endorsed in various cases. For example, in *Tang*, the multi-tier dispute resolution clauses contained mandatory language, requiring that the Chief Executive "*shall*" attempt amicable dispute resolution before an LCIA arbitration can be commenced *[Tang, ¶62]*. The EWHC held that for pre-arbitration requirements to constitute enforceable condition precedent, the clause must prescribe "*a sufficiently certain and unequivocal commitment to commence a process*" *[Tang, ¶60]*. As the clauses "*lack[ed] sufficient definition",* were "*too equivocal*" about the required process and "*too nebulous*" regarding parties' obligations, they could not constitute enforceable conditions precedent *[Tang, ¶¶72, 82]*.

28. Similarly, in *Children's Ark*, the EWHC found language in the Dispute Resolution Procedure requiring that disputes "*shall first*" be referred to the Liaison Committee for resolution before being referred to the EWHC *[Children's Ark, ¶¶14-16]*. Although there was a "*clear chronological sequence*" in the procedure *[Children's Ark, ¶58(v)],* it was not a condition precedent as parties did not provide details on how the resolution was to take place and the time frame for such resolution *[Children's Ark, ¶¶61-66]*.

29. Even if some details on the conduct and timeline of proceedings are mentioned in the relevant clause, courts have held that a high threshold is to be met regarding the extent of detail required. In *Sulamerica*, the multi-tier dispute resolution clause stated "*prior to a reference to arbitration, [parties] will seek to have the Dispute resolved amicably by mediation*" *[Sulamerica, ¶5]*. The word "*will*" gave mediation a mandatory effect. Further, the clause provided some detail on how mediation was to take place, such as the procedure for terminating mediation and that arbitration may be commenced within 90 days of service of the termination *[Sulamerica, ¶5]*. Notwithstanding, the EWCA held that mediation was not a condition precedent to arbitration as in the "*absence of some defined mediation process*", the requirement was "*so uncertain as to render it impossible of enforcement" [Sulamerica, ¶36]*.

30. Similarly, in *CZQ*, the dispute resolution clause stated that parties "*shall*" meet to amicably resolve the dispute, and "*unless settled amicably, any dispute shall be finally settled by international arbitration*" *[CZQ, ¶10]*. Besides mandatory language used, the clause also provided some detail on the expected timeline for an amicable settlement, stating that representatives of parties are to meet within 7 days of notice *[CZQ, ¶10]*. Despite so, the SICC found that there was no condition precedent because there was no express language detailing when the right to commence arbitration arose after talks had taken place *[CZQ, ¶27]*.

31. On the contrary, what is expected for a clause to be a condition precedent is express wording such as the following: "*[i]f no solution can be arrived at in between the Parties for a continuous period of 4 (four) weeks then the non-defaulting party can invoke the arbitration clause" [Emirates, ¶3]*.

32. What is consistent across the cases is that the threshold to finding a condition precedent is high and any ambiguity must be resolved against finding preconditions *[SL Mining, ¶16; C v D, ¶42]*. This is because if the mediation requirement is treated as a condition precedent, it precludes access to arbitration which may impose disproportionate costs and unnecessary delays in the dispute resolution process, an undesirable outcome that cannot have been intended by parties *[Born, §5.08[A][4]; Born/Šćekić, p. 250]*.

33. Respondent may attempt to rely on Mr. Deiman's reference to arbitration being the *"last resort"* and that parties "*must first try to mediate their dispute before resorting to arbitration*" *[Exh. R 2, p. 31]* to establish mediation was meant to be a binding precondition. However, this pre-contractual statement does not affect the interpretation of Art. 30 PSA. Mr. Deiman's statement merely reflects the general preference for amicable dispute resolution shared by both parties, not an intention to create binding preconditions. A statement acknowledging mediation as preferable cannot transform the basic mediation clause into a condition precedent, particularly given the high threshold required for establishing condition precedents *[Tang, ¶60]*.

4. <u>Even if the mediation requirement is a condition precedent, the Tribunal should exercise its discretion to waive it on grounds of futility</u>

34. Non-compliance with pre-arbitration requirements may be excused where attempting such procedures would be an exercise in futility *[Born/Scekic, p. 253; ICC Case No. 8445, p. 168; Occidental, ¶¶19, 93-94]*.

35. For example, in *Occidental*, the BIT mandated six months of negotiations before arbitration *[Occidental, ¶90]*. Over eighteen months, the claimant consistently attempted to resolve the dispute with the respondent, who refused to compromise *[Occidental, ¶¶19, 93]*. The tribunal held that an additional six months of negotiations would be futile and thus waived the requirement *[Occidental, ¶94]*.

36. Similarly, in *Teinver*, the dispute resolution clause required parties to submit the dispute to the Argentine courts before arbitration *[Teinver, ¶107, 130]*. The parties had engaged in negotiations for "*at least 6 months*", during which the respondent initialled a draft agreement

and even obtained financing *[Teinver, ¶129]*. However, the respondent eventually refused to sign the final agreement, effectively ending progress *[Teinver, ¶¶128-129]*. The Tribunal waived the requirement to refer the dispute to the Argentine courts as engaging in further settlement "*would serve no further purpose*" *[Teinver, ¶129]*.

37. The rationale underlying these decisions is that if pre-arbitration procedures are incapable of resolving the dispute, parties would not suffer any injury from being denied participation in it *[Born/Scekic, p. 254]*. On the contrary, requiring that parties engage in unfruitful procedures would increase inefficiencies and costs.

38. Here, Respondent's consistent refusal to compromise reasonably indicates that mediation would have been a futile endeavour. In the five months between when the dispute arose (on 29 February 2024) *[Exh. C 6, p. 19]* to when Claimant initiated arbitration (on 31 July 2024) *[Request, p. 2],* Respondent never once bothered to initiate mediation between Parties *[PO 2, p. 53, ¶14]*.

39. Rather, it was Claimant who sought to resolve the dispute by initiating meetings between Parties on 28 April and 12 May 2024 *[PO 2, p. 53, ¶23]*. Like in *Occidental*, during the first meeting, Respondent refused to budge from their position. Instead, they derailed the conversation by making baseless accusations against Claimant, threatening police involvement *[Exh. C 8, p. 36, ¶¶3, 6]*. While Respondent appeared to be open to continuing the PSA during the second meeting, they "*immediately made clear*" that this was conditioned on a significant price reduction *[Exh. C 5, p. 18, ¶15].* This was shortly confirmed in a letter demanding at least a 10% cut, which would have imposed an additional EUR 28,500,000 loss on Claimant *[Exh. C 7, p. 20; see **II(B)**]*. Respondent was well aware that Claimant was a "*medium-sized*" company, taking on such a large-scale project for the first time, and was already incurring EUR 15,000,000 in losses under the PSA *[Request, pp. 2-3, 5, ¶¶1, 5, 13]*. Therefore, this demand was unreasonable and unacceptable to Claimant, as it would have been financially prohibitive. Notwithstanding, Respondent made the acceptance of the unreasonable price reduction a precondition to further negotiations by stating that *"any discussion between [Parties]…only makes sense if [Claimant was] willing to accept a serious price reduction" [Exh. C 7, p. 20; see **II(B)**]*. In contrast with *Teinver*, where the respondent made plausible concessions in the process of discussions, Respondent's demand here is completely implausible. *A fortiori*, this Tribunal should find that mediation would be futile. In the interest of an expedient resolution of the dispute, this Tribunal should waive the mediation requirement.

C. In any event, this Tribunal should exercise its discretion to hear the claim

40. Separate from jurisdictional and admissibility grounds, there are compelling prudential reasons for this Tribunal to exercise its discretion to proceed with the arbitration.

41. First, dismissing the claims would fundamentally undermine the parties' clear intention to resolve their disputes efficiently through arbitration *[Bentolila, p. 149]*. The parties deliberately chose arbitration under the FAI Rules specifically to ensure expeditious resolution of any disputes, as evidenced by their initial selection of the Expedited Arbitration Rules *[Exh. C 2, pp. 12-13, Art. 30]*. Forcing Claimant to restart proceedings would directly contradict this shared objective of efficient dispute resolution.

42. Second, dismissal would impose disproportionate and prejudicial delays on Claimant. Time is of the essence in this dispute, as Claimant requires timely project completion to secure crucial reference projects for its future business development *[PO 2, p. 54, ¶22]*. Any further procedural delays would irreparably harm Claimant's ability to showcase its innovative technology during the critical market growth period expected from 2026 onwards *[Request, p. 4, ¶9]*.

43. Third, both parties have already invested substantial resources in these proceedings, including payment of the EUR 900,000 advance on costs *[FAI Letter, p. 42]*. Requiring the parties to pursue mediation or seek recourse to domestic courts would needlessly duplicate these costs and efforts, contrary to the fundamental principle of procedural efficiency underlying both the FAI Rules and the Model Law *[Born, §1.02[B][7]]*.

44. Therefore, this Tribunal should exercise its discretion to hear and decide Claimant's claims on their merits.

PART II: THIS TRIBUNAL SHOULD ADMIT EXHIBIT C 7 AND EXCLUDE EXHIBIT R 3

45. To ensure a fair determination of this dispute, established principles of international arbitration and the IBA Rules on Taking of Evidence ("**IBA Rules**") should be applied ***[A]***. Consequently, Exhibit C 7 ***[B]*** should be admitted, while Exhibit R 3 should be excluded ***[C]***.

A. The IBA Rules should guide this Tribunal's determination of evidentiary issues

1. The FAI rules govern as *lex specialis* for procedural issues

46. As Parties' chosen institutional rules, the FAI Rules constitute *lex specialis* and must be applied first to determine evidentiary matters *[Exh. C 2, pp. 12-13, Art. 30]*. Under established principles of international arbitration, institutional rules selected by the parties take precedence over the *lex arbitri* for procedural issues *[Henderson, ¶7]*.

2. The FAI rules grant this Tribunal broad discretion over evidentiary matters

47. Art. 34.1 FAI Rules empowers this Tribunal with the broad discretion to "*determine the admissibility, relevance, materiality and weight of the evidence*". This discretion aligns with Art. 19(2) Model Law, which has been adopted without modifications in Danubia which is the *lex arbitri [supra, ¶16]*. This discretion allows this Tribunal to adopt the most suitable framework for resolving complex evidentiary issues.

3. This Tribunal should exercise its broad discretion by adopting the IBA Rules

48. This Tribunal should refer to the IBA Rules for guidance in exercising its discretion on evidentiary matters. Although not binding unless expressly adopted by the parties, IBA Rules are widely recognised as representing international standards in evidentiary issues *[Waincymer, §10.3.2.1; Catelli/Brueggemann, p. 1]*. Therefore, even without formal adoption by the parties, tribunals commonly apply the IBA Rules as they reflect best practices *[Clarke/Tutt, p. 1]*. Their acceptance arises from their ability to harmonise differing legal traditions while offering practical and specific guidance *[IBA COI Guidelines, pp. 4-5]*. Further, the IBA Rules were designed to provide an "*efficient, economical and fair process*" for taking evidence in international arbitration *[IBA Rules Commentary, p. 4]*.

B. The IBA Rules direct this Tribunal to apply Equatorianian law for the determination of the privilege issues surrounding Exhibit C 7 and R 3

1. The Parties' dispute on the exclusion or admission of Exhibit C 7 and R 3 centre on privilege

49. The current evidentiary dispute involves fundamental privilege issues. Respondent seeks to exclude Exhibit C 7 based on ‘without prejudice’ privilege (“**WPP**”), arguing it contains confidential settlement communications *[Answer, p. 27, ¶17]*. Meanwhile, Claimant seeks to exclude Exhibit R 3 based on legal advice privilege (“**LAP**”), as it contains communications between Claimant and their in-house counsel about legal matters *[Letter by Langweiler, p. 34]*.

2. IBA Rules direct this Tribunal to first determine the applicable privilege law governing Exhibits C 7 and R 3.

50. While the IBA Rules recognise several grounds of exclusion for privileged documents, Art. 9(2)(b) IBA Rules direct tribunals to apply "*legal or ethical rules determined by the Arbitral Tribunal to be applicable*" when assessing privilege claims. This empowers the Tribunal to select the most appropriate legal framework for evaluating privilege, considering the nature of the communications and Parties' legitimate expectations.

3. The ‘Most Favourable Privilege’ test should be applied to determine the applicable privilege law

51. The ‘Most Favourable Privilege’ test should be used to determine the applicable legal rule. Under this test, the rule of privilege which affords the greatest protection to both parties would apply *[ICSID Case No. ARB/13/8, pp. 6–7; Carter, p. 178]*. Not only has this approach been endorsed in international practice *[EC Regulation 1206/2001, Arts. 14, 17]*, it is justified as it ensures equal treatment of parties *[O'Malley, p. 304]*.

52. Common law systems generally impose stronger obligations to produce evidence than civil law systems, resulting in divergent privilege standards *[Waincymer, sec. 10.17.6; Exh. R 4, p. 33]*. As put in *ICSID Case No. ARB/13/8,* the application of divergent standards leads to the unsatisfactory result “*affect[ing] the balance and equality of treatment of parties...creating a clear imbalance*” *[ICSID Case No. ARB/13/8, ¶16]*. By adopting the broadest available privilege, neither party is disadvantaged by being required to disclose evidence that would otherwise be protected. This thereby maintains equality of treatment and procedural fairness *[Berger, p. 177; Schlabrendorff/Sheppard, pp. 768–769]*.

4. The ‘Closest Connection’ test should not be applied as it yields contradictory results

53. In the alternative, Respondent may argue that the 'Closest Connection' test should be applied, further arguing that it results in the application of Mediterraneo law.

54. While some tribunals have adopted this test, it is highly problematic as it generates uncertainty in two ways: First, there is no agreed set of factors that the court considers in determining said 'closest connection'. A non-exhaustive list of factors that have been considered include: (1) the jurisdiction where the attorney is admitted to practice; (2) where the attorney-client relationship has its predominant effects; (3) the domicile of the party claiming privilege; (4) where the document is located/stored; (5) where the document was created; (6) where the document was sent; and/or (7) law of the party who received the document *[ICC Case No. 2730, p. 914; Sindler/Wustemann, pp. 618–620; Yeoh/Lai, p. 309; Kuitkowski, pp. 92–93; Born, §16.2]*. Second, applying any of these factors may lead to several laws potentially applying. As there is no guidance as to when one takes precedence over the other, parties may be subjected to an unexpected standard of privilege *[O'Malley, pp. 303–304; Tevendale/Cartwright-Finch, p. 831]*.

55. This undesirable outcome can be illustrated by applying the test here. For Exhibit C 7, factor (5) suggests that Equatorianan law should apply, as the document was created by Respondent in Equatoriana, while factor (7) indicates Mediterranean law, where Claimant received the document. For Exhibit R 3, factor (1) would point to Mediterranean law, as Claimant's counsel is admitted to the Mediterraneo Bar *[Exh. R 3, p. 32]*, while factor (2) would favour Equatorianian law, as the legal advice pertains to Equatorianian law *[Exh. R 3, p. 32]*.

56. Even if a single law applies to a document, different laws may apply to different documents within the same proceeding. However, applying inconsistent privilege standards within the same case can result in procedural unfairness that disadvantages a party *[UPS v Canada, ¶9]*.

57. Under Art. 9.4(e) IBA Rules, tribunals must consider "*the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules*". Applying the 'Closest Connection' test is precisely an instance where issues of fairness and equality arise as one party may obtain greater protection for its communication than the adverse party *[O'Malley, pp. 303–304; Tevendale/Cartwright-Finch, p. 831]*.

58. In this case, Equatoriana has more extensive privilege rules than in Mediterraneo *[Exh. R 4, p. 33]*. This inconsistency may disadvantage Parties, who would have to produce internal documents according to a changing standard of document protection. Thus, the 'Closest Connection' test should not apply.

5. Applying the 'Most Favourable Privilege' test, Equatorianian law governs issues of privilege

59. Applying the 'Most Favourable Privilege' test, Equatorianian law applies. Equatoriana follows the common law approach that has "*detailed rules on privilege... such as the [United States] or those jurisdictions which have followed the American approach*" *[Exh. R 4, p. 33]*. In contrast, Mediterraneo and Danubia do not have as detailed rules for WPP and "*no rules on legal privileges"* for LAP *[Exh. R 4, p. 33]*. Thus, applying Mediterraneo or Danubian law would place Parties on an unequal footing as Claimant could be forced to produce sensitive documents that would have otherwise been shielded from disclosure. To ensure equal treatment, Equatorianian law should apply to both Exhibits C 7 and R 3.

C. Under Equatoriania law, Exhibit C 7 is admissible as it is not protected by without prejudice privilege or confidentiality

60. The Tribunal should admit Exhibit C 7 because it falls outside the scope of WPP *[**B1**]*. Exhibit C 7 is not, and should not, be protected by the confidentiality provision enshrined in Art. 15 FAI Mediation Rules *[**B2**]*.

1. The mere presence of a "without prejudice" label is not determinative for conferring privilege protection

61. While Exhibit C 7 is labelled "without prejudice", this alone is insufficient to invoke privilege protection. Common law courts have consistently held that the privilege determination requires an objective assessment of the communication's substance, not just its form. In *Bellatrix*, the court emphasized that 'without prejudice' is not conclusive; rather, the contents must evidence a genuine attempt at compromise *[Bellatrix, ¶25]*. Similarly, in *Sin Lian Heng Construction*, the court found that a 'without prejudice' letter seeking additional time for payment could not attract privilege because it lacked any actual effort to resolve the dispute *[Sin Lian Heng Construction, ¶33]*. The decision in *Chocoladefabriken Lindt* further underscores that labels are subordinate to content, as communications without the 'without prejudice' label were deemed privileged based on content *[Chocoladefabriken Lindt, ¶289]*. Accordingly, while Exhibit C 7 is marked 'without prejudice', this notation is not conclusive and an examination at the content of the communication is required.

2. The 'without prejudice' privilege rule does not apply to Exhibit C 7

62. Exhibit C 7 cannot benefit from WPP because it contains no genuine attempt to settle Parties' dispute about termination, instead presenting only non-negotiable demands for price reductions.

For WPP to attach, communications must be made as part of genuine negotiations aimed at settling a dispute *[Liew, p. 6; Ernest Ferdinand, ¶¶90-95]*. In considering whether communications whether or not a communication is part of a genuine negotiation aimed at settling a dispute, common law courts often examine two key factors: (1) whether the communication is centred on the dispute between the parties; and (2) whether it contains admissions or concessions made for the purpose of *settlement [Rush & Tompkins, p. 1299; Mariwu, ¶¶29, 31; Sin Lian Heng, ¶13]*.

63. Examining the first factor, Exhibit C 7 does not appear to be an attempt to settle the Parties' dispute. The central disagreement concerned whether Respondent's 29 February 2024 letter validly terminated the PSA *[Exh. C 6, p. 19; Request, p. 7, ¶34(2); Answer, p. 28, ¶21; PO 2, pp. 54-55, ¶23]*. However, rather than addressing this termination issue, Exhibit C 7 contains Respondent's demand for a price reduction under the PSA, presupposing that termination had already occurred *[Exh. C 7, p. 20]*. This is reminiscent of *Sin Lian Heng,* where the court found that communications focused on locating missing copper cables, rather than determining liability for the loss, did not pertain to the dispute and thus could not attract WPP *[Sin Lian Heng, ¶16]*. By raising a separate issue of potentially reviving the PSA under new terms, Exhibit C 7 does not directly engage with the question of valid termination.

64. Furthermore, under the second factor, Exhibit C 7 lacks clear admissions or concessions made for the purpose of settlement. WPP aims to protect against the use of compromise proposals made in an effort to resolve the dispute, recognising that such communications may diverge from parties' true legal positions *[O'Malley, p. 254; Rush & Tompkins, p. 1299]*. The Iran-US Claims Tribunal in *Mobil Oil* confirmed this principle, holding that settlement privilege only protects "*proposals and concessions that either party might have made in the course of such negotiations*" when made as part of formal settlement efforts *[Mobil Oil, ¶162]*. The court reasoned that these communications deserve protection precisely because they represent departures from parties' true legal positions for the sake of settlement. The presence of actual concessions or compromise proposals thus serves as a key indicator of genuine settlement intent. This distinction was reinforced in *Buckinghamshire County Council*, where the court held that communications merely attempting to persuade the other party of one's position, without demonstrating any willingness to compromise, cannot be protected *[Buckinghamshire County Council, p. 636]*.

65. Here, rather than containing proposals or concessions for resolving the termination dispute, Exhibit C 7 presents a non-negotiable demand that "*any further discussion made only sense if*

Claimant was willing to talk about serious price reduction of 15%" [Exh. C 7, p. 20]. Furthermore, the broader context surrounding Exhibit C 7 further undermines Respondent's claim of privilege. Respondent issued this communication as part of a broader pattern of attempting to renegotiate contracts following its policy changes *[PO 2, p. 55, ¶25]*. This systematic approach to demanding price reductions, which resulted in a 7% reduction in another contract *[PO 2, p. 55, ¶25]*, reveals that Exhibit C 7 was not a discrete attempt to settle the specific termination dispute with Claimant.

3. <u>Art. 15 FAI Mediation Rules regarding confidentiality do not apply to Exhibit C 7</u>

66. The confidentiality provision enshrined in Art. 15 FAI Mediation Rules does not apply to Exhibit C 7.

67. Art. 15 FAI Mediation Rules establish clear temporal boundaries for confidentiality protection, protecting only statements "*made or obtained during the mediation*". It further limits confidentiality to specifically "*the parties, the mediator, the FAI and any other person participating in the proceedings*". Therefore, the confidentiality protection is only engaged when mediation proceedings are formally commenced, specifically when the FAI receives a Request for Mediation *[FAI Mediation Guidelines, ¶26]*.

68. Although there is limited published case law or commentary specifically interpreting the provisions of the FAI Mediation Rules, valuable guidance can be derived by analysing the confidentiality rules of other prominent dispute resolution frameworks. For example, Art. 6 of the UNCITRAL Mediation Rules, similarly titled 'Confidentiality', provides that "all information relating to the mediation" shall be kept confidential. In the UNCITRAL Notes on Mediation, an explanation of this Article emphasises this temporal limitation, stating that "*the date of commencement of the mediation...marks the starting point of the obligation of confidentiality*" *[UNICTRAL Notes of Mediation, ¶26]*.

69. While there exist frameworks that take a broader view on confidentiality and extend its protection to pre-mediation correspondence, such an extension only happens in very narrow circumstances. For instance, the United States Uniform Mediation Act ("**UMA**") protects communications made "*for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation*" *[UMA, §2(2)]*. This protection is deliberately *"narrowly tailored"* and covers situations such as "*explanation of the matter to an intake clerk" [UMA, p. 4]*. Such a narrow interpretation is justified as it would prevent an abuse of the system

where parties attempt to hide evidence. Further, it reduces uncertainty as it prevents the extension of privilege far before mediation has even taken place *[UMA, p. 4]*.

70. In the present case, the communications in Exhibit C 7 occurred well before any mediation was contemplated and contain nothing related to establishing a mediation process. They were part of ordinary business discussions, unrelated to any formal mediation process. Accepting Ms. Ritter's testimony suggesting that "*Article 15 of the Mediation Rules should also extend to all negotiations preceding mediation*" *[Exh. R 1, p. 30]* would effectively render all business communications confidential simply because they occurred before a potential future mediation. Furthermore, even if a more liberal approach is taken on confidentiality obligations in meditation such as the UMA, it would still not be protected as the communication did not contain discussions about initiating a mediation process nor was a mediation process ever initiated.

71. Respondent may point to Mr. Deiman's email stating that "*Article 15 of the Mediation Rules and Articles 51 and 52 of the Arbitration Rules...should be sufficient to address your concerns as they ensure the needed confidentiality*" *[Exh. R 2, p. 31]*. However, this email simply confirms that formal mediation and arbitration proceedings would be confidential, it does not suggest that confidentiality would extend to preliminary communications.

D. Under Equatoriana law, Exhibit R 3 should be excluded as it is protected by legal advice privilege and was improperly obtained

1. <u>Exhibit R 3 is protected by legal advice privilege</u>

72. The email exchange in Exhibit R 3 should be excluded as it contains privileged legal communications between Claimant's in-house counsel and authorized company executives made for the purpose of obtaining legal advice.

73. While there is no single authoritative test for attorney-client privilege in U.S. law, courts have consistently recognized four basic elements necessary to establish its existence: (1) a communication; (2) made between privileged persons; (3) in confidence; (4) for the purpose of seeking, obtaining or providing legal assistance to the client [*Wigmore, p. 554; United Shoe Mach. Corp., p. 358-59*]. These requirements align with international arbitration practice, where LAP is widely recognized as a transnational procedural rule. The *Bank for International Settlement*s tribunal established similar criteria: (1) the communication must contain confidential legal advice; (2) the advice must be given by legal counsel; (3) the counsel must be providing advice to authorized decision-makers; and (4) the advice must be given in contemplation of a legal decision *[O'Malley, pp.292-293; PCA Case No. 2000-04, p. 10]*.

74. The communication in Exhibit R 3 clearly satisfies these established criteria. First, Ms. Smith provided the advice in her role as head of Claimant's legal department specifically to analyse "*potential liability risks under Equatorianian law*" *[PO 2, p. 53, ¶11]*. The communication was treated as confidential, protected by employee confidentiality agreements *[PO 2, p. 55, ¶28]*, and was never voluntarily disclosed. Second, Ms. Smith provided this advice in her capacity as head of Claimant's legal department *[PO 2, p. 53, ¶11]*. Third, the advice was given to Mr. Deiman, Head of Contracting, and Mr. Cavendish, the CEO, both authorized decision-makers regarding the contract negotiations *[Exh. R 3, p. 32]*. Fourth, Ms. Smith's analysis focused specifically on legal risks relating to potential misrepresentation claims and binding commitments in contract negotiations making it clearly legal rather than business advice *[Exh. R 3, p. 32]*.

75. Given that Exhibit R 3 meets the general requirements for LAP, and that Equatorianian law appears to grant broad protection to such communications, the Tribunal should uphold Claimant's assertion of privilege and exclude the document.

2. <u>Ms. Smith's position as an in-house counsel does not undermine the privileged nature of Exhibit R 3</u>

76. Under Equatorianian law, LAP protects communications from in-house counsel *[PO 2, p. 55, ¶29]*. The courts in the United States ("**US**") have consistently held that "*the attorney-client privilege applies to 'in-house' counsel just as it would to any other attorney*", provided that counsel made communications "*in his capacity as [a] legal advisor*" *[Neuder, p. 293]*. This is because the rationale underlying LAP applies equally to in-house counsel, promoting the administration of justice by encouraging full and frank disclosure between attorney and client *[Upjohn, p. 389]*. In the context of corporations, this ensures legal compliance and effective corporate governance *[Tatneft, ¶27]*. As Equatorianian law has largely adopted the American position, it is authoritative *[Exh. R 4, p. 33]*. Beyond the US, this position has been largely affirmed by tribunals *[Lone Pine, ¶5; PCA Case No. 2009-04, ¶21; Burlington Resources, ¶121; CME Czech Republic BV, ¶64]*. Further, the IBA Task Force Report confirms that the majority of common law jurisdictions and even several civil law jurisdictions have extended LAP protection to in-house counsel communications *[IBA Report, p.4]*.

77. Here, Ms. Smith provided legal advice on contract law, thereby recommending steps Claimant can undertake to avoid potential legal liability *[Exh. R 3, p. 32]*. As she was clearly acting in her capacity as a legal advisor, LAP extends to protect Exhibit R 3.

3. Ms. Smith's provision of legal advice outside her jurisdiction does not undermine the privileged nature of Exhibit R 3

78. Although Ms. Smith is not admitted to the Bar in Equatoriana, under Equatorianian law, LAP still extends to communications from qualified lawyers providing legal advice, regardless of their jurisdiction of admission.

79. US courts take an inclusive approach to privilege protection for foreign legal practitioners. For instance, in *Renfield,* the court held that privilege generally extends to practitioners who are "*competent to render legal advice and permitted by law to do so*", establishing functionality rather than formal credentials as the decisive factor. Thus, the court held that LAP protected communications from an in-house lawyer called to the Bar in France who advised on US law *[Renfield, pg. 444].* Beyond the US, the common law adopts the same approach. In *Tatneft*, the EWHC rejected the notion that LAP should be limited based on local bar admission, holding that the critical factor for privilege is the "*function of the relationship and not the status of the lawyer" [Tatneft, ¶57].*

80. Indeed, this position is justified given the international nature of corporations in the modern day, resulting in "*many foreign countries treat their patent agents as the functional equivalent of an attorney*" *[Golden Trade, pp. 519-521].* Divergent approaches between how LAP is applied to foreign and domestic lawyers would create issues of uncertainty and comity "*if the court were obliged to express views on the qualifications and regulation of foreign lawyers*" *[Tatneft, ¶47].*

81. Ms. Smith was admitted to the Bar in Mediterraneo and was acting squarely within her capacity as legal counsel when analysing potential liability risks under Equatorianian law *[supra, ¶75].* Therefore, the fact that she gave advice outside of her admitted jurisdiction does not vitiate the privilege that attaches to her confidential legal advice to her client *[Exh. R 3, p. 32]*.

4. Further or in the alternative, Exhibit R 3 should be excluded as it likely constitutes improperly obtained evidence

82. While international tribunals "*take a liberal approach to the admissibility of evidence…such discretion is not absolute" [EDF, ¶47]*. Improperly obtained evidence should be excluded under Art. 9.2(g) IBA Rules, based on "*considerations of procedural economy, proportionality, fairness or equality*" *[O'Malley, ¶¶9.117-9.118; EDF, ¶47].*

83. For instance, in *Methanex*, the US sought to rely on evidence that US state intelligence agents had obtained by trespassing onto private property. The UNCITRAL tribunal held that the US

had acted in reckless disregard of the law, and the evidence was excluded for their failure to act in good faith *[Methanex, p. 25]*. In *Libananco*, the complainant argued that the Turkish government was using separate police investigations to aid its case preparation. The ICSID tribunal held that *[Libananco, ¶42]*:

> *"The Tribunal recognizes that the Respondent may in the legitimate exercise of its sovereign powers conduct investigations into suspected criminal activities in [its jurisdiction].* ***The Respondent must, however, ensure that no information or documents coming to the knowledge or into the possession of its criminal investigations authorities shall be made available to any person having any role in the defence of this arbitration****."*

84. Similar to *Methanex* and *Libananco,* evidence strongly points to Exhibit R 3 being improperly obtained through state powers, specifically through an investigation by Equatorianian law enforcement against Mr Deiman.

85. As a preliminary point, it is acknowledged that some uncertainty exists about the precise chain of custody. However, the burden of proof should lie on Respondent to rebut the assertion that the evidence was improperly obtained, as they have exclusive knowledge over how Exhibit R 3 came into their possession. This finds support in *Caratube*, where the tribunal held that when if a party has sole possession of documents, that party "*could be held to bear the burden of presenting specific and relevant documents in its possession*" [*Caratube,* ¶319].

86. In the alternative, the standard of proof on Claimant should be lowered. In *Caratube*, the tribunal held that where a party faces "*extreme difficulty*" accessing relevant documents, the tribunal may accept "*less conclusive proof*" or "prima facie *evidence*" from that party *[Caratube, ¶316]*. In any event, this Tribunal should "*draw negative inferences*" from Respondent's failure to explain how it obtained documents within its control *[Caratube, ¶316]*.

87. Chronologically, the starting point is that Mr. la Cour had mentioned that he kept in close contact with the Equatorianian prosecution office *[Exh. C 8, p. 36, ¶8]*. On 28 April 2024, he explicitly threatened Claimant's negotiators with criminal prosecution, stating that he would *"hand over that information to the prosecution office for an investigation"* if there was no amicable settlement *[Exh. C 8, p. 36, ¶3]*. True to his word, Mr. la Cour initiated an investigation against Mr. Deiman when talks fell through *[PO 2, p. 28, ¶27]*. The police raided Mr. Deiman's office, confiscating "*all his documents*", which contained Exhibit R 3 *[Exh. C 8, p. 36, ¶2, 7]*.

88. On one hand, Claimant's employees have confidentiality agreements with the company *[PO 2, p. 28, ¶28]*. It is thus highly unlikely that Exhibit R3 was internally leaked. On the other hand,

Mr. Deiman had never revealed Exhibit R 3 to the Respondent *[Exh. C 8, p. 36, ¶7]*. Further, the investigation took place when Respondent sought to pressure Claimant into lowering the price of the PSA *[Exh. C 7, p. 20]*. The investigation was also unmeritorious and Mr. Deiman was acquitted in just one month *[PO 2, p. 55, ¶27]*. Taken together, this points toward Exhibit R 3 having been improperly obtained by state agents and handed over to Respondent, the exact situation which the tribunal in *Libananco* held to be a breach of good faith *[Libananco, ¶42]*.

PART III: THE CISG IS APPLICABLE TO THE PSA

89. Respondent wishes to renege on its contractual obligations by asserting that the PSA is governed by the Civil Code of Equatoriana *[Answer, pp. 27-28]*. This is incorrect. The PSA is governed by the CISG because Parties agreed to apply it pursuant to Art. 29 PSA *[**A**]*. Nothing in the CISG prevents its application to the PSA. Parties have their places of business in different Contracting States pursuant to Art. 1(1) CISG *[**B**]*; the reverse auction is not an auction in the meaning of Art. 2(b) CISG *[**C**]*; and the PSA constitutes a mixed contract with a preponderant sales obligation under Art. 3(2) CISG *[**D**]*.

A. Art. 29 PSA selects the CISG to govern the PSA

90. Art. 29 PSA provides that the PSA "*is governed by **the law of Equatoriana**, to the exclusion of its **conflict of laws principles***" *[Exh. C 2, p. 12, Art. 29]*. The phrase "*law of Equatoriana*" refers to the CISG, and the exclusion of Equatorianian "*conflict of laws principles*" does not preclude the application of the CISG.

91. Whether Art. 29 PSA selects the CISG must be determined according to the interpretive provisions of the CISG. This is because the CISG determines its sphere of application autonomously *[CISG-AC Opinion No. 16, ¶6.3; Pereira, p. 169]*.

92. The phrase "*law of Equatoriana*" refers to the CISG because Equatoriana is a Contracting State of the CISG *[PO 1, p. 50, ¶III.4]*. As the CISG is automatically incorporated into the law of a Contracting State, it thus forms an integral part of the law of Equatoriana *[Honnold/ 55; ThyssenKrupp, ¶18; CISG-AC Opinion No. 16, ¶4.2; Bell, p. 56]*. By expressly selecting "*the law of Equatoriana*" in Art. 29 PSA to govern the PSA, Parties therefore chose to apply the CISG to the PSA *[Exh. C 2, p. 12]*.

93. The exclusion of Equatorianian "*conflict of laws principles*" does not preclude the application of the CISG, as the CISG is not a "*conflict of laws*" convention *[Born/Kalelioglu, pp. 101–103;*

Waste Separation Machine Case, p. 3; Ostroznik, ¶15; Officine Maraldi, pp. 4-5; Mitias; Investment Case, p. 2].

94. Respondent argues that, despite Art. 29 PSA selecting the CISG to apply, Arts. 1-3 CISG preclude its own application. The party who seeks to contradict the wording of a choice-of-law clause by relying on the provisions of the CISG must prove that the conditions in those provisions are not met *[Huber/Mullis, pp. 36-37; Kroll, p. 49]*. Therefore, the burden of proof lies on Respondent. Respondent has failed to prove that the conditions in Arts. 1-3 CISG are not met.

B. Parties have their places of business in different Contracting States pursuant to Art. 1(1) CISG

95. The PSA satisfies the internationality requirement of Art. 1(1) CISG. It is undisputed that Respondent's place of business is in Equatoriana *[Exh. C 2, p. 10, read with PO 2, p. 56, ¶35.b]*. Contrary to Respondent's arguments, Claimant's only place of business is in Mediterraneo *[**1**]*. In any case, even if Claimant has multiple places of business, its principal place of business is in Mediterraneo *[**2**]*. This means that Claimant and Respondent have their places of business in different Contracting States of the CISG, satisfying the internationality requirement in Art. 1(1) CISG.

1. <u>Claimant has only one place of business in Mediterraneo.</u>

96. While the term "*place of business*" is not defined by the CISG, scholars and case law have interpreted the phrase as merely indicating where the parties come from *[Huber/Mullis, pp. 49-50]*. For legal persons such as Claimant, this would be their place of incorporation—Mediterraneo *[Exh. C 2, p. 10, read with PO 2, p. 56, ¶35(b)]*.

97. Respondent argues that the PSA is not an international contract because Claimant's place of business was in Equatoriana, where "*most of the [Claimant's] actual deliveries of goods were made*" *[Answer, p. 28, ¶20]*. However, this construction of the phrase "*place of business*" in Art. 1(1) CISG has been rejected. The CISG "*does not use… the place of performance in order to define the required international character of the contract, but simply looks at where the parties come from*" *[Huber/Mullis, pp. 49-50]*.

98. For instance, if two parties with their places of business in Singapore conclude a contract for the delivery of goods from Austria to China, the CISG will not be applicable. Conversely, if two parties with their respective places of business in Singapore and China conclude a contract

for the delivery of goods from Vienna to Salzburg, the CISG will be applicable *[Huber/Mullis, pp. 49-50]*.

99. Thus, the fact that Claimant delivered most of its goods in Equatoriana does not render Equatoriana their place of business.

2. Even if Claimant has multiple places of business, Claimant's principal place of business is at its headquarters in Mediterraneo

100. Even if Claimant has multiple places of business, the relevant place of business for the purposes of Art. 1(1) CISG is Mediterraneo.

101. According to Art. 10 CISG, "*if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance*". This refers to the place where the party has its headquarters, from which it directs its activities *[Honnold/Flechtner, pp. 221-223; Schlechtriem/Schwenzer, p. 200; VLM Food Trading, ¶¶23-25; Asante Technologies, ¶¶17-20; Equipment for Packaging of Milk Case]*.

102. On the facts, the PSA demonstrates that Claimant and Respondent entered a contractual relationship while based in the Contracting States of Mediterraneo and Equatoriana respectively *[Exh. C 2, p. 10]*. It is in Mediterraneo where Claimant's leadership are headquartered *[Exh. C 5, p. 16; Exh. C 8, p. 36]*. It is in Mediterraneo where Claimant's communications to Respondent are directed from *[Exh. C 4, p. 15; Exh. C 6, p. 19; Exh. C 7, p. 20; Exh. R 2, p. 31]*. It is in Mediterraneo where Claimant's strategic decisions are made *[Exh. C 5, pp. 16-18]*.

103. Thus, Mediterraneo would be Claimant's place of business which "*has the closest relationship to the contract and its performance*". Combined with the fact that Respondent's place of business is in Equatoriana, the PSA aligns with the internationality requirement in Art. 1(1) CISG that parties have their places of business in different Contracting States.

C. The reverse auction is not an auction in the meaning of Art. 2(b) CISG

104. Contrary to Respondent's assertions *[Answer, p. 28, ¶20]*, the mere fact that the Parties utilised an auction-like bidding process to conclude the PSA does not exclude it from the CISG's scope under Art. 2(b) CISG. The PSA was not concluded by an auction process; rather, the reverse auction was merely used to initiate negotiations for the PSA.

105. Art. 2(b) CISG provides that the CISG "*does not apply to sales… by auction*". Here, sales by auction refer to "*public sales where the good is awarded to the highest bidder by knock-down*" *[Slakoper/Tot, p. 144; Schlechtriem/Schwenzer, p. 68]*. This means that each bid is an acceptance and immediately forms a contract between the bidder and sale *[Advocate*

Communications, p. 807; Slakoper/Tot, p. 143]. The reverse auction by which the PSA was procured is fundamentally different from such an auction. The reverse auction did not by itself conclude the PSA. Rather, it operated merely to select bidders for further negotiations. The reverse auction is thus a procedural step removed from the formation of the contract *[Slakoper/Tot, p. 149; Industrial General Equipment Case; Electronic Electricity Meters Case]*.

106. This distinction between a traditional auction and a reverse auction is also supported by the legislative intent behind the exclusion of auctions. Traditional auctions are typically domestic sales held in person; thus, "*the parties do not foresee the appearance of any foreign element… [and] if the CISG should apply or not*" *[Slakoper/Tot, p. 145]*. Indeed, academics have argued that, where it is "*not unreasonable for the seller to consider the possibility of the highest bidder being located in another country*", such as in an online auction, "*the application of the [CISG] would not come as a surprise and hence should not be excluded*" under Art. 2(b) CISG *[Schlechtriem/Schwenzer, p. 69; Ferrari, p. 326]*.

107. Here, Claimant's foreign location in Mediterraneo was not only a possibility for Respondent, but a reality that Respondent was in fact aware of since the commencement of negotiations in May 2023 after the reverse auction *[Request, p. 4, ¶10]*. Thus, it does not lie in Respondent's mouth that an application of the CISG comes as a surprise.

108. Further, Art. 2(b) is part of an exhaustive list of exclusions *[Slakoper/Tot, pp. 149–150]*. It should not be extended by analogy to cover merely auction-like processes *[Pereira, p. 163]*. The key question is whether the auction process itself concluded a contract, thereby risking surprise application of the CISG. The mere use of an auction-like process in arriving at the contract does not attract an exclusion by Art. 2(b).

109. In conclusion, the PSA does not fall under the Art. 2(b) CISG exclusion. The reverse auction was merely a precursor to subsequent contract negotiations that concluded the PSA. This is not a "*sale by auction*" within the wording of Art. 2(b) and, in any case, lacks the surprise factor motivating the exclusion.

D. The PSA constitutes a mixed contract with a preponderant sales obligation under Art. 3(2) CISG

110. Respondent alleges that the PSA falls outside the scope of Art. 3(2) CISG, because a considerable part of Claimant's obligations consisted of planning and engineering work *[Answer, p. 28, ¶20]*. As with the Art. 2(b) CISG exception, Respondent bears the burden of proving that the PSA is excluded from the CISG on this basis and has failed to do so *[Honnold/Flechtner, p. 94; Huber/Mullis, p. 37]*. A proper analysis demonstrates that the

Claimant's sales obligation comprising of the delivery of goods constitutes the preponderant part of the PSA.

111. The CISG applies to mixed contracts, provided that the preponderant part is the sales obligation *[CISG, Art. 3(2); CISG-AC Opinion No. 4, ¶3.1]*. The PSA constitutes such a mixed contract, with the delivery of goods making up the preponderant sales obligation *[CISG-AC Opinion No. 4, ¶3.1; CISG Case Digest 2016, p. 20; CLOUT Case 346; Filling and Packaging Plant Case]*. This is evidenced by an examination of both the economic value of Claimant's obligations against the total contract price and the Parties' essential focus of the PSA.

112. The preferred test for establishing preponderance is the economic value criterion, where the sales obligation will make up the preponderant part if its economic value exceeds 50% of the total contract price *[Huber/Mullis, pp. 46–47; Officine Maraldi; CISG-AC Opinion No. 4 ¶3.4]*. If the economic value of the obligations cannot be discerned however, the term 'preponderant' can be determined on the basis of an overall assessment, which includes factors such as the interpretation of the parties' intentions, the entire content of the contract and the weight given by the parties to the different obligations under the contract *[Honnold/Flechtner, pp. 88–89; CISG-AC Opinion No. 4, ¶3.4]*.

113. There is scholarly debate over whether turnkey contracts like the PSA *prima facie* are beyond the purview of the CISG, given the difficulty with distinguishing the sales obligation amidst the considerable network of mutual duties involved with constructing and maintaining a plant *[Waste Separation Machines Case, p. 4]*. However, there is case law and commentary demonstrating that the CISG can apply to such turnkey contracts *[CLOUT Case 346; Filling and Packaging Plant Case; Window Production Plant Case; Pessa Studio; SAS]*. Thus, the CISG will apply to the PSA so long as the sales obligation is the preponderant part of the PSA *[Honnold/Flechtner, pp. 89-90]*.

1. <u>The economic value of Claimant's sales obligation exceeded 50% of the PSA's total contract price, establishing preponderance</u>

114. Where a contract has specific values for the sale and service components, the sales obligation is considered preponderant if its economic value is equal to or exceeds 50% of the total contract price.

115. During negotiations, Claimant showed Respondent an internal calculation table outlining the estimated values attributed to various sale and service obligations under the PSA *[Exh. C 5, p. 17]*. It should be noted that adducing this extrinsic material in the analysis does not contravene the merger clause captured in Art. 31 PSA. This is because the table of values merely assists

the Tribunal in interpreting the breakdown of costs associated with the PSA's total contract price *[infra, ¶133]*. The extrinsic evidence does not contradict anything which the Parties have previously agreed under the PSA. Claimant's internal calculation table is reproduced below.

	Total Investment		Green Hydrogen (Mediteranneo)		Volta Transformer (Equatoriana)	
Electrolyser	**Investment (Mio €)**	**Ratio**	**Investment (Mio €)**	**Ratio**	**Investment (Mio €)**	**Ratio**
Core system	100	50%	60	60%	40	40%
Trafo and electrical equipment	40	20%	0	0%	40	40%
Packaging	20	10%	0	0%	20	20%
Project managment and engineering	15	7.5%	15	15%	0	0%
Site works	15	7.5%	15	15%	0	0%
Training and maintenance	10	5%	10	10%	0	0%
Subtotal	**200**	**100%**	**100**	**100%**	**100**	**100%**
EPC-Work	**Investment (Mio €)**	**Ratio**	**Investment (Mio €)**	**Ratio**	**Investment (Mio €)**	**Ratio**
Compressor, pipes, cable installation, connections, and other equipment	50	50%	50	50%	0	0%
Buildings and foundations for the facility	25	25%	25	25%	0	0%
Remaining "EPC" services for constructing the turnkey facility	25	25%	25	25%	0	0%
Subtotal	**100**	**100%**	**100**	**100%**	**0**	**0%**

Figure 1: Claimant's internal calculation of costs

116. Claimant's sales obligation is comprised of the highlighted delivery of goods such as the core system, the transformer and electrical equipment, compressor, pipes, cable installation, connections, and other equipment *[PO 2, p. 54, ¶17]*. Claimant's calculations indicate that the total value for delivery of goods amounts to EUR 190,000,000.

117. Respondent may argue that this figure does not adequately take into account the EUR 15,000,000 reduction in price, which could have affected the value of Claimant's sales obligation. This is because Claimant's EUR 190,000,000 sales obligation was based on the previously proposed EUR 300,000,000 contract, and not the concluded EUR 285,000,000 PSA after a EUR 15,000,000 reduction in price.

118. Even if the Tribunal were to take Respondent's case at its highest by deducting the EUR 15,000,000 reduction in price entirely from Claimant's sales obligation of EUR 190,000,000, the remaining EUR 175,000,000 still exceeds 60% of the total contract price. This is illustrated in the chart below.

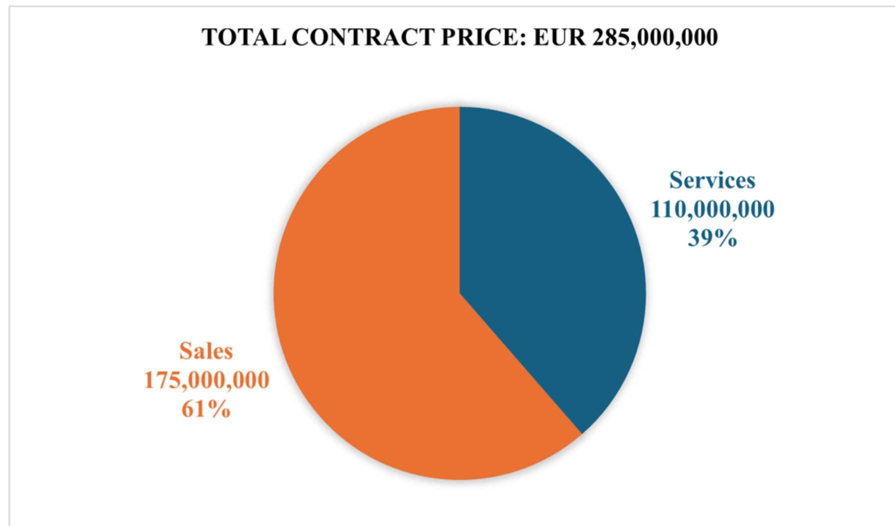

Figure 2: Proportion of sales of goods to services in the total contract price

119. As the economic value of Claimant's sales obligation comprising the delivery of goods substantially surpasses the 50% preponderance threshold, the sale thus constitutes the preponderant part of the PSA in accordance with Art. 3(2) CISG.

2. The Claimant's delivery of goods was the essential focus of the Parties, constituting the preponderant part of the PSA

120. Even if the Tribunal is not satisfied that the economic value can be precisely discerned, the preponderant obligation can still be determined through an overall assessment of factors such as the parties' intentions, the contract's entire content, and the weight given to different obligations *[Honnold/Flechtner, pp. 88–89; CISG-AC Opinion No. 4, ¶3.4]*. As addressed prior, these extrinsic materials are relied upon to interpret what the Parties have agreed upon, and not to contradict the PSA. This holistic 'essential criterion' analysis further confirms that the sale is the preponderant obligation.

121. The essential criterion of the PSA was for Claimant to deliver the goods necessary to construct the Plant, with the additional construction, maintenance, and training services playing only a supporting role. After all, a plant cannot be constructed and maintained without the necessary building resources in the first place.

122. A comparable case involving a turnkey contract for a crepe cylinder is instructive. There the tribunal found that the delivery of goods was the essential criterion, as the delivery obligations were far more extensive and detailed in the contract compared to the ancillary service obligations *[CLOUT Case 346]*.

123. A tribunal in another analogous case found that a contract for delivery which also contained obligations to assemble the goods, train personnel, and provide maintenance services still fell within the CISG's scope of application as the primary obligation was the delivery of goods *[Filling and Packaging Plant Case, ¶26]*.

124. Similarly, here the delivery of goods by Claimant was the core aspect enabling the realisation of the Plant, satisfying Respondent's local content and efficiency requirements that prompted the PSA's formation. In contrast, the construction, maintenance, and training services were not nearly as comprehensively negotiated or specified by the parties when concluding the contract *[Exh. C 1, pp. 8-9; Exh. C 2, p. 10; Exh. C 5, pp. 16-18; Exh. C 8, p. 36; Exh. R 1, p. 29; Exh. R 2, p. 31]*. The sale therefore represented the preponderant part of the PSA based on the essential criterion as well.

125. In summary, under both the governing economic value test and the supplementary essential criterion, the PSA qualifies as a mixed contract with a preponderant sales obligation pursuant to Art. 3(2) CISG. Respondent has failed to discharge its burden of establishing that the PSA falls outside the CISG's scope in this regard.

126. For all the foregoing reasons, Respondent's challenges to the applicability of the CISG are unavailing. The Tribunal should conclude that the CISG applies to the PSA.

PART IV: PARTIES HAVE NOT EXCLUDED THE CISG.

127. The CISG should also apply because nothing in the PSA excludes its application. Although Parties are empowered to exclude the CISG *[CISG, Art. 6]*, Art. 29 PSA does not operate to this effect. Under Art. 29 PSA, Parties' choice of "the law of Equatoriana" does not exclude the CISG *[A]*. Respondent argues the CISG is excluded because Art. 29 PSA was based on the 2022 Model Contract. In 2022, the Equatorianian government amended the Model Contract to remove a provision expressly providing for the CISG's application. In Respondent's view, this suggests that Parties' intended to exclude the CISG *[Answer, p. 27, ¶19]*. However, this argument is unmeritorious *[**B**]*. Notably, Respondent bears the burden of proof to show that Parties had intended to exclude the CISG *[Huber/Mullis, pp. 36-37; Kroll, p. 49]*. They have failed to discharge this burden.

A. Parties' choice of Equatorianian law does not exclude the CISG.

128. Art. 29 PSA is clear; it does not exclude the CISG. Art. 29 PSA only provides that the PSA "*is governed by the law of Equatoriana to the exclusion of its conflict of laws principles*" *[Exh. C 2, p. 12]*. It does not contain any express exclusion of the CISG.

129. Art. 29 does not contain any implied exclusions either. Indeed, courts and academics have opined that a simple choice of law clause selecting the law of a Contracting State, without more, is insufficient to opt out of the CISG *[Born, §19.03[A][4]; Ajax Tool Works, p. 3]*. The overwhelming weight of judicial, arbitral and academic authority indicates that, since Equatoriana is a Contracting State to the CISG *[PO 1, p. 50, ¶4]*, the CISG forms part of "*the law of Equatoriana*" *[Aluminium Rings Case, ¶15; Boiler Case, p. 8; Prefabricated House Case, ¶5.2.1; Used Repainted Car Case, ¶II.1.aa; Easom, p. 4; Fepco, p. 2; CLOUT Case 166, p. 1; Citroen; Honnold/Flechtner, p. 108; Kroll/Mistelis, pp. 106-107; Johnson, p. 291; UNCITRAL Case Digest 2012, Art. 6 ¶11, nn. 42 & 43; CISG-AC Opinion No. 16, ¶4.2; Schlechtriem/Schwenzer, p. 125-126]*. Accordingly, by selecting the law of Equatoriana, Parties could not have intended to exclude the CISG.

B. That express inclusion of the CISG was removed from the 2022 Model Contract does not exclude it.

130. Respondent argues that the removal of the words expressly providing for the application of the CISG in the Model Contract suggests that Parties' intentions were to exclude it *[Answer, p. 27, ¶19]*. However, this argument should be rejected for two reasons. Firstly, this argument relies on previous drafts of the Model Contract, whose wording does not appear in the PSA. Reliance on these pre-contractual drafts as an interpretive aid for the PSA is prohibited by Art. 31 PSA *[**1**]*. Nonetheless, even if Respondent may rely on such pre-contractual drafts, the ambiguity in Art. 29 PSA should be interpreted against Respondent according to the *contra proferentem* rule *[**2**]*.

1. <u>The merger clause in Art. 31 PSA precludes Respondent from relying on pre-contractual drafts.</u>

131. Art. 31 PSA prohibits the use of pre-contractual drafts as evidence of Parties' intentions. The starting point is whether the law of the PSA permits the use of such evidence to interpret the PSA. The law of the PSA is Equatorianian law *[Exh. C 2, p. 12]*. Equatorianian contract law includes both the UNIDRIOT Principles (as adopted by its national contract law), and the CISG *[supra, ¶129; PO 1, p. 50, ¶4]*. While both sources of contract law provide that extrinsic evidence of parties' intentions are generally admissible *[CISG, Art. 8(3); UNIDROIT Principles,*

Art. 4.3], this is merely the default position. Parties may agree to derogate from this rule *[CISG, Art. 6; UNIDROIT Principles, Art. 1.5]*.

132. Art. 31 PSA is precisely such a derogation. It provides that the PSA "*contains the entire agreement between the Parties*" *[Exh. C 2, p. 13, Art. 31]*. This means that all the terms of the PSA are found within its text and no other binding terms exist between Parties. The effect of this clause, known as a "merger clause", "*is to exclude any claim based on extrinsic evidence, such as pre-contractual negotiations or agreements*" *[Pedamon, p. 1112]*.

133. The inclusion of a merger clause in a contract governed by the CISG displaces the presumption in Art. 8(3) PSA that extrinsic evidence may be used to interpret the contract. As the USCA rightly held, "*to avoid parol evidence problems, [parties] can do so by including a merger clause in their agreement that extinguishes any and all prior agreements and understandings not expressed in writing*" *[Marble, p. 1391]*. Academics have supported this proposition, opining that "*a court is not authorised by Article 8(3) [CISG] to ignore the effect of a "merger clause" stating that the writing is intending to be a final and complete statement of the agreement*" *[Brand/Flechtner, pp. 251-252]*.

134. The position under the UNIDROIT Principles is identical. A contract "*which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements*" *[UNIDROIT Principles, Art. 2.1.17]*. While "*such statements or agreements may be used to interpret the writing*" *[UNIDROIT Principles, Art. 2.1.17]*, this is only justified if the contract contains an unconventional expression whose meaning is impossible to determine without recourse to pre-contractual statements *[Buan, p. 12]*. For example, in *NHS v Vasant*, the EWCA resorted to extrinsic evidence because the court did "*not consider that it is possible to give meaning to the phrase ["Intermediate Minor Oral Surgery Service"] as a whole without extrinsic evidence*" *[NHS v Vasant, ¶49]*. Similarly, in *ProForce*, the EWCA held that "*[t]he expression ["preferred supplier status"] does not… have an obvious natural and ordinary meaning. Its meaning can only be properly determined in the context of the agreement read as a whole and of all the surrounding circumstances*" *[ProForce, ¶25]*. Here, Art. 31 PSA does not contain expressions that lack an obvious natural and ordinary meaning. As established above, the natural and ordinary meaning of the phrase "*law of Equatoriana*" in Art. 29 PSA clearly includes the CISG *[supra, ¶129]*. Thus, recourse to extrinsic material is unnecessary and precluded by Art. 31 PSA.

135. In conclusion, whether this Tribunal applies the CISG or the UNIDROIT Principles, effect must be given to Art. 31 PSA. Its effect is that, without support in the text of the PSA, expectations nurtured by Respondent should not give rise to terms binding on Claimant *[ICSID Case No. ARB/06/18, ¶115]*. Instead, the merger clause serves as a barrier to the idea that a particular action or practice could become significant enough to bind Parties *[Buan, p. 10]*. Accordingly, the PSA "*contains the entire agreement between the Parties*" *[Exh. C 2, p. 13, Art. 31]*, and cannot be supplemented or contradicted by the fact that express inclusion of the CISG was removed from the 2022 Model Contract.

2. Even if Respondent may rely on pre-contractual drafts, Art. 29 PSA should be interpreted against Respondent according to the *contra proferentem* rule.

136. In any case, even if this Tribunal permits Respondent to adduce evidence of amendments to the Model Contract, Art. 29 PSA should be interpreted *contra proferentem* against Respondent, who supplied the Model Contract.

137. Firstly, even if Respondent may rely on the pre-contractual drafts, this only proves that Parties intended to remove the express inclusion of the CISG. This could be for reasons other than that they intended to exclude it. For example, Parties may have thought such specificity unnecessary since the CISG already forms part of the "*law of Equatoriana*" *[Exh. C 2, p. 12]*. Indeed, undue weight should not be given to the pre-contractual drafts as the wording of Art. 29 PSA is, on its face, clear in including the CISG. The CISG does not cease to be part of the "*law of Equatoriana*" simply because Parties failed to specify as much. In other words, Respondent would only have succeeded in casting some ambiguity upon the meaning of Art. 29 PSA.

138. To resolve this ambiguity, Art. 29 PSA should be interpreted *contra proferentem* against Respondent. "*If contract terms supplied by one party are unclear, an interpretation against that party is preferred*" *[UNIDROIT Principles, Art. 4.66]*. Here, the PSA was based on the Model Contract *[Exh. C 2, p. 13, Art. 31]* which was supplied by Respondent in the RFQ *[Exh. R 1, p. 29, ¶7]*. Therefore, any ambiguity in the PSA should be interpreted against Respondent's interests. This means that, contrary to Respondent's assertion, Parties have not excluded the CISG *[Answer, p. 27, ¶19]*. Instead, the PSA is governed by the CISG and not the Civil Code of Equatoriana.

REQUEST FOR RELIEF

In light of the above, Claimant respectfully requests the Tribunal to grant the following relief:

(1) DECLARE that the Tribunal has jurisdiction, the claim is admissible, and that the Tribunal should exercise its discretion to hear the claim;

(2) DECLARE that

  a. Exhibit C 7 should be admitted,

  b. Exhibit R 3 should be excluded;

(3) DECLARE that the CISG applies to the PSA; and

(4) DECLARE that the CISG has not been excluded from the PSA.

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