Thirty-Second Annual

WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

Memorandum for RESPONDENT

University of New South Wales

On behalf of	Against
RESPONDENT	**CLAIMANT**
Equatoriana RenPower Ltd 1 Russell Square Oceanside Equatoriana	GreenHydro Plc 1974 Russell Avenue Capital City Mediterraneo

Aman Mohamed • Nathan Roberts • Sonia Ram • Tucker Greer

Sydney ~ Australia

30 January 2025

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

¶/¶¶	paragraph/paragraphs
§/§§	section/sections
CISG	United Nations Convention on Contracts for the International Sale of Goods
l./ll.	line/lines
Contract	Purchase and Service Agreement dated 17 July 2023
CM	Claimant Memorandum
Art.	Article
Merger Clause	Art. 31 Miscellaneous This document contains the entire agreement between the Parties and is based on the Model Purchase and Sales Agreement for governmental entities in Equatoriana. It should be interpreted in light of the Request for Quotation RFQ 1/2023.
No.	Number
RfA	Request for Arbitration
ARfA	Answer to Request for Arbitration
ToR	Terms of Reference
PO.1	Procedural Order No. 1
PO.2	Procedural Order No. 2
UNCITRAL	United National Commission on International Trade Law

INDEX OF AUTHORITIES

COMMENTARY

CASES

Australia

Hong Kong

International Chamber of Commerce (ICC)

Italy

Netherlands

Singapore

AWARDS

Arbitration and Mediation Centre of the Santiago Chamber of Commerce (CAM-Santiago)

International Centre of Settlement of Investment Disputes (ICSID)

STATEMENT OF FACTS

1. The Parties to this arbitration are GreenHydro Plc ('**CLAIMANT**') and Equatoriana RenPower Ltd ('**RESPONDENT**').

2. **CLAIMANT** is a medium-sized engineering company based in Mediterraneo, producing green hydrogen plants and connected services for the whole hydrogen and Power-to-X value chain.

3. **RESPONDENT** is a wholly government-owned Equatorianian company created by a merger of two state-owned renewable energy companies to implement Equatoriana's Green Energy Strategy.

3 Jan 2023	To decarbonise Equatoriana's steel and transport industry, RESPONDENT publishes a Request for Quotation for the planning, construction and delivery of a plant to produce green hydrogen and potential derivatives. The Request envisages an operational plant by 2026 and requires at least 25% local Equatorianian content. CLAIMANT applies to be and is approved as a potential seller for the plant. CLAIMANT's bid promises at least 30% of local content for the 100MW green hydrogen plant and plans for the eAmmonia module to be produced with 80% local content using P2G as its main subcontractor.
Early May 2023	RESPONDENT selects CLAIMANT as one of two bidders to enter final negotiations. The Model Contract, revised in 2022 to strengthen Equatorianian law, is used as the basis for the contractual terms. CLAIMANT accepts its choice of Equatorianian law to govern the Contract. This contrasts with the pre-2022 version explicitly selecting the CISG.
12 Jul 2023	CLAIMANT communicates that it recognises a need for confidentiality for dispute-related communications. CLAIMANT also confirms that the Parties must first try to mediate their disputes, and that arbitration is a last resort to dispute resolution. CLAIMANT also communicates to RESPONDENT that the local content will likely be close to 50% of the project. Despite issues with negotiations with P2G, CLAIMANT conveys to RESPONDENT that the negotiations with P2G were promising and likely to materialise.
13 Jul 2023	Anticipating this high level of local content, RESPONDENT forgoes the broad right to terminate for convenience and agrees to include a best endeavours clause.
17 Jul 2023	The Parties sign the Contract.

26 Aug 2023	After winning the bid and despite prior representations, CLAIMANT suddenly informs RESPONDENT that P2G will not produce the eAmmonia module. Rather, Green Ammonia, whose sole production facility is in Danubia, is to replace P2G. RESPONDENT is taken by surprise and makes clear it expects CLAIMANT to do its best to otherwise increase the local content. RESPONDENT also raises concerns about the potential for negative public scrutiny for the project, due to which compliance with timelines and budget is imperative.
Oct 2023	Local elections lead to a shift in government policy away from green hydrogen and other green energy strategies to alleviate the burden on businesses in Equatoriana. Despite this shift in policy, RESPONDENT keeps the Contract afoot.
Nov 2023	RESPONDENT emphasises to CLAIMANT that timeliness is of paramount importance, and that there is increasing critical public scrutiny over the project. Meanwhile, CLAIMANT acquires Volta Transformer, the only subcontractor which meets RESPONDENT's local content requirements.
1 Feb 2024	CLAIMANT's first contractual milestone, the delivery of the plans for the plant and eAmmonia module, is due. Despite RESPONDENT's warning on timeliness, CLAIMANT fails to meet this milestone.
28 Feb 2024	CLAIMANT finally delivers plans for the plant. However, the eAmmonia module plans are not included. Consequently, RESPONDENT refuses payment of 25% of the Contract price that would have been payable on 10 February 2024.
29 Feb 2024	Seriously concerned about CLAIMANT's ability to perform the Contract as agreed and with changes in government priorities, RESPONDENT terminates the Contract for CLAIMANT's breach of the Contract due to the delayed and incomplete delivery of the plans for the plant. Moreover, Art. 7.3.8 of the ECC enables RESPONDENT to terminate the Contract due to the conflict with government policy.
12 Mar 2024	CLAIMANT alleges the termination was invalid and requests at least 50% of the amount due on 10 February 2024, and the issuance of final permits.
31 Jul 2024	Rather than submitting the dispute to mediation under the FAI Mediation Rules as had been agreed, CLAIMANT files a Request for Arbitration. Despite having acknowledged the need for confidentiality, CLAIMANT also tenders Exhibit C7, a privileged without-prejudice opening offer to resolve the dispute, as evidence.

SUMMARY OF ARGUMENT

'The man who complains about the way the ball bounces is likely the one who dropped it' – Lou Holtz

1 Although CLAIMANT had much to gain from the project, it always knew that it was contracting with an Equatorianian state-owned entity in the lead-up to an election. The Contract was made in pursuance of Equatoriana's Green Energy Strategy. However, after the elections, the Strategy was significantly revised by the new government with a focus on affordable energy. CLAIMANT's continued failure to meet project milestones threatened this objective, such that RESPONDENT terminated the Contract. To re-align the project with its new policy and seek an amicable way forward, RESPONDENT requested a price reduction and was happy to negotiate accordingly. However, CLAIMANT never explored options to continue the project under these new circumstances. Instead, CLAIMANT jumped to arbitration, ignoring the Parties' express agreement to first mediate their disputes.

2 Accordingly, this Tribunal has no jurisdiction to hear and decide the claim. Equatorianian law governs the Arbitration Agreement, and provides that non-compliance with the mediation condition precedent affects a tribunal's jurisdiction. Moreover, the Parties intended for mediation before arbitration to be mandatory. Even if this Tribunal has jurisdiction, it should declare the claim inadmissible until the Parties have mediated under the FAI Rules as mediation can still yield efficacious solutions to the dispute. (**Issue 1**)

3 Even if this Tribunal is to hear this dispute, it should not decide based on the CISG as the CISG does not apply to the Contract. The Contract was neither international, nor for the sale of goods. The primary purpose of the Contract was the delivery of a turnkey plant, requiring significant EPC work from CLAIMANT. Furthermore, RESPONDENT's public procurement process falls within the auction exception of Art. 2(b) CISG. (**Issue 3**)

4 In any event, the Parties intended to exclude the CISG. The Parties used RESPONDENT's 2022 Model Contract, which removed reference to the CISG with the aim to '*strengthen the role of Equatorianian law*'. The new Model Contract selected the '*law of Equatoriana to the exclusion of its conflict of laws principles*', which the Parties understood to mean the non-harmonised law of Equatoriana would govern the Contract. (**Issue 4**)

5 Finally, CLAIMANT submits Exhibit C7 despite well-established international law principles recognising settlement-negotiations privilege. In any event, this Tribunal should not admit Exhibit C7 into evidence because it is not material to the outcome of CLAIMANT's case. Contrarily, this Tribunal should admit Exhibit R3, which is both relevant and material to RESPONDENT'S case. The Parties never expected legal advice privilege to attach to Exhibit R3, and assertions that it was obtained illegally or improperly are unsubstantiated. (**Issue 2**)

ARGUMENT

ISSUE 1: THIS TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR AND DECIDE THE CLAIM OR THE CLAIM IS NOT ADMISSIBLE

6 Contrary to CLAIMANT's contentions [*CM, pp. 4, 8 ¶¶1, 29*], this Tribunal cannot and should not hear this dispute. When negotiating, the Parties made clear that they intended arbitration to be a '*last resort*' [*R1, p. 30 ¶9; R2, p. 31*]. CLAIMANT itself insisted that mediation under the FAI Mediation Rules was to come first to ensure quick and amicable dispute resolution [*R2, p. 30 ¶8*]. As such, the Parties agreed that '*any dispute, controversy or claim…shall first be submitted to mediation*' [*C2, p. 12 Art. 30*]. Despite its insistence on mediation [*R1, p. 30 ¶8; R2, p. 31*], CLAIMANT now seeks to resile from this legal obligation. In keeping with party autonomy, this Tribunal ought to honour the Parties' agreement and decline to hear this dispute. RESPONDENT's consent to arbitration is conditional upon any dispute first being mediated under the FAI Mediation Rules.

7 Accordingly, this Tribunal lacks jurisdiction to hear and decide the claim because under Equatorianian law, non-compliance with a mediation condition precedent affects a tribunal's jurisdiction (**A**). Alternatively, this Tribunal should declare the claim inadmissible until the mediation condition precedent has been complied with (**B**).

A This Tribunal lacks jurisdiction to hear and decide this claim

8 RESPONDENT agrees with CLAIMANT that this Tribunal can rule on its own jurisdiction [*CM, p. 5 ¶11; Art. 16(1) Model Law; Art. 33.1 FAI Arbitration Rules*]. However, CLAIMANT argues that compliance with conditions precedent are *always* matters of admissibility rather than jurisdiction [*CM, p. 4 ¶¶2-3*]. This misstates the true legal position. Although noncompliance is '*ordinarily*' a matter of admissibility rather than jurisdiction, this ultimately '*depends on the intentions of the Parties*' [*Born/Šćekić, pp. 228, 246; Jones/Walker, p. 167 ¶6.150*]. Moreover, whether a condition precedent to arbitration affects jurisdiction or admissibility varies between legal systems [*Born/Šćekić, pp. 244-245, 247; Lal et. al., pp. 799-801*]. This issue should be determined according to the law applicable to the Arbitration Agreement [*Born/Šćekić, p. 261; Dicey/Morris/Collins ¶16-008; Lacreta, p. 104*].

9 In this case, non-compliance with the mediation condition precedent affects this Tribunal's jurisdiction because the Parties impliedly chose Equatorianian law to govern the Arbitration Agreement [*Jones/Walker, p. 168 ¶6.150; cf C v D ¶51*]. This is because a choice of law to govern the main Contract extends to the Arbitration Agreement (**I**), and this presumption in favour of the main Contract is not rebutted (**II**). Consequently, this Tribunal does not have jurisdiction to hear the dispute under Equatorianian law, which has consistent case law

that non-compliance with a condition precedent to arbitration affects an arbitral tribunal's jurisdiction [*R1, p. 30* ¶*9*] (**III**).

I A choice of law to govern the main Contract extends to the Arbitration Agreement

10 CLAIMANT argues that the law of the seat by default is the governing law of the Arbitration Agreement [*CM, pp. 4-5* ¶¶*6-10*]. This Tribunal should not follow that approach. The NY Convention requires this Tribunal to first look to the law to which the Parties have '*subjected*' the Arbitration Agreement [*Art. V(1)(a) NY Convention*] (**a**). CLAIMANT's suggested approach to apply the law of the seat is inconsistent with the Parties' chosen institutional rules and is not supported by recent authority (**b**). Instead, it accords with the Parties' expectations for the law governing the main Contract to extend to the Arbitration Agreement (**c**).

(a) The NY Convention requires this Tribunal to first look to the law that the Parties '*subjected*' the Arbitration Agreement to

11 The NY Convention provides that this Tribunal must first consider the law to which the Parties '*subjected*' the Arbitration Agreement [*Art. V(1)(a) NY Convention*]. This includes an express as well as an implied choice of law to govern the agreement [*Enka v Chubb* ¶*129; Born2* §*4.04[B][2][b][ii]; BCY v BCZ* ¶*64*]. Where no choice (express or implied) can be identified, the NY Convention then requires the governing law of the Arbitration Agreement to be the seat as a default rule [*Art. V(1)(a) NY Convention*]. This approach gives primacy to party autonomy. Given there is an implied choice, the default rule need not be activated. For the same reason, this Tribunal does not need to consider CLAIMANT's argument that a '*closest and most real connection*' test points to the seat and thus Danubian law applying [*CM, p. 5* ¶*6*; *Redfern* ¶*3.22, discussing Enka v Chubb*].

(b) CLAIMANT's '*default rule*' approach reflects the position of other arbitral institutions, not that of the FAI, and is not supported in recent decisions

12 CLAIMANT's approach (to apply the seat by default) is generally used by arbitral institutions which have a built-in default rule that the law of the seat applies where the Parties have not made an express choice of law [*Redfern* ¶¶*3.30-3.32; e.g., Bulbank* ¶*291; e.g., Art. 16.4 LCIA Rules*]. However, the present dispute is governed by the Model Law and FAI Arbitration Rules [*Letter 27 Aug., p. 38; PO.1, p. 51* ¶*4*], which do not contain a rule to that effect [see *SQD v QYP* ¶*17*]. To apply CLAIMANT's suggested approach contradicts Art. V(1)(a) NY Convention [*Born2* §*4.04[A][2][i]; cf CLOUT Case 2051* ¶¶*97, 102; Lacreta, p. 105*].

13 CLAIMANT also refers to the *FirstLink Case* to propose that a choice of a Danubian seat amounts to an implied choice for Danubian law to govern the Arbitration Agreement [*CM,*

p. 5 ¶6; FirstLink ¶¶15-16]. However, more recent authority rejects that reasoning [*BCY v BCZ ¶59; Dyna-Jet ¶31; BMO v BMP ¶39; Yoong, p. 664 ¶¶44-45*] and subsequent Singaporean appellate authority has instead favoured the presumption that the law chosen for the main Contract is a stronger indication of implied choice for the Arbitration Agreement than the choice of a seat [*BNA v BNB ¶¶44-48; Anupam Mittal v Westbridge ¶¶31, 70*]. Other jurisdictions and arbitral tribunals have followed suit, also adopting that presumption [*Enka v Chubb; China Railway v Chun Kin, p. 18 ¶35(b); ICC-FA-2021-071, p. 95*].

(c) The express choice of law for Equatorianian law to govern the main Contract extends to the Arbitration Agreement

14 Accordingly, the starting point for choice-of-law analysis is that there is '*a very strong presumption*' that an express choice of law for the main contract amounts to at least an implied choice of law to govern the Arbitration Agreement [*Lew, p. 143; Enka v Chubb ¶¶53, 255, 263; Kabab-ji ¶35; Born2 §4.04[A][2][d]*]. Therefore, *prima facie*, the Arbitration Agreement is governed by Equatorianian law, which was expressly chosen by the Parties in Art. 29 of the Contract. Moreover, civil and common law courts including in Austria, Canada, Germany and India even regard the presumption as an *express* choice to govern the Arbitration Agreement [*Ling, p. 408; Scherer / Jensen §III(A)(i)*].

15 This approach is consistent with separability. The purpose of separability is to ensure the survival of the Parties' preferred method of dispute resolution [*Yoong, p. 658 ¶¶18-19; Ling, p. 410; Jones/Walker, p. 172 ¶6.190*]. Arbitration agreements are severable rather than hermetically isolated and separate [*Briggs ¶14.37; see also BCY v BCZ ¶¶60-61*]. Separability does not require a different law to apply the to Arbitration Agreement [*Scherer/Jensen §III(A)(i); Born2 §4.02; Bermann, p. 152*]. A misunderstanding of separability should not defeat the reasonable expectations of the Parties to view Art. 29 of the Contract as extending to the Arbitration Agreement [*Enka v Chubb ¶¶257(iii), 270, 286; BCY v BCZ ¶¶60-61*].

II The presumption that the Arbitration Agreement is governed by the same law expressly chosen for the main Contract is not rebutted

16 The presumption will only be rebutted where there is '*good reason*' to conclude the Parties did not impliedly select the same law governing the main Contract to extend to the Arbitration Agreement [*Enka v Chubb ¶43*]. The choice of a Danubian seat by itself does not rebut the presumption (**a**), and no other recognised rebutting factors apply here (**b**).

(a) The choice of a Danubian seat does not negate the presumption

17 The presumption cannot be rebutted merely through the choice of a third country as the seat of arbitration because reasonable businesspeople do not ordinarily intend a choice of

the seat to have any implication for the substantive law of the agreement [*Enka v Chubb ¶¶116-117, 170(v)-(vi); BCY v BNZ ¶¶63, 65*]. Therefore, the seat being Danubia does not by itself amount to an implied choice of Danubian law to govern the Arbitration Agreement instead of Equatorianian law [*ibid*]. CLAIMANT may point to the Parties' negotiations, which indicated that a neutral Danubian seat was important to the bargain [*R1, p. 30 ¶8*]. However, the neutral Danubian seat supplies the procedural law of the arbitration which, in accordance with standard practice, was chosen to secure a neutral dispute resolution process [*Redfern ¶¶3.42, 3.44; BCY v BNZ ¶63*].

(b) There is no risk of invalidity by applying Equatorianian law

18 The presumption that Art. 29 of the Contract extends to the Arbitration Agreement can also be rebutted where applying Equatorianian law would render the Arbitration Agreement invalid [*Enka v Chubb ¶¶106, 170(vi)(a)*]. This is because reasonable commercial Parties are unlikely to intentionally agree to a clause which is null and void [*ibid; Redfern ¶3.34; BNA v BNB ¶¶89-90*]. However, applying Equatorianian law to the Arbitration Agreement does not invalidate the agreement [*see PO.2, p. 56 ¶36(c)*].

III Under Equatorianian law, mediation under the FAI Mediation Rules is a condition precedent to the *jurisdiction* of this Tribunal

19 Applying Equatorianian law here, this Tribunal lacks jurisdiction to hear this dispute. Consistent case law in Equatoriana provides that in the case of multi-tier arbitration agreements (like Art. 29 of the Contract) non-compliance with a mediation condition precedent affects the jurisdiction of an arbitral tribunal [*R1, p. 30 ¶9*]. If this Tribunal decides to hear the claim despite this Equatorianian law rule, the award risks set aside or non-recognition [*Arts. V(1)(a) NY Convention; Arts. 34(2)(a)(i); Born2 §26.05[C][1][a]*].

B Alternatively, this Tribunal should declare the claim inadmissible

20 Should this Tribunal find that non-compliance with the condition precedent is a matter of admissibility rather than jurisdiction, the outcome is the same. This Tribunal should declare the claim inadmissible and decline to hear the Parties on the merits of the dispute until the Parties have satisfied the mediation condition precedent. This is prudent because, at the recognition and enforcement stage, an Equatorianian court might not enforce any final award without the mediation condition precedent fulfilled, making CLAIMANT's request for specific performance impossible [*RfA, p. 7 ¶31; R1, p. 30 ¶9; Jones/Walker, p. 170 ¶6.160*].

21 The Parties demonstrated a clear intention in Art. 30 of the Contract that mediation under the FAI Mediation Rules is a mandatory condition precedent to arbitration (**I**). There is no reason to declare the claim admissible in spite of non-compliance (**II**).

I The Parties intended that mediation under the FAI Mediation Rules be mandatory and the Parties should be held to their bargain

22 CLAIMANT contends that Art. 30 of the Contract contains expressions of aspiration rather than binding obligations on the Parties [*CM, p. 10 ¶41*]. However, the obligation to mediate is contained in a substantive (rather than preambulatory) clause of the Contract. Moreover, Art. 30 of the Contract is not drafted in an uncertain or indefinite way such as agreements to '*negotiate in good faith*' which have been deemed aspirational [*Born/Šćekić, p. 232; e.g., Walford v Miles, p. 138*]. Instead, mediation under the FAI Rules is not only a valid pre-arbitral procedural requirement with definable content (**a**), but the Arbitration Agreement is structured as a mandatory condition precedent to arbitration (**b**).

(a) Mediation is a valid pre-arbitration procedural requirement

23 Art. 30 of the Contract is a valid pre-arbitration procedural requirement because it has a reasonably clear set of substantive and procedural requirements against which the Parties' negotiating efforts can be measured [*Born/Šćekić, p. 231*]. CLAIMANT contends that a three-step test established by the High Court of England and Wales, which helps to determine whether obligations are reasonably clear, is not met [*CM, p. 9 ¶¶34-35; Wah v Grant Thornton ¶¶60-61*]. The test requires (i) sufficient certainty and unequivocal commitment to commence a process; (ii) from which what steps each Party must take can be discerned; and (iii) which is sufficiently clear to objectively determine the minimum required of the Parties and when the process is properly terminable without breach [*ibid*]. These requirements are met because the Parties agreed to submit disputes to mediation in accordance with the FAI Mediation Rules [*C2, p. 12 Art. 30*]. The agreement on institutional rules affords the certainty required in the three-step test [*Born/Šćekić, p. 233; e.g., HIM Portland, p. 42*].

24 Art. 30 of the Contract obliges the Parties to '*submit*' disputes to mediation, which has a clear meaning under Art. 2.1 FAI Mediation Rules [*cf CM, p. 9 ¶35 ll. 4-5*]. Moreover, one Party cannot immediately and unilaterally terminate mediation under Art. 10.1(b) FAI Mediation Rules. This is because the Parties agreed to be bound by the obligation to mediate in good faith before doing so [*Art. 8.5 FAI Mediation Rules; United Group Rail ¶23*]. Only when good faith attempts are exhausted might a Party terminate mediation under Art. 10.1 FAI Mediation Rules without breach [*cf CM, p. 9 ¶35 ll. 7-9*]. Difficulty in proving a breach of the obligation to mediate in good faith does not suggest that the obligation lacks objective certainty [*Emirates ¶64; United Group Rail ¶¶65, 81*]. Accordingly, the mediation condition precedent is a valid pre-arbitral procedural requirement.

(b) The Parties intended that mediation under the FAI Mediation Rules is a mandatory condition precedent to arbitration and not merely aspirational

25 Moreover, the Parties intended mediation under the FAI Mediation rules to be a mandatory condition precedent to arbitration. Since CLAIMANT supplied the wording of Art. 30 of the Contract, it should be construed *contra proferentum* [*Art. 4.6 UNIDROIT Principles*]. Not only did the Parties use the words '*shall first*' be submitted to mediation (**i**), but they also agreed to remove the bridging sentence from the FAI Mediation Rules model clause to make clear that arbitration could not be commenced until mediation had occurred (**ii**). Moreover, election to mediate under institutional rules also points towards mediation being a mandatory condition precedent to arbitration (**iii**).

(i) The Parties agreed that disputes '*shall first*' be submitted to FAI mediation

26 The Parties carefully renegotiated the wording of the Arbitration Agreement based on arbitration being their '*last resort*' [*supra* ¶*6*]. The plain meaning of the words '*shall first be submitted to mediation…*' demonstrates the Parties intended mediation to be a mandatory condition precedent. Mr Deiman supplied the language of the Arbitration Agreement, which in his correct view '*clearly provides that the Parties must first try to mediate their dispute before resorting to arbitration*' [*R2, p. 31; Arts. 4.1, 4.3(a) UNIDROIT Principles*].

27 As CLAIMANT recognises [*CM, p. 9* ¶*34*], the use of the words '*shall*' or '*must*' demonstrate that the Parties intended the mediation condition precedent to be mandatory [*Born/Šćekić, p. 238*]. For example, it is well established that the use of the word '*shall*' in Cl. 20.2 FIDIC creates a mandatory condition precedent to submit disputes to DAB prior to arbitration [*Lal et. al. p. 809-810*]. The position is the same for mediation. ICC cases have held that the word '*shall*' in connection with amicable dispute resolution processes is '*unmistakably mandatory'* [*Morris v Uruguay* ¶¶*140-141*]. Accordingly, the words '*shall first be submitted to mediation…*' demonstrates the Parties intended mediation to be mandatory.

(ii) The Parties removed the bridging sentence from the FAI Arbitration Rules model clause to make mediation *first* mandatory

28 The Arbitration Agreement is taken verbatim from the FAI Mediation Rules model clause [*FAI Mediation Rules*]. However, the bridging sentence was removed at CLAIMANT's request, which otherwise states: '*commencement of proceedings under the Mediation Rules shall not prevent any party from commencing arbitration in accordance with the clause below*.' The removal of these words demonstrates the Parties' intention that mediation be a mandatory condition precedent [*Arts. 4.1, 4.6 UNIDROIT Principles; PO.1, p. 50* ¶*4*].

29 CLAIMANT asserts that even though this bridging sentence has been removed, the FAI Mediation Guidelines state that mediation under the FAI Mediation Rules does not prevent the commencement of arbitration or other proceedings [*CM, pp. 6-7 ¶¶21-22; Art. 11.1 FAI Mediation Rules*]. However, this rule in Art 11.1 FAI Mediation Rules is subject to anything '*otherwise agreed by the parties…*' [*Art. 11.1 FAI Mediation Rules*; *FAI Mediation Guidelines ¶32*]. Removing the bridging sentence (among other factors) demonstrates an agreement between the Parties that arbitration is not to be commenced before litigation [*supra¶¶26-27*].

30 As such, it would not accord with party autonomy for this Tribunal to proceed with arbitration, or to order concurrent mediation and arbitration. The Parties made clear their intention for arbitration to only follow mediation [*Born/Šćekić, pp. 250-251; cf Morris v Uruguay ¶148*]. Moreover, initiating arbitration simultaneously with mediation '*may impair the parties' chances to benefit from mediation*' [*FAI Mediation Guidelines ¶32; LCA/HSF*].

(iii) The Parties' obligation to submit disputes to mediation under the FAI Mediation Rules is clear

31 Additionally, where the Parties' obligations are clear, such as where the clause provides for mediation under institutional rules, it is likelier that the Parties intended mediation to be compulsory [*Born/Šćekić, pp. 238-239; e.g., Lufthansa ¶97*]. This is the case here [*supra ¶23-24*].

II There are no reasons why this Tribunal should declare the claim admissible in spite of non-compliance with the mediation condition precedent

32 This Tribunal has discretion over the admissibility of the arbitral claim [*Born/Šćekić, p. 258; CM, p. 11 ¶¶45-46*]. Tribunals often deem it inappropriate to reject a presumptively valid claim if a party suffers no injury from being denied mediation [*Born/Šćekić, p. 254; Georgia v Russia ¶159; ICC Case No 8445*]. Such assertions should be treated with caution and must be justified on the evidence [*Morris v Uruguay ¶138*], and research demonstrates that mediation is often successful [*LCA/HSF*]. Contrary to CLAIMANT's contentions [*CM, pp. 10-11 ¶¶41-44*], mediation is not futile because the Parties have not discussed anything other than price (**a**), and the Parties' initial obstinate positions can be managed in mediation (**b**). CLAIMANT's assertion that RESPONDENT has no intention to settle the dispute is unsubstantiated (**c**).

(a) Mediation is not futile because the Parties have solely discussed price

33 After RESPONDENT gave the notice of termination on 29 February 2024, CLAIMANT purportedly rejected the notice and requested payment of at least 50% of the amount due to be paid [*PO.2, p. 54 ¶23*]. RESPONDENT rejected those requests on 24 March 2024 and CLAIMANT sought to schedule a C-level management meeting for 28 April 2024, which never eventuated due to unforeseen circumstances [*ibid*]. An informal meeting did, however,

take place between Mr Cavendish and Mr la Cour on 12 May 2024, which only lasted 30 minutes and was again limited to a discussion on price [*C5, p. 18 ¶15; PO.2, p. 55 ¶23*].

34 This is in contrast to the *Y Sàrl Case* CLAIMANT cites [*¶3.5.2, cited in CM, p. 8 ¶30*]. In that case, the Parties met in Geneva to conciliate, but failed to settle [*Y Sàrl Case ¶3.1.1*]. Accordingly, the tribunal concluded there were grounds to infer there was an '*irreversible deterioration*' of the relationship between the parties [*ibid ¶3.5.2*]. In any event, the tribunal was of the view that the conciliation condition precedent was fulfilled in that meeting [*ibid*].

35 Moreover, the Parties here have not yet explored the full range of potential options to resolve this dispute. For example, with a change in government policy not favouring green hydrogen [*RfA, p. 5 ¶¶17-18*], the Parties have not explored the possibility of allowing the project to continue on a more limited scale without the exercise of the additional options or with increased local content. Mediation along these lines could potentially assist CLAIMANT to achieve a successful reference project [*C5, p. 16 ¶7*], whilst also meeting RESPONDENT's budgetary requirements under the new policy.

(b) Mediation is not futile despite the Parties reaching obstinate positions

36 CLAIMANT argues that Mr Cavendish got the impression there was no room for further discussion since Mr la Cour required a large price reduction to get ministerial approval [*CM, p. 11 ¶¶42-43; C5, p. 18 ¶¶15-16*]. CLAIMANT might have also pointed towards animosity between the Parties culminating in allegations of fraud [*PO.2, p. 55 ¶27*].

37 However, first, Mr Deiman has left Equatoriana and would not participate in any mediation of his own volition [*C8, p. 36 ¶7*]. Secondly, even the limited discussions the Parties had on price indicated RESPONDENT showed some flexibility. RESPONDENT ultimately said it was open to discussion if there were a percentage reduction of '*at least a two-digit number*' after initially saying it needed 15% [*C7, p. 20*]. Thirdly, the structure of mediation and the ability of an impartial mediator to diffuse conflict would help the Parties reach settlement [*FAI Mediation Guidelines ¶14; Art. 6.1 FAI Mediation Rules*].

(c) CLAIMANT has not demonstrated RESPONDENT's lack of good faith

38 CLAIMANT argues that RESPONDENT is not acting in good faith by challenging the admissibility of the claim because it has no intention to settle the dispute [*CM, p. 8 ¶¶30-32; Art. 26.3 FAI Arbitration Rules*]. This essentially asserts that RESPONDENT is pursuing delay tactics or seeking to frustrate the arbitral proceedings [*Born/Šćekić, p. 254*]. This Tribunal should regard this allegation with caution [*Morris v Uruguay ¶138*]. CLAIMANT must demonstrate that proceeding to mediation '*can only lead to further delay*' [*Cumberland ¶4, cited in Born/Šćekić, p. 254*]. Here, the Parties have not discussed anything other than price [*supra*

¶¶*33-35*], and there is no evidence demonstrates RESPONDENT is acting contrary to good faith and causing unnecessary cost and delays [*Art. 26.3 FAI Arbitration Rules; PO.2, pp. 54-55 ¶23*].

CONCLUSION ON ISSUE 1

39 The Arbitration Agreement is governed by the law of Equatoriana, which provides that this Tribunal lacks jurisdiction when the mediation condition precedent is not completed. Alternatively, this Tribunal should declare the claim inadmissible. The Parties intended that mediation should come first and that arbitration was a '*last resort*'. There are no reasons why this Tribunal should proceed with arbitration in spite of the mandatory nature of mediation.

ISSUE 2: THIS TRIBUNAL SHOULD ADMIT EXHIBIT R3 INTO EVIDENCE AND EXCLUDE EXHIBIT C7 FROM EVIDENCE

40 This Tribunal should admit Exhibit R3 and exclude Exhibit C7. Exhibit R3, an email sent from Ms Smith (CLAIMANT's Head of Legal) to Messrs Cavendish and Deiman, is highly material to the outcome of this dispute. It establishes that CLAIMANT acted contrary to its good faith obligations by failing to disclose the true status of its negotiations with P2G to secure local content [*R3, p. 32*]. Exhibit R3 is not covered by privilege, and assertions that Exhibit R3 was obtained illegally through prosecution powers are speculative and unproven. By contrast, Exhibit C7 is a Without Prejudice settlement offer from RESPONDENT to CLAIMANT covered by settlement negotiations privilege [*C7, p. 20*]. The contents of Exhibit C7 are not material to the outcome of CLAIMANT's case and should be excluded.

41 RESPONDENT agrees with CLAIMANT that this Tribunal has broad discretion to determine the admissibility of evidence under Art. 19(2) Model Law and Art. 34.1 FAI Arbitration Rules [*CM, p. 12 ¶¶49-50*]. Moreover, RESPONDENT agrees that this Tribunal should apply the IBA Rules to guide its discretion [*CM, pp. 12 ¶51; O'Malley, p. 6 ¶1.15*]. The IBA Rules are a '*commonly accepted standard*' [*Kühner, p. 667*] and are preferable to other published rules which do not explicitly list grounds for exclusion [*see e.g., Prague Rules*]. Arbitral proceedings under the FAI Rules have regularly applied the IBA Rules [*IBA Arbitration Guide, p. 15 ¶IX*].

42 Applying the IBA Rules, Exhibit R3 should be admitted as all relevant evidence should *prima facie* be admitted and there are no grounds for its exclusion (**A**). Exhibit C7 should be excluded because it is immaterial and covered by settlement-negotiations privilege (**B**).

A This Tribunal should admit Exhibit R3 into evidence

43 On 10 July 2023, Ms Smith (CLAIMANT's Head of Legal) emailed Messrs Deiman and Cavendish instructions on how to provide RESPONDENT sufficient confidence in the P2G

negotiations while minimising its exposure to liability for misrepresentation [*R3, p. 32*]. This email should *prima facie* be admitted to allow RESPONDENT a reasonable opportunity to present its case [*Waincymer, p. 83*; *Ng, pp. 751-752*]. Tribunals often '*err substantially on the side of permitting presentation of the facts that a party desires*' [*Born1, 2306-13*] and can deal with shortcomings as to the content or manner of procurement of Exhibit R3 by deciding what weight to ascribe to it [*Art. 9.1 IBA Rules*; *Khodykin/Mulcahy/Fletcher p. 413 ¶12.24*]. Contrary to CLAIMANT's arguments [*CM, p. 17 ¶79*], legal advice privilege does not apply to this document (**I**). Moreover, Exhibit R3 cannot be excluded for illegality or corruption in the use of prosecution power upon mere speculation or suspicion (**II**). If Exhibit R3 was leaked, it is not contrary to good faith for RESPONDENT to seek to rely on it (**III**). In any event, this Tribunal should admit Exhibit R3 due to its relevance and materiality to the dispute (**IV**).

I Legal advice privilege does not attach to Exhibit R3

44 To exclude Exhibit R3, CLAIMANT, who insisted on a neutral third-party seat of arbitration in Danubia rather than in Equatoriana, now seeks to rely on more generous Equatorianian rules of privilege to govern an advice sent by Ms Smith, a lawyer admitted to the Mediterraneo bar [*CM, p. 18 ¶84*]. Faced with these competing legal or ethical rules of privilege, this Tribunal must select one which is applicable to this issue under Art. 9.2(b) IBA Rules (**a**). Mediterraneo rules should apply because it had the closest connection to Exhibit R3 at the time the document was created (**b**). Moreover, it is unnecessary to apply Equatorianian rules under the most favoured privilege approach (**c**).

(a) This Tribunal must select which legal or ethical rules of privilege are applicable to this issue under Art. 9.2(b) IBA Rules

45 The IBA Rules are guidelines and not a source of privilege [*Karrer, p. 896; Born, p. 186*]. Under IBA Rules, legal advice privilege only attaches '*under the legal or ethical rules determined by the Arbitral Tribunal to be applicable*' [*Art 9.2(b) IBA Rules*].

46 CLAIMANT may have argued that choosing a set of municipal rules is unnecessary as general transnational principles of legal advice privilege, or a '*commonly accepted rule* 'derived from a '*survey*' of different sources of law, protects Exhibit R3 [*see O'Malley p. 54-55*]. However, there is no such clear transnational principle or common rule to legal advice privilege internationally, as jurisdictions treat the privilege differently [*Kuitkowski, pp. 70, 74; Sindler/Wüstemann p. 614; cf IBA Taskforce p. 9*]. For example, there is inconsistency on whether advice from in-house lawyers can attract the privilege at all [*see e.g., Akzo Nobel Chemicals ¶174; Raeschke-Kessler, p. 427–29; Khodykin/Mulcahy/Fletcher p. 443, ¶12.130*]. Accordingly, this Tribunal should choose an applicable municipal set of privilege rules.

(b) Mediterraneo law should apply to Exhibit R3

47 The law most closely connected to Exhibit R3 should supply the privilege rules, as it accords with what privilege the Parties expected would apply [*Art. 9.2(c) IBA Rules; O'Malley1, p. 285*]. Mediterraneo law had the closest connection to Exhibit R3 for five reasons.

48 First, Exhibit R3 was made by Ms Smith (CLAIMANT's Head of Legal) who is admitted to the Mediterraneo Bar [*R3, p. 32*]. The place of admission is the most persuasive and often determinative of closest connection [*O'Malley1, pp. 286-287; Born1, p. 1913; Rosher p. 17*]. Secondly, CLAIMANT, who received the communication, is located in Mediterraneo [*O'Malley1, p. 286; Berger1, p. 172*]. Thirdly, the document was likely sent from Mediterraneo, where Ms Smith is presumably based [*Rosher, p. 17*]. Fourthly, the document was sent to Mediterraneo. The email signatures of Messrs Cavendish and Deiman, to whose email addresses the advice was sent, contain Mediterraneo physical addresses [*PO.2, p. 53 ¶11; R3, p. 32; see C4, p. 15; R2, p. 31*]. Fifthly, all Parties are located in Mediterraneo, so it was there where the lawyer-client relationship had its '*predominate effects*' [*Rosher p. 17*]. As Mediterraneo affords virtually no protection over legal advice [*R4, p. 33*], CLAIMANT did not legitimately expect Exhibit R3 to come under legal advice privilege [*see Möckesch, ¶8.118*].

(c) It is not appropriate for Equatorianian privilege rules to govern Exhibit R3 under the *most favoured privilege* approach

49 CLAIMANT argues that applying the closest connection test leads to the Parties' legal advices being governed by different standards of privilege, thus treating the Parties unfairly or unequally [*CM, p. 18 ¶84; Art. 9.4(e) IBA Rules; Raeschke-Kessler, p. 429*]. It contends that this Tribunal should use the *most favoured privilege* approach and remedy the unfairness by applying Equatorianian rules, which would privilege Exhibit R3 [*ibid; R4, p. 33; PO.2, p. 55 ¶29*].

50 Here, the *most favoured privilege* approach should not be applied. First, fairness or equality is *one of many factors* to consider under the IBA Rules and does not itself determine which approach this Tribunal should take [*Art. 9.4 IBA Rules*].

51 Secondly, applying Equatorianian law is contrary to the Parties' legitimate expectations (another factor for consideration) that Mediterraneo law would apply [*supra ¶47-48; Art. 9.4(c) IBA Rules*]. The legitimate expectations of the Parties are those at the time the document was created [*Bradford, p. 943*]. Exhibit R3 was created on 10 July 2023 [*R3, p. 32*]. On this date, CLAIMANT would not have legitimately expected the privilege rules of Equatoriana to apply to Exhibit R3. There was no signed Contract with a choice for Equatorianian law between the Parties to attach Equatorianian privilege rules to CLAIMANT's legal advice; the Contract was signed later on 17 July 2023 [*RfA, p. 5 ¶14*].

Moreover, there was no guarantee CLAIMANT would be selected to contract, as it was still competing against another bidder to supply the plant [*R1, p. 29 ¶4*]. The privilege attaches only if both parties '*know at the time of the communications whether the privilege will apply*' and that '*if they are uncertain, their communications will be chilled, and the purpose of the privilege will be entirely defeated*' [*Bradford, p. 943*]. This Tribunal should not work to defeat the underlying purpose of legal advice privilege.

52 Thirdly, there is no real unfairness or inequality between the Parties to warrant the *most favoured privilege* approach. RESPONDENT does not rely on Equatorianian legal advice privilege in this dispute. CLAIMANT's suggestion of differential treatment between the Parties is entirely hypothetical. This Tribunal should not contradict the Parties' legitimate expectations to resolve a scenario that is not rooted in reality.

53 Fourthly, if this Tribunal seeks to maintain perfectly equal standard of privilege, it better accords with Party expectation to apply Danubian rules of privilege. Tribunals often choose to adopt the rules of evidence of the seat, as evidence is often considered procedural in nature [*Ng, pp. 751-752*]. The Parties carefully negotiated Danubia to supply the *lex arbitri* [*R1, p. 30 ¶8*], and can be understood to more readily expect Danubian law to supply privilege rules. Danubian law (like Mediterraneo law) contains '*no rules on legal privileges protecting such documents from disclosure*' [*R4, p. 33*]. The only requirement of confidentiality is within the '*ethical rules for lawyers*' [*R4, p. 33*]. An ethical rule enforceable against lawyers [*Kuitkowski, p. 70*] does not amount to an *evidentiary rule of privilege*, and the Parties would not have expected as much [*ibid*]. Exhibit R3 is not privileged.

II Claims that Exhibit R3 was obtained illegally through corruption or the use of sovereign power are speculative and unproven

54 CLAIMANT argues that Exhibit R3 was '*obtained most likely in the course of an illegal criminal investigation*' [*CM, p. 19 ¶91*]. CLAIMANT bears the onus of proving that fact [*Born1, p. 2313-15; Waincymer, p. 762-766; Kubalczyk, §IV.3*]. The standard of proof for establishing illegality is higher than a tribunal's ordinary standard of '*balance of probabilities*', instead requiring '*clear and convincing evidence*' [*Dadras v Iran, pp. 127, 135-36; Khvalei, p. 69*]. CLAIMANT has not supplied this requisite level of evidence to support its assertion [*cf CM, p. 19 ¶91*].

55 Moreover, tribunals typically only exclude evidence that has been obtained illegally if the Party adducing the evidence was involved in the illegality [*EDF v Romania ¶¶45-47; Ng, p. 754; cf Methanex*]. Similarly, to exclude Exhibit R3 on equality of arms principles [*CM, pp. 19-20 ¶¶87-93*], RESPONDENT must have 'obtained' the evidence through its own use of sovereign power [*cf Libananco ¶82*]. Here, Mr la Cour reported Mr Deiman for fraud and

collusion to the prosecution [*PO.2, p. 55 ¶27*]. Beyond the reporting, no evidence suggests that RESPONDENT had any internal involvement in the investigation. Any other connection between RESPONDENT personnel and Equatorianian authorities is of a personal kind [*C8, p. 36 ¶7; PO.2, p. 52 ¶3; R1, p. 29 ¶6*].

III Exhibit R3 should not be excluded because it might have been leaked by a CLAIMANT employee

56 CLAIMANT argues alternatively that Exhibit R3 might have been leaked by a CLAIMANT employee, and that that it would be contrary to good faith for RESPONDENT to rely on leaked evidence [*CM, pp. 20-21 ¶¶98-99; PO.2, p. 53 ¶11; RfA, p. 5 ¶15*]. However, tribunals often admit leaked information if the party relying on the evidence is not shown to be involved in the leak [*Caratube ¶156; Ireton, pp. 240-241; Blair/Vidak-Gojkovic, pp. 247-250, 255; Yukos Universal; ConocoPhilips*]. Moreover, RESPONDENT has a competing right to a reasonable opportunity to present its case [*infra ¶58*]. When balancing these interests, and to avoid risk of the award being set aside, this Tribunal should admit Exhibit R3, and if necessary, consider any good faith issues relating to the obtaining of this evidence later when determining costs [*Art. 9.7 IBA Rules*; *Khodykin/Mulcahy/Fletcher, ¶12.389*].

IV In any event, Exhibit R3 is relevant and highly material to this dispute

57 As there are no mandatory evidence laws of the arbitral seat, this Tribunal is not obliged to follow any strict rule of evidence and can admit into evidence documents at its discretion [*Khodykin/Mulcahy/Fletcher p. 409 ¶12.7*]. Accordingly, this Tribunal may still admit Exhibit R3 irrespective of its confidential nature or wrongful procurement [*Ras Al Khaimah ¶¶43-45*], so long as the reasons for its admittance outweigh those factors, such as its relevance to a Party's case (**a**) and its materiality to the outcome of that case (**b**).

(a) Exhibit R3 is relevant to RESPONDENT's case

58 A document is relevant where it assists a party to establish a fact to support its case or to challenge facts relied upon by its opponent [*Khodykin/Mulcahy/Fletcher, p. 136 ¶¶6.96-6.97*]. Exhibit R3 evidences that CLAIMANT did not act in good faith when obscuring the degree of local content it would likely deliver. This helped CLAIMANT secure the Contract and its best endeavours clause [*C5, p. 11 ¶10*]. Even if CLAIMANT successfully establishes that RESPONDENT wrongfully terminated the Contract under the CISG, CLAIMANT's lack of good faith invokes an implied restriction against the remedy of specific performance [*Shen, p. 276; CLOUT Case 154, p. 8*]. Furthermore, Exhibit R3 casts doubt on the credibility of Messrs Cavendish and Deiman and their submitted evidence.

(b) Exhibit R3 is material to the outcome of RESPONDENT's case

59 The materiality requirement is more onerous than relevance [*Khodykin/Mulcahy/Fletcher p. 136, ¶6.102*]. To be material, Exhibit R3 '*must add something to the evidence…that is on the critical path to a determination of the dispute*' [*Khodykin/Mulcahy/Fletcher p. 136, ¶6.102*]. Evidence is immaterial '*where the tribunal already has sufficient evidence on the particular issue*' [*Khodykin/Mulcahy/Fletcher p. 136, ¶6.105; ABB v Hochtief; O'Malley, p. 34*].

60 Exhibit R3 is material because it is the only probative evidence on the file that demonstrates CLAIMANT's lack of honesty and good faith as to its progress with the P2G negotiations. In Ms Ritter's witness statement, her friend is said to have informed her that CLAIMANT was exaggerating its negotiation progress with P2G [*R1, p. 29 ¶6*]. This is hearsay evidence. By contrast, Exhibit R3 directly evidences CLAIMANT's lack of good faith in failing to honestly inform RESPONDENT of the true state of negotiations with P2G [*Art. 7 CISG*]. The exhibit also casts doubt on the reliability of CLAIMANT's assertions on facts in issue [*supra ¶58*].

B This Tribunal should exclude Exhibit C7 from the file

61 After RESPONDENT gave notice of termination on 29 February 2024 [*C6, p. 19*], CLAIMANT disputed that decision [*supra ¶33*]. In response, RESPONDENT sent CLAIMANT a Without Prejudice offer to resolve the dispute containing two terms [*C7, p. 20*]. First, RESPONDENT sought a reduction in price by 15% and the realisation of the project as planned. Secondly, in exchange, RESPONDENT offered a first demand guarantee in the value of 10% of the reduced price. Despite RESPONDENT's openness in seeking to amicably resolve the dispute, CLAIMANT now wishes to improperly admit Exhibit C7 into evidence. Exhibit C7 should be excluded because it is covered by settlement-negotiations privilege (**I**). In any event, Exhibit C7 should not be admitted because it is not material to the dispute (**II**).

I Exhibit C7 is covered by settlement-negotiations privilege

62 First, settlement-negotiations privilege is applicable to Exhibit C7 under international principles (**a**) and is in line with the Parties' legitimate expectations (**b**). Secondly, Exhibit C7 falls within the scope of settlement-negotiations privilege (**c**).

(a) This Tribunal should apply well-recognised international principles of settlement-negotiations privilege

63 Irrespective of the position under potentially applicable municipal laws, this Tribunal may recognise settlement-negotiations privilege to exclude Exhibit C7 under Art. 9.2(b) IBA Rules. Unlike legal advice privilege [*supra ¶¶45-46*], there is a well-established principle and practice in international arbitration for tribunals to recognise and uphold settlement-negotiations privilege [*Berger1, p. 270; Lew/Mistelis/Kröll ¶1.54*]. The absence of privilege

attaching under the appropriate domestic law should not be a bar to applying this established international principle [*Khodykin/Mulcahy/Fletcher p. 455 ¶12.180*]. Settlement negotiations privilege is treated differently to legal advice privilege because it has been normatively developed from international institutional mediation rules for confidentiality [*Marghitola, p. 78; Berger1, pp. 266-269*]. By contrast, privilege rules arise from the status of the advisor within their unique municipal contexts [*Kuitkowski, p. 68*; *supra ¶¶45-46*]. Moreover, arbitral tribunals have an overriding duty to facilitate efficient dispute resolution [*Godhe p. 8*], and so especially protect practices promoting settlement-negotiations [*see Berger1, pp. 266-269*].

(b) Additionally, this Tribunal can give effect to the legitimate expectations of the Parties by excluding Exhibit C7

64 Applying international principles of settlement negotiations privilege also gives effect to the legitimate expectations of the Parties [*Art. 9.4(c) IBA Rules*]. First, RESPONDENT's use of the '*without prejudice*' mark on its offer suggests that it expected the document to remain confidential [*Khodykin/Mulcahy/Fletcher p. 456, ¶128.184*].

65 Secondly, the Parties agreeing to the FAI Mediation Rules demonstrates an expectation for confidentiality [*Arts. 9.4(b)-(c) IBA Rules*]. Art. 15.2 FAI Mediation Rules stipulates that the Parties cannot '*invoke or produce as evidence any information (including, but not limited to, any statements made regarding the possibility to settle the dispute)*' in any subsequent legal proceedings. Mr Deiman (CLAIMANT's Head of Contracting) had also *used* the applicability of these Rules to reassure Ms Rhitter (RESPONDENT's Head of Contracting) during negotiations that the Parties did not need a confidentiality agreement [*R1, p. 30 ¶10; R2, p. 31*]. Mediation was not commenced before the Without Prejudice offer was sent. However, it is unduly technical to impugn the Parties' expectations when, ultimately, they expected to resolve all disputes via mediation, and the content of their dispute settlement attempts be confidential.

(c) Exhibit C7 was a genuine offer of compromise made in settlement negotiations that attracts settlement-negotiations privilege

66 Exhibit C7 was an offer '*created in good faith with a genuine desire to explore possible ways of resolving the dispute*' [*Khodykin/Mulcahy/Fletcher, p. 456 ¶12.182; Berger, p. 265; O'Malley1, p. 282*]. First, RESPONDENT made the offer in good faith '*in the interest of keeping [a] good relationship*' with CLAIMANT [*C7, p. 20*]. Contrary to CLAIMANT's argument [*CM, p. 16 ¶73*], RESPONDENT did not abuse the '*without prejudice*' tag to hide information [*Khodykin/Mulcahy/Fletcher, p. 456 ¶12.182; Berger1 p. 174*]. All the offer contained were terms related to settlement.

67 Secondly, the offer explored possible ways of resolving the dispute, and its terms were not illusory [*Bartlett v Coomber ¶¶8, 10; Miwa v Siantan ¶9*]. The offer suggested a price reduction

of 15% [*C7, p. 20*], but expressed amenability to explore at least double-digit price reduction options. This would have enabled RESPONDENT to obtain the necessary approval to then continue the project. RESPONDENT also offered CLAIMANT a 10% first-demand CLAIMANT to assuage the financial risk CLAIMANT faced with its loss-making operations.

68 These terms reflected a genuine desire to resolve the dispute. The 10% first-demand guarantee was a significant compromise, departing from the balance of risk under the existing terms of the Contract. Per the payment 'Schedule', RESPONDENT would only pay CLAIMANT upon its completion of Contractual 'Milestones' [*C2, p. 12 Art. 7*]. Despite CLAIMANT's lack of transparency in negotiations and failure to meet the very first milestone, RESPONDENT's guarantee offered CLAIMANT the right to request a full 10% of the price on demand, with no stipulated precondition or RESPONDENT right of refusal.

II In any event, Exhibit C7 should be excluded as it is not material

69 This Tribunal may exclude evidence which is not material to a Party's case as pleaded [*Art. 9.2(a) IBA Rules; O'Malley1, p. 268 ¶9.06*]. Here, CLAIMANT relies on Exhibit C7 to plead that RESPONDENT terminated the Contract purely because they wanted to renegotiate the price [*CM, pp. 14-15 ¶¶67-68*]. Exhibit C7 is not material to the success of this issue. Exhibit C7 suggesting a price reduction to *resolve* the dispute does not prove that RESPONDENT *caused* the dispute by its termination solely to obtain a price reduction. Even without direct proof, CLAIMANT seeks to infer from Exhibit C7 that RESPONDENT terminated the Contract just to secure a price reduction. However, this inference is ultimately unlikely to rebut RESPONDENT's legitimate reasons for termination, and so Exhibit C7 is not material.

CONCLUSION ON ISSUE 2

70 In applying the IBA Rules, Exhibit R3 should be admitted. It is not covered by legal advice privilege. There is also insufficient proof to establish that RESPONDENT was involved in procuring it unlawfully or contrary to good faith that warrants its exclusion. Moreover, Exhibit R3 is relevant and material to RESPONDENT's case, such that excluding it strips RESPONDENT of a reasonable opportunity to be heard. Finally, Exhibit C7 should be excluded because it is covered by settlement-negotiations privilege, and is not material.

ISSUE 3: THE CISG DOES NOT APPLY TO THE CONTRACT

71 Contrary to CLAIMANT's assertions [*CM, p. 22 ¶107*], the CISG does not govern the Contract. RESPONDENT rightfully terminated the Contract on 29 February 2024. CLAIMANT failed to meet the first substantial milestone of the project, where the final plans arrived not only late but incomplete [*C6, p. 19; ARfA, p. 27 ¶12*]. Moreover, with a change in

government, RESPONDENT became entitled under Art. 7.3.8 ECC to terminate due to changes in Equatoriana's Green Energy Strategy [*C6, p. 19; ARfA, p. 27 ¶12; C5, p. 18 ¶13; PO.1, pp. 50-51 ¶4*]. However, CLAIMANT now contends that the CISG applies to this Contract as part of its challenge to the legitimacy of RESPONDENT's termination [*CM, p.34 ¶172*]. CLAIMANT should not be allowed to evade RESPONDENT's valid termination. The Contract falls outside of the scope of the CISG as it is not an international contract (**A**), nor for a sale of goods (**B**). Alternatively, even if this a mixed contract, the CISG does not apply to turnkey contracts (**C**). Additionally, the CISG auction exception applies (**D**).

A The Contract is not an international sale of goods transaction

72 RESPONDENT agrees with CLAIMANT that the CISG applies to a sale of goods contract where parties have their places of business in different Contracting States [*CM, p.22 ¶109; Art. 1(1)(a) CISG*]. However, contrary to CLAIMANT's argument [*CM, p. 23 ¶¶110-112*], Mediterraneo is not RESPONDENT's *only* place of business. This issue is determined according to the '*circumstances known to or contemplated by the parties before or at the time of the conclusion of the contract*' according to objective, external criteria [*Art. 10(a), CISG; Schwenzer/Schroeter, p. 223 ¶11; Staudinger/Magnus ¶9*]. Where a party has more than one place of business, the conclusion of the Contract and its *actual performance,* rather than its principal place of business, is decisive of which has the '*closest relationship to the contract*' [*Art. 10(a) CISG; Secretariat Commentary, p. 19 ¶6; Schwenzer/Schroeter, p. 221 ¶6; Zodiac v Synergy ¶11*]. In this case, the Contract does not meet the degree of internationality required as CLAIMANT's operations in Equatoriana constituted a place of business in the same State as RESPONDENT [*CISG Digest, p. 5 ¶6; CLOUT Case 698; Schwenzer/Schroeter, p. 218 ¶1*] (**I**). This place of business has the closest connection to the Contract (**II**).

I CLAIMANT established a place of business in Equatoriana

73 CLAIMANT not only has a principal place of business in Mediterraneo, but also a place of business in Equatoriana through Volta Transformer as an arm of operations. CLAIMANT asserts that because Volta Transformer is a separate entity, Volta Transformer's operations should not be considered by this Tribunal in determining internationality [*CM, pp. 23, 24 ¶¶114-117*]. This misunderstands the test under the CISG. The CISG directs this Tribunal to engage in an autonomous interpretation of the concept of '*place of business*' that promotes the uniformity of the CISG. As such, domestic laws including the incorporation status of Volta Transformer are irrelevant to the inquiry [*Art. 7(1) CISG; CLOUT Case 867; CLOUT Case 930; Schwenzer/Schroeter, p. 219 ¶3; Loizou, p.4*]. Instead, Art. 10(a) CISG takes a functional approach to determining what is a place of business. A place of business is

defined as '*the place from which a business activity is de facto carried out*' [*CISG Digest, p. 4 ¶5; CLOUT Case 360*]. It requires '*a certain degree of duration, stability, and independence*' [*Schwenzer/Schroeter, p. 219 ¶3; Floor coverings case ¶21; CLOUT Case 608 ¶3.2*]. The drafting history of the CISG reveals that the term '*place of business*' was formulated broadly to avoid unduly limiting the application of the CISG to sale of goods transactions [*Vienna Diplomatic Conference, p. 204 ¶¶75, 78; Art. 32 VCLT*]. Importantly, the drafting history notes the desirability of capturing the activities of multinational corporations, including locations where the goods are produced [*ibid*].

74 Applying this test, Volta Transformer is a place of business for CLAIMANT as it is the place from which CLAIMANT's business activity is de facto carried out for the Contract (**a**). Additionally, Volta Transformer satisfies the requirements of permanence, stability and autonomy to constitute a place of business for CLAIMANT for the purposes of the CISG (**b**).

(a) Volta Transformer is a de facto place of business for CLAIMANT

75 Whilst Volta Transformer was not legally owned by CLAIMANT at the time of the Contract's signing on 17 July 2023, CLAIMANT controlled Volta Transformer as its de facto place of business. Although there is a formal subcontract between CLAIMANT and Volta Transformer to fulfil local content obligations, this does not negate CLAIMANT's '*actual control*' over Volta Transformer's operations [*CM, p. 24 ¶116; Jan v Navimer ¶80*].

76 When the Contract was signed, Volta Transformer was producing nearly exclusively for CLAIMANT making up majority of its production capacities [*C5, p. 36 ¶2; Jan v Navimer ¶80; ARfA, p. 28 ¶20*]. From June 2023, Volta Transformer prioritised this project to allocate workforce and other resources solely for CLAIMANT [*PO.2, p. 52 ¶5*]. Moreover, Volta Transformer's 100%-owned subsidiary, Volta Electrolyser, produced PEM-electrolysers under a licence from CLAIMANT and this project was to make up majority of its production capacity for the year [*C5, p. 17 ¶11; PO.2, p. 52 ¶6*]. CLAIMANT was also organising Volta Transformer's formal acquisition, which was finalised just months after the Contract's signing in November 2023 [*C8, p. 36 ¶2; RfA, p. 4 ¶11; ARfA, p. 27 ¶13*]. Accordingly, Volta Transformer was a de facto place of business for CLAIMANT.

(b) Volta Transformer's operations are of sufficient duration, stability and autonomy to be a place of business for CLAIMANT in Equatoriana

77 CLAIMANT's operations in Equatoriana were a '*permanent and stable business organisation*' and not merely a place for the preparation for the conclusion of a single contract [*ICC Case 9781 ¶33; Bianca/Bonell, p.30; CISG Digest, p. 4 ¶5*]. Volta Transformer has been a stable business organisation in Equatoriana since at least 2020 [*RfA, p.3 ¶8*]. Hence, Volta Transformer's

operations and the acquisition by CLAIMANT was not only for the duration of the Contract's timeline (July 2023 to January 2027) [*C1, p. 8 ¶1 C2, p. 11 Art. 3*]. Volta Transformer had separate legal authority and independence from CLAIMANT signalling autonomy [*Furnace case; CISG Digest, p. 44 ¶4*]. Combined with its planned acquisition in November 2023, CLAIMANT's operations through Volta Transformer were sufficiently permanent, stable and autonomous to establish a place of business in Equatoriana.

II CLAIMANT's place of business in Equatoriana has the closest connection to the Contract

78 Since CLAIMANT has multiple places of business, the relevant place of business for the Contract is that which has '*the closest relationship to the contract and its performance*' according to circumstances known or contemplated by the Parties before or at the conclusion of contracting [*Art. 10(a) CISG*]. CLAIMANT contends that the key criterion is the location where negotiations of price originated, which leads this Tribunal to Mediterraneo [*CM, p. 23 ¶111*]. However, simply relying on the principal place of business is incorrect [*CM, p. 23 ¶112; Schwenzer/Schroeter, p. 221 ¶6; Zodiac Seats ¶11*]. The procurement of goods or services and place of performance is typically of much greater significance [*Honnold, p. 32; Schwenzer/Schroeter, p. 221 ¶6*]. Simply relying on the principal place of business is incorrect [*CM, p. 23 ¶112; Schwenzer/Schroeter, p. 221 ¶6; Zodiac Seats ¶11*]. From the beginning, Equatorianian local content was critical to the Parties [*C1, p. 9 ¶9*].

79 Where CLAIMANT has set up a place of business in Equatoriana for the purposes of performing the Contract, it will be the relevant place of business as this is where performance will occur [*Schwenzer/Schroeter, p. 221 ¶5; Target v JJS; Arsape v Uniphase*]. Here, the Contract's components were to be produced entirely within Equatoriana, as well as delivered and connected to the existing infrastructure (electricity, pipes, buildings) at the Equatorianian site for the turnkey plant [*PO.2, p. 53 ¶16*]. Volta Transformer was responsible for most of the plant's components including the electrolyser's core system, '*trafo*', electrical equipment and packaging [*C5, p. 17 ¶11; R1, p. 29 ¶4*]. It was evident at the time of contracting that the Equatorianian operations were the focus for the Parties [*C4, p. 15; ARfA, p. 28 ¶20*]. Accordingly, CLAIMANT's Equatorianian place of business has the closest connection to the Contract, and, as both Parties have their places of business there, this Contract is not international [*Art. 1(1)(a) CISG*].

B The whole Contract is not for a sale of goods

80 In order for the CISG to apply to a contract, the contract must be for the sale of goods. The prevailing view is that '*goods*' under the CISG are items that are '*at the moment of delivery,*

moveable and tangible' [*CISG Digest, p. 5 ¶9; Vujačić, p. 171; CLOUT Case 608 ¶3.1; CLOUT Case 328 ¶1.2.1; CLOUT Case 122; CLOUT Case 106, p. 149; Ferrari, p. 63*]. In contrast, this Contract involves engineering, planning, and construction for the delivery of a turnkey plant [*C1, p. 2 ¶1*]. Whilst the final product hydrogen plant is tangible, it is not moveable and thus not a '*good*'. CLAIMANT is to construct a large, immoveable facility on-site which is connected to existing infrastructure (electricity, pipes, buildings) [*PO.2, p. 53 ¶16*]. Thus, contrary to CLAIMANT's assertions [*cf CM, p. 24 ¶¶120-121*], it was tasked with implementing a functioning plant, rather than transferring property in the tangible elements of the plant, making the Contract a pure service contract.

C Alternatively, even if this is a mixed contract, the Parties attached greatest weight to CLAIMANT's obligation to supply service and labour as part of EPC works

81 While the CISG can apply to mixed contracts, it only does so if the goods component forms the '*the preponderant part'* of the parties' obligations. Here, the CISG does not apply because the preponderant part of the obligations consists in the supply of labour and services, like a construction contract [*Art. 3(2) CISG; Schlechtriem, p. 30; cf CM, p. 25 ¶123*]. In turnkey contracts, '*the decisive factor will be the weight the parties attribute*' to the obligations, rather than the economic value [*Inter Rao (Chile) ¶235; Hybrid sports (Netherlands)*]. This is because the variety of obligations render a direct economic comparison between the value of goods and services difficult, if not impossible [*Schwenzer/Schroeter p. 84 ¶19*]. This is the case here (**a**).

82 Where an accurate calculation of economic value is impossible, the Parties' intentions and the primary or essential purpose of the Contract is also critical [*CISG Digest, p. 15 ¶5; CLOUT Case 346*]. CLAIMANT simultaneously argues that the '*delivery of goods*' and the '*delivery of the plant'* is indispensable to fulfilling the Contract [*CM, p. 25 ¶¶128-129*]. However, only the latter is correct. The Parties attributed most weight to CLAIMANT's EPC obligations to deliver a turnkey plant, not the mere tangible parts of the plant. Two factors indicate this: the structure of the contract (**b**) and the primary purpose of the Contract (**c**).

(a) It is impossible to assess the economic value of the Contract

83 This Tribunal should not base its assessment of preponderance on the quantitative data available on CLAIMANT's input costs. The *starting point* to determine preponderance is to assess whether the economic value of the Contract, as a reflection of what the Parties attached value to, lies in its supply of goods or services [*Schwenzer/Schroeter p. 85 ¶20*]. In some cases, quantitative price information can assist to determine economic value by indicating the value the Parties ascribed to specific contractual obligations [*CISG Digest, p. 15 ¶4; AC Op. 4, ¶3.4; CLOUT Case 346; CLOUT Case 152; cf C2, pp. 11-13 Arts. 4, 7*].

However, no such information is available here. Moreover, the input costs that CLAIMANT relies on are a poor indicator of preponderance for two reasons.

84 First, CLAIMANT's input costs do not reflect what the Parties intended or understood the Contract predominantly to be for. CLAIMANT's input cost merely reflects what it had to invest to perform its obligations, rather than economically reflecting what the Parties valued in the Contract [*RfA, p. 17 ¶11; CM, p. 25 ¶124*]. Moreover, the Parties consistently devalued the importance of the input cost. CLAIMANT itself did not calculate its bids with a profit margin. It was instead willing to forego the chance to recover its costs and operate at a loss. If price is a determining factor of Party intent, its quantum being lower than that of the input costs suggests that cost was not the primary consideration of the Parties when concluding the Contract. By contrast, cost was only relevant to the Parties when CLAIMANT communicated its input costs to RESPONDENT to '*increase…chances of winning the tender*' by demonstrating how much local content they would be using [*C5, p. 17 ¶11*].

85 Secondly, input costs do not sufficiently capture the broader economic value the Parties derived from the transaction and therefore is an inaccurate test for preponderance. The input costs to build the plant were immaterial to RESPONDENT. RESPONDENT was only concerned about building a functional green hydrogen plant that could serve the Equatorianian steel and transport industry within government budgetary allocations, while supporting Equatorianian producers [*RfA, p. 3 ¶2, p. 4 ¶10*]. Similarly, CLAIMANT entered into the Contract and was willing to forego full recovery of its input costs was because it ultimately wanted to showcase a viable green hydrogen production process to a sceptical market [*C5, p. 16 ¶¶7-9*].

86 To CLAIMANT, this Contract was not about its current expenditure, but rather, the future gains achieved by having a large-scale, operational reference project [*CM, p. 25 ¶126; RfA, p. 4 ¶9*]. This is why CLAIMANT negotiated certain data-sharing commitments [*C5, p. 5 ¶13*] which, while unquantified in cost for RESPONDENT, would allow data to be used for reference purposes [*C2, p. 12 Art. 27*]. Similarly, RESPONDENT was benefiting from CLAIMANT's patent-protected production process which was unquantified. CLAIMANT's input costs analysis does not reflect or quantify these intangible benefits. Therefore, key indicia for an overall assessment of economic value are missing and party intention and interests must '*tip the balance*' [*AC Op. 4, ¶3.4*].

(b) The Contract terms demonstrate a preponderance of services

87 In EPC contracts, the weight of any '*sale of goods*' element decreases and is rarely, if ever, preponderant [*Schwenzer/Schroeter p. 85 ¶21*]. This is because generally turnkey contracts do

not provide for an exchange of goods [*infra* ¶*89*]. RESPONDENT agrees that an objective of the Contract was generally the delivery of the plant to showcase a large-scale facility utilising the innovative production process of PEM-electrolysis [*CM, p. 25* ¶*126*]. However, CLAIMANT fails to consider services other than maintenance in weighing the obligations. CLAIMANT asserts that three out of the four obligations in Art. 2 of the Contract are for the sale of goods [*CM, p. 26* ¶*127*]. This Tribunal should not accept this argument because it misconstrues the Parties' intentions.

88 First, RESPONDENT supplied Art. 2 of the Contract, titled '*Scope of Supplies and Services and Other Contractor Obligations / Scope of Services*', indicating the significance of services as part of CLAIMANT's obligations [*C2, p. 10*]. CLAIMANT's overarching obligation is to '*deliver*' the plant [*CM, p. 26* ¶*127*]. The Parties attached greatest value to the CLAIMANT's EPC works to ensure that the project aligned with the milestones prescribed by Art. 3 to be '*delivered*'. Two of these initial milestones required CLAIMANT's planning ability to ensure building activities on the site could begin [*C2, p. 11 Art. 3*]. For the second and third obligations to grant RESPONDENT options, the Parties attached significant weight to CLAIMANT's expertise in the production of green hydrogen and connected services. CLAIMANT's service obligations are far more protracted than the provision of any tangible parts required for building activities on-site [*C2, p. 11 Art. 3*]. CLAIMANT was contracted to adhere to consistent milestones for the delivery of a plant over the course of over at least 2 years [*ibid*]. The Parties attached greatest weight to CLAIMANT's EPC expertise in meeting every milestone of the Contract. Therefore, whilst the Contract required the provision of tangible parts, this was a non-sales obligation for purposes of delivering a plant. RESPONDENT attached greatest value to CLAIMANT's EPC works to ensure these components operated as required as part of the desired final product.

(c) The primary purpose of Contract was to deliver a turnkey plant

89 The first objective of the Contract was the '*delivery of a plant (turnkey)*' [*C1, p. 8* ¶*1; RfA, p. 3* ¶*4; C5, p. 16* ¶*9*]. This required engineering, planning, construction, and delivery of a plant that would be a fully equipped, functional facility, ready for RESPONDENT's use. Any '*goods*' elements are rarely at the forefront of turnkey contracts as such contracts do not provide for an exchange of goods [*Inter Rao (Chile)* ¶¶*235-236*]. This is why Art. 3(2) CISG has been interpreted to exclude turnkey contracts, especially when it involves a turnkey plant [*AC Op. 4* ¶*3.5; Schlechtriem/Herber; CLOUT Case 881*]. In this case, the primary purpose of the Contract was the delivery of EPC works for a plant and not goods [*Leather goods case*]. '*Delivery*' should not be interpreted as mere physical movement to the site or incidental to a

sale of goods because CLAIMANT's obligations would not have been fulfilled by simply transferring electrical equipment for the plant to the site [*CM, p. 24 ¶121; C5, p. 17 ¶11*].

90 CLAIMANT relies on *CLOUT case 346* to argue that the delivery of goods was indispensable to the Parties' obligations [*CM, p. 26 ¶128*]. However, this once again relies on a presumption that maintenance and training were the only services under the Contract, secondary to the other obligations. Given this is unlikely, the construction of the plant is the indispensable part of the Contract [*supra ¶88*]. In any case, without the training and services promised for the first year of RESPONDENT's operations, RESPONDENT would face extreme difficulty in understanding how to effectively operate the turnkey plant, indicating its significance.

D Additionally, the auction exception under Art. 2(b) CISG applies to RESPONDENT's reverse auction public procurement process

91 Art. 2(b) CISG exempts sales by auction. Sales by auctions have been '*undisputedly considered to be covered by special national provisions and usages*' requiring it to be excluded from the CISG's application [*Kröll/Mistelis/Viscasillas, p. 47 ¶27*]. This is because traditionally, auctions are held in one place, governed by the law of that place and parties do not attach significance to the fact that they may have places of business in another country [*Schwenzer/Atamer/Butler, p. 54 ¶19*]. This also avoids a surprise application of the CISG [*Secretariat Commentary, p. 16 ¶5; Schwenzer/Atamer/Butler, p. 55 ¶19; Kröll/Mistelis/Viscasillas, p. 47 ¶27*]. CLAIMANT concedes that auctions governed by specific legal frameworks are not subject to Art. 2(b) [*CM, p. 27 ¶136*]. As this reverse auction process of public procurement in Equatoriana was governed by the special rules of Equatoriana, including the Public Procurement Law of Equatoriana, it does not constitute a significant part of international trade for the purposes of Art. 2(c) CISG [*Secretariat Commentary, p. 16 ¶6*]. It is not governed by the CISG as Parties were aware that Public Procurement Law of Equatoriana would apply [*PO.2, p. 55 ¶32; CM, p. 1*].

92 CLAIMANT argues that RESPONDENT's bidding process is not an '*auction*' under Art. 2(b) CISG because it is not privately conducted or an auction by law [*CM, p. 26 ¶132*]. However, CLAIMANT's interpretation of this exception is unduly narrow as compared to the original intent of the exception [*CM, p. 28 ¶143; CLOUT Case 1980; Vienna Diplomatic Conference, p. 16 ¶5*]. Art. 7 CISG plays an important interpretive role in developing the Convention and '*adjusting it to modern needs of trade and commerce*' for each case [*Schwenzer/Atamer/Butler, p. 115 ¶7.3.2*]. Most recent authority has clarified that auctions are '*a public, advertised sale to the highest bidder, which allows for competitive bidding*' [*Face masks case*]. Given the development in modern

auction processes since the CISG's drafting such as online bidding and public procurement tendering, the exception can and should be applied to align with contemporary commercial realities [*ibid; Sale of Horse; Bulko ¶IV; ECHR p. 7*].

93 In any case, RESPONDENT's public procurement reverse auction falls within the bounds of CLAIMANT's narrow interpretation of the Art. 2(b) CISG exception. Despite being a reverse auction, RESPONDENT invited bidders like CLAIMANT to ultimately compete on price. The reverse auction that was the second step of the public procurement process involved only eligible potential Bidders and provided an in-person opportunities for eligible bidders to competitively bid for the Contract [*C1, p. 9 ¶3; PO.2, p. 52 ¶9*].

94 Whilst contracts that are equally awarded to all eligible bidders as a result a public tender may fall outside the scope of this narrow interpretation, this is not the case here [*Face masks case*]. Determining the cheapest bidder was difficult for a '*technology-open*' Request for Quotation [*PO.2, p. 52 ¶9*]. To make the bids comparable, RESPONDENT developed a complex formula to arrive at a (calculated) price of each bid [*PO.2, p. 52 ¶9*]. The reverse auction was conducted based on these formulas and CLAIMANT was picked for its highly competitive bid when prices were calculated. Hence, RESPONDENT was ultimately looking to contract for the cheapest bid. Accordingly, RESPONDENT's reverse auction was an auction under Art. 2 (b) CISG that can be excluded from the application of the CISG.

95 CLAIMANT argues that the Contract was not formed until RESPONDENT indicated final acceptance [*CM, p. 28 ¶140*]. However, in this case, RESPONDENT only commenced individual negotiations because of the outcome of the auction. The majority of the Contract was concluded by this stage, after which only final details were negotiated [*CM, p. 28 ¶141*]. This is reinforced in the contractual terms themselves [*C2, p. 13 Art. 31*].

CONCLUSION ON ISSUE 3

96 The CISG does not apply. As CLAIMANT's place of business in Equatoriana had the closest connection to the Contract, the Contract lacks international character. Moreover, the Contract is not a sale of goods or at least the preponderant part of the obligations was for the provision of services. Finally, the Art. 2(b) CISG auction exception applies to RESPONDENT's procurement process such that the CISG does not apply to the Contract.

ISSUE 4: THE PARTIES EXCLUDED THE CISG

97 Even if the CISG is *prima facie* applicable to the Contract, the Parties excluded its application. In 2022, the Equatorianian Ministry of Justice altered the Model Contract for Equatorianian entities ('Model Contract') to '*strengthen the role of Equatorianian law*' [*R1, p. 29 ¶7; PO.2, p. 53*

¶*10*]. These changes included the removal of an explicit reference to the CISG in the choice of law clause. Claimant had on two occasions used the old Model Contract, and the official press release '*explicitly mentioned*' this amendment [*PO.2, pp. 52, 53* ¶¶*2, 10*].

98 The new choice of law clause, which is now Art. 29 of the Contract, provides the governing law to be the '*law of Equatoriana to the exclusion of its conflicts of law principles*'. After receiving the Contract, Ms Smith (CLAIMANT's Head of Legal) understood the provision to mean a choice of the non-harmonised law of Equatoriana [*PO.2, p. 53* ¶*11*]. CLAIMANT now asserts a construction of Art. 29 of the Contract that contradicts its own understanding of the term when the Contract was concluded [*cf CM, p. 33* ¶*161*]. The CISG can be impliedly excluded at the conclusion of the Contract where the Parties manifest a clear intention to do so (**A**). When all relevant circumstances are taken into account, it is clear that the Parties here manifested a clear intention to exclude the CISG (**B**).

A The CISG can be impliedly excluded where the Parties manifest a clear intention

99 The prevailing view is that the CISG itself provides the rules to assess whether it has been excluded by the Parties [*AC Op. 16 p. 3* ¶*2.1*; *CLOUT Case 2336; cf Schlectriem pp. 85-89* ¶¶*7-10; see AC Op. 16 p. 3* ¶*2.2*]. This is because the CISG applies autonomously, so the question becomes whether the CISG has been excluded under its own rules [*AC Op. 16, p. 4* ¶*2.3; CLOUT Case 220*; *AC Op. 16, pp. 3-4* ¶*2.2*]. In order to do so, the Parties must demonstrate a clear intention under Art. 8 CISG to expressly or impliedly exclude the CISG (**I**), and this Tribunal is entitled to look at all relevant evidence to determine intent (**II**).

I The Parties must demonstrate a clear intention to exclude the CISG

100 RESPONDENT agrees that in this case, the Parties did not expressly exclude the CISG [*CM, pp. 31-32* ¶¶*156-157*]. However, the Parties may exclude the CISG impliedly [*AC Op. 16, pp. 5-6* ¶*3.1-3.3*], as CLAIMANT readily concedes [*CM, p. 33* ¶*162*]. The Parties will exclude the CISG impliedly where their intention to do so manifested through their statements and conduct is clear in accordance with Art. 8 CISG [*AC Op. 16 p. 5, 7* ¶*3, 3.1, 3.6; CLOUT Case 956; Secretariat Commentary, pp. 18* ¶¶*1-2; Schwenzer/Schroeter p. 161* ¶*2*].

101 Two alternative bases of intent are available to find exclusion of the CISG. First, the CISG will be excluded if the hypothetical reasonable person in the position of the Parties would conclude the CISG was excluded [*Art. 8(2) CISG; AC Op. 16, p. 7* ¶*3.6; Schwenzer, pp. 171, 173* ¶¶*21-22, 26*]. Secondly, if the subjective understanding the Parties come to differs from the objective meaning, that subjective meaning takes primacy [*Art. 8(1) CISG; Schwenzer/Schroeter, p. 170* ¶*19; Kröll/Mistelis/Viscasillas, p. 153* ¶*17*].

II In determining Party intent, this Tribunal is entitled to look at all relevant evidence

102 The parol evidence rule and the German presumption of accuracy and completeness are inapplicable to contracts governed by the CISG [*Spagnolo 2014, p. 82; AC Op. 3 ¶¶1.1.1, 2.1; Schwenzer/Schroeter, pp. 176-178 ¶¶34, 36*]. Those rules, broadly speaking, exclude extrinsic material where the Parties reduce their agreement to writing [*ibid*]. This departure is reflected in Art. 8(3) CISG which provides that '*due consideration is to be given to all relevant circumstances of the case*'. CLAIMANT is correct that the wording of Art. 29 of the Contract on its own is *usually* inclusive of the CISG [*CM, p. 30 ¶149; AC Op. 16, p. 8 ¶4.2*]. However, '*the facts of a particular case are not to be ignored*' and all the circumstances of the case must be considered by this Tribunal in determining the Parties' intent [*Art. 8(3) CISG; AC Op. 16, p. 7 ¶¶3.7-3.8*].

103 Moreover, the Merger Clause in the Contract does not prohibit reference to extrinsic material to construe the Parties' intentions. Whether Art. 31 of the Contract excludes extrinsic material depends on whether the Parties '*actually intended for the Merger Clause to have this effect*' [*AC Op. 3 ¶4.5; Brödermann §D[A]¶2*], as ascertained by the wording of the clause, alongside all other relevant factors [*AC Op. 3 ¶4.6*]. Under the CISG, a merger clause generally does not have the effect of derogating from Art. 8(3) CISG unless the Parties do something more to manifest such an intent [*ibid; Schwenzer/Schroeter, p. 179 ¶39; Proforce Recruit v Rugby Group*]. Here, there is no evidence to suggest the Parties intended this result. The wording of Art. 31 of the Contract instead suggests extrinsic material is available. It states that the Contract is '*based on the Model Purchase and Sales Agreement for governmental entities in Equatoriana*' and that it '*should be interpreted in light of the Request for Quotation*' [*C2, p. 13*]. The Parties therefore contemplated reference to extrinsic material is available.

B The Parties manifested a clear intention to impliedly exclude the CISG

104 Claimant relies entirely on an objective interpretation of Art. 29 of the Contract under Art. 8(2) CISG [*CM, pp. 29-35*]. However, Claimant has missed a crucial step in the enquiry, which is that the CISG may be excluded by subjective intent [*NY Health v Rusi*]. Primacy is afforded to the subjective understanding of the Parties [*Art. 8(1) CISG*]. The subjective intent of a Party will be used to interpret contractual terms if the other party '*knew or could not have been unaware what the intent was*' [*ibid*]. This will be the case where the other party is aware of facts which practically compel further inquiry as to what was intended [*Schwenzer/Schroeter, p. 169 ¶18*]. It is only when subjective intent cannot be determined that party statements and conduct are to be interpreted according to what a reasonable person in the Parties' circumstances would have believed [*Art. 8(2) CISG;* supra].

105 Here, the Parties came to a subjective understanding that the CISG was excluded, which takes primacy over the objective meaning of their statements and conduct (**I**). Alternatively, even if Art. 29 of the Contract is construed objectively, in light of all relevant circumstances specific to this case, a clear intent was manifested for the CISG's exclusion (**II**).

I The Parties came to a subjective understanding that Art. 29 of the Contract excluded the CISG, which is given primacy over objective meaning

106 As CLAIMANT recognises, a specific choice of non-harmonised law (such as a domestic code or statute) amounts to an exclusion of the CISG [*CM, p. 32 ¶159; AC Op. 16, p. 10 ¶4.4; Kröll/Mistelis/Viscasillas, pp. 106-108 ¶18; Schwenzer/Schroeter, pp. 123-124 ¶15*]. RESPONDENT intended that Art. 29 of the Contract be a choice for the non-harmonised law of Equatoriana and therefore an exclusion of the CISG (**a**). As CLAIMANT knew that Art. 29 of the Contract was a reference to the non-harmonised law of Equatoriana, the intent under Art. 8(1) CISG was to exclude the CISG (**b**). Alternatively, CLAIMANT could not have been unaware that Art. 29 was a reference to the non-harmonised law of Equatoriana (**c**).

(a) RESPONDENT intended that Art. 29 of the Contract was a choice for the non-harmonised law of Equatoriana and thus an exclusion of the CISG

107 In determining RESPONDENT's subjective intent for the CISG's exclusion, all relevant circumstances must be taken into account including negotiations, practices the Parties have established, usages and any subsequent conduct of the Parties [*Art. 8(3) CISG; Schwenzer/Schroeter, p. 168 ¶14; AC Op. 16, p. 7 ¶¶3.7-3.8*]. The Parties had previously used an older version of the Model Contract with explicit incorporation of the CISG [*see Schwenzer/Schroeter, p. 184 ¶50; R1, p. 30 ¶11; PO.2, p. 53 ¶11*]. That clause having now changed to remove reference to the CISG shows RESPONDENT's subjective intent to exclude the CISG. The official press release explicitly referred to the choice of law clause being altered and stated its objective was to '*strengthen Equatorianian law*' [*PO.2, p. 53 ¶10*].

108 Further, the expression used '*to the exclusion of [Equatoriana's] conflict of laws principles*' points to RESPONDENT's subjective intention to exclude the CISG [*C2, p. 12 Art. 29*]. As CLAIMANT recognises, the phrase excludes the CISG's application at least under Art. 1(1)(b) CISG [*CM, p. 32 ¶157*]. Moreover, if the phrase is meant to preclude renvoi and retain the application of domestic statutes [*Born3, p. 164 ¶2; Ferrari/Rosenfeld ¶18.3; Mortensen/Garnett/Keyes p. 501-502 ¶21.5*], it is not effective if the CISG applies because it then supersedes whatever domestic law is applicable [*see CM, p. 30 ¶150*].

109 Finally, RESPONDENT's subsequent conduct in relying on the ECC to terminate also evidences its subjective intention behind the Contract [*C6, p. 19*]. Contrary to CLAIMANT's

argument [*CM, pp. 34-35 ¶¶171-176*], this is an important consideration under Art. 8(3) CISG and should not be taken as a unilateral post-contractual intention to exclude the CISG [*Schwenzer/Schroeter, p. 188 ¶56; Nucap v Bosch*]. The fact that this reading benefits RESPONDENT now is no reason disregard the Parties' intentions [*cf CM, p. 34-35 ¶¶173*]. Accordingly, RESPONDENT intended to exclude the CISG by subjectively intending a reference to non-harmonised law in Art. 29 of the Contract [*Zeller, p. 634*].

(b) CLAIMANT knew that Art. 29 of the Contract was a reference to the non-harmonised law of Equatoriana

110 This Tribunal has made a factual finding that Ms Smith interpreted Art. 29 of the Contract to be a reference to the non-harmonised law of Equatoriana [*PO.2, p. 53 ¶11*]. Ms Smith is CLAIMANT's Head of Legal [*R3, p. 32*]. Accordingly, the choice of law clause was primarily addressed to her, and it is appropriate to impute her knowledge that RESPONDENT subjectively intended the non-harmonised law of Equatoriana to CLAIMANT [*Schwenzer/Schroeter, p. 169 ¶16; Brunner/Hurni/Kissling, p. 91 ¶3*]. RESPONDENT's subjective intent was therefore known to CLAIMANT at the time the draft of Art. 29 of the Contract was supplied to it, engaging Art. 8(1) CISG [*Schwenzer/Schroeter, p. 170 ¶19*]. Accordingly, since CLAIMANT actually knew that RESPONDENT subjectively intended the non-harmonised law of Equatoriana to apply, this meaning takes precedence [*Art. 8(1) CISG*].

(c) Alternatively, CLAIMANT could not have been unaware that Art. 29 of the Contract was a choice of Equatorianian law

111 If CLAIMANT did not have actual knowledge, it could not have been unaware of RESPONDENT's subjective intention to refer to non-harmonised Equatorianian law [*Art. 8(1) CISG; supra ¶101*]. The factual circumstances compelled CLAIMANT to enquire what RESPONDENT intended in Art. 29 of the Contract [*Schwenzer/Schroeter, p. 169 ¶18; Brunner/Hurni/Kissling, p. 91 ¶4*]. CLAIMANT could not have been unaware of the removal of explicit reference to the CISG in the Model Contract (**i**), nor could it have been unaware of the associated public statements aimed to strengthen Equatorianian law (**ii**). Consequently, CLAIMANT could not have been unaware of what RESPONDENT intended by excluding '*conflict of laws principles*' (**iii**).

(i) CLAIMANT could not have been unaware of the removal of explicit reference to the CISG in the Model Contract

112 The wording of the pre-2022 model contract clause stated that the agreement was '*governed by the CISG. For all issues not regulated by the CISG the law of Equatoriana shall apply*' [*PO.2, p. 53 ¶10*]. The clause CLAIMANT signed removed all reference to the CISG and referred *only* to

the application of '*the law of Equatoriania*' [*C2, p. 12 Art. 29*]. CLAIMANT had used the pre-2022 model contract twice in the past and had a '*positive*' experience [*R1, p. 30 ¶11; PO.2, p. 52 ¶2*]. Mr Deiman told Ms Rhitter that CLAIMANT '*had already used the then Model Contract in a previous transaction*' [*R1, p. 30 ¶11*]. Mr Deiman, who holds an LL.M [*PO.2, p. 55 ¶26*], could not have been unaware that the choice of law clause had been altered to remove reference to the CISG. It was as simple as running a redline over the two contracts.

113 Moreover, it is not to the point, as CLAIMANT argues, that RESPONDENT did not explicitly inform CLAIMANT of the changes [*CM, p. 34 ¶172*]. CLAIMANT is a well-resourced medium-sized engineering company with an in-house team of at least five lawyers and a legal intern [*RfA, p. 2 ¶1; PO.2, p. 53 ¶11*]. Where CLAIMANT has experience with the old version of the Model Contract and resources to conduct a proper contractual review, it could not be unaware of critical changes made when presented with the new 2022 Model Contract [*R1, p. 30 ¶11*]. The removal of explicit reference to the CISG clearly communicates RESPONDENT's subjective intention that the CISG was to be excluded [*supra ¶¶107-109*].

(ii) CLAIMANT could not have been unaware of the statements of government policy announced publicly

114 When in 2022 the Equatorianian Ministry of Justice amended the Model Contract, it did so with the object '*to strengthen the role of Equatorianian Law and Equatoriana as a place of dispute resolution*' [*R1, p. 29 ¶7*]. First, those statements are publicly available and were made as part of a '*larger campaign*' by the Equatorianian Ministry of Justice [*ibid*]. Additionally, the statements were attached to the official press release which explicitly mentioned that changes were made to the forum selection clause and the choice of law clause for that purpose [*PO.2, p. 53 ¶10*]. CLAIMANT was already aware of the pro-Equatorianian policy of the Contract, having found unacceptable and negotiating the removal of arbitration under the rules of the Equatorianian Arbitration Institution in Equatoriana [*R1, p. 30 ¶8*]. CLAIMANT was also aware that RESPONDENT is a state-owned enterprise to which these government policy objectives are important [*PO.2, p. 52 ¶3*]. CLAIMANT, a well-resourced entity, could not have been unaware of these widespread statements of policy in relation to the Model Contract amendments.

(iii) CLAIMANT could not have been unaware of what was intended by excluding conflict of laws principles

115 Considering the removal of explicit reference to the CISG with the goal to strengthen Equatorianian law [*supra ¶¶97-98*], it compelled further inquiry from CLAIMANT as to what RESPONDENT intended by excluding Equatoriana's '*conflict of laws principles*' [*C2, p. 12 Art. 29;*

Schwenzer/Schroeter, p. 169 ¶18]. Should the clause be read as excluding renvoi, it is meaningless because the Model Law already precludes that possibility [*Art. 28(1) Model Law; Born3, p. 164 ¶2; Ferrari/Rosenfeld ¶18.3*]. CLAIMANT could not have been unaware that RESPONDENT intended something more if it was to strengthen Equatorianian law [*PO.2, p. 53 ¶10*]. Evidently, the phrase was intended to exclude the entirety of Art. 1(1) CISG and not just Art. 1(1)(b) as CLAIMANT concedes [*CM, p. 32 ¶157*]. CLAIMANT could not have been unaware of this.

II In any event, if Art. 29 of the Contract is construed objectively, in light of all relevant circumstances a clear intent was manifested for the CISG's exclusion

116 Should this Tribunal find that the Parties did not come to a subjective understanding, the objective meaning of Art. 29 of the Contract still excludes the CISG [*Art. 8(2) CISG; supra ¶101*]. As with all provisions of a Contract, a choice of law provision is unique to, and construable by, its context [*AC Op. 16, p 7 ¶3.7*]. This evidence sheds light on what a reasonable person in the position of the Parties would understand Art. 29 of the Contract to mean [*supra ¶¶102-103*; *Art. 8(2) CISG; AC Op. 16, p. 7 ¶3.6; Schwenzer/Schroeter, p. 171 ¶¶21-22*].

117 Here, the same factors which speak to CLAIMANT's subjective understanding the CISG was excluded are relevant [*Art. 8(3) CISG*] (**a**). Moreover, various elements of the Contract lend towards an objective construction that the '*law of Equatoriania*' refers to its non-harmonised law (**b**). Finally, contrary to CLAIMANT's assertions [*CM p. 34 ¶168-170*], the negotiations do not contradict this reading of Art. 29 of the Contract (**c**).

(a) The same factors which speak to CLAIMANT's subjective understanding the CISG was excluded are also relevant objective intent

118 Art. 8(3) CISG requires this Tribunal to take into account all relevant circumstances in determining *both* subjective and objective intention [*Art. 8(3) CISG; Kröll/Mistelis/Viscasillas, p. 157 ¶29; Schwenzer/Schroeter, p. 176 ¶33*]. First, the removal in the new Model Contract of explicit reference to the CISG would indicate to a reasonable person in the position of the Parties that reference to the non-harmonised law of Equatoriana was intended in Art. 29 of the Contract [*supra ¶¶112-113*]. This is a material consideration because Art. 31 of the Contract explicitly refers to the Contract being based on the Model Contract [*C2, p. 13; Schwenzer, p. 188 ¶55*]. Secondly, the statements of public policy associated with those amendments aiming to '*strengthen the role of Equatorianian Law*' would also communicate to a reasonable person that the non-harmonised law of Equatoriana was intended [*supra ¶114*]. Thirdly, the addition of excluding Equatoriana's '*conflict of laws principles*' also objectively

points attention to a reference to domestic Equatorianian law [*supra ¶115*]. As the CISG favours an interpretation which gives effect to the Parties' contractual terms [*Schwenzer/Schroeter, p. 188 ¶55; Brunner/Hurni/Kissling, pp. 97-98 ¶21*], these words should be read as excluding Art. 1(1) CISG and not merely precluding renvoi, which is already provided for in the Model Law [*Art. 28(1) Model Law; Born3, p. 164 ¶2; Ferrari/Rosenfeld ¶18.3*].

(b) Various elements of the Contract itself speak to an objective interpretation of '*the law of Equatoriana*' to mean its non-harmonised law

119 The phrase '*law of Equatoriania*' must also be interpreted in light of the Request for Quotation [*C2, p. 13 Art. 31*]. The Request for Quotation refers to Equatoriana's non-harmonised Public Procurement Law to govern the award of the Contract as well as the bidding process [*C1, p. 9 ¶8*]. The reference to this domestic statute read alongside the reference to '*law of Equatoriana*' in Art. 29 of the Contract would lead a reasonable person in the position of the Parties to conclude the non-harmonised law of Equatoriana was intended.

120 Moreover, numerous terms of the Contract are inconsistent with the wording of the CISG. Art. 28 of the Contract refers to '*termination*' of the Contract. By contrast, the CISG uses the word '*avoidance*' for the same concept [*Arts. 26, 75-76, 81 CISG*]. Additionally, Art. 4 of the Contract contains an express requirement that the Parties use their '*best endeavours*' to perform the Contract. This language is similar to that of the ECC, where Art 5.4.1 contains a '*duty of best efforts*' [*UNIDROIT Principles*]. By contrast, the CISG, if it has a functionally equivalent obligation at all, might only have a duty to act in *good faith* under Art. 7(1) CISG which impliedly invokes a best endeavours obligation in conjunction with Arts. 59 and 79(1) CISG [*Muñoz, p. 14*]. Accordingly, the reasonable person in the position of the Parties would conclude that the reference to '*law of Equatoriana*' was a reference to its non-harmonised law and thus an exclusion of the CISG.

(c) The conduct of the negotiations between the Parties does not contradict this reading of Art. 29 of the Contract

121 CLAIMANT argues that Mr Cavendish calling the CISG the '*gold standard*' indicates an implied choice for the CISG [*CM, p. 34, ¶170*]. However, this places too much weight on what was a passing remark by Mr Cavendish to Ms Faraday as one of many issues on a list of points of negotiation [*R1, p. 30 ¶11; PO.2, p. 53 ¶11*]. In fact, no further discussion was had about the choice of law [*ibid*]. Instead, the comment about the CISG being the '*gold standard*' was immediately displaced by both Mr Cavendish and Ms Faraday agreeing that the issue of choice of law should ultimately be '*left to the lawyers for discussion*' [*R1, p. 30 ¶11*].

122 No further discussion was had between the lawyers [*ibid*], and this was because Ms Smith (CLAIMANT's Head of Legal) interpreted the clause as a reference to non-harmonised law [*PO.2, p. 53 ¶11*]. As far as CLAIMANT was concerned there was nothing to discuss. It was clear the CISG was not applicable. Moreover, CLAIMANT may have argued that negotiation to remove the right for termination for convenience is inconsistent with the ECC applying [*C2, p. 12, Art. 28(2); C5, p. 16 ¶10*]. However, the right under Art. 7.3.8 ECC only applies *only* to change in government policy, which is not inconsistent with negotiation to remove a broader contractual right to terminate for convenience [*PO.1, pp. 50-51 ¶4*]. Therefore, the conduct of the Parties in their negotiations does not demonstrate an intention for the CISG to apply and does not negate the clear intent of the Parties to exclude the CISG.

CONCLUSION ON ISSUE 4

123 The Parties shared a subjective understanding that the non-harmonised law of Equatoriana would govern the Contract. But even objectively, the unique drafting and negotiation history of the Contract between CLAIMANT and RESPONDENT displays a clear intent for the CISG to be excluded. A passing reference about the CISG being the '*gold standard*' does not negate these facets of the Parties' conduct that lead to a choice of the non-harmonised law of Equatoriana.

REQUEST FOR RELIEF

For the above reasons, RESPONDENT respectfully requests this Tribunal to find that:

1) The Tribunal does not have jurisdiction and alternatively that the claim is inadmissible;
2) Exhibit R3 is admissible and Exhibit C7 be excluded from the file; and
3) The CISG does not govern the Contract.

ACADEMIC INTEGRITY & AI DISCLOSURE STATEMENT

University University of New South Wales
Country Australia

We hereby confirm that this Memorandum:

- does not include text from any source, whether the source was in hard copy or online available, which has not been properly distinguished by quotation marks or citation; and
- was written only by the persons whose names and signatures appear below.

We also make the following declarations regarding the use of artificial intelligence:

	Yes	Unsure	No
We have used AI enhanced **search engines** for researching sources and (factual or legal) information on the Moot Problem.	X		
We have used AI-enhanced **proof-reading** tools.			X
We have used AI enhanced **translation tools** to translate sources relevant for our work on the Moot Problem.	X		
We have used AI enhanced **translation tools** to translate parts of the text submitted in this Memorandum into English from any other language.			X
We have used AI to **generate overviews or briefings on relevant factual and legal topics** which are not submitted as part of the memorandum but have been solely used to advance our own understanding.			X
We have used AI tools to **generate statements that are now included in the memo**. Please tick yes even if you have altered or amended the text generated by AI before submission.			X
We have **trained an AI tool** on Vis Moot documents.			X
We have **used an AI tool that has been trained on Vis Moot documents** to generate text that is part of our Memorandum			X
Other (please specify):			

Aman Mohamed **Tucker Greer** **Nathan Roberts**

Sonia Ram