32ND ANNUAL WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT
VIENNA, 11-17 APRIL 2025

PONTIFICAL CATHOLIC UNIVERSITY OF SÃO PAULO

FACULTY OF LAW

MEMORANDUM FOR RESPONDENT

ON BEHALF OF

EQUATORIANA RENPOWER LTD

1 Russell Square, Oceanside, Equatoriana

AGAINST

GREENHYDRO PLC

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&	And
§/§§	Section/Sections of this Memorandum
¶/¶¶	Paragraph/Paragraphs
Arbitration	Case No. FAI Moot 100/2024: GreenHydro Plc. v. Equatoriana RenPower Ltd.
Art./Arts.	Article/Articles
ATRFA	RESPONDENT's Answer to the Request for Arbitration
CEO	Chief Executive Officer
CISG/ the Convention	United Nations Convention on Contracts for the International Sale of Goods of 1980
CISG-AC OPINION NO.	CISG Advisory Council Opinion Number
CLAIMANT	GreenHydro Plc
Contracting State(s)	Any State that has implemented the CISG by ratification or accession under Arts. 91(2)(3) CISG
Danubian Arbitration Law	Danubia's arbitration law, which is a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration of 1985 with the 2006 amendments (Article 7 – Option 1)
Danubian Contract Act	Danubia's general contract law, which is a verbatim adoption of the UNIDROIT Principles on International Commercial Contracts
e.g.	*Exempli gratia*; "for example"
ed.	Edition
Edt.	Editor/Editors
Equatoriana Contractual Law	Equatoriana's general contract law, which is largely an adoption of the UNIDROIT Principles on International Commercial Contracts, with an inclusion on Art. 7.3 in the

	sense that governmental entities may always terminate contracts which have been concluded in the pursuance of a particular strategy if the government has changed the strategy
Et al.	*Et alia*, "and others"
Et seq.	*Et sequens,* "and the following ones"
Etc.	*Et cetera*, "and so on"
EUR	Euros
EXH.	Exhibit
eAmmonia Option	Customer's option defined in Art. 2(3) to request until 31 December 2026 the addition of a part to produce eAmmonia at the price fixed and in line with the schedule agreed in Annex 3 [PSA, p. 10, Art. 1]
FAI MEDIATION RULES	Mediation Rules of the Finland Chamber of Commerce
FAI ARBITRATION RULES	Arbitrations Rules of the Finland Chamber Commerce
IBA RULES	International Bar Association's Rules on the Taking of Evidence in International Arbitration of 1999 with the 2020 revision
Ibid	*Ibidem*, "in the same place"
Inc.	Incorporated
Lex arbitri	The procedural law of the seat of arbitration
MFC	King's College London Memorandum for CLAIMANT
Model Law	UNCITRAL Model Law on International Commercial Arbitration of 1985 with the 2006 amendments
Mr.	Mister
Ms.	Miss
New York Convention	1958 United Nation Convention on the Recognition and Enforcement of Foreign Arbitral Awards

No./Ns.	Number/Numbers
p./pp.	page/pages
Parties	CLAIMANT and RESPONDENT
Party	CLAIMANT or RESPONDENT
Plant	100-MW green hydrogen Plant ordered by RESPONDENT
PO1	Procedural Order No. 1
PO2	Procedural Order No. 2
PSA	Purchase and Service Agreement
RESPONDENT	Equatoriana RenPower Ltd.
RFA	CLAIMANT's Request for Arbitration
RFQ	Request for Quotation
Tribunal/Arbitral Tribunal	Panel consisting of Mr. Narvin Aqua, Mr. Carl Gustaf Synonoun and Prof. Dolores Greenhouse (Presiding Arbitrator)
v.	*Versus*, "against"

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UNITED STATES OF AMERICA	*KeKemiron Atl., Inc. v. Aguakem Int'l,Inc* United States Court of Appeals 2002	Referred to in: §15 of the Memorandum [cited as: *Kemiron Atl., Inc. v. Aguakem Int'l, Inc*]
UNITED STATES OF AMERICA	*Belmont Constr., Inc. v. Lyondell Petrochem. Co* Court of Appeals of Texas 1995	Referred to in: §15 of the Memorandum [cited as: *Belmont Constr., Inc. v. Lyondell Petrochem. Co*]
UNITED STATES OF AMERICA	*Palmetto Design Assocs., Inc. v. BG Framing Co* United States District Court for the District of South Carolina 2021	Referred to in: §15 of the Memorandum [cited as: *Palmetto Design Assocs., Inc. v. BG Framing Co*]

UNITED STATES OF AMERICA	*Fluor Enterprises, Inc. v. Solutia Inc* United States District Court, S.D. Texas, Galveston Division. 2001	Referred to in: §15 of the Memorandum [cited as: *Fluor Enterprises, Inc. v. Solutia Inc*]
UNITED STATES OF AMERICA	*Dustex Corp. v. Bd of Trustees of the Mun. Elec* United States District Court for the Northern District of Iowa Eastern Division 2014	Referred to in: §22 of the Memorandum [cited as: *Dustex Corp. v. Bd of Trustees of the Mun. Elec*]
UNITED STATES OF AMERICA	*Lake Utopia Paper v Connelly Containers* United States Court of Appeals 1979	Referred to in: §§105, 106, 111 of the Memorandum [cited as: *Lake Utopia Paper v. Connelly Containers*]
UNITED STATES OF AMERICA	*United States v. United Shoe Machinery Corp* United States Supreme Court 1968	Referred to in: §88 of the Memorandum [cited as: *United States v. United Shoe Machinery Corp*]
UNITED STATES OF AMERICA	*Caratube International Oil Company LLP e Devincci Salah Hourani v. Republic of Kazakhstan* ICSID Case No. ARB/13/13 2013	Referred to in: §82 of the Memorandum [cited as: *Caratube International Oil Company v. Kazakhstan*]
UNITED STATES OF AMERICA	*United States v. Alvarez-Machain* *U.S. District Court of Los Angeles* Case No. 91-712 1992	Referred to in: §158 of the Memorandum [cited as: *United States v. Alvarez-Machain*]
UNITED STATES OF AMERICA	*Case No. 3046* *U.S. District Court of Minnesota* Case No. 16-cv-1184 (JNE/TNL) 2018	Referred to in: §§164, 169 of the Memorandum [cited as: *Target Corp v. JJS Developments Ltd*]
UNITED STATES OF AMERICA	*American Biophysics Corp. v. Dubois Marine Specialties*	Referred to in: §192 of the Memorandum

	U.S. District Court for the District of Rhode Island 2006	[cited as: *American Biophysics v. Dubois Marine Specialties*]
UNITED STATES OF AMERICA	*Rienzi & Sons, Inc. v. N. Puglisi & F. Industria Paste Alimentari S.p.A.* United States Court of Appeals for the Second Circuit 2007	Referred to in: §§182, 183, 192 of the Memorandum [cited as: *Rienzi & Sons. v. Puglisi Industria Paste*]
UNITED STATES OF AMERICA	*Allied Constr. Corp. v. Parsons Transp. Group of N.Y* Supreme Court of New York County 2022	Referred to in: §22 of the Memorandum [cited as: *Allied Constr. Corp. v. Parsons Transp. Group of N.Y*]
UNITED STATES OF AMERICA	*Consol. Edison Co. of N.Y. v. Cruz Constr. Corp* Appellate Division of the Supreme Court of New York, First Department 1999	Referred to in: §22 of the Memorandum [cited as: *Consol. Edison Co. of N.Y. v. Cruz Constr. Corp*]
UNITED STATES OF AMERICA	*HIM Portland, LLC v. DeVito Builders, Inc* United States Court of Appeals 2003	Referred to in: §28 of the Memorandum [cited as: *HIM Portland, LLC v. DeVito Builders, Inc*]

STATEMENT OF FACTS

RESPONDENT Equatoriana RenPower Ltd. is a company owned by the State of Equatoriana. It was created in 2004 by a merger of the two Equatorianian state-owned energy companies operating in the field of renewables [RFA, p. 3, ¶2].

CLAIMANT GreenHydro PLC is an engineering firm that designs, builds, and sells plants for green hydrogen production, catering to industries, energy systems, and mobility solutions [RFA, p. 2, ¶1].

2019 The Equatorianian Government launches the Green Energy Strategy, aimed at decarbonizing energy production, transportation and industrial production. RESPONDENT was responsible for the energy production sector and for building infrastructure to produce green energy and possible derivatives, such as eAmmonia [PSA, p. 10].

2022 Equatorianian state entities use a Model Contract for all their public procurement agreements. The updated version of the contract, used by the Parties, specifically omitted mention of the CISG to strengthen Equatorianian law [PO2, p. 53, ¶10; EXH. R1, p. 29, ¶7].

NOVEMBER 2022 RESPONDENT approved CLAIMANT as one of the potential bidders for the Power Plant it intended to build [EXH. C5, p. 16, ¶6].

3 JANUARY 2023 RESPONDENT invited bids for the construction of a 100 MW green hydrogen plant and the extension options by way of an auction governed by the Equatoriana Public Procurement Law [RFQ, pp. 8-9, ¶1; RFA, p. 3, ¶4]. RESPONDENT requested the construction of a Plant with additional maintenance and training services for its first year of operation [RFQ, p. 8, ¶1]. RESPONDENT deemed two factors as crucial: that the bids followed its request to have most of the plant's components produced in Equatoriana [ATRFA, p. 25, ¶4], and a very strict timeline [ATRFA, p. 26, ¶9].

MAY 2023	CLAIMANT started negotiations with the Equatorianian company P2G for the eAmmonia-Option to fulfill the requirement that most of the Plant's components would be produced in Equatoriana [EXH. R2, p. 31, ¶1]. P2G's works would result in 45% of the overall contract volume being locally sourced in Equatoriana [EXH. C5, p. 17, ¶12].
12 JULY 2023	After the negotiations with P2G failed, CLAIMANT assured RESPONDENT that the Plant's components produced in Equatoriana would remain above 30% [EXH. R2, p. 31].
17 JULY 2023	The Parties signed the PSA, which stipulated that CLAIMANT was responsible for building the Plant and making it operational by 1st January 2026, for EUR 285 million [PSA, p. 10, Art. 1].
OCTOBER 2023	Ms. Theresa Vent assumed office as the new Minister for Energy and Development in Equatoriana. Following her appointment, Ms. Vent restructured RESPONDENT's board, appointing Mr. La Cour as RESPONDENT's new CEO [EXH. C5, p. 18, ¶13].
1 FEBRUARY 2024	CLAIMANT failed to achieve a fundamental step towards the performance of the PSA, which was delivering the final plans for the Plant [EXH. C6, p. 19].
29 FEBRUARY 2024	After waiting 28 days for CLAIMANT to fulfill its obligations, notably, the delivery of the project's final plans, RESPONDENT terminated the PSA, under Art. 7.3.1 of the Equatoriana Contractual Law [EXH. C6, p. 19].
12 MARCH 2024	CLAIMANT sent an email to RESPONDENT contesting the termination and reassuring that the delay in delivering the Final Plan was unlikely to impact the scheduled handover of the plant [PO2, p. 54, ¶23].
24 MARCH 2024	RESPONDENT reiterated the PSA's termination and informed CLAIMANT that no further payments would be made [PO2, p. 54, ¶23].

12 MAY 2024 The Parties' CEOs had a brief meeting, in which RESPONDENT made clear that further support from the government of Equatoriana, in particular from the new minister, was necessary [EXH. C5, p. 18, ¶15; PO2, p. 54, ¶23].

31 JULY 2024 CLAIMANT, despite the multi-tiered clause in the PSA [PSA, pp. 12-13, Art. 30], filed its RFA as an attempt to hinder RESPONDENT's termination, requesting the Arbitral Tribunal to declare (i) the applicability of the CISG to the PSA; (ii) the invalidity of the PSA's termination by RESPONDENT; order (iii) RESPONDENT to fulfill the PSA; and (iv) RESPONDENT to bear the costs of the arbitral proceedings [RFA, p. 7, ¶37].

14 AUGUST 2024 RESPONDENT filed its ATRFA, contending that the Tribunal has no jurisdiction, since CLAIMANT did not initiate mediation proceedings [ATRFA, p. 27, ¶16] and contesting the application of the CISG to the PSA on the merits [ATRFA, p. 27, ¶19]. RESPONDENT also requested the exclusion of CLAIMANT's EXH. C7 from the file, as it is protected by confidentiality, and that CLAIMANT be ordered to bear the costs of the proceedings [ATRFA, p. 28, ¶23].

CLAIMANT, on the same day, presented a letter objecting to the inclusion of RESPONDENT'S EXH. R3 and requesting its exclusion from the proceedings, due to an alleged illicit acquisition of this document [CASE FILES, p. 34].

12 DECEMBER 2024 CLAIMANT presented its written submission on 12 December 2024, in accordance with PO1.

30 JANUARY 2025 RESPONDENT presents its written submission according to the PO1 [PO1, p. 50, ¶2].

SUMMARY OF ARGUMENTS

A. THE TRIBUNAL SHOULD NOT HEAR THE CLAIM

1. RESPONDENT will demonstrate that (**A.1**) the Tribunal lacks jurisdiction over the claim, as compliance with the mediation clause is a binding condition precedent to arbitration, and (**A.2**) the claim is inadmissible due to CLAIMANT's failure to fulfill this mandatory procedural requirement. Additionally, (**A.3**) the Tribunal should reject the claim as part of its discretion to uphold the enforceability of the agreed dispute resolution framework.

B. THE TRIBUNAL SHOULD ADMIT EXH. R3 AND ORDER THE EXCLUSION OF EXH. C7

2. In case the Tribunal decides to hear the claim, RESPONDENT shall demonstrate that (**B.1**) the Tribunal should admit EXH. R3, since it is not protected by privilege and, therefore, the document is admissible as evidence, while simultaneously (**B.2**) ordering the exclusion of EXH. C7 due to its inadmissibility under the institutional rules and it being privileged.

C. THE CISG IS NOT APPLICABLE TO THE PSA

3. RESPONDENT will demonstrate that the CISG is not applicable to the PSA since (**C.1**) the PSA is not a sale of goods agreement under Arts 1(1) and 3(2) CISG; (**C.2**) the PSA falls within the exception under Art. 2(b) CISG; and (**C.3**) the Parties' places of business are located in the same Signatory State.

D. PARTIES VALIDLY EXCLUDED THE CISG'S APPLICATION

4. Having established that the CISG is not applicable to the PSA, RESPONDENT shall demonstrate that the Parties validly excluded the CISG, since (**D.1**) the subjective intent of the Parties to exclude the CISG is clear; and (**D.2**) under an objective interpretation of the Parties' agreement on governing law, the Convention was validly excluded.

ARGUMENTS ON JURISDICTION

5. Before addressing the merits of the dispute, RESPONDENT shall demonstrate that the Tribunal (**A**) should reject the claim and (**B**) if it decides to hear the claim, it should admit EXH. R3 while ordering the exclusion of EXH. C7.

A. THE TRIBUNAL SHOULD REJECT THE CLAIM

6. The Tribunal should find that it lacks jurisdiction over the present dispute, because CLAIMANT failed to comply with the mandatory and enforceable mediation requirement outlined in Art. 30 of the PSA, a condition precedent to arbitration [PSA, p. 12, Art. 30].

7. CLAIMANT's assertions that the mediation clause is unenforceable or does not affect the Tribunal's jurisdiction [MFC, p. 50, ¶¶2-5] are unfounded. CLAIMANT argues that (i) the absence of a specified timeframe for mediation renders the clause unenforceable and (ii) non-compliance with the mediation requirement does not bar arbitration or affect the admissibility of the claim [MFC, p. 50, ¶¶2-5].

8. CLAIMANT's arguments are an attempt to avoid its contractual obligations under the PSA. By challenging the enforceability of the mediation requirement, CLAIMANT seeks to bypass a binding step in the dispute resolution process and prematurely escalate the matter to arbitration. The Tribunal should determine that (**A.1**) it does not have jurisdiction over the claim and that (**A.2**) CLAIMANT's non-compliance renders the claim inadmissible. In any case, (**A.3**) as part of its discretion, the Tribunal should not admit the claim.

A.1. THE TRIBUNAL DOES NOT HAVE JURISDICTION OVER THE CLAIM

9. The present dispute arises out of an agreement for the engineering, construction, and delivery of a plant, which CLAIMANT asserts includes the Parties' agreement to arbitrate disputes under the terms of the PSA [MFC, p. 48, ¶5]. Yet, in its rush to embrace arbitration, CLAIMANT seems to have overlooked the critical procedural preconditions – such as the mandatory mediation step explicitly required by Art. 30 of the PSA – that must be satisfied to establish an operable arbitration agreement under the applicable legal framework.

10. CLAIMANT advances a series of arguments to support its assertion that the Tribunal has jurisdiction this claim [MFC, p. 50, ¶¶2-5]. Specifically, CLAIMANT contends that the mediation requirement in Art. 30 PSA does not bar the Tribunal's jurisdiction and the claim's admissibility,

arguing that the clause is either unenforceable due to lack of a specific timeframe, or a matter of procedural admissibility rather than jurisdiction [MFC, pp. 50-53, ¶¶2-16].

11. However, the mediation requirement in Art. 30 PSA is enforceable and constitutes a mandatory precondition to arbitration, as (i) the FAI MEDIATION RULES provide flexibility for the definition of a timeframe for mediation; (ii) the language of the clause qualifies it as a mandatory provision; and (iii) the mediation clause is a key part of the PSA's dispute resolution process.

12. **First**, the absence of a specific timeframe in the mediation clause itself does not render it unenforceable. The FAI MEDIATION RULES, which are explicitly referenced in Art. 30 of the PSA, address this issue in its Art. 2.1(e), which states that parties can specify time limits for conducting the mediation in the request for mediation. This provision ensures flexibility, allowing the parties to determine appropriate timeframes after the commencement of mediation [LEHTINEN/YILDIZ, p. 8].

13. Also, Art. 10.1(c) of the FAI Mediation Rules further supports the enforceability of the clause by providing a mechanism to terminate mediation when it is no longer purposeful.

14. Thus, there was no need to add a fixed timeframe to the PSA, as this matter could be addressed by the Parties once the mediation begins. CLAIMANT's argument overlooks this important mechanism, which ensures procedural clarity while preserving the enforceability of the clause.

15. **Second**, when dispute resolution clauses use mandatory terms such as '*shall*' or '*must*', courts and tribunals interpret these as creating binding obligations [FIGUERES, p. 72; BORN, p. 120; KOHL/RIGOLET, p. 427; JENKINS/ROSENBERG, p. 179; *Emirates Trading v. Prime Mineral Exports; Kemiron Atl., Inc. v. Aguakem Int'l, Inc.*; *Belmont Constr., Inc. v. Lyondell Petrochem. Co; Maxx Engineering Works Pte Ltd v PQ Builders Pte Ltd*], particularly when combined with a structured procedural framework [BORN, p. 120; FILE, p. 33; *Palmetto Design Assocs., Inc. v. BG Framing Co; Fluor Enterprises, Inc. v. Solutia Inc; Palmetto Design Assocs., Inc. v. BG Framing Co; Ohpen Operations UK Ltd v. Invesco Fund Managers Ltd*], as the one provided by the FAI MEDIATION RULES.

16. In the present case, the clause expressly uses the word '*shall*' [PSA, p. 13, Art. 30], which imposes a mandatory obligation rather than a discretionary option. It mandates a specific sequence in the dispute resolution process, requiring disputes to be mediated before arbitration, reflecting the Parties' intent to make it a binding condition precedent to arbitration.

17. **Third**, the mediation clause is a critical part of the PSA's multi-tiered dispute resolution framework. Its design prioritizes amicable resolution before escalating to arbitration. Ignoring

this requirement would fragment the interpretation of the agreement and undermine its negotiation structure. Multi-tiered clauses are crafted to provide a clear, flexible and enforceable mechanism [GUILLEMIN, pp. 22-23; KAYALI, p. 552].

18. Therefore, a holistic textual reading of the PSA confirms that mediation is not optional but a precondition for invoking arbitration [PSA, p. 13, Art. 30]. The explicit order between mediation and arbitration in Art. 30 PSA underscores the tiered mechanism agreed upon by the Parties.

19. This aligns with Article 5.3.1 of the Equatoriana Contractual Law, which establishes that contractual obligations are contingent on the occurrence of a future uncertain event. Mediation, as a mandatory step, operates as such as a suspensive condition, highlighting the enforceability of the clause.

20. In this sense, a mediation clause is a condition precedent because it establishes a mandatory step that must be fulfilled before initiating arbitration [*Morrow v. Chinadotcom; New South Wales v Banabelle Electrical Pty Ltd*].

21. The failure to fulfill a condition precedent, such as the mediation clause, bars the Tribunal from asserting jurisdiction.

22. When a contract explicitly establishes pre-arbitration procedural requirements, compliance with such conditions is integral to the operation of the arbitration agreement. The failure to fulfill these conditions undermines the tribunal's jurisdiction [*Allied Constr. Corp. v. Parsons Transp. Group of N.Y; Consol. Edison Co. of N.Y. v. Cruz Constr. Corp*; *Holloway v Chancery Mead*; *Dustex Corp. v. Bd of Trustees of the Mun. Elec.; Genops Group LLC v. Pub. House Invs. LLC*; *Klinge v Bentien*].

23. The mediation requirement in Art. 30 PSA is a binding and enforceable condition precedent to arbitration, as demonstrated by its mandatory language and tiered structure. CLAIMANT's failure to comply with this precondition directly affects the Tribunal's jurisdiction, not the admissibility of the claim, rendering the arbitration agreement inoperative. This failure cannot be overlooked without undermining the integrity of the dispute resolution framework chosen by both Parties.

24. Therefore, the Tribunal should find that the failure to fulfill the mediation requirement bars it from asserting jurisdiction and should dismiss CLAIMANT's claim accordingly.

A.2. THE CLAIM IS INADMISSIBLE

25. CLAIMANT relies on the Danubian Contract Act, arguing that the interpretation of the arbitration agreement must align with the common intention of the Parties [MFC, p. 51, ¶¶7-9].

At the same time, CLAIMANT maintains that no common intention exists, citing the absence of discussions or conduct addressing the enforceability of mediation [MFC, p. 52, ¶¶11-12].

26. RESPONDENT contends that determining the law applicable to the interpretation of the dispute resolution clause is immaterial, as the general contract law of Mediterraneo, Danubia and Equatoriana adopt the UNIDROIT Principles on International Commercial Contracts [PO1, p. 50, ¶4]. Regardless of whether the Danubian Contract Act or another framework applies, the result is unchanged: Parties failed to comply with the mediation clause, which was a mandatory condition precedent to arbitration. Consequently, the claim is inadmissible.

27. However, following CLAIMANT's rationale and analyzing the Parties' intentions, the mediation clause was clearly always intended as a binding precondition to arbitration.

28. Enforceability of a mediation clause does not depend on rigid formalities such as a pre-determined timeframe, but on the clear intention of the parties [BORN, p. 119; ALEXANDER, p. 180; SALEHIJAM, pp. 47-48; *HIM Portland, LLC v. DeVito Builders, Inc; New South Wales v Banabelle Electrical Pty Ltd*].

29. In the present case, Parties' commitment to mediation as a necessary step is clearly reflected in their communications and deliberate actions during the negotiation of the PSA. Ms. Johanna Ritter, RESPONDENT's Head of Contracting, emphasized that arbitration was intended as a last resort, with mediation being the preferred and prioritized method for resolving disputes [EXH. R1, p. 30, ¶9]. She explicitly stated that arbitration should only occur after efforts to resolve the matter amicably had been exhausted [EXH. R1, p. 30, ¶9]. These points clearly demonstrate RESPONDENT's expectation that mediation would take place as a required step before arbitration.

30. CLAIMANT not only acknowledged this priority during PSA negotiations, but agreed to do so by mentioning that the dispute resolution clause to be included in the PSA would provide for mediation as a first step [EXH. R2, p. 31, ¶2]. In its communication, CLAIMANT explicitly stated that the clause ensured the Parties would first attempt to mediate their dispute before resorting to arbitration, confirming that this approach aligned with RESPONDENT's wishes.

31. To further solidify the binding nature of mediation, CLAIMANT made a specific modification to the standard FAI Model-Mediation Clause by removing a sentence that would have allowed arbitration to commence independently of mediation [PO2, p. 52, ¶13]. The omitted sentence reads: *'The commencement of proceedings under the Mediation Runot prevent any party from commencing arbitration (...) in accordance with the clause below'*. By removing this provision, CLAIMANT ensured

that mediation became a mandatory prerequisite to arbitration, creating a clear procedural framework that the Parties were expected to follow.

32. Thus, despite RESPONDENT's consistent willingness to mediate, CLAIMANT chose to bypass this structured mediation process. It initiated this Arbitration based on informal communication and unilateral assumption that mediation would have been futile, which is not equivalent to a mediation proceeding.

33. CLAIMANT's decision disregards the agreed-upon framework for dispute resolution and was not in line with the clear wording of the PSA, which aimed for amicable resolution before resorting to arbitration.

34. RESPONDENT had every reason to expect that mediation would be conducted in accordance with the agreed terms, given both the language of the dispute resolution clause and the intention and understanding of the Parties during negotiations. CLAIMANT's deviation from this framework undermined the agreed upon process and contradicted the intention of the Parties during the negotiations of the PSA.

A.3. THE TRIBUNAL SHOULD NOT ADMIT THE CLAIM AS PART OF ITS DISCRETION

35. Contrary to CLAIMANT's assertions, the Tribunal should exercise its procedural discretion to reject the claim, as such discretion is not unrestricted. Compliance with the mediation clause is mandatory and not futile.

36. CLAIMANT's understanding that enforcing mediation would be futile, as it was unlikely to succeed [MFC, p. 54, ¶¶21-23], is inaccurate. RESPONDENT will demonstrate that mediation is useful given that (i) its ineffectiveness cannot be proven; and (ii) CLAIMANT cannot bypass it based on RESPONDENT's settlement-focused without-prejudice offer [EXH. C7, p. 20].

37. **First**, as CLAIMANT decided to deviate from the contract by initiating this Arbitration without first referring the dispute to mediation, it bears the burden of proving that mediation would have been futile or that RESPONDENT acted unreasonably in insisting on compliance with the agreed mediation clause. CLAIMANT has failed to meet this burden.

38. Whether a party was unreasonable in refusing to engage in alternative dispute resolution must be assessed based on the circumstances of the case. These circumstances include (i) the extent to which other settlement methods have been attempted; (ii) if the costs of the alternative dispute resolution would be disproportionately high; (iii) if any delay in setting up and attending

the alternative dispute resolution would have been prejudicial; and (iv) if the alternative dispute resolution had a reasonable prospect of success [*Invenia Technical Computing Corp v Hudson*].

39. In the present case, CLAIMANT lacks evidence to support its arguments on RESPONDENT's refusal to mediate. This is particularly significant considering that the multi-tiered clause under the FAI institutional rules was initially proposed by CLAIMANT. This further undermines CLAIMANT's position and highlights its failure to adhere to the agreed procedural framework [EXH. R1, p. 30, ¶8].

40. Apart from CLAIMANT's controversial attempt to deviate from its own proposal, it also desperately, albeit unsuccessfully, tried to blame RESPONDENT for a lack of interest in mediation [MFC, p. 54, ¶22]. However, RESPONDENT's conducts always expressed its willingness to amicable settlement (**A.2**).

41. Furthermore, CLAIMANT has not given any concrete evidence that mediation, something which has not even been attempted, would have a negative outcome. Mediation consists of a sequence of formal and complex steps that lead to a possible settlement of the dispute. These steps are crucial to reaching a positive outcome, so it is impossible to assert a mediation's probability of success with little to no evidence [SMITH/SMOCK, p. 8; STEPP, p. 1-2], such as the present case.

42. For this reason, CLAIMANT's assertion that it would be complying with a pointless pre-condition to mediate [MFC, p. 54, ¶¶21-22] is precipitated, as the mediation has not even started. Its assumption on the ineffectiveness of mediation [RFA, p. 6, ¶25] is based solely on informal negotiations between the Parties, which cannot be used as an indicative to the success of a formal mediation.

43. **Second**, Claimant uses EXH. C7 as an indicative that mediation would be futile. EXH. C7 is a without-prejudice offer sent from RESPONDENT to CLAIMANT after the termination of the PSA, in an attempt to amicably settle the Parties' dispute. However, although RESPONDENT will demonstrate that said document is inadmissible (**B.2**), its existence demonstrates RESPONDENT's strong will to reach a settlement to resolve the dispute amicably.

44. A without-prejudice offer is a legal tool that allows disputing parties to discuss potential settlements without fear of the other party using their communications against them in court [PAWLOWSKI, pp. 1-2; *Unilever Plc v. The Protecter & Gamble Company; sable offshore energy inc. v. Ameron International Corp*].

45. For this reason, CLAIMANT's attempt to justify the deviation from mediation by the fact that the dispute could not be resolved due to RESPONDENT without prejudice offer directly contradicts the main purpose of the offer.

46. It was CLAIMANT that had an intransigent behavior by going straight to arbitration after the rejection of the offer [PO2, p. 55, ¶24]. RESPONDENT's silence by no means allowed CLAIMANT to conclude that RESPONDENT did not want mediation at last, as RESPONDENT had no obligation to start mediation after it had rightfully terminated the PSA.

47. For these reasons, mediation remains crucial for a potential settlement of the dispute, and none of CLAIMANT's arguments hold any ground.

48. Moreover, CLAIMANT tries to argue that mediation would be inefficient and would cause unnecessary delays [MFC, p. 54, ¶¶24-27]. However, mediation would in fact be more efficient and cost-effective than arbitration.

49. A data analysis conducted by the Alternative Dispute Resolution Center calculated mediation's impact on length and cost of the resolution of the dispute in correlation with the estimated mediation success rate [DE PALO/FEASLEY/ORECCHINI., p. 4]. In Belgium and Italy, a 75% mediation success rate saved 330 days and €5,000, and 860 days and €7,000, respectively. Even with moderate compliance rates, mediation saves time and costs [ALEXANDER, pp. 9-16; DE PALO/FEASLEY/ORECCHINI, p. 5; SGUBINI/MARIGHETTO/PRIEDITIS, p. 6].

50. CLAIMANT ignored mediation's potential benefits when it opted for arbitration, prematurely abandoning negotiations [RFA, p. 6, ¶25; CASE FILES, p. 35]. Mediation, even if unsuccessful, would have eased subsequent steps and reduced arbitration costs. CLAIMANT's decision to avoid mediation led to unnecessary expenses.

51. Additionally, mediation is typically faster than litigation, as it focuses on a collaborative approach where both parties work together to resolve the dispute [GRAVILA/NUMAN, ¶¶4-5; KHAN, p. 1; KASCELAN, p. 7; FULLER, p. 7].

52. Thus, CLAIMANT's arguments on the disadvantages of mediation are unfounded, as choosing arbitration rather than mediation would be counterproductive.

53. In light of the above, the Tribunal should reject CLAIMANT's arguments regarding the compliance with Article 30 of the PSA. Mediation is a binding condition precedent to arbitration, and CLAIMANT's disregard with this step violates the agreed upon dispute resolution process. As a result, the Tribunal lacks jurisdiction, and the claim is inadmissible.

B. THE TRIBUNAL SHOULD ADMIT EXH. R3 AND ORDER THE EXCLUSION OF EXH. C7

54. In case the Tribunal finds that it has jurisdiction over the present dispute irrespective of the mediation clause, the Tribunal should (**B.1**) admit EXH. R3 and (**B.2**) order the exclusion of EXH. C7 from the case files, contrary to CLAIMANT's arguments.

55. From the outset, RESPONDENT highlights that it does not contest CLAIMANT's conclusion regarding the Tribunal's powers to decide on the admissibility of evidence [MFC, p. 26, ¶¶29-30]. However, contrary to CLAIMANT's assertions, EXH. R3 is admissible while EXH. C7 should be excluded from the records.

B.1. EXH. R3 SHALL BE ADMITTED

56. EXH. R3 is an email between CLAIMANT's Head of Legal Department, Mr. Cavendish, and Mr. Deiman, CLAIMANT's lead negotiator, in which they discuss issues related to the local content requirements of the RFQ [EXH. R3, p. 32].

57. The Tribunal shall admit EXH. R3 as a valid evidence in the Arbitration, since (**B.1.1**) EXH. R3 is not privileged under the Law of Mediterraneo; (**B.1.2**) subsidiarily, EXH. R3 is not privileged under the Law of Danubia. In addition, the Tribunal should find that (**B.1.3**) EXH. R3 was properly obtained and that (**B.1.4**) even if EXH. R3 is protected by attorney-client privilege, irrespective of the applicable law, the Tribunal should still admit it.

B.1.1 EXH. R3 IS NOT PRIVILEGED UNDER THE LAW OF MEDITERRANEO

58. There is a discussion regarding the law applicable to privilege in the present case. With that in mind, RESPONDENT shall demonstrate that the law of Mediterraneo governs privilege regarding EXH. R3 and that, according to such law, it is admissible, as this exhibit is not protected by attorney-client privilege.

59. CLAIMANT first argues that the Tribunal should apply the most favored nation approach to determine the applicable law, which would lead to the application of the law of Equatoriana [MFC, p. 57, ¶¶33-37]. It then claims that, since EXH. R3 involves legal advice, it is inadmissible under the Law of Equatoriana [MFC, pp. 56-59, ¶¶32-40]. Finally, it concludes that EXH. R3 should also be excluded under Art. 9.2.b of the IBA Rules [MFC, p. 58, ¶¶38-40].

60. However, contrary to CLAIMANT's assertions, the law of Mediterraneo is the one that governs privilege in the case of EXH. R3, because the closest connection approach is more suitable than the most favorable nation approach when determining the applicable law to privilege.

61. RESPONDENT does not contest CLAIMANT's affirmation that the absence of an express choice of governing law for privilege, the Tribunal shall determine it [MFC, p. 57, ¶34].

62. However, the application of the most favored nation approach to determine the applicable law is inappropriate. This is because, as CLAIMANT itself confesses, said approach seeks to ensure procedural fairness such that none of the parties is '*unfairly prejudiced*' [MFC, p. 56, ¶33]. There is no unfair prejudice in the application of the Law of Mediterraneo, as it is the law that CLAIMANT itself reasonably expected to be applied to the document, as will be demonstrated.

63. There is, on the other hand, unfairness in the application of the Law of Equatoriana. Equatoriana is RESPONDENT's place of business, meaning it has no relation to an email between CLAIMANT and its in-house counsel. Therefore, if the Tribunal were to apply the Law of Mediterraneo to decide on the admissibility of EXH. R3, it would be using completely unrelated legislation for the sole purpose of benefiting CLAIMANT.

64. Instead, RESPONDENT suggests the adoption of the closest connection test to determine the law applicable to privilege. Under this approach, the applicable law is the one with the closest connection to the relevant attorney-client relationship, as to ensure that the parties' expectations regarding the privacy of their documents is being respected and as to not cause any surprise [BERGER, pp. 508-511; BLACKABY/PARTASIDES/REDFERN, p. 43; DIMSEY/KREINDLER, pp. 157-160; FLETCHER/KHODYKIN/MULCAHY, p. 440; GORE, p. 2; GROVES/KELLY, p. 1; HOFMANN/OETIKER/ROHNER/ZUBERBÜHLER, pp. 207, 210-213; WAINCYMER, pp. 803-804].

65. Hence, the Tribunal should find that the closest connection approach is more appropriate than the most favored nation approach to determine the applicable law to privilege.

66. In the present case, the law with the closest connection with EXH. R3 is the Law of Mediterraneo, as it is the law of the place where the attorney who sent the communication is admitted [EXH. R3, p. 32]. Besides, Mediterraneo is also CLAIMANT's place of registration [PO2, p. 52, ¶1], where most of its assets are likely to be located. The Law of Mediterraneo is also the law of the place where the information was created and the law of the place where the information was sent from and to.

67. Therefore, the Tribunal shall conclude that the law applicable to privilege is the Law of Mediterraneo. Consequently, the Arbitral Tribunal should find that EXH. R3 is not protected by any privilege and is admissible.

68. There is an important distinction between the concepts of confidentiality and privilege, despite the connection with an attorney-client relationship. While confidentiality involves an attorney's ethical obligation to keep information secretive, privilege presupposes a right to protect communications from disclosure in legal proceedings when said communications involve legal advice [ALEXANDER, p. 266; CODY, p. 3; GIESEL, pp. 489-490; RODGERS, p. 1].

69. Under the Law of Mediterraneo, there are '*no rules on legal privileges protecting* [communications between the legal profession and its clients] *from disclosure*' [EXH. R4, p. 33].

70. For this reason, EXH. R3 cannot be excluded under Art. 9.2(b) of the IBA Rules, despite CLAIMANT's unsubstantiated affirmation to the contrary [MFC, p. 58, ¶¶38-40]. This is because said Art. expressly provides that a tribunal shall exclude evidence due to '*privilege under the legal or ethical rules determined by the tribunal to be applicable'*. Additionally, considerations under Art. 9.2 may only be made '*insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable*', under Art. 9.4.

71. As demonstrated, there are no rules on legal privileges under the applicable law. Consequently, due to the lack of attorney-client privilege under the applicable law, CLAIMANT has no right to protect EXH. R3 from disclosure, even if the Tribunal deems that the document is a communication seeking legal advice.

B.1.2 SUBSIDIARILY, EXH. R3 IS NOT PRIVILEGED UNDER THE LAW OF DANUBIA

72. In case this Tribunal finds that the Law of Mediterraneo is not applicable to privilege, it should apply the Law of Danubia instead, rather than favoring any other legislation.

73. When ruling on the applicable law to privilege, a tribunal may also apply the law of the seat. Under this rationale, the law of the seat is seen as the implied choice of law by the parties when no other agreement has been made, as it represents a neutral option when issues of fairness are raised [BERGER, pp. 508-511; GORE, p. 1; HOFMANN/OETIKER/ROHNER/ZUBERBÜHLER, pp. 207, 210-213].

74. The Arbitration seat is Danubia. Since the Law of Danubia, as the Law of Mediterraneo, has no provisions on attorney-client privilege [EXH. R4, p. 33], the aforementioned rationale (**B.1.1**) must be applied.

75. Consequently, the Tribunal should find that EXH. R3 is admissible under the Law of Danubia due to the lack of attorney-client privilege provision.

B.1.3 EXH. R3 HAS BEEN PROPERLY OBTAINED

76. CLAIMANT also raises the argument that RESPONDENT did not act in good faith by supposedly submitting '*improperly obtained evidence*' [MFC, p. 59, ¶¶42-43]. Additionally, it argues that the Tribunal would have to exclude EXH. R3 to ensure procedural fairness [MFC, p. 60, ¶¶44-46]. However, these claims are groundless.

77. In International Law, unless agreed otherwise, each party has the burden of proof regarding the facts relied upon to support its claim [AMARAL, pp. 1-4; DERAINS/MIRABAL, p. 197; GARNETT, pp. 67-69]. The *onus probandi incumbit actori* principle dictates that if a tribunal is left in doubt and the party which bears the burden of proof fails to sufficiently prove a claim, the fact is treated as not having happened [AMARAL, pp. 1-4; DERAINS/MIRABAL, p. 197; GARNETT, pp. 67-69].

78. CLAIMANT has failed to produce any evidence that could indicate that EXH. R3 was illicitly obtained. In its submission, CLAIMANT makes the egregious affirmation that EXH. R3 '*was likely obtained via illicit means through a leak in the public prosecution office*' or that, alternatively, it '*was obtained by inducing an employee of CLAIMANT to unlawfully disclose a highly confidential document*' [MFC, p. 59, ¶43] without presenting any substantive evidence to support its claim.

79. Since CLAIMANT has failed to demonstrate that EXH. R3 was acquired through illicit means, the Tribunal should disregard this argument. Thus, there is no compelling reason to order the exclusion of EXH. R3 under the grounds of bad faith in the tendering of evidence or procedural fairness.

B.1.4 EXH. R3 SHOULD BE ADMITTED IRRESPECTIVE OF THE APPLICABLE LAW OR PROTECTION BY ATTORNEY-CLIENT PRIVILEGE

80. In the unlikely scenario the Tribunal concludes that EXH. R3 is protected by attorney-client privilege, it should still (i) admit the document due to its materiality, or (ii) merely redact the parts of the document that contain legal advice while admitting the rest of the document.

81. **First**, the Tribunal should admit the entirety of EXH. R3 irrespective of any privilege, since it is materially relevant to the resolution of the dispute.

82. As recognized by CLAIMANT, the Tribunal has the power to evaluate the admissibility of evidence under Art. 34.1 of the FAI ARBITRATION RULES [MFC, p. 56, ¶29], a rule that is

mirrored in Art. 9.1 of the IBA Rules. Due to this discretion, a tribunal may still admit evidence that would otherwise be inadmissible in cases where said evidence is materially relevant to the dispute [LEEUWEN/PAISLEY, p. 61; *Caratube International Oil Company v. Kazakhstan*]. Additionally, the exclusion of relevant evidence may result in prejudice to a party's right to present its case and bar the efficient resolution of a dispute [HOFMANN/OETIKER/ROHNER/ZUBERBÜHLER, p. 207].

83. In the present case, EXH. R3 is relevant and material to the dispute, as it relates to the main issues of the Arbitration and may influence the Tribunal's decisions, despite CLAIMANT's empty argument to the contrary [MFC, p. 59, ¶40].

84. EXH. R3 is an email between CLAIMANT's in-house counsel, CEO, and lead negotiator, in which they discuss legal issues related to the governing law of the PSA [EXH. R3, p. 32]. More importantly, the document demonstrates that, even in internal communications, CLAIMANT did not express an expectation that the Convention would apply to the PSA, accepting its exclusion as will be demonstrated (**D**).

85. Therefore, EXH. R3 is not only relevant to the Arbitration, as it relates to the issue of the applicable law to the merits, but is also material, since it demonstrates that CLAIMANT knew CISG had been excluded by the Parties.

86. To avoid a violation of RESPONDENT's right to fully present its case and allow for an efficient resolution of the dispute, the Tribunal should admit EXH. R3 irrespective of any privilege.

87. **Second**, if the Tribunal still decides that it cannot admit EXH. R3 due to attorney-client privilege under any of the possible applicable laws, it should still admit the parts of the document that do not contain legal advice.

88. For a specific piece of communication to be protected by attorney-client privilege, it must have been produced for the purpose of legal advice [RUHLAND, pp. 1-2; BERGER, pp. 303-304; *United States v. United Shoe Machinery Corp*]. This means that communications that involve an attorney-client relationship but do not contain legal advice are not protected by attorney-client privilege [HAUSER/SIEBER, pp. 160-161; *United States v. United Shoe Machinery Corp*].

89. Moreover, Art. 9.5 of the IBA Rules determines that a tribunal may, when appropriate, '*make necessary arrangements to permit (…) evidence to be presented or considered subject to suitable confidentiality protection*'. Art. 9.2 of the IBA Rules further provides that a tribunal has the power to exclude a document '*in whole or in part*'.

90. The only section of EXH. R3 that contains legal advice is the final paragraph, in which the in-house lawyer discusses issues of misrepresentation [EXH. R3, p. 32]. The rest of the document merely illustrates a factual situation which, under the rules of attorney-client privilege, is admissible as evidence.

91. Therefore, the Tribunal should at most redact the final paragraph of EXH. R3 while admitting the rest of the document, rather than excluding the document in its entirety. With that, the Tribunal preserves attorney-client privilege while still admitting relevant parts of the document.

B.2. EXH. C7 SHALL BE EXCLUDED

92. As previously established (**A.3**), EXH. C7 is a without-prejudice offer sent from RESPONDENT to CLAIMANT after the termination of the PSA, in an attempt to amicably settle the Parties' dispute [EXH. R3, p. 32].

93. RESPONDENT shall demonstrate that the Tribunal should exclude EXH. C7 because (**B.2.1**) Parties agreed to maintain negotiations confidential; and (**B.2.2**) the document is also confidential under the without-prejudice rule.

B.2.1 PARTIES AGREED TO MAINTAIN NEGOTIATIONS CONFIDENTIAL

94. The drafting history of the PSA demonstrates that CLAIMANT led RESPONDENT to reasonably believe that the confidentiality rules contained in Arts. 51 and 52 of the FAI ARBITRATION RULES and Art. 15 of the FAI MEDIATION RULES would extend to negotiations prior to mediation.

95. CLAIMANT argues that EXH. C7 is not protected under both the scope of the FAI ARBITRATION RULES [MFC, p. 61, ¶¶49-50] and of the FAI MEDIATION RULES [MFC, p. 61, ¶¶51-52]. Furthermore, it states that the Parties did not intend for the confidentiality rule contained in Art. 15 of the FAI MEDIATION RULES to extend to negotiations [MFC, p. 62, ¶¶53-56].

96. However, none of CLAIMANT's arguments shall prevail. Although the secrecy obligation contained in the aforementioned institutional rules does not automatically extend to negotiations, Parties agreed to such extension.

97. Party autonomy is considered a cornerstone of arbitration. Under this principle, parties are free to conduct the proceedings in accordance with their mutual agreement, which includes their right to choose the rules applicable to an arbitration and even derogate from certain legal provisions [BORN/KALELIOGL; GRIMM, p. 192; *Ircon International v. RCF*].

98. This principle is expressed in both Art. 19 of the Danubian Arbitration Law and Art. 4.1 of the Contractual Acts of Danubia, Mediterraneo, and Equatoriana, which provide that the interpretation of a contract is dependent on the intention of the parties.

99. In this context, during the drafting of the arbitration agreement, RESPONDENT made it clear that confidentiality was an important issue. Given the political climate and the existing opposition to the new energy strategy, RESPONDENT did not want issues related to the Green Energy Strategy to be misrepresented to the public [EXH. R1, p. 30, ¶10]. CLAIMANT then reassured RESPONDENT that the institutional rules chosen by the Parties would '*be sufficient to address* [RESPONDENT'S] *concerns as they ensure the needed confidentiality*' [EXH. R2, p. 31, ¶2].

100. It is exactly from CLAIMANT's reassurance to RESPONDENT, that it is, not only reasonable to believe, but also logical, to conclude that the Parties implicitly extended the confidentiality obligations contained in the institutional rules to negotiations prior to mediation. Consequently, there was a reasonable expectation for EXH. C7 to be confidential, as it is a document produced in the context of negotiations prior to mediation.

101. As such, the Tribunal should find that EXH. C7 is confidential and cannot be used as evidence in the Arbitration, in accordance with Arts. 51 and 52 of the FAI ARBITRATION RULES and Art. 15 of the FAI MEDIATION RULES.

B.2.2 EXH. C7 IS PROTECTED BY THE WITHOUT-PREJUDICE RULE

102. In addition to the Parties' agreement, EXH. C7 is protected by the without-prejudice rule and is therefore inadmissible as evidence in the Arbitration.

103. CLAIMANT argues that (i) EXH. C7 is not protected by the without-prejudice rule [MFC, pp. 62-63, ¶¶51-52] and that (ii) even if the Parties' intent regarding admissibility is ambiguous, the Tribunal should still not exclude EXH. C7 because of its relevancy to the dispute [MFC, pp. 62-63, ¶¶55-56, ¶59]. Finally, it argues that (iii) RESPONDENT is estopped from objecting to the admissibility of EXH. C7 for supposed contradictory behavior [MFC, p. 64, ¶¶60-68].

104. **First**, RESPONDENT's offer is protected by the without-prejudice rule, since it was made in a legitimate attempt to settle the Parties' conflict.

105. The without-prejudice rule dictates that communications and documents made with the intention of resolving a dispute cannot be used as evidence in legal proceedings [ALEXANDER, pp. 266-268; ALTARAS, p. 474; SUTER, p. 147]. Its main goal is to promote an amicable resolution between parties by excluding the possibility of documents produced during negotiations being

used against each other [ALEXANDER, pp. 266-268; ALTARAS, pp. 475-476; SUTER, p. 148; *Lake Utopia Paper v. Connelly Containers*].

106. As CLAIMANT itself concedes [MFC, p. 63, ¶57], the applicability of the without-prejudice rules depends on if an offer was made for the purpose of settling a particular dispute [ALEXANDER, pp. 266-268; ALTARAS, p. 483; SUTER, p. 148; *Lake Utopia Paper v. Connelly Containers*].

107. This is precisely the case at hand. RESPONDENT sent a without-prejudice offer to CLAIMANT in '*the interest of keeping the good relationship with* [CLAIMANT] *and ensuring the jobs of the Equatorianian workers at Volta Transformer*' [EXH. C7, p. 20], a clear attempt to resolve the issues regarding the termination of the PSA. Whether CLAIMANT agrees with the terms of the offer is completely irrelevant to the applicability of the without-prejudice rule, since its requirements have been met.

108. Additionally, CLAIMANT's argument that '*there are no without-prejudice laws in Equatoriana*' [MFC, p. 62, ¶57] is incorrect. The mere fact that there is no case law on the meaning of the term "without-prejudice" in Equatoriana, Danubia, or Mediterraneo [PO2, p. 55, ¶30] does not imply that without-prejudice rules cannot be applied.

109. As RESPONDENT's without-prejudice offer fulfills the requirements for the application of the without-prejudice rule, the Tribunal cannot authorize EXH. C7's inclusion in the Arbitration.

110. **Second**, EXH. C7 is not materially relevant to the Arbitration, since it is a without-prejudice offer made in the context of amicable negotiation.

111. As demonstrated, the without-prejudice rule exists to protect amicable resolutions without the possibility of documents produced during negotiations being used by the parties against each other [ALEXANDER, pp. 266-268; ALTARAS, pp. 475-476; SUTER, p. 148; *Lake Utopia Paper v. Connelly Containers*].

112. EXH. C7 was produced in the context of negotiations prior to arbitration [EXH. C7, p. 20], which is exactly the reason for RESPONDENT's choice to send a "without-prejudice" offer. It was meant as a non-binding offer that sought to resolve the dispute at that moment. In fact, RESPONDENT's offer was based on factors that had yet to even be determined, such as the feasibility studies of the production of green steel [EXH. C7, p. 20, ¶2].

113. Consequently, EXH. C7 is not materially relevant in the context of the Arbitration, as the offer is subject to change and does not represent RESPONDENT's final position if mediation were to occur. Therefore, the Tribunal shall not admit EXH. C7.

114. **Third**, RESPONDENT is not estopped from opposing to the admission of EXH. C7, as its request is not contradictory to its conduct.

115. Although RESPONDENT agrees that the Parties must conduct themselves in good faith and that estoppel does fall within the scope of good faith [MFC, p. 64, ¶¶61-64], CLAIMANT's conclusion that RESPONDENT acts inconsistently with Equatoriana's representations by objecting to the admission of EXH. C7 [MFC, pp. 65-66, ¶¶65-68] is inaccurate and groundless.

116. Estoppel involves three connected elements, which are (i) a previous pattern of behaviors with conclusive meanings, (ii) the consequent trust or legitimate expectation based upon said behaviors and (iii) a contradictory behavior that violates said expectation [MARTINS-COSTA, p. 675; HENRIQUES, p. 357].

117. None of these elements are present in this case. Equatoriana's support for the transparency of arbitral proceedings that involve public interest logically does not create a reasonable expectation that RESPONDENT would publish any and all documents shared between the Parties. Transparency in arbitration does not equate the disclosure of settlement negotiations.

118. CLAIMANT's argument that Equatoriana's support for transparency would contradict RESPONDENT's interest in preserving a confidential document's confidentiality shall not prevail.

119. Therefore, since there is no inconsistency in RESPONDENT's request, the Tribunal should find that EXH. C7 is inadmissible and should consequently be excluded from the Arbitration.

CONCLUSION

120. In light of the above, the Tribunal should recognize that compliance with the mediation clause is a condition precedent and consequently an issue of jurisdiction rather than admissibility.

121. Mediation at this stage would possibly be fruitful, so the Tribunal should exercise its discretion to refuse the continuation of the present proceedings in favor of mediation, respecting the Parties' intentions.

122. Moreover, the Tribunal should find that EXH. R3 is not privileged under the applicable law and, even if it were, it should still authorize its inclusion due to its relevance to the Arbitration or only exclude the parts of the document that contain legal advice.

123. However, the same rationale cannot be applied to EXH. C7, as the Parties have chosen to extend the confidentiality obligation contained in the institutional rules and the document relates to an offer without-prejudice. As such, the Tribunal must order its exclusion.

ARGUMENTS ON MERITS

124. After demonstrating that this Tribunal does not have jurisdiction over this dispute and that the claim is inadmissible, proving that EXH. R3 shall not be excluded, while EXH. C7 shall not be admitted as evidence, RESPONDENT will demonstrate on the merits that (**C**) the CISG is not applicable to the Arbitration, and (**D**) that the Parties validly excluded the CISG under its own terms.

C. THE CISG IS NOT THE APPLICABLE LAW TO THE MERITS OF THE ARBITRATION

125. In the unlikely event the Tribunal concludes that it has jurisdiction over the present dispute, RESPONDENT shall demonstrate that the Convention is not applicable to the PSA because (**C.1**) the PSA is not a sale of goods agreement under Arts. 1(1) and 3(2) CISG; (**C.2**) the PSA falls under the exception in Art. 2(b) CISG; and (**C.3**) the Parties have their places of business in the same Contracting State, hindering the Convention's application due to Art. 1(1)(a).

C.1. THE PSA IS NOT A SALE OF GOODS AGREEMENT UNDER ARTS. 1(1) AND 3(2) CISG

126. CLAIMANT alleges that the CISG applies to the PSA as it supposedly constitutes a "*sale of goods*" agreement under Art. 1(1) CISG, not falling within the exceptions of Art. 3 CISG, once the contract's preponderant aspect is the delivery of goods [MFC, pp. 68-69, ¶¶76-83]. However, the Tribunal shall disregard CLAIMANT'S assertions.

127. RESPONDENT shall demonstrate that the CISG does not apply to the PSA because (**C.1.1**) it is preponderantly a service agreement, falling within the exceptions of Art. 3(2) CISG; (**C.1.2**) and exhibits typical turnkey characteristics that undermine the CISG's applicability, therefore (**C.1.3**) hindering the contract's classification as a "*sale of goods*" under Art. 1(1) CISG.

C.1.1 THE PSA FALLS WITHIN THE EXCEPTIONS OF ART. 3(2) CISG AS ITS PREPONDERANT ASPECT IS THE LABOR COMPONENT

128. Under Art. 3(2) CISG, the Convention is inapplicable to contracts in which the seller is preponderantly liable for services provision. In this sense, CLAIMANT relies on a distorted interpretation of the recommended methods for determining the preponderant part of a contract [MFC, pp. 70-72, ¶¶89-97], incorrectly arguing that an overall assessment of the case is merely supplementary [MFC, p. 72, ¶97] in an attempt to allege that the PSA is a mixed agreement [MFC, pp. 72-73, ¶¶97-99]. However, as RESPONDENT shall demonstrate, such an

assessment is indispensable, and reveals, in the case at hand, that the most appropriate criterion for establishing the preponderant aspect of the PSA is the essentiality criterion.

129. For a contract to be considered mixed under the CISG, the preponderant aspect between the seller's service and delivery obligations must be ascertained [CISG-AC OPINION NO. 4; FLECHTNER, pp. 88-89; LÜCHINGER, p. 729]. There are two criteria to asset the preponderant part of a contract: the economic value, which deems delivery of goods preponderant when it represents 50% or more of the contract's total value [CISG-AC OPINION NO. 4; HACHEM, p. 84; BRUNNER MEIER/STACHER, pp. 40-41] and the essentiality, which assesses the weight each obligation holds in the contract's result [HACHEM, p. 84; CISG-AC OPINION NO. 4; KOPONEN, p. 33].

130. Although the economic value criterion is recommended as the primary approach, the preponderant part of a contract should not be assessed using fixed value percentages, as these are often inappropriate or impossible to apply, but on the basis of an overall assessment, including the value of the services rendered [CISG-AC OPINION NO. 4; HACHEM, p. 84; SCHWENZER/HACHEM, p. 70]. As such, the essentiality criterion may be employed to establish the importance of the traded goods to the success of the contract [CISG-AC OPINION NO. 4; SCHWENZER/HACHEM, p. 70; PEROVIĆ, p. 185], which shall also be analyzed though an overall assessment [*Alfred Dunhill Ltd. v. Tivoli Group S.r.l.; Window Production Plant Case; Cylinder For The Production of Tissue-Paper Case*].

131. CLAIMANT could not have fulfilled its delivery duties without its service responsibilities, as the PSA required CLAIMANT to build the Plant on-site before handing it over to RESPONDENT [PSA, p. 10, Art. 1]. For this reason, determining the PSA's preponderant aspect solely through an economic value analysis — especially using fixed percentages as CLAIMANT has done [MFC, pp. 71-71, ¶94]—would be insufficient.

132. Thus, an overall assessment of the complexities of the case at hand requires that the issue of the PSA's preponderance be resolved under the essentiality criterion, which, as explained above, gages the importance each obligation held to the contract's success.

133. Hence, in addressing the application of the essentiality criterion to the PSA, RESPONDENT shall prove that (i) the extensiveness of CLAIMANT's labor duties hinders the PSA's classification as a mixed contract under Art. 3(2) CISG, and (ii) the Parties intended to highlight the PSA's service components.

134. **First**, per the essentiality criterion, the CISG is inapplicable to the PSA under Art. 3(2) CISG given the amount and consistency of services CLAIMANT was to provide during the performance of the contract.

135. The preponderant part of a contract can be determined under the essentiality criterion by asserting the scope and duration of each obligation. This rationale was applied in the *Prada S.p.A. v. Caporicci USA Corp.* case, where the Milan Chamber of Arbitration held the CISG inapplicable under its Art. 3(2) because the seller's service obligations held a larger weight to the contract's success, evidenced by the fact that they vastly exceeded its delivery obligations in scope and duration [*Prada S.p.A. v. Caporicci USA Corp.*, KOPONEN, p. 59].

136. According to CLAIMANT's CEO's spreadsheet [EXH. C5, p. 19], CLAIMANT's service obligations included packaging, project management, engineering, site works, training, maintenance, and provision of buildings, foundations, and other services. On the other hand, CLAIMANT's delivery duties were limited to the core system, trafo, electrical, and equipment [PO2, p. 56, ¶17]. Alongside CLAIMANT's prior engineering efforts for the Plant's unique technology, the PSA's timeline and the training and maintenance requirements of the contract [PSA, pp. 12-13, Arts. 2-3] demanded over two years of intensive labor, culminating in a single moment of handover of the Plant [PSA, p. 13, Art. 3] as a "*final product*" [RFQ, p. 11, ¶5].

137. Hence, CLAIMANT's service obligations significantly outweighed its delivery duties in both amount and duration, rendering the CISG inapplicable under its Art. 3(2).

138. **Second**, the PSA is not a mixed contract under Art. 3(2) CISG, as an overall assessment of the Parties' intentions for the contract's result reveals that, under the essentiality criterion, CLAIMANT's service responsibilities were preponderant.

139. The overall assessment can be performed under the lens of Art. 8 CISG, which provides tools for interpreting the parties' conduct and statements to assess their true intention for the contract's result [SCHMIDT-KESSEL, p. 160; *Video Surveillance Systems Case*; *Car Trim GmbH v. KeySafety Systems Srl; UN Conference*]. Under Art. 8(1) CISG, the conduct and statements of a party must be interpreted in accordance with the party's intention, in such a way that the other party knew or should have known about that intention [*Fruits and Vegetables Case V; Construction Materials Case V;* SCHMIDT-KESSEL, p. 160]. The intention of the parties can be ascertained through an objective standpoint according to their behavior and all the circumstances throughout their contractual relationship [SCHMIDT-KESSEL, p. 161*; Pizzeria Equipment Case; Cylinder For The Production of Tissue-Paper Case*]. As such, service obligations are deemed

preponderant if it is determined, under Art. 8 CISG, that the buyer's ultimate intention was to receive a fully assembled, tailored system that relies on the seller's labor [*Potato Chips Plant Case; Orintix S.r.L. v. Fabelta Ninove NV*].

140. RESPONDENT does not dispute that its own contributions are irrelevant for the purposes of Art. 3(1) [MFC, p. 69, ¶82] and that the PSA unifies both CLAIMANT'S sales and service obligations [MFC, pp. 69-70, ¶¶84-88]. However, CLAIMANT's analysis of the Parties' intentions is misguided [MFC, p. 72, ¶97], stemming as the root of its entirely contradictory recapitulation of the importance of its own labor for RESPONDENT.

141. CLAIMANT has repeatedly stated that it was enthusiastic to participate in the auction due to the possibility of showcasing its new patented PEM-electrolysis technology [RFA, p. 5; EXH. C3, p. 16; EXH. C5, p. 18, ¶7]. As CLAIMANT itself recognizes [MFC, p. 70, ¶88], the nature of this technology required advanced personnel training and maintenance services, which RESPONDENT counted upon and CLAIMANT knew it would be responsible for providing [RFQ, p. 10; PSA, Art. 2]. Furthermore, RESPONDENT's needs indeed directly aligned with such technology, as it would have been instrumental in RESPONDENT's role in managing "*the challenges of green hydrogen production*" [MFC, p. 73, ¶99].

142. In arguing that RESPONDENT's primary interest was in the mere delivery of the Plant's disassembled parts [MFC, p. 73, ¶¶98-99], CLAIMANT seemingly ignores that these components, useless without assembly, were a fruit of its own labor. This is the reason why RESPONDENT sough to acquire CLAIMANT's "*engineering, planning, construction*" services, along with training and maintenance during the first year [RFQ, p. 10, ¶1; PSA, pp. 12-13, Art. 2].

143. Conversely, CLAIMANT's services were indispensable for the success of the contract. Both the circumstances of the case and the conduct of the Parties highlight the fact that RESPONDENT procured a fully assembled, operable system, whose utility depended entirely on its functionality.

144. Thus, the PSA falls outside the scope of the CISG under Art. 3(2). This is because an overall assessment of the case's circumstances and the Parties' intentions under Art. 8(1) CISG reveals both that the essentiality criterion is the most appropriate for determining the contract's preponderance, and that, under said criterion, CLAIMANT's labor obligations were central to the contract's success. This conclusion holds even if the financial value of the goods exceeded that of the services, as CLAIMANT's labor obligations were also dominant in scope and consistency.

C.1.2 THE PSA'S TURNKEY CHARACTERISTICS UNDERMINE THE CISG'S APPLICABILITY

145. Although CLAIMANT has not addressed the non-applicability of the CISG due to the PSA's nature in its MFC, the Tribunal should also find the Convention inapplicable under Art. 3(2) CISG given the contract's turnkey characteristics.

146. Turnkey projects involve comprehensive services such as planning, installation, supervision and commissioning, in which the buyer has mutual duties of assistance to the seller [CISG-AC OPINION NO. 4; SCHWENZER/HACHEM, p. 262, JENKINS, p. 2; *Waste Separation Machines Case*]. These contracts often require engineering, procurement and construction services to deliver fully operational projects tailored to the employer's requirements, typically in industries like power plants and infrastructure [HANSEN, p. 2; ER/KÖMÜRLÜ, p. 268; ALDRIDGE/MSHALI, p. 3].

147. The very nature of turnkey agreements requires substantial labor provision, which is why they are typically excluded from the CISG's scope. Although not automatic, this exclusion applies when the seller's labor obligations, such as assembly and employee instruction, are preponderant [BRUNNER MEIER/STACHER, pp. 37-44; SCHWENZER/HACHEM, p. 262; CISG-AC OPINION NO. 4; HACHEM, p. 85; *Waste Separation Machines Case*].

148. The Plant's turnkey facet is undisputed by the Parties [RFA, p. 5, ¶4; RFQ, p. 10, ¶1; EXH. C5, p. 18, ¶9], as are the engineering, procurement and construction services that would have been necessary for the implementation of the project [EXH. C4, p. 17; EXH. C5, p. 19; RFQ, p. 10, ¶1]. Moreover, RESPONDENT is not merely responsible for payment, but instead has infrastructure provision responsibilities aimed at assisting CLAIMANT in its contractual duties [PSA, p. 13, Art. 4], a telltale characteristic of a turnkey contract.

149. Thus, as CLAIMANT was preponderantly liable for services (**C.1.1**), the PSA presents the typical characteristics of a turnkey contract that is excluded from the CISG's scope of application.

C.1.3 THE PSA IS NOT A SALES CONTRACT UNDER ART. 1(1) CISG

150. Having demonstrated that the applicability of the CISG is hindered by the PSA's preponderant service aspect and its turnkey characteristics, RESPONDENT will establish that these factors directly negate CLAIMANT's labeling of the PSA as a sales contract under Art. 1(1) CISG [MFC, pp. 68-69, ¶¶77-80].

151. Under Art. 1(1) CISG, the Convention applies to "*contracts of sale of goods*", which are to be understood as the result of a contract where the seller delivers goods in exchange for the buyer's payment [*Gardena House S.a.r.l. v. Timber group UAB;* LOOKOFSKY, p. 19; SCHWENZER/HACHEM, pp. 220-221]. Art. 3(2) CISG precisely aims to disqualify contracts in which the seller is preponderantly liable for services as typical sales agreements [HACHEM, pp. 81-84; CISG-AC OPINION NO. 4].

152. As demonstrated by RESPONDENT (**C.1.1; C.1.2**), the PSA's primary purpose is CLAIMANT's labor provision. Thus, the CISG is inapplicable to the PSA, as it is preponderantly a service agreement under Art. 3(2) (**C.1.1**), evidenced by its turnkey nature (**C.1.2**), which hinders the contract's characterization as a sales agreement under Art. 1(1) CISG (**C.1.3**).

C.2. THE PSA FALLS WITHIN THE EXCEPTION UNDER ART. 2(B) CISG

153. CLAIMANT argues that the PSA does not constitute a "*sale by auction*" under Art. 2(b) CISG [MFC, p. 73, ¶101] because it wrongfully interprets the application of the Convention, contending that the exclusion of said provision cannot be applied to the PSA since it resulted from a reverse auction [MFC, p. 73, ¶104]. However, the exclusion provided under Art. 2(b) CISG does apply to the PSA, as it is the award of an auction process organized by RESPONDENT for the construction of the Plant [RFQ, pp. 8-9].

154. Under Art. 2(b) CISG, the Convention is inapplicable to "*sales made by auction'*. This is because auctions are held locally and governed by the domestic law of where the auction is held [*Secretariat Commentary*; SPOHNHEIMER, p. 47]. Given the fact that the Convention is a recognized body of law aimed at providing uniformity, courts' reliance on domestic provisions goes against the purpose of even interpretation of the CISG's text [LOOKOFSKY, p. 46]. Hence, the expectation of a domestic nature on a local auction transaction is unsuitable to the CISG's framework.

155. In addition to promoting a uniform interpretation of the Convention, parties should resort to Art. 7 CISG, which requires a primary interpretation by the literality of the text [HACHEM, p. 145; SPOHNHEIMER, pp. 127-128; PERSON-WENGER, p. 203]. In this sense, the literal definition of an auction under the CISG is a public online or on-site sale through knocking down [BRUNNER MEIER/STACHER, p. 34; HACHEM, p. 68; SPOHNHEIMER, p. 47], in which parties from abroad come to a local auction [SCHWENZER/HACHEM, p. 55; SPOHNHEIMER, p. 48].

According to the Secretariat, auctions are subject to special rules under the applicable national law, which should not change [*Secretariat Commentary*, p. 16, ¶5].

156. The concept of reverse auction is a modern variation of the auction itself, retaining the competitive public characteristics but with only one seller and many buyers, usually happening online [NASH/SCHOONER/O'BRIEN-DEBAKEY/EDWARDS, p. 421; PIPER, p. 5]. Besides the award going to the lowest offer, reserve auctions share their essential characteristics with auctions, as they are both public open competitive sales.

157. In different case law, it was already decided that contracts resulting from auction processes were excluded from the application of the CISG [*Sale of Horse via Internet Auction; Online Auction of Photography Case*]. In these cases, the auctions were organized by online platforms. The CISG does not apply to online organized auctions [HACHEM, p. 69], which is how reverse auctions are usually settled [NASH/SCHOONER/O'BRIEN-DEBAKEY/EDWARDS, p. 421; PIPER, p. 5].

158. When deciding on whether to exclude auctions from the CISG's scope, courts first look to the meaning of the term "auction" [*United States v. Alvarez Machain*], making no differentiation between if it was held in presence or online, nor considering the terms and conditions or the mechanism for the formation of the contract [HACHEM, p. 69; BULKO, ¶15]. Hence, courts apply Art. 2(b) to any method of procurement labeled as an auction [BULKO, ¶15; *Sale of Horse via Internet Auction; Online Auction of Photography Case*].

159. In the present case, the PSA was awarded by way of an auction process under the requirements of the RFQ [RFQ, p. 8, ¶2(a)(2); EXH. R3, p. 32], rendering it outside the scope of application of the CISG under its Art. 2(b). The auction process was developed in different phases: first online for the registration of suppliers, then, in presence [PO2, pp. 52-53, ¶9]. The whole process was based on the "technology-open" nature of the RFQ [PO2, p. 52, ¶9], demanding a competitive sale in which CLAIMANT was amongst the final bidders [RFA, p. 4, ¶10]. Contrary to CLAIMANT'S allegations, a uniform interpretation of the term under Art. 7 CISG makes it so that a reverse auction is still a "*sales by auction*".

160. Therefore, since the PSA is an awarded contract in an auction process, it cannot be governed by the CISG under its Art. 2(b).

C.3. THE PARTIES HAVE THEIR PLACES OF BUSINESS IN THE SAME SIGNATORY STATE

161. CLAIMANT argues that the PSA falls under the CISG's scope, since CLAIMANT's sole place of business is in Mediterraneo [MFC, p. 76, ¶111]. However, RESPONDENT shall demonstrate that

(**C.3.1**) CLAIMANT has a place of business in Equatoriana, which is the relevant one under the CISG; and (**C.3.2**) RESPONDENT was not aware of the internationality of the PSA.

C.3.1 CLAIMANT'S PLACE OF BUSINESS WAS ESTABLISHED AT THE TIME OF CONTRACTING

162. Art. 1(1)(a) CISG rules that the Convention is only applicable when the parties' places of business are in different Contracting States [SCHLECHTRIEM, p. 16; SCHLECHTRIEM/BUTLER, p. 13; MANNER/SCHMITT, p. 18, *Case No. 2046; Case No. 1884*]. In this sense, RESPONDENT agrees with CLAIMANT regarding the fact that the place of business shall be determined in a case-by-case analysis [MFC, p. 76, ¶111] [JAYME, p. 30; HACHEM, p. 220; SCHLECHTRIEM, p. 30; HONNOLD, p. 42; *Case No. 727; Case No. 746*]. However, contrary to CLAIMANT's allegation that its sole place of business is in Mediterraneo [MFC, p. 76, ¶¶111-113], RESPONDENT shall demonstrate that CLAIMANT's relevant place of business under the PSA is in Equatoriana.

163. CLAIMANT fails to explain that a party can have multiple places of business [MFC, p. 76, ¶111]. If a party has multiple places of business, Art. 10(a) CISG determines that the relevant one to the contract is established as the one with the closest relationship to the contract and its performance [HACHEM, p. 220; FLECHTNER, p. 38; LOOKOFSKY, p. 31; SCHLECHTRIEM, p. 30; HONNOLD, p. 13; *Case No. 727; Case No; 1021; Case No. 746*].

164. In this sense, when Art. 10(a) mentions the performance of the contract, it refers to the place contemplated by the parties when they were entering into the contract [*Secretariat Commentary*, HACHEM, p. 218, HONNOLD, p. 42], which could be the place where the goods are manufactured, where the warehouse from which the goods are shipped is located, or where the buyer uses the goods to assemble the final product [FLECHTNER, p. 38; HACHEM, pp. 220-221, *Case No. 261, Target Corp. v. JJS Developments Ltd.*].

165. In the present case, CLAIMANT wrongfully alleges that Mediterraneo is its place of business [MFC, p. 77, ¶115]. However, CLAIMANT'S relevant place of business under the CISG is Equatoriana, precisely because it is the Place in which it was determined that the PSA's performance would happen at the time of contracting.

166. The PSA's timeline [PSA, p. 11, Art. 3] establishes that CLAIMANT would be in the Contracting State of Equatoriana [RFA, p. 7, ¶34] for over two years overseeing the assembly of the Plant, the training of RESPONDENT's employees, and the maintenance services for the first year of operation [RFQ, p. 8, ¶1].

167. Hence, it is in Equatoriana that CLAIMANT would be conducting its PSA-related business, making it its relevant place of business under Art. 10(a) CISG.

C.3.2 VOLTA BEING A SEPARATE ENTITY DOES NOT HINDER CLAIMANT'S PLACE OF BUSINESS

168. On the other hand, CLAIMANT argues that, once Volta is a separate legal entity, it cannot constitute a place of business for CLAIMANT [MFC, p. 77, ¶118]. Such an argument must not prevail, as the management of the enterprise is not a criterion to determine a place of business.

169. Despite CLAIMANT'S misleading interpretation of Art. 10(a) CISG to determine that Volta should not be considered to determine its place of business [MFC, pp. 77-78, ¶¶117-119], the Convention does not consider the location of a party's administration as the sole factor to determine its place of business [SCHLECHTRIEM, p. 30; LOOKOFSKY, p. 31; HONNOLD, p. 13; *Case No. 261; Target v. ERS*]. On the contrary, several locations are equally relevant to establish the place of business [HACHEM, p. 221; SCHLECHTRIEM, p. 30; HONNOLD, p. 13], and, as demonstrated above (**C.3.1**), the place with the closest relationship to the contract and its performance at the time of contracting is the relevant one under the Convention.

170. In the present case, Volta would perform a relevant portion of the obligations undertook by CLAIMANT in the PSA: For RESPONDENT, one essential criterion in the PSA was the local content, *i.e.*, the production of most of the power plant's components in the country of Equatoriana [RFQ, p. 9, ¶9; EXH. R1, p. 29, ¶4]. Volta, as an Equatorianian company [RFA, p. 3, ¶8], would provide Equatorianian works and goods on behalf of CLAIMANT [EXH. C4, p. 15, ¶1; PO2, p. 53, ¶16; EXH. C5, p. 16, ¶8], aiding in the fulfillment of the local content requirement.

171. At the time of contracting, Equatoriana was determined as CLAIMANT'S place of business because of the PSA's performance, regardless of having its headquarters in another Contracting State, and regardless of Volta's activities on CLAIMANT's behalf (**C.3.1**). However, Volta's acquisition [PO2, p. 52, ¶8; EXH. C4, p. 15] and the fact that Volta would perform an important portion of the PSA on behalf of CLAIMANT, providing the electrolysers and the transformer [EXH. C5, p. 16, ¶8; EXH. C5, p. 17, ¶11], reinforces the argument that Equatoriana is CLAIMANT'S place of business, as Volta eventually became CLAIMANT's subsidiary.

172. Therefore, Equatoriana must be considered CLAIMANT'S relevant place of business for the PSA under Art. 10(a) CISG, as it was established as such in the contract and is where Volta Transformer, CLAIMANT's subsidiary, is located at.

C.3.3 RESPONDENT DID NOT CONSIDER MEDITERRANEO AS CLAIMANT'S PLACE OF BUSINESS

173. CLAIMANT asserts that the Convention is applicable because RESPONDENT was aware of the PSA's internationality, since Respondent knew CLAIMANT'S address as in Mediterraneo [MFC, p. 78, ¶¶120-123]. However, even though RESPONDENT acknowledges that CLAIMANT'S headquarters is in Mediterraneo, RESPONDENT believed that CLAIMANT'S place of business is in Equatoriana because of the relevance this State had during the PSA's performance.

174. Art. 1(2) CISG rules that the Convention applies when the parties know or ought to know that they have their places of business in different Contracting States during negotiations and closing of the contract [LOOKOFSKY, p. 15; SCHLECHTRIEM, pp. 17-18; HACHEM, p. 222; HONNOLD, p. 41 *Ball-Bearings Case; Case No. 378; Case No. 651; Case No. 425*]. Nevertheless, contrary to CLAIMANT'S allegation, such Article has no relevance when the parties have place of business in the same Contracting States [HONNOLD, p. 15; *Ball-Bearings Case*; *Case No. 616*], as the CISG is not applicable then.

175. As previously explained (**C.3.1**), CLAIMANt's relevant place of business is in Equatoriana, since it is the place where the goods would be produced and assembled, and the services would have been supplied, both by Volta and CLAIMANT itself. RESPONDENT never considered Mediterraneo as CLAIMANT'S place of business for the PSA during its negotiations and closing.

176. In conclusion, as CLAIMANT's place of business was established as Equatoriana during the PSA's negotiation (**C.3.1**), which is not hindered by Volta Transformer's involvement (**C.3.2**), (**C.3.3.**) Art. 1(2) CISG has no relevance given that the Parties have their place of business in the same Contracting State.

D. PARTIES VALIDLY EXCLUDED THE APPLICATION OF THE CISG

177. After addressing the non-applicability of the CISG (**C**), RESPONDENT shall demonstrate that even in the unlikely event that the Tribunal finds the CISG is applicable to the PSA, it should find that the Parties have validly, albeit implicitly, excluded its application under Art. 6 CISG.

178. CLAIMANT, on the other hand, argues that the Parties never validly agreed to exclude the CISG [MFC, p. 79, ¶127], and that the Convention is applicable to the PSA under its default rule of application [MFC, p. 79, ¶127]. However, RESPONDENT shall demonstrate that this allegation is contradictory, as (**D.1**) an objective analysis of the case's circumstances reveals that the Parties

demonstrated its intention to exclude the Convention; (**D.2**) making the Arbitration an exception to the CISG's default rule of application.

D.1. THE INTENT OF THE PARTIES TO EXCLUDE THE CISG IS CLEAR

179. CLAIMANT argues that the Parties' intent was to include the CISG as part of their legal framework [MFC, p. 80, ¶131]. Nevertheless, during the Parties' negotiations, RESPONDENT made clear its intention to exclude the application of the Convention, in such a way that CLAIMANT ought to have known about that intention. Hence, in order to assess RESPONDENT's reasonable expectation of the exclusion of the CISG, it is necessary to rely on Art. 8 CISG to demonstrate why the exclusion is valid under Art. 6 CISG.

180. Art. 6 CISG establishes that parties have the autonomy to exclude the Convention's application in situations where it would otherwise govern the agreement [MANNER/SCHMITT, p. 71; HACHEM, pp. 116-117; MÜLLER-CHEN, p. 1676]. This provision requires a clear and unequivocal intention to exclude the CISG entirely, or modify its provisions, whether explicitly or implicitly [FLECHTNER, p. 190; MANNER/SCHMITT, pp. 77; RODRÍGUEZ, pp. 27-28; HACHEM, p. 116]. When assessing the validity of an exclusion under Art. 6 CISG, the interpretation of the parties' intent is paramount [CISG-AC OPINION NO. 16; *Gasoline And Gas Oil Case*].

181. The intention of the parties can be interpreted through the framework of Art. 8 CISG [FARNSWORTH; FLECHTNER, pp. 188-190; SCHMIDT-KESSEL, p. 160; YILDIRIM, p. 131; *Car Trim GmbH v. KeySafety Systems Srl; UN Conference*], which functions as an instrument to analyze the subjective element inherent to contractual relations [LOOKOFSKY, p. 49; SCHMIDT-KESSEL, p. 161*; Pizzeria Equipment Case; Cylinder For The Production of Tissue-Paper Case*]. Pursuant to Art. 8(1) CISG, the actions and declarations of a party must be interpreted based on that party's intent, provided the other party was aware or ought reasonably to have been aware of such intent [MORRISSEY/GRAVES, p. 84; SCHMIDT-KESSEL, p. 160; *Fruits and Vegetables Case V; Construction Materials Case V*]. However, if subjective intent is unclear, Art. 8(2) CISG applies an objective standard of interpreting actions from the perspective of a reasonable person of the same kind and under the same situation, with Art. 8(3) broadening the spectrum of interpretative tools to ascertain intent by considering all relevant circumstances to the case [MORRISSEY/GRAVES, p. 145; YILDIRIM, p. 139].

182. In this sense, parties may implicitly exclude the application of the CISG under its own terms [HACHEM, pp. 118-119; *Citroen Type C 5 Case*; *Gasoline And Gas Oil Case; Muller Ecole et Bureau v. Federal Trail*], provided that such an exclusion stems from a demonstrably clear intention of the parties to this effect, which is ascertainable through the tools of Art. 8 CISG [HACHEM, pp. 119-123; *Tantalum Powder Case I*; *Spacers For Insulation Glass Case*]. Specifically, there must be evidence indicating that the parties intended their legal relationship to be governed by a particular domestic law, which can be exampled by a party's subsequent reliance on domestic law [MANNER/SCHMITT, pp. 77-78; HACHEM, p. 124; *Rienzi & Sons, Inc. v. Puglisi; Boiler Case*].

183. The rationale explained above was also applied in the *Rienzi & Sons, Inc. v. Puglisi* case, in which the U.S District Court for the Eastern District of New York ruled that the parties had validly, albeit implicitly, excluded the CISG under its Art. 6. The court reasoned that the plaintiff, seeking to invoke the CISG only after realizing it would benefit its claim, would have expressed its intent to apply the CISG earlier if it truly intended to rely on it [*Rienzi & Sons, Inc. v. Puglisi*].

184. CLAIMANT'S argument that the inclusion of the law of Equatoriana in the PSA does not constitute a valid exclusion of the CISG [MFC, p. 80, ¶133] is inaccurate. CLAIMANT argued that "*pre-contractual negotiations can be relied upon to determine whether the Parties intended to exclude the application of the CISG*" [MFC, pp. 79-80, ¶130], however it is precisely demonstrated that during the negotiations the intention to solely apply the law of Equatoriana was so clear that CLAIMANT knew or ought to have known about it.

185. Firstly, at the beginning of the tender process, RESPONDENT used its Model Contract as a starting point for the negotiations with bidders, including CLAIMANT, but was always aware that changes would be requested due to the singularities of the potential deal [EXH. R1, p. 29, ¶7]. The 'governing law' clause was specifically discussed between the Parties during the draft of the PSA [EXH. R1, p. 29, ¶¶8-11], and expressly mentioned, at first, the applicability of the CISG [PO2, p. 53, ¶10].

186. Nevertheless, the governing law clause was updated by RESPONDENT with no further mention of the CISG. The update is reflected in Art. 29 of the PSA, which indicates that the law applicable is the "*law of Equatoriana with the exception of its conflict of law principles*" [PSA, p. 12, Art. 29; Exh. R1, p. 29, ¶7]. Such modification was part of a governmental campaign aimed to strengthen Equatoriana's law and was in accordance with the objectives set forth in the RFQ of performing most of the obligations in the territory of Equatoriana [EXH. C1, pp. 8-9; EXH. R1, p. 29, ¶7]. In this sense, RESPONDENT'S choice has always been clearly indicative of its intention

to not enter into an agreement ruled by the CISG, denying CLAIMANT'S argument to the contrary [MFC, p. 80, ¶132].

187. Furthermore, CLAIMANT'S acceptance of the wording in Art. 29 of the PSA is to be understood as an expression of its consent to exclude the CISG's application. This is also supported by the fact that CLAIMANT had previously used the outdated version of the Model Contract, and was thus aware that the new version did not mention the Convention [PO2, p. 52, ¶2; PO2, p. 53, ¶11]. In addition, despite having had ample opportunity to do so, CLAIMANT at no point expressed that it expected the PSA to be governed by the Convention, or that its acceptance of the final draft of the PSA was contingent on the applicability of the CISG. [EXH. R1, p. 29, ¶7].

188. In this sense, CLAIMANT'S argument that Mr. Cavendish's, CLAIMANT's CEO's, labeling of the CISG as a "*gold standard*" amounts to an expression of CLAIMANT's intention to enforce the Convention [MFC, p. 80, ¶131] is disingenuous. Afterall, Mr. Cavendish was only repeating what he had heard about the Convention [EXH. R1, p. 30, ¶11]. This is why CLAIMANT's argument that the lawyer that accepted the final draft of the PSA "*was not familiar with international sale of goods law*" [MFC, p. 80, ¶131] is not factual, as said lawyer was briefed on the regimes that were potentially applicable to the PSA [PO2, p. 53, ¶11]; thus, had CLAIMANT wished to apply the CISG to the PSA, it would have circled back to discussions on the matter, which it did not.

189. Lastly, RESPONDENT terminated the PSA evoking the law of Equatoriana [ATRFA, p. 28, ¶21; EXH. C6, p. 19], further cementing the fact that it neither intended for the PSA to be ruled by the CISG, nor did it enter into the agreement considering the CISG applicable. CLAIMANT did not raise the issue of the applicability of the CISG prior to requesting arbitration when attempting to persuade RESPONDENT not to terminate the PSA [PO2, pp. 54-55, ¶13], which also points to the fact that it consented and intended to exclude the CISG.

190. The Parties have validly excluded the CISG application under its Art. 6. It is clear that RESPONDENT had always demonstrated the intention to solely apply the law of Equatoriana to the detriment of the CISG. The conduct of both Parties during the draft of the PSA supports RESPONDENT's reasonable expectation that the Parties had implicitly agreed to exclude the CISG. From an objective standpoint, there is ample evidence about RESPONDENT's intention to exclude the Convention's application in such a way that CLAIMANT knew or ought to have known that the CISG would not govern the PSA.

D.2. APPLYING AN OBJECTIVE INTERPRETATION TO THE PARTIES' AGREEMENT ON GOVERNING LAW, THE PARTIES HAVE AGREED TO EXCLUDE THE CISG

191. CLAIMANT argues that by choosing the law of Equatoriana, the Parties effectively reinforced the CISG's default rule of application as part of the chosen governing law [MFC, p. 79, ¶127]. However, the Tribunal should find that in the present case the reference to the law of a Contracting State was meant to exclude the Convention's application and, therefore, is an exception to the automatic application of the CISG.

192. The CISG's default rule of application determines that when the elements for the Convention's application laid out in its Arts. 1-3 and Art. 100 are present, the CISG is automatically applicable to cases in which the parties are from Contracting States [MORRISSEY/GRAVES, pp. 58/59; HACHEM, pp. 117-118; CISG-AC OPINION NO. 16]. However, there are exceptions to the default rule. If the transaction is more closely associated with the legal system of a country other than the one that would otherwise govern under the preceding rules, the law of that other country should apply [MORRISSEY/GRAVES, pp. 64-65]. Similarly, selection of the law of a Contracting State in the contract without mention of the CISG can be viewed as an exception to the default rule of automatic application [CISG-AC OPINION NO. 16; *American Biophysics Corp. v. Dubois Marine Specialties; Ho Myung Moolsan, Co. Ltd. v. Manitou Mineral Water, Inc.*; *Rienzi & Sons, Inc. v. Puglisi*].

193. As mentioned, the PSA would be performed in Equatoriana (**C.3**), the core of the auction process was to develop the local industry in Equatoriana for renewable energy, and the CISG is not mentioned in the PSA in order to strengthen the role of Equatorianian Law and Equatoriana as a place of dispute resolution (**D.1**). Thus, the domestic law of Equatoriana is the system with the closest connection and association with the transaction [Exh. R1, p. 30, ¶11].

194. Contrary to CLAIMANT'S arguments that Art. 29 of the PSA is not sufficient to exclude the CISG [MFC, p. 81, ¶138], the express mention of the Law of Equatoriana in the clause is enough to establish that the Parties intended to exclude the CISG under its own terms.

195. In conclusion, the Arbitral Tribunal should find that an objective analysis of the Parties behavior along their contractual relationship reveals that (**D.1**) there was an unequivocal intention to exclude the application of the Convention, (**D.2**) thereby establishing this Arbitration as an exception to the CISG's default rule of application. Therefore, the Parties' have validly excluded the CISG under its own terms.

CONCLUSION

196. Hence, CLAIMANT's assertion that the CISG is applicable to the PSA is completely inaccurate, since (i) the PSA is preponderantly a service agreement; (ii) the RFQ is excluded from CISG's application due to Art. 2(b) CISG; (iii) the Parties' places of business are located in the same Contracting State; and (iv) the Parties validly excluded CISG's application. In this sense, the CISG is not applicable to the PSA, hence RESPONDENT's termination of the PSA under the Civil Code of Equatoriana was its rightful choice, as this is the applicable law.

REQUEST FOR RELIEF

197. In light of the above, Counsel for RESPONDENT respectfully requests the Tribunal to find that:

1) The claim should be rejected since the Tribunal has no jurisdiction over it nor is the claim admissible
2) It should admit EXH. R3 while ordering the exclusion of EXH. C7
3) The CISG is not applicable to the PSA
4) The Parties have validly excluded the application of the CISG

Equatoriana, 30 January 2025

ON BEHALF OF EQUATORIANA RENPOWER LTD.